

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE LOCAL DIVISION: MTHATHA]**

CASE NO. CC20/2020

In the matter between:

THE STATE

VS

MSIMELELO MPEYI

Accused No.1

AZOLA SHAI

Accused No.2

LINDIKHAYA KRATSHI

Accused No.3

REANETSE TSOSI

Accused No.4

NKOSISIVE JIKA

Accused No.6

CINGICEBO NGXAMA

Accused No.7

JUDGMENT

JOLWANA J

[1] The accused were indicted in this Court on charges of kidnapping, robbery with aggravating circumstances and murder. At the beginning of the trial the State withdrew all the charges against accused no.5 indicating that she would be called as a State witness in terms of section 204 of the Criminal Procedure Act 51 of 1977 (the CPA). The State provided a summary of substantial facts of the case.

[2] The State's summary of substantial facts reads as follows:

“1. On the 26 September 2019 accused 6 (Nkosivumile Zinto Jika) was in company of the deceased. Deceased arrived at Achumile Mtibe’s place with accused no.6 driving his Toyota Hilux 4X4. Accused no.6 called upon Achumile telling her that the deceased was interested in a love relationship with her. Then accused no.6 introduced Achumile to the deceased.

2. Accused no.6 and the deceased left Achumile saying they will come back later. Indeed around 18h30 accused no.6 and deceased come back to fetch Achumile. Lindikhaya Kratshi [accused no.3] joined them after being invited by accused no.6. They all left proceeding to Moyikwa tarven and on the way accused no.6 asked deceased how much he had in his bank account.

3. The four were later joined by Azola Shai [accused no.2]. Msimelelo Mpeyi [accused no.1 and Cingicebo [accused no.7]. The accused persons demanded deceased’s bank cards and they assaulted the deceased with fists and open hands to submit. Deceased was forcefully removed from the driver’s seat into the back seat and tied with his shoe lace.

4. Cingicebo took deceased cell phone using force and after paging it, he told the others that the deceased had an amount of R10 000.00 in his bank account. Msimelelo Mpeyi drove the vehicle to town at FNB where Cingicebo alighted and withdrew cash at the ATM using deceased’s bank card.

5. They drove to Mokhesi location where deceased was stabbed with a knife, stoned and left to die. Deceased’s motor vehicle was dumped a few metres and they left the scene on foot with deceased’s bank cards. Msimelelo Mpeyi and Cingicebo Ngxame transferred deceased’s money using their cell phones into their Capitec Bank Accounts. A sum of R10 500.00 was withdrawn from deceased’s bank account.

6. The deceased died as a result of head injuries following:

- blunt force trauma

- stab chest.”

[3] The accused pleaded not guilty to all the charges and elected not to disclose the basis of their defence save for accused no.6 and accused no.7 who gave a plea explanation outlining their defence.

Accused no.6's plea explanation.

[4] Accused no.6's plea explanation was that on 26 September 2019 he met Sandile Ntloko (the deceased) during the day and they travelled together and drank beer that whole day. They also picked up their co-accused and travelled with them. He and the deceased were very drunk as they had been drinking alcohol almost the whole day. It was suggested that somebody else must drive the vehicle and accused no.1 was phoned and was later picked up. The deceased gave accused no.6 some money to go and buy beers. At no stage did he force the deceased to give him money or take his money out of his account at all. He did not participate in killing the deceased.

Accused no.7's plea explanation.

[5] On the date of the incident he was at his father's homestead at Kwa-Gcina location where there was a traditional ceremony. Between 20:00 and 21:00 in the evening he decided to go home at Teresa location. He hitch-hiked and after a while a vehicle stopped for him and he boarded the vehicle which was a double cab bakkie with a canopy. He boarded in the load bin under the canopy. He noticed that Achumile and all the other accused as well as the deceased were in the vehicle, in the front part of the vehicle. The deceased was unknown to him. The vehicle was at that stage, driven by accused no.3. Accused no.1 was not present. The vehicle drove off towards the direction of Macacuma. When the vehicle reached Teresa bus stop he alighted from the vehicle.

[6] After alighting from the vehicle he saw accused no.1 who was his friend and neighbor going to board the vehicle. He asked accused no.1 if they were going to drink alcohol and accused no.1 confirmed. Accused no.1 took over the driving of the vehicle from accused no.3. He jumped back into the vehicle at the back thereof

under the canopy again. The vehicle drove towards town. As the vehicle was moving accused no.6 opened a small window and handed him a cellphone from inside the vehicle. Accused no.6 requested him, to check the balance of money using the said cellphone. He checked and noticed an amount of R10 000.00 reflecting as the balance. He did not know to whom the cellphone belonged nor the money reflecting therein. Accused no.6 instructed him to transfer R1000.00 into the bank account of accused no.1 and he did so. The vehicle continued to drive towards town.

[7] He heard accused no.1 saying that he had forgotten his bank card at home and would therefore not be able to access the R1000.00 which had been transferred to his account. One of the accused asked him if he had his own bank card with him and he responded affirmatively. He was then told to transfer money into his own bank account and he did so. The vehicle continued driving towards town and stopped near FNB in Sterkspruit. He alighted and accused no.6 instructed him to withdraw R600.00. He returned to the vehicle and handed both the cellphone and R500.00 to accused no.6. He noticed another vehicle nearby and the people in that vehicle were pointing firearms towards their vehicle. Accused no.1 then sped off together with all other the accused, Achumile and the deceased. The vehicle drove into a gravel road towards Mokhesi and suddenly stopped in a dark area. After the vehicle stopped everybody opened the doors, alighted and ran away. He, however, could not open the door of the canopy from inside the bakkie. Accused no.6 opened for him and he then got out.

[8] He and accused no.6 ran in the same direction as the others. As he and accused no.6 were running he could hear that there was some struggling ahead of them but he did not know what was going on. They reached the other accused and found them assaulting the deceased. Achumile was at a distance from where the deceased was being assaulted. He and accused no.6 intervened trying to stop the other accused from assaulting the deceased. Their co-accused ignored them and continued assaulting the deceased who was lying on the ground. Accused no.3 said that the deceased must be killed because he knew them and their places of residence. Accused no.2 had a knife and he stabbed the deceased. As all of that was happening he saw police vehicles which were flickering their blue lights. At that

stage they all ran in different directions except the deceased. He never met the other accused again until they were all arrested.

[9] On 27 September 2019 he was surprised to notice R1500.00 being transferred into his bank account. He never withdrew the said amount of money as he did not know who deposited it or where it came from. After they were arrested he enquired about the sum of R1500.00 which had been deposited into his account. Accused no.1 told him that he had deposited the sum of R1500.00 into his account as he still had the deceased cellphone. He had intended to fetch the money at a later stage but never got a chance to do so. Accused no.1 further told him that he had also transferred R1000.00 to his own bank account from the deceased account. Accused no.7 concluded his plea explanation by saying that he had no intention of committing any crime and he did not commit any crime. He never acted in common purpose with anyone to commit any crime.

The case for the State.

[10] The first witness for the State was Achumile Mtibe (Achumile), a witness called by the State, in terms of section 204 of the CPA and was warned accordingly. Achumile testified that as at the date of giving evidence she was 20 years old but was 19 years old when the offences were committed. She knew all the accused as they all resided in the same locality as herself. However, accused no.3 was also a friend of hers and accused no.1 was her boyfriend.

[11] During the afternoon of the 26 September 2019 she was at accused no.3's home with accused no.3, his mother, Leti Vanga and Zikhona Vanga. Accused no.6 arrived and told her that the deceased wanted to see her. She initially refused to go and see the deceased who was unknown to her but accused no.6 came back again begging her to go and see the deceased, even if to just listen to what he wanted to say. Eventually she went with accused no.6 to the deceased's vehicle. The deceased greeted her saying hello Achumile. The vehicle was a double cab bakkie which she described as dusty pink in colour. The deceased invited her to come into the vehicle which she did.

[12] The deceased asked her if she knew him and she said she did not know him. The deceased told her that he knew her as he once saw her at Teresa school. The deceased asked her if she consumed liquor and she responded affirmatively and indicated that she preferred castle lager beer. The deceased took out R200.00 and gave it to accused no.6 to go buy castle lager beer. He then proposed love to her and indicated that he would like to take her out on a date. She indicated to the deceased that she was cooking inside and wanted to return to her cooking. This was because she did not want to remain alone with the deceased after accused no.6 had left. The deceased then indicated that he would call her when accused no.6 returned.

[13] At some point accused no.6 came back with some beers. The deceased gave her one beer and told her that he and accused no.6 were leaving for the Moyikwa tavern and that they would return later. The deceased and accused no.6 left thereafter. They came back at about 18:30 in the early evening. Accused no.6 came into the house and told her that the deceased wanted to take her out on a date.

[14] They eventually all left being herself, the deceased, accused no.6 and were joined by accused no.3. She sat in the front passenger seat. The deceased was driving. Accused no.3 and no.6 were seated in the back seat. When they were near the Moyikwa homestead accused no.6 asked the deceased to stop the vehicle and asked him how much money he had. The deceased indicated that he did not have any cash with him. Accused no.6 enquired how much he had at the bank and the deceased said he had R1000.00 at the bank. The vehicle drove off. When they were somewhere near the town the deceased indicated that his wallet was not with him. Accused no.6 asked him if there was no one who could meet them halfway with the wallet. The deceased agreed and phoned somebody who was on voicemail. Accused no.6 suggested that another person should be called. Indeed another person was called. The deceased asked this person to bring his wallet and meet them halfway.

[15] She indicated that it was late and she wanted to go home. The vehicle turned driving back to Kwa-Gcina taking her home. When they were near the Moyikwa homestead accused no.6 said that the vehicle should drive up into a gravel road. It

then stopped and accused no.6 alighted and went away. He returned with accused no.2 and accused no.4 and they all got into the vehicle. Accused no.6 borrowed the deceased's cellphone from him. Accused no.6 phoned accused no.1 and told him to wait for them at the bus stop so that they should go to town with him. The vehicle was getting nearer to her home but she also wanted to meet accused no.1. She then changed her mind about going home. The vehicle turned back driving towards town. Along the way accused no.7 was hitch hiking. The vehicle stopped for him and he indicated that he would alight at a place called Nquthu.

[16] When the vehicle reached Teresa bus stop where they found accused no.1 accused no.6 said that accused no.1 must drive. At that stage accused no.7 had alighted and the deceased was now seated at the back seat. Accused no.7 enquired as to where the vehicle was going. He was told that it was going to town. He then decided to board the vehicle again and join them. He again boarded in the load bin under the canopy. She and accused no.3 were in the front seat and accused no.1 was driving. When the vehicle was near Katberg accused no.7 got the deceased's phone but she was not sure who gave it him. Accused no.7 exclaimed at how much money reflected on that phone. Those accused persons who were seated at the back seat wanted to know how much it was and accused no.7 said it was R10 000.00. The accused who were seated at the back seat requested a pin code for the phone but the deceased would not give it to them. The deceased was assaulted but she did not know who assaulted the deceased. Accused no.2 was carrying a knife and she noticed that the deceased was bleeding through the nose.

