IN THE HIGH COURT OF SOUTH AFRICA

(NORTH WEST HIGH COURT)

VRYBURG

CASE NO.: CC 49/13

DATE: 2015.09.28
2015.09.29

In the matter between

THE STATE

and

CLOETE, MATHYS JOHANNES — Accused 1
CLOETE, DANIEL NICHOLAS — Accused 2

J U D G M E N T

HENDRICKS, J:

Eleven (11) charges are preferred against Mr Mathys Cloete, hereinafter referred to as accused 1 and his son, Mr Daniel Cloete, hereinafter referred to as accused 2.

The first two counts of murder and kidnapping relates to Bakang Maleko, alias Kop, hereinafter referred to as the deceased, who was allegedly kidnapped and murdered on 3 September 2012.

Counts 3, 4, 5 and 6 relates to Shadrack Anderson Matlolo, alias Aaron, who was allegedly intimidated, kidnapped, pointed with a firearm and attempted to be killed. All this also happened on 3 September 2012.

Counts 7, 8, 9 and 10 relates to Stone Malone, alias Mokhari, hereinafter referred to as Stone, who was allegedly kidnapped, assaulted with intent to do grievous, pointed with a firearm and robbed of his Isuzu motor vehicle.

Count 11 was withdrawn by the State and count 12 is that of assault with intent to do grievous bodily harm allegedly perpetrated against Semetse Kgabo Tsamang.

The two accused pleaded not guilty to the charges preferred against them. In explanation of their defence they stated they were acting lawfully in effecting private arrest in terms of the provisions of section 42 of the Criminal Procedure Act, Act 51 of 1977 as amended.

31 witnesses testified on behalf of the State and 13 for the defence.

The Facts.

The facts can be summarised as follows: The two accused persons are father and son respectively. They are farmers on Cremorapan Farm at Boshoek. In the early morning of 3 September 2012 the domestic helper, Sanah, also called Sarah Korope, made coffee for accused 1 and his wife, whom she called Meisie, but who will be referred to in this judgment

as Mrs Cloete. She was later informed that accused 1 required her presence at the storeroom.

Shoe tracks of three different shoes were shown to her and her co-workers. According to her they were unable to identify the said shoe tracks. According to accused 1, Sanah and her co-worker, Dolly, said that the shoeprints belongs to the deceased and Aaron. According to accused 1 he covered the shoe tracks with a dish, but according to Sanah, it was covered with a corrugated iron sheet.

After 08:00 that morning Aaron arrived and informed accused 1 that he is unable to work because he was suffering from a hangover. Within an hour thereafter Tonto Matlapeng apparently arrived and made a report to accused 1 that Aaron and the deceased stole diesel and tyres and sold it to a certain man at a shop which is situated plus minus four kilometres from the farm. Accused 1 then contacted accused 2.

They got into accused 2's motor vehicle and proceeded to a certain house at Mabule Village where they found a lady. When asked about a gentleman with a bakkie she said that he had gone to the hostels. They then travelled to Vergelee. Accused 2 was armed with a rifle.

Tonto went on foot to look for the said motor vehicle or bakkie. After he spotted, it he phoned accused 1 and made a report to him. By then accused 1 and 2 were at the koöperasie. Jan van Biljon was also at the koöperasie.

Accused 1 asked Jan for his assistance and he complied. Jan van Biljon followed accused 1 and 2 and they approached a certain house.

The apprehension of Stone Malone alias Mokhari.

The versions of accused 1 and accused 2 with regard to how Stone was apprehended differs from that of Tonto, Stone and Semetse.

According to Tonto, accused 1 and accused 2 assaulted Stone. Accused 2 pointed Stone with a firearm when he wanted to flee. Tonto also testified that Semetse was assaulted by accused 1.

Stone testified that accused 1 punched Semetse with a fist, furthermore, that accused 2 pointed him with a firearm and that accused 1 and 2 assaulted him with fists and kicked him with booted feet.

Semetse testified that accused 2 pointed a firearm at Stone when he wanted to flee and that accused 1 hit him, that is now Semetse, with a firearm on his chest and also punched him on his left cheek above his left eye with a fist. Accused 2 assaulted Stone by kicking him which caused him to flee into the veld

The State witnesses, Stone, Semetse and Tonto, corroborated each other on all material aspects as to how Stone was apprehended. Their version, apart from where it differs from that of accused 1 and 2, coincides with what

accused 1 and 2 testified.

The following was admitted by accused 1 and 2:

First of all that accused 1 punched and chopped Stone on his arm. According to accused 1 it was a karate chop on the arm in order to cause Stone to let go of the pole that he was holding onto. Accused 2 picked up Stone's legs in an attempt to get him to lose the pole which he was hanging onto in the shack.

That they used force to free Stone's hand from the pole when he held onto the pole inside the shack was also admitted. This is indicative of the fact that Stone did not freely want to accompany accused 1 and 2 to their farm.

Constable Ramolobeng met with Stone after the incident. She confirmed the injuries that Stone sustained, as supported also by the medical evidence. He suffered injuries to his face and he was holding his one arm with the other in an attempt to support it.

Dolly Kok who was at Stone's shanty when the two accused, Jannie van Biljon and Tonto arrived, testified that accused 1 assaulted Semetse and Stone and corroborate their versions.

The incident at the storeroom.

Back at the farm of the accused they went to collect the deceased and Aaron where they stayed. Their hands were tied with sellotape in effecting their arrest. These two, being the

deceased and Aaron, were employees of the accused, they were farm workers or farm labourers. As to how the deceased and Aaron were apprehended, is also common cause. There is also not much difference in the evidence tendered on behalf of the State by Tonto and Aaron and that of the accused on this point. Aaron testified that he was with the deceased when the accused arrived.

Accused 1, Mathys, then said that it is their last day. He also uttered the following words: "Kom hier kaffirs, vandag is julle laaste dag". This is denied by accused 1 and 2.

Accused 1 and 2 testified that Tonto was with them when they went to fetch the deceased and Aaron, whilst Tonto testified that he went home to eat and accused 1 and 2 went to collect them.

Inside the storeroom the deceased and Aaron were tied with a chain around their waists which in turn was tightened into a bench vice or screw which was mounted to a working table or bench. According to the accused they were tied on the instructions of Tonto presumably because they will run away.

To say the least I find this very strange and hard to believe. First of all, they were the employees of the accused working on their farm for quite sometime. Why would they all of a sudden abscond whilst being so well known?

A ring of truth is to be found in the evidence of accused 2 on this point, namely that according to him accused 1 sent

Tonto to fetch a rope but he instead came back with a chain. That accused 1 sent Tonto can be believed. Tonto was acting on instructions of accused 1. I disbelieve that it was Tonto's idea that the deceased and Aaron be tied up.

According to accused 2, Tonto fastened the deceased and accused 1 helped Tonto to tie Aaron. Accused 2 said that he took a prodder and said "julle moet ophou kak praat" and he wanted to prod or shock the deceased with it.

The deceased grabbed hold of the prodder whereupon accused 2 pulled it out of his hand. Apparently, on the version of accused 2, this prodder was not working and accused 2 only wanted to scare them so that they can tell the truth. He pointed it in the direction of both the deceased and Aaron but the deceased was closer to accused 2. What is of significance is the fact that accused 2 in his evidence testified that he wanted to use an instrument that can shock in order to get the deceased and Aaron to tell the truth.

On the version of accused 2, the deceased all of a sudden collapsed for no apparent reason to the extent that he thought that he was faking a faint. Accused 2, on his own version, then asked Tonto whether the deceased is epileptic and according to him Tonto replied in the affirmative.

Tonto tried to resuscitate the deceased. Accused 2 then told Tobie to fetch water which he poured over the face of the deceased. He also told Tobie to help with the resuscitation

by applying CPR but to no avail. They then drove to the clinic. Accused 1's version is almost similar on this aspect except according to him Tonto said that the deceased is epileptic, which differs from the evidence of accused 2.

What the cause of the collapse of the deceased was differs remarkably from what the State witnesses testified. According to Tonto there was an electric plug to which jumper cables were connected and the deceased was shocked, which caused the collapse of the deceased. This was also testified to by Stone.

Aaron, who was tied together with the deceased with a chain to the vice and the workbench, also confirmed these events. He testified that accused 2 clamped the deceased from behind on the left side of his ribs with one clamp and on the right upper arm with the other. I will later on in this judgment deal with the medical evidence which supports this evidence.

