



**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)**

**Case No.: CC 64A/2024**

<b>Reportable</b>	<b>YES/NO</b>
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In the matter of:

**THE STATE**

versus

**DYABANA ODWA**

**ACCUSED 1**

**NGANGELIZWE LUTHANDO**

**ACCUSED 2**

**MAGOBONGO LUNDI**

**ACCUSED 3**

**QHAYISO SISEKO**

**ACCUSED 4**

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**JUDGMENT**

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**Cengani-Mbakaza AJ**

**Introduction**

[1] On 20 February 2024, a farm attack incident (the first crime scene) which was perpetrated by six unknown armed male assailants prompted the police to obtain statements from 35 witnesses and collate 34 documents (exhibits). This incident was followed by a second episode involving vehicle collision at N2 Road Beacon Bay in East London (the collision scene). The Toyota Landcruiser which

is counted amongst the properties that were stolen at the farm escaped the first crime scene and collided with a mini-bus taxi (the Toyota quantum) carrying fifteen passengers as well as a VW Polo (the Polo) carrying one passenger. As a consequence of these events, the Director of Public Prosecutions for the Eastern Cape Division Makhanda, instituted prosecution against the four accused on the following charges. Some of these charges relate to accused 1 only:

**Count 1 - Pointing of a firearm in contravention of section 120(6), read with sections 1, 121 and Schedule 4 of the Firearms Control Act 60 of 2000.**

In that on or about 20 February 2024 and at or near Lorain Farm, Bluewater, in the Buffalo City Magisterial District, the accused, in the execution or furtherance of a common purpose, unlawfully and internationally pointed firearms at Heyden Aldred Luck, an adult male person, without good reason to do so.

**Count 2 - Kidnapping.**

In that on the date and at the place mentioned in count 1, the accused, acting in the execution or furtherance of a common purpose, unlawfully and intentionally deprived the said Heyden Aldred Luck of his freedom of movement by tying his hands behind his back with masking tape, forcing him onto the back of his Land Cruiser and holding him against his will in his house.

**Count 3 – Robbery with aggravating circumstances as defined in section 1(1)(b) of the Criminal Procedure Act number 51 of 1977.**

In that on the date and at the place mentioned in count 1, the accused, acting in the execution or furtherance of a common purpose, unlawfully, intentionally and through the application of force and violence to the said Heyden Aldred Luck, took from him the items listed in annexure “A”<sup>1</sup> hereto, the property, or in the

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<sup>1</sup> “ANNEXURE “A””

Item	Value
Toyota Land Cruiser motor vehicle with registration number KFX 411 EC	R 1, 023, 509.00

lawful possession of the said Heyden Aldred Luck. Aggravating circumstances as defined in section 1(1)(b) of the Criminal Procedure Act, No. 51 of 1977 were present in that the accused wielded firearms and inflicted grievous bodily harm on the said Heyden Aldred Luck.

**Count 4 – Robbery with aggravating circumstances as defined in section 1(1)(b) of the Criminal Procedure Act No. 51 of 1977.**

In that on the date and at the place mentioned in count 1, the accused, acting in the execution or furtherance of common purpose, unlawfully, intentionally and through the application of force and violence to Zameka Gelem, took from her an Oddo cell phone, the property, or in the lawful possession, of the said Zameka Gelem. Aggravating circumstances as defined in section 1(1)(b) of the Criminal Procedure Act 51 of 1977 were present, in that the accused wielded firearms and/or threatened to inflict grievous bodily harm on the said Zameka Gelem.

**Count 5 – Attempted murder.**

In that on the date and at the place mentioned in count 1, the accused, acting in the execution or furtherance of a common purpose, unlawfully and intentionally attempted to kill Heyden Aldred Luck by forcing him to lie on his back in a bath,

Toyota Hilux motor vehicle with registration number KHH 384 EC	R 673,988.00
Cash	R 24,994.00
A large safe	R 12,850.00
A small safe	R 4,000.00
2 wrist watches	R 45,594.00
Wedding rings	R 215,150.00
Bangles and other jewellery	R 6,000.00
Two .308 calibre Sako rifles; Two .243 calibre Sako rifles;	R 180,000.00
A shot gun and a pellet gun	R 20,000.00
Cartons and packets of cigarettes	R 2,000.00
TOTAL VALUE	R 2, 283, 085.00

with his hands and legs tied, tying a towel around his face and dousing it with water, putting the plug in the bath and running hot water into it, and leaving him tied up and blindfolded in the bath with the tap running when they left the house with reckless disregard to him drowning.

**Counts 6 to 9 and Schedule 1 – Kidnapping.**

In that on the date and at the place mentioned in count 1, the accused, acting in the furtherance of a common purpose, unlawfully and intentionally deprived the persons listed in the second column of Schedule 1 hereto of their freedom of movement, by forcing them into a shop building and locking them up inside it against their will.

**SCHEDULE 1**

Count 6	Bonga Yekani, a 38-year-old male person
Count 7	Maboy Veni, a 58-year-old male person
Count 8	Zameka Gelem, a 42-year-old female person
Count 9	Andile Khangelana, a 20-year-old male person

**Counts 10 to 22 and Schedule 2 (Accused 1 only) – Attempted Murder.**

In that on the date mentioned in count 1 and at or near the Bonza Bay off ramp along the N2, East London, in the Buffalo City Magisterial District, accused 1 unlawfully and intentionally attempted to kill the persons listed in the second column in Schedule 2 hereto by deliberately driving a vehicle at high speed over a stop sign and through a busy intersection, in an attempt to avoid an arrest after having committed the offences detailed in counts 1 to 9, causing a collision with two other vehicles, a VW Polo and a Toyota Quantum minibus, as a result of which the occupants thereof, listed in the second column of Schedule 2 hereto, sustained various injuries, and accused 1, notwithstanding his foresight of the possibility of his actions causing the deaths of the said occupants, acted with reckless disregard for this consequence.

## SCHEDULE 2

Count 10	Luvo Zweni, a 34-year-old male person (Quantum)
Count 11	Bulelwa Vionah Gola, a 47-year-old female person (Quantum)
Count 12	Nomachina Jacob, a 60-year-old female person (Quantum)
Count 13	Winnie Mbovu, a 66-year-old female person (Quantum)
Count 14	Wele Smile, a 64-year-old male person (Quantum)
Count 15	Thandiswe Matross, a 40-year-old female person (Quantum)
Count 16	Ntombozuko Mboso, a 51-year-old female person (Quantum)
Count 17	Fundiswa Mnokoto, a 44-year-old female person (Quantum)
Count 18	Vuyiswa Gombe, a 65-year-old female person (Quantum)
Count 19	Bulelwa Petse, a 45-year-old female person (Quantum)
Count 20	Lungisile Mesetywe, a 47-year-old male person (Quantum)
Count 21	Wiseman Komisa, a 51-year-old male person (Quantum)
Count 22	Preston Premlala, a 21-year-old male person (VW Polo)

**Count 23 (Accused 1 only) – Murder (read with the provisions of section 258 of the Criminal Procedure Act 51 of 1977).**

In that on the date and at the place, and acting in the same manner described in counts 10 to 22, accused 1 unlawfully and intentionally killed Nongetheni Foki, an adult female person, by colliding with the Toyota Quantum vehicle in which the said Nongetheni Foki was a passenger thereby causing her serious injuries as a result of which she died at Frere Hospital on 27 May 2024, and accused 1, notwithstanding his foresight of the possibility of his actions causing the death of the said Nongetheni Foki, acted with reckless disregard for this consequence.

