REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

(1) REPORTABLE NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES /NO

CASE NO: HGC: CC76/2018
DPP REF NO: 10/2/11/1-L41/18

In the matter between:

THE STATE

And

MOGALE, CHARLES	**ACCUSED 1**
NTHUTANG, SEHLABE LOUIS	**ACCUSED 2**
APHANE, BOITUMELO DANIEL	**ACCUSED 3**

JUDGMENT

MUDAU, J:

[1] The 3 accused are charged jointly in an indictment, which contains 11 counts. For the sake of brevity and clarity, the charges may be formulated and reproduced as follows: robbery with aggravating circumstances (count 1); conspiracy to commit robbery with aggravating circumstances, in contravention of section 18 of the Riotous Assemblies Act, 17 of 1956

(count 2); three counts of attempted murder (counts3-5); two counts of murder read with the provisions of section 51 (1) of Act 105 of 1997 (counts 6 and 7); unlawful possession of firearms, including a fully automatic firearm, and unlawful possession of ammunition in contravention of the Firearms Control Act, 60 of 2000 (counts 8-10) and finally, against accused 1 only, reckless or negligent driving in contravention of section 63 read with other relevant provisions of the National Road Traffic Act 93 of 1986 (count 11).

[2] All the accused are legally represented. They pleaded not guilty to the charges. Accused 1, with the exception of accused 2 and 3, elected not to disclose the basis of his defence and exercised his right to remain silent during the plea proceedings. Accused 2's plea explanation was that of an *alibi* in respect of count 1. In respect of the remaining charges, accused 2 denied the allegations. He explained that on the date and place as detailed in count 11, he hitchhiked a lift from an unknown driver to Johannesburg.

[3] Accused 3's plea explanation was that in respect of counts one and two, he was in police custody and therefore could not have committed the alleged offences. As for the remaining charges, on the day of the incident he was in the company of his friend, Solly, the deceased in count seven. He accompanied Solly to collect money from Jappie, the deceased in count six. They had travelled from Mahwelereng Township to Mokopane town where they met with Jappie at an Engine garage. Jappie was traveling in a Ford Ranger fully described in respect of count 11 together with two other unknown men. After withdrawing cash from the garage ATM machine that he gave to Solly, Jappie offered them a lift back to Mahwelereng. On the way, unknown men who later introduced themselves as the police shot them.

[4] It is proper to set out by way of introduction to the evidence and issues raised in this matter, the essential factual allegations advanced by the prosecution in seeking to establish its case against the accused. The indictment is a good starting point. The State alleges in the summary of

substantial facts that the victims in respect of count one were at gunpoint accosted by two men when they alighted out of their motor vehicle, a Ford Ranger. After being ordered to the ground, they were robbed of the Ford Ranger including other personal belongings. It is common cause that the Ford Ranger, whose registration numbers had in the meantime been cloned, was used during the incident referred to in counts 2 to 11.

[5] The state alleges that upon receiving information pertaining to the allegations in count 2, the police observed the area and surroundings. After spotting the vehicle with the accused inside at the targeted place, attempts to stop it failed. It is also not in dispute that the Ford Ranger was indeed a stolen vehicle, that it had been stolen during the robbery incident on 21 January 2017. The driver, accused 1 sped off with the police in pursuit. The occupants of the stolen Ford Ranger started shooting at the police who returned fire. It was not in dispute that the two persons who are the subject of the murder charges, died not far from the scene of the planned robbery on 1 April 2017 and that they died because of gunshot wounds sustained in a shooting incident after the high- speed pursuit by the police. It was not in dispute that the firearms and ammunition that relate to the relevant counts referred to above were recovered on the scene of the crime. It was also not in dispute, where the firearms were found on the scene.

[6] During the course of the trial, each accused made a number of formal admissions in terms of section 220 of the Criminal Procedure Act. The formal admissions ('exhibit A') comprise a large number of aspects such as photographs that were taken of at the scene of the capital crimes, the key and sketch plan of the scene, as well as the two deceased's identity and the respective post-mortem examination reports. The accused formally admitted that the deceased in count 6, Tebogo Jacob Ngwaila, a male person, died on 1 April 2017, the cause of death was determined to be a gunshot wound to the chest. In his case, the post-mortem report recorded *" an oval entrance gunshot wound (0, 4x0, 3cm) with an eccentric abrasion ring (0, 1-0, 2) at* 5 *to 6 o'clock position. The wound is located on the left outer aspect of the chest wall along the anterior axillary*

line, 25 *cm away from the sternum and 1.29* m *above the heel. No burning/blackening or tattooing around the wound".* The accused formally admitted that the deceased in count 7, Lesiba Solly Pale, a male person, died on 1 April 2017, the cause of death was also determined to be a gunshot wound to the chest. In the latter instance, the post-mortem report records that the body of the deceased had "a *round entrance gunshot wound (0, 4x0, 4cm) with eccentric abrasion ring (0, 1-0,3cm) at 11 to 4 o'clock position. The wound* is *located on the left outer aspect of the chest wall along the anterior axillary line, 22 cm away from the sternum midline and 1.29 cm above the heel. No burning/blackening or tattooing around the wound".* Other formal admissions are recorded in Exhibit B and related in the main to the firearms, spent cartridges and ammunition recovered on the scene.

[7] The forensic evidence presented by the prosecution consisted in the main of evidence relating to the crime scene in De Klerk Road. Two photograph albums, Exhibits, B and L were submitted in evidence. These albums consisted of some 152 photographs depicting the crime scene, the Ford Ranger recovered on the scene, the positions of the two deceased and photographs of firearms and other evidential materials such gloves recovered on the scene of the crime as well as photographs of accused two and three who survived the shooting.

[8] It was not in dispute that the firearms and ammunition that relate to the counts 8, 9 and 10 were recovered on the scene of the crime. It was also not in dispute, where the firearms were found on the scene. The position of the deceased persons was also admitted and the forensic evidence relating to the deceased persons formed the subject of section 220 submissions made by the accused. It is accordingly not necessary to set out the nature of this forensic evidence and the particular evidential material found on the scene of the crime, in any detail. Where necessary this will be dealt with in the evaluation and assessment of the evidence presented by the prosecution and that presented by the defence.

[9] In respect of the firearms and ammunition recovered at the scene, it was not disputed that a 5.56 X 45 mm calibre Vector model RS fully automatic

assault rifle of which the serial number was erased, was recovered on the scene with rounds of ammunition; one 9 mm parabellum caliber Norinco model 201C semi-automatic pistol and one 9 mm parabellum caliber Arcus model 980A semi-automatic pistol with rounds of ammunition were recovered from the scene. The accused also admitted the content of an affidavit tendered in terms of section 212 of the Criminal Procedure Act by Warrant Officer Goertzen attached to the Ballistics Section of the Forensic Science Laboratory as a Forensic Analyst. The effect of this forensic report was that the firearms recovered on the scene were, with the exception of the 9 mm Norinco semi- automatic pistol which had no firing pin, all in working condition and that they functioned without any obvious defects.

[10] Warrant Officer Goertzen has since immigrated to New Zealand. Colonel Mkhabela, a ballistic expert was made available by the state to testify on behalf of the defence in place of Goertzen in respect of the ballistic report. Mkhabela later testified and confirmed that the cartridge cases mentioned in 9.1, 9.2 and 9.3 were not fired in the firearms mentioned in 3.38, 3.41 or 3.44 of the ballistic report, these being the firearms confiscated from the scene of the incident. He further explained with reference to the gunpowder residue which tested positive on Solly that, it could either be that he was in possession of a firearm and actively discharged the said arm or that he was within a radius of 1 m from a firearm discharging the ammunition .

[11] The complainant in respect of count one, Mr Mathume Geoffrey Matlala (Matlala) testified and confirmed that at about 21h30 on 21 January 2017, he was dropping off his companion, Ms Florah Mphahlele outside the gate of her residence when two gunmen accosted them. They were robbed of their personal belongings including cell phones and cash as well as his motor vehicle, a double cab Ford Ranger with registration number DHW 515 L. He later identified his vehicle albeit with different registration numbers fitted on 1 April 2017 after having received a call from the police at the scene of the shootout. Although his insurance company helped to settle the debt with the bank that helped him finance the purchase of the

motor vehicle, it was not in full as he had to top up an extra R185 000-00 in settlement of the arrears due. He could not describe the robbers. Neither could he identify any of the accused before court as the robbers. The statement of Ms. Mphahlele (exhibit D) was by agreement of the parties admitted in evidence without oral testimony.

[12] Sergeant Robert Marokane, a member of the South African Police Service, attached to the Provincial Tracking Team, testified and confirmed with regard to counts 2 11 that, on 1 April 2017 the police had received a tip off about a group of 5 men traveling in a Ford Ranger who intended to rob a cash in transit van at Boxer Grocery Store, Mokopane situated alongside the N11 road. The N11 is a national route in this country, which runs from the Botswana border in the north at Groblersbrug, through Mokopane town pass through several other towns to end at the N3 in the South, near Ladysmith. The stretch of road in Mokopane, a dual carriageway to either direction has been renamed Nelson Mandela Drive.

[13] Sgt Marokane testified that at about 9 AM he and his colleague, Bopape drove to the Boxer grocery store. They were travelling in an unmarked white BMW sedan car that was however fitted with concealed police blue lights and a siren. They found the white Ford Ranger as described with registration number [….] stationary next to the Boxer Store on Nelson Mandela Drive. A quick check on the database of registered motor vehicles revealed that the Ford Ranger with registration number [….] was in fact gold in colour and belonged to a man with a registered address in Leydenburg, which made them suspicious.

[14] They called for backup. However, before backup could arrive, the Ford Ranger drove off northwards along Nelson Mandela Drive. Attempts to stop the Ford Ranger by blue lights and a siren were to no avail as it increased speed, drove through red traffic lights and on its incorrect side of the road with the police in hot pursuit. The Ford Ranger eventually turned right into Bezuidenhout St. Where Bezuidenhout st joins De Klerk st, it turned left. It was at that point that the occupant of the Ford Ranger started firing at their BMW. By then the police back up team, in another unmarked white BMW had joined in the chase. There was an exchange of

fire by the police also armed with R 5 rifles with the occupants of the Ford Ranger.

[15] After a while, the Ford Ranger reduced speed and all five men who were inside the Ford Ranger jumped out whilst it was still in motion. Some of the men, in all three, were armed. The man continued shooting at the police whilst scattered. When they stopped firing at the police those still standing were ordered to lie on the ground. Others had already fallen to the ground. The armed men were approached with a view to remove the firearms next to them for the place to be secured. Of the five men, he knew three from a previous encounter and that was the two deceased as well as accused 3. Those armed were the two deceased Solly, with the R5 rifle and Jappy Ngwaila with a 9 mm semiautomatic pistol. However, he could not remember who of the three accused, was armed with the second pistol. He explained that accused 1 was the driver of the Ford Ranger.