Of importance in Aaron's evidence is the fact that when he went back to the storeroom with the police after the whole incident on the day in question they did not find the jumper cables and the plug. Somebody must have removed it during their temporary absence.

Mr van Niekerk, the electrician called by the accused in their defence, testified during cross-examination that he was shown the plug used on the day of the incident. Accused 2

went to the house to fetch the plug. It was broken on top and part of it was open. This is indeed a crucial piece of evidence. It lends credence to the testimonies of the State witnesses that there was indeed an electric plug that was open on top to which the jumper cables were connected. Furthermore, that when Aaron returned with the police the plug and the jumper cables that were used were no longer in the storeroom.

I reiterate, it emerged on the request of Mr van Niekerk from the house, which means that someone must have removed it and had taken it into the house. This piece of vital important evidence is also the silent contributory evidence coming from the side of the defence that electricity was used on the day of the incident to shock the deceased and Aaron, as testified to by the State witnesses. The evidence clearly shows that accused 2 must have been aware of who removed the plug and the jumper cables, that is why he was able to produce the plug on the request of Mr van Niekerk.

Much has been made during cross-examination of the State witnesses about the open plug and how impossible it is to attach jumper cables thereto, but it really all comes to nothing in the face of this piece of evidence by Mr van Niekerk, that accused 2 produced the required plug used on the day of the incident.

After what transpired in the storeroom it is common cause that the deceased was loaded onto the back of the an

open bakkie and transported to the clinic by accused 1 and 2 and also Aaron.

Aaron's version of what transpired along the way is that at a T-junction accused 2 alighted and said to him that he must say at the clinic that the deceased suffers from epilepsy. He was also threatened that should he not comply he will also lie like the deceased. He testified that he was frightened and scared.

There is truth in the evidence of Aaron about the suggestion of epilepsy by accused 2 because it coincides perfectly well with the evidence-in-chief of accused 2, that when the deceased collapsed, on the version of accused 2, he asked whether the deceased was suffering from epilepsy. I am convinced that the whole idea of epilepsy originates from accused 2 as a possible cover-up.

Once again, much emphasis was laid on the possibility of epilepsy suffered by the deceased that could have caused his death. I will deal later on in this judgment with the evidence regarding epilepsy.

The events at the clinic.

Nurse Mokalaka was at the clinic at Piet Plessis after 16:00 on the day of the incident when the two accused and Aaron brought the deceased to the clinic. She examined the deceased and could not detect any pulse or heartbeat. She handed a stethoscope to Nurse Koekemoer, her senior.

According to her, that is Nurse Mokalaka, there was a bad smell but it was not alcohol.

According to Nurse Koekemoer after examining the deceased she informed accused 1 that he is late. Accused 1 appeared to be frightened. Nurse Koekemoer confirmed the testimony or Nurse Mokalaka in broad sense. She said that a black man who was on the bakkie, which must have been Aaron, said that the deceased had an epileptic fit.

Ms Koekemoer detected a sour smell on the deceased as though he had vomited. She testified that usually a person suffering from epilepsy has wounds or scars or even burn wounds on his body. According to her the marks on the deceased seems to be old marks with no fresh blood. Ms Koekemoer then called the police.

Police officers Godfrey Tau and Bosman Mokoela attended to the complaint. Tau was informed that the deceased passed away on their way to the clinic and that he had drank the whole weekend, the cause of death could be as a result of the alcohol intake.

Then Aaron divulged information to the contrary about he assaults and the electricity that was applied and also other detail. Aaron must have felt safe in the custody of these two police officers, that is why he proverbially spilled the beans without any fear of further intimidation. There was no mention of any epilepsy to Tau and Mokoela by Aaron.

One can safely accept that when these police officers were not there he carried out the instruction of accused 2 that he should say that the deceased was suffering from epilepsy, but now that his safety was guaranteed he told the truth of what happened.

Mokoela corroborates the version of Tau in all material respects. There are some differences between the testimony of Tau and Mokoela but these differences in relation to their statements are insignificant. Based on the information they received from Aaron the accused was taken to the police station, arrested and detained.

The police officers, in the presence of Aaron, also attended at the farm of the accused where the incident occurred. According to them a white woman, Mrs Cloete, opened the storeroom.

Aaron showed the electric wall plug to Tau, also the water on the floor and Aaron also told Tau about the jumper cables and open plug being used, but they were not there. It is important to note that Mrs Cloete was at the farm and in control of the storeroom in the absence of the accused who transported the deceased to the clinic.

The epilepsy.

It was contended on behalf of the accused that the deceased suffered from epilepsy. Sophie Maleko, the mother to the deceased, testified that the deceased experienced good

health and he certainly did not suffer from epilepsy.

Aaron testified that on the way to the clinic with the deceased, accused 2 stopped the vehicle and alighted and pointed him with a firearm and said that upon their arrival at the clinic he should say that the deceased suffers from epilepsy.

Aaron testified that he grew up together with the deceased and he therefore knew the deceased from childhood. The deceased never suffered from epilepsy, nor did he become epileptic when he consumed alcohol. I reiterate, the suggestion that the deceased suffered from epilepsy comes from accused 2.

It was put to the State witnesses by the defence counsel that the deceased received treatment from an unknown clinic. This was according to the evidence of accused 1. This statement, with due respect, is very vague and it casts doubt on the version put forward by the accused. No evidence to that effect was produced by the defence. Not that there was any onus on them to do so.

But, it was put to the witnesses that witnesses will come and testify and be called to testify that the deceased suffered from epilepsy. This did not happen. No such witness or witnesses testified to that effect. I reiterate, not that there was any onus on the defence to prove the contrary. However, on the contrary, Tonto denied that he said that the deceased

suffered from epilepsy. Doctor van Schalkwyk testified that under normal circumstances epilepsy would not lead to aspiration because there are reflexes that would prevent it from happening.

I already dealt with the evidence of Koekemoer but to reiterate, Ms Koekemoer testified that a black man, most probable Aaron, told her that the deceased suffered from epilepsy. This coincides with what accused 2 told Aaron to say, namely that the deceased suffered from epilepsy.

Doctor Wagner who testified in the defence of the accused put paid to this allegation. He testified that the deceased did not appear to be a person who takes medication for epilepsy. There were no signs to that effect of the taking of such medicine with reference in particular to the gums, teeth and tongue of the deceased. So much to say for the defence that the deceased suffered from epilepsy.

In actual fact the expert evidence of Dr Wagner on this point draws a line through that part of the defence and all the related questions about this epilepsy comes to nothing. I am convinced beyond any reasonable doubt, that the deceased did not suffer from epilepsy which could have contributed to his death. The version of the accused that the deceased suffered from epilepsy is rejected. I find it to be false beyond any doubt.

No complaint registered with SAPS.

The next aspect is that no complaint was registered with the South African Police Services at Boshoek.

It was alleged that accused 1 tried to contact Boshoek Police Station in order to lay a charge telephonically. Constable Rabanyana of South African Police Services stationed at Boshoek denied that a complaint was received on the day of the incident from any of the two accused. Instead a complaint was received from Mr Engelbrecht about diesel being stolen at his farm called Sonop.

Constable Mabole attended to the complaint of Mr Engelbrecht. That Mr Engelbrecht made such a report was indeed confirmed by accused 2 during his testimony. Constable Mabole was the person who answered the phone at Boshoek Police Station on the day in question. He also testified that no complaint was received from the accused.

Ms Lobelo, the administrative officer at Vryburg Police Station, also testified that she did not receive a telephonic complaint from the accused at Vryburg. Even the commander, Lieutenant Colonel Dettner, testified that he did not receive a complaint from the accused.

Apparently accused 1 tried to phone but could not get an answer. Accused 2 then allegedly phoned Vryburg Police Station and spoke to Sergeant Annelise Smit. She could not be of any assistance seeing that they were busy with a heist.

I find it strange that the accused, in particular accused

2, would go to the trouble of phoning Vryburg Police Station which is situated much further from their farm than Boshoek Police Station.

Letters of complaints directed at seniors in the South African Police Services in the North West Province were submitted and evidence was even tendered about these complaints that had occurred in the past. That clearly explains why no serious effort was made to contact Boshoek Police Station and why even Piet Plessis Police Station which is nearer to the farm of the accused than Vryburg Police Station, was bypassed.