[17] Eventually the deceased gave the accused the pin code. When the vehicle reached town and near FNB accused no.7 alighted from the vehicle and went to an ATM where he withdrew R500.00. He thereafter returned and got into the vehicle. Another vehicle, arrived and one person alighted from it and fired a gun shot. Accused no.1 then quickly drove off through Mokhesi location until the vehicle stopped on a certain gravel road. One of the accused asked as to what should be done with the deceased. Accused no.6 said that he must be tied with a shoe lace. She agreed with accused no.6 about the deceased being tied with a shoe lace. Accused no.6, no.4 and no.2 alighted and took the deceased out of the vehicle. Thereafter they used a language that is used in prison. The deceased then ran

away. Accused no.1, 2, 3, 4 and 6 pursued the deceased. She was at that stage left behind with accused no.7. She heard some continuous thumping sound after which she heard the deceased snoring. Accused no.3 later came to her and held her by her hand saying they should run away. The thumping sound was not far from where she and accused no.7 were standing.

[18] Visibility in the area was not good as there were no lights and it was at night between 21:00 and 22:00. Accused no.1 and accused no.6 took the deceased vehicle driving it away from the area where the deceased was. Accused no.7 ran to a different direction with the money he had withdrawn in town. She, accused no.2, 3 and 4 also ran away. They hid whenever they saw vehicle lights. They left accused no.1 and 6 behind. They reached their locality which is Nquthu at about 04:00 in the morning. Accused no.2 and 4 took a different direction and she continued walking with accused no.3. At some stage accused no.3 phoned accused no.1 asking about their whereabouts. His phone was on loud speaker so she could hear the conversation. Accused no.1 said that they were in town at his friend's place and that they were safe. She and accused no.3 went to buy cigarettes from a local shop. When they returned they found accused no.1 and 6 at accused no.3's homestead. Accused no.1 and 6 suggested that they should go to town but she refused because she was tired. Accused no.1, 3 and 6 left going to town. Accused no.3 returned alone without accused no.1 and 6. When accused no.3 returned from town he brought her and Zikhona Vans sneakers. Later on accused no.1 arrived at accused no.3's homestead. He enquired from her if the sneakers fitted her and if she liked them and she responded affirmatively. She then requested accused no.1 to give her R100.00 and he did so.

[19] Thereafter she and Zikhona walked to Moyikwa's tavern where they consumed some liquor. They later came back home. On Saturday she and Zikhona again went to Moyikwa's tavern. On this occasion they had no money. While she and Zikhona were still at that tavern she was approached by accused no.2. Accused no.2 told her that he intended to stab accused no.1 saying that accused no.1 and his crew had robbed them by giving them only R400.00 from the money that had been robbed from the deceased. Achumile then informed accused no.1 who was also at the tavern about what accused no.2 was saying. Thereafter she saw accused no.1 and

accused no.2 stabbing each other there at the tavern. Thereafter accused no.2 was lying on the floor and accused no.4 commented that the stabbing between accused no.1 and 2 was as a result of spilling the blood of a human being. Their fight resulted in the incident in which the deceased died being publicly known. Achumile concluded her evidence in chief by pointing out that when they were at Katberg the deceased asked that he should not be killed. Accused no.6 responded that he was not going to be killed because all they wanted from him was his money. When accused no.6 made those utterances he was in a bad mood. She was asked by the prosecutor what prompted the deceased not to drive his vehicle. She testified that she did not know but it was accused no.6 who told accused no. 1 to drive the vehicle of the deceased.

[20] Achumile was cross-examined at length on behalf of accused no.1 and accused no.4. She testified that she was arrested sometime in October 2019 and was released on bail on 9 December 2019. After her arrest she was interviewed by the police. During that interview she told the police the truth about the events of the 26 and 27 September 2019 as they related to the incident and she told the police everything. She confirmed that she had an interview with captain Dinga who took a statement from her. However, captain Dinga did not read the statement back to her.

[21] She testified that had she not been arrested she would not have told the police about the incident. This was because the accused had said on the day of the incident that if anyone of them said anything about the incident that person would have to stand for it alone. One of the accused found the deceased's wallet in the vehicle. The wallet had his bank cards and that is how they got to be in possession of the deceased's bank cards after he had said his wallet was not with him. It was accused no.7 who told them that he had withdrawn R500.00.

[22] Achumile was cross-examined on her warning statement which was taken from her by captain Dinga. She confirmed that when she made her warning statement she told the police everything about the incident. It was pointed out to her that during her evidence in chief she had testified that accused no.7 was given R200.00 by the deceased to go and buy liquor whereas in her warning statement the figure was reflected as R300.00. Achumile responded by saying that captain Dinga made a

mistake in reflecting the amount as R300.00 instead of R200.00. The correct figure was R200.00. She further testified that captain Dinga made a mistake in reflecting that accused no.6 had a knife as that was not what she said to captain Dinga. She further pointed out that when she made the statement to captain Dinga she said that all the accused chased the deceased. During her testimony she had said that it was accused no.1, 2, 3, 4 and 6 who chased after the deceased. She explained that when she made the statement she was afraid. She testified that she would have told captain Dinga about the events of the 27 September 2019 as she told her everything. It was pointed out to her that in her warning statement there was nothing about what happened on 27 September 2019 and that had she mentioned the events of that day to captain Dinga she would have written it down as well.

[23] She testified that when the vehicle stopped in the Mokhesi area where they ultimately ran away a suggestion was made to tie the deceased with shoe laces. She explained that she agreed with the tying of the deceased. This was because accused no.6 had said that the deceased should not be killed, he should just be tied so that if he ever laid charges against them, they would be arrested for taking his money only. She insisted that accused no.1 also chased after the deceased and that she saw them chasing after the deceased. She denied implicating accused no.1 because she had been offered indemnity by the State. She confirmed that near FNB shots were fired and accused no.1 sped off running away from the people that were firing shots at them. She however, disputed that at Mokhesi accused no.1 stopped vehicle and they immediately ran away.

[24] Achumile disputed that after the vehicle stopped at the Mokhesi area accused no.4 immediately ran away. She insisted that accused no.4 had made a comment at the Moyikwa tavern that accused no.1 and 2 were stabbing each other as a result of the spilling the blood of a human being. She disputed that the fight between accused no.1 and 2 related to a misunderstanding between them at a traditional ceremony the previous weekend.

[25] Under further cross-examination Achumile confirmed that she and accused no.3 were friends. They are also maternal cousins. It was confirmed on behalf of accused no.3 that they are indeed cousins. Other aspects of her evidence in chief were also

confirmed on behalf of accused no.3. She also confirmed that she was the one who invited accused no.3 to join her, accused no.6 and the deceased as there was going to be drinking liquor. She testified that the deceased was taking her out to town that evening. When they left accused no.3's home it was herself, accused no.3 and accused no.6 and all three of them boarded the deceased's vehicle and went with him and the deceased was driving the vehicle at that time.

[26] The vehicle was driven towards town but on the way to town the vehicle turned back when the deceased indicated that his wallet was not with him. The mood in the vehicle was still good. When the conversation about the deceased's wallet started accused no.2 and 4 had not yet joined them. The vehicle stopped near Moyikwa's tavern. Accused no.6 got out of the vehicle and went away. When he returned he was with accused no.2 and 4 who also joined the rest of the group in the deceased's vehicle. The mood in the vehicle was still good even though there was no conversation in the vehicle. Accused no.2 and 4 got into the back seat of the vehicle joining accused no.6. The deceased was still driving at that point.

[27] After accused no.2 and 4 had joined them in the vehicle and the vehicle was in motion accused no.6 borrowed a phone from the deceased who then gave him his phone. The mood in the vehicle was still good even at this stage and the deceased was driving the vehicle. When accused no.1 joined them in the vehicle she told accused no.1 that she was being taken out by the deceased. Accused no.1 was her boyfriend and he did not show any sign of unhappiness about her being taken out.

[28] Accused no.1 had taken over driving the vehicle and the deceased was seated at the back seat. Accused no.7 had also joined in the vehicle. The mood in the vehicle changed and became bad after accused no.7 informed the other accused that the deceased had R10 000.00 appearing in his cellphone and the discovery of the deceased's wallet in the vehicle. The deceased was assaulted by one of the accused sitting at the back seat but she did not notice which one of the accused assaulted the deceased. It was dim in the vehicle as there was no source of light. Accused no.2 had a knife which she saw while the deceased was being assaulted. The knife was in his hands but he was not using it. It was a folding knife. As she was sitting in the front passenger seat, she had looked back and this is when she saw

accused no.2 carrying a knife. At that time accused no.1 was driving. She was sitting in the front passenger seat with accused no.3 sharing the front seat. Accused no.2, 4 and 6 were at the back seat with the deceased and accused no.7 was in the load bin under the canopy. When she had turned and looked back she saw blood coming out of the deceased and accused no.2 holding a knife.

[29] The vehicle drove towards town and stopped near FNB. Accused no.7 got out of the vehicle and went to withdraw money from the bank. As accused no.7 was coming back from the bank a car stopped at a distance from their car and the occupants of that car opened fire. Accused no.7 got into the deceased vehicle and the vehicle drove towards Mokhesi where it eventually stopped. She confirmed that accused no.2, 4 and 6 got out of the vehicle and took the deceased out of the vehicle. They spoke what she described as prison language. The deceased ran away and they gave chase. She heard a thumping sound and thereafter she heard the deceased snoring from a distance. As the vehicle was driving away from FNB she was under the impression that the vehicle whose occupants had fired shots was chasing after them. She would not dispute that all of them including the deceased were under the same impression and they feared for their lives.

[30] She however, maintained her evidence that when the vehicle stopped at Mokhesi accused no.2, 3, 4 and 6 took the deceased out of the vehicle. She thought that the person who fired shots near FNB was known to the deceased. She disputed that when the deceased's vehicle reached the dead end at Mokhesi where it stopped, accused no.2 and 3 immediately ran away. She explained that accused no.3 only grabbed her hand and said they should run after returning from chasing the deceased. She disputed accused no.2 and 3's version that they did not assault the deceased and that accused no.2 never had a knife on that day. She further disputed that the fight between accused no.1 and 2 was not related to the incident. She testified that she could not dispute that accused no.3 bought takkies for Zikhona which he had planned to buy and could do so because he was working. She confirmed that accused no.3 was working. It was also put to her that accused no.3 was able to drive a vehicle. After he boarded the vehicle of the deceased the deceased had indicated that he had been consuming liquor the whole day and wanted somebody else to take over driving. At that stage accused no.3 drove the

vehicle of the deceased. Achumile disputed this version of accused no.3 having driven the deceased's vehicle.