[16] During cross-examination, Sgt Marokane could not dispute that the R5 rifle on photograph 39 holds 35 live ammunition and that six rounds were fired from it. Neither could he dispute that one shot was fired from the semiautomatic pistol on photo 49. He also could not dispute that the magazine of the firearm depicted on photograph 95 and 96 holds a maximum of 15 rounds of ammunition. On that basis, counsel on behalf of accused 1 suggested to him that on the probabilities five shots were fired, which he could not dispute if. It was further put by counsel on behalf of accused1 that on her instructions, after the shooting there were about 99 R5 empty cartridges found. Marokane responded and disputed that most of the shots were fired from the police firearms.

[17] As to the question whose lives were in danger because of the shooting, he testified that it was members of the police, the residents in the area as well as the suspects. Marokane denied that the police were the first to shoot at the Ford Ranger. He also denied that the reason why accused 1 , the driver of the Ford Ranger wanted to get away was that the police were shooting at them. He maintained that there was a shootout between the police and the occupants of the Ford Ranger.

[18] It was his version that the rear back window of the Ford Ranger was open with someone firing the RS rifle through the open window. He disputed the suggestion by counsel on behalf of accused 1 that the Ford Ranger was never at any stage stationary. He confirmed however, that accused 1 was not in physical possession of any firearm at the time of arrest. He explained that accused 1 was not in possession of a firearm was only established at the point of his arrest. Marokane also disputed that accused 1 exited the Ford Ranger, lifted his hands and only then, and was shot. He maintained however, that during the briefing earlier that morning by the team commander, Sgt Makela, they were told that the suspects would be five in the Ford Ranger. On Marokane's version when the suspects exited the Ford Ranger they came out through different doors which is what he referred to when he testified in chief that they scattered, after which they headed towards the same direction across the road where they all took cover behind a tree. At that point, he could no longer see them.

[19] During cross-examination by counsel on behalf of accused 2, Marokane was not in a position to confirm from where the occupants of the Ford Ranger picked each other up. However, he disputed that accused 2 was hitchhiking and was on his way to Gauteng when the incident happened. Further, on his version, from the point where he found the Ford Ranger stationary next to Boxer grocery store, he noticed that it had five occupants. He only established the identity of those three he mentioned after the arrest.

[20] He disputed a suggestion made by counsel on behalf of accused 2 that where he found them at Boxer Grocery Store it is on the main road, the R101 that leads either to Polokwane or to Gauteng in the South. This he adamantly disputed. At this point, Marokane drew an arrow on page 2 of the Google map provided, exhibit F regarding this matter on the N11 road pointing northwards. As to the reason, why the Ford Ranger moved from where it was parked next to the grocery store, he suspected that it must have been because they recognized the police BMW car in which he was in, since the colour and the registration numbers had not changed from a previous encounter with three of the suspects. It was put to him by counsel

on behalf of accused 2 that, he was on his way to Gauteng, after a getting a lift at Engine Garage. Marokane explained that he found it surprising that accused 2 occupied the front passenger seat whereas the Ford Ranger on accused 2's version already had four passengers inside.

[21] As to the bullet holes on the right side window of the Ford Ranger, he testified that the board police motor vehicles had to take defensive cover by moving to the right side of the Ford Ranger to avoid exposing themselves to the line of fire of the rifleman on the rear left side of the Ford Ranger. After the suspects jumped out of the slow-moving Ford Ranger, they too stopped their car and "engaged with them" whilst taking cover on the right side of the police motor vehicle. It was put to him that accused 2 ran towards the tree, which Marokane confirmed. However, he disputed that accused 2 left the tree upon seeing one of the deceased ran towards the same tree. As to the dispute by accused 2 that he had no knowledge of any firearms inside the Ford Ranger, Marokane disputed the suggestion. He reasoned that no one could hide an RS rifle inside the Ford Ranger, as it is a big firearm.

[22] As to the questions by counsel on behalf of accused 3, he maintained that the shooting started at the corner of Bezuidenhout and De Klerk street. It is common cause that there is no forensic evidence that covered the corner of Bezuidenhout and De Klerk street. He disputed the suggestion that accused 3 immediately laid on the ground. On his version, accused 3 was arrested when he tried to flee from the scene. He also disputed that accused 3 was neither at Boxer grocery store nor hid behind the tree as put by counsel on behalf of accused 3.

[23] The police Tracking Team leader, Sgt Makola testified and confirmed that on 1 April 2017 he received information about planned cash in transit robbery next to the Boxer grocery store, Mokopane town as well as a description of the motor vehicle to be used for that purpose. He circulated the registration number of the Ford Ranger on the SAPS circulation system and established that it was golden in colour, registered under the name E P Blaaw, at a given address in Lydenburg, Mpumalanga. He briefed the team and gave directions to prevent the planned robbery. Two

unmarked police BMWs were dispatched in that regard. He was in one of the two BMWs and his driver was Rachidi. As they had taken different positions in town, he received a message through the police radio frequency from Sgt.Marokane that the motor vehicle fitting the given description was spotted at Boxer.

[24] As the Ford Ranger had tinted windows, Marokane told him that he was unable to ascertain the number of the occupants. As he and his colleague drove to the direction that was given, he could hear the wailing sound of a siren from a distance even before he could see the second police BMW. Marokane then radioed and informed them that the Ford Ranger was fleeing from the scene. As he and his colleague were about to enter Nelson Mandela Drive, he saw the white Ford Ranger pursued by their other BMW in which Marokane was, with its blue lights on. He too switched the blue lights of the motor vehicle on and gave chase. He noticed the Ford Ranger skip the next robots that were on red at an intersection, followed by the next set of red robots at another intersection and driving whilst facing oncoming traffic.

[25] From Nelson Mandela drive, the Ford Ranger turned right on a street he could not recall at that stage but, which joins De Klerk Street still traveling at high speed. As it turned into De Klerk Street, he noticed from a distance of about 150 m that the rear left window was rolled down, and through that window a barrel of a rifle that was pointed at the direction the police cars were approaching from followed by a gunshot. There was a little bit of smoke that he noticed from the rifle. In response, he took out his R5 rifle and shot towards the Ford Ranger.

[26] He confirmed that the Ford Ranger slowdown and that the occupants alighted whilst it was still in motion. He confirmed that the driver was accused 1. As they exited the Ford Ranger, he noticed that the R5 rifle was in the possession of Solly, and that the pistols were in the possession of Jappie and accused 2 , respectively . They all took cover behind a trunk of the tree in a 'stuck-up position,' meaning one after the other, as commonly described in police parlance. He confirmed that the police stopped their motor vehicles and shot in the direction of the tree. The

suspects started to run from the tree in different directions albeit not far as they went down as a means of surrendering. From the five suspects, he already knew three of them; and that was the two deceased as well as accused 3 from a previous undisclosed encounter.

[27] Accused 1, who was injured, did not give an explanation about the ownership of the Ford Ranger. As he was found in control of the Ford Ranger that was reportedly stolen, accused 1 was informed that he was under arrest for possession of the stolen Ford Ranger and informed of his rights regarding arrest before he was taken to hospital by the emergency personnel. In addition, after cordoning off the scene, forensic experts were summoned. The official draughtsman and photographer, Captain Kganare later arrived. Accused 3 who had sustained a scratch on his forehead from an apparent fall called him from the back of the police van where he was temporarily detained and made certain statements to him which he declined to disclose as he was not a commissioned officer, but referred him to his seniors, instead. He explained that accused 3 never reported to him that he accompanied his friend Solly to fetch money from the deceased, Jappie after which they were offered a lift.

[28] During cross-examination, Makela confirmed that each of the 4-team members was issued with an R5 rifle. Although he did not personally see the Ford Ranger parked next to the Boxer grocery store, Marokane called him and reported that he found it parked there. As to a question where he caught up with the first BMW, it was at the intersection of Nelson Mandela and Pretorius streets. The siren of his BMW was switched on at that stage, as the traffic lights were red.

[29] He confirmed that he saw the rear left window of the Ford Ranger with the barrel of the rifle protruding whilst giving chase on Bezuidenhout Street after due regard to exhibit F. It was at that point that he had the sound of a shot from the rifle, as the Ford Ranger turned left into De Klerk Street. He could not recall how many shots he fired whilst in his car, but confirmed that he fired other shots after exiting his car. He was not in a position to give the details as to who from the side of the suspects were shooting

because of the fact that their lives were exposed and had to act in self-defence. As for point C where the deceased Ngwaila perished, he explained that point C was in line with the tree where the suspects were. As to the question why there were no obvious 9 mm spent cartridges suggesting that shots were not fired from the pistols, he countered this by pointing out a jammed 9 mm pistol next to the deceased in point C. He confirmed that after the incident they sprayed the area to two indicate where the firearms were laid for convenience whilst waiting for the forensic team. He disputed that accused 1 was shot with his hands up in the air after exiting the Ford Ranger until he fell to the ground as suggested.

[30] He also testified that the Engine garage with a Wimpy restaurant is situated on the R101. As for the usual hiking spot for those getting out of town to Gauteng, it is the Caltex garage, which is situated last along the R101 South next to a KFC restaurant. As for accused 2 he occupied the front passenger seat. He admitted that from his written statement made shortly after the incident, no reference was made about the suspects standing in a stuck-up position. Neither was any reference made about accused 2 in possession of a pistol. It was put to him that accused 2 did not know any of the others in the Ford Ranger. Makola disputed this assertion. He testified that accused 2 knew the deceased Ngwaila, but declined to give details because he would have introduced character evidence against accused 2.

As to the suggestion that accused two was unarmed, he maintained that accused 2 was armed with a pistol when he fell, which Bopape took away. He conceded to his credit, that the two deceased died by gunshots that came from the side of the police team. As to the suggestion that no robbery took place and that the Ford Ranger was at all times stationary, he responded that the police went to the scene to foil the planned robbery and the loss of innocent lives. As to the suggestion that accused 3 accompanied Solly to collect money from the deceased, he testified that accused 3 called him aside at the scene and implicated himself, which information required a commissioned officer to record.

[31] Warrant Officer (as he then was) Kgare, whose role was in relation to the

crime scene analysis and was in charge of the collection of evidentiary material and compilation of the photo album, exhibit B referred to above from the crime scene in De Klerk Road by virtue of his position as an official draughtsman and photographer. He also examined the Ford Ranger and objects such as firearms and spent cartridges found on the scene. It is appropriate to record the key findings of his crime scene analysis as recorded in the photograph album (Exhibit B and L) that the witness prepared. He arrived at the scene at 11:00 on the morning of 1 April 2017. The scene of the events of 1 April extended over a considerable area along De Klerk Street and included some residential premises situated alongside the road but excluded Cnr Bezuidenhout Street, which was not brought to his attention.