The accused could so easily, seeing that they had apprehended the perpetrators and seeing that they had collected the evidence, even have driven to the Boshoek Police Station with the perpetrators and the evidence and then laid a charge and handed the suspects and the exhibits to the police, but that did not happen. They elected not go that route. Instead they wanted to torture the perpetrators, that is the deceased and Aaron, on the version of accused 1, to get a confession out of them.

I find that the accused did not contact the nearest Boshoek Police Station as proven beyond reasonable doubt by the State.

The alleged stolen property was found on the farm of Mr Engelbrecht. He was even called. He was present. He

could have said that diesel was also stolen at his farm and that he, Mr Engelbrecht, contacted the police at Boshoek Police Station. The evidence that Mr Engelbrecht registered a complaint, as testified to by Rabanyana and Mabole, stands uncontested. I reiterate, the accused confirms that Mr Engelbrecht said that there were also articles stolen at his farm. The court therefore must accept this evidence.

The bail proceedings.

After their arrest an application was made by the accused to be released on bail. Evidence produced proved that it was decided that it was vitally important that a post-mortem should be conducted and concluded so that the evidence relating to the cause of death should be presented in the court of first instance in order to persuade the court to allow the accused out on bail.

It needs no rocket science why there was such a haste in finalising the post-mortem. The procedure followed in this particular case is not at all the normal, standard procedure that is usually followed. Post-mortems need not be completed before an accused can or should be admitted to bail.

In my view the alarming speed with which the initial post-mortem examination was conducted raises more than just eyebrows. Furthermore, the method used in filing an affidavit or sworn statement with regard to the cause of death by Dr van Schalkwyk and Dr Wagner is also not the usual practice, as

testified to by Dr van Schalkwyk. I will revert to this later on in this judgment.

The electricity.

Colonel Grobler, the chief electrical engineer, employed in the South African Police Services testified as an expert on behalf of the State. He is not the officer, as an electric expert, that visited the scene shortly after this incident. He only visited the scene at the farm on the day before his testimony in this court.

He explained the setup as far as electricity in the storeroom is concerned. Everything was found at that stage to be in working condition. Of importance in his testimony is the fact that a 30 amp circuit breaker will normally trip at 25 amps, which is a safety device, if it is in good working condition.

Different scenarios were sketched and this witness' expert opinion was sought. According to him different factors may contribute to the conductivity and flow of current. Important, however, is that he stated that to test anything reliable the original items should be available.

It goes almost without saying that the original items that were used on the day of the incident were not available to be reliably tested. That is the chain, the plug and the jumper cables. This witness could therefore only test up until the multi-plug.

What followed thereafter could not be reliably tested.

Up to the multi-plug the earth leakage functioned correctly. According to this witness depending on what was or is connected after the multi-plug will depend whether or not the earth leakage will trip. If there is a flow of electrical current from the live to the neutral through the body with no imbalance the earth leakage will not trip. Electricity follows the path of least resistance.

In his expert opinion 220 volts can take a life. A 20 amp circuit breaker will not trip as a result of the natural resistance of a human body. Cement can be a conductor and also an isolator. As a conductor, if a person is barefoot, like on the case of the deceased, electricity will follow the path of least resistance to the earth. Depending upon the circumstances, the question still remains whether there is enough current to trip the earth leakage.

Mr van Niekerk, the electrician called on behalf of the defence, testified that he visited the farm of accused 1 on two occasions. The first time he went alone and on the second occasion he was with Colonel Grobler. According to him everything was in good condition and he explained how he conducted his tests.

According to him and based on the test that he had conducted, there is no way whatsoever that a person can be shocked in the storeroom of accused 1. This, he was adamant about until he was cross-examined. He conceded that the

reliability of the test depends on the items used.

I already dealt with the fact that the plug that was used on the day of the incident was given to him by accused 2. It was not made available to Colonel Grobler. According to Mr van Niekerk, even a rusted chain was a good conductor of electricity. The opposite was actually put to the State witnesses by counsel for the defence.

His testimony as to whether a concrete slab is a conductor or an isolator of electricity differs from that of the experts as contained in the literature used during cross-examination. He tried to maintain that it was impossible to shock a person with electricity in the storeroom of accused 1's farm but ultimately had to concede that he was not present when the incident occurred and can therefore not tell.

To prove that he who pays the piper calls the tune this witness' demeanour clearly shows that of importance to him was to testify that it is impossible that a person can be shocked in the storeroom of accused 1. This was the case until he was asked whether he reconstructed the whole scene as it was on the day of the incident. In other words did he do exactly as was done on the day of the incident.

His reply was, to quote *verbatim*, "I am not going to let a person die by shocking him, I do not want a person to die, it is too dangerous". So much to say about the reliability of the testimony of this witness. To reiterate, what Lieutenant

Colonel Grobler testified, to test anything reliable the original items should be available.

The testimony of the accused with regard to the state of the electricity in the storeroom of the farm does not take the matter any further. That it was in working order and that the earth leakage tripped when accused 1 placed his finger on the bench whilst being connected to electricity is neither here nor there.

Once again, as testified to by Colonel Grobler it is not what was the state of affairs up until the multi-plug but what was connected thereafter that matters most. Those apparatus were conspicuously removed and tests could therefore not be performed reliably. It beholds no argument why it was removed. The simple answer is that it was done in order to conceal evidence.

The post-mortems.

An initial post-mortem examination was conducted on the body of the decease four days after the death occurred. This post-mortem was done in Vryburg. Present during the post-mortem was, amongst others, the investigating officer, Sitlho, Dr van Schalkwyk on behalf of the State, Dr Wagner on behalf of the defence, Mr Fortuin, the attorney of the accused and Advocate Strydom, counsel for the accused.

The investigating officer Sitlho, testified that the two doctors were not cooperative, according to him. Whilst he

observed the injuries on the upper arm of the deceased and made Dr van Schalkwyk aware of it she did not reply him, instead she spoke to Dr Wagner in Afrikaans and this made him suspicious. According to him a letter, which must have been the sworn statement, was written and handed in at court and to his surprise the accused were then granted bail.

Dr van Schalkwyk testified that she performed the first post-mortem examination on the body of the deceased. Although in the sworn statement which was prepared for the bail hearing she indicated that the cause of death was as a result of aspirations, she could find no signs of aspirations.

She explained how it came about that she made the statement. It was unusual for her to make such a statement. Blood was drawn for blood-alcohol tests four days after death occurred. According to her due to fermentation, the blood-alcohol content rose to 0.26 grams per 100 millilitres. This according to her does not mean that the deceased had consumed so much alcohol and it is definitely not a true reflection of the amount of alcohol consumed by the deceased.

She took samples and sent it for histology after it was properly sealed and handed to Colonel Dihemo. She gave a description of the wounds on the body of the deceased which, according to her, were patterned injuries that could be caused by a device with crocodile teeth, like jumper cables. According to her, electrocution could be the cause of death but she

awaited the histology results.

Epilepsy under normal circumstances would not lead to aspiration. She confirmed that the histology results are consistent with what she thought or concluded. She did not agree, as testified to by Ms Koekemoer, that the wounds were old wounds. Of importance to her, there was no foreign substance pressed out of the lungs. The injuries that were sustained confirmed the suspicion that it was thermal injury. Most importantly she testified that Dr Wagner did not want to take his own samples. In the main, she disagreed with Dr Wagner, as embodied in her post-mortem report.

Dr Wagner testified. He stated that the history he was given is that the deceased was assaulted and electric shocks were administered on the deceased. The deceased was intoxicated and suffered from epilepsy. Wounds on the right arm were not recently sustained and were in the process of healing. No lesions were detected under the feet of the deceased. There were no signs that the deceased used drugs for epilepsy.

According to him there was foreign material present in the lungs of the deceased when pressed and the lungs were also congested. According to him there was aspiration of the stomach contents which had a strong smell of alcohol. He could find no trauma of electrocution.

According to him Dr van Schalkwyk is not a specialist

and that he and Dr van Schalkwyk agreed on the cause of death, namely aspiration of the stomach contents and that Dr van Schalkwyk was not forced or coerced into this finding and the making of the statement in that regard

With regard to the injuries, he agreed that there was no fresh blood but did not conclude that they were old injuries as testified to by Nurse Koekemoer. There was no inflammatory cells and therefore he concluded that they were in an advanced stage of healing. These observations he made macroscopically and not microscopically. He disagreed with the findings of the histology. According to him it was not thermal injuries and also not consistent with joule burns.

