

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: CC31/2019

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

27 March 2023

DATE

.....
SIGNATURE

In the matter between:

THE STATE

and

JACOB BHUTI MLAMBO	Accused 1
MISHACK MABUSA MATSHIYA	Accused 2
MFUNDO INNOCENT MLAMBO	Accused 3
PHILLIP MADODA JWARA	Accused 4
FIHLIWE LETTY MASANGO	Accused 5
THOMAS MOSES KABINI	Accused 6

PAULINAH ZANELE MASANGO	Accused 7
LANCELOT SIPHO MTHIMUNYE	Accused 8
SIMON PATRICK NXUMALO	Accused 9
PAULINAH NURSE SIBIYA	Accused 10
TRYPHINA NTOMBIFUTHI SIBIYA	Accused 11

JUDGMENT

AVVAKOUMIDES AJ

THE TWO CHARGES AGAINST THE ACCUSED:

1. The Accused have all been charged with murder (read with the provisions of section 51(1) of the Criminal Law Amendment Act 107 of 1997) in that the death of the deceased was caused by the Accused, acting in the execution, or furthering of common purpose. In addition, the Accused have been charged with kidnapping.
2. In respect of count 1 the amended indictment dated 29 April 2019 states that, on or about 24 September 2018 and at or near Stand 626, Section A, Sokhulum, in the district of Bronkhorstspuit, the Accused unlawfully and intentionally killed an adult male L[...] J[...] S[...].
3. In respect of count 2, the amended indictment states that on or about 24 September 2018 and at or near Stand 626, Section A, Sokhulum, in the district of Bronkhorstspuit, the Accused unlawfully and intentionally deprived L[...] J[...] S[...] of his freedom of movement. I will refer to the deceased as L[...] or deceased.

INTRODUCTION:

4. Ms E Kabini appeared for the State. Ms Kabini is also known as Ms Mguni and referred to by both names in the record.

5. For reasons which will become clear later Accused 1 was represented by Mr Matshego, Accused 2 and 7 by Ms Mogale, Accused 3 by Mr Motsweni, Accused 4 by Mr Mathunzi, Accused 5 and 9 by Mr Rakobela, Accused 6 by Ms Mazibuko, Accused 8 by Ms Monyakane and Accused 10 and 11 by Mr Mahlangu. Mr Mahlangu was later replaced by other counsel, and I will deal with this aspect later.

6. Throughout the proceedings the services of an adequate interpreter/translator were utilised. The charges were put to all the Accused who confirmed that they understand the charges. All the Accused pleaded not guilty. The various legal representatives confirmed that the plea of not guilty accords with their respective instructions and all the representatives confirmed that the provisions of section 51(1) of the Criminal Law Amendment Act of 105 of 1997 were explained to the Accused, including the consequences thereof. No plea explanation was entered by any of the Accused.

SECTION 220 ADMISSIONS AND EXHIBITS:

7. The state handed up, and read into the record, the admissions made by the Accused in terms of section 220 of Act 51 of 1977, namely Exhibit B, being photographs numbered 1-34, captured on 24 September 2018 by Eveline Thrombi Mahlangu, a constable in the South African Police Services, who is a qualified photographer. These photographs were taken of the crime scene next to house number 626 A Sokhulumi. The key to the photographs was handed up as Exhibit B1.

8. All the Accused admitted Exhibit B and Exhibit B1 together with two pieces of rope which were placed in Exhibit bag number PAD001741180.

9. All the Accused admitted Exhibit C, consisting of a white t-shirt with

bloodstains from Accused 3 which was placed and sealed in the evidence bag number PW3000458227 and recorded on the SAP13 record number 750/2018.

10. All the Accused admitted Exhibit D, consisting of blood samples of the deceased with reference number 13DBAA5791TF sealed in evidence bag number PA5002267289.

11. All the Accused admitted, Exhibits D1, D2 and D3 being the chain of evidence of the exhibits aforesaid, were admitted being correctly sealed and handed to the forensic science laboratory.

12. All the Accused admitted, Exhibit E which is the report by Warrant Officer Vulani Clem Ngobeni confirming that on 27 February 2019 she received sealed bags with numbers PW300045227, PAD001741419 and PA5002267289 marked under Bronkhorstspuit number CAS3219/2018. The report confirms that she examined the exhibits and recorded her findings as per report LAD346457/2018.

13. All the Accused admitted Exhibit F2, which is the report by Dr Koloman, a forensic medical officer, confirming that on 25 September 2018, he examined the body of the deceased with tag number DR209/2018, referred to as Exhibit F1.

14. All the Accused admitted Exhibit G, which is the post-mortem report and accompanying affidavits by Dr Paul Lombard who conducted the post-mortem examinations on the body of the deceased DR209/2018. The report confirms that the body was examined, it was recorded that the deceased's hands and feet were tied with ligatures, the deceased's ribs, heart, lungs, liver, spleen, and other abdominal organs were normal. However, the deceased had multiple bruises and abrasions over his body with an 8cm deep laceration over the right Temporo-Occipital area with the underlying skull and Cribiformis also fractured. From the finding he concluded that the cause of death was head injuries.

15. The section 220 admissions by the Accused also included the DNA analysis

of the Accused, the DNA result from the t-shirt obtained from Accused 3, the identification of the deceased's body, the post-mortem examination and the cause of death.

EVIDENCE OF S[...] D[...] S[...]:

16. The trial commenced and the State called Ms S[...] D[...] S[...]. I will refer to Ms S[...] herein as S[...]. I do so respectfully for practical reasons, because all the parties including the State, referred to her, and her evidence, as being that of S[...]’s and to distinguish her from three further witnesses, who will feature hereunder, bearing the same surname. In respect of the latter three witnesses all parties will be referred to by their first names as well.

17. S[...] testified that she is the niece of the deceased. It is common cause that the deceased lived diagonally across the road from S[...]. S[...] testified that on 24 September 2018 at approximately lunchtime she was at home doing her washing. She went outside to hang up the washing when she heard a voice of a child who was screaming.

18. She was at home with her child K[...]. K[...] was 13 years old at the time. S[...] testified the child was screaming, as she exited from the house across the road where an incident had occurred and ran into the road screaming: *“he is raping us”*. S[...] ran towards her gate and saw the child run to her father. The child’s name is N[...]. The father of the child was running towards his own yard. S[...] confirmed that Accused 1 is the father of Nomthandazo. Accused 1 was in the company of Accused 2 and Accused 3 who entered a yellow shack belonging to Accused 1.

19. S[...] estimated the distance from where she was standing to the yellow shack being approximately 20-24 metres and compared this distance to the distance from the witness stand to the rear door of the court. All legal representatives agreed with the estimation of the approximate distance. S[...] testified further that she witnessed Accused 1, 2 and 3 coming out of the yellow shack, dragging the

deceased whilst the deceased was bound with his hands behind his back and his legs bound together at the ankles. A further piece of rope was used to bind his hands and feet to each other, vertically behind the back.

20. S[...] testified that Accused 1 was dragging the deceased and Accused 2 and 3 were following behind. The deceased was dressed only in a t-shirt and underwear. Accused 1 then laid the deceased down and hit him with an object which S[...] could not identify. Then Accused 2 dragged the deceased. It is common cause that the property of Accused 1 is divided into two yards, one containing an RDP house thereon, and the other where the yellow shack is situated.

21. S[...] testified that the deceased was dragged between the two yards. Then Accused 4 and 5 arrived. Accused 2 was dragging the deceased from the yard where the yellow shack was towards the yard where the RDP house stood. She could not see what Accused 3 was doing at that stage but when Accused 4 and 5 arrived they started assaulting the deceased all over his body by kicking him. Accused 1, when hitting the deceased with the unknown object, hit the deceased on his back.