[32] An R5 automatic rifle with an obliterated serial number and a loaded magazine was found at point E1 and a 9 mm pistol that point E2 next to the deceased marked B (Solly Phale) as depicted on photo 39-58. The second deceased, (Ngwaila) was found at a point marked C next to the trunk of a huge tree. This is not far from point E3 on the verge of the road outside a residential property next to a municipal water meter, a distance of 1.4 m from where the third 9 mm pistol with ammunition , was found as depicted on photo 81- 96. The two deceased were found at distance of 6.3 m apart. Also recovered from the scene was a pair of Black Hand gloves at point D6 and D7 as well as caps and a hat at point D2, D3, D9 and D5 respectively. Sandals and Cell phones were also picked up from the scene D1, D4, D8 and D10 respectively.

[33] The Ford Ranger was found at the point marked F depicted on photo 123-132 approximately 50 m from the two deceased .The window in the rear right passenger side door was damaged and there were bullet holes on that side of the vehicle. Thirty-seven empty rifle cartridges were picked up from various points. These were sent for ballistic examination together with the three firearms confiscated from the scene. Significantly, gunshot residue evidence were collected from all the suspects except accused one who at that stage had been taken to hospital. Except for the deceased at point B, Phale whose results were positive, the rest turned out negative.

THE ADMISSIBILITY OF THE STATEMENT MADE BY ACCUSED NO. 3

[34] The following day accused 3 made a statement to Col Sivhagi, which the prosecution tendered in evidence. It is trite that the state bears the onus to prove that a statement made by an accused person containing admissions and or amounting to a confession was made freely and voluntarily by the accused whilst he was in his sound and sober senses and that the accused was not unduly influenced to make the adverse statement. The accused objected to the admissibility of the statement and, following a trial within a trial to determine the admissibility, I ruled it to be admissible .

[35] In challenging the admissibility of the statement, the accused alleged that he had been assaulted and threatened by three unknown police officers following his arrest and that the statement was accordingly, not freely and voluntarily made.

[36] In the trial within a trial, the prosecution presented the evidence of Col Sivhagi. Sivhagi explained that the accused was brought to an office where he was by a member of the SAPS from the community service center. He and accused 3 were the only two inside the office. After inviting the accused to be seated and the necessary introductions made, he went through the notice of rights in detail and explained it to the accused, which he personally interpreted in Northern Sotho, a language he is fully conversant with for the accused.

[37] The preliminary interview form records that he warned the accused that he was not obliged to make any statement and informed him of his rights to silence and to obtain legal representation. He was also told that if he wished to make any complaint about assaults or ill treatment that Sivhagi would arrange appropriate protection for him in that regard. He noted that the accused had a bruise on his forehead and a red eye that the accused attributed to having been sustained at the time he took cover on the ground to avoid the shooting. The accused also had black marks on his right wrist attributed to handcuffs. He observed that the accused had no other visible injuries other than old scars on the shoulders.

[39] He afforded the accused an opportunity for a hospital visit but, which the accused declined. Once the rights had been explained to the accused he was afforded an opportunity to sign an acknowledgement, which he did. The accused was also issued with an SAP 14A no R4522623 form detailing his constitutional rights, which he signed for in acknowledgment. The accused was afforded an opportunity to sign and acknowledge the statement, which he did. According to Sivhagi, it was his impression that the accused was relaxed and at his ease and that, he freely indicated his desire to make a statement concerning his involvement in the offences.

[40] The accused's version of what transpired following his arrest with regard to the taking of the statement is in stark contrast to the version set out by the prosecution witness above. The accused did not lead the evidence of any other witnesses. As indicated, the onus is upon the state to prove that the statement was freely and voluntarily made and that it was not made as a result of any undue influence brought to bear upon the accused.

[41] In cross-examination, the accused stated that his constitutional rights were never explained to him and that the statement made by him to Sivhagi was based on what he had been told to say to him by three other officers who tortured him. He stated that the information contained in the statement did not come from him, as Sivhagi kept writing, threatening that him that he will not get bail unless he signed. According to the accused, the statement made to Sivhagi was false.

[42] When it was his turn to testify in the trial within a trial, it was the accused's version that Sivhagi took out a cell phone and showed him a video of his friend, Solly. He told him not to waste time but to tell what happened at Shoprite, Louis Trichardt before he left leaving him with three other unknown officers in a separate office who tortured him by placing a plastic bag over his head to stop him from breathing. He agreed to comply with what they ordered him to do. In that event, the three men ordered him to go to Col Sivhagi and to tell him what happened in Louis Trichardt. Since he knew nothing about the incidents, the officers told him what to say. A uniformed officer took him upstairs where Col Sivhagi was and left him there. Of his own accord Sivhagi, started writing the contents of which he

did not know. He was asked however whether he knew the two deceased, which he confirmed. Sivhagi of his own accord continued to write the statement.

[43] Sivhagi asked him if he knew one Malakalaka, which he confirmed since they were arrested together in January. He was asked to sign which he refused before he could speak to his lawyer. Col Sivhagi continued writing many pages without saying anything. Sivhagi threatened to call the three officers downstairs; out of fear, he then signed the statement. He disputed that he gave the officer his personal details and explained that the investigating officer regarding this case was the investigating officer in his other case. It was accused 3's version that none of his constitutional rights were explained to him. Sivhagi told him that he had no rights, as he was one of the troublesome people in the Province.

[44] Accused 3 maintained that all that Sivhagi asked him were his names and surnames, as for the rest of the statement he was never asked. After signing the statement, it was then that Sivhagi promised to grant him bail contrary to an earlier version that that he was asked to make this statement in return for being granted bail. As for the black mark on his wrist, he explained that the handcuffs that were tight on his wrists caused it. The accused's version of what gave rise to the statement is inherently improbable. It was never put during cross-examination of Col Sivhagi that he mentioned to accused 3 that he was one of the troublesome people in the province. He also conceded during his cross-examination that it was never put to Col Sivhagi that he first met him with three others in a separate office where he was tortured before the statement was taken.

[45] Significantly, on his version, he did not ask the three officers for information he was supposed to relate to Col Sivhagi. Neither did he make any statement to Col Sivhagi which contradicts the version placed on record to the effect that he was directed what to say in the statement. Accused 3, also conceded that it was never put to Sivhagi that from the office below a uniformed officer, took him to an office where he was upstairs. He further conceded that it was never put to Sivhagi whether he knew Solly. He also conceded that it was never put to Sivhagi that he

threatened to call the three officers when he allegedly refused to sign the statement. He was also constrained to concede that it was never put to Sivhagi during cross-examination that he had no right to call his legal representative.

[46] As to the allegations that his rights when not explained to him, he was referred to exhibit J page 2 paragraphs 3 and 4 were rights are detailed with his signature on the side. In addition, there was an SAP 14 a notice issued to him, which he acknowledged. It was put to him by counsel on behalf of the state that, the submission would be he made the statement freely and voluntarily, he responded thus: *"what he wrote is what I was told to go and tell him" ,* in contradiction to an earlier version that he made no statement to Sivhagi.

[47] When all of these facts are considered and when regard is had to the probabilities I am satisfied that the accused's version of what transpired between his arrest and when he made the statement to Col Sivhagi cannot reasonably possibly be true. The statement is detailed. Indeed, I hold that his version is, manifestly false. In contrast, Col Sivhagi was an outstanding witness whose version was not materially challenged in any meaningful way. Accordingly, I hold that Sivhagi's version is in all material respects credible and trustworthy as compared to that of accused 3. I am satisfied therefore, that the state discharged the onus of proving beyond any reasonable doubt that the statement was made by the accused whilst he was in his sound and sober senses; that he was not subject to any undue influence and that it was freely and voluntarily made. It was for this reasons that I admitted the statement in evidence.

[48] Testifying in his defence, the first accused (Mogale) gave evidence and denied all the charges. He denied that he was involved in the robbery of the Ford Ranger on 21 January 2017. He specifically also denied being a party to the conspiracy to rob the cash in transit vehicle on 1 April 2017. On that day, he was test-driving his friend, Jappie's motor vehicle, the Ford Ranger whilst they were on the way to Mahwelereng together with his co-accused and the two deceased. Moreover, he was driving the car

because he liked it. He was driving normally on the outskirts of town along De Klerk Street. Suddenly, he had gunshots on the side of his door. As a result, he accelerated to avoid the shooting. However, he was shot on his arm and buttock. He jumped out of the Ford Ranger whilst it was still in motion as he thought those shooting at them were robbers. Once outside on the ground he raised his hands to show that he was not armed, but was shot just above his ankle. As a result, he fell to the ground where he remained without realizing what was going on. Having fallen unconscious, he regained his conscience whilst in hospital where he remained, for approximately six weeks. He specifically denied the allegation by the state that any shots were fired from the Ford Ranger.

[49] During cross-examination by counsel on behalf of accused 2, he testified that accused 2 was unknown to him and that when they left the garage; they found accused 2 hiking for a lift. He stopped for accused 2 after Jappie told him to do so. Accused 2 said he was going to Gauteng. However, Jappie told accused 2 that he first had to drop *off* people at Mahwelereng, which accused 2 had no problems with. The shooting happened hardly five minutes thereafter. On his version, whilst inside the Ford Ranger there were no discussions about robbing a cash in transit van. He denied that they took a stuck-up position behind a tree. On his version, accused 2 never stood behind the two deceased and himself in a stuck-up position. He testified that accused 2 after alighting, laid on the ground on the side of the road. When he and Solly jumped out of the Ford Ranger both of them had already been shot whilst inside the vehicle and were bleeding. He was not in a position to indicate at what point Jappie was shot during the incident.

[50] As to questions by counsel on behalf of accused 3, he testified that when he boarded the Ford Ranger at the Engine garage, it was only Jappie inside the motor vehicle. However when they left, there were already five. He denied that they went to Boxer Store or stopped anywhere near it. After accused 3 jumped out, he did not see where accused 3 was, but they were all on the ground.

[51] During cross-examination by the state, he could not explain why the

version of how he came to be in control or possession of the Ford Ranger was never put to the owner of the Ford Ranger. As to why it was never put to Sgt. Marokane that the Ford Ranger never stopped at Boxer grocery store he had no explanation to give. He confirmed hearing the evidence by the two police officers that from Boxer Grocery Store the Ford Ranger continued along Nelson Mandela Drive and that if he wanted to continue driving to Mahwelereng he could easily have proceeded straight until he joined Dudu Madisha Drive, which led to Mahwelereng. He responded that he was under no such obligation. From the Engine garage, he turned right on Thabo Mbeki commonly known as the R 101 and left into de Klerk Street.