**Count 24 (Accused 1 only) – Reckless or negligent driving in contravention of section 63(1), read with sections 89(1) and 89(5)(a) or (b) of the National Road Traffic Act No. 93 of 1996.**

In that on the date and at the place mentioned in counts 10 to 23, accused 1 unlawfully drove a vehicle, to wit a Toyota Land Cruiser with registration number

KFX 411 EC, in a reckless or negligent manner by deliberately driving at a high speed through a stop sign and through a busy intersection, thereby colliding with two other vehicles.

**Counts 25 to 33 – Unlawful possession of a firearm in contravention of section 3(1)(a), read with sections 1, 120(1), 121 and Schedule 4, of the Firearms Control Act 60 of 2000.**

In that on the date and at the place mentioned in count 1, the accused, acting in the execution or furtherance of a common purpose, unlawfully possessed the firearms listed in column 2 of Schedule 3 thereto, without being the holder of a licence, permit or authorisation to possess such firearms.

**SCHEDULE 3**

Count 25	12-gauge calibre double barrel shotgun with serial number 32852
Count 26	.22 long calibre pump action rifle with serial number 15794
Count 27	.308 calibre Sako model L579 rifle with serial number 46106
Count 28	.308 calibre Sako model VL63 rifle with serial number 3281
Count 29	.243 calibre Sako model L579 rifle with serial number 21930
Count 30	.243 calibre Sako model L 579 rifle with serial number 101560
Count 31	A handgun of unknown make and model
Count 32	A handgun of unknown make and model
Count 33	A handgun of unknown make and model

**Count 34 – Unlawful possession of ammunition in contravention of section 90, read with sections 120(1), 121 and Schedule 4 of the Firearms Control Act, 60 of 2000.**

In that on the date and at the place mentioned in count 1, the accused, acting in the execution or furtherance of a common purpose, unlawfully possessed and unknown quantity of ammunition, of unknown calibre and make, without having

a valid licence, permit or authorisation to possess firearms capable of discharging such ammunition.

[2] All the accused pleaded not guilty in respect of all charges. Through their legal representatives, Mr Erasmus for accused 1 and Mr Mgudlwa for accused 2,3 and 4 reserved the basis of their defences.

### **The facts:**

#### *(a) The first crime scene.*

[3] Hayden Aldred Luck (Luck) is a proprietary of the farm that operates as a mixed agricultural enterprise cultivating vegetables and raising cattle. The farm employs 70 permanent staff members and is supplemented by about 200 temporary workers. Among Luck's employees are Bongani Yekani (Yekani), Maboy Veni(Veni), Zameka Gelem (Gelem) and Andile Khangelana (Khangelana). On the day in question, Luck and the specified employees were on duty as usual. Around 14:00 which is their lunch time, three men were seen taking drinks next to the shop which is also situated in the farm. These three men politely approached Luck who was about to drive his Toyota Landcruiser out of the premises. Luck was in company of Yekani. They pretended as if they wanted to buy dogs. Together with Yekani and the three assailants, Luck drove towards the dogs' kennels.

[4] A peaceful conversation between Luck and the assailants carried on without any suspicions from either Luck or Yekani. Whilst still in the driver's seat, the three men pointed Luck with weapons which he believed were 'firearms', one on the side of the driver's seat and two on the side of the passenger's seat. Yekani who was at the back of the Toyota Landcruiser had already been instructed to lie

down. He was tied with a masking tape. One of the assailants took control of the Toyota Landcruiser and drove it next to the main house,

[5] When Luck was instructed to get inside his house, the ‘firearms’ were still pointed in his person. He was tied with a masking tape so as to restrain him from moving. The assailants demanded safe keys. It is gleaned from Gelem’s evidence that Luck was not in control of the safe keys and monies, his wife Jacquie Luck (Mama Jack) was. As a result he knew nothing about the safe keys that were demanded from him. This then outraged the assailants and they started to beat him up. The other three assailants simultaneously accosted the other employees to wit Yekani, Veni, Gelem and Khangelani. From there they came to where Luck and other three assailants were and started to ransack the house. One of the assailants kept an eye on the employees that were locked in another house and instructed them not to move.

[6] Because Luck could not tolerate the excruciating pains from the torture, he asked them to call Gelem to give a clue of where the safe keys were. Gelem used Luck’s mobile phone which was already robbed from his possession. She phoned Mama Jack whilst under the guard of the robbers. At the time Gelem was phoning Mama Jack, one of the robbers had pointed a ‘firearm’ on her head. Gelem politely asked for the keys from Mama Jack and pretended all was well at home. Mama Jack confirmed that the safe keys were in her possession. This also angered the assailants, they continued to torture Luck. One of the assailants took Gelem back to where the other employees were and locked the door and the buglar.

[7] Luck explained the role played by some of the assailants and testified that one of them whilst beating him up opened a hot water inside the bathtub and



instructed him to lie inside. He did as instructed, the hot water started pouring at him whilst he was in the lying position.

[8] He recalled them placing a cloth over his mouth while he was submerged in scalding water in the bathtub. The burning of the hot water could not be tolerated, he swiftly removed the bath cap and some water was running down the drain. As he attempted to lift himself up to drain the water, one of the attackers pulled a knife out and pressed it painfully against his throat. The assailant threatened, *“I am going to slit this whiteman’s throat just like slitting a pig’s throat in water.”* When he dared the attacker to proceed, the knife was released and his face was covered with a cloth.

[9] As a result of the torture, Luck sustained multiple injuries , including cuts on his head from being struck with a firearm. There was widespread bruising on his chest, ribs and other areas, He sustained facial swelling and discoloration. There were blisters on his buttocks emanating from being submerged in scalding water.

[10] Luck informed the assailants to ask the tools from one of his employees so as to break the safes and take whatever they wanted to take. Khangelana was called to look for the electric grinder and the crowbar. When he lifted the garage door, one of the assailants hit him with a firearm. He could not tolerate the pain and the shock that he found himself in and asked them to call Veni to check the tools instead. Veni was instructed to look for the tools which he found. The assailants broke the door and the removed the safes. Veni was instructed to assist in loading the items including the safes which had firearms and money inside the Toyota Landcruiser. Since they were two motor vehicles in the yard, one of the assailants ordered that both vehicles be driven out of the premises. This was

adhered to. The six assailants left the scene in possession of all the listed properties. They drove towards East London direction at extremely high speed.

[11] The news regarding the robbery at Luck's place was circulated via the WhatsApp group of the community members. Those who could follow the lead did. Amongst those who were chasing Luck's car were Karl Human (Human) who was in company of Johannes Jansen (Jansen) as well as Christi Roestort (Roestort). Human and his co-driver witnessed how the collision between Toyota Landcruiser, the polo and the Toyota quantum occurred. He observed people flying out of the Toyota quantum due to the collision. Immediately after the collision, the driver of the Toyota Landcruiser escaped the collision scene and went to the bushes. One of the occupants was left at the collision scene with visible injuries.

[12] After learning about robbery at Luck's home Roestort drove to settler's way towards the direction of the town. Upon arriving at the collision scene, he found one of the suspects already handcuffed. Roestort assisted the police by searching the area, including the tunnel for possible evidence such as hidden firearms and other relevant clues. As he walked through the tunnel, he spotted an abandoned jacket approximately 10 metres from the exit. The jacket appeared clean suggesting that it had been discarded recently. It featured distinctive yellow and white patches on the sleeves. Concerned that someone might find and conceal it, he took the jacket and handed over to Sergeant Xhibeni Mgudlwa who registered it in the SAP 13 register.

*(b) The collision scene*

[13] There were fifteen passengers in the Toyota quantum. 13 of them gave testimony except for Ms Nongetheni Foki, who passed away at Frere hospital on

27 May 2024. Although the passengers could not directly witness the incident, their accounts were similar. They stated that they heard a bang and only to discover that the Toyota Landcruiser had collided with the back of the Toyota quantum. The Toyota quantum flipped over resulting in a mix of minor and severe injuries among the passengers.