22. S[...] called her Uncle P[...] S[...] by phone. He arrived quickly and proceeded to the yard of Accused 1. S[...] heard P[...]’s voice reprimanding them to stop assaulting the deceased and suggesting that they should rather call the police. S[...] testified that she heard Accused 1 saying to P[...] that he should keep quiet otherwise they would assault him as well. It was then that S[...] attempted to call the police and thereafter called her Uncle T[...]. At that stage her son K[...] was still with her. She testified further that Accused 7 then arrived and assaulted the deceased on his body with a plastic pipe.

23. S[...] again attempted to call the police and when she focused on the scene of the incident, she saw Accused 8 who was dragging the deceased towards the street and out of the yard. Accused 9 then arrived and asked: *“You are saying what did he do?”* Then Accused 9 took the pipe and assaulted the deceased. Accused 9

and 10 used the same pipe to assault the deceased. Accused 6 held a long stick approaching the deceased and S[...] decided to move from where she was to wait for the police on the road.

24. S[...] testified further that when Accused 8 and 9 arrived the other Accused stood aside and when Accused 10 and 11 arrived the other Accused also remained standing around. S[...] then corrected herself by stating when Accused 9 arrived, he assaulted the deceased, and immediately left. Accused 8 used a pipe in the assault and the assault did not take a long time. S[...] was shown the album of photographs, marked 7 and 8, and she confirmed that the photographs depict how the deceased was found.

25. The yellow shack and the RDP house are built on one stand and are separated by a wire fence. After many requests by the court and several undertakings by Ms Kabini and the various legal representatives, an affidavit in terms of section 212 of the Criminal Procedure Act, 1977 was handed in by agreement, such affidavit containing a recordal and reconstruction of the scene of the crime and including a key to the photographs and sketch plan marked "K1" to "K3". Although Exhibits "K1" to "K3" were handed in later in the proceedings such exhibits, by agreement, various uncertainties appeared in respect of the position of various homes, the position of the yellow shack, the RDP house, the place where the deceased eventually passed on and, generally setting out the surrounding areas with accurate measurements. I will deal with this later.

26. S[...] stated that when the paramedics arrived at the scene of the crime one of the paramedics examined the body of the deceased and requested S[...] to fetch a blanket. At that stage she could not be certain where all the Accused were because the scene became crowded thereafter. S[...] and both her uncles, P[...] S[...] and T[...] S[...], gave statements to the police officer in charge. S[...] corrected herself by testifying that instead of it being Accused 6 who was holding a stick, it was Accused 11. There was some confusion as to where the various Accused were seated in court in accordance with the charge sheet but ultimately S[...] was certain it was

Accused 11 who was in possession of the stick.

27. S[...] made a good impression before the court. In having to look at the Accused it was clear that she was afraid of them and described the tension between the families concerned. S[...] stood firm about her evidence and maintained that she testified on what she witnessed.

CROSS EXAMINATION OF S[...] ON BEHALF OF ACCUSED 1:

28. S[...] confirmed that she was interviewed by the South African Police in Isizulu. She conceded that her statement was written down in English and that it was not read back to her at all. She testified that the officer who interviewed her told her to sign the statement. S[...] stated that she was not asked to read the statement before she signed it although she confirmed that she had been previously read bank accounts and school documents of her children. Her explanation was that she accepted that the police officer recorded everything that she told him.

29. S[...]’s statement did not contain all her evidence in chief. S[...] maintained that her testimony is correct, and she cannot explain why her statement does not contain all her evidence. It was put to S[...] that the deceased was bound by his hands and feet whilst in the yellow shack and the reason for the deceased being bound was that he was trying to rape a young girl. S[...] was not able to comment because she could not see into the yellow shack from her vantage point.

30. It was also put to her, according to Accused 1, 2 and 3, that they carried the deceased to the RDP house because people were throwing stones at the shack. S[...] responded that she did not see this. It was also put to S[...] that there were people who threatened to burn down the RDP house if the deceased is not permitted to leave the house so that these people can get hold of him. S[...]’s comment is that she did not observe or hear any such threats.

31. S[...] maintained that what she saw is what she testified on and denied that

Accused 1 did not assault the deceased. She corrected the paragraph contained in her statement that the mother of the rape victim was using a pipe and the father was kicking him seriously all over his body while Mr Mlambo (Accused 1) and Mr Mfundu (Accused 3) were dragging him out of the yard.

32. The correct version is that Accused 2 had already pulled the deceased to the other yard (towards the RDP house) and Accused 4 and 5 were assaulting the deceased there. She denied paragraph 5 of her statement that the community members started to gather in a group and that she moved away from the scene. She explained that she never left the position where she stood but never went close to the crime scene.

33. S[...] maintained her observation that relatives of the alleged rape victim approached the scene of the crime with a stick and a spade. All the Accused are related to one another in some way, except Accused number 9. This was contained in her statement. S[...] denied the portion in her statement that she distanced herself from the events and locked herself in her room. She could not explain why the police officer had inserted that in her statement. S[...] conceded that her statement does not include her having observed Accused 1 assaulting the deceased and her explanation was that this was omitted erroneously by the police.

34. S[...] also conceded that her statement does not include that her Uncle P[...], (the deceased's one brother), when arriving at the crime scene, reprimanded the people who were assaulting the deceased. This of course, must be seen against the background of her concession that the statement she provided to the police was not read back to her.

CROSS EXAMINATION OF S[...] ON BEHALF OF ACCUSED 2 AND 7:

35. Cross-examination then ensued on behalf of Accused 2 and 7. The initial cross-examination on behalf of Accused 2 and 7 was of no value and culminated in an agreement between all parties that an inspection *in loco* must be conducted and,

in addition, that the State had not obtained a plan from the police investigator depicting the scene of the crime and surrounding area. Ms Kabini for the State explained that it was not because of any decision on her part that a plan had not been forthcoming. After a lengthy debate I ruled that an inspection *in loco* be held at Bronkhorstspuit, Sokhulum Village and that all concerned should meet at the Bronkhorstspuit Police Station at 09h00 on 3 March 2021.

INSPECTION IN LOCO:

36. After the inspection *in loco* Ms Kabini for the State placed on record the various distances between the surrounding buildings and all relevant measurements and all parties concerned were satisfied that these distances had been correctly recorded.

CROSS EXAMINATION OF S[...] CONTINUED ON BEHALF OF ACCUSED 2 AND 7:

37. S[...] persisted with her evidence that she observed Accused 1 dragging the deceased from the yellow shack. Accused 1 assaulted the deceased with an object that S[...] could not see and Accused 3 dragged the deceased to an electric pole close to the yellow shack. Whilst Accused 3 was dragging the deceased Accused 1 and 2 were following behind.

38. S[...] also confirmed that Accused 8 dragged the deceased out of the yard of the RDP to the street. S[...] maintained that Accused 7 whom she knows as Zanele, arrived at the scene while the deceased was laying on the road.

39. S[...] confirmed that Accused 7 arrived and struck the deceased with a pipe, black in colour. Accused 7 struck the deceased more than five times. S[...] confirmed that Accused 7 assaulted the deceased on his private parts and then moved and stood aside.

40. S[...] conceded that her testimony about Accused 7 is not contained in her statement. It was put to S[...] that when Accused 7 arrived at the scene the deceased was being assaulted by a mob. Ms Mogale for Accused 2 and 7 then put it to S[...] that upon arrival of Accused 7 the community was already assaulting the deceased who was laying down on the ground and that she, Accused 7 will testify and deny taking part in assaulting the deceased. S[...] maintained that she saw Accused 7 assault the deceased as she previously testified.

CROSS EXAMINATION OF S[...] ON BEHALF OF ACCUSED 3:

41. S[...] conceded that she did not witness Accused 3 assault the deceased. When confronted with the proposition that she was witnessing the events at all times, S[...] qualified this by stating that she had gone into the house to fetch her cell phone and whilst she was busy making phone calls, she did not focus in the direction of what was happening all the time. S[...] also conceded that she had confused Accused 2 with Accused 3 and explained this as an error.