[52] He disputed that he ever drove along the N11 or Nelson Mandela drive and turned right into Bezuidenhout Street as depicted on exhibit F2 or that he ever crossed any robot-controlled intersections. As to why the state witnesses were not challenged in that regard, he could not explain. Neither could he explain why the officers were not challenged that as the Ford Ranger turned left into de Klerk Street, they saw the barrel of the gun pointed towards them. As to the version by both officers that he was speeding, he attributed this to a lie. Neither was he in a position to explain why accused 3 implicated all the occupants of the Ford Ranger in his confession. He could not explain why it was put to Sgt. Makela that he was only shot once he had jumped out of the Ford Ranger whereas that was not the case on his version.

[53] Accused 1 had no explanation to give as to how the three firearms seized in the aftermath came to the scene. Neither could he explain why the gunpowder residue tests came out positive regarding the deceased, Solly. He confirmed that he owns a Golf VW 6 GTI, albeit bought in 2020 on his version. He went to the scene where he met the others in a Nissan bakkie 1400. It was his impression that the accused 2 did not know the occupants in the Ford Ranger but was uncertain. On accused 1's version, he started hearing gunshots at the point marked X1 on exhibit F2 after which he was shot at the point marked X2 contrary to the version put to the state witnesses on behalf of accused 2. After accused 2 was picked up, on

accused 1's version he did not stop the Ford Ranger anywhere. As to the question, whether accused 2 two ran to the tree, he disputed this. On his version, the tree was far at a distance of about 8 to 10 m. Further, on his version, the only person close to the tree was the deceased, Jappie.

[54] During examination by this court, he testified he regarding the Ford Ranger that, Jappie, his friend informed him that he bought the vehicle in December 2017, which he later changed to 2016 from a dealership in Pretoria through a finance scheme. He first saw the vehicle in February 2017. He confirmed that Nelson Mandela Dr. is a dual carriage Rd, with parking on either side of the road. He further confirmed that 1 April 2017 being month end, the town was busy with traffic and people going about their business. Traffic was congested as well on Nelson Mandela Dr., which explains why he took De Klerk St. As to whether the Ford Ranger drove from the Engine Garage before accused 2 boarded, he testified that they, meaning accused 2, 3 and the deceased Solly, boarded at the same time. As to a question whether he would have noticed the R5 rifle inside the Ford Ranger had it been there, which he confirmed. As to where the rifle came from it is his evidence that he saw it when they were on the ground with the police holding it. Howeve,r he could not confirm that the R5 rifle did not come from the Ford Ranger.

[55] Accused 2, Nthuteng testified in his defence and denied the allegations of the robbery in relation to the incident of 21 January 2017. He also denied any involvement regarding the events that occurred on 1 April 2017. He confirmed accused1's evidence that on 1 April 2017 at about 8:15 am he obtained a lift from the occupants of the Ford Ranger and next to the Engine Garage from Mokopane on the old N1 South road to Alexandra, Gauteng where he lived. This was after a request he made to the front seat passenger he came to know later as, Jappie. He had just spent the night with his girlfriend at a local BIB. None of the occupants were known to him. He had with him a bag as depicted on photo 31 that contained toiletries, cell phone and a wallet.

[56] Accused 2 confirmed that he had no problems upon being informed that there were people inside the Ford Ranger who had to be dropped off first

at the Township before proceeding to Gauteng. He took the front passenger seat. On his version, from the point where he was picked up, the motor vehicle turned to the right, and again took another right before taking another Street to the left.

[57] After the Ford Ranger had stopped for a little while, he further confirmed that one of them said they :would buy food along the way. It was traveling on a street that it turned left into that he became aware of cars that were following them. He confirmed that the driver accused 1 increased speed after the sound of gunshots from the two BMW cars following them. The Ford Ranger slowed down. That is when he opened the door and fell on the ground where he remained lying. He also noticed accused 1 getting out of the motor vehicle with his hands up.

[58] He noticed Jappie who had been seated directly behind him opened the motor vehicle door and ran to the tree. As he remained on the ground, he saw Sgt. Makola who at that stage was next to him, shoot Jappie. However, he was not in a position to say where on his body, Jappie had been shot. He remained lying and pretended as if he too had been shot. The sound of firearms eventually stopped. He only stood up from his position where he was lying on the ground when there were a lot of police officers at the scene verifying who had died and those still alive among them.

[59] He denied that he was in possession of a pistol as the police testified. As for the firearms found at the scene, he saw those lying on the tarred road for the first time when he arose from the ground where he had been lying. He disputed that there were any shots fired at the police BMW cars from the Ford Ranger. On his version, he knew nothing about the conspiracy related charges or that he acted in furtherance of a common purpose. Further on his version, Solly did not discharge a firearm. Contrary to the version by accused 1 that the Ford Ranger never stopped after he was picked up, he maintained that it did, albeit not for a long time. However, the Ford Ranger stopped at the stop sign.

[60] On accused 2's version, he never heard the police siren or saw the blue lights and that, Sgt. Makola lied during his testimony in that regard. He

disputed that the Ford Ranger drove through red traffic lights. That said, he remember that where the Ford Ranger made the last turn to the right, there was a set of robots. To facilitate an understanding of his testimony in that regard he made markings on F2 with a blue pen indicating that the Ford Ranger travelled first on Thabo Mbeki Drive (R101) southbound and turned right at the next intersection along Nelson Mandela Dr., until it turned right on Bezuidenhout Street and thereafter left on De Klerk Street.

[61] Accused 2 denied that after getting out of the Ford Ranger he maintained a stuck-up position behind the tree with his companions. He maintained that he was unaware of the presence of any firearms in the Ford Ranger or that he possessed a firearm as depicted on exhibit B photo 50 as well as the ammunition therein.

[62] During cross-examination on behalf of accused 1, he confirmed that he was not familiar with the area of Mokopane and that it was possible that he made mistakes in that regard during his testimony. Further, during cross-examination by the state he was invited to indicate where the Ford Ranger had come to a stop as testified in chief. He indicated that it stopped at the robots where it took the second right before its last turn to the left. Regarding J1, the confession by accused three, he could not explain why reference was made to him and the role he allegedly played. The reason why he took the front passenger seat was because of his leg problem. He could not give an explanation why it was not put to Sgt. Marokane in that regard during cross- examination when the latter expressed a view that it was highly unlikely for a hitchhiker to take a front seat in a car with four occupants, already inside.

[63] He confirmed that he saw the two police cars as their motor vehicle turned left at corner Bezuidenhout and De Klerk Streets. Contrary to his testimony, in J1 it is stated that the Ford Ranger was traveling at high speed before the gunshots were heard. He had no explanation to give in that regard. Contrary to what was put to Sgt. Marokane during cross-examination on behalf of accused 1 that the latter was shot with his hands raised up after getting out of the motor vehicle, he explained that accused1 was shot in the Ford Ranger before getting out. Contrary to

what was put to the state witnesses that he (accused 2) ran to the tree after jumping out, it was his version that he fell to the ground where he remained lying down since he cannot run because of knee problems and had undergone knee replacement surgery.

[64] Counsel for the state read the back the relevant interaction between counsel for accused 2 and the State witness to the effect that he ran towards the tree. Accused 2 responded that he walked fast after alighting and laid on the ground. He attributed that to a possible misunderstanding between them. When he was pressed on this aspect that his counsel often approached him for further instructions he was constrained to concede that he did not correct her in that regard. Regarding the alleged shooting of Jappie by Makola, he conceded that it was never taken up with the latter during cross-examination. As to the allegation that he saw the firearms at the scene only at the stage when he was taken to the police van, he was constrained to concede that the police officers were never questioned in that regard.

[65] As regards his version that no one in the Ford Ranger shot at the police motor vehicles, he had no version to give why Solly tested positive for gunpowder residue. In his response to examination by this court that I took judicial notice of the fact that Nelson Mandela Dr. has several robot-controlled intersections, littered with many restaurants such as Chicken Licken and KFC for example, he could not deny this aspect. As to why he did not see the other robots was because he was a passenger. As for the firearms that are the subject matter of this trial, he could not explain where they came from at the scene. On his version, Jappie was shot, from what he could see only once, unarmed whilst running towards the tree.

[66] Accused 3, Aphane also testified and disputed all the charges and the allegations pertaining to the said charges. As for the allegations regarding the 21 January 2017, he was home the entire day. Regarding the events of 1 April 2017, he accompanied his friend, Solly. They travelled by Taxi to Mokopane town where they met Jappie at the Engine Garage. After Jappie gave Solly the money, Jappie offered them a lift back to the

Mahwelereng Township where they came from. Inside the Ford Ranger was accused 1 who was the driver. Jappie took the front passenger seat whereas he and Solly took the rear seat.

[67] He confirmed that as the whereabouts to enter the R101 southbound, that is when they picked up accused 2 who asked for a lift to Gauteng. He confirmed that accused 2 was given a lift subject to them being dropped off at the Township and that accused two had no problem with that. He confirmed that accused 2 complained of a knee problem and that Jappie gave up his front seat for accused 2. The Ford Ranger made a U-turn and took the R101 northbound lane, and at the robots turned left into De Klerk St.

[68] As they drove along after passing the next intersection that is the stage when he heard the gunshots at which event, accused 1 increased the speed. Realizing that the gunshots were aimed at their motor vehicle, he took a ducking position by keeping his head down. The Ford Ranger reduced speed, the occupants alighted and he followed suit. He remained on the ground with his face covered until, as he put it, "awakened". That is when he was told he was under arrest. He was taken to see the body of his deceased friend, Solly and thereafter taken to a police van. In the meantime, the shirt he had on was removed and he remained with his vest and thereafter they went to the police station.

[69] The next day, on Sunday 2 April 2017, the police fetched him from the cells. He was taken to an office where he found four police officers. He was questioned about the Ford Ranger that allegedly was at another crime scene in Louis Trichardt. He was tortured in that they covered his head with a plastic bag. The police officer who took down the statement, exhibit J1 left the room, leaving him with the remaining three. He was questioned regarding what he knew about the robbery at Boxer Grocery Store, which he denied. The torture continued with the use of the plastic bag in the manner described above. They told him that Jappie was armed with the R5 rifle, accused 2 with a pistol and Solly with another pistol, which he disputed.

[70] The assault on him continued in the manner described above in which

event, he agreed to do anything they wanted him to do. They told him to go Sivhagi and tell him that: he went to town with Solly and accused 1, were they met with accused 2 and Jappie for a planned robbery at Boxer Grocery Store. When he protested his innocence in that regard, they once more threatened to assault him. The three officers committed to grant him bail if he conveyed to Sivhagi what they told him to say. He eventually relented. He was taken to an office upstairs where Sivhagi was. After a brief introduction and after being offered a seat, Sivhagi asked him whether the other officers told him what he was supposed to say to him, which he confirmed.

