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**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)**

**CASE NO: CC18/21**

In the matter between

**THE STATE**

V

**GCINITHEMBA BEJA**

ACCUSED 1

**FUNDILE MASETI**

ACCUSED 2

**JUDGMENT delivered 22 November 2023**

**THULARE J**

[1] The accused are charged with seven counts of murder read with the provisions of section 51(1) of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997) (as amended) (the CLAA), three counts of attempted murder read with the provisions of section 51(2) of the CLAA, one count of unlawful possession of a firearm and one count of unlawful possession of ammunition. The accused pleaded not guilty to all charges and elected to remain silent. Essentially, the accused relied on *alibi*.

[2] The issue is whether the State, as regards the identity of the accused, proved its case beyond reasonable doubt.

[3] On the night of 7 March 2020 four armed men arrived in a vehicle at Q 166, Sihawu Street, Site B, Khayelitsha (the scene) and started shooting. The scene was a tavern and on that night N[...] M[...] (N[...]1), one of the deceased, who also lived there and ran the tavern, was hosting his belated birthday party. Relatives, friends, patrons and visitors were in attendance. Some were seated outside the yard in front; some were outside the house but inside the yard in front and in the passage on the left of the house; others were inside the house in the lounge. There were people in the kitchen, and the three bedrooms. The front was the main entrance into the house. It led you into the big lounge which covered the breadth of the house. Inside the lounge, the one door to the right led one to the outside. The lounge had a round table with chairs to the right and a bench and a sofa to the left. There was one door which led further into the house, to be exact, into the kitchen. This door had burglar bars as it was used as the counter through which sales of liquor was done from the kitchen. The kitchen had three doors. The one on the right as you entered from the lounge went outside and led to the toilet. The one to the left went into a bedroom. The one straight proceeded into a passage. There were two doors on either side of the passage. The one to the left went into another bedroom. The one to the right went into a small storeroom which was next to a small room. The small room next to the storeroom was the size of a bathroom and it was the room into which the passage ended. Each of the bedrooms to the left had a window.

[4] Outside, between the lounge and the kitchen doors was the toilet. The toilet was on the immediate right outside the kitchen and its door faced the end of the passage to the left of the kitchen door. The one wall of the side of the toilet was the house and the other wall was joined by a precast wall on both the kitchen and the lounge side and formed the perimeter fence which separated this yard from the neighbour. This area was narrow and was basically a passage. At the opposite end of the toilet the passage was closed off with old corrugated iron, closing the gap in the precast wall at the back, between the wall of the house and the precast wall of the neighbours. There was a precast wall at the back which ran through between the houses and the shacks. The line of houses on Q166's side of the street are the last houses before the shacks. Behind this house, and the

adjacent properties, was the precast wall and then the shacks, the informal settlement. Over the corrugated iron sheets on the passage, a different passage, which led to other passages forming a network of footpaths through the shacks. One path in the network of footpaths, moved through a number of shacks and led one back to the back of that house, Q166, on the other side. On that side of the house, from behind, there was a precast wall that separated the adjacent houses and the squatter shacks. In that area, the shacks and the adjacent houses were lower, as there was a heap of sand that ran against the precast wall on the shack side. An inspection in loco revealed that when one stood at that elevated part, one could easily see the fence at the front, the tarred road strip and the houses across the road through the passage. The distance between that point and the front of the house where the alleged vehicle stopped was measured to be 14,5m. The distance from the front wall of the house to where the alleged car parked was measured to be 4.5m. The passage from the shacks which led to the back of Q166, immediately after passing the precast wall into the Q166 yard, had a wooden gate which led one to walk into a passage between the bedrooms and lounge of Q166 on one side and the structures of the adjacent property on the other.

[5] The first structure as you come from the back, to the right of Q166, was a shack which was attached to the house of the adjacent property. That shack's size was almost along the second bedroom in Q166. The house itself, on the adjacent property, had two further rooms which were almost in line with the first bedroom and the lounge in Q166. The structure on the adjacent property, including the shack, formed what one would call a zig-zag. They were not in a straight line. The zig-zag was deeper at its inside corners and narrowed the passage at its outside corners. The narrow part, between the outward corner of the adjacent structures and the wall of Q166 was measured to be 0,6m. The deeper ends of the zig-zag served as some urinal for those attending the tavern, primarily for its convenience for those sitting outside the house including in that very passage. At the end of wall of the last room of the adjacent property towards the street, there was a net-wire fence which separated the properties. There were two tyres and planks mounted on this net-wire fence. Almost half of the front yard of Q166, from the end of the wire fence on the adjacent property to the beginning of the front fence of Q166, was not fenced. The

other half, in line with the far-end of the front door, also had a net-wire fence closing that part of the yard at Q166. The space between that fence and the sliding door was almost the size of an ordinary bedroom. There were two Apollo lights which provided some light in the area. Both were about 300m from Q166. The other was in the shacks and the other in the houses. There were also two street lamps, one about 50m and the other 100m from Q166. There were lights from the house itself, as well as from neighbours which were the sources of and contributed to visibility.

[6] At around 22H00 Phumlani Xhegwana (Xhegwana) was at the scene standing outside the house with Sipho Mtshikwe (Mtshikwe). Xhegwana saw N[...]1 next to the front door talking to Nkwera Swartbooi. After some time he saw a man who came in and looked around as if he was looking for somebody. After the person left another man approached and when the second person was close to N[...]1, the man started shooting at N[...]1. N[...]1 ran away, and Xhegwana and others also ran away. He did not identify any of the shooters. Abongile Mbi (Mbi) could not assist as regards time or the identity of the shooters, but was also at the tavern that evening, sitting inside the lounge at the table. He was only 7 days in Cape Town from the Eastern Cape. His companion left the tavern to fetch money. After some time he heard gunshots outside. He lay on the floor with others. The shots would go off and then pause. The windows and the sliding door broke from the shots and when his companion came in running, he stood up and they ran towards the rooms and hid under the bed. Others also ran to different rooms. He could hear that somebody was shooting in the room in which they hid. Ladies were screaming. He saw a hand that came through a window in which he hid. The hand fired shots, also pausing in between. He was shot on his hand. At one pause, he went to the window and peeped through, saw nothing and when he returned back the hand emerged and shot again. When it paused they climbed onto the bed and through the incomplete boards into the ceiling. Someone kicked at the door but it would not open as they had placed a bed against it. The person shot through the door and his companion, Sibulele was hit on the buttocks. They helped Sibulele into the ceiling. They moved through the ceiling to the toilet, exited the house and ran away.