CROSS EXAMINATION OF S[...] ON BEHALF OF ACCUSED 4:

42. It was put to S[...] that Accused 4 would come and testify that he did not arrive together with Accused 5 but a minute later. S[...] maintained that she witnessed Accused 4 and 5 assaulting the deceased together. There was no further cross-examination for Accused 4.

CROSS EXAMINATION OF S[...] ON BEHALF OF ACCUSED 5 AND 9:

43. It was put to S[...] that prior to the trial she had discussed the case with her two uncles (brothers of the deceased) T[...] and P[...]. S[...] confirmed that she did talk about the case with her two uncles. S[...] confirmed that her Uncle P[...] arrived before Uncle T[...], but he did not enter the yellow shack. S[...] agreed that when Accused 5 arrived at the crime scene the deceased had already been moved from the yellow shack to the yard next door at the RDP house. She denied the proposition

that there were more than 30 people gathered there.

44. It was put to S[...] that when Accused 5 arrived at the crime scene there were a lot of people surrounding the deceased. S[...] denied this. S[...] conceded that when Accused 5, who is the mother of the young victim K[...], took the child to the doctor with T[...], the deceased was still alive. Mr Rakobela then put it to S[...] that Accused 5 will testify that she left the scene of the crime when the deceased was still inside the yard of the yellow shack. S[...] did not have an answer to this proposition.

CROSS EXAMINATION OF S[...] ON BEHALF OF ACCUSED NUMBER 6:

45. S[...] conceded that when she saw Accused 6, the deceased was laying on the ground in the street, and no one was assaulting the deceased. The deceased was lying face down on his stomach. From where S[...] was standing at her gate she confirmed that Accused 6 approached the scene of the crime from her right-hand side.

46. Ms Mazibuko asked S[...] who had assisted her to mention the name of Accused 6 because S[...] had only mentioned the name of Accused 6 after tea two days in the trial. S[...] explained that Accused 6 was the last person she saw carrying a stick. Ms Mazibuko persisted in putting to S[...] that she had been assisted during the tea break to alter her evidence and implicating Accused 6. S[...] denied this and persisted that Accused 6 carried a long brown stick from a tree and that the stick was approximately two metres in length.

47. S[...] knew Accused 6 because they come from the same place and at the time he was accompanied by 3 men whom she did not recognise. Ms Mazibuko then put it to S[...] that her instructions are that Accused 6 picked up a stick that was on the road that he was walking, and the street was full of people. Accused 6 was moving that piece of wood and other implements. S[...] did not have any response to that proposition. It was further put to S[...] that after he moved the piece of wood Accused 6 threw it on the side of the road whereas S[...] persisted that the piece of

wood was still in his possession.

48. Ms Mazibuko was at pains to elicit from S[...] why she had not approached the deceased (her uncle) whilst he lay in the street, and her response was, that when Uncle P[...] arrived at the scene he was told to keep quiet otherwise he would be assaulted as well. She was thus afraid. Ms Mazibuko questioned S[...] as to why she did not shout when she saw the deceased being assaulted by Accused 1, 2 and 3 and her response was that she had already heard Thandaso shouting "*he is raping us*". S[...] confirmed that she could hear the deceased screaming. S[...] learned afterwards that Thandaso, when expressing the word "*us*" was referring to herself and K[...].

49. She saw K[...] on that day when she was taken from a neighbour's house to the hospital. S[...] confirmed that K[...] was taken to hospital by S[...]’s Uncle T[...] and K[...]’s mother.

CROSS EXAMINATION OF S[...] ON BEHALF OF ACCUSED NUMBER 8:

50. It was put to S[...] that Accused 8 arrived at the scene to fetch a small child and when he did so he left. S[...] stated that she never saw any child and maintained that when Accused 8 arrived he assaulted the deceased and then left.

51. S[...] was cross-examined on the discrepancy between her statement and her evidence in chief *vis-à-vis* Accused 8 and she explained that she may have made a mistake when mentioning the numbers of the Accused but was certain about what she witnessed. S[...] conceded that she never saw Accused 8 dragging the deceased but did witness him assaulting the deceased.

CROSS EXAMINATION OF S[...] ON BEHALF OF ACCUSED NUMBER 10 AND 11:

52. S[...] confirmed that the deceased did have a history of being violent and in

the past had even stabbed P[...]. Mr Mahlangu questioned S[...] on when P[...] arrived at the scene. S[...] confirmed that she had called the police and thereafter her other uncle T[...]. It was put to S[...] that his clients would testify that it was P[...] who assaulted the deceased.

53. Mr Mahlangu put it to S[...] that one Nothole would come and testify that the deceased was taken from the yellow shack into the RDP house because the RDP house had a steel door and the deceased was brought into the house for his protection. Despite every effort to understand who Nothole is Mr Mahlangu was unable to identify who Nothole is. Eventually Mr Mahlangu disclosed that Nothole is Accused 1's child and that she was in the RDP house.

54. S[...] was adamant about what she had witnessed and despite many occasions when Mr Mahlangu put a version that would be testified to by Nothole, Nothole never testified. It must naturally follow that the versions put to S[...] by Mr Mahlangu regarding Nothole stands to be disregarded in its entirety. It is of course also troubling that such an important aspect which could be clarified by a witness who was identified by Mr Mahlangu, was not called.

55. Insofar as Accused 10 and 11, Mr Mahlangu highlighted that S[...]’s statement does not implicate the two Accused and reiterated to S[...] that what she had testified on earlier, to the effect that the police officer did not include all the information given by S[...] in her statement, is not correct. It was put to S[...] that the investigating officer, Constable Chauke would come and testify that S[...] had only implicated the persons named in her statement.

56. Some debate ensued about the calling of Constable Chauke and Mr Mahlangu proceeded to put the version of Accused 10 to S[...]. It was put to S[...] that Accused 10 had entered Accused 1's yard and went into the RDP house. S[...] responded that she did not notice that and only saw Accused 10 when she was assaulting the deceased. S[...] confirmed that Accused 5 was speaking to T[...] at the side of the road close to the deceased's house. Mr Mahlangu continued questioning

S[...] about the conversation between Accused 5 and T[...]. Many objections were raised to these questions and after the adjournment Mr Mahlangu abandoned cross-examination about Accused 5 and T[...].

57. He put it to S[...] that Accused 10 left through the gate immediately when T[...], Accused 5 and K[...] left for the clinic. It was also put to S[...] that Accused 10 went outside Accused 1's yard where she met Accused 11 for the first time and they decided to go home. S[...] maintained that she saw Accused 11 also assaulting the deceased. This concluded cross-examination of S[...] for all the accused.

EVIDENCE OF P[...] S[...]:

58. The State then called S[...]’s uncle, Mr P[...] S[...], P[...]. P[...] also testified in Isizulu. P[...] confirmed that the deceased L[...] suffered from a mental condition and that he was on medication which he obtained from the Mamelodi Hospital. P[...] confirmed that at some stage in the past L[...] had stabbed him with a knife and he required medical treatment as a result. P[...] confirmed that he knows all of the 11 Accused describing some of them as neighbours and some as people that he would meet on the street. All of them live in the same vicinity.

59. P[...] confirmed that Accused 1 and 3 are his neighbours. In respect of Accused 2 he confirmed that it was the first time that he had seen him on the day of the incident. P[...] knows Accused 4 by meeting him in the street. He also knows Accused 5, 6, 7, 8 and 10 because they are from the same vicinity. In respect of Accused 11, P[...] knows her because they used to go to the same church. P[...] testified that Accused 1 enjoys a particular status in the community because he was a member of the school governing body and he also worked at the tribal office. P[...] confirms that everyone in the area was aware that L[...] suffered from a mental problem, more particularly Accused 1 and 3.