The cause of death, according to Dr Wagner, was intoxication together with epileptic seizure which led to the loss of consciousness and being transported on the back of the bakkie or the van, lying on his back and being prone to vomiting with the level of consciousness suppressed, leading to aspiration with fatal consequences, namely resulting in the death of the deceased. Therefore he concluded that the deceased died of unnatural causes as a result of acute alcohol intoxication and terminal inhalation of stomach contents.

He disagreed with Dr van Schalkwyk with regard to the accuracy of the blood-alcohol contents and the influence of fermentation on the blood-alcohol level. The expert evidence tendered on behalf of the State proves him to be wrong. I will

revert to this aspect later on in this judgment. Dr Wagner totally ruled out the possibility of electrocution.

During cross-examination it emerged that Dr Wagner did not know how long the body of the deceased was outside before being refrigerated, nor did he know what degrees Celsius the refrigeration was and also that blood from the deceased's body was only drawn four days after the death occurred.

Despite all this, he maintained that the blood-alcohol level is a true reflection of the amount of alcohol consumed by the deceased. This, in my view, cannot be correct. Again I will revert to this aspect later on in this judgment, save to say that Dr Wagner conceded ultimately that he is not a specialist in this field.

With regard to the injuries, Dr Wagner said they were in the process of healing. This is contrary to the evidence of Dr van Schalkwyk and Dr Moorat, who testified that these injuries were not old injuries. He disagreed, however, with Nurse Koekemoer and said that the injuries were not healed but was in the process of healing.

Dr Wagner concluded that the injuries on the right upper arm of the deceased was not a joule burn. After being confronted with literature he had to concede that a joule burn is not the only type or kind of injury that is caused by electricity. He, however, was only looking for joule burns, and may I add,

with a naked eye. He conceded also that it will be fatal if electric current passed through the heart.

With regard to aspiration, he stated that passively gastric fluid cannot flow into the lungs. Oedema and congestion in the lungs can only occur when a person is alive and this, according to Dr Wagner, can only be seen by what he termed to be with trained eyes.

Dr Moorat who performed a second post-mortem examination on the body of the deceased testified that she could find no stomach content in the lungs. To this Dr Wagner replied and said that she was at a disadvantage because the lungs were already pressed and the contents were therefore out of the lungs. This cannot be entirely correct.

If this was the case Dr Moorat, as a specialist, would not have gone through the trouble of pressing the lungs to see whether or not they contain any foreign material. To use the term of Dr Wagner about a trained eye, Dr Moorat also had a trained eye to observe the presence of foreign material in the lungs, unlike the attorney Mr Fortuin whom, it is commonly known, does not have the same trained eye, but who nevertheless testified under oath that he allegedly saw the foreign material when the lungs were pressed. This was with his naked eyes.

What Mr Fortuin concluded to be the foreign material must have been the foam which was found to be present in the

airways of the lungs. This is entirely different from the alleged stomach content foreign material that Dr Wagner claims to have been present in the lungs. Mr Fortuin is not a specialist in the field of post-mortems. Not much reliance can therefore be placed on his evidence, especially insofar as it differs from that of the specialists, Dr van Schalkwyk and Dr Moorat.

With regard to the statement, Dr Wagner was asked whether he usually makes such a statement when he conducts a post-mortem examination. No straightforward and definite answer was provided except to say that it was done for the purpose of the bail hearing in this matter and, of course, to say that he and Dr van Schalkwyk were *ad idem* on the cause of death.

It can safely be inferred that it is not Dr Wagner's usual way of communicating his findings of a post-mortem examination. The question that begs an answer is why it was done in this case and why with such great haste? To say that no pressure was brought to bear on Dr van Schalkwyk to go this extraordinary route of communicating her hasty conclusions of a post-mortem examination to a court of law is far removed from the truth, to say the least.

According to Dr Wagner there was no other pathology that could have caused the death of the deceased. This opinion was based on the macroscopic findings he concludes in the exercise of his discretion. This was without the benefit of

microscopic findings and histology being performed or conducted to determine beyond any doubt and with a very high degree of certainty what the real cause of death was.

He deemed it unnecessary to take samples and to send it for histology. He conceded ultimately, however, that histology might have been of assistance to determine the exact cause of death. He, however, did not go that far.

With regard to the shape of the injuries, Dr Wagner agreed with Dr Moorat's finding that it could have been caused by an instrument with crocodile-like teeth, but maintained that according to him the said injuries are neither electrical nor terminal.

That Dr Wagner concluded that it was not necessary to go the route of histology, I find totally surprising especially in view of the fact that according to him the history of the deceased and the possible death was mentioned and it was indeed mentioned that electric shocks were administered on the deceased with jumper cables that had crocodile-like teeth.

The conclusion which Dr Wagner reached was hastily done and it is apparent that Dr van Schalkwyk on second thought was more cautious than Dr Wagner. Mind you, Dr Wagner was employed by the accused and paid by them. Although he claims to be impartial I am convinced that he was not.

Counsel for the defence, Mr Strydom, prepared written

submissions which were handed in. In paragraph 29 thereof he stated:

> "It is of importance that when a court is faced with conflicting expert opinions concerning a certain issue one should look at the decision of Appeal Judge Majiedt that was recently made in the decision of *Jacobs v Transnet* 2015 (1) SA 139 (SCA) where he set out the principles that the court had to examine, the cogency of the reasons underlying an expert's opinion and then reject or accept that opinion as set out in paragraph 14 and 16.
>
> The honourable appeal judge also stated that the role of an expert witness was to assist the court rather than the party who had called him, in paragraph 15, where he states the following: It is well-established that an expert is required to assist the court, not the party for whom he or she testifies.
>
> Objectivity is the central prerequisite for his or her opinions. In assessing an expert's credibility an appellate court can test his or her underlying reasoning and is in no worse a position than a trial court in that respect."

Dr Moorat who performed the second post-mortem, concluded that electrocution cannot be excluded and awaited the histology results. According to her no food substance was

found in the lungs. No aspiration of stomach contents were noted. According to her the injuries were consistent with jumper cables being the cause thereof because of the patterned abrasions.

She did receive histology results. The conclusion with regard to the skin biopsies is that it was thermal injuries. With regard to the kidneys there was acute tubular necrosis resultant in renal failure which was a sign of electrocution.

During cross-examination she was adamant that there was no digested foods in the lung or trachea and that the cause of death was not as a result of aspiration due to the inhaling of stomach contents.

Although she initially agreed with Dr Wagner, Dr van Schalkwyk ultimately, together with Dr Moorat, excluded aspiration as a cause of death. Histology proves this finding. I reiterate, Dr Wagner did not go the route of histology. His conclusions and opinion on the case of death is suspect, to say the least.

I am convinced that the cause of death was not aspiration as a result of inhalation of stomach contents due to intoxication.

Dr Wagner also testified that Dr van Schalkwyk is not a specialist, she was not at all on the same level with him. Under cross-examination he admitted that a doctor can attain a high level of expertise in the field of pathology even though he

or she is not a specialist, but indicated that that will not make such a doctor a specialist. This statement was raised as a results of the attack that Dr Wagner launched against Dr van Schalkwyk, who was not only a capable pathologist but also possesses a postgraduate diploma in this field which she obtained after her undergraduate studies.

The issue of whether a witness is an expert and whether that witness' evidence should be treated as expert evidence was dealt with by the Supreme Court of Appeal in the case of *S v Mlimo* (2) SACR 48 (SCA) 13 where the court states the following:

> "In my view a qualification is not a *sine qua non* for the evidence of a witness to qualify as an expert, all will depend on the facts of the particular case. The court may be satisfied that despite the lack of such a qualification the witness has sufficient qualification to express an expert opinion on the point in issue. It has been said it is the function of the judge, including a magistrate, to decide whether the witness has sufficient qualifications to be able to give assistance.
>
> The court must be satisfied that a witness possesses sufficient skill, training or experience to assist it. His or her qualifications have to be measured against the evidence he or she has to give in order to determine whether they are sufficient to enable him or her to give

relevant evidence. It is not always necessary that a witness' skill or knowledge be acquired in the course of his or her profession, it depends on the topic. Thus in *R v Sivello* it was said that a solicitor who had made a study of handwriting could give expert evidence on the subject even if he had not made any profession use of his accomplishments."

I find that Dr van Schalkwyk had the necessary experience and expertise to be qualified as an expert.

The results of the histology by Dr Lakoo and as confirmed by Dr van der Berg, her supervisor, is that the specimens taken from the injuries of the arm and the back of the deceased were thermal injuries, injuries which were caused by heat, either normal burn or electricity.