[7] N[...]2 M[...] gave the time of the incident at around 12 midnight. She was asleep with M [...], a then 6 year-old daughter of N[...]1 when she heard gunshots outside. People ran into the house and some in her room and she rose from the bed and hid behind the fridge. The room was dark but she could see. She used a gown to cover herself. M[...] rose from the bed and Lisa Kalpen who was one of those who ran into her room, took the child and put the child on her own lap. A man came in with a firearm and shot at M[...] and also kicked the child. When the child fell off Kalpen who was then still sitting on the floor, the man shot several times at Kalpen. The gunshots were continuing in other rooms and outside. When everything went quiet, N[...]2 ran out to her aunt's place carrying the injured child. She saw the wound on the hand and on the child's bum. The child spent several days in hospital. Seven people died and seven others were injured during this incident. She did not know why people were attacked and who the attackers were. He only noticed that the shooter in their room was a big guy.

[8] Ncaku and Tyhali were detective constables attached to the Provincial Organised Crime with specific focus on Gang-related matters in the Western Cape. On the morning after the shooting, 8 March 2020, they attended to the hospital at Tygerberg to follow-up on people who were injured at the scene with the intention of checking on their readiness to make statements. They were on their way out when they walked down a passage where some of the patients were waiting to get to what appeared to be a triage. They both observed the strange reaction of one of the patients who seemed to hide from them. The patient pulled his blanket over the face to hide behind the blanket when they looked at him. This caused them to approach the patient. The passage where this patient was, was in the Trauma Unit. They realized that it was someone who was of interest to the police. It was accused 1. When they got to accused, he looked scared. They left. Later that morning they learned that accused 1 was mentioned by an eye-witness as someone who was shot at N[...]1's house. A follow-up revealed that accused 1 was shot incidentally at the same place on his body as what the eye-witness reported. This led them to come back later and arrested accused 1. Accused 1 told the police that he had been shot at, during an attempted robbery, on the same night as the shooting at the scene, but at a different place in Khayelitsha. The police followed up on his version and no one at that

area, including the police in their precinct, knew about the alleged shooting or attempted robbery as accused 1 alleged.

[9] Mr X grew up with N[...]1, knew that N[...]1 lived by committing robberies with other friends and at times would be in prison, but N[...]1 remained his friend. N[...]1 had a number 28 on his left upper arm and Mr X knew that it was a prison number and that numbers were well respected in the townships. After the death of N[...]1's parents, N[...]1 used his parental home as a tavern, selling alcohol and holding braai's. N[...]1 was also a money-lender and Mr X himself borrowed money from him at times although he would be exempt from interest. He knew N[...]1's friends with whom N[...]1 used to get into trouble with the law. He knew them mostly by their nicknames. They were Boss also called Lunga, Mampintsha, Loyiso also known as Beja and Phiri. He knew them for years and have met them over the years at N[...]1's place. N[...]1 and these friends would at times be arrested together. Lunga, N[...]1, Beja, Mampintsha and Phiri broke away from Boko Haram and formed The Guptas. Mr X joined Bosasa as a Chef and was placed at Pollsmoor. When he broke the news to N[...]1, N[...]1 told his friends. Phiri, Mampintsha, Beja, Lunga and N[...]1 met with him together with a lady. They were interested in whether he would have access to inmates. They wanted Mr X to sell drugs for their people in jail. Mr X declined.

[10] On 7 March 2020 Mr X was at the party from early on and N[...]1 was there as well. Mr X was seated outside Q166 on the street closer to the wire-fence more to the right of the house. There were many others there. At some point, he saw N[...]1 talking to some people outside the front door and later next to the lamp post. N[...]1 later left with some of his friends. Mr X also left to eat and fetch a jacket with a friend at about 01H10am on 8 March 2020. At that time he had consumed some beers but was not drunk. They were walking back when they saw N[...]1 walking fast past them towards his home. N[...]1 had his right hand under his left chest and had a firearm on his left waist. Mr X asked N[...]1 what was going on and N[...]1 said to him just come, follow me. They followed N[...]1. N[...]1 went through the front door, went to the backrooms, came back and left through the kitchen door. Mr X saw the blood on N[...]1's chest to the left on his white shirt. N[...]1

called him. Mr X could see that something was wrong. His friend followed and they met N[...]1 in the passage outside the kitchen. Mr X saw that N[...]1 was bleeding from his rib cage below the breast. Mr X asked N[...]1 what was going on and N[...]1 just said "Come, come". N[...]1 moved to the back of the passage and asked Mr X to push him over the boundary. Mr X asked him why was he not going to hospital. N[...]1 said he was and Mr X asked him why he was going that way instead of the front where there were cars that could transport him. N[...]1 asked Mr X to leave him alone. He helped N[...]1 over the boundary at the back. N[...]1 struggled to get up on the other side and he ran away.

[11] Mr X and his friend were still in that passage ready to move back when they heard gunshots. He was shocked. He wanted to go back and his friend wanted to run towards the house. Mr X pulled him back. They jumped over the boundary at the back. Mr X, once over the corrugated iron sheets into the shacks, used the shortest path in the network there to get to the other side of the house. He came to the back of Q166 and instead of moving further into the yard, turned right and found a spot where he could, whilst hiding, see what was happening in Q166. The elevated sand next to the precast wall fencing presented both the hiding and the enhanced vision. He could clearly see what was happening. The precast wall was shorter because of the elevated side. He saw a car, a Black Polo and saw people standing there and shooting. The Polo was already there when he saw it. He did not see the Polo arrive. The first person he saw, he recognized as Mampintsha. Mampintsha was at the time on his knees, with a long gun and he was shooting towards the house. The next person he saw he recognized as Lunga. Lunga was also holding a long gun and shooting towards the main door of the house. He then saw Phiri, who he identified as accused 2, and Loyiso also called Beja who he identified as accused 1. Both had small guns and were shooting. He knew all four of them very well, including their addresses. When he saw them they first shot from outside the yard, and then all four of them moved to the inside. He heard the gunshots inside the house and people were screaming. He stood there and his friend had ran away. After some time the four came out, still firing, walking backwards or retreating and still facing the house. The visibility was good. The Apollo lights are floodlights each with six lights on it and two

provide for the area. There are also two street lights nearby and the lights from the houses, including the bright beam light at the front at the tavern.