60. At approximately 13h45 on 24 September 2018 P[...] received a call from S[...] informing him that “L[...] is not well” and that he must hurry up and come

quickly.

61. He found S[...] at her gate with two children at her parental house. He was informed that L[...] is at the neighbour's house to which S[...] pointed and asked him to go and look what is happening. P[...] crossed over towards a neighbour's house and found a man there by the name of Siphiwe. He asked Siphiwe where L[...] is, and he responded that he does not know but there are people in the yard. Siphiwe told P[...] that there are people talking in the yellow shack whereafter he walked towards the shack. As he was approaching the shack, he saw the deceased being taken out of the shack and his hands and feet were bound from behind.

62. P[...] confirmed that he was limping and used a crutch due to a previous injury. P[...] testified that Accused 1 was dragging the deceased who was on the floor and hit the deceased with a black stick while uttering the words "*L[...] I have trusted you so much*". He could see that the deceased's eye was swollen and that he was bleeding from his ear. He asked Accused 1, 2 and 3 why they were doing this to the deceased and he tried to stop them but Accused 2 and 3 kicked the deceased as if they were kicking a ball. They were kicking the deceased on his body wherever they could reach. Whilst he was trying to stop the three men two dogs arrived and bit P[...] but the daughter of Accused 1 arrived and called off the dogs. Her name is Nothando.

63. It was difficult for P[...] to stand up and by the time he managed to get up Accused 2 was standing next to him and P[...] asked him why they assaulted the deceased when, in South Africa, there are police whenever an incident transpires, and the police may be called. At that stage the deceased had been taken next to the gate leading to the street between the yellow shack and the RDP house.

64. When P[...] arrived at the yellow shack there were only 6 people consisting of Accused 1, 2 and 3, the deceased, Nothando and P[...]. Nothando was the sixth person. P[...] testified that when he then came close to the deceased he was already outside the gate. He saw Accused 9 raising a black pipe and seriously beating the

deceased. The deceased was seated on the ground and his hands were tied to the back and there was nothing that he could do. He saw Accused 9 lift the black pipe after asking the people around what is that they had said that the deceased had done. When Accused 9 was told that he had raped K[...], Accused 9 then hit the deceased with the black pipe, hitting him everywhere and wherever he could reach.

65. P[...] could see Accused 1 with the pipe and he tried to come closer telling Accused 1 that this could not happen whereupon Accused 1 said if P[...] interfered any further, he would “get the same as the deceased”. Then P[...] saw that Accused 8 was holding the pipe and also hit the deceased. Accused 4 and 5 arrived and Accused 4 started kicking the deceased and Accused 5 leaned down towards the deceased telling him that he was going to rot in jail. The deceased was laying on the ground at that stage.

66. P[...] saw T[...] trying to stop Accused 4 and 5 from beating the deceased but there was nothing that he could do so he tried to call the police. P[...] left the scene to go and wait for the police at an area close by, which is well-known because the crime scene does not have any street names. He stood next to the clinic waiting for the police but before he left, T[...] had just stopped Accused 4 and 5 from continuing the assault on the deceased. However, Accused 8 continued assaulting the deceased and T[...] was trying to stop him. When P[...] left the deceased was laying on the ground facing downwards.

67. P[...] noticed some other community members who were simply watching not far from the incident. He estimated there could have been between 20 to 30 people, but when the police arrived, they moved the people from Road A to Road B.

68. I will at the end of this judgment append hereto the plan, key and correct measurements that were compiled by the investigating officer, and which was handed in and agreed upon by all parties. When P[...] left the deceased was still alive and he was screaming. When the police arrived L[...] had passed on. It took approximately 30 to 35 minutes for the police to arrive and T[...] was still at the

scene. P[...] denied that the deceased was ever taken into the RDP home. P[...] explained to the police what had happened, and his statement was taken down. The police officer was a warrant officer at the time, and he is now a captain who spoke to P[...] in Sepedi and P[...] responded in Sesotho. The investigating officer was writing in a book, black in colour.

69. P[...] admitted that he told the investigating officer only about Accused 1, 2 and 3 and the reason for this is because the investigating officer asked P[...] who were the people who started this. He told the investigating officer what happened when he arrived at the shack and he found Accused 1, 2 and 3. P[...] did not know when the investigating officer prepared the statement, but the investigating officer did come and see P[...] to sign his statement. They did not read the statement to him, and he signed the statement without reading it. P[...] confirmed that he had not told the police about the other Accused because he was simply asked by the investigating officer who started the events.

70. After the police had taken down P[...]’s statement Accused 1 called him to one side to talk, but P[...] told him it is too late to try and speak now because someone had just lost his life. He told Accused 1 that he wanted to talk to him before but Accused 1 had threatened him. Accused 1 attempted to grab P[...] at the time but P[...] moved away from him and went to sit elsewhere.

71. P[...] stated that during the week of the preparation for L[...]’s funeral he heard that the community would convene a meeting of its own. P[...] wanted to disclose what he had been told and there were various objections as to the hearsay nature thereof and the transcript of the proceeding is not of any assistance to the court in that respect because of the various counsel all wanting to speak at once.

72. P[...] stated that the relationship between the various families deteriorated, and the various families would not look at any member of the S[...] family in a good manner. The incident shattered the S[...] family.

CROSS EXAMINATION ON BEHALF OF ACCUSED NUMBER 1:

73. Counsel for Accused 1 commenced his cross examination. It was put to P[...] that Accused 1 would testify that he and the other two who assisted him in removing the deceased from the yellow shack acted so because L[...] was acting unlawfully. P[...] responded that he does not know anything about the submission. It was further put to P[...] that Accused 1 reacted to what was happening inside the shack, not because he knew that the deceased suffered from a mental problem, but because there was an act of rape which was taking place. P[...] was asked whether, on the day that L[...] stabbed P [...], “did P[...] provoke L[...]?” P[...] testified that he did not provoke the deceased and the stabbing occurred in the early hours of the morning when L[...] had not been sleeping.

74. It was put to P[...] that S[...] testified that when the deceased was removed from the yellow shack he was dragged by Accused 1 where Accused 2 and 3 followed. P[...] responded that Accused 2 and 3 were not following but rather kicking the deceased. He clarified the difference between S[...]’s evidence and his own by stating that S[...] saw what she saw and, he saw what he had observed and testified on.

75. P[...] maintained that he witnessed Accused 1, 2 and 3 coming out of the shack with the deceased, assaulting the deceased as he had testified and then the two dogs attacked him. By the time the dogs had been called off P[...] then saw the deceased outside the gate. P[...] stated that he was on the floor for approximately 5 minutes during the attack from the dogs. P[...] denied having any knowledge of the attempted rape on K[...] and all that he knew is that the deceased followed a little girl into Accused 1’s yellow shack.

76. P[...] was pressed to disclose whether he had discussed his testimony with S[...] and his family, but he denied discussing the merits with his family. He did state that his discussion with his family was limited to how this incident had affected them, particularly in the village where they live.

77. P[...] insisted that he and S[...] did not discuss the merits of the case but their discussions were confined to how they were treated by the community because of the incident.

78. P[...] persisted that the statement was not read back to him and in fact the statement was not taken down in his presence but the officer who interviewed him, wrote in a book. P[...] was taken through the statement, and he confirmed that on the day when he spoke to the police officer, he spoke in Sesotho. P[...] reaffirmed that he endeavoured to intervene when Accused 9 assaulted the deceased but Accused 1 stopped him from doing so.

79. It was put to P[...] that the police officer who prepared his statement will be called to testify in response to P[...]’s evidence. P[...] was comfortable with the proposition. P[...] persisted that Accused 1, despite what he intends testifying, indeed assaulted the deceased and if he contends that he was protecting his property and removal of the deceased from his property, he is not correct.