[31] The next witness was Mr Tembinkosi Mangciphu (Mr Mangciphu). His evidence was that the deceased was his cousin and they grew up together. He did not know any of the accused. On 26 September 2019 he was asleep at his home when he received a call on his cellphone from the deceased about 23:00. In that call the deceased told him to phone Whitey who is the brother of the deceased so that they both could fetch his Capitec Bank ATM card. The deceased said that the said card was at the deceased's business called Shukushukuma which is a liquor outlet. He told him that when they bring the card they should come with Sithembiso and Olwethu. He testified that Sithembiso and Olwethu were local police officers who resided at Macacuma locality. They were not friends of the deceased and were not related to deceased. When he enquired why they should come with Sithembiso and Olwethu the deceased hung up. He suspected that the deceased might be in some kind of trouble because he did not understand why they needed to bring Sithembiso and Olwethu along. Furthermore, the deceased was speaking in a rush. The deceased phoned him again and told him that they should come quickly. He asked the deceased where he was and the deceased said he was at Cobweb. After he said he was at Cobweb, he heard a voice saying "*we told you not to mention where you are*". Thereafter the deceased hung up.

[32] Mr Mangciphu testified that he then phoned Whitey whom he described as Mr Mhlabunzima Ntloko. He told Whitey about what the deceased said to him. Whitey told him that he had also been phoned by the deceased earlier that night but he did not answer the phone. He and Whitey drove to town in two separate vehicles. He was driving behind Whitey and they spotted the deceased's vehicle parked near FNB in Sterkspruit town. Whitey stopped in front of the deceased's vehicle and he stopped across the road. Whitey tried to block the deceased's vehicle but it sped off. He went back to his vehicle to chase after the deceased's vehicle which drove through Mokhesi locality. As he followed the deceased vehicle he realized that Whitey was no longer driving behind him and that the deceased's vehicle was driving through a very dark area. He became afraid and decided to no longer pursue it. He phoned Whitey and told him that the deceased's bakkie was driving through Mokhesi

location. He had noticed that the deceased's vehicle had many passengers in the front seat such that one passenger was sitting on top of another passenger.

[33] He and Whitey proceeded to the police station where they reported the incident. One police vehicle and himself went to the Mokhesi area while another police vehicle and Whitey went to the Mlamli Hospital direction where the police said the deceased's vehicle might exit. The police who were with him received a call from the other police officers who had taken the Mlamli Hospital direction saying that the deceased vehicle had switched off its lights at or near a grave yard in the Mokhesi area. He and the police proceeded to where the vehicle was spotted. They found the deceased's vehicle with no occupants. They searched the area looking for people but they did not find anyone. The police vehicle blue lights were also assisting in providing light.

[34] He eventually found the deceased at about 06:00 in the morning. He observed that the deceased was severely injured on his face. He observed that near the deceased's body there were stones with blood stains, the deceased's teeth were scattered on the ground and his mouth was wide open. The deceased body had a lot of blood and it seemed to him that the deceased had been assaulted with stones. The deceased was unrecognizable and his hands were tied to the back with shoe laces. Mr Mangciphu was not cross-examined on his evidence. The evidence of Mr Ntloko also known as Whitey largely corroborated that of Mr Mangciphu in most material respects. Therefore no purpose will be served by repeating it.

[35] The next witness for the State was warrant officer Tsoaeli who was a member of the SAPS and working at the Aliwal North Local Criminal Record Center. He attended the murder crime scene at Mokhesi in the morning of the 27 September 2019 where he took photographs and also made a video recording of the crime scene. He confirmed that the deceased's hands were tied to the back. The deceased's vehicle was 171 metres away from the deceased body. He was not really cross-examined and his evidence was not disputed.

[36] Admissions in terms of section 220 of the CPA were entered into the record about issues that were not disputed. They all related to the deceased being the

person referred to in the indictment, the date and place of death as well as the cause of death being blunt force trauma injuries to the head and chest stab wounds. The details regarding some of these admissions is contained in the post mortem report compiled by Dr Jwaqa. The photo album compiled by constable Tsoaeli depicting the crime scene, the key thereto as well as the contents thereof were also admitted.

Documentary evidence in terms of section 236.

[37] The evidence of the State also included bank statements of the deceased, accused no.1 and accused no.7 from the 26 September 2019 to the 10 October 2019. This documentary evidence was admitted into the record in terms of section 236 of the CPA. It is common cause that the deceased had a bank account with Capitec Bank Limited being account number [...]. The bank card related to that account number is reflected in the statement as ending with the numbers 5069. The relevant transactions as reflected in the deceased's bank statement for the period 26 September 2019 to the 30 September 2019 are the following:

- On 26 September 2019 a mobile payment of R1000.00 was made into account number [...] which it was common cause that it is accused no.1's bank account. Before that transaction the deceased's bank account had a credit balance of R11 449.16. The account number to which the payment of R1000.00 was made is accused no.1's, account number with Capitec Bank Limited. Its card number ends with numbers 2456. There is a corresponding credit amount of R1000.00 credited into accused no.1's bank account before which it appears that he only had a credit balance of R16.60 on 26 September 2019. On 27 September 2019 accused number 1's bank account received a further R1000.00 from the deceased bank account number.
- On 26 September 2019 another mobile payment from the deceased bank account was made into account number [...] in the sum of R2000.00. This is accused no.7's Capitec Bank account number. Accused no.7's bank statement also reflects a credit transfer of R2000.00 from the deceased's account number. It appears that he made a cash withdrawal of R600.00 using a card ending with numbers 8110 which is linked to his above mentioned account number.

- There is only one cash withdrawal from the deceased's account number in the sum of R5000.00 on 27 September 2019. The said cash withdrawal was made using the deceased's bank card linked to his account number as reflected above.
- There were also various card purchases made from the deceased's account number ranging from R50.00 to R260.00. The purchase of R260.00 was made at Zaba Motors in Sterkspruit on 26 September 2019 using the deceased's bank card. After all these transactions and small bank charges the deceased's account was almost depleted with a balance of R538.95 from R11449.56 which was his credit balance before these transactions.

[38] It appears from accused no.1's bank statement that soon after his account was credited with the two amounts of R1000.00 each on 26 and 27 September 2019 referred to above he wasted no time in spending it. His Capitec Bank account reflects the following debit transactions:

- On 27 September 2019 payment of R990 was made to account no.[....].
- On 27 September 2019 a payment of R650.00 was made to account number [....].
- On 27 September 2019 a payment of R150.00 was made to account number [....].
- On 30 September 2019 a cash withdrawal of R190 was made from his account. All these transactions basically depleted the two amounts of R1000.00 each which had been received from the bank account of the deceased.

[39] It appears from the bank statement of accused no.7 that from the total amount of R3500.00 made up of two separate transactions of R2000.00 and R1500.00 referred to above the following debit transactions were made:

- On 27 September 2019 a cash withdrawal of R600.00 entry appears from his Capitec Bank account. This is obviously the withdrawal which he said

he made at FNB on 26 September 2019 before the shots were fired at their vehicle.

- On 28 September 2019 a cash withdrawal of R1000.00 was made.
- On 06 October 2019 a purchase for R320.59 was made at Sterkspruit Liquor Shop which included a cash back of R150.00.
- A small transaction of R40.00 was also made at Sterkspruit Liquor Shop on 06 October 2019.

[40] After all these transactions were made accused no.7's, bank account was still left with a healthy balance R1441.98 after bank charges were deducted. There does not appear to have been any other transactions made on his account. A simple mathematical calculation of all these transactions add up to the amount that was in the deceased's account before the first of these transactions was effected. No further witnesses were called by the State.

The case for the defence.

Accused no.1.

[41] The defence opened its case with accused no.1 giving his evidence. He testified that he was 25 years old and passed grade 12. He knows Achumile, the first witness for the State who was also a section 204 witness. Achumile was his girlfriend. He confirmed Achumile's evidence that he was phoned by accused no.6. After receiving that phone call he left his home and proceeded to the bus stop. While still on the way to the Teresa bus stop he saw a vehicle standing there at the bus stop. Accused no.7 alighted from the said vehicle. Accused no.7 asked him where he was going and he told him that he had been called by accused no.6 asking him to drive them to town. Accused no.6 was in the same vehicle from which accused no.7 had alighted. The time was between 21:00 and 22:00. Accused no.6 had told him that they were going to a tavern or club called Impolo to drink liquor.

[42] He boarded the said vehicle and took over the driving of the said vehicle. The people in that vehicle were accused no.s 2, 3, 4, 6, 7, Achumile and the deceased who was unknown to him. He drove to town and when they arrived in town in

Sterkspruit it was said that he must stop at FNB. Accused no.7 alighted from the vehicle and proceeded to FNB. After accused no.7 had returned from FNB and boarded the vehicle he switched on the ignition. As he was doing that another white vehicle stopped in front of their vehicle. Two people alighted from the said vehicle carrying firearms. Two shots were fired by those people. He then sped off towards Mokhesi area. He drove into Mokhesi trying to avoid that vehicle from which shots were fired. They reached a dead end at Mokhesi. Everyone from the vehicle alighted and immediately ran away in different directions. At some point he came across accused no.6. They walked together to town.

[43] He and accused no.6 went to TO's place in Zwelitsha where they spent about an hour not knowing where to go being shocked and afraid. Accused no.6 said that they should go to New Rest where he had a relative. He decided to remain at TO's place while accused no.6 left for New Rest. They were to meet again in the morning. They met in the morning and got a hike. He alighted at Teresa while accused no.6 proceeded to Ndingishe locality. He later met accused no.6 in town and accused no.3 phoned him asking about their whereabouts and telling him that they were already home.

[44] With regards to Achumile's evidence that at Mokhesi where they had reached a dead end they alighted and took the deceased out of the vehicle, he said that he did not see that happening. He also denied Achumile's evidence that the deceased ran away after prison language was spoken and that he, accused no.s 2, 3, 4 and 6 chased him. He testified that the deceased was never pursued adding that there was no time for that. He confirmed Achumile's evidence that on the following day on 27 September 2019 she met him and asked for R100.00 which he gave to her. On Achumile's evidence that on the following Saturday she met accused no.2 at a tavern and accused no.2 told her that he was going to stab him, he testified that his fight with accused no.2 happened during the weekend following the Mokhesi incident weekend. He confirmed that he and accused no.2 did stab each other. About the reason given by accused no.2 for wanting to stab him which, according to Achumile, was that accused no.2 felt that they had been short changed by accused no.1 and his crew by giving them only R400.00 from the deceased's money, accused no.1 testified that the stabbing between himself and accused no.2 was not related to the

incident of the 26 September 2019. It was just a misunderstanding between the two of them which had happened on the Friday before the Saturday on which the stabbing occurred.