[12] Mr X heard accused 1 say in isiXhosa that this shit has shot me and at that time accused 1 was holding above his knee. Accused 1 then went into the car on the right side at the back. The four went into the car and it first reversed and then drove off. He could only see the CAA and not the rest of the registration numbers. He then went back to the shacks to look for N[...]1 his friend, and found him deep in the shacks. He asked N[...]1 what was going on and N[...]1 told him to keep quiet and when he insisted N[...]1 said they would talk the next day and that everything would be fine. After going home he went back to N[...]1's house. The police were already there. After a few minutes that he stood there, he saw Phiri standing behind the police tapes like everyone else who was onlooking. He also saw Mampintsha among the onlookers. The police were talking to other two ladies on the scene around identification. Mr X saw Phiri jump the tape and got involved in the discussion between the police and the two ladies. At that stage Mr X could not say anything to the police. No one else wanted to say anything to the police because the suspects were there and would see and hear when you spoke to the police. That Sunday evening he got the news that N[...]1 had passed away.

[13] On the Sunday morning, the 8<sup>th</sup>, he and two others decided to go to the police. He would not name the two as they would not want people to know about their identity. The commander of detectives who they intended to see was not there and they met with a Muslim detective. They told that detective of their mistrust of some of the police at Site B police station as they socialized with N[...]1 and his friends. The detective wanted to take their statements but they did not give the statements as the police who they knew socialized with N[...]1 and his friends kept themselves busy close by. They left without making the statements. After about two hours he returned alone to the police station. He was taken to a Coloured policeman who took his statement and who promised that nothing would happen to him. The policeman also advised him that the case would be handed over to the provincial team for further investigation. As he left the police station he met a policeman known to him as one close to the Guptas said to him he loved the



police station. He ignored him and continued walking. As he walked in the township he was asked by a number of people as to what had he done as The Guptas were looking for him. It was when he met his sister who asked him the same question and told him the same message that The Guptas were looking for him that he returned to the police station.

[14] The message that he had made a statement to the police about the incident had been passed on to The Guptas and this he reported to the detective. The detective told him to go home and that they would call him. When he got to the township he met Phiri, Lunga and Mampintsha who were in a car. Mampintsha asked him what was he looking for and why did he go to the police station. He said he had gone to certify documents. He said a lot of things and was nervous. Mampintsha was clearly not happy. Phiri asked him what was he doing at the police station. Phiri and Mampintsha did not see him coming out of the police station, but Mr X was convinced that it was members of the police who informed them that he was at the police station. As he walked he received a call from the provincial detective and he went back to the police station. They were the ones investigating the case. He indicated that he knew the suspects and also where they resided. The agreement was that late the police were going to effect the arrests. After he left the police station, he learnt that the The Guptas had now intensified their search for him, using a TSi vehicle. This vehicle had been to his home and he received a picture of it. Everybody he met who knew him told him that The Guptas were looking for him. He then left the township and waited for the provincial detectives at a freeway. The police suggested that he be taken to the rural village from which he came in the Eastern Cape. He told them that Mampintsha knew him from that rural village. He also showed the detectives the police who he knew worked with The Guptas. He was taken to a safe place to sleep. He was in transit with the police to the rural village when his aunt from there called and warned him that there were people looking for him. They had already travelled a long distance such that it was necessary for the police to arrange a sleep over, before returning to Cape Town. He continued to receive several calls from other family members in the Eastern Cape that he was wanted. This led to him being in witness protection from that period.

[15] Mr X was in witness protection when he was invited for a photo identification parade. It was about a week after the incident. The black and white photos from which he was requested to make the identification were not clear to him. He requested that the police make to him available colour photos. He told the police that the photos were not clear and he did not want to point out people that he could not see clearly. The police did not bring him colour photos and he was asked to use the black and white unclear ones. He identified Mampintsha and Lunga. He had a clear view of the shooters on the scene, including their faces as they did not wear anything on their heads. Although accused 1 and 2's photos were on the list provided to him, he did not point them out. His explanation was that the photos were unclear to him. He identified them in court.

[16] Wanda Tofile testified that he was also known as Mampintsha. He indicated that he was not a State witness and that a statement was presented to him to sign. He knew of the incident at N[...]1's house, that there was a shooting and that some people died and others were injured. He did not make or write the statement that was attributed to him. The statement was not read back to him. He was at N[...]1's house on the night. People were drinking and there was also meat. He arrived by car which was driven by Malibongwe, greeted the people around and started searching for the toilet. Whilst waiting for the meat, he wanted to use the toilet and went to the toilet. N[...]1 was at the veranda busy with the meat, it was a braai. From Mampintsha's explanation the veranda was more or less around where Mr X also said he was that night. There was someone in the toilet. He knew that there was a toilet available opposite N[...]1's house. He decided to walk across to that toilet. He was approaching that toilet when he heard gunshots and ran away. He did not observe the shooting. After running away he did not return to N[...]1's house that day. He had consumed alcohol but was not so drunk that he could not run. He had seen N[...]1 when he arrived. He had been friends with N[...]1 for a long time. They used to smoke cannabis together. He knew the accused, had seen them in the township but was not friends with them. He knew some of the deceased who were shot at on that scene like Thembelani Sihlali and some he did not know.

[17] Mampintsha said he did not know the contents of the statement attributed to him and did not depose to a statement. He was just presented with a statement to sign. He heard that Boko Haram and The Guptas are gangsters. He did not know N[...]1 as a gangster. He knew accused 2 as TaKanini and as Phiri. He knew accused 1 as Mdriver. The statement was brought to him when he was at Site B, Khayelitsha SAPS arrested for murder. He was in the cells at the time. The police said he was N[...]1's friend and if he did not agree with what was written in the statements or sign they would involve him in this case of N[...]1. In other words they would charge him in this case. He never read the statement. He signed the statement because he wanted to be released. The charges for which he was arrested at the time, murder and unlawful possession of a firearm, were then withdrawn against him. The State called the officers involved and a trial-within-a-trial was held. The judgment in the trial-within-a-trial appears in *S v Beja and Another* (CC18/2021) [2023] ZAWCHC 113 (19 MAY 2023).