CROSS EXAMINATION ON BEHALF OF ACCUSED NUMBER 2:

80. The version of Accused 2 was put to P[...] that Thandaso (Nomthandazo who was in the yellow shack with K[...]) had screamed that the deceased was raping K[...], but P[...] testified that he does not know anything hereof. The more Ms Mogale put the version of Accused 2 the more P[...] responded that he is not able to comment because the events put to him occurred inside of the yellow shack and that he had not entered the yellow shack. It was put to P[...] that Accused 2, upon hearing that there was an alleged rape, and Thandaso screaming, ran towards the yellow shack and when he entered and found K[...] lying on her back on top of a bed Accused 2 pushed the deceased away from K[...]. The deceased then punched Accused 2 in the face and then Accused 3 came in.

81. This is when K[...] left the shack and Accused 3 assisted Accused 2 to

subdue and tie up the deceased because the deceased became violent. Whilst they were tying the deceased up Accused 1 arrived and also assisted them because the deceased was fighting. It was put to P[...] that whilst being tied Accused 2 found his underwear and dressed the deceased due to him being naked.

82. I find it difficult to comprehend how this would have been possible because of how the deceased had been tied up. P[...] could obviously not respond to this version. Ms Mogale put it to P[...] that S[...] testified that she witnessed Accused 1, 2 and 3 dragging the deceased out of the yellow shack. At that stage P[...] had not yet arrived and Ms Mogale highlighted the discrepancy in P[...]’s evidence that he also saw Accused 1, 2 and 3 dragging the deceased out of the yellow shack. P[...] maintained that when the deceased was dragged from the yellow shack he was there.

83. What then ensued was a debate about the discrepancy between S[...]’s observations as opposed to what P[...] observed. The state objected. It was agreed by all the parties that the matter should stand down so that all counsel and counsel for the State should listen to the recording to establish clarity as to what S[...] testified, as opposed to what P[...] testified. There were many occasions when counsel for one or more of the Accused would put incorrect versions to the witnesses leading to delays in trying to locate the correct evidence on the recording.

84. S[...]’s evidence was repeated as per the recording. Before Ms Mogale proceeded with further cross-examination, I raised an issue regarding the statements of S[...] and P[...] more particularly how those statements were taken down. I will revert to this aspect later.

85. The cross-examination continued on the aspect that S[...] had testified that she only telephoned P[...] when she saw Accused 1, 2 and 3 exiting the yellow shack with the deceased being bound. P[...]’s evidence on the other hand is that when he arrived, he saw Accused 1, 2 and 3 had exited from the yellow shack with the deceased. It is my view that these discrepancies, along with others to which I will

return to later, arose from difficulties in the translation and interpretation, given the various languages used in court.

86. On many occasions I intervened to request the interpreter why a simple question to a witness would take so long to translate and then to repeat the answer. It appeared to me that the interpreter would inevitably have to ensure that the witness understood the question and it was difficult to merely translate literally, the questions posed in English, without a basic interpretation.

87. Ms Mogale proceeded to cross examine P[...] about a stick depicted in photograph 23 and 24 but he maintained that it was a black pipe in the assault. Ms Mogale intended to proceed with the cross-examination based on the statement. I had reservations about the admissibility of the statements because of the way they were taken down and not read back to the witnesses. Moreover, the statements were not commissioned properly, and I asked for submissions from all counsel before proceeding further.

SUBMISSIONS ON ADMISSABILITY OF STATEMENTS:

88. Mr Matshego submitted that it is not necessary to hold a trial within a trial to determine the admissibility of statements such as the one's in question but in these circumstances, it is in the court's discretion once the police officer is called who took down the statements, and after his or her evidence, the court may consider recalling previous witnesses to deal with the admissibility of the statements. Mr Matshego submitted that, in the interim, the statements should be provisionally accepted and the court can decide on their status once the investigating officer has testified. All counsel agreed with the suggested approach, and I was satisfied to proceed along these lines.

CROSS EXAMINATION ON BEHALF OF ACCUSED 2 AND 7 CONTINUED:

89. Ms Mogale proceeded to question P[...] on why his statement does not

reflect that Accused 2 stood next to him after the dogs had attacked him and that he asked Accused 2 *“why they were doing this”*. P[...] maintained that he was only asked who started this whole incident and that is the information he gave to the investigating officer.

90. It was put to P[...] that the version of Accused 2 is that he did take part in bringing the deceased out from the shack to the outside and the reason for him doing so is because he prevented the deceased from committing an unlawful act of rape. P[...] denied any knowledge thereof. It was further put to P[...] that Accused 2 only assisted to subdue the deceased because he was a violent person. P[...] maintained that Accused 2 was kicking the deceased like he was kicking a ball. It was put to P[...] that the version of Accused 2 accords with the version of S[...] i.e. that Accused 2 never did anything to the deceased. P[...] persisted that Accused 2 kicked the deceased.

91. The cross-examination continued and was centred around P[...] not reading his own statement before signing it particularly against the background that P[...] was at the time employed as a risk manager at OR Tambo International. P[...] explained that he was tired at the time and a lot had transpired on the day in question and he was also on sick leave. It was put to P[...] that it is highly improbable that the police can write a statement after making notes and then return with the statement and to ask a witness to sign the statement.

92. P[...] stated that he only mentioned the name of Accused 1 who was well known to him, to the investigating officer, then pointed out Accused 2 who he did not know, and lastly, Accused 3 as being the son of Accused 1.

CROSS EXAMINATION ON BEHALF OF ACCUSED NUMBER 3:

93. Mr Motsweni questioned P[...] on how the investigating officer would have known the name of Accused 2 if P[...] did not know his name. P[...] responded that perhaps the police officer had asked what the name of Accused 2 is, who was

identified by P[...]. It was put to P[...] that after he received a call from S[...] it must have taken him some time to get to the scene because he was approximately 200m to 300m away.

94. P[...] persisted that even though he limps and walks with one crutch he is still able to compete with people that are not affected by any disability and he has developed his own way of running. P[...] testified that when he arrived at the gate to enter the yard towards the yellow shack, he met Sipiwe, and he asked what was going on and was told that there were people in the shack. When P[...] entered the yard approaching the shack that is when Accused 1, 2 and 3 were coming out of the shack.

95. P[...] persisted that when he got off the ground, after the attack by the dogs, Accused 2 was standing next to P[...] and after speaking to Accused 2, he saw Accused 8 lifting up a pipe and assaulting the deceased. When he wanted to get closer he was prevented from intervening by Accused 1. P[...] demonstrated how the deceased was tied up, his hands were tied behind his back, so too were his feet tied together and, having regard to the photos the rope extended from the knots of the rope from the deceased's hands down to the knots of his feet. P[...] persisted that the deceased came out of the shack, and he was on his feet but Accused 1 pulled him out of the shack and dragged him and then started assaulting him when Accused 2 and 3 came closer and kicked the deceased as if they were kicking a ball.

CROSS EXAMINATION ON BEHALF OF ACCUSED NUMBER 4:

96. It was put to P[...] that Accused 4 denies that he was there during the assault but only arrived later. P[...] persisted that when he saw Accused 4, he was kicking the deceased and was stopped by P[...]’s brother, T[...].

CROSS EXAMINATION ON BEHALF OF ACCUSED NUMBER 5 AND 9:

97. Mr Rakobela tried to elicit from P[...] whether he, at any stage, went to the

police station to make a statement. P[...] denied having gone to the police station. P[...] conceded that he did not tell the police everything that he saw on the day of the incident and maintained that the reason for that was that he was only asked by the investigating officer who started the incident.

98. Mr Rakobela raised scepticism on how quickly P[...] can run, given the condition of his leg. P[...] had already explained this earlier. P[...] confirmed that he never saw Accused 5 in possession of a black pipe. It was put to P[...] that Accused 5 would testify that P[...] did not see her on that day. I find this difficult to believe. P[...] maintained that he did see Accused 5. P[...] repeated that he saw Accused 5 kneeling down next to the deceased and telling the deceased that he must rot in jail. P[...] confirmed that he saw Accused 9 as well, holding a black pipe and assaulting the deceased. He reiterated that Accused 9 was standing next to the deceased holding the pipe and asking what is it that the deceased had done. When he was told that he had raped he started assaulting the deceased. P[...] does not know where Accused 9 came from.