[45] He confirmed that the bank statement reflecting his details was his bank statement. He testified that the R1000.00 deposited into his bank account was transferred into his account by accused no.7 when they were near FNB on 26 September 2019. The second amount of R1000.00 credited to his bank account on 27 September 2019 came from the same account number as the previous amount. When he saw the second amount on 27 September 2019 he assumed that it was also deposited by accused no.7. He denied accused no.7's plea explanation that the amount of R1500.00 transferred into his account was transferred by him and that he had told accused no.7 that he had transferred that amount to him intending to get it back at a later stage because the deceased's phone was still with him. He testified that it was not true that he advised accused no.7 that he had also transferred R1000.00 to his own bank account. He testified that he never touched the deceased's phone and that he never met accused no.7 on 27 September 2019 and that he last saw accused no.7 on 26 September 2019 until they met again after they were arrested.

[46] Under cross-examination by the attorney for accused no.7 accused no.1 testified that accused no.3, 6 and 7 were his friends. He just knew the other accused but they were not his close friends. The deceased was unknown to him and that he saw him for the first time that day. When they reached the dead end at Mokhesi he did not know what happened to the deceased as they all ran to different directions. He disputed Achumile's evidence that at some stage after they had alighted from the vehicle at the dead end at Mokhesi he had moved the deceased's vehicle. He testified that when they reached the dead end there was no chance to move the vehicle because they were being pursued by the vehicle they saw near FNB. When they saw that vehicle they decided to run away. He testified that the thumping sounds that Achumile said she heard were as a result of them falling because that place is a rocky place. He confirmed accused no.7's version that the first amount of R1000.00 was transferred to his account so that it could be used for the liquor drinking that they intended to do. However, because it transpired that his bank card

was not with him R2000.00 was transferred from the deceased's account to accused no.7's account for drinking liquor. Accused no.1 testified that he spent the sum of R1000.00 which was deposited to him with accused no.3, accused no.6 and Achumile. When the first R1000.00 was transferred to his bank account he understood that it was transferred from the bank account of the deceased.

[47] Under further cross-examination on behalf of the State accused no.1 testified that when he arrived at the bus stop the driver's seat was empty and therefore he did not know who was driving the vehicle before he got there. He was asked by accused no.6 to drive the vehicle. Achumile and accused no.3 were in the front passenger seat and accused no.7 was in the load bin under the canopy of the vehicle. He also noticed that accused no.2, 4, 6 and the deceased were in the vehicle. He drove the vehicle towards town. He did not see the deceased being assaulted while he was in the vehicle. He did not see accused no.7 being given the cellphone of the deceased. He could not dispute that the phone used to phone him was the deceased's cellphone as that number was not on his contact list and he did not know the deceased's number. He could not dispute that accused no.7 was given the deceased's cellphone in which he saw that the deceased had R10 000.00 in his bank account. He did not dispute that after it became known in the vehicle that the deceased had R10 000.00 in his bank account he was assaulted to force him to give out his pin code but he did not know that and did not see it. The music was playing in the vehicle but the volume was low.

[48] He confirmed that before they reached town R1000.00 was transferred from the deceased's account to his account using the deceased's cellphone by accused no.7. He also confirmed that before the transfer took place accused no.7 got his banking details or his capital bank link from him. He used it to transfer the deceased's money to him which was going to be spent at Impolo tavern. Accused no.7 asked for his Capitec Bank link. At the time accused no.7 was at the load bin. It was when they had stopped near FNB that he realized that his bank card was not with him. When at some stage while they were still near FNB the vehicles with the people who were carrying firearms arrived and fired shots at them he quickly drove away running away to save their lives. He did not have a chance to turn and go to the police station. He testified that if indeed the deceased was assaulted to force him to surrender or give

out his pin code that would be robbery but he did not see it. He did not hear the deceased giving out his pin code.

[49] When the vehicle reached the dead end at Mokhesi he stopped the vehicle and they alighted and ran away immediately. When they alighted he did not notice where Achumile was or where she ran to. He did not know whether the deceased was taken out of the vehicle or whether he got out on his own because he got out of the vehicle and immediately ran away. He testified that there was no reason for the deceased to be killed from his observation. He did not hear accused no.6 saying that the deceased should not be killed. He ran away and in fact he was at the front as they were running away while others were slightly behind him. He testified that with regards to accused no.7's plea explanation that it was accused no.3 who said that the deceased should be killed because he knew them and their homesteads, he was not sure that the deceased knew his home as he had never been to his home. He also did not know about accused no.6's suggestion, according to the evidence of Achumile, that the deceased should be tied as he did not see any reason for him to be even tied.

[50] He could not remember to whom he transferred R990 from the money that was transferred to him from the deceased's account but confirmed that it was the deceased's money. He also confirmed that he transferred R650.00 to account number [...]. He also confirmed making a cash withdrawal of R190.00 at an ATM in Sterkspruit and that he spent the deceased's money on liquor. He denied accused no.7's version that when they met in prison after they were all arrested he told him that he had transferred the sum of R1500.00 to accused n.7's account with the intention of collecting it at a later stage. He confirmed spending the deceased's money but denied participating in killing the deceased. He testified that he contributed R350.00 to the buying of takkies for Achumile by accused no.3 and that it was also part of the deceased's money. He also testified that at the dead end in Mokhesi he was the one who switched off the ignition and the lights of the deceased's vehicle. He further testified that he did not withdraw R5000.00 from the deceased's bank account and that he was never in possession of the deceased's bank card.

The case for accused no.2.

[51] The evidence of accused no.2 was that on 26 September 2019 he was at his home with accused no.4 in the evening at about 18:00. He was asleep when he heard a knock on the door and on opening the door it turned out that it was accused no.6 who was knocking. Accused no.6 asked him about the whereabouts of accused no.4 and he told him that accused no.4 was in the room sleeping. He already knew accused no.6 from the locality but they were not friends. Accused no.6 was friends with accused no.4. Accused no.4 got up and attended to accused no.6. Accused no.6 asked him if he did not want to drink liquor and he indicated that he was interested in consuming alcohol. Accused no.6 did not say where the drinking he was inviting them to was going to take place. They all went together to a vehicle which was standing some distance from his home, about 17 minutes' walk away. They all boarded the vehicle at the back seat. He boarded on the right hand side behind the driver. Accused no.3, Achumile and the deceased were in the vehicle and he already knew Achumile and accused no.3 from the locality. The deceased was sitting in the middle between the driver's seat and the front passenger seat. Achumile was seated in the front passenger seat and accused no.3 was occupying the driver's seat. At the back seat it was himself, accused no.4 and accused no.6.

[52] Thereafter the vehicle drove away and proceeded to Moyikwa's tavern. Accused no.3 was driving at the time. At Moyikwa's tavern he and accused no.6 alighted and proceeded to buy beers. Accused no.6 gave him four beers and told him to take them to the vehicle and he was carrying two beers. They drank the beers in the vehicle and they left and on the road they saw a person who was hitch-hiking. Accused no.6 said he knew the person and the vehicle stopped for him. That person was accused no.7 who boarded and the vehicle continued towards town. They picked up accused no.1 on the way. Accused no.1 had been phoned to come as well by accused no.6. When the vehicle stopped for accused no.1 the deceased came to seat at the bank seat on his own volition between accused no.6 and accused no.4 as Achumile did not want to seat at the back seat. Accused no.3 shifted from the driver's sit to seat in the middle and accused no.1 took over driving the vehicle. The deceased did not get out of the vehicle, he merely jumped from the middle at the front to the back seat.

[53] Accused no.6 told accused no.1 to drive the vehicle because the deceased was drunk. The vehicle proceeded to town and stopped near FNB. Accused no.7 alighted to go and withdraw some money. He came back with R500.00 which he gave to accused no.6. Then a white vehicle approached and two men alighted from it and a single shot was fired followed by another shot to their vehicle as it was driving away. They drove towards Mokhesi until the vehicle reached a dead end. At the dead end the vehicle stopped and they immediately alighted and ran away. Accused no.1 fell and he ran past him. He came across Achumile, accused no.3 and accused no.4 and they walked together going towards Kwa-Gcina location. Accused no.3 and Achumile walked together taking a different direction while he together with accused no.4 went to their home to sleep. He and accused no.4 are cousins and they stayed together.

[54] They got home at about 7:00 in the morning on the 27 September 2019 since leaving home at about 21:00 on 26 September 2019. Throughout he was never at any stage in possession of a knife. He disputed the evidence of Achumile and the plea explanation of accused no.7 that he had a knife at any stage on 26 September 2019. He disputed that he stabbed the deceased. He said that upon alighting from the vehicle at Mokhesi they all ran away because they were scared. He disputed Achumile's evidence that when the vehicle stopped there at the dead end in Mokhesi he participated in forcefully taking the deceased out of the vehicle, in chasing him when he tried to run and in assaulting the deceased. He never heard any jail language being spoken. He never fought with accused no.1 about money. His fight with accused no.1 had nothing to do with what had happened on 26 September 2019. They had quarreled the previous weekend. He never met Achumile after the 26 September 2019. He had run away at the Mokhesi area at the dead end because the vehicle from which shots were fired in town was following them and chasing after them.

[55] On cross-examination by the prosecutor, accused no.2 testified that he did not hear the pin code of the deceased being demanded. He disputed Achumile's evidence that the deceased was assaulted at the back seat where he was seated. He further denied that he was carrying a knife. He testified that never saw accused no.7 being given the deceased's phone to check the balance in the deceased's bank

account. He disputed taking the deceased out of the vehicle at the dead end in Mokhesi. He alighted there and immediately ran away and did not participate in chasing the deceased. He disputed accused no.7's plea explanation that he stabbed the deceased. He testified that when he ran away he left the deceased in the vehicle and never participated by stabbing the deceased on the chest or killing him in any way. As far as his quarrel with accused no.1 was concerned it was just a misunderstanding between them on a previous Saturday. He confirmed that the fight between them took place on Saturday the 28 September 2019 at Moyikwa's tavern. He denied meeting Achumile there or speaking to her about intending to stab accused no.1 over R400.00 that he gave him from the money that was robbed from the deceased. He however, confirmed that he was stabbed by accused no.1. He confirmed that after accused no.7 withdrew R500.00 from the bank at FNB he gave it to accused no.6.

The case for accused no.3.

[56] Accused no.3 testified that he resided at Ndingishe locality which is part of Kwa-Gcina Administrative Area. He was born in 1988 on 25 December. He went to school as far as grade 9 or standard 7. He testified that Achumile who was a State witness is his cousin. When he arrived at his home on 26 September 2019 although he did not remember what the time was he saw a vehicle whose owner he did not know parked near his home. As he walked past the said vehicle he saw a person he did not know, the deceased in that vehicle with Achumile. At the time Achumile stayed at his home as she would sometimes stay at her home and sometimes stay at his home. He entered the premises at his home and saw accused no.6 drinking beer. Achumile alighted from the vehicle and came to towards him and accused no.6. He then proceeded into the house and as he was getting into the house accused no.6 said that they would talk again and went to that vehicle.