[14] Preston Premlal (Premlal) who was a driver of the polo involved in the collision witnessed the collision and attributed the cause to the reckless and inconsiderate driving of the Toyota Landcruiser. Specifically, he stated that the Toyota Landcruiser's excessive speed led to the collision.

[15] It is undisputed that as a result of the collision the Toyota Landcruiser veered off the tarred road and became lodged in the rails. The vehicle had significant damage and was subsequently declared a total loss or written off by the insurance company. Meanwhile, the second bakkie which escaped the first scene during robbery was abandoned on Hudson Avenue still in good condition.

**The evidence linking the accused with the crimes: *The state's case***

*(a) Arrests, identity and identification parades.*

[16] Based on his observation at the collision scene, Human noticed that the driver of the Toyota Landcruiser who ran to the bushes was tall and white in complexion. He had a floppy hat in his head. It is common cause that Accused 2 was a passenger in the Toyota Landcruiser allegedly driven by accused 1. He was apprehended at the collision scene.

[17] Mcebisi Sinkwana (Sinkwana), a resident at Nompumelelo village testified that the tarred road where the collision occurred is not far from his home. On the

day of the incident, he noticed that an accident had occurred due to high unusual volume of cars on the road. While at home with his girlfriend, accused 1 appeared with visible injuries. He spontaneously informed them that he was being pursued by the police for stealing a vehicle in Mooiplas. He bandaged accused 1's injuries and borrowed him his jersey, as he complained of feeling cold.

[18] Because he was afraid, Sinkwana swiftly asked Leizer, his neighbour to call the police. Leizer took time to return. He then walked accused 1 towards the direction of Minqi tavern. It was there that police emerged, prompting accused 1 to flee. Accused 1 was chased and subsequently apprehended by the police including Const Barney Don, who testified to that effect.

[19] According to Sgt Nkululeko Mtati's testimony (Sgt Mtati), he found accused 2 lying at the collision scene, covered in dust, bleeding and injured. Upon obtaining consent to search him, Sgt Mtati discovered four live ammunitions, including a live ammunition of a rifle in his pocket. In addition, he found a wristwatch which was later identified as belonging to Mama Jack. These items were exhibited and depicted in photographs that formed part of the court's exhibits.

[20] Following the arrest of accused 1 and 2 as well as the collection of witnesses' statements by the police, Luck and his employees indicated that they could potentially identify the suspects. On 01 March 2024, the investigating officer, detective warrant officer Kwenene (I/O) instructed detective Constable Nkathazo (Const Nkathazo) to hold an identification parade (Id parade). During the Id parade, 15 males participated including accused 1 and 3. According to Const Nkathazo's version Mr Somtsewu, an attorney represented both accused. The results of the Id parade were as follows: Veni, Yekani and Luck identified accused 1. Khangelana identified accused 1 and unknown person. Gelem who

appeared to be terrified and nervous identified an unknown person specifically the individual standing as number 15 in the lineup.

[21] In their testimonies Veni, Yekani, Luck and Khangelana explained how they identified accused 1 at the first crime scene. The witnesses inferred that accused 1 was a mastermind behind the crimes, citing his behaviour of moving around the premises and issuing instructions to the other perpetrators during the commission of the crimes. Luck and Khangelana explained that accused 1 had a yellow complexion, a floppy hat on his head, pants with pockets on the side as well as white tekkies. While Luck testified that accused 1's pants were brown with side pockets, Khangelana could not recall the colour. However, Khangelana did note that the pants had reflectors below the knee area. Khangelani explained that accused 1 was the one demanding the electric grinder and a crowbar from him. He was the person who hit him with a 'firearm' when he was trying to open the garage to look for the items.

[22] Although accused 2 did not participate in the Id parade, Luck pointed him in the dock as one of the assailants. When questioned about his identification, Luck explained that he recognised accused 2 because he was wearing a white T-shirt during the incident. He was the one who held a knife on his throat threatening to kill him, he explained. Accused 2 also participated in throwing him inside the bathtub. He further enquired about the whereabouts of the electric grinder and the crowbar.

[23] Sergeant Zukile Soli(Sgt Soli), one of the witnesses testified that although he did not have the details of how accused 3 was arrested, he took his warning statement. He submitted a standard police form used to obtain warning statements. The communication was in Isixhosa, a language understood by accused 3. Before proceeding writing a statement, accused 3 was informed of his

rights, including the right to legal representation at his own expense or through legal aid, as well as the right to remain silent. He was also cautioned that any statement made could be used against him in court during a subsequent trial. Accused 3 acknowledged understanding these rights and proceeded to make a statement, which reads:

‘ I deny the allegation against me that on Tuesday 20-02-2024 was phoned by Odwa who is a friend to me and asked me to take him to Mooiplaas together with his friends who were unknown to me. I met Odwa at Egoli near Buffalo Flats together with Odwa’s friends who were +- five in total. I proceeded to Mooiplaas with them. On arrival at Bluewater, I took the left turn and stopped in the gravel road and all of them alighted from my VW POLO with registration number ND 861-993 charcoal in colour and hatched back. After that I drove my vehicle to park at the taxi rank along the main road, after a while I noticed a Toyota Landcruiser Bakkie beige in colour and a white Toyota bakkie from a gravel road with a high-speed following each other to the direction of East London. I then followed also to the direction of East London. I am not sure of the drivers of the two bakkies. That is all I can say about this matter.’

[24] Siyabonga Vuyolwethu Mpusula (Mpusula) testified that accused 3 normally fetched his aunt’s child from school, but on the day of the incident he failed to do so. His aunt asked him to take charge. After some time he received a voice note from the cell-number 0783338285, from accused 3 explaining that he was delayed attending a business at Mooiplaas and would not be able to fetch the child. Mpusula identified the polo in the exhibited photographs as belonging to accused 3. He later presented the cell -number to the I/O.

[25] Subsequent to the arrest of accused 4, on 09 February 2025 a second Id parade was held. Sergeant Mkumatela was in charge of the second Id parade. They were eight participants in the Id parade including accused 4. Luck, Veni and Khangelana pointed accused 4 in the Id parade. In contrast, Gelem and Yekani failed to identify accused 4.

[26] Luck testified that accused 4 had a gold tooth at the first crime scene, however, when he pointed him out in the Id parade he had grown a little beard. Veni and Khangelana did not provide any identifying features for accused 4. Both testified that they primarily focused on the face. Their focus enabled them to identify accused 4 later at the Id parade, so they explained. Although Veni did not provide any identification marks for accused 4, he described the role he played during the incident. According to Veni, when the house was being ransacked accused 4 was on the bed, searching for the items to take.

*(b) The scientific evidence*

[27] Two fingerprint experts whose credentials were undisputed, testified about their independent analyses of the fingerprints found at the first crime scene. Warrant officer Lonele Dyakop (W/O Dyakop) visited the first crime scene on the day of the incident and collected DNA samples from the gear lever and steering wheel of the bakkie which was recovered at Huydson avenue. He also discovered a cello-type mask inside the kitchen and a cloth in one of the bedrooms. Allied to those discoveries he lifted fingerprints from a cello-type item which was on top of the chair. He further took photographs of the kit he used including the sport where the fingerprints were lifted.

[28] On 25 February 2024, W/O Dyakop received a set of fingerprints from the I/O. These were obtained at the time of arrest. Upon comparison, the fingerprints matched those obtained from the I/O, identifying accused 1. On the day of his testimony, he prepared a court chat by first taking fresh fingerprints from accused 1 and conducting a second analysis. The fresh prints, along with those from the cello-type and the I/O's submissions confirmed a match, conclusively linking them to accused 1.

