



**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION – MAKHANDA]**

CASE NO.: CC27/2024

In the matter between:-

THE STATE

and

NOMSA CAROLINE SEYISI

ACCUSED

JUDGMENT ON CONVICTION

NORMAN J:

[1] The State arraigned the accused, Ms Seyisi, on three (3) charges, one of murder, two of attempted murder and three of robbery with aggravating circumstances as defined in section 1(1)(b) of the Criminal Procedure Act 51 of 1977 (the CPA). Mr Engelbrecht represented the State and Mr Stamper represented the accused.

[2] The allegations in **Count 1: Murder:** are that on or about 25 August 2023 and at or near Mayfield Farm, Makhanda in the district of Sarah Baartman, the accused acting in furtherance of common purpose or conspiracy, unlawfully and intentionally killed Mr Thembinkosi Wambi (Thembinkosi), a 41-year-old male person. In **Count 2: Attempted Murder:** That on the same day, same place, the accused acting in the furtherance of common purpose or conspiracy, unlawfully and intentionally attempted to kill Ms Zukiswa Frans (Zukiswa), an adult female person by shooting her with a firearm. **Count 3: Robbery** that on

the same date and place the accused acting in the furtherance of a common purpose or conspiracy took by means of force and violence from the said Thembinkosi, a Stylo cellular phone, his property or in his lawful possession.

[3] The Director of Public Prosecutions (DPP) mentioned that there are aggravating circumstances as defined in section 1(1)(b) of the CPA that were present in that the accused wielded firearms and grievous bodily harm was inflicted. In the event of a conviction the DPP indicated that in respect of count 1, he would rely on the provisions of section 51(1) read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (the CLAA) which prescribes a discretionary minimum sentence of life imprisonment in that the murder was committed by a group of persons acting in the execution of or furtherance of a common purpose and the murder was premeditated. In respect of count 3, he would also rely on the provisions of section 51(2)(a) read with Part 2 of Schedule 2 of the CLAA prescribing a discretionary minimum sentence of fifteen (15) years imprisonment.

[4] The accused pleaded not guilty in respect of all the charges. She reserved all of her rights and elected not to give any explanation. There were, however, formal admissions made by the accused in terms of section 220 of the CPA. Those are:

- (a) That the person upon whom the medical post-mortem related was indeed the deceased Mr Thembinkosi Wambi.
- (b) The photographs and the recovery of ballistic evidence was also admitted that those three fired cartridge case and 1 fired bullet from the crime scene at Mayfield farm were correctly sealed and forwarded for testing to the ballistic section of the forensic science laboratory in Port Elizabeth.
- (c) It was also admitted that the findings of W/O Yolandi Schoeman of the ballistic section of the forensic science laboratory, Port Elizabeth, a qualified ballistic expert correctly determined that 2 of the 3 fired cartridge cases were 9mm calibre cartridge cases which were fired from the same firearm. She also correctly determined that the third fired cartridge case was a 7.65mm calibre cartridge case which was not fired from the same firearm that fired the two 9mm calibre cartridge cases.
- (d) She also admitted that the photographs contained in the photo album depict the crime scene at Mayfield Farm and that the W/O Kondile compiled the photo album. The photos and the correctness thereof is admitted.

- (e) The admissions were confirmed by the accused and were accordingly admitted into evidence.

The State's case

Sergeant Sauli

[5] The State led the evidence of four witnesses. The first witness was Sgt Ludumo Sauli, a member of the South African Police Services stationed at the Joza police station. He works at the Charge Office: Community Service Centre. He has been a policeman for 16 years. On 25 August 2023 he was on duty. He received a call from the charge office at about 20h47 to go to house no. 12872, Extension 10. It was reported to him that Zukiswa had called reporting to the police that she and her boyfriend, Thembinkosi were shot at, at the Mayfield farm. He did not know who Zukiswa was. Zukiswa did not tell them whether her boyfriend was alive or not at the time. He went to the house together with Constables Makebeni and Zwane. They found Zukiswa present at the house and she took them to the Mayfield farm. She was able to direct the police to the farm with ease. Zukiswa was also injured. She was complaining about her arm saying she had been shot on her hand. They found Thembinkosi still lying on the ground at the Mayfield farm. He was lying facedown, bleeding from the head. He was alive and breathing but he could not speak. Zukiswa was scared and trembling. She was not intoxicated at all and he did not smell any alcohol on her. There were no streetlights in that area where they found Thembinkosi. Zukiswa reported to them what happened at the scene.

[6] They searched around the scene and found three fired cartridges together with one projectile. The members of the LCRC were called to the scene and they uplifted those cartridges. Both Zukiswa and Thembinkosi were taken by ambulance to the Settler's hospital. Sgt. Sauli remained on the scene. When he went to the hospital to enquire about their medical condition, he was informed that Thembinkosi had passed away. Zukiswa could still speak but she was in bed and receiving medical attention.

[7] Under cross – examination he confirmed that he took down a statement from Zukiswa at the same time as she was giving details about the incident. He did not finish writing it as he had to rush to hospital to assess the condition of the victims. He completed it at the police station and also submitted the SAP13. He was shown his statement where he had stated that upon arrival he found Thembinkosi lying on his back facing the sky. He conceded that Thembinkosi was facing upwards. He was asked about the state of sobriety of Zukiswa that

evening. He was adamant that according to his observations, Zukiswa was not intoxicated and he did not smell alcohol on her.

[8] The accused's version was put to this witness that according to her when she went to fetch Zukiswa she was under the influence of alcohol together with her boyfriend. The witness stated that he did not observe that. The evidence of this witness was not challenged except for the issue that relates to Zukiswa's state of sobriety.

Zukiswa's evidence

[9] The second witness was Zukiswa Frans. She is related to the accused, they are cousins. She went up to Grade 10 at school. She resided at the accused's home because the accused's father, is her uncle and he paid for her schooling. They were a happy family. Whenever the accused had clothes that did not fit her those would be passed on to Zukiswa. She stayed at her uncle's place from 1994 until 1999. Thereafter she went to live with her parents. She never worked. During the relevant period she was residing with her boyfriend Thembinkosi, at his parental home, together with their 5 year old child, Thembinkosi's aunt and her boyfriend.

[10] On the day in question she was in bed having taken her medication for her chronic illness around 19h00. Thembinkosi, his aunt, her boyfriend and the child were watching TV. A program "Scandal" was about to play at 19h30. They heard the accused shouting Zukiswa's name from the gate. Thembinkosi went to open up for her because the gate was already locked. They entered the house. The accused asked Thembinkosi and her to accompany her to a traditional healer, Mr Blackcat.

[11] Zukiswa resisted and enquired why she wanted to be accompanied by her because she was not well as she had shortness of breath and was sickly. She also asked why she needed to be accompanied to Black Cat because she had been to see him on her own. She asked them to help her. She enquired from her as to how she got to them from George Street without a vehicle. The accused told her that she came with friends. She said they would return very quickly. She was wearing pajamas as she was in bed already. She put on a jacket and boots because it was cold. After they left the house she saw a red car at the corner of the second street from where they were. The car was moving towards them. It stopped next to them. The accused said they must get into the vehicle as it was her friend's vehicle.

[12] There were two male persons inside the vehicle. It was a red vehicle which looked like a Polo or Kia but she could not make out the model of the vehicle. The driver and the other person were occupying the front seats. Zukiswa sat in the middle, with the accused sitting next to her and Thembinkosi was sitting on the other side.

[13] It was her first time to see the motor vehicle. She was also seeing the people in the vehicle for the first time. When she got into the car she greeted and introduced herself as Zukiswa and introduced Thembinkosi. Both men introduced themselves, the passenger, as Siya and the driver as Ndumiso. The car drove to Mayfield farm. She did not know the house of the traditional healer but only knew that he was staying at Nkanini Location. No one was giving directions to the driver as the vehicle was proceeding to Mayfield farm. When she boarded the car she observed that both men had firearms on their waists.

[14] As the vehicle was proceeding the accused asked the driver to stop the vehicle because she wanted to urinate. The driver stopped the vehicle. The accused said to Zukiswa she must also get out of the vehicle. Zukiswa said she did not want to urinate. The accused pulled her out of the vehicle. The passenger, Siya, also got out of the vehicle. He opened the back door and pulled Thembinkosi out of the vehicle, aggressively. Thembinkosi complied. They were instructed by Siya and Ndumiso to lie down on the gravel road on Mayfield farm. They were not too far apart from each other as they were lying down. The accused was present. They were ordered to place their hands at the back of their heads. They were then shot at. She could not see who shot at them because they were facing down. She could not remember how many shots were fired but it was more than once. She struggled to breathe. She was struck on her left hand and that hand is no longer functioning. There were bullets lodged in it and they had to be removed in hospital. She also sustained injuries on the side of her head where a bullet had grazed her. The two males directed the accused to step on their backs and feel if they were still alive. The accused did so. Zukiswa could not tell whether she started with Thembinkosi or with her, as they were lying face down. When the accused stepped on her she did not make any movement. After that the accused and the two males boarded the vehicle, drove off and left them there. She crawled and went to a nearby house at extension 10.

[15] She received help from that house because the police were called. She corroborated the evidence of Sgt. Sauli about what she told the police on their arrival at that house, and the fact that she took them to the crime scene. She also confirmed that an ambulance was summoned and they were taken to hospital. Police also followed the ambulance to hospital. She had a

swelling on her head and had to be operated on. She was transferred to Livingstone Hospital in Port Elizabeth that same evening. Thembinkosi died at Settlers Hospital.

[16] She and Thembinkosi had a Stylo cellphone that was fitted with two sim cards, one for Vodacom and the other one for MTN. The phone was utilized by both of them. When they left the house Thembinkosi was in possession of the phone. These two males took their cellphone from them when they were made to lie down. Thembinkosi had it on his overall jacket on the left hand side upper pocket. It was taken from him by one of the males either Siya or Ndumiso. Before this phone was taken from them they had received a call from the accused earlier in the day around 17h00. She called them and told them that there were people from social development, they must go and wait for food parcels. They did not go.