[71] He asked Sivhagi for an opportunity to call his lawyer, which was denied. His request to be taken to the hospital because of the bruise on his forehead was refused. Sivhagi told him to stop wasting time failing which he will call the other officers. Out of fear that he might be tortured further, he repeated to Sivhagi a statement that, he had been told to repeat as detailed in exhibit J1. However, when he refused to sign off the statement, Sivhagi threatened to call the other officers. He relented and signed the statement. Once done, Sivhagi called another police officer to take him away. The next day, he was taken to the magistrate court where he explained what happened to his legal representative.

[72] He maintained that accused 1 and 2 were unknown to him and that he only knew Jappie by name as they had never met before. He maintained that the Ford Ranger never went anywhere near Boxer store nor drove along Nelson Mandela Dr., and thereafter turned into Bezuidenhout Street as alleged by the state witnesses. He denied that there were firearms in the Ford Ranger, and that if the rifle was in the Ford Ranger he would have seen it as it is impossible to hide an R5 in that motor vehicle.

[73] After jumping out of the Ford Ranger, he remained on the ground; face down covering his face whilst the shooting continued for approximately 2 to 3 minutes until he was placed under arrest. He denied that he was party to any conspiracy to rob or that the police retaliated upon being shot at. He explained that he was not in possession of any firearm.

[74] During cross-examination by the state, accused 3 drew arrows using a

black pen on exhibit F2 to indicate the route travelled by the Ford Ranger on 1 April 2017, which is inconsistent with the version by accused 1 and 2. It was put to him that the version to the effect that he was home the entire day on 21 January 2017 is inconsistent with his plea explanation to the effect that he was in fact in custody for another matter. His reply was that he was not sure about the dates. As for his allegation that the Ford Ranger made a U-turn that morning, he conceded that this was mentioned for the first time. Regarding the shootout, he conceded that he could not explain why Solly tested positive for gunpowder residue. He also conceded that the court heard for the first time and through his testimony that Solly was going to buy grocery at Choppies on the morning of their arrest, as the allegation was someone asked to buy food along the way.

[75] During examination by the court, he was not in a position to clarify the order in which the occupants of the Ford Ranger jumped out. Neither could he indicate where his companions where since he was on his version, on the ground with his face down. That concluded the oral testimony. None of the accused called a defence witness other than Col Mkhabela whose evidence it has already been dealt with above.

[76] It is trite that an accused person bears no onus whatsoever and he or she is accordingly not required to prove any aspect of his or her defence or to persuade the trial court of anything.[1] An accused person is entitled to be acquitted if, upon an assessment of the evidence considered as a whole, there is a reasonable possibility that the version put up in defence to a charge may be true.

[77] It is trite that in evaluating the evidence and in coming to a decision as to whether the state has proved beyond a reasonable doubt that the accused is guilty of an offence the correct approach, as stated in S *v Chabalala*[2] is: "*...to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the*

[1] S *v Jochems* 1991 (1) SACR 208 (A) at 211f.

balance weighs so heavily in favour of the State as *to exclude any reasonable doubt about the accused's guilt."*

[78] It is essential and convenient, for the purposes of this judgment, to consider the legal principles applicable to a charge of conspiracy to commit or procure the commission of an offence as well as the principles applicable to the doctrine of common purpose. Section 18(2) of the Riotous Assemblies Act, 17 of 1956 provides as follows:

> "Any person who-
>
> (a) conspires with any other person to aid or procure the commission of or to commit; or
>
> (b) incites, instigates, commands or procures any other person to commit, any offence, whether at common law or against a statute or statutory regulation,
>
> shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable."

[79] In S *v Alexander and Others*[3] the following is stated about the crime of conspiracy, which I take liberty to repeat generously:

> *"A conspiracy is an agreement between two or more persons to commit* a *crime. The parties to the agreement must be ad idem as to their object - Harris v R., 1927 NPD 330 - and in terms of decisions in English Courts the agreement must be such that, if lawful, it would be capable of being enforced. It is not necessary, to constitute a conspiracy, that anything should be done to put the criminal design into execution, for the conspiracy is complete as soon as the persons concerned have agreed together. Nor is it necessary on* a *charge of conspiracy that the prosecution establish that the individual conspirators were in direct communication with each other. In this connection the following quotation in the judgment in R. v. Meyrick,*

---

[2] 2003 (1) SA SACR 134 (SCA) at 139i- 140a
[3] 1965 (2) SA 818 (A) at 821-822.

21. C.A.R. 94 at p. 99, is illustrative: "And as far as proof goes, conspiracy, as GROSE, J., said in Rex v. Brissac, is generally 'matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them'. The other passage to which I wish to refer is in the well-known charge of Mr. JUSTICE FITZGERALD in the case of Queen v Parnell and Others, reported in 14. Cox, Criminal Cases at p. 515. Mr. JUSTICE FITZGERALD, having cited the words of Mr. JUSTICE GROSE which I have just read, said: 'It may be that the alleged conspirators have never seen each other, and have never corresponded. One may have never heard the name of the other, and yet by the law they may be parties to the same common criminal agreement. Thus, in some of the Fenian cases tried in this country, it frequently happened, that one of the conspirators was in America, the other in this country; that they had never seen each other, but that there were acts on both sides which led the jury to the inference, and they drew it, that they were engaged in accomplishing the same common object, and when they had arrived at this conclusion, the acts of one became evidence against the other." See also R v Heyne and Others (1) 1958 (1) SA 607 (W), to the effect that on a charge of conspiring to commit an offence proof of concerted action is not confined to direct evidence of an agreement to commit the offence but the entire conduct of each conspirator may be relied upon to establish either an agreement to commit the offence or the actual commission of the offence or both. Where two or more persons have associated themselves in an organisation with the agreed purpose or object of committing an offence, they have in law formed a conspiracy to commit the contemplated offence. It follows that any person who joins such an organisation as a member, well knowing the object or purpose thereof or who remains a member after becoming aware of the purpose thereof, has signified by his conduct his agreement with the aims of the said organisation and has made himself guilty of a conspiracy to commit such offence."

[80] Also in *S v Cooper and Others*[4] the court said:

> *"A conspiracy normally involves an agreement, express or implied, to commit an unlawful act. It has three stages, namely, (1) making or formation, (2) performance or implementation and (3) discharge or termination. When the conspiratorial agreement has been made, the offence of conspiracy is complete, it has been committed and the conspirators can be prosecuted even though no performance has taken place. But the fact that the offence of conspiracy is complete at that stage does not mean that the conspiratorial agreement is finished with. It is not dead. If it is being performed, it is very much alive.* So *long as performance continues, it is operating, it is being carried out by the conspirators, and it is governing or at any rate influencing their conduct. The conspiratorial agreement continues in operation and therefore in existence until it is discharged (terminated) by completion of performance or by abandonment or frustration whatever it may be; per Lord PEARSON in Director of Public Prosecutions v Doot and Others, (1973) 1 All E.R. 940 (H.L.) at p. 951. While the conspiratorial agreement is in existence it may be joined by others and some may leave it. The person who joins it is equally guilty; R v Murphy, (1837) 8* C. & *P. 297 at p. 311 (173 ER. 502 at p. 508). Although the common design is the root of* a *conspiracy, it is not necessary to prove that the conspirators came together and actually agreed in terms to have the common design and to pursue it by common means and so carry it into execution. The agreement may be shown like any other fact by circumstantial evidence. ..... It is generally* a *matter of inference deduced from certain acts of the parties concerned, done in pursuance of a criminal purpose in common between them."*

[81] The broad wording of section 18(2)(a) makes it evident that aside from a

---

[4] 1976 (2) SA 875 (T} at 8798 - F

person being culpable if he conspires with another to commit the offence alone, he will also commit the statutory offence of conspiracy if the unlawful agreement involves executing only a step in the plan, or is but one of a number of separately concluded agreements with others to attain the same unlawfully agreed objective. It will also suffice if a preparatory step is taken towards achieving the unlawful objective agreed upon.[5] As my brother, Spilg J puts it:

> *"It therefore appears that the actus reus in respect of* a *conspiracy may be sufficiently established by the conclusion of the agreement to commit the crime itself, but is not limited to that alone. The actus reus may be found in additional acts performed by one of the conspirators in furtherance of the purported agreement, and of which the accused was aware and did not disassociate from.[6]*

[82] In summary therefore, the determination as to whether or not there was an agreement to commit robbery is a question of fact, to be decided upon consideration of all of the evidence presented in relation to the alleged conspiracy. It is also a matter of inference deduced from the acts of the parties done in pursuance of a criminal purpose in common between them.

[83] The common law offence of robbery as commonly described, consists in the theft of property by unlawfully and intentionally using violence to take property from another alternatively by using threats of violence to induce the possessor of the property to submit to the taking of the property.

[84] Counsel for the accused contend that the evidence placed before the Court does not show that the accused committed the offences preferred against them. In this case, regarding the events on the morning of 1 April 2017, the trial proceeded on the basis that the alleged events on the morning of 1 April 2017 occurred along the N11. In the context of the belated dispute now, which was never put to the state witnesses, but equally significant, in the wider context of the outcome of this trial as well as the conduct of the defence, it is established in our law that a cross-

[5] *Ngobese v S* (2019] 1 All SA 517 (GJ)

examiner should put his or her defence *" on each and every aspect which he or she wishes to place in issue, "explicitly and unambiguously, to the witness implicating his client.*[7]

[85] As Smallberger *et al* put it: *"[A] criminal trial is not* a *game of catch-as-catch- can, nor should it be turned into* a *forensic ambush" .* The learned justices continued aptly as follows:

> *"[51] In this respect, we are in full agreement with the comments made by the Constitutional Court in President of the Republic of South Africa and Others v South African Rugby Football Union and Others [1999] ZACC 11; 2000 (1) SA 1 (CC) at 36 J - 37 E.*
>
> *"[61] The institution of cross-examination not only constitutes* a *right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that* a *witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross- examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in Browne v Dunn [(1893) 6 R 67 (HL)J and has been adopted and consistently followed by our courts.*
>
> *[62] The rule in Browne v Dunn is not merely one of professional practice but 'is essential to fair play and fair dealing with witnesses.' [See the speech of Lord Herschell in Browne v Dunn, above] . . .*
>
> *[63] The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed... particularly where the imputation relies upon inferences to be drawn from other*

---

[6] Id at para 29.
[7] S v Boesak 2000 (1) SACR 633 (SCA) at 647 c-d

evidence in the proceedings. It should be made clear not only that the evidence is to be challenged but also how it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed."

[86] The belated dispute being that accused 1 as supported by accused 3, did not drive the Ford Ranger on the N11 where Boxer Grocery Store is situated, but only on the outskirts of town along De Klerk Street. The state witnesses were not challenged in this regard during cross-examination. Neither was there any suggestion that accused1, the driver did not skip red traffic lights, on his incorrect side of the road, which formed the basis of the allegations in count 11. There was no suggestion made that the pursuing police cars did not have their blue lights on or that they did not activate their sirens.