[29] Captain Kelvin Swartbooi testified about his multi-facet role in the case: official photographer, duty officer, fingerprint expert and crime scene investigator. He referenced to the photographs he took and stated that he lifted fingerprints and collected DNA from the firearms found in the Toyota Landcruiser. He used an automated system to compare fingerprints found in the Toyota Landcruiser with those obtained from the I/O. The results came out identifying accused 2's fingerprints. To further confirm, he took fresh fingerprints and prepared a court chart. The second comparison also identified accused 2. Although he lifted a lot of fingerprints from the Toyota Landcruiser, the fingerprints that positively identified accused 2 were those lifted from the Toyota Landcruiser's fender.

*(c) The evidence of medical response*

[30] Mellisa Van Rooyen (Van Rooyen), an intermediate life support paramedic at ER24, testified that around 15:40 on the day of the incident, she attended to the collision scene with her colleague who had advanced support skills. She found a lot of passengers with minor to serious injuries. She attended to the deceased, who lay on the grass. The deceased was still alive complaining of severe neck pain and numbness in her limbs. Van Rooyen administered a drip and transported the deceased with her colleague's assistance to Frere hospital.

[31] The deceased sustained no further injuries from the time she was taken to the collision scene up to a stage when she was admitted in hospital. On 25 February 2024, Van Rooyen visited the deceased in the Intensive Care Unit for a follow-up. The patient was still able to talk complaining of being paralysed completely. This was the last time Van Rooyen saw her.



[32] Dr Sithandiwe Khunyuzwa (Dr Khunyuzwa), a medical practitioner conducted a post-mortem examination on the deceased's body on 31 May 2024. Her findings included C4 and C5 dislocation structure and enlargement of the head. C4 and C5 dislocation fracture refers to the fourth and fifth vertebrae in the neck region of the spine. The key implications are that there was severe neck injury. In the result, the cause of death was determined to be a spine injury, consistent with motor vehicle accident.

*(d) Formal admissions*

[33] Before the closure of the state's case, all the accused made certain admissions which were formally recorded in terms of section 220 of the CPA.

These are:

**A The still photographs:**

1. That Jason Kumm, the operations manager at Agri EC, Gqeberha, downloaded still photographs from the camera situated at Bluewater intersection with pole number P669, and prepared a still photograph album containing still images Exh "J"
2. The still photographs he so downloaded, pertain to photographs that were recorded by the said camera, which recorded the following: -
  - 2.1 On 20 February 2024 at 12:04:13 a VW Polo with registration numbers ND **861-993** heading towards the Great Kei River direction. The same vehicle on the same date at 13:45:35 appears stationary at the Bluewater intersection. At 15:04:38 same VW polo with registration numbers ND **861-993** appears moving towards the direction of East London.
  - 2.2 A Toyota Landcruiser with registration numbers **KFX 411 EC** on 20 February 2024 at 15:00:54 stationary on the side of the road at Bluewater intersection.
  - 2.3 A Toyota Hilux with registration numbers **KHH 384 EC** on the same day stationary on the side of the road at 15:01:24. The same Toyota Hilux at 15:01: 35 appears moving towards the direction of East London.

**B Photograph Album.**

3. That on 25 February 2024 Captain Augusto Johan Eric van Heerden of the Local Criminal Record Centre of the South African Police services, East London, photographed the VW polo with registration number **ND 861-993** at South African Police Services, East London Police station, and he compiled a photograph album. The said photograph album is admitted into evidence as Exhibit “V”

**C The Tracker (ND 861-993)**

- 4 That Warrant Officer Kwenene obtained a detailed tracker report for the VW Polo with registration **ND 861-993** which was used by Accused No.3, by means of a subpoena in terms of section 205 of the Criminal Procedure Act 51 of 1977. The said car tracker record is admitted into evidence as Exhibit “W”

**D The Firearms**

5. That on 21 February 2024 Captain Kelvin Cecil Swartbooi of the Local Criminal Record Centre of the South African Police Services, East London, photographed the firearms after they were removed from the safes as depicted in photographs 208-236 of Exhibit C at the Local Criminal Record Centre offices, East London,
6. The said firearms were correctly sealed in an exhibit bag, kept safe and forwarded to the Ballistics section of the SAPS Forensic Science Laboratory, Gqeberha.

**E The ballistic evidence**

7. That Lieutenant Colonel Mandisi Mgwadleka of the Ballistics Section of the SAPS Forensic Science Laboratory, Gqeberha, correctly examined and tested the mechanisms of the rifles mentioned in counts 25, 27, 28, 29 and 30 of the Indictment and determined that, the rifles were manufactured or designed to discharge centre-fire ammunition and the device mentioned in count 26 of the Indictment was manufactured or designed to discharge rim-fire ammunition.
8. That Lieutenant Colonel Mandisi Magwadlela correctly determined that, despite the fact that the butt-stocks and/or the butt stock covers of the rifles and shotguns mentioned in counts 25, 27, 28 and 29 of the Indictment are broken, the said firearms are still able to discharge ammunition.
9. That the butt-stock of the rifle mentioned in count 26 of the Indictment is broken and loose but the rifle is able to discharge ammunition.

10. That the rifle mentioned in count 30 of the Indictment functions normally without any obvious defects. The said ballistic report is admitted into evidence as Exhibit “X”

**F The cell phone evidence and Billing Data**

11. That warrant officer Kwenene, by means of a subpoena in terms of section 205 of Act 51 of 1977, obtained detailed billing records for the following cell phone numbers, 078 2219618, 083 22 66 864, 081 55 63 216 and 072 098 5948. The said billing records are admitted into evidence as

- 11.1. Billing for Cell phone number 078 22 19 618 Exhibit “Y”

- 11.2 Billing for Cellphone number 083 22 66 864 Exhibit “Z”

- 11.3. Billing for Cellphone number 081 55 63216 Exhibit “AA”

- 11.4 Billing for Cellphone number 072 098 59 48 Exhibit “BB”

12. That Lieutenant Colonel Maria Susanna Beetge of the South African Police Services, Cyber Crime Investigation Unit, Pretoria used the data mentioned in paragraph 11 above to compile a chart depicting communication between some of the cellphone numbers mentioned above and towers used at the time of communication.

The said chart and the accompanying affidavit are admitted into evidence as Exhibit “CC”

**G. Medical reports**

13. That on 21 February 2024 Hayden Aldred Luck was medically examined by Dr Marais. The injuries he sustained are correctly recorded in the medical report. The medical report is admitted into evidence as Exhibit “DD”

14. That on 20 February 2024 Thandiswa Matross was medically examined at Frere hospital by Dr. Taljaard. The injuries she sustained are correctly recorded in the medical report. Her medical report is admitted into evidence as Exhibit “HH.”

15. That on 21 February 2024 Nomatshayina Jacobs was medically examined at Empilweni Gompo Community Health Care Centre by Dr. Siyo. The injuries she sustained are correctly recorded in the medical report. Her medical report is admitted into evidence as Exhibit “EE.”

16. That on 21 February 2024 Vuyiswa Gomba was medically examined by at Empilweni Gompo Community Health Care Centre by Dr. Siyo. The injuries she sustained are correctly recorded in the medical report. The medical report is admitted into evidence as Exhibit “FF.”

17. That Captain Kevin Cecil Swartbooi obtained DNA swabs from the rifle and the double barrel shotgun that were at the back of the Toyota Landcruiser with registration number KFX 411 EC. The swabs were correctly sealed, kept safe and forwarded to the Biology Section of the Forensic Science Laboratory, Gqeberha.
18. That Detective Warrant Officer Phumelele Kwenene of the SAPS, Provincial Serious Violent Crime Unit collected a non-intimate Forensic DNA Reference sample from Accused No. 2, Luthando Ngangelizwe, which sample was correctly sealed, kept safe and forwarded to the Biology section of the SAPS Forensic Science Laboratory, Gqeberha.
19. That Warrant Officer Zuko Qwaka, a qualified Forensic Analyst from the Biology Section of the SAPS Forensic Science Laboratory, correctly received and compared the DNA profiles obtained from the rifle and a double barrel shot gun with the non-intimate Forensic DNA reference sample obtained from Accused No. 2, Luthando Ngangelizwe, and correctly concluded that the DNA results were a match. Warrant Zuko Qwaka's affidavit in this respect is hereby entered into evidence as Exhibit "GG".