[17] Some time, prior to the incident, the accused came to her home. She was sick at the time. She came in an ambulance and asked for her identity document. She was in the company of one Mr Buntu Manelisi (Buntu). She gave it to her, it was a temporary ID and she never got it back from her. She stated that she did not know Buntu. She was asked whether she knew a person by the name of Buntu Melani. Her response was that the person she knows is Buntu Manelisi, who also works with the accused at Guardmed. She denied that she is related to Buntu whatsoever. She stated that Buntu got her ID or ID number from the accused since she is the one who took it from her. She reiterated that on the day when accused came to fetch her ID she was in the company of Buntu. They were travelling together in the ambulance when they arrived at her home in extension 6. The accused entered the house but Buntu remained in the ambulance.

[18] The witness was cross-examined at length over a period of at least two days. She was cross-examined about a shooting incident that happened at her house, prior to the Mayfield Farm shooting. She stated that there was a lady whose name was Unathi. She came to Zukiswa's house one evening. She was drunk and asked to spend the night there. Zukiswa let Unathi sleep on the couch. Zukiswa's house was just a one - roomed house. There was a bed in the same room where Zukiswa and Thembinkosi slept. They were awoken by gunshots. Some unknown people came into the house and shot Unathi. She died instantly. Unathi was not related to her. She did not know what became of that case. However, she did make a statement to the police. Thembinkosi also made a statement to the police. It was put to her that the accused would testify that when there was that shooting at her house, Zukiswa phoned the accused and

told her that Unathi had been shot. The accused told her to go to the police station and report the incident. The witness denied that she ever called the accused about that incident.

[19] Zukiswa was questioned about her state of sobriety on the day of the Mayfield farm shooting. She was adamant that she did not consume any alcohol, only Thembinkosi did. It was also put to her that Buntu was her neighbour. She disputed that and stated that Buntu is not her neighbour because he lives on the other side of extension 6, they are separated by a street. It was suggested to her that there were times that she would visit Buntu. She disputed this and stated that she never even had a conversation with Buntu, she would only see him at a shop owned by foreign nationals. It was put to her that if Buntu took out insurance on her life, the accused had nothing to do with it and had no knowledge of that. The witness disputed that stating that the accused and Buntu were always together in the ambulance and that Buntu got her ID from the accused.

[20] It was put to her that the accused would deny that this witness gave her the ID book or card but will state that she simply gave her an ID number. The witness was adamant that she gave the accused her temporal ID document. About the traditional healer Blackcat, it was put to her that it was her, Zukiswa, who gave the accused's mobile number to BlackCat. One day the accused received a call from BlackCat who told her that he got her number from Zukiswa. The accused told him that she would contact him when she needed his services. Later when Zukiswa went to the accused's home she confirmed that she gave her number to Black Cat. This witness disputed that version and stated that she did not even know Black Cat, instead it is the accused that had told her that she had been to see the traditional healer, Black Cat.

[21] Her evidence was challenged mainly on two issues that were not mentioned in her first statement, namely, the fact that the accused pulled her out of the vehicle and that she stepped on their backs to feel whether they were alive or not. She explained that the first statement was taken when she was in hospital on the day of the incident. She had told the police everything. She was in distress. The investigator came back the next day and she told the investigator what happened. It was put to her that the things that she mentioned in the subsequent statements were a fabrication and they never happened. The witness disputed that contention and stated that everything that she told the police was the truth. She could not recall how many statements she made but accepted that those were her statements.

Ms Cethu from Sanlam

[22] The third witness for the State was Ms Nandi Thandiwe Cetu (Cetu). She is employed by Sanlam at the Makhanda branch as a Sales Consultant. She sells insurance policies including life policies. She knows the accused person and had known her since childhood. They live one street away from one another. She was aware that the accused was employed as a paramedic. The accused told her that she was a volunteer at Guardmed. She asked the accused to refer some of her colleagues to her offices. She essentially marketed the business to her. During the month of July 2023 she met the accused during the arts festival where they had parked the Guardmed ambulance. She went to the accused and again asked for referrals. The accused undertook to contact her later.

[23] On 21 July 2023, the accused phoned her and sent her a number of her colleague via WhatsApp. That colleague was Buntu Melani. The accused gave her Buntu Melani number. Buntu is not somebody that she knew personally. She then phoned Buntu, introduced herself and informed him that she got his number from the accused. Buntu indicated that he needed to get a policy for his two children. She then sent him a document with benefits to choose from. She then asked Buntu to send her a copy of his ID and bank statements for a period of three months. Buntu sent the required documents to her. She uploaded the documents on the application electronically.

[24] Because they work with applications electronically she informed Buntu that she would get an OTP which will serve as his signature. Buntu took out a funeral policy for his two children. Those policies for the children were effective from 21 July 2023, being the date of signature.

[25] On 24 July 2023 Buntu sent her a date of birth and the names of Zukiswa Frans. He indicated that Zukiswa was his cousin sister. He wanted to know how much he would pay for her funeral policy. When she received that information she was at a funeral and indicated to him that she would send the information on Monday.

[26] On Monday, 26 July 2023, she sent Buntu a document with benefits to choose from. Buntu chose the one for R40 000 and the monthly payment was R349. She processed that application because she already had Buntu's ID document and bank statements, she simply put those documents on the application. An OTP was sent to him and he signed using it. He also signed for a debit check. There was a problem on the first occasion when the policy had to be approved. She then requested Buntu to sign again and that became effective on 27 July 2023. The first premium was debited on 1st September 2023. The cover was effective on the date of

signature being 24 July 2023 which was the date of acceptance. Buntu had chosen a funeral policy, where the insured died a natural death, the policy would pay out R40 000. If it was an unnatural death where someone was murdered or died as a result of an accident then the person would receive R120 000 calculated as follows: R40 000x 3.

[27] During September 2023 Buntu called her saying that he wanted to cancel the policy because he was not able to afford it. She then referred him to head office for cancellation. He wanted to cancel the policy of Zukiswa Frans. She did not receive anything further from him and does not know what happened to the policy. She stated that if someone wanted to insure somebody, all that a person needs is simply a name and a date of birth of the person. They also do not require the insured person's consent. They do not verify the names, surnames, date of birth and even the relationship with the person to be insured. Under cross-examination she stated that Buntu was the only person that was referred to her by the accused. She stated that if a person says he is insuring a cousin, there are no questions asked. She confirmed that when the accused referred Buntu to her she did not give her any details, other than his number.

Raymond Clayton Pieters

[28] The next witness was Raymond Clayton Pieters. He is employed by Guardmed and performs paramedic services. She knows the accused as a colleague. He also knows Buntu Melani also a colleague. He was their Supervisor and his functions entailed plotting the roster for the team. He stated that for a number of months Nomsa worked with Melani. They worked together as partners. They would be placed together in the same ambulance. On 25 and 26 August 2023 there were various sports events that had to be guarded by Guardmed. On Friday and Saturday, 25 and 26 August 2023, respectively, the accused was on duty. Ordinarily, they would go to the office, check the vehicle, collect staff and take everything that they would need for that day. On the 26th August 2023 the accused was deployed at St Andrews upper field for a soccer event. The event started at 09h00 and he picked her up before 09h00 from home and dropped her off at St. Andrews. Her day ended at 5pm and he took her back home. She reported nothing to him. He observed nothing out of the ordinary. Under cross-examination he stated that even if the accused was distressed she would not display that visibly to him.

Thereafter the State closed its case.

Defence case

[29] The accused testified. She resides at Makhanda. Before the arrest she was employed at Guardmed. On 25 August 2023 she was at work, working 7am to 7pm. She knocked off work. On arrival at home her phone rang. When she answered the person said he is Caster from Port Elizabeth. At first, she could not recall who he was but the person explained to her and eventually she recalled who Caster was, a friend of her late cousin, Lithemba Seyisi. Caster indicated that he wanted to see her and she told him she was at home. He told her they were entering Grahamstown and that they would stopby. He also told her that he was with the gents or the guys. Upon arrival, he rang the bell. She looked through the blinds and saw a Polo sedan which was metallic blue. She saw a person that was looking through the car window. That person alighted from the vehicle. She asked the person to come closer because she could not see him properly. She then recognized him. The person told her that they were on their way to East London and that they were “wet”. They wanted somebody to assist them to wash themselves. She indicated that that was *tsotsi taal*. She understood him to mean that they had done some things or they had things in their possession and could not leave Grahamstown with those things. They told her that they heard there is somebody called Mr Black, a healer. She told them that she does not know Mr Black but knows uMama uNondithini, a traditional healer. They asked her to take them to Mama uNondithini’s house.

[30] The person she was talking to the whole time was Caster. When she entered the vehicle she found that there was another person in the car. She also identified the person as one of Lithemba’s friends, named SVIG. She stated that on some occasions when these people visited Lithemba at her home, Zukiswa would be present. They left and went towards the direction of Extension 7. On their way they enquired from her about the whereabouts of her cousin who was talkative and used to talk about traditional healers. She understood them to be referring to Zukiswa. Before they reached the turnoff, next to the indoor sports centre, Caster said fuel was running out. They asked whether they were at extension 7 and she directed them where to go. They asked where Nkanini was because they heard that Black was staying there. She told them to turn left. They wanted to go to Black because their petrol was running out. They asked whether Zukiswa knows where Black is as she is also resident at Nkanini. They then drove to Nkanini, to Zukiswa’s place. She stated that Zukiswa knew Black because at some point Zukiswa had given her number to Black. One day her phone rang and it was this Black who told her that he had been referred to her by Zukiswa. He indicated that if ever she needed a person for healing she must contact him. Her response was that she would revert to

him. And then one day Zukiswa arrived at their home and confirmed that she had actually given her number to Black.

[31] They went to Zukiswa's place but did not find her. A neighbour directed them to Zukiswa's boyfriend house because she did not know it. Upon arrival at Thembinkosi's home, she shouted out for Zukiswa and Thembinkosi responded. He came out of the door and he opened the gate for her. They both went inside the house. She found that there was a brazier that had been ignited. It was her first time to go there. She told Thembinkosi that there were some guys who needed to be shown where Black resided. At that point Zukiswa was coming out of the bedroom. She told Thembinkosi that those people were SVIJ and Caster. Zukiswa agreed that they should accompany them and she put on a jacket and boots and they left. It was put to her that Zukiswa had indicated that she simply said she had friends that wanted to be shown the place. Her response was that she had said they were friends of Lithemba and not her friends. When they came out of the house the car was not there because the street is very narrow and one would have to go around and turn in another street. They went out and boarded the vehicle.