[18] Accused 1 testified that he lived in Y section, Khayelitsha and was known as Mdriver or Ncira. Nobody called him Loyiso. Only his classmates sometimes called him by his other name, Owen. He knew accused 2 in 2008 when Accused 2 was released after he spent a long time in jail. He used to meet him in taverns. He was once arrested with accused 2 for the same offence. He did not have friends in Q section. He knew N[...]1. He was once arrested with N[...]1 in October 2015. The others were released in December 2015 and he only got out in April 2016. N[...]1 got out and left him in jail and they never had any connection and did not meet him again. He had been introduced to N[...]1 by a friend at an event in Strand and they enjoyed the event together. N[...]1 offered them transport in the morning when they had to leave. They left in two cars and the two cars were then blocked by the police on the road. The police then alleged that they had done a robbery of money and liquor at a liquor store in Strand and that is how they were arrested. That robbery charge was withdrawn and he was detained only for the unlawful possession of a firearm. N[...]1 was a 28 gangster and that he learned during their detention. He was detained where the detainees had no number. He had never been to N[...]1's place. He did not know the other deceased who were killed at Q166 except for

Thembelani Sihlali whom he knew from school and also played with for the same soccer team.

[19] On the 7<sup>th</sup> March 2020 he was shot at in Harare, Khayelitsha. He was with Thembelani and Patrick at the time. At about 3 until 5 in the afternoon he watched soccer on tv. He took a bath and then went to his cousin's boyfriend, Thembelani and they shared some drinks. Patrick joined them. Thembelani's girlfriend came back from work and also joined them. There was another soccer game later and he suggested that they go to Ngcuks, which is a tavern, to watch it there. Thembelani said he did not like Ngcuks and suggested a different place where they would join Thembelani's friend. He, Thembelani and Patrick left by car, Getz at about 20:10. They were meant to go to the friend in Harare but that person was in Macassar and he invited them there. They then drove to Gaba's tavern in Macassar where the friend was. They joined the friend with others on a table inside the tavern. They arrived at the tavern after the first half of the game and that is how he knew it was 20H45. He watched the second half from the next table to have a better view, until at 22H00 and then went back to join the table of his friends. It was around 11 when the tavern closed and they went outside to finish their liquor. They spent about 25 minutes outside and then left. They were on their way to site B. It was still only him, Thembela and Patrick. He sat at the front passenger seat. Thembelani was driving and Patrick was on the back seat. Thembelani wanted to collect something from a colleague in Harare. They went past a tavern to buy some liquor and on their way they approached a three-way stop. On the other side he could see Spar. To the left is Dr Nongongo's surgey.

[20] They were about to turn at the stop sign when he asked Thembelani to stop as he wanted to pee. The car stopped on the side of the road. There were a few cars on the road as it was late. He approached the fence of a house to pee. Thembelani also joined him to pee. Thembelani lit a cigarette and smoked. They stood next to the car and he was waiting to get a puff from Thembelani's cigarette. Thembelani gave him the cigarette and he smoked. He was done smoking and they were about to get back into the car when two young men approached the car. Patrick was in the car all the time. Accused 1 was about

to open the door, already holding the handle and Thembelani was also at the driver's door. The young men were about 5 metres when he heard the sound. The lighting there came from a pole light around Spar. The two men split, one approached him and the other approached Thembelani. The one approaching him called him by his mother's private parts and instructed him to just stand like that and not to get into the car. Because he was drunk, he swore back and said Voetsek and asked why was the young man swearing at him with his mother's private parts. He heard a gunshot. He had opened the door and his one foot was in the car already at that stage. He heard that the gunshot was from the person who was approaching him. He started running away and he heard three further shots. He ran into a passage and into a street. There was no one in the street. Whilst running he felt that his leg was numb, it felt loose and he was losing balance. He looked and saw that he was bleeding. He ran and then came to a point where he sat down. He loosened his belt and took down his pants and could not see any piercing. He could not see exactly where he was bleeding but his lower leg was full of blood. He did not have strength anymore. He lifted his pants and buttoned it. He got a lift from a Vito that took him to hospital. It took them between 10 to 15 minutes. He arrived at the hospital at around 00H00. He was dropped off and the couple in the Vito left. He was put on a wheelchair and taken into the hospital. He later came to know that he had four holes on the thigh. In front, on the inside and at the back of the thigh. It looked like two different holes.

[21] Accused 1 called his family from his phone which he had with him throughout. He first called his parents who were elderly people and they did not answer. He then called his uncle Xolani Gigaba in Macassar. He was in Khayelitsha hospital from around 12 and at 6 the next morning, 8 March, was transferred to Tygerberg Hospital. He lay in the passage in Trauma Unit when he saw Ncaku. Accused 1 was busy on his phone when Ncaku saw him and the police approached him. Ncaku and Tyhali knew him having been involved in the investigation of a case against him in 2019. They asked him what happened that he was there and he told them about the hijacking and how it happened. They expressed shock and left. He denied hiding or looking scared. His view was that he was in pain and they interpreted that as being scared. After Tyhali and Nacaku left another police officer in uniform arrived at around 12 midday and told accused 1 that he was there

to guard accused 1. Ncaku and Tyhali arrived late afternoon and told him about the shooting at N[...]1's house and that they already had his jean and wanted to take swabs from him for DNA tests. The police took his phone and pin as well. He was taken to the room where Akhona Swartbooi who said was shot at N[...]1's place was. Accused 1 asked the police to ask Swartbooi and others who were shot at N[...]1's place if they saw him among the shooters. The police did not do so. He denied that Tyhali or Ncaku arrested him in Tygerberg hospital or told him that he was a suspect in the Q166 matter. He only became aware the Monday morning at Site B police station that he was under arrest. He told the police in Khayelitsha about how he sustained the injury. He denied being a member of a gang. He saw Mr X for the first time here in court. He last saw the people that he was with when he was shot, on the day of the incident. Kwamafu is a tavern in R section. He was never at N[...]1's place and went there for the first time during the inspection in loco. He was not shot at N[...]1's place. He knew Mampitsha as he met him in prison in 2017. The allegations made in the written statement which Mampintsha denied, implicating him, were lies. Accused 1 did not know N[...]2. Thembelani passed on.

[22] Accused 1 called his uncle Xolani Gigaba, his cousin Nolusindiso Gigaba and his friend Patrick Paula as his witnesses. His uncle basically confirmed his version about what happened after he called him, which is that the uncle attended to the hospital. In the main his uncle was called to confirm the times of the call and the uncle's arrival at the hospital that night. His cousin and Patrick, who both also confirmed his version, were called to tell about his movements that night. Both Xolani and Nolusindiso did not assist as to what happened during the alleged gallivanting and hijacking. They were not there and could only relay what they were told respectively by accused 1 and Thembelani. Patrick basically repeated what accused 1 said.