[57] Achumile said that they were going to a place called Impolo in town. He knew that they would be going there for fun and drinks. At that time Achumile was cooking. The vehicle came back and accused no.6 alighted from the vehicle. He enquired from accused no.6 about the vehicle and accused no.6 said he did not know the driver of that vehicle but the driver had said to him that he wanted to see Achumile

and that he was sent by that man to buy some beers. He was invited by Achumile to come with her and he and accused no.6 boarded at the back seat while Achumile sat in the front passenger seat. The vehicle was a double cab bakkie. The owner of the vehicle drove off. While they were still on the way accused no.6 indicated that he wanted to go to accused no.4's home to see his girlfriend. Indeed the vehicle went to accused no.4's home but accused no.6's girlfriend was not there. They continued driving and stopped at a certain tavern. After that accused no.6 went back to accused no.4's home on foot. Accused no.6 went in and returned with accused no.4 and accused no.2. The deceased said he was tired as they had been driving around the whole day and they had been drinking. He then said he could drive but he did not have a driver's licence and the deceased allowed him to drive. The deceased shifted towards the middle leaving the driver's seat so that he could drive. Achumile took the passenger seat. During this conversation accused no.6, 2, 3 and 4 were standing next to the vehicle. Accused no.6 invited accused no.2 and 4 into the vehicle. At some point accused no.2 and no.6 alighted from the vehicle and went to the tavern. On their return they were carrying some beers.

[58] Accused no.6 commented about the fact that accused no.3 was driving and said that there was another young man who has driver's licence. He took his cellphone to call that young man. It turned out that he did not have airtime. He borrowed the deceased's phone from the deceased and phoned that young man who it later turned out was accused no.1. As accused no.6 was phoning accused no.1 there was another person who was hitchhiking at the tarred road as they were joining it. He enquired from the deceased if he should give him a lift. The deceased asked if Achumile knew the person who was hitchhiking. He himself said he knew that person. Accused no.6 looked through the window and said he also knew the person. He then stopped the vehicle. That person who was hitchhiking was accused no.7. Accused no.7 said he was going to his home at Nquthu and would alight at Teresa bus stop. Accused no.7 boarded the vehicle at the load bin. He then drove off until they reached Teresa bus stop for accused no.7 to alight. As accused no.7 alighted, accused no.1 emerged there at Teresa bus stop. He then indicated to the deceased that accused no.1 was the person accused no.6 had said has a driver's licence.

[59] The deceased moved to the back seat and sat next to accused no.6 without getting out of the vehicle. He then moved from the driver's seat to where the deceased had been sitting and accused no.1 took over driving the vehicle. Accused no. 7 who had alighted went back into the vehicle and boarded at the load bin where he had been sitting after learning that they were heading for Impolo. The passengers at the back seat were chatting and they at the front seat were also chatting but he heard accused no.6 asking for accused no.1's banking details. Accused no.1 gave out his banking details. Accused no.1 later said he had realized that he left his bank card at home. The deceased then said that that should not be a problem as they could first go to his home in Macacuma. But before they could go to Macacuma where the deceased stayed, somebody in the vehicle said that accused no.7 had his bank card with him. They then continued driving to town and stopped near FNB. Accused no.7 alighted at FNB and went to the bank.

[60] Shortly after accused no.7 returned from FNB another vehicle stopped next to their vehicle. Two men alighted from that vehicle. One of the men was wearing a gown and they were carrying firearms. Those men fired shots at them as accused no.7 was boarding the vehicle. Accused no.1 sped off and another shot was fired. There was silence in the vehicle until the vehicle reached a dead end at Mokhesi where it stopped. Accused no.1 immediately got out of the vehicle and he also got out of the vehicle from the driver's side. After getting out of the vehicle he went to Achumile and held her by her hand saying they should leave. They left there on foot and at some point accused no.2 and 4 emerged. They walked until they reached Kwa-Gcina location and parted ways at Ndingishe locality. He and Achumile proceeded to their home while accused no.2 and 4 proceeded to their own home. When he got home he phoned accused no.1 and asked him where he was. As he was phoning accused no.1 his phone was on loud speaker. Accused no.1 said he was in town with accused no.6 and that they were safe and were in a taxi going home.

[61] Accused no.6 arrived at his home with accused no.1. They had a conversation about the previous day. He said to them that he wanted to go to town to check for his identification card and also wanted to buy shoes for a certain child. At some point he, accused no.6 and accused no.1 went to town. They parted ways at the taxi rank

because he needed to start at Home Affairs for his identification card. Accused no.1 and 6 said they would go to a bottle store. After he had finished at Home Affairs he phoned them. They met near Boxer supermarket and walked together. He and accused no.1 went to a shop and he bought Vans shoes for the child. Accused no.1 indicated that he also wanted to buy shoes for Achumile but only had R350.00. He took the R350.00 from accused no.1 and paid for two pairs of Vans shoes on the basis that accused no.1 would refund him the difference as the shoes cost about R600.00. They thereafter took a taxi going home. He went home and gave Achumile her pair of shoes which had been bought for her by accused no.1 and he gave the second pair to Zikhona, the child.

[62] Accused no.3 disputed accused no.7's plea explanation that he said the deceased must be killed because he knew them and their places of residence. He also denied assaulting the deceased with stones. He also disputed Achumile's evidence that he was one of those who spoke language used in prison or chasing the deceased. He testified that he never heard the thumping sound that Achumile mentioned. All he heard was that somebody said that they should run away. He also heard the deceased saying he was not going to run away and leave his vehicle there. He said that there was no chance for chasing anyone as they were all running for their lives. They were running because they were scared as he could see the lights of the vehicle they were running away from. They did not want that vehicle to find them. He had also looked for his cousin Achumile which was why when he found her he grabbed her by her hand and said they should run.

[63] His evidence under cross-examination was that he did not hear the conversation about the deceased's money or bank card or that somebody could be called to bring the deceased's bank card. He testified that he did not dispute Achumile's evidence that somebody was phoned to bring deceased's bank cards or that indeed Whitey and Mr Manciphu were phoned, he just did not hear any of that. He accepted that Whitey and Mr Manciphu went to town because they were phoned. He testified that he was seated at the back seat with accused no.6 but did not hear the phone calls or the conversation by accused no.6 about bank cards. He would not dispute that the deceased's bank pin was demanded by the people at the back because at that time he was sitting at the front with Achumile. He did not see the deceased being

assaulted or bleeding from his nose or accused no.2 carrying a knife. He heard somebody asking accused no.1 for his banking details or cellphone banking details.

[64] He testified that when they were near FNB accused no.7 went to the bank and when he returned, shots were fired from another vehicle. At Mokhesi he alighted from the driver's side after accused no.1 had already done so. He did not hear accused no.6 saying that the deceased should not be killed but should be tied as Achumile testified. He testified that accused no.7 was lying in his plea explanation when he said that he said the deceased should be killed because he knew them and their places of residence. He denied robbing the deceased of his money and vehicle. He said that the deceased gave him his vehicle himself to drive because he was drunk. He did not hear the thumping sound that Achumile testified about. When they left Mokhesi he was with Achumile, accused no.2 and accused no.4. He said that he knew nothing about the killing of the deceased and that Achumile was falsely implicating him. The case for accused no.3 was closed.

The case for accused no.4.

[65] Accused no.4 testified that he was 27 years old and went to school up to grade 11. On 26 September 2019 he was at home when accused no.6 arrived. Accused no.6 invited him to go for drinking alcohol. He was with accused no.2 when accused no.6 arrived and they all left together and proceeded on foot to a vehicle that already had some occupants. Amongst the people in that vehicle it was Achumile and accused no.3 and the deceased whom he did not know. They got into that vehicle which drove them to a tavern. Accused no.2 and no.6 alighted and went into the tavern to buy some beers. They returned with some beers and the vehicle drove away. Accused no.6 indicated that they were going to town. They met accused no.7 at a bus stop hitchhiking. They gave a lift to accused no.7 and somewhere along the way the deceased said he had too much to drink and asked if anyone could drive the vehicle as they were going to town. Accused no.6 suggested that accused no.1 should be phoned because he has a driver's licence. Indeed accused no.1 was called and at a certain bus stop accused no.7 indicated that he was alighting there. He alighted but when he saw accused no.1 coming to the vehicle he changed his mind and boarded the vehicle again.

[66] The vehicle drove to town and stopped near FNB where accused no.7 alighted and went to the bank to make a cash withdrawal. He later returned and again boarded the vehicle. Suddenly another vehicle appeared in front of their vehicle and stopped. Two men alighted from it carrying firearms and fired some shots. He was not sure whether only one or both of them were carrying firearms. In fact he did not see a firearm, he only heard a gunshot sound. Accused no.1 immediately sped off to run away from that vehicle and drove towards Mokhesi. He drove until he reached a dead end where he stopped the vehicle and alighted. He and accused no.2 also alighted and ran away going home. On the way somewhere there they met Achumile who was with accused no.3. The four of them walked together. He did not know what happened to the deceased person.

[67] He disputed Achumile's evidence that he took part in taking the deceased out of the vehicle saying there was no chance for that. He also disputed as lies accused no.7's plea explanation that he and other accused assaulted the deceased saying that the deceased was not assaulted. He also disputed Achumile's evidence that on their way to town the deceased was bleeding through the nose and that near FNB a pin code was demanded from the deceased. He testified that he was present when accused no.1 and accused no.2 stabbed each other but denied having commented that they were stabbing each other as a result of having spilled the blood of a human being.

[68] He testified under cross-examination that he and accused no.2 left home together on 26 September 2019 and accused no.2 was not carrying a knife. He therefore disputed Achumile's evidence that accused no.2 had a knife and accused no.7's plea explanation that accused no.2 stabbed the deceased with a knife. Accused no.4 testified that he was sitting in the middle at the back seat of the vehicle flanked by accused no.6 and no.2. The deceased was seated on the extreme right near the window and accused no.2 was near the other window on the extreme left. When he boarded the vehicle the deceased was at the front seat with accused no.3 and Achumile. When the deceased said he was tired and would not be able to drive the deceased moved to the back seat to make way for accused no.1 to drive. He disputed Achumile's evidence that on the way to town the deceased was assaulted, bled through the nose and that accused no.2 had a knife. He did not hear when the

deceased's pin code was demanded. He also did not hear when somebody asked for the banking details of accused no.1 and when accused no.7 exclaimed that the deceased's phone reflected that the deceased had R10 000.00 in his bank account. He never heard anything about the money.

[69] He ran away at Mokhesi because he was scared as the vehicle that was chasing them and from which shots were fired in town was pursuing them. He testified that Achumile was lying to say that the deceased was caused to alight from the vehicle and accused no.6 said that he should be tied. He also disputed accused no.7's plea explanation that accused no.3 said the deceased should be killed. He disputed all of Achumile's evidence relating to the tying of the deceased, the speaking of the jail language, the thumping sound and the snoring sound of the deceased. He denied that he and his co-accused killed the deceased saying that accused no.2 did not have a knife and denied that accused no.2 stabbed the deceased saying there was no chance for any of that as they alighted from the vehicle and immediately ran away from the vehicle that was pursuing them.