[32] She sat behind the driver, Zukiswa in the middle and Thembinkosi on the left hand side. They greeted the occupants. Zukiswa and Thembinkosi were smelling of alcohol. After getting into the car pleasantries were exchanged. SVIG enquired from Zukiswa whether Zukiswa still remembered him. Zukiswa did not remember him. After he explained to her she appeared to remember who he was. The car drove and Zukiswa was busy chatting and they were laughing. The next thing was that SVIG's phone rang. He said before they proceeded to Black he had to fetch petrol money from extension 10. They were about to pass extension 10 and she felt Zukiswa tapping her slightly, she also did the same. Caster took the left turn and SVIG asked him if he could hear there was some noise coming from the wheels. Caster enquired whether SVIG wanted him to stop. He agreed and the driver stopped the vehicle.

[33] The accused asked Caster to open the door for her as she could not open it from the inside. She wanted to urinate. She got out and urinated on the right hand side next to the right wheel of the driver. The driver moved away. SVIG got out. She urinated and heard a gunshot. After urinating Caster was standing next to her and pointing a firearm at her. He demanded her phone. She heard shots again and looked down. She heard a sound of a firearm and it was being cocked near her. She didn't know whether the person was about to shoot her or not. The person closed the door and they both got in. The person said these rubbish will stop being witnesses

in cases they had nothing to do with. He threatened her that if she spoke about what happened she must know that they will come after her and her family. They dropped her off next to Shoprite. She was very scared and was afraid to go to the police. She did not even look back after alighting from the vehicle.

[34] When she got home she could not sleep that night. The following morning she woke up and went to work. She went to look for Melisa to tell her what had happened but found that Melissa had already left for work. She then prepared to go to work and left. She went to the field where she was supposed to be stationed for the day. She did not mention the incident to anyone at work. After work she went home and slept. The following day, on Sunday, she woke up and went to Thabisa and told her what had happened. Thabisa was in shock and they sat there thinking about going to the police. They eventually decided to go on Monday.

[35] Whilst on their way heading to the direction of the police station, Thabisa received a call from Nelisa who said the police were looking for the accused. The policeman was Mr Daweti. Thabisa told her that they were on their way to the police station. They proceeded to the police station and boarded a taxi and alighted next to the police station. After alighting from the taxi, the same sedan vehicle approached. The car windows were opened and the occupants were looking at them. They went inside the police station. She asked for Mr Daweti. They waited for about an hour for him. Upon his arrival she asked Mr Daweti as to why she was being arrested. They said she was in the company of the people who committed a murder. She told them that she did not kill anybody. After she got into the cells she decided to tell the police about the incident and she called for Mr Toto. She wanted to narrate to him what had happened. After she had narrated the story, Mr Toto said that is exactly what Zukiswa had told them. Mr Toto did not write down anything that she said.

[36] She confirmed that Buntu Melani and herself were colleagues. They were not friends. They worked as partners from time to time. She stated that one day she was in the company of Buntu and were passing by Zukiswa's home going to Buntu's home. Zukiswa was coming out of the yard. She went to them. They were in the ambulance. The accused told Zukiswa that she looked sick. Zukiswa confirmed that and said to the accused she needed to get insurance for her because if she were to die she will be buried by her. She did not give her an ID document but her ID number. She also wanted to know how Frans was spelt from her. She is the person who accompanied Zukiswa to Home Affairs in order for her to obtain a temporal ID document. She paid for it but she did not see it. She did not know that Buntu had insured Zukiswa. She

did not know whether she gave Buntu Zukiswa's ID number. She confirmed that she gave Buntu's number to Ms Cetu because Buntu wanted insurance in relation to Lusanda.

[37] She testified that when somebody was shot at Zukiswa's home, Zukiswa had called her at night at about 10pm or 11pm in the evening. There was loadshedding at the time. She reported that they were being shot at and Unathi had been shot. She told her to contact the police. That was the end of the matter. She had nothing to do with social development.

[38] She confirmed that Zukiswa and Thembinkosi were made to lie next to one another. She denied that she pulled Zukiswa out of the car. She did not know how Thembinkosi was pulled out because according to her she had already alighted from the vehicle as she wanted to urinate. She left Zukiswa and everyone else inside the vehicle. She did not know whether anyone of them was taken around the vehicle. She stated that if that had happened she would have seen it because she was urinating and her eyes were opened. She testified that Thembinkosi and Zukiswa were lying down on the passenger side of the motor vehicle. She disputed that Zukiswa asked a questions when she wanted them to accompany her to go to Blackcat. She stated that Zukiswa would not have asked her about a car because she knew that she owns a Jetta car.

[39] Under cross-examination she confirmed that Zukiswa and Thembinkosi were ordered to lie down and she saw them lying down. It was put to her that her counsel had referred to the two males as Caster and VG and had put those names to the state witnesses in cross-examination. The accused stated that the person was SVIG. When asked why she did not correct her counsel when he was putting on numerous occasions to the witnesses that it was VG, her response was that she did not pick that up because there was a lot of discussion. She confirmed that Zukiswa and her were like sisters. She confirmed that they grew up in the same household. She further confirmed that there has never been any bad blood between them.

[40] She denied that she pulled Zukiswa out of the car or put her foot on top of their backs. She stated that as a paramedic she would not put her foot on a person's back to feel whether a person is alive or not. She disputed that she was the one who caused the vehicle to stop by saying she wanted to urinate, instead it was SVIG who said he heard some noise coming from one of the tyres. She denied that she was part of any murder that had occurred on that day or even an attempt to kill Zukiswa.

[41] She agreed that the general import of the evidence of Zukiswa was to incriminate her in a conspiracy. However, she stated that she did not know why would Zukiswa turn against

her because they never had any fight at all. She stated that Caster and SVIG visited her cousin multiple times but she could not count how many times. Lithemba, that is her cousin, never worked, she did not know what things they were being done by them. She did not know the surnames of SVIG and Caster. She only knew them by those names. She said those people would visit from time to time and Zukiswa would be there and she was definitely acquainted to them. She was asked why would Zukiswa lie about knowing these people and she stated that she did not know why she would lie about that. It was put to her that on the probabilities her version that Zukiswa knew the two males must be false. Her response was that “I say they were acquaintances.” When it was put to her that in the vehicle these people introduced themselves to Zukiswa as “Ndumiso” and “Siya” in her presence, inside the car, her response was that she did not know, she only knew them as SVIG and Caster. She confirmed that introductions did take place in the car but she did not know the names Ndumiso and Siya.

[42] She stated that SVIG turned and said “do you recall me Zukiswa”. Initially Zukiswa did not recognize him but she could recollect as SVIG explained to her who he was. She then recollected that the person’s name was SVIG. The same thing happened with Caster, Zukiswa also recalled him as Caster. According to her these people never used false names and she did not know why Zukiswa used false names. It was put to her that she was using false names in order to protect the two people that had shot Thembinkosi and Zukiswa. She disputed that because she said she had nothing to gain by protecting them.

[43] She stated that she was never asked by the police about the case so she kept quiet. The only questions that were asked of her by Mr Britz, the Investigating Officer, were when were they travelling to Port Elizabeth, where she worked, her cell number and her children. She disputed that the car that they boarded was a red car, she insisted that it was blue. She stated that when people said they needed to be washed her understanding was that maybe they had stolen some clothes somewhere. She conceded that she did think that they had committed a crime when they said they were wet. She did not ask them why they needed to be cleansed. She went along with them because they needed assistance. She did not know where Black stayed but agreed to assist them. She denied that she had made any plans with them. Initially she said she knew of no relations between Buntu and Zukiswa but later on she said she never heard Buntu saying he was related to Zukiswa and *visa versa*. She only knew that they were neighbours. Later on, she said that as Xhosa people they have four clan names. She then stated that maybe Buntu is related to Zukiswa by clan names from Zukiswa’s maternal side. She stated

that according to the clan name that she shares with Zukiswa, they are not related but she cannot agree whether Buntu and Zukiswa are not related.

[44] She stated that there was never a discussion between her and Buntu about Zukiswa's insurance. She disputed that she gave Buntu Zukiswa's ID. She heard about Buntu having taken a life insurance policy for Zukiswa in court during this trial. She didn't know whether Zukiswa and Buntu were related. She did not know why the two men would come all the way to Makhanda to look for traditional healers instead of looking for them in Gqeberha.

[45] She stated that she had told Zukiswa and Thembinkosi that Lithemba's friends wanted to know where Black stayed. She made it clear to them that it was not her but the two friends who were looking for the traditional healer. She never mentioned to Zukiswa that the person was 'Blackcat', she simply said the person was Black. She disputed that she had told Zukiswa that she is the one that was looking for Black. She did not observe that Zukiswa was sick that night as she was wearing jeans and a polo neck top. She disputed that Zukiswa had a shortness of breath that evening and she never mentioned that to her. She disputed that she pleaded with them to accompany her.

[46] She agreed that she is the one that asked the two of them to accompany her. She stated that no one was giving directions because as soon as they got into a vehicle SVIG's phone rang and he requested that they proceed to extension 10. No one directed the driver to extension 10. SVIG simply said here is extension 10 but did not specifically direct the driver. No one asked any questions. She did not know why Zukiswa touched her hand but she touched her because she could see that they were now going past extension 10 and was wondering as to where they were going. She was not suspicious but she was simply wondering.

[47] She stated that the vehicle did not stop because she wanted to urinate, it was because SVIG had said there was something on the wheel. She got out and requested to pee only after the car had stopped and when it was at a standstill. She did not hear or see any scuffle when Thembinkosi was being pulled out of the car by SVIG. She did not see Zukiswa exiting from the vehicle. She denied that she had pulled Zukiswa out of the vehicle.