Coupled with the admissions made by the accused, the state submitted 34 exhibits whose contents and correctness were undisputed by the defence.<sup>2</sup> Exhibit AA

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<sup>2</sup> Exhibit A – Maboy Veni's Statement.(this was submitted through cross-examination by counsel for accused 2,3 and 4).

Exhibit B – Statement regarding Interview with suspect(accused 3).

Exhibit C – Photo Album compiled by Captain Kelvin Cecil Swartbooi – Scene of Accident.

Exhibit D – Pertaining TOLCRC Investigation on scene.

Exhibit E – Scotch Tape – Print lifted from clear sellotape that was on the chair inside office.

Exhibit F – Finger and Palm Prints of Odwa Dyabana – accused 1.

Exhibit G – Latent Scene Print of Odwa Dyabana – accused 1.

Exhibit H – Palm Prints of Odwa Dyabana (Accused 1) taken before court (the court chart).

Exhibit I – List of stolen property during armed robbery.

Exhibit J – Images of a VW Polo and Toyota HiLux 4X4.

Exhibit K – Photo Album compiled by Sergeant N Tuze – Identification Parade.

Exhibit L – Identification Parade Form.

Exhibit M – Images of Toyota Landcruiser.

Exhibit N -Fingerprints of Luthando Ngangelizwe (accused 2) lifted from the Toyota Landcruiser' fender.

Exhibit O – Finger and Palmprints of Luthando Ngangelizwe (accused 2).

holds no significance in these proceedings, as it was subsequently withdrawn by the state.

### **Application in terms of section 174 of the CPA**

[34] After the closure of the case for the prosecution, Mr Mgudlwa applied that accused 3 be discharged in terms of section 174 of the CPA. The application was dismissed for reasons advanced which will not be repeated in this judgment.

### *The defence case*

[35] Following the dismissal of the application, all accused testified in their defences. Accused 1's version can be summarised as follows: on the day before

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Exhibit P – Latent Scene Print Image of Luthando Ngangelizwe (accused 2).

Exhibit Q – Fingerprints of Luthando Ngangelizwe (accused 2) taken before court.

Exhibit R – Identification Parade Form (Sergeant Mkumatela).

Exhibit S – Photo Album compiled by Sergeant Z Njambe (Identification Parade).

Exhibit T – Affidavit in terms of Section 212 (4) of Act 51 of 1977 (Forensic Pathology Services).

Exhibit U – Formal Admissions by all accused persons.

Exhibit V - Photo Album of the VW Polo at the Police Station (Compiled by Captain Aje Van Heerden).

Exhibit W – Detailed Trip Report of the VW Polo.

Exhibit X – Affidavit in terms of Section 212 of the Criminal Procedure Act 51 of 1977 (Mandisi Mgwadleka).

Exhibit Y – Cellphone records in respect of cell number 0782219618.

Exhibit Z – Cellphone records in respect of cell number 0742151222.

Exhibit AA – Cellphone records in respect of cell number 0633483275.(exhibit withdrawn).

Exhibit BB – Cellphone records in respect of cell number 0720985948.

Exhibit CC – Affidavit in terms of Section 213(1) and (2)(a) of the CPA 51 of 1977 (M S J Beetge).

Exhibit DD – Medico-Legal Examination (J88) in respect of Hayden Aldred Luck.

Exhibit EE – Medico-Legal Examination (J88) in respect of Nomatshayina Jacob.

Exhibit FF – Medico-Legal Examination (J88) in respect of Vuyiswa Vivienne Gomba.

Exhibit GG – Biology Report prepared by Warrant Officer Zuko Qwaka.

Exhibit HH – Affidavit in terms of Section 212(4) Act 51 of 1977 ( Physical Examination of Thandiswa Matross).

the incident, he was in Mdantsane where he met a woman and developed a fleeting romance. Together with the girlfriend, they went to look for her friends at Nompumelelo. However their encounter became sour when the girlfriend's boyfriend appeared, became jealous and assaulted him. After fleeing from assault, he took a refuge in the forest. He met a kind stranger who was in company of a woman and a child. The stranger took him to his house borrowed him a jersey and tended to his injuries.

[36] Accused 1 later went to look for Minqi's tavern. On the way he was spotted by another stranger who pointed him out to the community members, saying "there he is." He was subsequently caught. Accused 1 testified that after being apprehended he was severely assaulted and sustained injuries on his face. Police took him to the collision scene and later to the police station. At the police station some police officers suggested that he be taken to the Dr. After the Dr's treatment, he was detained. Accused 1 denied that he committed crimes as alleged by the state.

[37] Accused 2 testified that around 13:30, he left his village in Mooiplaas to head to East London. He hitchhiked and spotted a Toyota Landcruiser being driven recklessly at a high speed. This Toyota Landcruiser was being followed by a bakkie. The driver stopped and offered him a lift. He got at rear section at the driver's request to hold a cupboard. While riding in the speeding vehicle, he noticed a firearm lying nearby. He thought it might be a toy gun.

[38] The Toyota Landcruiser was soon chased by police. As it was speeding, he heard a loud bang and found himself on the ground having lost consciousness. When he regained consciousness, he realised that an accident had occurred. accused 2 denied his involvement in the commission of the crimes as alleged by the state. Furthermore, he denied that Mama Jack's watch and a set of 5

ammunitions were found in his possession during the arrest. When asked to explain about the DNA found in Luck's firearms that were in the Toyota Landcruiser, he testified that the firearms might have touched him during the accident, potentially transferring his DNA.

[39] Accused 3, a Bolt driver testified that on the day of the incident , he had been driving a child to school as usual. Around 9:00, he received a request via the Bolt App to transport passengers to Blue water for a fare of R600. To avoid Bolt commission, he made a private deal with the passengers , cancelling the formal trip authorised by Bolt. As a result, he relied on the passangers' directions since the App was off. Although delayed by road constructions on the way, he eventually dropped off the passengers before they could reach their destination. Upon returning, he noticed his mud flaps were missing and later finding them. While fixing the mud flaps, he discovered that the front number plate had been dislodged and was lying under the car.

[40] Accused 3 admitted being in the vicinity for legitimate purposes as depicted in the still photographs but denied involvement in the crimes. He also confirmed phoning Mpusula to assist in fetching the child from school but denied making a warning statement to the police. Accused 3 confirmed knowing accused 1 and 2, but claimed no knowledge of accused 4. He testified that he could not recall the identities of his passengers that day but was certain that accused 1 and 2 were not among them.

[41] Accused 4 testified that on the day of the incident he was with his girlfriend Bukiwe at her place trying to resolve a conflict that they had. He testified that his injuries from the days prior made it impossible for him to commit the crimes, as he was limping. He also provided his cell number to the investigating officer. When confronted with the cell phone records showing his cell phone was used

near Blue Water during robbery, he denied this, insisting that his cell phone was non-functional at that stage. Accused 4 confirmed knowing accused 1 but claimed no knowledge of others.

[42] Accused 4 raised concerns about the Id parade procedure, alleging that the I/O took his photograph beforehand. He also claimed that although he was given the opportunity to change clothing and directions which he declined, he was not allowed to choose the participants in the Id parade.