[70] Accused no.4 confirmed that on Saturday 28 September 2019 there was a fight between accused no.1 and no.2 at Moyikwa's tavern. He said however, that that fight during which accused no.1 and 2 stabbed each other was about liquor at a traditional ceremony (umgidi). It took place on Saturday 28 September 2019 at Moyikwa's tavern but it started at a traditional ceremony about liquor a week earlier. He said that Achumile was lying in her evidence that the fight was about sharing the spoils of the robbery of the deceased's money. He testified that when Achumile came out of the tavern where accused no.1 and 2 fought they had already stabbed each other. He denied participating in the robbery and the killing of the deceased. The case for accused no.4 was closed.

[71] It will be recalled that Achumile was charged with the other accused as accused no.5. When this trial commenced the State indicated that she would testify as a State witness in terms of section 204 of the CPA. Accused no.6 closed his case without taking the witness stand or giving any evidence.

The case for accused no.7.

[72] The evidence of accused no.7 was that on 26 September 2019 between 20:00 and 21:00 in the evening he was at his father's homestead where he had attended a ceremony. His father's homestead is different from his own homestead. He decided to go home by hitchhiking in order to get a lift from any vehicle that was heading in his direction. At some point a double cab bakkie with a canopy stopped and gave him a lift. He boarded in the load bin of the said vehicle. He alighted at Teresa and after alighting he saw accused no.1 there and asked him where he was going. It transpired that accused no.1 was going for alcohol consumption in town with other accused. He decided to join them and boarded the vehicle again. When he got a lift earlier that vehicle was driven by accused no.3 and at the Teresa bus stop where he alighted and accused no.1 emerged, accused no.1 took over driving. On the way before they reached town accused no.6 gave him a phone and asked him to transfer R1000.00 to accused no.1's account and he did so. He did not know accused no.1's bank account number but he used accused no.1's cellphone number to do the transfer. He already knew accused no.1's cellphone number. After transferring the money he returned the cellphone to accused no.6. When he did the transfer he noticed that the account number from which he transferred the R1000.00 had a balance of R10 000.00. Accused no.1 later indicated that his bank card was not with him. When this was taking place he did not suspect any criminal activity.

[73] After accused no.1 had said that his bank card was not with him he decided to transfer some money into his own bank account. Accused no.6 then gave him back the cellphone he had returned to him to enable him to transfer money to his own bank account. He transferred R2000.00 into his own bank account and returned that cellphone to accused no.6. When they reached town he alighted near FNB to make a cash withdrawal. He withdrew R600.00 from his bank account and returned to the vehicle and boarded in the load bin as before. He gave accused no.6 R500.00 and left R100.00 for himself. While inside the vehicle and as the vehicle was driving off he saw a white vehicle through the back window of the bakkie. There were two men standing outside of that vehicle. One of those men was carrying a firearm and he fired a shot and their vehicle sped off towards the Mokhesi area. It entered the Mokhesi area driving on a gravel road and stopped somewhere there. He assumed that the vehicle was stopping there because it had a mechanical breakdown or that it had run out of fuel.

[74] When the vehicle stopped there his co-accused and the deceased alighted from the vehicle. He realized that he could not open the canopy from inside. He knocked at the window and accused no.6 opened the canopy door for him. Achumile was also there. As he alighted accused no.1, 2, 3, 4 and the deceased ran. The four accused grabbed the deceased as he was running and assaulted him with stones. He and accused no.6 tried to stop them from assaulting the deceased by telling them to stop assaulting him. The assault was taking place about seven metres from where he and accused no.6 were standing. Achumile was not far from him and accused no.6 was about three metres from him. There was no source of light there other than a quarter of a moon. Accused no.2 stabbed the deceased with a knife. Accused no.3 said that that man must be killed but he was not sure whether it was before or after the stabbing. He urged them not to kill the man but accused no.3 insisted that the man must be killed because he knew them and their places of residences. At some point he saw police vehicle lights and they ran in different directions. He took the direction that was going to town and boarded a taxi going home.

[75] He testified that when he was given a phone by accused no.6 he was not told whose phone it was. He knew that accused no.6 was not working and in the vehicle there was the man he did not know and it had been said that there was going to be liquor consumption. He thought that the R2000.00 which he transferred to his account belonged to that man, the deceased. On 27 September 2019 another R1500.00 was transferred to his account. He did not know who transferred the money to him and from whose account the money was transferred. He did not spend the R1500.00 and it must still be in his account. He was referred to the transactions which reflected in his bank statement. On 28 September 2019 a cash withdrawal of R1000.00 was reflected. He testified that he made that withdrawal himself. His intention was to withdraw the whole balance of R1400.00 which was the balance from the R2000.00 that he had transferred to himself on 26 September 2019 and from which he had withdrawn R600.00 at FNB. However, his withdrawal limit was R1000.00 hence he made a cash withdrawal of R1000.00. He kept the said R1000.00 at home but he did not know if it was still there since his arrest and detention.

[76] His intention at that time was to keep it for the owner so that he would not have to go to town to make a cash withdrawal if the owner thereof came and wanted it back. He further testified that he made a cash withdrawal of R150.00 through what is referred to as a cashback on the 08 October 2019. He admitted that that money was not his money. He used it on the basis that he would refund it from the money he kept at home. He also made the other transactions at a liquor store on the 08 October 2019 using his bank card.

[77] After they were all arrested in relation to the incident of the 26 September 2019 he had a conversation with accused no.1 while they were all in custody. He told accused no.1 about an amount of R1500.00 which he did not know about. Accused no.1 told him that he was the one who transferred the said amount to him. His intention at the time was to collect it later but they were arrested before he had a chance to collect it as they never met after the incident until they were arrested. He also had a conversation with accused no.6 about the incident. Accused no.6 told him that he never intended that the deceased be killed. He just wanted them to use his money on liquor consumption.

[78] Under cross-examination by the legal representative for accused no.1 and 4 he testified that accused no.1 and accused no.4 assaulted the deceased and he saw them assaulting him. He also testified that it was his own decision to transfer R2000.00 to his own account. Nobody told him to transfer the said R2000.00. He did not give the balance from that amount to any of the accused because he never got a chance to do so. He never met any of the accused after the 26 September 2019. He never left his home or the locality. He surrendered himself to the police after his co-accused were arrested. He received a report that the police had come to his home looking for him when he was not at home. He then went to the police station to hand himself over. At the time he transferred money to the account of accused no.1 and to his account he did not suspect any criminal activity with what was happening. He pointed out that if he had suspected that criminal activities were taking place, he would have alighted from the vehicle and left the other accused alone.

[79] When he witnessed the assault on the deceased at Mokhesi he tried to intervene but his attempts to stop his co-accused from assaulting the deceased fell

on deaf ears. After witnessing that tragic assault, he became scared. When police vehicles appeared whilst they were at Mokhesi he ran away. He, Achumile and accused no.6 witnessed the other accused assaulting the deceased. When they ran away they left the deceased there at the crime scene injured. He knew that the money that had been transferred to him in the sum of R2000.00 was the deceased's money. He kept some of the money hoping that if the deceased recovered he would try to trace them to get it back. However, he never made any attempt to trace the deceased or ask his co-accused about him because he did not even want to meet them. He did not report the incident to the police because he was scared.

[80] When it was put to him that accused no.1 denied having been the one who transferred R1500.00 to his account, he testified that even when they discussed the matter while in detention accused no.1 had said he would deny it. About Achumile's evidence that he kept the amount he had withdrawn at FNB with him he said that she was mistaken, perhaps she did not see him when he handed it to accused no.6. He testified that he did not see it when the deceased was being tied as depicted in the photos. He, however saw him being chased by accused no.1, 2, 3 and 4 and when they assaulted him at Mokhesi. The accused chased the deceased and when they caught up with him they immediately assaulted him.

[81] Under cross-examination by the legal representative for accused no.2 and 3 he confirmed his evidence that after he alighted from the vehicle at Mokhesi he saw accused no.1, 2, 3 and 4 chasing and getting hold of the deceased. He saw them assaulting him and the assault was taking place about seven meters from where he was standing and accused no.6 was standing about three meters or so from him towards where the assault was taking place. He intervened trying to stop them from assaulting the deceased by word of mouth. They ran when they saw the lights of the police vehicles. He could see who was pelting the deceased with stones from the light that was from by the quarter moon. He insisted that he saw his co-accused assaulting the deceased including accused no.2 and 3 and denied misleading the court. He also saw it when the deceased was being stabbed by accused no.2. He denied that the accused alighted from the vehicle at Mokhesi and immediately ran away running for their lives from the motor vehicle they had seen near FNB whose occupants had firearms thinking that they were still chasing them. He maintained that

he and accused no.6 intervened trying to stop them from assaulting the deceased by word of mouth. He testified that all the accused benefitted from the deceased's money because they all consumed the liquor bought with it.

[82] Under cross-examination by the prosecutor accused no.7 testified that he was sitting in the load bin of the vehicle which had a canopy. He communicated with his co-accused on the front part of the vehicle through a small window fixed on the canopy. He confirmed exclaiming that the phone which had been handed to him by accused no.6 reflected a balance of R10 000.00. That phone had a message that showed that amount as the balance. He transferred R1000.0 to the account of accused no.1 and later R2000.00 to his own account. He confirmed that he used some of the deceased's money for his own benefit. But he was going to give back the R1000.00 he had withdrawn and which he kept at home until his arrest. About the R1500.00 which was transferred to him, he did not know to whom it belonged hence he never withdrew it and should still be in his bank account. The case for accused no.7 was closed which brought to an end the defence case as a whole.

The analysis of evidence.

[83] The six accused have been charged with kidnapping Mr Sandile Ntloko, robbing him of his vehicle, described as a toyota hilux 4X4 and a sum of R10500.00 and thereafter intentionally killing him during the night of the 26 September 2019. The events that culminated in the death of the deceased started with what escalated into a craftily conceived plan, unbeknown to the deceased, involving the use of a nineteen-year-old woman, Achumile, with her consent and participant, to lure him for his money. It appears that the deceased was at some point, put into a situation of helplessness where he would be subjected to violence and part with his money by force. To get this done successfully accused no.6 invited and collected all the other accused from their homes. The evidence of Achumile understood together with the plea explanation of accused no.6 indicates quite clearly that the deceased was interested in a love relationship with Achumile. It is not clear where and how accused no.6 met the deceased. However, it appears from Achumile's evidence that the deceased already knew Achumile. The deceased who, apart from his other small business ventures, was also a teacher by profession.