[48] When asked whether she saw the firearms, she said she saw SVIG on the other side as he was pointing a firearm at Zukiswa and Thembinkosi. He was visible to her. Caster had ordered her to give him her cellphone and she heard a cocking of a firearm. She did not see where it came from because she was looking down. She was ordered to get into the vehicle by Caster and she complied. More shots were fired while she was entering the vehicle. She thought

it was SVIG that had fired more shots because Caster was next to her. She did not see the firearms earlier she only saw them as the shots were being fired. She did not see where Caster got his firearm. She only saw it when he was standing next to her. She stated that she did not see any firearms on both of them because she was seating behind the driver at the back. She never looked at the bodies Caster and SVIG but she focused on their faces. She did not see any firearms on them. She did not know what happened outside when she was ordered to board the vehicle. Her head was facing downward the whole time inside the vehicle. She saw people lying down and those that were lying down were being shot at.

[49] She stated that it was SVIG who said that these rubbish would stop being witnesses in cases they have no knowledge of. She did not know what he meant by that. She did not know whether Zukiswa or Thembinkosi were witnesses in relation to the case that happened at their home. She stated later on that it dawned on her that the whole shooting had something to do with the killing of Unathi and that occurred to her after SVIG had uttered those words. She believed that the two assailants would eliminate anyone who was a witness as they had threatened her and her family.

[50] She understood that they were not going to live behind any witnesses. She agreed that there were no intentions to get to Blackcat that night. She realized later on that she was used by the two assailants and had used a ploy to get her into a position where they would finish off the two witnesses, Thembinkosi and Zukiswa. When asked a question that there was no real intention to meet up with Blackcat? Her answer was that she did not know whether there was really no genuine intention of doing so or that this was the mission of the assailants. After the shooting she stated that they did not look for Black. She agreed that Black was a ploy to get to the deceased and Zukiswa. She did not know why the assailants left her alive. She denied that she was part of the commission of the offence from the onset. They dropped her off at Shoprite because she resides behind Shoprite. She did not go to the police station although Shoprite was next to the police station because she was afraid. She did not tell anyone about the incident until Sunday. She did not think of waking up her sister who was sleeping and did not think of phoning the police anonymously to report the crime.

[51] On Sunday she still feared the assailants but she decided that she was going to go to the police. She could not go and check on Zukiswa and Thembinkosi because she feared that the assailants could spot her vehicle. She did not think of sending a colleague/paramedic to go and check on them. When she was going to the police station she observed the driver, being Caster

but did not recognize the other two occupants because she was looking at the driver. She thought seeing the Polo vehicle at that point was by chance. She did not tell Mr Daweti that she had just seen the motor vehicle but she spoke to Mr Toto. She never told Mr Toto that she had just seen the vehicle with Caster in it because she was afraid. She stated that she did not tell the police about the two assailants because she feared that they might harm her family. She disputed that the plan was to get two assassins from Gqeberha who would shoot and kill Zukiswa so that the money could be split between her and Buntu. She denied that she was a central part to the plan. She denied that she took Zukiswa to Mayfield farm for her to be shot at. It was put to her that she kept quiet for two days, not because she was scared but she wanted to wait until the bodies were found so as to set their plan in motion.

[52] When they discovered that Zukiswa did not die that became the reason Buntu wanted to cancel the policy. She denied that. It was put to her that she was the connection between Zukiswa and Buntu. She was also the only link between the two males and Zukiswa. When it was put to her that without her the two males would not have found Zukiswa, her response was that she would not know whether they would have other plans. She denied that she was part of the common purpose with those two males to commit a crime. She stated that it was the first time for her to see someone being shot at in her presence. She got to know Buntu in 2022. She did not know any connection between Buntu and Zukiswa. Inside the vehicle it was dark but streetlights were on and they could see each other. She could not see any firearms on the assailants because their waists were behind the seats. There was sufficient light inside the car. When she boarded a taxi to go to the police she had managed to overcome her fear.

Constable Nosiphiwe Makebeni

[53] The accused called a defence witness Ms Nosiphiwe Makebeni. She is a Constable placed at Joza Police Station. She is one of the police officers that attended to the scene of crime on 25 August 2023 at the Mayfield Farm. She testified that they were three in total and she was the first one to arrive. She took the statement from Zukiswa at the hospital. They were communicating in IsiXhosa and she wrote the statement in English. She confirmed that on the statement that Zukiswa made, she did not mention that the accused pulled her out of the car. She stated that if Zukiswa had mentioned that the accused pulled her from the car, she would have written that down. Zukiswa only mentioned her boyfriend as the person who was pulled out of the vehicle. She did mention that it was the accused who went to them and asked them

to accompany her to a traditional healer. She also mentioned that they were cousins. She could not take a statement at the scene because she had been injured and she wanted to get medical help for her first.

[54] Under cross-examination she stated that when she met Zukiswa at the house where she was calling from for help, Zukiswa was scared saying that the people might still be around. Zukiswa did accompany them to the scene. She also stated that the events left her traumatized.

Mr Mcebisi Mbunge

[55] The next defence witness was Mr Mcebisi Nelson Mbunge. He stays at No. 86 Nkanini Thembinkosi's paternal home. He testified that his daughter was shot in 2022 in that house. She was just sitting, having come back from church. Her name was Anovuyo Wambi. She was also killed at Thembinkosi's home. He stated that the shooting that happened at Zukiswa's house was the first one and was followed by the shooting of his daughter and then Thembinkosi was the third one to be shot dead. No case was opened for the killing of his daughter. The assailants are not known. At the time his daughter was shot at Zukiswa and Thembinkosi were also staying in that house. He corroborated the evidence of Zukiswa that when Nomsa arrived she called out for her and Thembinkosi responded and opened up for her. He stated that Nomsa asked Zukiswa and Thembinkosi to accompany her to go to Mr Mbekwa. It appears that Mr Mbekwa is the same person as Blackcat. He disputed that Zukiswa questioned Nomsa for requesting her to accompany her. The witness stated that Zukiswa simply agreed and accompanied her. Nomsa told them that they were going to return quickly. He stated that when Nomsa arrived Zukiswa was in the bedroom. She dressed herself in the room and came out.

[56] Under cross-examination he disputed that Zukiswa was sick at the time. In fact, he stated that even to date, that is on the day he was testifying, Zukiswa was not sickly. She was very well. When asked about the fact that she had been to hospital, his response was that Zukiswa no longer stays with them at their home. He confirmed under cross-examination that Zukiswa was already lying in bed when the accused arrived. He stated that the person who was looking for Blackcat was the accused and that she, herself, wanted to be accompanied to Blackcat. They went to report to Oom Ray that Thembinkosi and Zukiswa had not returned home. Later they heard from the police about the incident. He made a statement to the police. The police questioned as to whether they knew who the person was who had gone to fetch Thembinkosi and Zukiswa and they pointed out the accused. His statement was read out where

he had stated that he asked the accused how she came to the house and she said she came in a car. His response was that he did not ask her that because he does not even know the accused. He disputed the things written on his statement such as “I told her the street is not wet why she did she not park in front of the gate”. His response was that “I did not ask, I did not even know Nomsa”. He disputed that the statement that was being read out was his statement. He, however identified and acknowledged the signature thereon as his signature. He said he did not know the accused. He stated that Thembinkosi was going to be a witness in Anovuyo’s case but that case did not proceed. He was never even called as a witness in any of the cases. Nobody knew who the killers were in Anovuyo’s case. The defense closed its case.

State’s legal submissions

[57] In argument, Mr Engelbrecht submitted that the question is whether the accused person was a mere innocent spectator or bystander or whether she was actively involved as part and parcel of killing of Thembinkosi and in the attempt to kill Ms Frans. He submitted that Ms Frans gave a version that had no inherent improbabilities. It is supported by a number of witnesses. He submitted that although she was taken to task about certain omissions in her statements, she never deviated from her evidence. In this regard, he dealt with the deviations by witnesses. He referred to the following cases **S v Govender**¹, **S v Bruiners**² and **S v Mafaladiso en Andere**³. He submitted that the importance of these decisions is that not every deviation from a witness police statement has a detrimental effect on the witness’s evidence. Many things that the court must consider is that, first of all, these statements are never taken in perfect situations. The timing of the first statement should be considered considering the situation that Zukiswa was in at the time. She had just experienced an ordeal. She was in hospital and she was in pain when it was taken.

[58] He submitted that the court cannot use a police statement to supplement the person’s evidence in court. The issues that were omitted in the first statement were dealt with in the second one and they are simply omissions not contradictions. He asked the court to consider those holistically and the import of those against all the other evidence. He submitted that the omissions in Zukiswa’s evidence and the corroboration of her evidence will mean that those

¹ S v Govender 2006 (1) SACR 322 (EC),

² S v Bruiners 1998 (2) SACR 432.

³ S v Mafaladiso en Andere 2003 (1) SACR 583 (SCA).

omissions cannot have a fatal effect on Zukiswa's evidence. He submitted that the court is not faced with direct contradictions. She simply went further from what she had stated earlier by putting the evidence that the accused had pulled her out of the vehicle and the setting of her foot on their backs. He submitted that the contradiction in Sgt. Sauli's evidence that he found the deceased lying face up and in another statement saying he was facing down that is of no moment because Thembinkosi did not die at the scene. He may have moved and he only died in hospital. He submitted further that there was no dispute in relation to the medical evidence where the wounds of Thembinkosi were. The court should find that all the state witnesses' evidence was reliable. He urged the court to take into account circumstantial evidence and relied on **S v Reddy**⁴ and asked the court to take into account the following aspects: that the accused is a work colleague of Mr Buntu Melani.

[59] It is the evidence of Ms Zukiswa Frans that it is the accused who gave Melani Zukiswa's ID number and that Melani took out a policy on her life. That was done on the 25 July 2023, a month before the event. Mr Melani wanted to have a policy on Zukiswa cancelled a month after the event. The accused had not indicated or given an explanation as to how Buntu Melani got the birth date of Zukiswa. It was the accused who had put Buntu in contact with Ms Ncethu for the policy. After the incident, the accused went to work and did not tell a soul about what happened. She made no attempts to contact the police and indicate that there were these two people that had been shot. No report to the police until the Monday. He submitted that he relies on her conduct after the event of the shooting had taken place. The court should consider the impact together with the direct evidence of her participation. The court must find that it has been established beyond reasonable doubt that she was a party to and a prime mover in the events that led to the death of Thembinkosi. He submitted that the mosaic of the evidence described is overwhelming against the accused.