### **Issues**

[43] The issues for determination are whether the accused were correctly identified as perpetrators of the crimes in question. Allied to that, the court must examine whether the perpetrators acted in common purposes in order to act in furtherance of a shared criminal design. Another point in issue is whether the perpetrators collectively possessed unlicensed firearms and ammunitions as alleged by the state. Furthermore, the court must determine whether accused 1 had intention to kill the deceased and whether he had intention to attempt to kill 13 passengers including one motorist.

### **The legal Principles**

[44] In South African law, the standard of proof that has been consistently reaffirmed through various cases<sup>3</sup>, is proof beyond reasonable doubt. For an acquittal, the version of the accused need only be reasonably possible true. In *Shakell v S*<sup>4</sup>, the court held per Brand AJA,

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<sup>3</sup> S v Ntsele 1998 (2) SACR 178 (SCA); S v Jackson 1998 (1) SACR 470 (SCA) @ 476 e-f.

<sup>4</sup> [2001] 4 All SA 279 (SCA) at 288 e-f.



‘A court does not have to be convinced that every detail of an accused’s version is true. If the accused’s version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused’s version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.’

[45] Where identity is at issue, the court must approach witness’ evidence with caution. The caution approach assists to ensure reliable identification. This means that the state must present credible , reliable and sufficient evidence to meet the high burden of proof demonstrating accused’ identity beyond reasonable doubt.

[46] The principle in *S v Mthethwa*<sup>5</sup> (Mthethwa) serves as a guiding authority in assessing whether the perpetrators of crimes were reliably identified. In this case the court had the following to say:

‘Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused’s face, voice, build, gait, and dress; the result of identification parades, if any, and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities; ...

[47] Although this case involves numerous legal principles, to contextualise issues I will pause here and proceed to the discussion.

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<sup>5</sup> 1972(3) SA 766 AD at 768a-c

## **Discussion**

[48] Counsel for the state sought convictions for all accused making concessions regarding counts 26,31,32 and 33. These counts pertain to possession of unlicensed firearms under section 3(1) of the Firearms Control Act 60 of 2000. Notably, counsel for the state highlighted Exhibit 'C', which shows, among other things, that the firearm in count 26 was incapable of discharging the ammunitions. This firearm was among those stolen during the robbery at Luck's home.

[49] The debate surrounding accused 3 centres on his absence from the crime scenes. Counsel for the state argued that despite his absence, it can be inferred that he had prior agreement with accused 1 to participate in the commission of the crimes. The state's argument is based on the discovery of accused 3's VW polo, without front number plate, approximately 200-300 metres from the first scene. This suggests that the vehicle may have been used as a gateway car after the commission of the crimes.

[50] In contrast, counsel for accused 1 submitted that the contradictions in the state witnesses' testimony regarding accused 1's clothing suggest an honest mistake in relation to the perpetrator's identity. This includes the mistake made by Human, who testified that that he saw accused 1 jumping out of the stolen Toyota Landcruiser after it overturned. Most importantly, so he argued, the credibility of the Id parade and the presence of accused 1's fingerprints on the masking tape allegedly lifted at the scene are questionable. In support of this proposition, accused 1's counsel pointed out that Luck's evidence indicated that no fingerprints were lifted from his premises.

[51] Counsel for accused 2, 3, and 4 argued for their acquittal in respect of all charges. He argued that their version of events is more probable than that of the

state. Counsel argued that it was plausible for the stolen items to be found where accused 2 was because he had coincidentally hitchhiked a stolen vehicle. He also disputed the claim that the items were found in accused 2's pocket, given that he was unconscious after the accident. Additionally, counsel raised similar concerns to those of accused 1's counsel specifically regarding the Id parade that implicated accused 4. Furthermore, he argued that the evidence linking accused 3 to the crimes is insufficient to sustain a conviction, particularly in light of his detailed explanation for being in the vicinity of the first crime scene.

[52] My duty is to weigh up all the elements which point towards the guilt of the accused against all those that indicate his innocence. In addition, I have to evaluate the evidence in its totality taking into account the inherent strengths and weaknesses, probabilities and improbabilities from both sides. Ultimately, I must analyse and decide whether the burden weighs so heavily so as to exclude any reasonable doubt about the accused' guilt.<sup>6</sup>

[53] Despite the defence's oral submissions, I am satisfied that the state has met the legal requirements as outlined in *Mthethwa*<sup>7</sup>. The overwhelming evidence suggests that accused 1,2 and 4 were at the crime scene. The chain evidence regarding the Id parades was not disputed by the defence, instead the defence argued that the Id parades were improperly conducted due to differences in the height width and clothing among the participants. However, this argument is unconvincing given that accused 1 was represented during the first Id parade. After considering the evidence from those in charge of the Id parades, I conclude that both were properly conducted. The reliability of the Id parades is further supported by the fact that some witnesses pointed out irrelevant persons including Gelem who failed to identify anyone, indicating an objective process.

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<sup>6</sup> S v Chabalala 2003 (1) SACR 134 (SCA) Heher AJA at 140 a-b.

<sup>7</sup> Fn 3 above.

[54] At this point it is further apposite to present the corroborative evidence which confirms that the perpetrators were correctly identified. The incidents occurred during daylight. The witnesses to wit Veni, Khangelana and Luck, though terrified, identified accused 1,2 and 4's faces. Accused 1 and 2 were arrested immediately after the commission of the crimes. Accused 1's spontaneous admission to Sinkwa about stealing a car aligns with Human's testimony who saw him jumping out of the Toyota Landcruiser after the accident. This is also corroborated by the evidence of Roestorf and Constable Ralton Nelson who found the jacket and the hat which items were identified as those worn by accused 1 during the commission of the crimes. Furthermore accused 1 and 2 were found in possession of the stolen goods including the Toyota Landcruiser immediately after the commission of the crimes in question. Accused 2 was found in possession of the wristwatch belonging to Mama Jack as well as ammunitions tucked in his pocket. This then reminds me of the doctrine of recent possession which infers guilt when someone is found in possession of the stolen goods soon after the theft.

[55] I acknowledge the principle in *S v Skweyiya*<sup>8</sup>(Skweyiya) where the court noted that the nature of the article is an element in the determination of what is recent. In *Skweyiya*<sup>9</sup>, the court stated that if the article stolen is of the type which is usually and can easily and rapidly be disposed of, anything beyond a relatively short period will usually not be recent. In the matter under consideration, the state presented a distinct scenario. Although watches, ammunitions and cars can easily move from one hand to the next, the accused were pursued by the police and community members after the crimes. It is therefore clear that the doctrine of

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<sup>8</sup> 1984 (4) SA 712 (A), see also *S v Parrow* 1973(1) SA603 (A) at 604 B-E.

<sup>9</sup> *Ibid.*

recent possession applies, particularly given the immediate recovery after the chase.

[56] Additionally the prints found at the scene and those found at the Toyota Landcruiser's fender including the accused 2's DNA found at Luck's firearms carry a strong objective probative weight in linking both accused 1 and 2 in the commission of the crimes. The fingerprints experts testified in coherent, consistent and credible manner in explaining the process of the lifting of the fingerprints and DNA in question until the final analysis was conducted. There is no evidence to rebut the experts' testimonies in this regard.

[57] The presence of the accused 2's DNA which was lifted in Luck's firearm contradicts his alibi and supports Luck's testimony, suggesting that he was present at the scene of crimes and participated when the firearms were lifted in the safes. Accused 2's alibi is indeed improbable. It is implausible that a driver fleeing from police would offer a lift to bystanders. Luck's explanation on this point was convincing to the court.

[58] It is therefore crucial to mention that the evidence of accused 1,2 and 4 cannot be reasonably possibly true in the circumstances. Their evidence need a lot to be desired. There is no valid explanation why the alibi of accused 4 was not put to the witnesses for them to comment. Even if such version were put to the witnesses, the overwhelming evidence negate the alibi in question.