[84] When the deceased and accused no.6 arrived at accused no.3's home where Achumile stayed at the time, he parked his vehicle outside. Accused no.6 went into that homestead to call Achumile telling her that somebody wanted to see her. Initially Achumile refused but eventually she went out to the vehicle of the deceased. The deceased's vehicle's doors were open and the deceased greeted her by saying hello Achuma. The deceased told her he knew her from school at St Teresa. The deceased offered Achumile liquor and accused no.6 was given R200.00 by the deceased to go and buy some beers and he left leaving Achumile with the deceased. At some point the deceased left and returned later with accused no.6 bringing some beers to Achumile. Eventually the deceased and accused no.6 left saying that they were going to Moyikwa's tavern but would return later to fetch her. The deceased had indicated that he intended to take Achumile out on a date. When the deceased and accused no.6 returned to fetch Achumile, they were joined by accused no.3.

[85] The deceased drove off and stopped near Moyikwa's tavern where accused no.6 told the deceased to stop the vehicle. He asked him how much he had. The deceased said he did not have any cash with him. Accused no.6 asked the deceased how much he had in his bank account. The deceased said he had R1000.00. They drove off and along the way the deceased said he did not have his wallet with him. Accused no.6 then asked if there was no one who could be phoned and asked to meet them halfway and bring the wallet. The first person the deceased phoned was on voicemail. Accused no.6 asked the deceased whether there was no other person. The deceased phoned the second person, Mr Mangciphu and asked him to bring his wallet. During all of this Achumile's evidence was that the mood in the vehicle was still fine. The vehicle turned driving back towards Kwa-Gcina and got into a gravel road. While Achumile's evidence was that the mood was still good in the vehicle, I think that things had started to escalate at this stage as the evidence of Whitey and Mr Mangciphu indicated. It is clear from the evidence that when Mr Mangciphu and Mr Mhlabunzima Ntloko were phoned by the deceased he was already in trouble and he was no longer in control of what was happening in his vehicle.

[86] The undisputed evidence was that when the deceased called Mr Mangciphu, he could tell that he was in trouble. This explains why they went to look for his vehicle.

Accused no.6 alighted somewhere and returned with accused no.2 and 4 who boarded the vehicle as well. Accused no.6 borrowed the deceased's phone from him. Accused no.6 phoned accused no.1 telling him to wait for the vehicle at the bus stop. But before they got to that bus stop accused no.7 was picked up at a hiking spot and alighted at Teresa bus stop going home. This is where incidentally accused no.1 was going to be picked up. When accused no.7 saw all the people in the vehicle being joined by accused no.1 he enquired where they were going. He was told that they were going to town. He came back into the vehicle boarding in the load bin where he was before alighting. Accused no.1 was told by accused no.6 to take over the driving of the vehicle from accused no.3. It appears from the evidence that at some point a decision was taken that accused no.3 must take over driving from the deceased. The circumstances in which this happened are not clear. In fact Achumile did not have a recollection of accused no.3 driving. However, accused no.3 testified that the deceased indicated that he was tired and had had too much to drink.

[87] The evidence of accused no.3 about the deceased not driving because he was tired and drunk is clearly false. Deceased's kidnaping must have been taking place at this stage. Accused no.3's evidence was that when he took over driving, the deceased shifted from the driver's seat, squeezed himself between Achumile and the driver and accused no.3 took over driving. If he voluntarily decided not to drive as suggested by accused no.3, I do not understand why he did not occupy one of the passenger seats at the back or ask Achumile to go to the back seat with him. It appears from the evidence of Achumile that somewhere along the way two significant events occurred. The first one is that it was established that the deceased had R10 000.00 or so in his bank account. Secondly, the deceased's wallet containing his bank card was found in the vehicle at some point. According to the evidence of Achumile it was about this time that the mood changed in the vehicle. The pin code was demanded from the deceased but he refused with it but later gave them his pin code. This could not possibly have been done voluntarily by the deceased. The timing and the actual sequence of events is somewhat fuzzled. However, this should not be confused with whether or not the deceased was kidnapped, robbed and eventually killed on that day.

[88] Achumile testified that the deceased was assaulted and she noticed that accused no.2 was carrying a knife. The deceased was bleeding through the nose which must have been because of the assault. This assault was most probably intended to force the deceased to disclose his pin code after his wallet was found in the vehicle. This is the pin code that was used to make a cash transfer of R2000.00 to accused no.7's bank account from which accused no.7 withdrew R600.00 according to his evidence. This was after a sum of R1000.00 had been transferred by accused no.7 to the bank account of accused no.1. None of these transactions could have been done voluntarily with the deceased's permission or consent. Accused no.1 and 7 to whose bank accounts these amounts were transferred never testified that the deceased consented to the transfer of his money to them. Kidnapping must have been in motion when accused no.3 took over driving the deceased's vehicle. Accused no.1 was phoned and fetched to drive everybody to town where the withdrawal of the deceased's money was to take place which had earlier been transferred to the bank accounts of accused no.7 and no.1. The evidence of accused no.7 that when he transferred money into his and accused no.1's bank accounts he did not suspect that criminal activities were taking place must be rejected as being so improbable as to be false. He did not know the deceased, neither did accused no.1. How they thought he voluntarily allowed his money to be transferred by them to themselves is another glaring falsity. On a proper understanding of all this evidence, circumstantial as it is, it is clear that the deceased had been kidnapped and robbery was in progress and all the occupants of the vehicle were aware of it and none of them, on the evidence, dissociated themselves from the obviously criminal activities taking place in that vehicle.

[89] Sight should not be lost of the fact that Mr Mangciphu testified to receiving a phone call from the deceased. During that phone call he sensed that the deceased was not making sense and he kept on calling him. The deceased told him that he would send some people to his place of business to fetch his Capitec Bank card. At some point he said he should come with Kanyile and Mbolekwa. Mr Mangciphu testified that the deceased had never before asked him to bring his bank cards and he did not know where the cards were kept. During these conversations with the deceased who clearly was speaking in riddles Mr Mangciphu heard voices saying that *"we said to you that you must not mention where you are"*. At that stage the

deceased had already said he was at Cobweb. He suspected that the deceased was in some kind of trouble. Mr Mangciphu and Mr Mhlabunzima Ntloko then drove their vehicles looking for the deceased in town. Mr Mangciphu spotted the deceased's vehicle in town and he phoned Mr Mhlabunzima Ntloko who was in his own vehicle and told him to come quickly as he had spotted the deceased's vehicle. Mr Ntloko arrived quickly and tried to block the deceased's vehicle near FNB. It was also the evidence of all the accused that they did go to FNB where they were shot at by two occupants of a vehicle as a result of which they drove away towards the Mokhesi area. Both Mr Mangciphu and Mr Ntloko denied firing any shots. This is immaterial to the question of whether or not the deceased was kidnapped and robbed. In any event Achumile did also testify about the shooting taking place.

[90] On the consideration of all the evidence I am satisfied that all the accused participated in various degrees in the kidnapping and robbery of the deceased. None of them dissociated themselves from what was taking place. They were all in the vehicle where all the criminal activities started. Accused no.2, 4 and 6 were sitting with the deceased at the back seat when he was assaulted by one or some of them and bled through the nose. Accused no.6 had, throughout, been giving instructions coordinating the activities in their presence after cunningly and unbeknown to the deceased, putting the team together and collecting all of them from their various homes. At some point accused no.6 handed the deceased's phone to accused no.7 who happily transferred R2000.00 to himself. Could it be that when he transferred money to himself he did not know that the money was that of the deceased? I do not think so. He must have seen through the back window between the load bin where he was sitting and the back seat where accused no.6, 2, 4 and the deceased were sitting, that the deceased was subdued and he actively transferred some of the money to himself.

[91] On the proper understanding of his own evidence, he had no difficulty at all in communicating with his co accused especially accused no.6 while he was sitting in the load bin of the deceased's vehicle. On his own clear evidence he only withdrew R600.00 from his bank account, presumably for drinking with others. He was the only one who knew at that stage how much he had transferred to himself even though they all knew that the deceased had R10 000.00 in his bank account after he had

told them. The recipients of the deceased's money that was transferred from his account were the two accused, accused no.1 and accused no.7. The documentary evidence in the form of bank statements shows that between the two of them they received about 50% of the deceased's money directly into their bank accounts. The following day accused no.1 went to town with accused no.3 and accused no.6. I must point out though that it is not clear from the evidence who withdrew R5000.00 cash from the account of the deceased and for what purpose. There is no evidence of accused no.7 being in town on that day the 27 September 2019. The circumstantial evidence in this matter makes the conclusion that accused no.1 and 6 went to town to withdraw the balance of the deceased money to be shared with other members of the group unavoidable.

[92] In kidnapping and robbing the deceased the accused including Achumile, on the evidence, worked together to achieve a common objective, which was to rob him of his money. They succeeded in this enterprise by working jointly with various degrees of participation. The evidence also shows that the deceased's phone was at some point, in the hands of accused no.6 who co-ordinated most activities from the onset. He is the one who was clearly giving instructions as to what should happen. His attempt at projecting himself, through his plea explanation, as having been acting innocently is rejected as false. So too should that of accused no.7. He wasted no time after hearing that the bank card of accused no.1 was not with him. He transferred to himself R2000.00 and according to his own evidence, nobody told him how much to transfer to himself, not even accused no.6. It was his personal decision. He also took another decision of withdrawing only R600,00 from his bank account whereas, on his own evidence, his card limit was R1000.00. These were not, by any stretch of imaginations, actions of an innocent man but those of an active participant in the criminal activities and who ensured that he got himself a good share of the robbery.

[93] The following day he received a further amount of R1500.00 from the deceased's account. He claims not to have known where the said money came from but he could see that it was from the same account from which he had transferred to himself R2000.00. On the other hand, accused no.1 received the second amount of R1000.00 from the deceased's account. The deceased cellphone which was used to

make these transactions was, on the evidence of accused no.7, returned to accused no.6. Accused no.1 and 6 were together throughout after the everybody ran away at Mokhesi leaving the deceased there. They were together in town the following day. There is evidence that the wallet of the deceased was found in his car which obviously had his bank card. There is evidence that he was forced to reveal his bank pin code. This explains the cash withdrawal of R5000.00 from the bank account of the deceased at the FNB ATM in Sterkspruit the following day after his murder.

[94] While it is not clear from the evidence which one of the accused did the cash withdrawal and how it was split or shared, it could only have been some of the accused. There is no evidence of accused no.2 meeting accused no.1 at any time after the murder until the 28 September 2019 at the tavern where they fought. The evidence of Achumile was that she was told by accused no.2 that he was going to stab accused no.1 because accused no.1 and others had given accused no.2 and presumably his cousin, accused no.4 only a sum of R400.00. They indeed stabbed each other. The evidence of Achumile was that the stabbing occurred on Saturday 28 September 2019 at Moyikwa's tavern.