CROSS EXAMINATION ON BEHALF OF ACCUSED NUMBER 8:

99. P[...] testified that Accused 8 assaulted the deceased after Accused 9 had finished his assault on the deceased. Ms Monyakane simply continued rehashing the evidence. It was put to P[...] that Accused 8 simply arrived at the scene of the incident to find his younger brother and, when he did so, he left. P[...] denied this emphatically insisting that Accused 8 assaulted the deceased.

CROSS EXAMINATION ON BEHALF OF ACCUSED NUMBER 10 AND 11:

100. Mr Mahlangu had no cross examination for Accused 10 and 11.

RE-EXAMINATION ON BEHALF OF THE STATE:

101. Ms Kabini commenced with re-examination. P[...] stated that although he did

not see Accused 4 and 5 arrive at the scene, he maintained that they were assaulting the deceased. When P[...] left he saw his brother T[...] attempting to stop Accused 4 and 5 from continuing with the assault on the deceased. At that stage S[...] was standing at the gate of her home. P[...] confirmed that when he left he saw Accused 8 standing next to the deceased and he still had the pipe in his hands.

102. The court posed certain questions to P[...] for purposes of clarification mainly focussed on the word “*isi pithi pithi*” and to understand what P[...] meant by using these words. His understanding was that there were many things happening, one after the other and some simultaneously. The deceased was screaming. There was a lot of noise.

EVIDENCE OF T[...] D[...] S[...]:

103. The State called Mr T[...] D[...] S[...] to whom I will similarly refer to as T[...] for convenience purposes. T[...] testified that on 24 September 2018 he was not staying in the Sokhulumi Village but approximately 1km away. T[...] was asked to identify all the Accused commencing with Accused 1. Accused 1 is the neighbour who lives next to his parental homestead. Accused 2 is also a neighbour, Accused 3 is the son of Accused 1, Accused 4 and 5 are the parents of the alleged rape victim. Accused 6 is the brother of Accused 5, Accused 7 is the sister of Accused 5, Accused 8 is the son of Accused 5, Accused 9 is a neighbour in the village, Accused 10 and 11 are related to Accused 5.

104. T[...] testified that he received a call from his niece S[...] on 24 September 2018 at about 13h45. She informed him that L[...] is being assaulted. S[...] sounded frightened. He inquired from S[...] why L[...] was being assaulted and she told him that there was an allegation that he had raped someone at the home of Accused 1. T[...] then got into his car and drove straight to Accused 1’s home. He parked his car after the T-junction opposite his parental homestead and went to Accused 1’s home.

105. He described that Accused 1 has two homes, the yellow shack and the RDP

house. He went to the RDP yard where he found Accused 1, Accused 2, Accused 3, Accused 4, Accused 5 and Accused 8. The deceased was outside on the ground next to the RDP house and his hands and feet were bound with the same rope. He was laying down facing upwards and bleeding from the ear. His evidence is to the effect that there was no one inside the RDP house.

106. He asked what had happened and Accused 4 and 5 responded saying that their child had been raped. Accused 1 said that he trusted my younger brother, but he had been disappointed. Accused 8 was in possession of a black pipe and those were the only persons in the RDP yard. Accused 8 was assaulting the deceased. T[...] asked whether the police were called and inquired what the reason was for L[...] being bound as he was. He then proceeded to make Accused 4 aware of the manner in which her son, Accused 8, was assaulting the deceased and that he might end up dead because he was hitting him on the head. Whilst trying to talk to Accused 4 who pushed T[...] away, Accused 5 also started assaulting the deceased with her hands and the pipe. T[...] testified that whilst Accused 8 kicked the deceased, the pipe dropped to the ground and Accused 5 picked it up and continued to use it to assault the deceased.

107. When T[...] asked why they were assaulting the deceased like that, Accused 5 said that she does not care and is prepared to go to jail for that. T[...] tried to find out if the police had been called and then Accused 7 assaulted the deceased who, despite being tied, was rolling himself on the ground to guard against the assault but he was assaulted all over his body. Accused 4, 5, 7 and 8 were assaulting the deceased when Accused 11 also came in the yard and she stood next to Accused 5.

108. Accused 11 said that she felt uncomfortable in T[...]’s presence but wanted to be part of the people that were assaulting the deceased. She wished that T[...] would go so that she can deal with the deceased. Despite his appeal to Accused 5, she told T[...] that he does not know how she feels because it is her child that was raped. He inquired whether the child had been taken to a specialist to confirm whether she had been raped.

109. Accused 5 then asked T[...] that if he wants his brother to be released what help will she get for her child. He asked her what she is thinking about whereupon she responded that the child should be taken to the doctor to check whether there has been a rape. T[...] offered to take the mother and child to the clinic on condition that she would tell her family to stop assaulting the deceased and that they must take him into the RDP house until the police arrive. They agreed. T[...] then spoke to Accused 1 and asked him that he must ensure that the deceased does not leave the premises and if he does leave, he must be unbound.

110. Accused 1 responded that if the community comes in and they threaten to burn his house what does T[...] expect him to do. T[...] told him that he does not believe that this would happen because the house of Accused 1 is so very much respected. That is so because Accused 1 is a member of the delegates of the Traditional Council and was also on the school governing body. T[...] said the child was brought towards him and she was crying. Despite this, the assault still continued on the deceased by Accused 4, 7 and 8. While T[...] was preparing to leave with the child and her mother, Accused 9 arrived from the direction of S[...]’s parental home and he asked what it is that they were saying that this person (the deceased) had done, when he heard the response that the deceased had raped a child, he picked up a pipe and started assaulting the deceased.

111. He took the pipe that was used to assault the deceased and assaulted the deceased quickly and heavily within 5 minutes. T[...] did not know Accused 9 well. He was shown the direction where Accused 9 lived. As T[...] moved towards the car with the child and her mother he looked back to see his brother and noticed Accused 7 and 8 were continuing with the assault. When T[...] left the yard Accused 1, 2, 3 and 4 were in the RDP yard including Accused 7 and 8. When they left the yard there were a few people outside and he estimated less than 5. T[...] did not see S[...] or P[...] because he concentrated on the deceased.

112. On the drive to the clinic from the scene, T[...] drove past his house requested that his wife accompany them to the clinic. There was another lady who

accompanied them to the hospital with the child and the mother. At the hospital he called S[...] asking how the situation was and he was informed that L[...] had passed away. When he heard this, he called his wife and asked her to go and tell the victim's mother. He said that he can no longer wait for them because he had received a message that his brother is dead. He then went to the police station to report his brother's death.

113. When he returned to the scene of the assault, he saw the deceased laying opposite Accused 1's gate and the police were there and the area was barricaded. He approached the deceased and did not see any of the accused. The police took his statement down at the scene.

CROSS EXAMINATION ON BEHALF OF ACCUSED NUMBER 5:

114. It was put to T[...] that in honour of the agreement, the Accused would stop assaulting the deceased and put him inside the house and he in return would take K[...] to the hospital. Furthermore, upon leaving the scene the assault on the deceased would have stopped otherwise he had no reason to honour the agreement. However, upon hearing that the L[...] has passed away, he refrained from helping anymore. T[...] testified that upon hearing of the deceased's passing he left to go make arrangements for the funeral. The purpose of the agreement and talking to the accused, particularly 1, 2, 3 and 4, was because they were men and there was no way of trying to stop them physically. Therefore, he spoke to Accused 5 as the mother of the victim, that if she was to say stop, the Accused will listen to her.