[60] He submitted that there is evidence that it is the accused who went to fetch the victims and thus played an active role in the commission of the crime. She did not disassociate herself from the acts of the two males. She actively associated herself with their actions.

[61] Mr Engelbrecht conceded that the robbery charge has not been proved against the accused. He submitted that the scope of foreseeability, the taking of the cellphone whether that act was something foreseen by the accused or whether it was part and parcel of the plan, has

⁴ S v Reddy 1996 (2) SACR 1 (SCA).

not been proved. He conceded that the scope of the common purpose in relation to the robbery does not go as far as to affect the accused.

[62] He submitted that in so far as counts 1 and 2 are concerned, the State has successfully proved its case beyond reasonable doubt. All the pieces of evidence point in one direction that the evidence of the accused turned to corroborate the evidence of Zukiswa. He submitted that the evidence of the accused was riddled with fabrications. The Polo passing her at the police station and that the Polo stopped because of the tyre noise. Those are fabrications and must be rejected. The accused was not there by chance but by design. He submitted that if the court accepts the evidence of the State, the court would find that there was no duress at the crucial time before everything happened. She fabricated it to try and exculpate herself. She was the reason the vehicle stopped. She is the reason the two victims ended up on the Mayfield Farm. Her evidence is riddled with improbabilities.

[63] He submitted that if the court finds that she was part of the common purpose, there would be no basis to find that she was threatened. In any event the threat was after the event. He submitted that if the reason for shooting the two victims was because they were witnesses, the two assassins would not take a chance and leave a witness alive, which was her in this case. He urged the court to find you guilty as charged in counts 1 and 2.

Defense's legal submissions

[64] Mr Stamper submitted that the State has failed to prove its case beyond reasonable doubt. He disagreed that there was any direct evidence. The State's case is based on circumstantial evidence, he argued. He submitted that the State seeks to draw an inference that the accused is the one that gave Buntu Zukiswa's details to enable him to take out a life policy on Zukiswa. In this regard he relied on **R v Blom**⁵. He submitted that, that would not be the only inference to be drawn because we do not know how Buntu got the identity document of Zukiswa. Unless it is found that there is no other probable way then that inference could justifiably be drawn. He submitted that if the suggestion is that the accused pulled Zukiswa out of the vehicle for her to be killed, that aspect is inferential. He submitted that an inference is sought to be drawn where there is no direct evidence. He submitted that no common purpose was shown. He argued that the evidence of Zukiswa was so full of improbabilities that it stands

⁵ R v Blom 1939 AD 188.

to be rejected. Zukiswa failed to answer questions directly, according to him. He submitted that Zukiswa did not know on which side of the car they were caused to lie down. She did not know whether she was made to turn around the vehicle. That evidence, according to him is inconsistent with the evidence of the accused. He submitted that the reason Zukiswa did not know these things is because they did not happen. He submitted that those were crucial improbabilities which must lead to the rejection of Zukiswa's evidence.

[65] He urged the court to have regard to the two issues that Zukiswa had forgotten which according to him, were very crucial. Those should cast doubt on her evidence. He urged the court to approach the evidence of Zukiswa as that of a single witness. He relied on **S v Mokoena**⁶ before her evidence can be relied on it must be credible in all material respects and it must be satisfactory. He conceded that the evidence of the accused was not without its improbabilities. A finding of guilty against the accused in this case cannot be obtained on the State's case. He relied on **S v Van Aswegen**⁷ the proper test is that an accused is bound to be convicted if the evidence establishes her guilt beyond reasonable doubt. If her version is reasonably possibly true she must be acquitted. He submitted that the court must account for all the evidence whether it is true or false. In this regard he relied on **S v Chabalala**⁸ on the decision of Heher AJA that:

"[15] The trial court's approach to the case was, however, holistic and in this it was undoubtedly right: S v Van Aswegen 2001 (2) SACR 97 (SCA). The correct approach 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 balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence. Once that approach is applied to the evidence in the present matter the solution becomes clear."

He submitted that the evidence that was given at the scene should be looked at. The accused's evidence has not been seriously challenged in many respects.

[66] He submitted that the court might not be convinced but the truth is that the accused was in that situation at that time and she gave evidence that she had been threatened, that can never be rejected as false. He submitted that if the court finds that the evidence of her pulling Zukiswa

⁶ S v Mokoena 1956 (3) SACR 81 at page 85.

⁷ S v Van Aswegen 2001 (2) SACR 97 (SCA).

⁸ S v Chabalala 2003 (1) SACR 134 (SCA) para 15.

and stepping on them is to be rejected, the court must accordingly acquit her. He urged the court to acquit the accused on counts 1 and 2.

[67] He agreed with the State that there was no evidence to prove the count of robbery and the court should find the accused not guilty on that count.

[68] In reply, Mr Engelbrecht submitted that it was suggested that Zukiswa added more things to incriminate the accused. He submitted that for there to be merit in that argument, there must be a reason for Zukiswa to want to do that. If it is not a mistake made, then there must be a deliberate attempt to incriminate the accused. There is no evidence in that regard. Zukiswa and the accused grew up together. They were like sisters. They have a relationship that has not changed. On the fear aspect, he submitted that, the alleged fear came and went as it suited the accused. She only went to the police station when she saw that the police were closing in on her. She never raised the alarm with anybody. Circumstantial evidence does not change. The fact that it was the accused who lured these witnesses under false pretences does not change. The fact that she remained silent throughout does not change. He submitted that even if the court were not to place any reliance on those aspects the situation never changed. Her complacency in the crimes has been proved beyond reasonable doubt.

Evaluation of the evidence

[69] The manner of evaluating the evidence was explained by Nugent J in **S v Van der Meyden**⁹:

‘What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.’

This dictum has been quoted with approval in several cases delivered by the Supreme Court of Appeal¹⁰.

[70] The general principle of the common law is that credibility does not depend upon the number of witnesses. Section 208 of the Criminal Procedure Act provides that an accused person may be convicted on the single evidence of any competent and credible witness. In **S**

⁹ S v Van der Meyden 1999 (1) SACR 447 (W) at 450a-b; 1999 (2) SA 79 at 82D-E.

¹⁰ See for example, S v Van Aswegen; [2001] ZASCA 61; 2001 (2) SACR 97 (SCA) para 8; S v Trainor; [2002] ZASCA 125; 2003 (1) SACR 35 (SCA) para 8; S v Gentle; [2005] ZASCA 26; 2005 (1) SACR 420 (SCA) para 27, Mulaudzi v The State (768/2015) [2016] ZASCA 70 (20 May 2016) para 10

v Letsedi¹¹, it was held that where there is a measure of corroboration, even if it is small, one is no longer dealing with a single witness. In evaluating the evidence of a single witness, a final evaluation can rarely, if ever, be made without considering whether such evidence is consistent with the probabilities¹².

[71] The evidence of Sgt. Sauli was not challenged except the position in which Thembinkosi was lying when he found him at the scene. He readily conceded that what was contained in his statement was correct because he had not had regard to it before he testified. His statement was made during the evening of the incident on 25 August 2023 and he testified before this court more than a year later. There was no challenge to the evidence of Zukiswa that they were made to lie, face down with their hands on their heads. The accused admitted, amongst others, that the contents of the postmortem report including the findings as to the cause of death was admitted as correct. This witness observed that Thembinkosi was bleeding from his head. A medico – legal report was compiled by the chief Medical Officer, Forensic pathology services, Dr Stuart Wayne Dwyer, on 28 August 2023, recorded that the death occurred on 25 August 2023. The chief post- mortem findings made on the body were ‘*A small circular wound on the right side of the the head, larger irregular wound left side of head. Wound track through skull and brain.*’ The position of how Thembinkosi was lying when the police arrived has no bearing on the cause of death and on the injuries sustained as admitted. Thembinkosi was alive and breathing on his own when the police arrived, he died at the hospital. He may have moved, as correctly submitted on behalf of the State. Most importantly, as soon as that innocent mistake was brought to the witness’s attention, he corrected it.

[72] This witness corroborated the evidence of Zukiswa in the following respects: She was not intoxicated on the night in question. Zukiswa took the police to the scene with no difficulty. She called for help as soon as it was opportune for her to do so, and as a result of her actions Thembinkosi was found still breathing. Zukiswa told the police what happened and her narration of the events was reliable because cartridges were found at the scene and one projectile. This was a person who had been subjected to an ordeal and was seriously injured. Thembinkosi was found lying at the scene having sustained a wound to his head described by the pathologist as “*Not inconsistent with gunshot wound head*”. The photo album that has been admitted depicts the road as a gravel road, where they were shot at.

¹¹ S v Letsedi 1963 (2) SA 471 (A) 473.

¹² S v Teixeira 1980 (3) SA 755 (A) at 761

[73] The evidence of this witness is corroborated by the evidence of the accused as well in that: The scene of crime was admitted, the cartridges that this witness picked up were admitted as having been found at the scene, the accused had admitted in evidence that the two victims were lying down when they were shot at. That is how Thembinkosi was found by him. The fact that he made a mistake in evidence about the position, whether he was facing the sky or lying face down is of no moment. I say so because it is common cause between the parties that the deceased sustained gunshot wounds on his head. I accordingly find that Sergeant Sauli gave reliable and credible evidence and I accordingly accept it.

[74] The evidence of Zukiswa was corroborated by the accused in material respects. Those are : That it is the accused who went to them; she mentioned that she wanted to be accompanied to Blackcat, she was in the bedroom when the accused arrived; the accused told Zukiswa that the vehicle she came in belonged to her friends; she caused them to board the vehicle; they were caused to lie down and shot at with firearms; the accused was present when they were shot at; Zukiswa and Thembinkosi were left lying on the road after being shot ,the accused together with the two males boarded the vehicle after the shooting and left them there; the accused did not assist them in anyway; she is the person that asked for Zukiswa's Identity document, she was a close colleague and work partner to Buntu who took out an insurance policy on Zukiswa's life.