[59] Furthermore, the contradictions regarding accused 1's clothing, as highlighted by both the state and the defence are immaterial. Despite these minor discrepancies, the probabilities strongly suggest his involvement as one of the perpetrators. Even applying cautionary rules to Human's single testimony about

seeing him jumping out of the veered Toyota Landcruiser, there is substantial corroborating evidence implicating him in the crimes.

[60] Despite the overwhelming evidence linking accused 1,2 and 4 the same cannot be said about accused 3. The state relied on circumstantial evidence which is governed by two principles and these are: The inference sought to be drawn must be consistent with the proven facts. The proven facts must be such that they exclude every reasonable possibility save the one to be drawn. In relation to accused 3, the state faces significant challenges. His version raises a questions about familiarity with accused 1, the warning statement suggesting prior agreement for a business trip with accused 1 and others as well as his delay in leaving the crime vicinity after dropping off the passengers.

[61] Given accused 3's testimony, where he provided detailed explanations and answered state' questions, it is difficult to exclude every reasonable inference. His explanation as a bolt driver, attributing delays to a tyre problem, road construction and a lost number plate remains unrefuted and creates a doubt about his guilt.

*The doctrine of common purpose and joint possession of unlicensed firearms and ammunitions.*

[62] Regardless of the overwhelming evidence against accused 1, 2 and 4, the state bears onus of proving beyond reasonable doubt that the accused acted in concert to achieve a common goal. At paragraph 21 of its judgment, the Constitutional Court (CC) in *Thebus and Another v S<sup>10</sup>* noted that the principles laid down in *Mgedezi v S<sup>11</sup>* were since refined and developed by the Supreme

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<sup>10</sup> 2003 (6) SA 505 (CC);[2003] ZACC 12; 2003 (10) BCLR 11100 (CC).

<sup>11</sup> 1989 (1) SA 687 (A).

Court of Appeal in various authorities.<sup>12</sup> The CC *per* Moseneke J (with Madala J, Ngcobo J, O'Regan J, Chaskalson CJ, Langa DCJ, Mokgoro J, Yacoob J, Ackerman J and Goldstone J concurring) re-affirmed the principles of common purpose and held:

[18] The doctrine of common purpose is a set of rules of the common law that regulates the attribution of criminal liability to a person who undertakes jointly with another person or persons the commission of a crime. Burchell and Milton define the doctrine of common purpose in the following terms:

“Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number which falls within their common design. Liability arises from their ‘common purpose’ to commit the crime”.

Snyman points out that “the essence of the doctrine is that if two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, the conduct of each of them in the execution of that purpose is imputed to the others”. These requirements are often couched in terms of which relate to consequence crimes such as murder.’

[19] The liability requirement of a joint criminal enterprise fall into two categories. The first arises where there is prior agreement, express or implied, to commit a common offence. In the second category, no such prior agreement exists or is proved. The liability arises from an active association and participation in a common criminal design with the requisite blameworthy state of mind.’ [footnotes omitted]

[63] In the present case, the evidence does not prove any such prior agreement. Notwithstanding this, the overwhelming evidence explicitly demonstrate a joint

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<sup>12</sup> S v Petersen 1989(3) SA 420 a; S v Yelani 1989 (2) SA 43 (A); S v Jama and Others 1990 (4) SA 484 (A); S v Khumalo en Andere 1991(4) SA 310 (A); S Singo 1993(2) SA765(A).

enterprise among the accused 1, 2 and 4 with all actively participating in the criminal activities.

[64] Revisiting the applicability of common purpose to joint possessions of firearms and ammunitions is essential. The court's consideration would involve examining whether all the accused shared knowledge, intent and active participation regarding the firearms and ammunitions, beyond general participation in the crimes.

[65] The joint possession of Luck's firearms seems evident, given the accused' collective actions during the commission of the crimes, including breaking safes and escaping with firearms. This shared involvement supports the notion of joint possession.

[66] To determine joint possession for specific 'firearms' used during the commission of the crimes pointing at Luck and Gelem as well as hitting at Khangelana, it is crucial to assess whether all the accused had knowledge, intent and control over those 'firearms' particularly if their use was part of the shared criminal design. The evidence of accused 1 and 2's possession of gun like objects remains unshaken. Given the manner in which the crimes were committed including active participation by accused 1 and 2, accused 4 cannot be disassociated from the use of the 'firearms' which were used to threaten Luck and his employees during the commission of the crimes. It is conclusive that when he participated, he joined accused 1 and 2 who were already armed, foreseeing the possibility of the 'firearm' use and reconciling himself with it. Clearly, his intention was to commit crimes together with others using gun like weapons to threaten victims and facilitate escape with stolen goods and Luck's firearms.



*Crimes against accused 1 only*

[67] Counsel for the state cited *S v Qeqe*<sup>13</sup> (Qeqe) and argued that accused 1, while escaping in Luck's Toyota Landcruiser and collided with the Toyota quantum as well as a polo intended to attempt to kill the 13 passengers in the Toyota quantum including a motorist. He further argued that accused 1 had the intention to kill the deceased. Counsel asserted that in both instances, accused 1's intention was in the form of *dolus eventualis*, meaning he foresaw the possibility of death occurring and reconciled himself with that possibility.

[68] The well-known legal position is that intention is ordinarily inferred from the facts of the case through inferential reasoning. For intention in the form of *dolus eventualis*, the test is subjective, involving both conative and cognitive elements. This subjective test must not be conflated to an objective test which is applicable in cases involving negligence is an element.

[69] The facts in *Qeqe*<sup>14</sup> are distinguishable from the present case. In *Qeqe*<sup>15</sup> the accused drove a stolen vehicle, striking children on the sidewalk while being pursued by the police. The court found *dolus eventualis* based on clear evidence, including the sketch plan detailing the motor vehicle and the children's position at the time of the collision. Notably, *Qeqe*<sup>16</sup> predates the Supreme Court of Appeal's<sup>17</sup> thorough examination of *dolus eventualis* in motor vehicle collision cases.

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<sup>13</sup> 2012 (2) SACR 41 (ECG).

<sup>14</sup> Fn 13 above.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> See *Humphreys v S* (424/2012) [2013] ZASCA 20; 2013(2) SACR 1 SCA.

[70] The following key considerations are crucial in the circumstances of this case: the accident's circumstances surrounding the accident are not as clearly detailed as in *Qeqe*.<sup>18</sup> The deceased died over three months after the collision. The witnesses only reported hearing a bang at the back of the Toyota Quantum and could not provide further insight into what actually happened. The evidence of some of the witnesses demonstrate accused 1 driving at a high-speed overtaking inconsiderately and failing to stop at an intersection.

[71] Therefore, in light of the aforesaid, it is reasonable to infer that accused 1, as an adult who was speeding and overtaking other cars recklessly foresaw the possibility of the potential harm caused by his manner of driving including death. The key question is whether he subjectively reconciled himself with that possibility. The evidence is insufficient to demonstrate that accused 1 had reconciled himself with the risks involved. Instead, the evidence overwhelmingly suggests that accused 1 was trying to escape police pursuit driven by false confidence and bravery in outrunning them. Therefore, the convictions on 13 counts of attempted murder and one count of murder cannot be sustained.

[72] Despite the insufficiency of evidence in the attempted murder and murder charges, one must examine whether accused 1 is not criminally liable for the negligent killing of the deceased. The test for negligence was summarised in the well-known judgment of *Kruger v Coetzee*<sup>19</sup> where the court held that if a reasonable person would have foreseen the possibility of harm and would have taken reasonably steps to prevent it from happening, and the person in question did not do so, the element of negligence is established. In *casu*, accused 1 failed to exercise the standard of care expected of a reasonable person in the circumstances. According to Dr Khunyuzza, the deceased's injuries were

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<sup>18</sup> *Ibid.*

<sup>19</sup> 1966 (2) SA 428 A at 430 E-H.

consistent with motor vehicle accident. Therefore, accused 1's actions namely driving a motor vehicle recklessly as demonstrated by the witnesses and accused 2 as well as the failure to observe traffic rules showing disregard for safety are all factors that contributed to the deceased's death.