115. Mr Rakobela put it to T[...] that he assaulted the deceased saying that he is tired of the deceased being violent. He stabbed P[...] with a knife and terrorises people in the community. He has dragged the S[...] name through the mud. Mr Rakobela placed reliance on the statement T[...] made to the police. Despite Mr Rakobela's numerous attempts to get T[...] to admit the contents of the statement, T[...] persisted that he could not tell the police officer how to do his job, and the police officer summarized the events of the incident.

116. Furthermore, it was put to T[...] that Accused 5 will be testifying that there were a lot of people inside the yard. Those people were aggressive and wanted the deceased released, so that they could assault him. Accused 1, 2, 3 and 4 tried their best to protect the deceased. The assault was triggered by the things T[...] said upon his arrival.

117. Mr Rakobela in cross examination for Accused 9, relied on T[...]’s statement deposed to at the scene. The statement was handed up and provisionally accepted as Exhibit J. It was put to T[...] that he, P[...] and S[...] had previously discussed the merits or surrounding facts of the matter. T[...] persisted that the merits of the matter were not discussed.

CROSS EXAMINATION ON BEHALF OF ACCUSED 7:

118. Ms Mogale commenced with cross-examination for Accused 7. T[...] disagreed with the contextual use of the word *‘isi phithi phithi’*. This word was used in his statement as an indication of how events transpired before he left for the clinic. He maintained that the manner in which the sentence was written was not correct. T[...] insisted that he saw Accused 7 holding a pipe inside the yard of Accused 1 assaulting the deceased despite Ms Mogale’s numerous attempts to get T[...] to agree that by the time Accused 7 arrived, the deceased was outside. Furthermore, that upon arriving at the scene there were no more than 3 people outside.

119. Ms Mogale put it to T[...] that Accused 7 will testify and deny that she assaulted the deceased inside Accused 1’s yard in the manner he described. T[...]’s response was that she continued assaulting the deceased even when T[...] was driving away with Accused 5 and her daughter, K[...].

CROSS EXAMINATION ON BEHALF OF ACCUSED NUMBER 8:

120. T[...] testified that Accused 8 was assaulting the deceased from the time that

he was in the RDP yard till T[...] left. However, other people, as identified, were assaulting the deceased with Accused 8. It was not Accused 8 alone.

121. It was put to T[...] that his version differs from that of S[...] and P[...] regarding allegations that only Accused 8 assaulted the deceased while he was face down outside the yard for less than 10 minutes, as opposed to his testimony that Accused 8 assaulted the deceased inside the yard prior to him leaving the premises. Ms Monyakane persisted in her cross-examination that it is S[...]’s evidence that she only saw Accused 8 outside of the premises.

122. T[...] insisted that Accused 8 assaulted the deceased when he was still inside the yard, and that he cannot comment on Accused 8 assaulting the deceased outside of the yard as he was not there. It was put to T[...] that P[...] had witnessed what happened inside the yard and mentioned the people who assaulted the deceased. In P[...]’s evidence he never mentioned Accused 8.

OBJECTION BY STATE:

123. Ms Kabini objected to the line of questioning, particularly that Ms Monyakane was putting a version to T[...], alleging that it was P[...]’s evidence when it was not. Ms Monyakane in her rebuttal informed the court that she was referring to P[...]’s evidence at the time when the deceased was led into the RDP area.

124. For the sake of fairness to everybody, the recording of 9 March 2020 was sought. The court, in the interests of justice adjourned to 26 March 2021 to allow the registrar to send the electronic transcription. On 26 March 2021, Ms Monyakane put it to T[...] that P[...] testified that the incident that happened within the RDP yard was only five minutes. T[...] insisted that he was there for less than an hour, not five minutes. Accused 8 was exchanging the pipe with other Accused persons, even if he cannot tell who came first.

125. Ms Monyakane proceeded to question T[...] on his statement to the police,

particularly why there was no mention of Accused 8 exchanging the pipe with Accused 7 to beat the deceased. T[...] testified that the police asked him to be brief in giving his statement. Ms Monyakane put it to T[...] that Accused 8 came to the scene looking for his brother very late, where he found a lot of people and noise. He did not get into the compound as he found his brother on the street, he then took his brother, and left immediately. He was not at the scene for longer than 10 minutes. He never used a pipe to assault the deceased. T[...] denied the version put to him and persisted with his observations and evidence.

CROSS EXAMINATION ON BEHALF OF ACCUSED 10 AND 11:

126. T[...] testified that when he arrived, the deceased was inside Accused 1's property, in the open space in front of the RDP. It was put to T[...] that he had not seen Accused 11 assaulting the deceased. Furthermore, that it is Accused 11's version that she had not entered the yard and T[...] mistook her for someone else. T[...] agreed that he had not seen Accused 11 assaulting the deceased but persisted that he had spoken to her while in the property and identified her by name.

CROSS EXAMINATION ON BEHALF OF ACCUSED 4:

127. Mr Mathunzi sought an indulgence from the court and his colleagues to ask T[...] one question regarding Accused 4. He put it to T[...] whether he could recall what Accused 4 was wearing. T[...] did not know what Accused 4 was wearing. He put it to T[...] that he could not kick as he was wearing sandals that day and was thus unable to kick the deceased. T[...] had no comment.

RE EXAMINATION BY THE STATE:

128. The purpose of the re-examination was to seek clarity from T[...] about the exchange that he had testified to in cross-examination. T[...] testified that the pipe was used by one person, the person would put it down, whereafter the next person would come, pick up the pipe and use it. He identified the people that were

exchanging the pipe as Accused 7, 8 and 9. T[...] also testified that he left Accused 11 in the yard.

ADMISSION IN TERMS OF SECTION 220 OF THE CPA ON BEHALF OF ACCUSED 7:

129. Ms Mogale sought indulgence to make an admission in terms of section 220. The admission is as follows: “when Accused 7 arrived at the scene and the deceased was already outside on the street, Accused 7 admits that she picked up a black pipe and assaulted the deceased therewith on his private parts. Accused 7 is a right-handed person and her right hand was injured as she had suffered from a mild stroke. As a result, she used her left hand to assault the deceased on six occasions and thereafter she stopped.” Accused 7 confirmed the admission. This admission comes after the version of Accused 7 was put to S[...], P[...] and T[...] to the effect that she had not assaulted the deceased at all. The admission was recorded as such and there was no reaction to the admission by any of the other legal representatives or the state.

EVIDENCE OF K[...] DUNCAN S[...]:

130. Ms Kabini called K[...] Duncan S[...], referred to as K[...]. Ms Kabini made an application for the witness to testify through an intermediary in terms of section 170(A) of the Criminal Procedure Act, as K[...] is a 15-year-old minor. None of the parties opposed the application, consequently it was granted. The intermediary is Christina Magolego, who took the necessary oath. K[...] was admonished to tell the truth in terms of section 165 of the Criminal Procedure Act. Ms Magolego’s qualifications were taken down as BCD diploma from Unisa and an Education qualification from University of Pretoria, where she worked as an intermediary from 2008 till the proceedings on 2 November 2021.

131. K[...] testified that he is related to the previous witnesses. S[...] is his mother, P[...] and T[...] are his grand uncles. K[...] testified that he did not attend school that

day, as it was Heritage Day. He was at home helping his mother with laundry. While helping his mother with the laundry he heard Nomthandazo screaming that the deceased wants to rape another child. He rushed outside with S[...] after they heard the scream. When he came outside of the house he saw Nomthandazo at the corner of the house outside of the yard of the parental home. S[...] inquired what was happening from Nomthandazo while they were standing by the gate.

132. Afterwards S[...] called his grand uncle P[...], who said he will arrive soon as he is nearby. Accused 1 and his wife, Happy, came back from collecting firewood and Nomthandazo informed them that the deceased was raping a child in the house. After she told them Accused 1 and Happy went into the shack. K[...] identified Accused 3 as the son of Accused 1. Before Accused 3 ran into the shack, he ran to the RDP house first and he came out carrying a Knobkierie. A Knobkierie was described as a wooden stick that has a head on it.