[87] The allegation by accused 1 that he fled from the scene after hearing shots from people whom he assumed were robbers, is not supported by any objective facts. This was in broad daylight. Flashing blue lights and sirens, which make police vehicles more visible on patrol, may only be used in case of emergency, and intended to order all other vehicles to make way, since these vehicles have the absolute right of way. I find it highly improbable that the police would not have activated their blue lights and sirens when accused one skipped the robots that were red for his side of the traffic. Police blue lights are in their very nature very bright , and siren very loud as Makela confirmed that he heard the loud sound of this siren well before he spotted the second police BMW. There is a positive duty and a legal obligation to stop upon being signalled to do so by members of the SAPS, which the accused in this case ignored for his own nefarious reasons.

[88] It is trite, as I alluded to above that, it is grossly unfair and improper to let a witness' evidence go unchallenged in cross-examination and afterwards argue that he or she must be disbelieved. The accused's failure to cross-

examine the state witnesses on such material issues that they ultimately challenged only in their evidence in chief, ought to prevent them from later disputing the truth of the witnesses' evidence. As indicated in *Carroll v Caroll*[8] authoritatively by Moshidi J in *S v Msimango and Another*[9]*:*

> *"The objects sought to be achieved by cross-examination are to impeach the accuracy, credibility and general value of the evidence given in chief·, to sift the facts already stated by the witness, to detect and expose discrepancies or to elicit suppressed facts which will support the case of the cross-examining party."*

[89] As the renowned Wigmore on Evidence, 3rd ed. Vol. V, para 1367, states:

> *"Not even the abuses, the mishandlings, and the puerilities which are so often found associated with cross-examination have availed to nullify its value. It may be that in more than one sense it takes the place in our system which torture occupied in the mediaeval system of the civilians. Nevertheless, it is beyond any doubt the greatest legal engine ever invented for the discovering of truth.*"(my underlining)

[90] It is however also trite that the rule regarding failure to cross-examine, is by no means inflexible, but admit of exceptions. In my view, however, there are no grounds for any exceptions regarding this case on the relevant disputed evidence. The allegation that the Ford Ranger was driving along Nelson Mandela supported by accused 2's version, is consistent with the probabilities in that there are no robots on De Klerk st, but stop signs. The evidence in that regard being that the Ford Ranger was being driven passing red robots and in the face of oncoming traffic that was never disputed. This manner of driving on a public road is manifestly, reckless driving. These probabilities are also borne out by the common sense inference that had it been to the contrary version, it would have been put to the State witnesses to advance the case of the accused.

---

[8] 1947 (4) SA 37 (W), at paragraph 40.

[91] It is inconceivable that counsel would not have been alive to the implications of the evidence relating to the route travelled by the Ford Ranger. In my view, therefore, the State has proved that the incident complained of happened along the N11, Nelson Mandela Drive where the Box Grocery Store is situated. In coming to this conclusion, I have relied solely on the facts as they emerged during the trial, and the well-known rules of our common law relating to the establishment of prima facie proof, the absence of a rebuttal thereof and the burden of proof in a criminal case. This conclusion is, of course, fatal to the accused's version as testified in chief. The conduct by accused 1 of driving with false number plates, and fleeing when the police confronted him. That conduct, unexplained, together with the evidence linking accused 1 with the place where the offending objects, in this case the firearms were recovered, results in the overwhelming conclusion that he was himself involved with the stolen Ford Ranger. It was not a jolly ride as accused number one suggested. For a criminal mission of that nature, the two deceased would not have taken along accused 1, 2, and 3. The respective versions by the accused in this regard cannot under any stretch of imagination, be reasonably possibly true.

[92] The version by the state witnesses that the two deceased were in possession of firearms including the rifle at least, was not seriously challenged. None of the accused could explain where the firearms came from. Any admission by either of them that the firearms came from their motor vehicle would have been fatal to their case. It is an unfathomable that the police would have planted these firearms at the scene or in the Ford Ranger as insinuated. At any rate, this is not supported by the objective facts. Neither was it suggested during the trial or in argument before this court. To do so would have been criminal conduct on the part of the police. If that where the case I doubt if any of the accused would have lived to tell their story. Accordingly, I find that some of the suspects were in possession of the firearms and by necessary implication the ammunition, which were seized from the scene that day.

---

[9] 2010 (1) SACR 544 (GSJ).

[93] Accordingly, I find that the taking of firearms to the scene and ammunition to be fired from such firearms is, in my view, consistent only with the intention to use violence or the threat of violence to carry out the agreed criminal enterprise, namely the unlawful taking of cash from the cash in transit vehicle. The presence of firearms must also have been calculated to act as a threat use of violence directed at the intended victims. In my view, the only reasonable inference that can be drawn from this fact is that they foresaw the possibility that, in the execution of the criminal enterprise violence or the threat of violence may be required in order to achieve the object of the criminal enterprise, namely the unlawful taking of the cash. The criminal enterprise that was the subject of the conspiracy contemplated the commission of the offence of robbery because of accused 3'statement and the information received by the police.

[94] Any argument to the contrary fails to take into account the authorities referred to hereinabove. As noted in the above matters the means by which the criminal enterprise is to be carried out need not be established in order to establish the existence of the conspiracy. It is sufficient if the evidence discloses an agreement to commit an unlawful act, which is the object or purpose of the conspiratorial agreement as apparent from the facts in this case.

[95] Against this however must be considered the fact that the conspirators knew that the criminal enterprise would take place in a public street in broad daylight from an armed vehicle in which there were at least one of them armed with a rifle that could not on the objective evidence, be hidden in the double cab Ford Ranger. In these circumstances, it can hardly be seriously suggested that they did not, in fact, foresee the possibility that violence would be required in order to carry out the enterprise.

[96] The exchange of gunfire continued across a wide area beyond that which the forensic evidence covered even on the version of the accused as the robbers attempted their escape. It is hardly surprising therefore; that, the 37 spent rifle cartridges picked up from the scene of the fatal incident involving the deceased could not establish a connection between the firearms including the offending rifle seized at the scene. As accused one

suggested during cross- examination, there were at least 99 spent cartridges. Added to this being the presence of gloves at the scene.

[97] Makela impressed as a very competent witness. He remained unshaken during cross-examination. I find no serious argument advanced on behalf of any of the accused suggesting that his evidence should be rejected as being not credible or reliable. Of course, there discrepancy with regard to whether he conveyed to the team the number of suspects involved contrary to what Marokane testified in that regard. There was also discrepancy regarding whether accused 1 was still at the scene when the forensic evidence was collected.

[98] I do not find these discrepancies to be material regard being had to the totality of the evidence. In any event, it is competent for a Court, while rejecting one portion of the sworn testimony of a witness, to accept another portion. The fact of the matter is that, there were five occupants inside the Ford Ranger from the moment the police took sight of it, throughout the chase and the arrest of the accused, who were undoubtedly on an unlawful mission. Similarly, the criticism against Marokane is unfounded regard being had to the totality of the evidence.

[99] Both officers withstood lengthy cross-examination over a number of days, and did not contradict themselves in any meaningful way regarding the material portions of their evidence. As for the details regarding his statement, the criticism overlooks the reality in this country that statements taken down by the police are frequently not taken with the degree of care, accuracy and completeness which is desirable... "[10]. One might add the poor quality of education received by black people because of apartheid policies.

[100] The case against accused 3 is also founded upon the content of the statement made by him to Col Sivhagi. For the reasons indicated herein above, the statement was ruled to be admissible following the trial within a trial. It was submitted on behalf of accused 3 essentially that, the admissibility should be reconsidered in the light of the evidence tendered

[10] See S *v Xaba* 1983 (3) SA 717 (A).

by the accused. The reliability of the statement is to be assessed as a whole, having regard to the existence of evidence, if there is such evidence, which provides some corroboration for the content of the statement.

[101] What is apparent from the content of the confession statement, however, is that there was a conspiracy that concerned the robbery of the cash in transit motor vehicle with firearms by the accused including the two deceased, and that a stolen motor vehicle would be used in the course of executing the robbery. The evidence *aliunde* the said statement that I found in favour of the state is that the stolen Ford Ranger was found parked next to the grocery store with all the five men, including all the accused inside. The Ford Ranger fled from the scene at high speed upon site of the police for no credible reason. The only reason I find is that, it is fair to conclude that it was because of the firearms in the motor vehicle and the fact that the motor vehicle was stolen, in addition to the reasons proffered by accused 3. In my view, all of these features accord with the common cause or objective facts established by the prosecution. In the main trial, he was contradicted by the version of accused 2 regarding whether the Ford Ranger travelled on the N11.

[102] There is in my view no basis for reconsidering the confession made by accused 3 to Col Sivhagi. That is so because the accused tendered no credible evidence to suggest that the statement was not freely and voluntarily made and that he was unduly influenced to make the statement. It was argued on behalf of the accused that the content of the statement made by him was not supported by evidence tendered by the prosecution or was unsubstantiated and therefore unreliable. I have already found that accused is an unreliable witness whose version I held, to be improbable in his confession statement.

[103] It is trite as regards accused 3, the general purpose of s 115 is to expedite criminal proceedings and to make more effective. In S v Seleke[11] Rumpff CJ stated that the purpose of the section is to eliminate unnecessary

[11] 1980 (3) SA 745 (A)

evidence by establishing exactly what the accused wishes to dispute by his plea of not guilty[12]. And in S v Mayedwa[13] it was said that the purpose of the explanation of plea procedure is to permit the accused to reveal ab initio what the essential basis of his defence will be and that this will tend to shorten the trial 'in that the State will then be apprised as to the aspects of the case on which its evidence should be concentrated[14]. In S v Mjoli[15] Didcott J stated the following with regard to informal admissions:

> *"[informal admissions] do not prove the facts admitted. They are nevertheless evidence of such facts. They go into the scale, to be weighed with everything else there. Their individual weight may be great or small, according to the circumstances. Sometimes they happen to be decisive, simply because nothing further or better on the point is forthcoming. Whenever that turns out to be the result, however, the proof engendered by the admission is a conclusion of fact drawn from all the evidence in the particular case, not a conclusion of law dictated by a statutory provision out to set proved by the testimony of the witness to whom it was made. That the same goes for an admission made by the accused person himself in the presence and hearing of the court trying him is, as a general rule, equally plain. Admissions like that require no additional or more formal proof I can see no reason why an exception should be carved from the general rule, merely because the stage of the proceedings spawning the admission is that regulated by s 115.'*[16]

[104] There is a clear material contradiction between the Section 115 (1) statement by accused 3 in which he stated that he and Solly found the owner of the Ford Ranger in the company of two other unknown men (accused 1 and 2) and his evidence in chief that the accused 2 was picked up as he hiked for a lift on the old N1 South. The significance hereof is

---

[12] Id at 753G
[13] 1978 (1) SA 509 (E)
[14] Id at 511B
[15] 1980 (3) SA 172 (D)
[16] Id at 179G-180A

that, the version by all the accused concerning how accused 2 came into the picture and the reasons thereof is not only highly suspect, but contradicted by accused 3's plea explanation. Significantly, the plea explanation in that regard accords with his confession.