The lungs had no features of aspiration. This puts it beyond any doubt that Dr Wagner was not correct in concluding what the cause of death was. It is proven beyond any doubt that aspiration was not the cause of death. The fact that the injuries were thermal injuries cause by heat, including electricity, lends credence to the testimonies of the State witnesses, that electric shocks were administered by accused 2 on the deceased whereafter the deceased collapsed.

find that the State had proved beyond reasonable doubt that the deceased died as a result of the electric shocks that he was subjected to. I have no doubt whatsoever that the

correct processes and procedures were followed in taking samples and biopsies for analysis as testified to by Julia Malachi, Elizabeth Kubedi, Arta Mpini, Bruce Myberg, Colonel Dihemo, Dr Maritz and Dr Kivala.

A criminal trial is not a tactical game where one party would gain over the other due to technicalities. A criminal trial is the pursuit of justice. It is to determine where the truth lies. I have no doubt in the correctness of the findings of the histology results as a scientific exact field and I have no doubt in the expertise and experience of Dr Lakoo and Dr van der Berg. I accept the formal evidence tendered by Dr Maritz, Dr Kivala, Dr Lakoo and Dr van der Berg as truthful and reliable.

I stated earlier on that with regard to the blood-alcohol level and the influence of fermentation, that Dr Wagner was not correct and that I will revert to this aspect later on in this judgment.

The testimonies of two pathologists that testified on behalf of the State were to the effect that the blood-alcohol level obtained from a deceased's body should be treated with caution as fermentation can considerably increase the level of alcohol in the body of the deceased, post-mortem.

To this extent Dr Wagner was referred to an article which raised a concern regarding alcohol that can be produced post-mortem. This article was by Innes B Collison in October 2005, entitled elevated post-mortem ethanol concentrations in

an insulin-dependent diabetic Journal of Analytical Toxicology Volume 29.

After being referred thereto Dr Wagner quickly pointed out that in this instance we are not dealing with a decomposed body. He indicated this forgetting that more than once in his evidence-in-chief he indicated that the deceased could not have suffered from renal failure, what the anatomic pathologist saw was autolysis tissue. Apparently Dr Wagner forgot that he testified that even when a body is refrigerated autolysis does not stop and that the samples were taken four days after the death.

He was referred to another article in which it was stated that a high glucose concentration and bacteria or fungus or yeast found in post-mortem blood makes it an ideal environment for the production of alcohol as the sugar is converted eventually into alcohol causing a falsely high blood-alcohol concentration. Sight should not be lost of the fact that the body of the deceased was taken to the hospital or clinic at the back of the bakkie during summer and had to be driven from Piet Plessis Clinic to Vryburg which are some distances apart.

Dr Wagner disagreed with the two doctors who testified on behalf of the State that a person who is drunk at a level of 0.26 grams per 100 millilitres speech will be slurred and he might not be able to walk properly. He also indicated that the

view of Nurse Koekemoer regarding the condition of the injury cannot be relied on as it is not correct. Dr Wagner ultimately admitted that acute tubular necrosis causes renal failure.

When dealing with the relationship between acute tubular necrosis and electricity he testified there is nowhere where they can be read together. In this regard he was referred to an article which indicates that electric shock can cause damage to muscle as a result of which myoglobin will be released which may cause acute tubular necrosis and a subsequent renal failure.

Dr Wagner thereafter agreed that there was indeed a relationship between electric shocks and acute renal failure. In my view Dr Wagner knew that there was a connection between the electric shock and acute tubular necrosis but he concealed this fact from the court.

As Dr Wagner mentioned in his evidence-in-chief he made an extensive research on the internet to establish whether there is any relationship between electric shocks and thermal injury and that there was none.

He was confronted with an article by Gjorgje Dzhokic and others entitled Electrical Injuries Etiology, Pathophysiology and Mechanism of Injury, Macedonian Journal of Medical Science 2008, December 15; 1(2):54-58, on page 54. The article refers to three major mechanisms of electrical injuries. As 1, direct tissue damage, 2, terminal injury and, 3,

mechanical injury.

Dr Wagner agreed completely with this article. This concession was confusing in the face of his testimony earlier that there is no relationship between thermal injury and electric shock. He wanted to create the impression that the only injury that can be caused by an electric shock is a joule burn.

He was confronted in this regard with the contents of the article by Dr Rao, entitled Electrical Injuries, Forensic Pathology Online. Of importance is that Dr Wagner later on conceded that a joule burn is not the only injury that can be caused by an electric shock.

How the injury looks depends on a number of issues, for instance the type of skin, amongst others, whether the skin was wet or dry and that sometimes there might not even be an injury despite the fact that a person was shocked. Therefore in my view Dr Wagner's evidence in this regard cannot be relied upon.

What caused the injuries on the right upper arm of the deceased and the left lateral back of the body of the deceased was an issue. I reiterate, Dr Wagner conceded that he did not submit samples for histology.

Dealing with the injury on the right upper arm, it was his testimony that it was in the process of healing. During cross-examination he was shown a picture of the injury with the scratches that clearly shows that they were caused by the

instrument. Dr Wagner conceded that there is clear evidence of vital reaction, something that he elected not to testify about in his evidence-in-chief. On the contrary Dr van Schalkwyk when being showed the same picture, stated that she could detect vital reaction.

It must also be taken cognisance of the fact that the deceased was a dark skinned person and a reddish colour will not be as clearly visible on the skin of such a person compared to a light skinned person.

In my view Dr Wagner hastily concluded the cause of death as aspiration when in fact that was not conclusively the cause of death.

Dr Moorat cut the lungs at a different place to see whether or not there is any evidence of aspiration. Dr Moorat, who is also a specialist like Dr Wagner, took some samples of the lungs, kidneys and submitted them for histology, the exercise she knew will greatly assist in diagnosing the cause of death. The report came back and the doctors who performed the histology testified that there was no foreign material in the lung.

In my view the State proved beyond reasonable doubt that there was no foreign material in the lungs of the deceased. In contrast to the doctors that testified with regard to the histology results is only the evidence of Dr Wagner, who was the only witness who saw aspiration. He tried to convince this

Court that the presence of foreign material is visible on the slides that he showed to the Court. When cross-examined about it by the State, he stated that it can only be observed with a trained eye.

Aspiration as a cause of death should not be done lightly. As per the literature of Dr S Zaib Kumar NO entitled Gastric Contents in Respiratory Tract a Diagnostic Dilemma at Autopsy, J Indian Acad Forensic Med, 32, in which the following is stated on page 22.

> "In cases of sudden death finding of gastric contents in air passages is by no means as significant as the presence of freshly swallowed food.
>
> Gastric contents are commonly found in the larynx, trachea and bronchi at autopsy when no other evidence of aspiration exists and when there is a clear and unconnected cause of death."

Dr Wagner denied this statement in no uncertain terms and said it is not common to find gastric contents in the larynx, trachea and bronchi. This prompted a further reference to be made to the book that he had in his possession of B Knight entitled Forensic Pathology, Second Edition, page 357. Knight also confirmed that gastric contents are commonly found in the larynx, trachea and bronchi at autopsy where no other evidence of aspiration exists and when there is a clear and unconnected cause of death.

So too did Richard Shepherd in Simpson's Forensic Medicine, 12th Edition on page 97 states and also confirms that findings of gastric contents in the larynx, trachea and bronchi is common at autopsy and stated that it is not safe to conclude on autopsy findings alone that death was due to aspiration of stomach contents.

A crucial concession was made by Dr Wagner when he was having a look at a photo of the injuries of the deceased. He said that he cannot exclude the possibility that the lesions on the right upper arm of the deceased's body was caused by an instrument that caused the injury on the left lateral back. He said the injuries were caused by a similar instrument with crocodile teeth like jumper cables but without electricity.

This concession was indeed well made and it supported the evidence as tendered by the State. It serves as confirmation that there was an instrument used to grab the deceased and that could be deduced from the photos that were presented. There was also the concession that the scratches caused by the instrument on the right upper arm shows vital reaction. They were therefore not old injuries but were fresh injuries.

When the court adjourned Dr Wagner came back the following day trying to change his evidence and produce a lot of new evidence, which was led in a desperate attempt to do some damage control. It is clear from the reactions of Dr

Wagner in this regard that he came to do exactly the opposite of what he stated his stance was in his opening statement, namely that he was not here to take sides or to advance the case of the accused but as an impartial witness and wanted to assist this Court. In my view he did exactly the opposite.