[73] Furthermore, given accused 1's reckless manner of driving, as observed by the state witnesses including accused 2, a conviction for reckless driving that caused harm to the passengers in the Toyota quantum and a motorist is inescapable.

### *The convictions*

[74] The final issue concerns the rule against duplication of convictions. While the state has a discretion to frame charges as it deems fit, the court retains a discretion to guard against duplicative convictions. This is necessary to promote fairness of the trial on both sides and to avoid prejudice to the accused. Punishing an accused multiple times for a single offence would be unfair and violate a principle of justice.

[75] In my view, count 1 (pointing of a firearm at Luck) and count 2 (robbery with aggravating circumstances ) constitute a single transaction. The accused' actions, specifically putting Luck in a bathtub with hot water, constitute a separate charge of attempted murder. This is further supported by accused 2's declaration who stated that Luck's throat would be slit like a pig, indicating a clear intent to attempt to kill.

[76] Similarly, the charges of kidnapping stand as the accused clearly formed distinct intentions, including restraining the employees' freedom by confining them in one room while committing the crimes. Regarding the pointing of a

‘firearms’ against Gelem, it is clear from her evidence that her cell phone was not among the stolen items. However, there is overwhelming evidence that the accused demanded safe keys, pointed a weapon believed to be a firearm at her.

[77] It may well be argued that this was a single intent in pursuit of robbery against Luck. However, the ‘firearm’ and the demands were directed to a different person to wit Gelem. The conviction outcome demonstrates that although Gelem was harmed, her cell phone was never stolen, resulting in a competent verdict<sup>20</sup>.

[78] Regarding counts 26,31, 32 and 33, the state’s concessions are correct. The essential elements of the offences of unlawful possession of firearms as contemplated under section 3 of the Firearms Control Act 60 of 2000, were not proved beyond reasonable doubt.

## **Verdict**

[79] **In the result, the verdict is pronounced as follows:**

1. Accused 3 is found not guilty and discharged in respect of all counts.
2. **Count 1- pointing of a firearm in contravention of section 120(6) read with sections 1,121, and Schedule 4 of the Firearms Control Act 60 of 2000-** (Accused 1,2 and 4 are found not guilty and discharged).
3. **Count 2- Kidnapping** (Accused 1,2 and 4 are found guilty as charged).
4. **Count 3-Robbery with aggravating circumstances as defined in section 1(1)(b) of the Criminal Procedure Act 51 of 1977-** (Accused 1,2 and 4 are found guilty as charged).

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<sup>20</sup> Pursuant to section 260 (1) ( c) of the Criminal Procedure Act 51 of 1977, if the evidence on a charge of robbery or attempted robbery does not prove the offence of robbery or, as the case may be, attempted robbery, but... the offence of pointing a firearm, air-gun or air-pistol in contravention of any law, the accused may be found guilty of the offence so proved...

5. **Count 4-Robbery with aggravating circumstances as defined in section 1 (1) (b) of the Criminal Procedure Act 51 of 1977** ( Accused 1,2 and 4 are found not guilty and discharged. However, accused 1,2 and 4 are found guilty to **pointing of a firearm in contravention of section 120(6) read with section 1,121 and Schedule 4 of the Firearms Control Act 60 of 2000**, a competent verdict).
6. **Count 5- Attempted murder** (Accused 1,2 and 4 are found guilty as charged).
7. **Count 6-Kidnapping** ( Accused 1,2 and 4 are found guilty as charged).
8. **Count 7- Kidnapping** (Accused 1,2 and 4 are found guilty as charged).
9. **Count 8- Kidnapping** (Accused 1,2 and 4 are found guilty as charged).
- 10.**Count 9- Kidnapping** (Accused 1,2 and 4 are found guilty as charged).
- 11.**Count 10 -22, in respect of accused 1 only** ( Accused 1 is found not guilty and discharged in respect of all counts).
- 12.**Count 23-Murder, in respect of accused 1 only** (Accused 1 is found not guilty and discharged). However, Accused 1 is found guilty to **culpable homicide**, a competent verdict.
13. **Count 24- Reckless driving in contravention of section 63 (1), read with section 89 (1) and 89 (5) (a) of the National Road Traffic Act No. 93 of 1996, in respect of accused 1 only** (Accused 1 is found guilty as charged).
14. **Count 25- Unlawful possession of a firearm in contravention of section 3(1)(a), read with sections 1, 120 (1),121 and Schedule 4, of the Firearms Control Act 60 of 2000** ( Accused 1,2 and 4 are found guilty as charged).
15. **Count 26- Unlawful possession of a firearm in contravention of section 3(1) (a), read with sections 1,120 (1), 121 and Schedule 4, of the Firearms Control Act 60 of 2000-** (Accused 1,2 and 4 are found not guilty and discharged).

- 16. Count 27- Unlawful possession of a firearm in contravention of section 3(1) (a), read with sections 1, 120 (1), 121 and Schedule 4, of the Firearms Control Act 60 of 2000 (Accused 1,2 and 4 are found guilty as charged).**
- 17. Count 28- Unlawful possession of a firearm in contravention of section (3)(1) (a) , read with sections 1, 120 (1), 121 and Schedule 4, of the Firearms Control Act 60 of 2000 (Accused 1,2 and 4 are found guilty as charged).**
- 18. Count 29- Unlawful possession of a firearm in contravention of section (3)(1) (a) , read with sections 1, 120 (1), 121 and Schedule 4, of the Firearms Control Act 60 of 2000 (Accused 1,2 and 4 are found guilty as charged).**
- 19. Count 30- Unlawful possession of a firearm in contravention of section (3)(1) (a) , read with sections 1, 120 (1), 121 and Schedule 4, of the Firearms Control Act 60 of 2000 (Accused 1,2 and 4 are found guilty as charged).**
- 20. Count 31- Unlawful possession of a firearm in contravention of section (3)(1) (a) , read with sections 1, 120 (1), 121 and Schedule 4, of the Firearms Control Act 60 of 2000 Accused 1,2 and 4 are found not guilty and discharged).**
- 21. Count 32- Unlawful possession of a firearm in contravention of section (3)(1) (a) , read with sections 1, 120 (1), 121 and Schedule 4, of the Firearms Control Act 60 of 2000 Accused 1,2 and 4 are found not guilty and discharged).**
- 22. Count 33- Unlawful possession of a firearm in contravention of section (3)(1) (a) , read with sections 1, 120 (1), 121 and Schedule 4, of the Firearms Control Act 60 of 2000 Accused 1,2 and 4 are found not guilty and discharged).**

**23. Count 34- Unlawful possession of ammunition in contravention of section 90, read with sections 120 (1), 121 and Schedule 4 of the Firearms Control Act, 60 of 2000 (Accused 1,2 and 4 are found guilty as charged)**

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**N CENGANI-MBAKAZA  
ACTING JUDGE OF THE HIGH COURT**

**APPEARANCES:**

Counsel for the state : Adv A. Nohiya  
DPP, Makhanda

Counsel for accused 1 : Adv A. C. Erasmus  
Instructed by : Legal Aid-SA

Counsel for accused 2,3 and 4 : Adv L. Mgudlwa  
Instructed by : Legal Aid-SA

Dates Heard : 25, 26,27,28 February 2025  
03,04,05,06,07 March 2025  
01,02,22,23,24,29,30 April 2025  
01, 02,29 May 2025

Date Delivered : 30 May 2025