[75] Her evidence differs from that of the accused mainly on the role the accused allegedly played at the crime scene. Did the accused pull Zukiswa out of the car against her wishes? Did she step on their backs to ascertain whether they were alive or not? These questions lead to the examination of the statements made by Zukiswa because the complaint is that these two issues were a fabrication and they never happened. Context is everything. It is so that in the first statement dated 25 August 2023 there is no recordal of the accused pulling Zukiswa out of the motor vehicle. Zukiswa stated in evidence that the police officer never asked her any questions she was just telling her what happened and she was writing down. This is a person who had just been through the ordeal. She was scared and shivering. She was traumatized and was injured and in pain. She was bound to forget one or two things. The very next day another statement was taken from her. She mentioned how the vehicle stopped because the accused asked the driver to do so because she wanted to urinate, and how she pulled Zukiswa out of the vehicle. That was not the end. She went further and mentioned most of the things mentioned in her previous statement. She mentioned that the accused was just looking at them not saying anything. On the accused's version she saw them lying down, being shot at and she did nothing.

The third statement was made on 07 September 2023. What is crucial about that statement is what is stated in the opening paragraphs:

“This is an additional statement from my previous statements.

On 2023.09.07 at about 12:30 I was assisted by W/O Britz and Sgt Daweti with private arrangements during this period. We spoke about the incident of the night of the murder.

During my report to them W/O Britz informed me that some of the information is not mentioned in my previous statement and requested an additional statement regarding the new facts like whilst myself and Thembinkosi (deceased) were lying on our stomach after the they shot us one of the black male who shot us ordered Nomsa Seyisi to put her foot on our back to hear if we are still breathing. Nomsa started to put her foot on my back (lower back) and put it to Thembinkosi and she (Nomsa) said they are dead. They all got into the vehicle and left.”

[77] This statement was admitted into evidence as ‘Exhibit 10’. It is apparent therefrom that Zukiswa was talking about the incident when the investigators realized that some of the things she mentioned were not recorded in her previous statements. This statement was made 14 days after the first one. It was not disputed that Zukiswa was shot at and sustained injuries on her head and on her left hand. She was operated on. When these issues are viewed they must be viewed together with the evidence in its totality, taking into account the emotional state in which the witness was when the statements were taken by the police.

[78] In **S v Govender and Others**¹³ Nepgen, J discussed the issue extensively. He pointed out that it is important that it should always be borne in mind “... *that police statements are, as a matter of common experience, frequently not taken with the degree of care, accuracy and completeness which is desirable.* . .’ (S v Xaba 1983 (3) SA 717 (A) at 730B - C.)

[79] Furthermore, in **S v Bruiners**¹⁴ the purpose of a police statement was explained to be, to obtain details of an offence so that a decision can be made whether or not to institute a prosecution, and the statement of a witness is not intended to be a precursor to that witness' evidence in court. Quite apart from that, however, there are other problems associated with police statements. They are usually written in the language of the person who records them. Frequently the use of an interpreter is required and, invariably, such interpreter is also a policeman and not a trained interpreter. The statement, according to my experience, is also usually a summary of what the policeman was told by the witness and is expressed in language or in terms normally used by him and not necessarily the witness. I am of the view that the fact that discrepancies occur between a witness' evidence and the contents of that witness' police statement is not unusual nor surprising. Whenever there are contradictions between the police statement of a witness and the evidence of such witness, or where there is no reference in a

¹³ S v Govender and Others 2006 (1) SACR 322 (E).

¹⁴ S v Bruiners en 'n Ander 1998 (2) SACR 432 (SE) at 437h

police statement to what can be considered to be an important aspect of that witness' testimony, the approach to be adopted in regard thereto is as described in **S v Mafaladiso en Andere**¹⁵.

[80] In **S v Mafaladiso** the Supreme Court of Appeal gave directions on how one should approach self – contradictions and contradictions between two witnesses. It found that *in neither case is the aim to prove which of the versions is correct, but to satisfy oneself that the 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 a 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 contradictions, the actual effect of the contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions - and the quality of the explanations - and the connection between the contradictions and the rest of the witness' evidence, amongst other factors, 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. (At 593e - 594h.)*

[81] In casu, I have dealt with the dates and the timing of the taking of the statements from Zukiswa. There are no contradictions in her statements. She gave a plausible explanation as indicated above, why the two issues do not appear in her first statement. I am satisfied that in this case where certain things were not mentioned it is because of how the statements were taken. It is apparent from the above quoted extract from one of her statements that she narrated the events of that day but the investigator observed that not everything was captured in her statements. Such an omission is clearly not of her own doing but is as a result of the approach adopted by those who listened and recorded the events. From the manner in which Zukiswa gave her evidence I am persuaded that whatever was omitted by the police officers from her statements was dealt with sufficiently in her oral evidence and that she told the truth about what she conveyed when she reported the crime and in so doing, she was not actuated by

¹⁵ S v Mafaladiso en Andere 2003 (1) SACR 583 (SCA) at 593e - 594h.

dishonesty. Zukiswa dealt with all these issues in her evidence -in - chief. She was cross-examined at length and in the end it became clear that she had told the full story to the police. She was truthful enough to state that she was not certain on whom did the accused step on first. That was the only correction she made to the statement quoted above. That is consistent with her evidence that she did not know who was shot at first.

[82] It is not necessary for the State to prove its case beyond all doubt¹⁶. In **R v Mlambo**¹⁷, the Appellate Court stated:

"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."

An accused person does not have to prove anything.

[83] I find that Zukiswa gave reliable evidence. This is a person who looked frail and sickly before this court. Her evidence was supported by Mr Mbunge on the most crucial aspect that the accused told Thembinkosi and Zukiswa that she (the accused) was the one who needed to be accompanied to the traditional healer. She endured lengthy cross-examination over a period of at least 2 days. She was not shaken at all under cross- examination. She did not contradict herself. She was an impressive, truthful and forthright witness whose evidence concerning the accused was beyond reproach. I accordingly accept her evidence.

[84] The evidence of Ms Cethu was an unbiased account of the events that led to the taking out of an insurance policy on the life of Zukiswa by Buntu. Her evidence is supported by the policy document that was admitted into evidence. I find her evidence to be objective and reliable. I accordingly accept it.

[85] The evidence of Mr Mbunge was tailor- made to suit the version of the accused in certain respects. When he realized that he was caught out on Zukiswa being sick and in hospital during the trial he quickly changed and stated that Zukiswa no longer stays with them. This is a person who was adamant that Zukiswa was not sick at all. In any event most of his evidence relates to what happened in the house when the accused came to ask Zukiswa and Thembinkosi

¹⁶ S v Pallo and others 1999 (2) SACR 558 (SCA), Olivier JA at para [10] at 562 followed the approach that was taken in R v Mlambo 1957 (4) SA 727 (A) at 738A-C.

¹⁷ R v Mlambo 1957 (4) SA 727 (A) at 738A-C.

to accompany her. His evidence though paints a sad picture of random killings of young women. Their deaths remain unresolved. There are no inquests held to enquire into the circumstances relating to the deaths of Unathi and Anovuyo and others who may have died in similar circumstances. I am alive to the fact that this witness had a stutter when he spoke and appeared to be hard of hearing. That may have contributed to my observation that he did not fare well under cross-examination. As aforementioned his evidence was limited to what transpired inside the house after Thembinkosi had opened the gate for the accused. I accordingly accept his evidence only where it corroborates that of Zukiswa.

[86] The evidence of Sgt Makebeni was not controversial. I accordingly accept her evidence in relation to the statement she took from Zukiswa. The same applies to the evidence of Mr Pieters, it corroborated the evidence of Zukiswa on the relationship between Buntu and the accused.

[87] The accused, on the other hand, was not an impressive witness. She made up her evidence as questions were being put to her. One of the examples is that she stated that the police never asked her about the incident whilst on her warning statement she stated that she needed a lawyer. When she then realized that that was presenting a problem for her she stated that it was her family that needed a lawyer and not her. She was the person who had told this court that she told Mr Toto everything. She could not explain how her family would feature in a warning statement that relates only to her. The versions that she placed before court were irreconcilable.

[88] On the one hand she gave the names of Caster and SVIG as the names of the two males, when these males gave Zukiswa different names she did not explain why she kept quiet instead she simply responded that she did not know those names. She presented these two males as her friends but later sought to distance herself from that by stating that they were Lithemba's friends and not hers. She tried hard to avoid the questions of how she could not have seen the firearms on the two males. Her response was that she focused on their faces. She had a conversation with Caster outside the motor vehicle before leaving with them. The firearms were visible on their waists and Zukiswa saw them. She made an effort to conceal the identity of her co-perpetrators by giving their false names which, by the way, she never mentioned to Zukiswa and Thembinkosi when she went to fetch them, she gave a false colour of the vehicle and said it was metallic blue, instead of red. Zukiswa mentioned the colour of the vehicle in her very first statement to the police which was made the same evening of the incident. She

created a falsehood that Zukiswa knew these assailants very well and embellished that falsehood when she gave evidence by stating that these two males identified themselves to Zukiswa and explained to her who they were until she remembered who they were.

[89] Mr Stamper submitted that Buntu was not called. The version that was put to Zukiswa and other witnesses was that the accused was going to call Buntu to state that he did not get the ID number of Zukiswa from her. There was no explanation why Buntu was not called. On the accused's version she corroborated the evidence of Zukiswa that she was not related to Buntu. Buntu was a work colleague and work partner of the accused. That evidence is supported by their supervisor Mr Pieters that for a number of months they worked together. The accused further supported Zukiswa's evidence that on the day when she went to ask for her identity number, she was in the company of Buntu. It is also the accused's evidence that she also asked for the spelling of Frans. On the evidence as a whole, she is the only person who is a link between Zukiswa and Buntu. That finding is not based on conjecture. When the accused realized that her earlier statement that Buntu and Zukiswa were not related was problematic for her, she quickly changed it as follows: They were neighbours, Zukiswa used to visit Buntu, to maybe they are related by clan names since Xhosa people have four clan names and lastly that she did not know whether they were related or not.