[23] Accused 2 knew N[...]2 and not Mr X. He knew Mampintsha and accused 1. He also knew N[...]1 and visited his tavern in the past until it closed in 2015. On the night of 7 to 8 March 2020 he was home. He did not keep records as in a diary but relied on his daily routine. He had two businesses, leasing of accommodation and was a chicken supplier.

Ordinarily, which was the case on 7-8 March 2020, he prepared chickens for the next day's business from 20H00 to 2200. Until 22H00 he still allowed site sales from home. At 22H00 he locked his gates and would not leave his property until the next day. Between 22H00 and the next morning he was home with his wife and son. He denied being at N[...]1's house that day and denied shooting at people that day. He knew that some used a nickname, Phiri, to refer to him but did not like the nickname.

[24] It is trite that the State must prove its case against the accused beyond reasonable doubt. In *S v Jackson* 1998 (1) SACR 470 (SCA) at 476e-f it was said:

"In our system of law, the burden is on the State to prove the guilt of the accused beyond reasonable doubt – no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule."

In *S v Ntsele* 1998 (2) SACR 178 (SCA) at 182b-c the court cited *Miller v Minister of Pensions* [1947] 2 All ER 372 at 373H where it was said:

"it need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable", the case is proved beyond reasonable doubt."

[25] In *S v Van Aswegen* 2001 (2) SACR 97 (SCA) at para 30 it was said:

"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 may be found to be false, some of it might be found to be unreliable, and some of it might be found only possibly false or unreliable, but none of it may be ignored."

[26] It is necessary to contextualize this matter as a point of departure. The investigating officer at the time of the incident, Lieutenant-Colonel Nceba Mathentamo, made the observation that there was an element of fear in the community, in investigating this crime. No one wanted to be seen talking to the police. When he interviewed the witnesses, he noticed with significance that there was information known to the witnesses which they

held back. As a result of the fear and holding back, the case relied on a single witness as others did not want to assist. Mathentamo did not testify in these proceedings. His written statement was handed in at the instance of accused 1. The other fact in contextualization, was that from the evidence of Mr X supported in some respects by both Tyhali and Ncaku, both accused and N[...]1 allegedly belonged to one gang, Boko Haram, initially. Other members of Boko Haram broke away and formed The Guptas. Accused 2, known as Phiri, had been identified by the police as a former member of Boko Haram who joined The Guptas. According to the police and Mr X, both gangs were extortionists of business people in general, but especially targeting Somali businessmen in the townships of the Western Cape. Business people paid what was called “protection fee”, so as to not be robbed and even killed by the gangs. Failure to pay protection fee resulted in business robberies including being shot at deliberately, either being injured or even killed. The extortion gangs were ruling the township business environment with an iron fist. N[...]1 was a Boko Haram member who also defected to The Guptas, according to Mr X. The incident in this matter, in its context, is understood by the police and Mr X as the battle for turf between gangsters. Within The Guptas, fractures emerged between members from Y where accused 1 and 2 resided and Q section where N[...]1 resided. According to Mr X and to some extent by the police, this is the motive for the killing of N[...]1 and those killed at the scene, including those injured. Some of those shot at, like M[...] the then 6-year old child, were simply collateral damage.

[27] It was common cause that on or about 8 March 2020 at Q section in Khayelitsha, Q166 Sihawu Street, Site B, Thembelani Sihlali, Akhona Cuba, Lisa Kalpens, Bongani Lonert Stiwa, Tabita Mgidlana and Monwabisi Nolusu were shot with a firearm and killed. The State also alleged that on the same date and place N[...]1 was also killed by being shot with a firearm. It was also common cause that there was an attempt, on the same date and at the same place, to kill Siphon Mtshikwe, M[...] S[...] and Abongile Mbi by shooting them, respectively with a firearm. The chain of events leading up to and reports on medico-legal examinations of the injured including the post-mortem examinations of the deceased were also admitted. The chain of events leading up to and the ballistic reports were also admitted.



[28] Xhegwana was not standing next to N[...]1 when the shooting started. N[...]1 was there earlier when Xhegwana saw him talking to Swartbooi. Xhegwana's evidence was that there was some lapse of time between then, and when later he saw a man looking around as if looking for somebody. It was after the person looking around left, that he noticed a second person shooting, according to Xhegwana that person specifically aiming at N[...]1. There can be no doubt that N[...]1 was the subject of the attack that evening and was the one specially targeted by the attackers that night. The man who came in just before the shooting, who looked around as if looking for somebody, and left, and who immediately he felt the shooting started was Mampintsha in my view. He was looking for N[...]1. On his own version, Mampintsha is the man who came into the property immediately before the shooting, and looked around. According to Mampintsha, he was looking at the possibility of using the toilet and when he established that it was busy, he went out and immediately after he left the house, the shooting began. If one had regard to the reaction times of the police, when they arrived on the scene, including the specialist units of crime scene investigation, the time given by Xhegwana as the approximate time of the shooting, around 22H30 can be relied upon. The time given by N[...]2, 12 hours midnight, having regard to the reaction time of the police, simply cannot be correct. She can't be much criticized because she had been sleeping and was woken up by the gunshots. The time according to Mr X as to when the shooting happened, against the background of the reaction time of the police, cannot be correct. Warrant Officer Swart, one of the Specialist Units of the SAPS who took photos that night, arrived on the scene at 1H30. This must be understood in the context that he was called by the Khayelitsha police after they had arrived on the scene, assessed it and deemed the specialist units necessary. The Khayelitsha police would themselves had reacted to the shooting after being called to the scene. Mr X gave the time of the shooting as sometime after 1H10am on 8 March 2020.

[29] Where N[...]2's evidence attracts criticism, is her being adamant that the shooters cannot be both accused and Mampintsha, for the sole reason that accused 2 and Mampintsha were friends of her brother, N[...]1. This is so even when she claims not to

know accused 1. The evidence suggests that Mampintsha and Phiri were not only close friends of N[...]1, but also belonged to the same gang not once but twice. They were members of Boko Haram and defected to The Guptas. Accused 1, in my view, was also a close friend of N[...]1. However, what N[...]2 refused to appreciate, was that there had been a fall-out between them and her brother, and that they were now rivals, which related to not only gang affiliation but their livelihood in extorting money from businesses in the townships especially how they dealt with their areas, Q and Y sections. It may be that honestly she did not know about the fall-out and the subsequent rivalry. It may also be that she is one of those witnesses Mathentamo was referring to, who did not want to tell the police what they knew, which may implicate the accused, because of fear of it being a deadly move. N[...]2 on her own version knew that her brother was involved in gangsterism, fee extortion and had friends whose lifestyle was criminal activity. Tyhali testified that many people knew and informed the police that the accused were fee collectors from businesspeople. However the cases got cold as some people were scared for their lives to make formal statements to the police. It has to be mentioned that there were witnesses who made statements to the police in this matter, and who did not come to testify expressing fear for their lives, to the police.