Dr Wagner was adamant that the blood results were a true reflection of the alcohol level of the blood of the deceased during his death. His evidence in this regard cannot be relied upon. Much can be said about the demeanour of Dr Wagner. To reiterate, he had to concede ultimately that he was not an expert as far as blood-alcohol levels are concerned though he held himself out to be one.

In the same vein, the manner in which he testified about the jumper cables he created the impression that he was an expert when he was not. I reject the evidence of Dr Wagner insofar as it differs from that of the State witnesses.

The statements made by the witnesses.

Almost all the eyewitnesses that testified on behalf of the State were confronted with the contents of the statements they made to the different police officers. These statements were handed in as exhibits after the defence called the respective police officers who testified and who laid a basis for acceptance of these statements. The contents of these statements become, therefore, admissible as evidence. In the main all these statements now serving as previous consistent

statements cannot be used to corroborate in material respects the evidence tendered *viva voce* during the trial.

I need not deal in great detail with the contents of these statements. Much emphasis was laid by the defence counsel on the differences between the contents of the statements of the various witnesses and their evidence in court.

There are indeed discrepancies with regard to the contents of these statements. These differences or contradictions are in my view not material to the extent that it warrants the total rejection of the witness' evidence. Contradictions *per se* do not automatically lead to the rejection of a witness' evidence. It may be indicative of an error or mistake. Not every contradiction will result in the rejection of a witness' evidence. Detailed evidence is always given before court. See in this regard *S v Mkhole* 1990 (1) SACR 95 (A).

The correct way of evaluating the evidence in situations where there are contradictions between the witness' statement to the police, on the one hand, and the evidence of such a witness in court, on the other hand, is set out by the Supreme Court of Appeal in *S v Mafaladiso* 2003 (1) SACR 583 (SCA) 593e-594h, as follows:

> "The juridical approach to contradictions between two witnesses and contradictions between the versions of the same witness, such as *inter alia* between her or his

viva voce evidence and a previous statement is in principle identical. indeed in neither case is the aim to prove which of the versions is correct but to satisfy oneself that a witness could err either because of a defective recollection or because of dishonesty. The mere fact that it is evident that there are self-contradictions must be approached with caution by the court.

Firstly, it must be carefully determined what the witnesses actually meant to say on each occasion in order to determine whether there is an actual contradiction and what is the precise nature thereof. In this regard the adjudicator of fact must keep in mind that a previous statement is not taken down by means of cross-examination, that there may be language and cultural differences between the witness and the person taking down the statement which can stand in the way of what precisely was meant and that the person giving the statement is seldom, if ever, asked by the police officer to explain their statement in detail.

Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Non-material deviations are not necessarily relevant. Thirdly, the contradictory versions must be considered and

evaluated on a holistic basis. The circumstances under which the versions were made, the proven reasons for the contradiction, the actual effect of the contradictions with regard to reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions and the quality of their explanations and the connection between the contradictions and the rest of the witness' evidence, amongst other factors, are to be taken into consideration and weighed up.

Lastly, there is the final task of the trial judge, namely to weigh up the previous statement against the *viva voce* evidence, to consider all the evidence and to decide whether it is reliable or not and to decide whether the truth has been told despite any shortcomings."

The following factors need to be taken into account:

1. The fact that Aaron was intoxicated, he suffered from a hangover on the evidence of not only himself but also accused 1. This may have affected his ability to observe what transpired, however, his testimony is corroborated in all material respects by other eyewitnesses.
2. The level of literacy. The State witnesses were either illiterate or semiliterate farm labourers

and one cannot expect them to be very specific and detailed about the unfolding of events on the day in question.

3. The witnesses were frightened, scared and confused about the unfolding of events.

Statements are but a summary of the testimony of a witness. See in this regard *S v Govender* 2006 (1) SACR 322 (SCA). It cannot be expected in a statement to include even the slightest, minute detail. Memory is but fallible and fades with the passage of time. Some witnesses testified almost two years after the incident occurred. It cannot be expected of such witnesses to remember and recall the evidence *verbatim*. To do so will be irrational.

The onus is on the State to prove the guilt of the accused beyond reasonable doubt and not beyond any shadow of a doubt. There is no onus on the accused to prove their innocence. The version of the accused need only be reasonably possibly true to be accepted by this Court. If the version of the accused is reasonably possibly true they must be given the benefit of the doubt and be acquitted.

In *S v Chabalala* 2003 (1) SACR 145 (SCA) the following was stated as the correct approach in evaluating evidence:

"The correct approach is to weigh up all the elements which points 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 balance weighs so heavily in favour of the State as to exclude any reasonable doubt to the accused's guilt. The result may prove that one scrap of evidence or one defect in the case of either party, such as a failure to call a material witness concerning an identity parade, was decisive but that can only be on an *ex post facto* determination and a trial court and counsel should avoid the temptation to latch onto one apparently obvious aspect without assessing it in context of the full picture in evidence."

The State alleges that the accused acted in concert with one another in the furtherance of a common goal or common purpose. Briefly and simply put, common purpose is the imputing of the act of one member of the group to the other members of the same group or *vice versa* provided, of course, that some form of intention is proved against each of them.

In *S v Mgedezi* 1989 (1) SA 687 (A) 705I-706C the following is stated:

"In the absence of proof of prior agreement accused 6 who was not shown to have contributed causally to the killing or wounding of the occupants of room 12 can be

held liable for those events on the basis of the decision in *S v Sefatsa and others* 1988 (1) SA 868 (A) only if certain prerequisites are satisfied. In the first place he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others.

Fifthly, he must have had the requisite *mens rea*, so in respect of the killing of the deceased he must have intended them to be killed or he must have foreseen the possibility of them being killed and performed his own act of association with the recklessness as to whether or not death was to ensue."

The evidence provided proves that there was no stage whatsoever where one of the accused disassociated himself with the conduct of the other. See in this regard *S v Musingadi* 2005 (1) SA 395 (SCA) where it was emphasised that the courts will have to take into account the manner and the degree of participation, how far the commission of the crime has proceeded and what steps could have been taken to

prevents its commission. In paragraph 39 of the judgment the following is stated:

> "That the greater the accused's participation and the further the commission of the crime has progressed then much more will be required of an accused to constitute an effective disassociation. He may even be required to take steps to prevent the commission of the crime or its completion. It is in this sense a matter of degree and in a borderline case calls for a sensible and just value judgment."

The accused acted in concert with one another throughout the incidents on the day in question. The evidence of the accused insofar as it differs from that of the State witnesses is rejected. With regards to counts 1 and 2, the accused kidnapped the deceased from his place, tied his hands with sellotape, caused him to be loaded onto the bakkie and transported him to the storeroom. At the storeroom he was tightened with a chain to Aaron and fastened to the vice of the workbench or table.

Accused 2 attempted to shock the deceased with a prodder but it did not have the desired effect. Thereafter accused 2 connected jumper cables to an electric plug and electrocuted the deceased. He collapsed and urinated and never regained his consciousness. The deceased died as a result of being electrocuted as proved by the medical evidence.

Both accused are therefore found guilty as charged on counts 1 and 2.

As far as the murder is concerned, accused 2 had a direct intention of killing the deceased. Accused 1 was present, did not disassociate himself at all with the conduct of accused 2. His words to Aaron and the deceased, "kom hier kaffirs, vandag is julle laaste dag", came to fruition because the deceased did die on that day in question at the hands of the two accused.

As far as counts 3, 4, 5 and 6 are concerned, Aaron was together with the deceased, removed from his place and his hands were tightened with sellotape, although he later on removed the sellotape. He testified about the words uttered by accused 1, "kom hier kaffirs, vandag is julle laaste dag". He was ordered to get onto the bakkie and was transported to the storeroom. Although he had removed the sellotape from his hands, that does not mean that he freely and voluntarily accompanied the accused to the storeroom.

At the storeroom he was fastened with a chain to the deceased and the chain was in turn fastened to the workbench. Accused 2 pointed a prodder at him and also at the deceased, although the deceased was nearer to accused 2 than what Aaron was. Thereafter accused 2 connected jumper cables to an electric plug and shocked the deceased and Aaron. The accused knew very well that electricity can kill. Aaron testified

that he felt shocks but not that much. In my view understandably so because electric shocks were directed at the deceased. There was an attempt on the part of accused 2 to shock and kill Aaron.