[90] This is a person who stated that she was not aware that Buntu had insured Zukiswa. The version of the accused in relation to this issue is improbable and stands to be rejected. The version of the State, on the other hand, is more probable because it is the accused that gave Buntu's contact details to Ms Cethu. A few days later Buntu took out a policy on Zukiswa and described her as her first cousin. It is common cause that Zukiswa and the accused are cousins. Two weeks before the Mayfield farm shooting, Unathi was murdered at Zukiswa's home. Two weeks after the Mayfield farm shooting Buntu Melani wanted to cancel the policy. There can only be one inference to be drawn from these facts and that is that the attack on Zukiswa and Thembinkosi was related to the life policy. Zukiswa herself had told this court that she agreed with her family that the accused would take out a funeral policy to bury her in the event of her death. It follows that Buntu and the accused as close colleagues were going to benefit from her death.

[91] The issue about a life policy on the life of Zukiswa favours a finding that given all the circumstances under which the names and surname of Zukiswa ended up being used by a co-worker, a partner at work of the accused can only be through the accused herself. Her version

in this regard vacillated as demonstrated above. The inference that it is the accused that gave the ID numbers or ID of Zukiswa to Buntu is justifiable given the fact that it is the accused's evidence that when she went to ask for Zukiswa's identity number she was in company of Buntu. Given those facts there is only one person who would have linked Zukiswa to Buntu and that is the accused.

[92] I disagree with Mr Stamper that there is no direct evidence against the accused. The accused is the person who lured Zukiswa and Thembinkosi out of their home in what turned out to be a falsehood. She conceded that there was no real intent to go to Black Cat. It is so that some of the evidence is circumstantial. However, on the evidence it is the accused who caused Zukiswa and Thembinkosi to board the vehicle of the co-perpetrators by telling them that it was her friends' car. She was the reason the car stopped on the road that was next to a cemetery at night. She participated by pulling Zukiswa out of the vehicle. By causing the vehicle to stop since she said she wanted to urinate she enabled one of her co-perpetrators to pull out of the vehicle, Thembinkosi also. She was present when the victims were caused to lie down and were shot at. She placed her foot on their backs to check whether they were alive. That is not a conduct of the bystander but a prime mover and an involved participant. I find that given her actions and the versions that she gave, the accused gave false evidence with the intention to mislead this court.

[93] I find that taking all the evidence into account including circumstantial evidence there was a common purpose between the accused and the assassins. The identity of the two males was concealed by the accused. She knew those people well. It is unthinkable that Zukiswa would know who the culprits were and give wrong names. The accused, on the other hand, would have reason to hide the identity of the culprits. In **S v Govender & Another**¹⁸ the court stated that the appellant in that case foresaw that the person would be killed and intended that to happen without disassociating himself.

[94] The requirements for active association in common purpose were outlined in **S v Mgedezi and Others**¹⁹, by the Supreme Court of Appeal as follows:

“The accused must have:

(a) been present at the scene where the violence was committed;

¹⁸ S v Govender & Another 2023 (2) SACR 137 (SCA).

¹⁹ S v Mgedezi and Others (415/1987) [1988] ZASCA 135; [1989] 2 All SA 13 (A) (30 September 1988).

(b) been aware of the assault on the victim by somebody else;

(c) intended to make common purpose with the person perpetrating the assault;

(d) manifested his sharing of a common purpose by himself performing an act of association with the conduct of the perpetrator; and

(e) have the requisite mens rea. Dolus eventualis is sufficient: the accused must have foreseen the possibility that the acts of the perpetrator may result in the death of the victim and reconciled himself with that eventuality.”

[95] The State proved all these requirements in the present case. There was no direct evidence of prior conspiracy between the accused and the two perpetrators. However, the accused is the person that lured the deceased Thembinkosi and Zukiswa, into the vehicle of the assailants who were known only to her; she directed them to get into the vehicle. When they entered the vehicle there was no mention of directions to the house of the traditional healer, Mr Black or Black Cat. She is the one who caused the vehicle to stop at the cemetery because she said she wanted to urinate. As she alighted from the vehicle she pulled Zukiswa out even though she told her that she did not want to urinate. She was present and witnessed the actions of the assailants, only known to her, when they caused Thembinkosi and Zukiswa to lie down and when they were shot at. She did nothing to disassociate herself from that act. She participated actively by pulling Zukiswa out of the vehicle and by stepping on their backs to assess whether they were dead or alive. She failed to report the crime to the police for two days.

[96] In **S v Mzwempi**²⁰, at paragraph 20 to 21, Alkema J, stated:

“[20] Whilst I have no problem with the logic of the above argument, the missing link is the absence of any evidence that the appellant was a party to such planning or agreement. As I will show later in this judgment, a prior agreement to commit a crime may invoke the imputation of conduct committed by one of the parties to the agreement which falls within their common design, to all the other contracting parties. Subject to proof of the other definitional elements of the crime such as unlawfulness and culpa, criminal liability may in these circumstances be established. The test, and requirements, however, of criminal liability under the common purpose doctrine in the absence of proof of a prior agreement, as I hope to demonstrate, is very different and more restrictive. It is therefore essential that before convicting under the common purpose doctrine on the strength of a prior agreement, the Court must be satisfied beyond reasonable doubt that such a prior agreement was proved, and that the accused was a party thereto.

[21] Our Courts are regularly faced with evidence of, say, a pre-planned robbery or burglary. It is trite that a prior agreement may not necessarily be express but may be inferred from surrounding circumstances. The facts constituting the surrounding circumstances from which the inferences are sought to be drawn must nevertheless be proved beyond reasonable doubt. And in this case there are no facts proved from which an implied prior agreement involving the appellant may be inferred. It is common cause that his shotgun was licensed and that he regularly used it for hunting purposes. The inference that he spontaneously joined the attacking force whilst on a hunting venture, or that he simply joined the attacking force without having been a party to any prior agreement to do so cannot be reasonably excluded.”

²⁰ S v Mzwempi v S²⁰ (2011 (2) SACR 237 (ECM)) [2011] ZAECMHC 5; 284/04 (28 April 2011).

[97] The conduct of the two assailants is imputed to her even if only two of the perpetrators pulled the trigger. The State succeeded in proving that. The accused acted in common purpose with the two assailants whose actions caused the death of the deceased and the attempted murder of Zukiswa. These are the positive acts on the part of the accused:

1. she lured the two victims to the assailants under false pretenses that she wanted to be taken to a traditional healer, Mr Blackcat;
2. she caused them to enter the vehicle with the assailants by telling them that those assailants were her friends;
3. she caused the vehicle to stop at the cemetery, Mayfield Farm because she said she wanted to urinate;
4. after the vehicle had stopped she instructed Zukiswa to alight. When she resisted that she did not have the urge to urinate, the accused pulled her out of the vehicle;
5. because of her actions the vehicle stopped and thus enabled the pulling out of the vehicle of both the deceased and Zukiswa;
6. the victims were caused to lie down next to one another. The accused was present and saw this when it happened;
7. she was present when Thembinkosi and Zukiswa were being shot at whilst lying on the ground;
8. she, on being ordered by one of the assailants, placed her foot on their backs to ascertain whether they were alive or not;
9. she, together with the assailants left the shot and injured victims, believing that they were dead, boarded the vehicle and drove off.
10. she enabled Buntu to take out a policy on Zukiswa by providing him with Zukiswa's ID or ID number and her full names.
11. she facilitated the taking out of the policy on Zukiswa's life by being a link between Buntu and Ms Cethu.

[98] The accused concealed the identity of the two assailants deliberately. She did not report the incident for a period of two days. She only went to the police after she heard that the police were looking for her at her home. I find that the accused had the necessary intention to have the deceased and Zukiswa shot and killed. Fortunately, Zukiswa survived. She remained with

the assailants all the way from her home until the crime was committed. She participated before the commission of the crime by luring Zukiswa and Thembinkosi to the assailants. She was a party to the common purpose at the time of the commission of the offence and thereafter in that she never reported the incident to anyone. She had her cousin lying there with her boyfriend and as a paramedic she did nothing to ensure that their lives were saved or at least they received medical attention. She, together with the assailants left because they all believed that they were dead as she and her co-perpetrators had intended.

[99] On the accused's version, the threat to her by the two assailants started after the shooting of the deceased and Zukiswa. From the time she received the call from Caster, them getting into the vehicle right up to the time shots were fired at the two victims there was no threat to her. Even if one accepts her evidence, one can only come to one conclusion that, at that point the crime to which they had formed common purpose with each other's actions had been achieved. Save that Zukiswa did not die from the injuries sustained by her. She contended that she was afraid to go to report the crime to the police because of the threat that the assailants made to her that they would find her and her family. She also stated that she saw the vehicle when she alighted from a taxi next to the police station and saw the driver looking at her. She continued to go into the police station. This can only mean one thing, that that there was never a threat in the first place. Initially she had said she saw three males in the car but later she stated that she only saw Caster who was a driver because she was looking at him. This evidence is untruthful because at that point, the accused had heard that the police were at her home and were looking for her. She had no intention of going to the police to report the crime.

[100] The accused stated that the two assailants stated that the two victims would stop being witnesses in cases they knew nothing about. In the two cases where members of Thembinkosi's family were murdered there were no arrests. The father of Anovuyo stated that he did not know who the assailants were. Zukiswa had stated that they did not know who the assailants were who shot and killed Unathi who was lying on the sofa in her house. The accused was an eye witness to the murder of Thembinkosi and attempted murder of Zukiswa. These assailants knew where she lived but they decided to let her go when they killed someone in a case where the assailants were unknown.? That is highly improbable especially looking at the surrounding circumstances after the crime was committed in her presence. Thembinkosi was murdered in cold blood, the co-perpetrators had only one intention to kill the victims. She went into the police station after she had allegedly seen Caster looking at her. She overcame that fear that day. The reason for the attack on Zukiswa and Thembinkosi could not have been about them being witnesses because on the

accused's version, he was allowed to go by Caster and Siya although she was an eyewitness to the shooting of Thembinkosi and Zukiswa. It is common cause that when she went to the police station the police were looking for her. Her version that she went in order to tell the police what had happened is highly improbable. The version she presented in this regard is false.