[30] N[...]2 had first-hand experience at her own home and knew what happened when someone differed with or stood in the way of The Guptas. Her testimony, especially going out of her way to exclude the accused as the persons who shot people dead and injured others at her home, when she did not see who the shooters were, except for one big man who came in her room, is a demonstration of her desperation and quest for self-preservation. Fear and reluctance to testify or to tell what they saw, by witnesses in this trial, was real and could not be ignored. Tyhali told the court that even Mampintsha, identified by Mr X as a Gupta gang member, expressed the fear to testify against the accused in open court and made the request to testify through CCTV and by extension in camera if he had to give evidence in this trial. Mr X was a friend of N[...]1. It is loyalty to that friendship and a sense of loss and a quest for justice that he was prepared to risk his life to testify against people that he knew to be dangerous, to wit, accused 1 and 2 and other gang members of The Guptas including Mampintsha, moreso because, to his

knowledge, The Guptas had informers including within the SAPS in Khayelitsha. It is against this background that the denial by N[...]2 that he knew any other friend of N[...]1, basically denying knowing Mr X, should be understood. Mampintsha was the obvious beneficiary of the position adopted by N[...]2 on this matter and escaped being charged as well. N[...]2 understood that you cannot betray The Guptas and hope to live another day in Khayelitsha. In 'Poetry of Monsters', Charles Bukowski is reported to have said:

"Those who escape hell, however, never talk about it, and nothing much bothers them after that."

[31] In my view, the evidence established that Mampintsha may be an accomplice. I am enjoined to exercise caution in evaluating his evidence. His evidence was open to all the objections that could be made to an accomplice evidence [Hoffman and Zeffert, *The Law of Evidence*, 2nd edition at 269; *Mulaudzi v S* (768/2015) [2016] ZASCA 70 (20 May 2016) at para 11]. The additional special danger of reliance on the evidence of Mampintsha was that the State did not consider him an accomplice and did not charge him, for reasons understood by the State. Mampintsha disavowed a statement that he made to the police. He made a poor impression to the court and his evidence lacked consistency. It is not for this court to pronounce further on analysis, suffice to say that I am unable to rely on Mampintsha's evidence in coming to a just decision.

[32] Mr X was both a single witness and an identifying witness. As regards identity it was said in *S v Mthetwa* 1972 (3) SA 766 (A) at 768A-C:

"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 this 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; see cases such as *R v Masemang*, 1950 (2) SA 488 (AD); *R v Dladla and others*, 1962 (1) DA 307 (AD) at p. 310; *S v Mehlope*, 1963 (2) SA 29 (AD).”

[33] As regards a single witness, it is trite that in order for the evidence to be sufficient, it must be clear and satisfactory in every material respect [*S v Sauls* 1981 (4) All SA 182 (A). In *Y v S* (537/2018) [2020] ZASCA 42 (21 April 2020) at para 48 it was said:

“... it is trite that a court will not rely on such evidence where the witness has made a previous inconsistent statement, where the witness has not had a sufficient opportunity for observation and where there are material contradictions in the evidence of the witness. In *Sauls* it was held that there is no rule of thumb, test or formula to apply when it comes to the consideration of the credibility of a single witness. Rather, a court should consider the merits and demerits of the evidence, then decide whether it is satisfied that the truth has been told despite the shortcomings in the evidence.”

[34] Mr X heard gunshots outside first, whilst he was still in the passage where the toilet is situated. The other witnesses testified about the shooting from outside first before the shooters entered the house. The defence tried their level best to discredit Mr X for not having seen when a shooter or shooters were at the window shooting into the room from outside in the passage from which X hid and observed. It must be born in mind that the shooting was fluid and the shooters were moving. If Mr X came to court to simply put the accused in a bad light, nothing prevented him to say he saw either or both accused 1 and 2 at the window shooting into the house. Worse still, Mr X was clearly emotionally attached to N[...]1, and the whole evidence suggest that the shooting targeted N[...]1 and was intended to hurt him. N[...]1's infant daughter was shot. Mr X was in a place to say that he saw how either accused 1 or 2 or any of the other shooters he identified, shoot at N[...]1. But that was not his testimony. His testimony was that N[...]1 was already shot when he came home before the shooting where he identified the accused as the shooters. He did not see who shot N[...]1 and did not observe the shooting of N[...]1. Mr X's evidence was that N[...]1 mentioned another place, KwaMafu, as where he was shot.

[35] Furthermore, Mr X's testimony, as a whole, was that he did not see anyone getting shot or being shot. He saw that there was a shooting, and saw the shooters, but did not see who was being shot. Furthermore, Mr X did not see the shooting through the window in the passage where he came to observe. Mr X had a discussion with N[...]1 more than once, asking N[...]1 what was going on. When he met N[...]1 in the shacks after he had observed the shooting, Mr X informed N[...]1 that people were dying at N[...]1's place and still enquired to know what was going on. His evidence was that N[...]1 only said everything will be okay and that they would talk the next day. Mr X had the opportunity to make his version more attractive by the addition of decorative details of features to make his statement more interesting although the additions would be untrue to put the accused in a bad light. Mr X did not do that. This is not the kind of testimony by someone who came to court with the sole purpose of falsely implicating the accused, especially in the killing of N[...]1 but also in the killing and attempted murder of others.

[36] There was a lapse of time between the first shot and when Mr X came to position himself behind the yard. There were further shots fired in the interim. Mbi's evidence was that the shooting had some intervals. The shooting at the window happened before the shooting by someone inside the house. The kicking of the door and the shooting through the door including the shot that injured his companion, Sibulele, were later, and all shooting episodes were punctuated by pauses. From Mbi's testimony, the shooting through the window was, after some pauses, followed by the shooting inside the house. Mbi and his companions escaped whilst the shooters were inside the house. Mr X did not see the shooting at the window. It follows that the shooting through the window by someone in that passage outside the house happened before Mr X arrived at his hideout. The evidence showed that there were people who were sitting on that passage before the shooting, and enjoying the party from there. It was to be expected that people intending to go inside the house would first clear the outside, especially where they expected a fight back. The party-goers in that passage must have been seen by the shooters to warrant attention. The use of the passage by party-goers, and their visibility to the shooters, was a clear indication that the suggestion by the accused that the passage was dark cannot be correct. The passage had sufficient visibility to be useful.