There was no disassociation on the part of accused 1. Although he caused Aaron to get onto the bakkie and to collect some money, that happened after the deceased was shocked. That in itself is not disassociation from the conduct of accused 2. On the way to the clinic with the deceased the motor vehicle was stopped and accused 2 alighted. He threatened and intimidated Aaron by pointing him with a firearm and said that at the clinic Aaron should say that the deceased suffered from epilepsy.

Both accused are therefore found guilty as charged on counts 3, 4, 5 and 6.

Counts 7, 8, 9 and 10 relates to Stone. The accused, whilst acting in concert with one another, travelled to the place where Stone was. They both assaulted Stone by hitting him with fists, kicking him with booted feet, pulled his legs and arms in order to cause him to let go of the pole to which he was clinging onto. Stone did not want to accompany them to their farm.

Accused 2 also pointed Stone with a firearm when he attempted to flee. Jan van Biljon, who was also present at the scene, took the firearm from accused 2. This firearm, in my

view, was not in the motor vehicle nor was it contained in a bag. Jan van Biljon himself did not point the firearm at Stone but held it in his hands. He did not assault either Stone or Semetse and that explains why no charges were preferred against Jan van Biljon.

The bakkie motor vehicle of Stone was removed without his consent. Tonto was instructed by accused 1 to drive the bakkie of Stone to the farm. The bakkie was taken as testified to by accused 1 because it was allegedly used to steal the tyres and diesel. The accused drove in their bakkie motor vehicle and followed Tonto who was driving the motor vehicle of Stone on the instructions of accused 1. I find that Stone did not freely accompany the accused to their farm. He was assaulted and instructed to go with. In the storeroom accused 1 hit Stone with an iron rod. He blocked and his arm was injured.

Consequently the accused are found guilty as charged on counts 7, 8, 9 and 10.

Count 12 relates to Semetse. The two accused approached Semetse and Stone. Semetse was in the company of Stone. Accused 1 hit Semetse with the butt of the firearm on his chest and punched him with the fist in his face.

Accused 1 is found guilty as charged on count 12, of assault with intent to do grievous bodily harm and accused 2 is acquitted on this charge.

04/11/2015

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH WEST HIGH COURT)

VRYBURG

CASE NO.: CC 49/13

DATE: 2015.10.02

In the matter between

THE STATE

and

CLOETE, MATHYS JOHANNES Accused 1
CLOETE, DANIEL NICHOLAS Accused 2

S E N T E N C E

HENDRICKS, J:

You have been convicted on various counts for various offences and it is now the task of this Court to impose a suitable sentence upon you. In so doing this court must take into consideration your personal circumstances, the nature and the seriousness of the offences of which you have been convicted of, as well as the interest of society. Furthermore, to also blend the sentence with a measure of mercy.

Starting with your personal circumstances, that is what

you have testified to in mitigation of sentence, as well as the testimony of Dr Theron and the submissions made by your counsel.

Starting with accused 1. You are currently 72 years of age. During the commission of this offence in 2012 you were 69 years old. You are a first offender. You are married for 51 years and had five children of whom one passed away in a tragic motor vehicle accident. Your four remaining children are all adults.

You are a farmer, being a cattle farmer and a game farmer, deriving a monthly income of approximately R20 000 per month. You are the breadwinner and you have in your employ approximately eight people. Five who are working for you and three who are working for your wife.

You are not experiencing good health. You are diabetic, suffer from high cholesterol and you have knee and back problems. You were diagnosed by the psychiatrist as suffering from Bipolar Mood Disorder coupled with insomnia and that you are also suicidal. You were bitten by a mamba snake and miraculously survived in total three snakebites. Your wife is also not enjoying good health. Her mobility is impaired in that she walks with the aid of a crutch and needs assistance of someone to put on her shoes.

Accused 2, you are 36 years of age. You were 33 years old at the time of the commission of these offences. You

are married and you are the father of one minor child aged two years. Like accused 1 you are a first offender. You are also engaged in farming activities together with accused 1 for the past three years, although it seems to me that you are not farming for your own account. As I understand it, accused 1 from time to time will give you some money as and when you need it which will be derived from the selling of cattle or game or hunting during the hunting season. After you completed matric you furthered your studies and obtained an N6 certificate. Your are currently busy with an intense breeding programme of exotic game.

Like your father, accused 1, you also are not experiencing good health. You suffer from depression. You were diagnosed as suffering from Bipolar Mood Disorder since the year 2009. Again, like your father, accused 1, you are also suicidal. Your wife is also diagnosed as suffering from Bipolar Mood Disorder coupled with postnatal stress and stress as a result of this case.

Dr Theron, your pastor, testified about your character. He knows you for three years as one of his congregants. According to him you are a family man and your personality borders between being an introvert and an extrovert. You are soft spoken and you did not show any aggression. According to him you are not an aggressive person. It is clear that he does not know that you testified that on the day of the incident

you said to the deceased and Aaron "julle moenie kak praat nie", or words to that effect, which clearly demonstrates aggression.

It is not clear from his testimony though how close he was or how close he is with you. This Court does not know whether he only sees you as a pastor on a Sunday at church or at church gatherings and functions or whether he did have a good relationship on a daily basis with you. How often he sees you and to what extent he interacted with you is not clear and whether or not you are a so-called Sunday Christian.

It is difficult to attribute the aggression to you, according to Dr Theron. Dr Theron also initially testified that you are not schizophrenic or bipolar but later on, being confronted directly with a question by your counsel, he said and admitted that he knows about your ailment, referring to the fact that you are diagnosed to be bipolar. Dr Theron is, however, not a psychologist nor a psychiatrist. He maintains, however, out of his little knowledge about you that you acted outside of your character. That is as far as your personal circumstances are concerned.

Coming to the nature and the seriousness of the offences of which you have been convicted of, of which the most serious of all is the murder. A person, a breadwinner has lost is life. This court must also have regard to the circumstances under which these offences were committed.

Accused 1, you got wind of the fact that diesel was allegedly stolen from your storeroom and that did not disturb you too much. You thought that you will fix it by deducting from their salary, a noble and a good idea if you had conclusive evidence who the culprits were that allegedly stole the diesel, although there are other ways in which you could have dealt with this issue.

It did, however, not end there. When informed that some tyres were also stolen you decided to investigate the matter further. You elicited the help of accused 2 in this regard and later on also the help of Jan van Biljon, whom you met at the koöperasie.

The two of you and Jan proceeded to Stone's place. As already alluded to in the judgment on the merits, Stone was assaulted with the intent to do grievous bodily harm, he was pointed with a firearm, he was kidnapped and robbed of his Isuzu motor vehicle.

In the process Semetse, who was also present together with Stone, was also assaulted with the intent to cause him grievous bodily harm by accused 1, hence the conviction on count 12 of accused 1.

Back at the farm the deceased and Aaron were kidnapped from their place of residence and taken to the storeroom where hey were tortured, fastened with a chain to one another and in turn also fastened to the vice on the

workbench. At first there was an attempt to shock them with a prodder and later on they were subjected to electric shocks that caused the death of the deceased. Aaron also felt electric shocks, hence the conviction of attempted murder.

To state that these offences are not so serious is indeed an understatement. They are, without any stretch of the imagination, serious offences. To subject a person to electric shocks to the extent that he is electrocuted is just as serious as shooting and killing a person with a firearm. It is just a different instrument that will be used to bring about the death of the person by electrocution. That is by no means less serious than to shoot and kill a person. The end result is the same.

All the counts are serious. Assault with the intent to do grievous bodily harm, intimidation, kidnapping and the pointing of firearms are all serious offences. Accused 2, you testified that you did not realise the seriousness of your actions. On your own version you at first attempted to shock or scare the deceased and Aaron with a prodder. I already stated that I disbelieve that the said prodder was not in a working condition, otherwise why would you have gone through the trouble of doing it in the first place? I disbelieve that you merely wanted to scare them. You were dissatisfied with not achieving your goal by using the prodder, that is why you decided to use electricity.

You connected the jumper cables to the electric plug as a power point. You approached the deceased and shocked him from behind with fatal consequences. This is no way to treat your employees. They may be farm workers but they are human beings. The treatment that was meted out to them on the day in question is indeed inhumane. As much as you employ farm workers or farm labourers and provide them with an income they too have a role to play in working for you.