[101] Her evidence that she gave the full story to Mr Toto about the events of that evening but later on stated that Mr Toto did not write any of that is not consistent with what is stated in her warning statement that she needed a lawyer. When questioned about this fact her evidence changed that it was her family that wanted to get her a lawyer. Why would the police detain someone who wanted to assist in solving a crime? There is one probable explanation that when she went to the police she knew that the net was closing in and decided to hand herself over hence she was detained the very same day. There was accordingly never a time where the accused disassociated herself from the actions perpetrated by the two assailants when they shot at the victims.

[102] Both the accused and the main state witness, Zukiswa, are related by blood. They are cousins. They grew up together with the accused's parents having accommodated Zukiswa in their home and paid for her schooling. The accused shared her clothes that no longer fit her with Zukiswa. There is no bad blood at all between them. They kept in contact even after Zukiswa moved out of the accused's home to live with her parents.

[103] Having weighed all the evidence I am satisfied that the accused gave unreliable and false evidence with the intention of misleading the court. Although she corroborated the evidence of Zukiswa in many respects, when confronted with Zukiswa's evidence she was determined to dispute everything she said just to cast some doubt on her evidence. What that strategy did was to backfire under cross-examination in that she ended up giving long, unhelpful answers in trying to exculpate herself.

[104] In **Govender v The State**²¹, the Supreme Court of Appeal at paragraphs 12 stated:

"[12] There was no evidence of a prior agreement between Accused 1 and the appellant to murder the deceased. However, a finding that a person acted together with another in a common purpose is not dependent upon proof of a prior conspiracy. Such a finding may be inferred from the conduct of the participants. The State was therefore required to prove that the appellant had actively associated himself with the execution of the common purpose. The concept of active association is wider than that of agreement, since it is seldom possible to prove a prior agreement. Consequently, it is easier to draw an inference that a participant associated himself with the perpetrator."
(footnotes omitted)

²¹ Govender v The State (221/2022) [2023] ZASCA 60 (3 May 2023), at paragraphs 13.

[105] Her conduct evinced planning and that she foresaw the use of firearms on the victims could lead to the death of the deceased and that of Zukiswa. Save that Zukiswa survived. In **S v Nkwenja**²² the court found that the appellant's conduct evidenced planning, a division of roles and common approval of the use of violence on the bodies of the occupants of the car in order to overcome possible resistance was sufficient for the court to convict. The court found that it was reasonably foreseeable that the use of violence for that purpose in those circumstances could possibly result in death. The division of roles in this case is very clear. I refer again in this regard to the positive acts of the accused outlined above. I am satisfied that the state proved its case beyond reasonable doubt. It follows that the version of the accused is not only improbable, it is unreliable and plainly false. I accordingly reject it.

[106] The first form is prior agreement which will be established where the perpetrators previously agreed to commit an offence. The court in *S v Molimi*²³ found that: *'The evidence shows that the first appellant initiated and then planned the robbery in collaboration with the second appellant and accused 1.'* This is a clear indication that an agreement between the parties was reached that they want to commit robbery and that they acted in concert to commit this crime as founded by the court after evidence was led. The court in *S v Mzwempi*²⁴ found that 'prior agreement may not necessarily be express[ed] but may be inferred from surrounding circumstances.'

[107] The second form is active association. In **Namane and Another v S**²⁵ the court held that each of them is responsible for the acts committed by the others, either foreseeing the possibility that the others might perform an act in order to further their common purpose, and *'was indifferent to such acts and their consequences'*. The court indicated that the other party foresaw the possibility that the one party might commit a crime and he who did not do the actual offence, reconciled himself with that possibility, making him as liable as the one who committed the offence.

[108] In **Nube v S**²⁶, the Supreme Court of Appeal dismissed the appellant's contention that he dissociated himself from the planned robbery. In dismissing the contention, the court held that 'the day of the heist; and his unexplained failure to disclose sufficient information pertaining to the planned heist which would have allowed Grootboom [the police officer] to

²² *S v Nkwenja* 1985 (2) SA 560 at 562A para C – D.

²³ *S v Molimi and Another* 2006 (2) SACR 8 (SCA) at para 34.

²⁴ *S v Mzwempi* ²⁴2011 (2) SACR 237 (ECM) held at para 21.

²⁵ *Namane and Another v S* (A196/2014) [2016] ZAFSHC 224 (15 December 2016).

²⁶ *Nube v S* (SCA) (unreported case no 091/15, 30-9-2015) (Bosiello JA (Pillay and Dambuza JJA, Van der Merwe and Govern AJJA concurring)) at para 23.

foil it.’ The Supreme Court of Appeal indicated that to effectively withdraw it might require one to divulge information to the police in order to stop the planned unlawful act. In **S v Musingadi and Others**²⁷, the Supreme Court of Appeal held that a sufficient dissociation would depend on, inter alia, the circumstances; manner and extent of involvement; how far the crime had progressed; the timing and manner of disengagement; and in some instances, the preventative measures the person took to prevent the completion of the crime.

[109] In **Mawala v S**²⁸, the court held that common purpose is a ‘legal construct’ to assist the State in prosecution where evidence is insufficient to link offenders to one another and to the crime. It is evident that the principle of common purpose is not just a tool, but an effective mechanism created to serve justice. Without it the State would have been in many instances clueless as to the true identity of the one who committed the act. The common purpose principle makes it easier to not just punish the true actor but also his co-conspirators who had the intention to commit such crimes that caused the unlawful result.²⁹

[110] In **S v Thebus**³⁰, the facts were briefly that a group of protesting residents in Ocean View, Cape Town, gathered and approached the houses of several reputed drug dealers in the area, including the house of one Grant Cronje. They allegedly caused damage to the property of Cronje before moving on. The protestors drove through the area in a motorcade of about five to six vehicles. As the motorcade approached a road intersection Cronje opened fire on the group. In response, some members of the group alighted from their vehicles and returned fire. In the resulting crossfire, a seven-year-old girl, Crystal Abrahams, was fatally shot and two others, Riaan van Rooyen and Lester September, were wounded. The two appellants were arrested on suspicion of having been part of the group involved in the shooting incident. The State led evidence that placed both appellants in the vicinity of the shooting. One witness testified that he had seen the first appellant standing near a vehicle holding a pick – handle,

²⁷S v Musingadi and Others 2005 (1) SACR 395 (SCA)

²⁸Mawala v S (KZP) (unreported case no AR267/16, 12-10-2018) (Pillay J) at para 19.

²⁹ Andrew Jeffrey Swarts LLB (Unisa) is an aspirant prosecutor at the National Prosecuting Authority in Upington. This article was first published in De Rebus in 2023 (Nov) DR 18.

³⁰ S v Thebus 2003 (6) SA 474 CC at para 22. In that paragraph the Constitutional Court referred to, inter alia, the following authorities: S v Petersen 1989 (3) SA 420 (A); S v Yelani 1989 (2) SA 43 (A); S v Jama and Others 1989 (3) SA 427 (A); Magmoed v Janse van Rensburg n 19 above; S v Motaung and Others 1990 (4) SA 485 (A); S v Khumalo en Andere 1991 (4) SA 310 (A); S v Singo 1993 (2) SA 765 (A). See Magmoed v Janse van Rensburg n 19 at 789G. In R v Powell and Another; R v English [1997] 4 All E.R 545 HL, the House of Lords held that the doctrine of joint enterprise liability still applies in English Law.

while the second appellant was retrieving spent cartridges discharged from the firearms of the other members of the group. The appellants raised alibi defences. Their alibi defence was rejected by the trial court. The trial court concluded that both appellants were present at the scene of the shooting. Applying the doctrine of common purpose the trial court found both appellants guilty of one count of murder and two counts of attempted murder.

[111] The Supreme Court of Appeal dismissed the appeal on the conviction. The appellants approached the Constitutional Court and mounted a challenge to the doctrine of common purposes, namely, that it unjustifiably limits the appellant's rights to dignity, freedom, security of the person and a fair trial including the right to be presumed innocent. They contended that both the trial court and the Supreme Court of Appeal failed to develop the doctrine of common purpose in accordance with section 39 (2) of the Constitution. In dealing with the constitutional challenge the Constitutional Court stated, amongst others,

"[22] After S v Mgedezi there remains no doubt that where the prosecution relies on common purpose as a basis for criminal liability in a consequence crime such as murder, a causal connection between the conduct of each participant in the crime and the unlawful consequence caused by one or more in the group, is not a requirement. Rules of criminal liability similar or comparable to common purpose are found in many common law jurisdictions, including England, Canada, Australia, Scotland and the USA. In all these legal systems, a causal nexus is not a pre-requisite for criminal liability. In civil legal systems, such as France and Germany there appear to be no rules, which, in substance, approximate our rule of common purpose."

[112] The Constitutional Court found that the doctrine of common purpose did not relate to a reverse onus or presumption which relieved the prosecution of any part of the burden. The doctrine of common purpose set a norm that passed constitutional scrutiny. The doctrine neither placed an onus upon the accused, nor did it presume her or his guilt. It dismissed both appeals of the first and second appellants.

[113] If the prosecution relies on common purpose, it must prove beyond a reasonable doubt that the accused had the requisite *mens rea* concerning the unlawful outcome at the time the offence was committed. That means that she must have intended that criminal result or must have foreseen the possibility of the criminal result or must have foreseen the possibility of the criminal result ensuing and nonetheless actively associated herself, reckless as to whether the result was to ensue³¹.

³¹ S v Thebus, supra, para G-H (page 532).

[114] I also find that the concession made by the State in relation to the charge of robbery in Count 3 was correctly made.

[114] In the result I make the following Order:

Count 1 : Murder of Thembinkosi Wambi. I find the accused GUILTY.

Count 2 : Attempted Murder of Zukiswa Frans: I find the accused GUILTY

Count 3 : Robbery : I find the accused NOT GUILTY.

T.V NORMAN

JUDGE OF THE HIGH COURT

APPEARANCES:

For the STATE : ADV ENGELBRECHT

Instructed by : Director of Public Prosecutions

For the DEFENCE : ADV STAMPER

Instructed by : Legal Aid Board SA

Matter heard on: 09 October 2024; 10 October 2024; 11 October 2024; 14 October 2024;
15 October 2024; 16 October 2024; 17 October 2024 & 18 October
2024

Judgment on conviction delivered on : 31 October 2024