[37] Mr X did not remember the year when he first met the accused and N[...]1. He knew them for many years before the incident. He met the accused through N[...]1 as N[...]1's friends. When Mr X told N[...]1 that he was employed by Bosasa and would be working as a Chef in Pollsmoor Prison, N[...]1 organized a meeting with his friends, which included the accused, where they wanted to know whether he would come into contact with inmates. They wanted him to assist them to steal cannabis into prison, intended to be sold to inmates. Mr X said N[...]1 would at times be arrested with some of his friends. Accused 1 was arrested with N[...]1 as a co-accused on allegations related to robbery of a liquor store around 2015-2016. Mr X said that N[...]1 lived on robbery, and that he was usually arrested with his friends, and further that accused 1 was a friend of N[...]1. Accused 1 sought to suggest that his arrest with N[...]1 was a once-off co-incidence, and that they did not know each other. The other fact that accused sought to suggest was a co-incidence, was that he was shot on the same day and approximately at the same time as another person, who Mr X mistook for him, that person being involved in the shooting at N[...]1's house. Mr X did not see accused 1 being shot, but heard accused 1 when he said that he was shot from the inside of the house. Mr X testified about shots that were coming from the house, which he heard when he was in the hideout. It was when the shooters were approaching the house, shooting. There were others from the house, whether outside or inside, who also shot back. This is supported by the firearm and the magazine that were found on the scene as well as the evidence of the ballistic expert that the number of cartridges found on the scene exceeded the number of the firearms that were used by the shooters who arrived on the scene, according to the evidence.

[38] Mampintsha confirmed the version of Mr X about his own nickname and also that accused 2 was also known as Phiri. Mampintsha also confirmed the version of Mr X that he, Mampintsha, was a friend of N[...]1. Although he denied other serious allegations, he confirmed that he used to visit N[...]1 at his home and together they would smoke cannabis. Phiri denied the nickname, but also confirmed the version of Mr X that he used to be a regular at N[...]1's house, although he denied being friends with N[...]1. N[...]2 also confirmed the version of Mr X that Phiri used to visit N[...]1's home. The evidence

established that Mr X was introduced to the accused by N[...]1 and that Mr X knew the accused very well as friends and regulars at N[...]1's place. Mr X knew the accused to belong to the same gang, initially Boko Haram and later The Guptas with N[...]1. The accused and N[...]1 were involved in extortion of businesspeople in Khayelitsha. Mr X saw the accused and identified both of them as some of the shooters at Q166 at around 22H30 on 7 March 2020. Mampintsha and accused 2 arrived on the scene and posed as onlookers when the police attended to the scene. This is one of the ways in which The Guptas kept themselves informed of who said what to the police, and enforced an iron grip to the community to keep the community away from benefitting from the presence of the police. This is demonstrated by the fact that when Phiri realized that two ladies were speaking to the police, he jumped the police tape and joined in the discussion, to monitor and assess the discussion.

[39] Mr X did not falsely construct a sophisticated and long account of a series of related events and experiences, simply to disrupt his life and put it at risk by taunting and provoking selfish, dangerous and extremely deadly criminals who he knew had no conscience and mercy. Mr X saw some of the police members who he knew as those who informed The Guptas, keeping themselves busy around him and the Muslim detective when he and others were at the police station to report what they saw. This explained why members of the community did not trust members of the SAPS in Khayelitsha. It is the reason why other witnesses who initially went with Mr X to the police to report what they had seen, did not return or avail themselves on what they saw or to testify. One of those police officers told Mr X that Mr X liked the police station when Mr X left the police station after making a statement to the police. Mampintsha, Phiri and Lunga met Mr X in the township and asked Mr X what was he doing at the police station. At that stage, clearly they did not yet know that he had made a statement. Once they knew, obviously told by a member of the SAPS, The Guptas immediately started looking for Mr X in the township. The search went so far as some unknown men visiting his relatives in a rural village in the Eastern Cape the next day to look for Mr X there. This demonstrates how far the network and influence of the extortionists in Khayelitsha stretch.

[40] The evidence of Mr X is not the imagination of a highly fertile, and dare I say, sick mind of an unoccupied and useless person. Unfortunately, it is a true reflection of the situation in Khayelitsha. This evidence of Mr X encapsulates in miniature the characteristics of a much larger situation in Cape Town. It is the daily lived reality of the so-called 'poor masses of our people'. They learn from the news on radio and television that there is an authority of the State, led by the Minister of Police to prevent, combat and investigate crime. In their reality, the gangsters' "bullet rule" applies in every inch from the street corner, through the police station, to the grave. In those gangster-controlled streets of the townships, the Bill of Rights do not apply and a Constitutional State is a myth. The Bill of Rights and the Constitution may apply and be enjoyed elsewhere in the country, but not in the island of their misery, which are the townships of Cape Town commonly referred to as the Cape Flats.

[41] In *Shackel v S* 2001 (4) AllSA 279 (SCA) at para 30 it was said:

"It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused' version is true. If the accused's version is reasonably probably 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 I cannot reasonably possibly be true."

As regards an *alibi*, it was said in *R v Hlongwane* 1959 (3) SA 337 (AD) at 340H-341B:

"The legal position with regard to an alibi is that there is no *onus* on an accused to establish it, and it might reasonably be true he must be acquitted. *R v Biya* 1952 (4) SA 514 (AD). But it is important to point out that in applying this test, the alibi does not have to be considered in isolation. I do not consider that in *R v Masemang* 1950 (2) SA 488 (AD), Van den Heever, JA, had this in mind when he said at pp. 494 and 495 that the trial court had not rejected the accused's alibi evidence "independently". In my view he merely intended to point out that it is wrong for a trial court to reason thus: "I believe the Crown witnesses. *Ergo*, the alibi must be rejected." See also *R v Tusini and Another* 1953 (4) SA 406 (AD) at p. 414. The correct approach is to consider the alibi in the light of the totality of the evidence in the case, and the Court's impressions of the witnesses. In *Biya's* case *supra*, GREENBERG JA said at p. 521 (the italics being mine)



“... if *on all the evidence* there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime.”