Their labour also assists you as farmers to put bread on your tables. Even more, their labour assists you in becoming commercial farmers who accumulate wealth and who help you to sustain and live a good life. It is indeed a symbiotic relationship. Farm labourers have, therefore, a vital important role to play in the lives of you as farmers. They should not be ill-treated. They are not your subjects or belongings so much so that you can think that you can do as you please with them at whim.

Accused 1, you uttered words to the effect that "kom hier kaffirs, vandag is julle laaste dag". That clearly has a racial undertone. I echo the sentiments as expressed in the case of *Lourens Prinsloo v S*, case 534/21013 quoted in the written submission by the State.

> "The word kaffir is racially abusive and offensive and was used in its injurious sense. It is trite that in this country its use is not only prohibited but is actionable

as well. In our racist past it was used to hurt, humiliate, denigrate and dehumanise Africans. This obnoxious word caused sorrow and pain to the feelings and dignity of the African people of this country."

Sight should not be lost of the fact that a person has died here. A human being has been killed. Life is precious. Each and every life is precious. As a Christian and God-fearing and God obeying believer as testified to by Dr Theron, your pastor accused 2, you are supposed to know that people created in God's image are precious to God irrespective of whom that person is.

This Court must also take into consideration the interest of society in imposing a suitable sentence. Here not only the community of farmers and farm workers should be taken into account but also the broader community. Although these offences happened on a farm in a farming area, the community and the citizens as a whole have an interest in this matter and these type of offences, that is why there are non-governmental organisations or so-called NGOs, such as human rights institutions that has as its core function the protection and fostering of human rights even in farming communities. To reiterate, farm workers should not be subjected to inhumane treatment.

Much has been made about the fact that the police at Boshoek Police Station are either unwilling to assist when

crimes are reported or do not do so with the required diligence. If this is indeed true this matter should be taken up with the relevant policing authorities and reported to the relevant authorities to do something about it. But that by no means entitled you to take the law into your own hands and resort to self-help. The facts of this case are very clear. You investigated and acquired evidence through self-help. That, according to you, was not enough and you wanted to torture the deceased and Aaron to the extent to force a confession out of them, with dire consequences. Such behaviour cannot be tolerated or even more it cannot and should not be justified.

You and the public at large should understand that this case is not about the alleged theft of the diesel and the tyres, you are on trial for your actions. The case of the alleged theft of the diesel and tyres will still be investigated and possibly be prosecuted, although it cannot be ignored or overlooked that the alleged theft of the diesel and tyres sparked or prompted your actions on the day of this incident.

The legislature enacted the Criminal Law Amendment Act, Act 105 of 1997 as amended, commonly known as the Minimum Sentence Act. This act prescribes to the court what sentence the court should impose as a minimum sentence for certain types of offences. The sentence prescribed for murder where two or more persons acted in concert with one another in bringing about the death of the deceased is that of life

imprisonment, unless there are substantial and compelling circumstances present which warrants a deviation.

I find that there are indeed such circumstances present in this case. Circumstances such as the fact that you are first offenders, accused 1, your age, the fact that both of you are sickly persons, your family circumstances and the health of your wives, the alleged theft that promoted investigating and resultant actions, anger and your personal circumstances.

This as a whole taken cumulatively is indeed, in my view, substantial and compelling enough for me not to impose life imprisonment for the murder count and ten years' imprisonment for the count of robbery with aggravating circumstances.

However, due to the serious natures of these offences this Court cannot impose the suggested sentence, that you be detained until the rising of the court. That, in my view, will be to err too much on the side of leniency and may make a mockery of the judicial system, under the circumstances of this case.

This Court must carefully balance all the facts and circumstances relevant to the impositioning of a suitable sentence. No fact, factor or circumstances must be either over- or underemphasised at the expense of the other. Your moral blameworthiness are more or less the same, except that accused 2, you are the person that actually shocked the

deceased on the day of the incident.

Having due regard to all the facts and circumstances I am of the view that the following will be an appropriate sentence under the circumstances of this case:

Accused 1, on count 1, the count of murder, you are sentenced to 15 years' imprisonment.

On count 2, the count of kidnapping, you are sentenced to five years' imprisonment.

On count 3, the count of intimidation, you are sentenced to two years' imprisonment.

On count 4, which is also a count of kidnapping, you are sentenced to five years' imprisonment.

On count 5, the count of attempted murder, you are sentenced to five years' imprisonment.

On count 6, the pointing of a firearm, you are sentenced to two years' imprisonment.

On count 7, the count of kidnapping, you are sentenced to five years' imprisonment.

On count 8, the count of assault with the intent to do grievous bodily harm, you are sentenced to one year imprisonment.

On count 9, pointing of a firearm, you are sentenced to two years' imprisonment.

On count 10, the count of robbery with aggravating circumstances, you are sentenced to seven years'

imprisonment.

On count 12, the count of assault with the intent to do grievous bodily harm, you are sentenced to one year imprisonment.

The sentences on counts 2, 3, 4, 5, 6, 7, 8 and 10 are ordered to run concurrently with the sentence on count 1. Counts 3 and 12 are ordered to run consecutively with the sentence on count 1. So effectively you will serve 18 years' imprisonment.

Accused 2, on count 1, murder, you are sentenced to 20 years' imprisonment.

On count 2, kidnapping, you are sentenced to five years' imprisonment.

On count 3, intimidation, you are sentenced to two years' imprisonment.

On count 4, which is also a count of kidnapping, you are sentenced to five years' imprisonment.

On count 5, attempted murder, you are sentenced to five years' imprisonment.

On count 6, pointing of a firearm, you are sentenced to two years' imprisonment.

On count 7, kidnapping, you are sentenced to five years' imprisonment.

On count 8, the count of assault with the intent to do grievous bodily harm, you are sentenced to one year

imprisonment.

On count 9, pointing of a firearm, you are sentenced to two years' imprisonment.

On count 10, robbery with aggravating circumstances, you are sentenced to seven years' imprisonment.

The sentences on counts 2, 4, 5, 6, 7, 8 and 10 are ordered to run concurrently with the sentence on count 1. The sentences on counts 2 and 9 are ordered to run consecutively with the sentence on count 1. So effectively you will serve 24 years' imprisonment.

04/11/2015

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH WEST DIVISION,MAHIKENG)

CASE NO. CC 49/2015

Held at **Vryburg** on this the 02nd day of OCTOBER 2015 BEFORE the Honourable Mr Justice R D Hendricks.

In the matter between:

THE STATE

and

MATHYS JOHANES CLOETE 1st ACCUSED

DANIEL NICOLAAS HENDRICK CLOETE 2nd ACCUSED

HAVING read all the documents filed of record and having heard submissions by ADV. RANTSANE on behalf of the state and ADV. STRYDOM on behalf of the Accused 1 and 2.

IT IS ORDERED

1. **THAT :** Accused 1 be and is hereby sentenced in count 1 to fifteen (15) years imprisonment, count 2 to five (5) years imprisonment, count 3 to two (2) years imprisonment, count 4 to five (5) years imprisonment and count 5 to five (5) years imprisonment, count 6 to two (2) years imprisonment, count 7 to five (5) years imprisonment, count 8 to one (1) year imprisonment, count 9 to two (2) years imprisonment, count 10 to seven (7) years imprisonment and count 12 to one (1) year imprisonment. The Sentences on count 2, 3,4,5,6,7 and 8 are ordered to run concurrently with the sentence on count 1. The Sentence on

counts 9 and 12 are ordered to run concurrently with the sentence on count 1. Effectively eighteen (18) years imprisonment. 231

2. **THAT:** Accused 2 be and is hereby sentenced in count 1 to twenty (20) years imprisonment, count 2 to five (5) years imprisonment, count 3 to two (2) years imprisonment, count 4 to five (5) years imprisonment and count 5 to five (5) years imprisonment, count 6 to two (2) years imprisonment, count 7 to five (5) years imprisonment, count 8 to one (1) year imprisonment, count 9 to two (2) years imprisonment and count 10 to seven (7) years imprisonment. The Sentences on count 2,,4,5,6,7,8 and 10 are ordered to run concurrently with the sentence on count 1. The Sentence on counts 3 and 9 are ordered to run concurrently with the sentence on count 1. Effectively twenty-four (24) years imprisonment.

BY THE COURT

NORTH WEST HIGH COURT MAFIKENG
PRIVATE BAG X2010
2015 -10- 21
MMABATHO 2735
REPUBLIC OF SOUTH AFRICA

REGISTRAR OF HIGH COURT
NORTH WEST HIGH COURT
MAFIKENG
REGISTRAR