[95] Accused no.2 corroborated this evidence regarding the stabbing and the date it occurred. Accused no.1 confirmed in his evidence that the stabbing occurred but only a week after the 26 September 2019. This evidence of accused no.1 that the stabbing occurred a week later must be rejected as being false and a clear attempt at deflection. In any event it is contradicted by accused no.2 who was the one he stabbed. It also flies in the face of accused no.2's medical records. It is understandable why accused no.2 would be upset about the money not being shared equally which explains the reasons for their fight. After all, they all knew that the deceased's account had R10 000.00. For him to be only given R400.00 after he had ensured that the deceased died by stabbing him on his chest must have been annoying. The medical records of accused no.2 show that on 28 September 2019 he went to hospital and reported that he had been assaulted by a known person, which it is not disputed it was accused no.1.

[96] I emphasize that there is no clear evidence of how the sum of R5000.00 was shared after it was withdrawn and who withdrew it. I however, do not think that it was

a co-incidence that the following day after the kidnapping, robbery, and murder of the deceased, there is evidence of accused no.2 fighting with accused no.1 over the money of the deceased. Similarly accused no.3 went to town on the 27 September 2019 with accused no.6 and 1. Accused no.3 and 1 bought two pairs of Vans takkies. One pair was for a child named Zikhona who is a member of accused no.3's family. On the other hand, accused no.1 bought a pair of takkies for his girlfriend Achumile who, no doubt, played a very important role. She was involved in fooling the deceased into thinking that the only plan was for him and Achumile to spend time together on a date. Achumile and her friends including her boyfriend, accused no.1 had a different agenda. That agenda culminated in the kidnapping, robbery and the murder of the deceased.

[97] On the conspectus of all the direct and circumstantial evidence in this matter all the accused including Achumile worked together to achieve a common goal of kidnapping and robbing the deceased. On the basis of the doctrine of common purpose it is not necessary for the State to prove the role each accused played in the sequence of events. What is necessary is for the State to prove an agreement between the accused to commit the crimes. There is no evidence of an agreement having been reached by and amongst the accused or even discussed. The alternative requirement of the doctrine of common purpose is active participation in the common criminal enterprise.

[98] The *locus classicus* on the doctrine of common purpose is the celebrated case of *Mgedezi*¹ in which Botha JA restated the requirements of the doctrine of common purpose as follows:

“...There is no suggestion of an express agreement and there is no proof of an implied agreement. As to the latter, the acts that accused no.6 was proved to have committed in the vicinity of blocks 4 and 5 do not give rise to an inference beyond reasonable doubt that he had agreed with any other person that the occupants of room 12 were to be killed. At the time when, and the place where, accused no.6 participated in the activities of the group who were calling for impimpis to be killed, those activities constituted no more than

¹ *S v Mgedezi and Others* 1989 (1) SA 687(A) at 705-706

threats and intimidation, which had not reached any stage of actual execution, as we knew from what happened in room 108, and it would be too much of a leap in time and place to infer from those events that accused no.6 had agreed to the events that occurred at room 12.

In the absence of proof of a prior agreement, accused no.6, who was not shown to have contributed casually to the killing or wounding of the occupants of room 12, can be held liable for those events, on the basis of the decision in *S v Sefatsa and Others* 1988 (1) SA 868 (A), only if certain prerequisites are satisfied. In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite *mens rea*; so, in respect of the killing of the deceased, he must have intended them to be killed or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue. (As to the first four requirements, see Whiting 1986 SALJ 38 at 39). In order to secure conviction against accused no.6 in respect of the counts on which he was charged, the State had to prove all of these prerequisites beyond reasonable doubt".

Did the accused act with common purpose?

[99] When Whitey and Mr Mangciphu arrived at FNB accused no.7 had already returned from withdrawing some of the money, which on his evidence he gave to accused no.6 together with the phone of the deceased. Achumile and all the accused save for accused no.6 who did not testify, testified that the two men who arrived there which it was Whitey and Mr Mangciphu, fired shots at them. This led to the vehicle being driven by accused no.1 to the Mokhesi area until it reached a dead end. The evidence of Achumile was that there was a discussion in the vehicle about what to do with the deceased. Only accused no.7 did not participate in this

discussion. Accused no.3 said that the deceased must be killed because he knew them and their homesteads. Accused no.6 did not agree with the idea of killing the deceased. He suggested that the deceased must be tied up with his shoe laces. Indeed the photo album compiled by constable Tsoaeli depicts, in some of the photos, the deceased's hands tied to the back with shoe laces. The deceased was caused to alight from the vehicle. At some point after he was caused to alight he ran away clearly trying to save his life. Accused no.1, 2, 3 and 4 chased after him. Not far from where she was Achumile heard thumping sounds which she understood to have been the deceased being assaulted with stones and then heard the deceased snoring. According to accused no.7 he and accused no.6 tried to intervene dissuading the four accused from assaulting the deceased, to no avail. He saw accused no.2 stabbing the deceased with a knife. It should be remembered that in her evidence Achumile had said that she had seen accused no.2 carrying a knife in the vehicle when the deceased was being assaulted.

[100] The evidence of constable Tsoaeli was that he found the vehicle about 171 metres from the body of the deceased. This is in line with Achumile's evidence that after the accused had returned from killing the deceased accused no.1 and 6 moved the vehicle from where it had stopped initially. This is the time at which its lights must have been switched off. At this stage the deceased had already been killed. When accused no.7 saw the deceased being assaulted with stones and being stabbed by accused no.2 he was about 7 metres from where the assault and stabbing were taking place. I therefore accept as being reliable accused no.7's evidence of who participated in the killing. Besides, there was no evidence of other people being there other than the accused themselves and Achumile and the deceased. Accused no.7 knew all the other accused very well and he saw them chasing the deceased. The fact that the only light there was that of a quarter moon does not mean he could not have seen them killing the deceased. Accused no.7's evidence was also that accused no.6 did not participate in the chasing and assaulting of the deceased. Accused no.6 was standing about 3 or 4 metres from where the assault and killing were taking place. Achumile was also nearer to accused no.7 although she did not see which one of the accused assaulted the deceased. However, she accepted under cross-examination that accused no.6 did not chase after the deceased. This aligns well with the evidence of accused no.7 that accused no.6 did not participate in

the chasing, the assault and the murder of the deceased. It should be recalled that Achumile testified that accused no.6 had said during the discussion on what to do with the deceased that he did not want the deceased to be killed. He wanted him to be tied and left there so that if he ultimately went to the police they would be arrested for robbing him and not his murder.

[101] While there is no evidence of some of the accused playing specific roles in the kidnapping and robbing of the deceased, the evidence, considered as a whole, proves beyond reasonable doubt that they were all present in the deceased's vehicle. They associated with the kidnapping of the deceased. Not a single one of them disassociated themselves from the kidnapping and robbery. The evidence shows that at some point the deceased was squeezed in the limited space between Achumile and accused no.3 who on his evidence, took over the driving of the vehicle despite not having a driver's licence because the deceased said he was drunk and tired. Clearly the deceased had alternatives, like people he could have called if he felt he could not drive either because he was tired or too drunk. In fact when he said he had left his wallet at home it was decided that he should phone somebody. Indeed he phoned Mr Mangciphu and Whitey. These are the same people he could have called if he was free and not kidnapped, to come and fetch him instead of giving his vehicle to accused no.3 who was both a stranger to him and did not have a driver's licence. The evidence shows overwhelmingly that accused no.1 was roped in because amongst the whole group he was the only one with a driver's licence. They needed to drive to town after all, where the risk of being stopped by the police was higher. He drove the vehicle to town where some of the deceased's money was withdrawn by accused no.7 who falsely claims innocence after transfers to his and accused no.1's bank accounts were effected.

[102] I therefore find that accused no.1, 2, 3 and 4's participation in chasing after the deceased and in assaulting and killing him was intended to hide the earlier crimes of kidnapping and robbery after the discussion on what to do with the deceased. I just do not see how they could have participated so decisively in his murder if it was not because of their involvement in the deceased's kidnapping and robbery. In any event the circumstantial evidence shows clearly that all the accused were not only present during the kidnapping and robbery but some also participated even in the murder

itself. Therefore, the evidence of Achumile considered with that of accused no.7, the evidence of some of the accused and the rest of the circumstantial evidence establishes beyond reasonable doubt the guilt of all the accused in respect of kidnapping and robbery. It also establishes the guilt of accused no.1, 2, 3 and 4 in respect of the murder of the deceased. There is clear evidence of Achumile and accused no.7, of accused no.6 and accused no.7 not only dissociating themselves from the murder of the deceased but also trying to stop others from doing it.

[103] Achumile's evidence was not perfect and at times unclear about some goings in that vehicle. However, her evidence considered as a whole and together with the rest of the evidence, I am satisfied that she testified honestly and answered all questions to the best of her ability for a 19 year old young woman who clearly was not always concentrating on what was happening. To the extent that some of her evidence may have been contradictory, I regard that as having been because of a mistake on her part than a deliberate attempt to mislead the court. Her evidence considered as a whole was credible and reliable. Where it was lacking in some respects it was corroborated by that of accused no.7 and other circumstantial evidence. She is therefore granted indemnity from prosecution for any of the offences in this matter. I reject as being so improbably as to be falls, the evidence of all the accused that sought to exculpate themselves from the crimes that were committed in this matter.

[104] To the extent that some concessions might have been made by the prosecutor when he made submissions, on the kidnapping and robbery charges about some of the accused, I am of the view that such concessions are misplaced. They are not supported by the evidence which the State witnesses gave. The evidence of Achumile, even as an accomplice about which cautionary rules apply was credible and reliable and in fact she told the truth to the best of her memory. In any event most of her evidence was not disputed by the accused save where she implicated them. To the extent that the evidence was not common cause, her evidence was largely corroborated by accused no.7 whose evidence was also in most material respect both credible and reliable. This is in stark contract to the other accused's evidence which appeared to have been a rehearsed version which they all largely repeated almost verbatim. In any event most of it was far-fetched, defied logic and

so improbable as to be false. The State has therefore discharged the onus resting upon it to prove the guilt of the accused beyond reasonable doubt.

[105] In the result I find the accused guilty as follows:

1. Accused no.6 and 7 are found not guilty of the murder of the deceased.
2. Accused no.1, 2, 3, 4, 6 and 7 are all found guilty of the kidnapping as charged.
3. Accused no.1, 2, 3, 4, 6 and 7 are all found guilty of the crime of robbery as charged.
4. Accused no.1, 2, 3 and 4 are all found guilty of the murder of the deceased as charged.

M.S. JOLWANA
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the State : L. POMOLO

Instructed by : NPA

UMTATA

Legal representative for accused nos. 1 & 4: A. NOHIYA

Instructed by : Legal Aid South Africa

UMTATA

Legal representative for accused nos. 2 & 3: B. KREWU

Instructed by : Legal Aid South Africa

UMTATA

Legal representative for accused no.6: V. NTSHANGASE

Instructed by : Legal Aid South Africa

UMTATA

Legal representative for accused no.7: Z. NOMLALA

Instructed by : Legal Aid South Africa

UMTATA

Date heard : 22 June 2021

Delivered on : 15 & 16 November 2021