[105] As indicated above with reference to established case law, the concurrence of minds to a conspiracy need not necessarily be by way of explicit spoken words, for the agreement can be arrived at tacitly and by conduct[17].Where, however, the agreement is sought to be inferred solely from the conduct of the alleged conspirators, such inference must, on the cardinal rules of logic enumerated in *R. v. Blom,* 1939 A.D. 188 at pp. 202-3, be consistent with all the proved facts, and the proved facts must in turn be such that they exclude every reasonable inference from them save the one sought to be drawn. All the accused including the two deceased were beyond a reasonable doubt, I find, parties to the conspiracy to commit robbery. In respect of accused 1 and 3 there is, it is common cause, no evidence that they were at any time in possession of any unlicensed firearms or ammunition. Their liability is solely sought to be founded on joint possession of the firearms recovered from the scene of the robbery because of their status as co-perpetrators.

[106] The question of joint possession of firearms and ammunition has been dealt with in several judgments. In S v Nkosi[18] Marais J found that the inference of joint possession is only justified where:

> *"...the State has established facts from which it can properly be inferred by a Court that: (a) the group had the intention (animus) to exercise possession of the guns through the actual detentor and (b) the actual detentors had the intention to hold the guns on behalf of the group."* The SCA agreed with the statement as being the correct legal position in S v Mbuli 2003 (1) SACR 97 (SCA) at para 71.[19]

---

[17] See for example R. v. B 1956 (3) S.A. 363 (E) at p. 365).
[18] 1998 (1) SACR 284 (W)
[19] Id at 286

[107] Not so long ago, in S v Kwanda[20] , the court in overturning a conviction on charges of contravening section 32 (1) (a) and (e) of the Arms and Ammunition Act 75 of 1969 (the now repealed Act) stated that knowledge that a co-accused is in possession of a firearm is not sufficient to establish that such accused had the intention to jointly possess a firearm with his co- accused. The court further explained that:

> *"In this matter there are no facts from which it can be inferred that the appellant had the necessary intention to exerci se possession of the firearm through Mahlenche or that the latter had the intention to hold the firearm on behalf of the appellant."*[21]

[108] That is also the case in this matter. There are no facts which permit an inference to be drawn that accused 1 and 3 had the intention to exercise possession of firearms or that those who had actual possession intended to hold the firearms on behalf of accused 1 and 3. Accordingly, accused 1 and 3 cannot be convicted of possession of firearms and ammunition as set out in the relevant counts of the indictment. Similarly, I cannot find conclusive evidence with regard to which of the two pistols accused 2 was in possession thereof considering that one had a dysfunctional firing pin. Neither can I infer, by parity of reasoning that, the two deceased held the other two firearms on his behalf.

[109] The evidence show beyond a reasonable doubt that members of the South African Police Service had received information about a planned robbery at a Boxer store with the use of a particular motor vehicle, the Ford Ranger. I find it inconceivable that the police would have somehow fortuitously run into the Ford Ranger in the street and tried to stop it for no apparent reason. When police arrived, at the targeted area accused number 1 took off at high speed, skipping red robots obviously to evade arrest. Had Jappie been alive, I have no doubt that the narrative regarding where the stolen Ford Ranger came from, would have been different. It is safe to infer under the circumstances that accused 1 fled from the police at

---

[20] 2013 (1) SACR 137 (SCA)

the scene on Nelson Mandela because of the offending objects, that were in the Ford Ranger as well as the motor vehicles itself, which had been stolen, and that their cover had been blown up. I accept the state's version that the police were shot at first along Bezuidenhout St and retaliated in defence.

[110] The fact that gun the residue test conducted turned out positive from Solly, confirms this aspect. The fact that it was only Solly who turned positive is hardly surprising, there were hand gloves recovered from the scene which were no one bothered to subject to forensic testing. On the probabilities, some of them jumped out of the moving Ford Ranger still armed in a confrontation with the police. That there was a confrontation is corroborated by the fact that both deceased suffered chest wounds, which cost them their lives. I reject the version by accused 2 that Jappie was shot as he ran towards the tree. If that were the case, he would have had a bullet entry wound at the back. The evidence clearly establish that that the firearm next to Jappie had jammed during the confrontation. All these findings are concomitant with the probabilities of a confrontation. Otherwise, all the occupants in the motor vehicle could easily have surrendered leaving the offending firearms in the motor vehicle.

[111] On the common cause evidence and from the side of the accused at least two of them ran to the tree is consistent with the state's version. In this instance however I accept the state's version all five initially took cover behind the tree and some of them at least realized that the *' game was not worth the candle'.* The criticism that the deceased, Solly could not have ran to the tree given the nature of the injury on his foot is devoid of any merit. To start with, they all jumped from a moving motor vehicle. Solly did not die immediately after being shot but paramedics were called by the state witnesses attempted to save his life until he succumbed to his injuries. I accept the state's version essentially that he was one of those that surrendered. Undoubtedly, the suspects were out-gunned by the police in relation to the number of rifles used, which led to the two fatalities. Had Solly been rendered immobile , he would not have jumped

---

[21] Id at 139I-140A

out of the Ford Ranger in possession of the R5 rifle.

[112] It is improbable that, accused 2 and for that matter accused 1 and 3 as I have already found , would have been taken along by the two deceased if they were not party to the a commission of a particular crime. The suspects had the means to carry out the planned robbery and in addition, a bag to carry the cash with, which hardly had any contents. At the scene of the shootout, all of them, as indicated above jumped from a moving vehicle, which can only points to guilt. I reject as I do the version by accused 1 that he suspected the two white BMW's to be some robbers targeting them. This cannot under any stretch of imagination accord with the probabilities given that both BMWs had their police blue lights on as well as their sirens. One can then ask rhetorical question, why jump out of a moving motor vehicle risking life and limb at the sight of the police? The sound of a police siren and blue lights is a common feature in this country, with high incidence of serious crimes.

[113] It is appropriate to restate the proper approach to its evaluation, articulated consequently in S *v Reddy and Others*[22]*:*

> *"In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to* a *consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oft-quoted dictum in R v Blom 1939 AD 188 at 202-3, where reference is made to two cardinal rules of logic which cannot be ignored. These are, firstly, that the inference sought to be drawn must be consistent with all the proved facts 30 1996 (2) SACR 1 (AD) at p 8 (c) top 9 (e) and, secondly, the proved facts should be such 'that they exclude every reasonable inference from them save the one sought to be drawn'.* This is an approach I take of this matter.[23]

[22] (1996 (2) SACR 1 (AD)

[114] The matter is aptly summed in the following remarks of Davis AJA in R v De Villiers:

> *"The Court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way; the Crown must satisfy the Court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as* a *whole is beyond reasonable doubt inconsistent with such innocence."*[24]

[115] It is trite from a long list of authorities that, when triers of fact come to deal with circumstantial evidence and inferences to be drawn therefrom, they must be careful to distinguish between inference and conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts, which it is sought to establish. In some cases, the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases, the inference does not go beyond reasonable probability. Nevertheless, if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture. In the instant case, the *actus reus* may be found in additional acts performed by accused 1 when he drove away from the scene skipping red robots, with the police in pursuit with the blue lights on and sirens.

[116] In addition, when the police were shot at by means of a rifle from the Ford Ranger by one of the conspirators, it was in furtherance of the purported agreement and the fact that some of the conspirators jumped out of the Ford Ranger whilst armed to confront the police, of which the accused was aware, and did not disassociate themselves there from. The fact that Solly

---

[23] Id at p 8(c) top 9(e)

had gunpowder residue is corroborative of the fact that a firearm was used to discharge an arm.

[117] However, in this instance, all these factors taken cumulatively regarding this matter, I hold that, on the cardinal rules of logic referred to in *R. v. Blom* the State has shown beyond reasonable doubt that there was a concluded agreement between them-an actual concurrence of minds inferable from their conduct.

[118] In *R. v.* S.[25] relied upon in S v Cooper[26], it is stated that, *"Once there is evidence aliunde of* a *common enterprise and the parties thereto, the acts and statements, executive* as *opposed to narrative, of one of the co-conspirators are admissible to confirm the scope of the common enterprise or the conspiracy and the nature of the steps taken to carry it out, and there* seems *to be no reason why such evidence should not be used to confirm the other evidence* as *to the parties who took part therein;* see *judgment of SCHREINER, J., as quoted in R. v. Leibbrandt, 1944 A.D. 253 at p. 276; R. v. Mayet, 1957 (1) S.A. 492 (A.D.) at p. 494."*

[119] With reference to the criticism against the arresting officers, it is appropriate to refer to the following remarks. In *S v Hadebe & Others S v Hadebe & Others*[27] with reference to *Moshesi & Others v R* (1980-1984) LAC 57, enunciated the correct approach to resolving such a problem as follows:

> *"The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing* so, *one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all,* a *mosaic of proof Doubts about one aspect of the evidence led in* a *trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available*

---

[24] 1944 AD 493 at 508-9
[25] 1959 (1) S.A. 680 (C).
[26] S v COOPER AND OTHERS [1976] 3 All SA 253 [T].
[27] 1998 (1) SACR 426 (SCA) F-G.

evidence. That is not to say that a *broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in* a *body of evidence. But, once that has been done, it is necessary to step back* a *pace and consider the mosaic as* a *whole. If that is not done, one may fail to see the wood for the trees."*

[120] In our law, the classic decision is that of Malan JA in *R v Mlambo*[28] as this court also alluded in *Nkuna v S*[29] (per Mokgohloa OJP), which is worth repeating, the learned Malan JA deals, at 737F-H , with an argument (popular at the Bar then) that, proof beyond reasonable doubt requires the prosecution to eliminate every hypothesis which is inconsistent with the accused's guilt or which, as it is also expressed, is consistent with his innocence. Malan JA rejected this approach, preferring to adhere to the approach which *' at one time found almost universal favour and which has served the purpose* so *successfully for generation'* (at 738A). This approach was then formulated by the learned Judge as follows (at 738A-C)

'In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a *high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused.*

An accused's claim to the benefit of a *doubt when it may be said to exist must not be derived from speculation but must rest upon* a *reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case'*

[121] Regarding the murder charges, this case contains the unique feature of some of the would-be robbers being killed by shots, most probably fired by

---

[28] 1957 **(4) SA** 727 **(A).**

the police during their confrontation with them, as Makela conceded. The shootout, it is clear from the common cause evidence, was in the nature of a constantly moving and generally uncoordinated event. The incapability of someone, in this case the police involved, to consequently distil the action in a description analogous to a choreographic explanation is conceivable.