[42] Accused 1 challenged Mr X for not knowing that Azola Swartbooi and Thembelani Sihlali were N[...]1's friends. He also challenged Mr X on the lay-out of N[...]1's house. Accused 1 also criticized Mr X for not being able to point out Lunga at the ID parade as one of the shooters. All these are indicators that accused 1 knew N[...]1 very well because he knew who were N[...]1's friends as well as N[...]1's home. Accused 1 claimed that he did not know Mr X at all. Yet he knew about Mr X's previous convictions and was able to instruct his legal representatives as to the courthouse where to draw the charge sheets where Mr X was on trial to present it in this trial to counter the evidence of Mr X that he was a good friend of N[...]1 who was not in conflict with the law. Accused 1 did not disclose his *alibi* to the police during arrest and in his warning statement. His *alibi*, including the availability of witnesses to this alibi, came later. Conveniently, according to him, his *alibi* was disclosed immediately to police officers in Khayelitsha police station, on the Monday of his arrest. This is the police station where the evidence showed that some members of the SAPS there have a relationship with The Guptas, which relationship undermines the authority of the State. Accused 1's uncle Xolani was not with him during that night and was not on the scene of the alleged hijacking. His cousin and Thembelani's girlfriend then, Nolusindiso was also not on the scene of the alleged hijacking. At best Nolusindiso could only tell that she was with accused 1 before 20H10 that day on 7 March 2020. What accused 1 did and where he was thereafter she did not know. Patrick, the third *alibi* witness was allegedly in the car whilst they were gallivanting that night according to the *alibi* version, including when accused 1 was shot. It was opportunistic of accused 1 to seek to concentrate, in his response to the evidence against him, to only zoom on the time that Mr X gave of the shooting, which was obviously wrong, and to disregard the evidence of Xhegwana around the time of the shooting, including the written statement of Siphon Mtshikwe which was handed in at the instance of accused 1, on the time of the shooting. It was also opportunistic for accused 1 to zoom in on the year in which they met which Mr X estimated, in order to try and discredit the evidence of Mr X in its totality. Both accused did not provide any reasonably possibly true motive for Mr X to implicate them

falsely, as according to them he did not know them and they did not know him. His motive, in Mr X's own words, was to pursue justice for N[...]1 and others. It stands without contradistinction.

[43] The conduct of all three men allegedly in the car immediately before the alleged hijacking, was so extra-ordinary that it cannot be true. Accused 1 had a phone on him. He was allegedly shot, ran away and lost power, yet he did not use the phone to contact either the two who were with him to enquire about their safety or to summon their help. He had just escaped from gunshots and had left the other two with a gunman and another. He did not call them at all. None of them also called him. Even when he was stranded in the street he did not call them. Accused 1 did not even call anyone that he knew, including his uncle, to let them know that he was injured and stranded in the street. When he was in hospital none of the two who were allegedly with him in the car came to see him. This is strange after one had just escaped death in the manner accused 1 alleged, in the presence of close friends. Moreover, because of their relationship Thembelani and Patrick ought to have been aware that accused 1 was arrested. More was expected of them if he was innocent, especially as they were not only friends, but one was a neighbor and the other was in a relationship with his cousin. It is too indifferent to be true that men who where friends would be attacked, and shots fired at them, and that none would check on another to establish how they were doing, after securing one's own safety, for several years thereafter.

[44] Thembelani and Patrick had no particular interest, were unconcerned and had no empathy to accused 1 on the night of 7 to 8 March 2020 or immediately thereafter. Since 2020 neither Thembelani in his lifetime nor Patrick supported accused 1's case until recently. The two of them did not care much about accused 1 in one way or another. In my view this was because nothing happened, which involved them, which would initiate a reaction from them and move them to act. Accused 1 was not shot whilst with Thembelani and Patrick and that is why none of them had any intense and usual emotional reaction. They did not know that night that accused 1 was shot. Accused 1 had no reason to call Thembelani, Patrick or even his cousin that night. He was shot at N[...]1's

place. Accused 1 called his uncle only after he arrived in hospital. It is to be accepted that under the circumstances that he was shot, there must have been a general sense of being lost and not knowing what to do and this was a legitimate reason for a nephew to call on the wisdom of an uncle to help one weigh the consequences and to talk to someone about his situation and all the options he may have to explore. The evidence of accused 1, Xolani, Nolusindiso and Patrick was not strong, independent evidence indicative of the innocence of accused 1. In the absence of compelling evidence that accused 1 was in Harare and was shot in Harare, the alibi cannot reasonable possibly be true. Accused 2 did not call any witnesses, at least two of which according to him were available. His alibi stood unconfirmed by any one or in any other way.

[45] In *S v van der Meyden* 1999 (2) SA 79 (W) at 82C-E it was said:

“... The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possibly true that he might be innocent. The process of reasoning which is appropriate to the application of that test in any case will depend on the nature of the evidence which the court has before it. 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.”

[46] Considering all the evidence, I am satisfied about the reliability of Mr X's identification of the accused as the shooters [*S v Mlati* 1984 (4) Sa 629 (A) at 632H-I]. In my view, the fact that he did not point the accused from a photo-identification, when the black and white pictures presented to him were not clear, and instead requested better quality colour photos to do an identification, is a clear indication that Mr X went to the photo identification with a clear and open mind [*Rex v Masemang* 1950 (2) SA 488 (AD) at 492]. Mr X gave a meticulous attention to detail and presented accurate understanding of what happened. I am satisfied that he was also trustworthy and honest. There is no reasonable possibility of truth in the defence that both accused were elsewhere than at N[...]1's place contemporaneous with the shooting. The totality of the evidence showed the accused to be unreliable. Nothing suggested that Mr X bore some grudges against the accused. In

my view, there had not been any evidential basis for suggesting that the evidence of Mr X was unreliable. The mere suggestions by the accused was not enough.

[47] The accused version, to the extent that it contradicts that of Mr X is not reasonably possibly true and is rejected. N[...]1 was shot elsewhere and not during the shooting at his home. When he arrived home, his conduct suggested that he knew that those who shot at him, or those who shared the common purpose to shoot and kill him on that day, were coming after him, and this explained why he escaped, assisted by Mr X. I do not think that under the circumstances, it would be a stretch too far to hold that those who followed him home were those intending to finish off what started KwaMafu. For these reasons I find that the State proved beyond reasonable doubt the guilt of the accused on all charges, and both are found guilty as charged.

**DM THULARE**  
**JUDGE OF THE HIGH COURT**