[122] It has become an all too common occurrence for criminals to use even fake guns to commit offences. An attacker drawing a replica firearm on a victim to commit a crime can be charged with the pointing of a firearm, even though it is not a real firearm. In terms of section 120(6)(a) of the Firearms Control Act 60 of 2000 it is an offence to point any firearm, an antique firearm, or airgun, whether or not it is loaded or capable of being discharged at any other person without good reason to do so and (b) anything that is likely to make a person believe it is a firearm, an antique firearm, or airgun without good reason to do so. As Cameron JA (as he then was) puts it[30]:

> *" It is now well established that* a *two-stage process is employed in our law to determine whether* a *preceding act gives rise to criminal responsibility for* a *subsequent condition. The first involves ascertaining the facts; the second imputing legal liability. First it must be established whether the perpetrator as* a *matter of fact caused the victim's death. The inquiry here is whether, without the act, the victim would have died (that is, whether the act was a conditio sine qua non of the death). But the perpetrator cannot be held responsible for all consequences of which his act is an indispensable pre- condition.* So *the inquiry must go on to determine whether the act is linked to the death sufficiently closely for it to be right to impose legal liability. This is* a *question of law, which raises considerations of legal policy".*

[123] **Now,** on the application of the doctrine of common purpose to the death of some of the co-perpetrators, *S v Nkombani & Another*[31] is instructive. In

---

[29] (A18/2016) [2018] ZALMPPHC 21 (11 May 2018)
[30] S *v Tembani* (2007 (2) SA 291 (SCA) at para 10.
[31] 1963 (4) SA 877 (A)

that case, the 2 appellants, the deceased and 1 other conspired to carry out (and in fact carried out) a robbery at a filling station. The deceased (co-robber) got into a scuffle with a worker and was accidentally shot dead by the 1st appellant. The 2nd appellant argued though he foresaw someone being harmed, he was not reckless that it happened or not, and therefore no constructive intention to kill the deceased could legally be imputed to him. The court was not convinced and found that he foresaw that anybody associated with the robbery could be killed by the robbers' revolvers and that he was indifferent as to who might thus be killed. Their conviction was confirmed by the Appellate Division.

[124] On the vexed question whether the accused intended to cause death of the two deceased, the law in this regard is settled and very clear. *" If* a *person foresees the possibility of death resulting from his deed and nevertheless does it, reckless whether death ensues or not, he has in law the intention to cause death"* per Holmes JA[32]. In *S v Malinga and Others*[33] the court said:

> *"Now the liability of a socius criminus is not vicarious but is based upon his own mens rea. The test is whether he foresaw (not merely ought to have foreseen) the possibility that his socius would commit the act in question in the prosecution of their common purpose. R v Hercules, 1954 (3) SA 826 (AO) at p. 831; R v Nsele, 1955 (2) SA 145 (AD) Cat p. 151; R v Bergstedt, 1955 (4) SA 186 (AD) at p. 188. In considering the issue of intention to kill, the test is whether the socius foresaw the possibility that the act in question in the prosecution of the common purpose would have fatal consequences, and was reckless whether death resulted or not. R v Horn, 1958 (3) SA 457 (AD), and cases there cited.*
>
> *In both of the foregoing tests the foresight may of course be proved by inference; and remoteness of the possibility is relevant to the D subjective question of foresight thereof."*

[125] The State has in my view, at any rate, succeeded in proving a

---

[32] In *S v Mini* 1963 (3) 188 (AD) at 190F.
[33] 1963 (1) SA 692 (AD) at p. 694 .

'constructive' intent beyond a reasonable doubt, which as indicated may also be proved by inference drawn from all the circumstances of the case. The facts of the following case bear a close resemblance to the facts before this court. In *Xabendlini v S*[34] the Supreme Court of Appeal (SCA) dismissed an appeal by the appellant, Mandia Xabendlini, against his conviction of the pointing of a firearm in contravention of the then applicable s 39(1)(i) of the Arms and Ammunition Act 75 of 1969. The facts giving rise to the appeal were briefly the following. Mr Thompson and Mr Badenhorst had been employed as security officers by Fidelity, a company involved in the transportation, delivery and collection of money. They were on duty on the morning of 4 June 1998, and had delivered money to Woolworths in Adderley Street, Cape Town. As they were leaving Woolworths, they were attacked and robbed of an empty metal money container and the firearm, which Badenhorst had in his possession. The persons involved in the robbery left the scene in a white Ford Bantam bakkie. Sergeants du Toit and Beesley who had been in the vicinity pursued the bakkie. While in pursuit of the bakkie, the police officers fired shots directed at the wheels of the bakkie. They noticed a passenger in the bakkie, (later established to be the appellant) pointing a firearm at them. The police then fired shots directly at the appellant, whereafter he disappeared from their view. The bakkie crashed into another vehicle and a short while later was forced to stop. The two occupants, the appellant and his former coaccused, were arrested. In dismissing the appeal, Theron JA (as she then was), with Harms DP and Malan JA concurring held at paragraph 8:

> *"Every case must ultimately be determined with reference to its facts. I tum now to the facts of this matter. The police officers were travelling close behind and in pursuit of the bakkie in which the appellant and his former co-accused were travelling. The police officers had fired shots at the bakkie. The occupants of the bakkie were, or must have been aware that they were being pursued by the police. The police officers noticed the appellant pointing* a *firearm at them. They were uncertain whether they*

[34] (608/10) [2011] ZASCA 86 (27 May 2011).

would have been struck by a *bullet fired by the appellant. Sergeant du Toit testified that that possibility existed. Sergeant Beesley said in evidence that he could not express an opinion on whether any bullet fired would have struck them or their vehicle. What is clear, however, is that the appellant's pointing of the firearm in their direction induced the belief in their minds that they were going to be shot at. The police officers retaliated by shooting at the appellant. The appellant's motive in pointing the firearm at the police officers could only have been to impede their pursuit of him and his companion and to evade arrest. In the circumstances, the appellant's conviction is supported by the evidence".*

[126] The vital objective of law enforcement is, as Sgt Makela alluded to, crime prevention. At a practical level, the most effective and direct means of law enforcement in relation to serious crimes is to take preventative measures such as infiltrating criminal syndicates and apprehending the offenders prior to them committing an offence as apparent from the facts regarding this incident.

In this case, the accused must have foreseen and therefore by inference did foresee the possibility that the loaded firearms taken to the scene of the planned robbery would be used against the contingency of resistance, pursuit or attempted capture. In the process, they confronted the pursuing police with firearms after jumping out of still moving Ford Ranger as already found. Accordingly, I find that the shots fired by one culprit is, as far as their *mens rea* is concerned, the shot of each of them and must be imputed to each, rendering them guilty of the attempted murder charges as well as the murder charges in relation to co-conspirators[35]. This in the light of the well-known principles that counsel for the accused also referred to established in *S v Safatsa*[36] and *S v Mgedezi*[37].

[127] As regard the allegations in respect of count 1, is trite that the doctrine

---

[35] see S *v Nkosi* 2016 (1) SACR 301 (SCA); S *v Nh/apo and Another* 1981 (2) SA 744 at 751 A-C and *Mapangose and Others v State* unreported full court judgment by Tolmay J, No A150/1O, GP on 2 March 2012)

[36] *1988* (1) SA 868 (A) at 894C- 901H.

[37] 1989 (1) SA 687 (A) at 7051- 7 06C .

of recent possession permits the court to make the inference that the possessor of the property had knowledge that the property was obtained in the commission of an offence and in certain instances was a party to the initial offence. The inference that a person found to be in possession of stolen property is the thief or one of the thieves or one of the robbers can only be drawn as the only reasonable inference where the nature of the goods stolen and the time lapse between the theft (or robbery) and the discovery of the goods in that person's possession lend themselves to such a finding The court must be satisfied that (a) the accused was found in possession of the property; (b) the item was recently stolen. When considering whether to draw such an inference, the court must have regard to factors such as the length of time that passed between the possession and the actual offence, the rareness of the property, the readiness with which the property can or is likely to pass to another person[38].

[128] In this case, the period that passed was approximately two months and 10 days. The question to be answered is whether it can be inferred from these facts that accused 1 was party to the original robbery and theft of the Ford Ranger. The theft of motor vehicles in this country is a common scourge. That said, I cannot conclude regard being had to the authorities and the facts regarding this matter that he was party to the actual robbery of the Ford Ranger. However, the conduct by accused 1 and the explanation givenremains unsatisfactory given the totality of the evidence. Accordingly regard being had to the circumstances under which the Ford Ranger was recovered was in the possession of accused 1, his explanation as to how he came in possession of the Ford Ranger is unconvincing and remains unsatisfactory.

[129] That accused 1 was test driving the car in the outskirts of town along De Klerk St instead of an open road which the R101 is, is a fable version that stands to be rejected for reasons already alluded to above. It is not supported even by any objective facts that there are alleged owner,

[38] see S v Skweyiya 1984 (4) SA 712 (A); S v Madonsela 2012 (2) SACR 456 (GSJ); S v Mavinini

Jappie, was on his way to Gauteng, which is hundreds of kilometers away. The fact that he was the one who fled from the scene at Boxer makes his version even more improbable. I have difficulty to infer that he was party to the robbery on 21 January 2017. I have no difficulty in concluding however, that the legal requirements for a conviction in contravention of s 36 of the General Law Amendment Act 62 of 1955, which is a competent verdict for the crime of robbery charged in terms of section 260(f) of the Criminal Procedure Act have been met.

[130] In all the circumstances, I conclude that the state proved beyond reasonable doubt that the following offences in respect of which the version by all the three accused, in turn, is not reasonably possibly true. In respect of count one, accused one, Mogale is convicted of possession of stolen property in contravention of section 36 of the General Law Amendment Act 62 of 1955 whereas the rest of the accused are acquitted. All the accused are convicted as charged in respect of counts 2, 3, 4**,** 5, 6 and 7. All three accused are acquitted in respect of counts 8, 9 and 10. Finally, accused one (Mogale), is convicted of reckless driving in contravention of section 63 (1) and other relevant provisions of the Nation of Road Traffic Act 93 of 1996.

T P Mudau

[Judge of the High Court]

Date of Judgment: 5 August 2020

APPEARANCES

For the State: Adv Mashiane

2009 (1) *SACR 523 (SCA); and Mothwa v The State 2016 (2) SACR 489 (at SCA)*

Instructed by:	DPP Limpopo
For Accused 1:	Ms C A Alberts
Instructed by:	De Meyer Attorneys
For Accused 2:	Adv L Mohlaka
Instructed by:	Legal Aid Polokwane
For accused 3:	MST R Makweya
Instructed by:	Mathopo- Makweya Attorneys