133. Afterwards Accused 3 ran into the yellow shack, Sarah Mashiane ran to call the parents of the child who was allegedly raped. Accused 2 came and ran into the yellow shack. K[...] ran to the corner of the street to see what was happening in the shack. He saw a struggle inside the shack. When P[...] arrived, the Accused persons were taking the deceased out of the yellow shack into the yard. The deceased was carried by Accused 1 and 3 with his hands tied at the back together with his feet. The deceased was only wearing underpants and a T-shirt.

134. While speaking to P[...], they put him down at the gate that divides the RDP stand and the stand where the yellow shack was erected. Sipho, Accused 8 arrived and proceeded to hit the deceased, after kicking him. The deceased was screaming and making a noise asking for help. Accused 8 dragged him out of the yard using the gate on the side of the RDP house. Then Accused 4 and 5 arrived. K[...] identified K[...]’s mother as A[...].

135. When Accused 4 and 5 arrived, Accused 5 picked up stones and struck the deceased all over the body whilst Accused 4 kicked the deceased on the head

several times. T[...] arrived while Accused 4 was kicking the deceased. T[...] spoke to the Accused 4 and 5, asking that they stop assaulting the deceased, and should take K[...] to the hospital to be checked.

136. K[...] could not see P[...] when his uncle T[...] was at the premises. While T[...] was speaking to Accused 5 standing on the side, Ntombifuthi, Accused 10, arrived, in the company of her sister, Accused 11. Upon their arrival, Accused 10 and 11 also took part in the assault using a black pipe. While they were assaulting the deceased, Nxumalo, Accused 9 arrived. The deceased was assaulted using two pipes, one was black, and the other was black and green. K[...] described the pipes as the ones used to water the garden.

137. When Accused 9 arrived, he inquired what had happened and was informed that the deceased had raped the K[...]. Thereafter, he took part in assaulting the deceased with the pipes which were already there. He assaulted the deceased all over his body. However, K[...] could not recall how many times or for how long. When he was done assaulting the deceased Accused 9 left.

138. K[...] testified that Accused 7 also assaulted the deceased using a pipe on his private parts. The deceased tried to use his legs to shield his privates from being assaulted. Then Accused 6 arrived. He joined in the assault and when he was done, he left. K[...] did not notice how many times he assaulted the deceased; however he testified that after Accused 6 struck the deceased three times on the head with a stick, the deceased was no longer moving. P[...] was the first one to leave, then S[...] followed with K[...]. K[...] followed his mother back to the scene. K[...] was unable to testify as to whether the Knobkierie was used.

139. K[...] was shown Exhibit B, photos 23, 24, 27 and 28. It was placed on the record that photos 27 and 28 are a close up of photos 23 and 24. K[...] was asked to identify the stick reflected in the four photos. K[...] indicated that the stick in the photos is not the stick that Accused 3 was carrying. K[...] could not specify all the people who remained behind. K[...] was allowed access to view the courtroom via

the video system available. He identified Mfundo as Accused 3, Mr Mlambo as Accused 1, Mr Matshiya as Accused 2, the victim's parents as Accused 4 and 5, Siphon as Accused 8, Mr Nxumalo as Accused 9, Ntombifuthi as Accused 10, Ntombifuthi's sister as Accused 11.

140. Mr Matshego had no cross-examination questions for Accused 1.

141. Ms Mogale had no cross-examination questions for Accused 2 and 7.

CROSS EXAMINATION ON BEHALF OF ACCUSED 3:

142. Mr Motsweni sought from K[...] as to what he meant when he said Nomthandazo was in a corner. K[...] testified that he saw Nomthandazo crying by the corner of the property and he saw Accused 3 coming out of the RDP house with a knobkierie.

143. K[...] testified that as Accused 3 ran to the shack. K[...] moved to another corner but did not see Accused 3 using the knobkierie. Further clarity was sought from K[...] on how Accused 1 and 3 were carrying the deceased. He testified that one held the deceased by his hands and the other grabbed him by his feet. It was put to K[...] that it is S[...]’s evidence that as Accused 1 was dragging the deceased out of the yellow shack, Accused 2 and 3 followed. The purpose of the evidence was to highlight the differences in the testimony.

144. It was put to K[...] that he never saw Accused 3 assault the deceased with a stick. K[...] conceded that he never saw Accused 3 use a stick but that Accused 3 did assault the deceased with a pipe. It was further put to K[...] that Accused 3 went away to the shop when Accused 5, T[...] and K[...] went to the hospital. It was further put to K[...] that Accused 3 did not remain in the yard and when he came back he found the police. He was informed that the deceased had been killed. K[...] could not comment.

CROSS EXAMINATION ON BEHALF OF ACCUSED 4:

145. It was put to K[...] that Accused 4 did not arrive at the scene at same time as Accused 5. K[...] testified that he witnessed Accused 4, wearing a blue jean, a dark blue shirt and greyish shoes and kicking the deceased for 6 to 7 minutes. It was put to K[...] that Accused 4 would deny that he kicked the deceased as he was wearing a cap and sandals. It was put to K[...] that Accused 4 will come testify that K[...] mistook him for someone else and he did not kick the deceased. K[...] maintained that he saw Accused 4 and how he took part in the assault.

CROSS EXAMINATION ON BEHALF OF ACCUSED 5:

146. It was put to K[...] that S[...] had testified that she had left the gate to go inside the house to fetch her phone and that he is putting a different version before the court. K[...] testified that S[...] exited the premises through the gate to stand on the street, just outside the gate. It was further put to K[...] that the distance between the corner where he was standing and Accused 1's property is approximately 20m. K[...] testified that he could see everything but could not hear everything that was said. K[...] testified that by the time Accused 5 arrived, the deceased was outside the gate lying on the ground. Accused 5 picked up the stones along the fence where the deceased was lying. At the time P[...] and S[...] were at the gate calling the police and T[...] was talking to Accused 5 about taking the child to the doctor.

147. It was put to K[...] that T[...] testified that he saw Accused 5 using open hands, fists, and a pipe to assault the deceased. He never made mention of stones. It was put to K[...] that Accused 5 will come and testify that when she arrived, the deceased was still inside the RDP yard. K[...] denied this and maintained that he saw Accused 5 assaulting the deceased with stones.

CROSS EXAMINATION ON BEHALF OF ACCUSED 9:

148. It was put to K[...] that Accused 9 arrived at the scene but he never

assaulted the deceased. K[...] testified that Accused 9 came on his bicycle, made K[...] hold the bicycle and went over to inquire what was happening. Accused 9 was told that the deceased had raped someone and the Accused 9 took part in assaulting the deceased. When Accused 9 was done, he came back, took his bicycle and left. It was put to K[...] that Accused 9 has never seen K[...]. K[...] maintained that Accused 9 made him hold his bicycle.

CROSS EXAMINATION ON BEHALF OF ACCUSED 6:

149. Ms Mazibuko inquired from K[...] on the position the deceased was lying, whether he was bleeding and where he was bleeding from. K[...] testified that the deceased bled from the back of the head and feet. K[...] conceded that when he gave his initial statement taken by Mr Mngoma, he omitted Accused 6 and his use of the pipe as he had forgotten this information, however he included Accused 6 in the second statement, recorded in March of 2019.

150. K[...] further testified that he gave his statement in Isizulu despite the statement being recorded in English. He testified that there were no difficulties in understanding each other and S[...] was present when the statements were taken. He further testified he does not recall the statement being read back to him.

OBJECTION BY THE STATE:

151. Ms Kabini objected to the second statement being handed up on the basis that it makes no material difference to the proceedings. Mr Matshego submitted that in order for the defence or state to use the statement against a witness, the basis should first be laid. The statement was presented to K[...], he recalled that the statement was read back to him and S[...] before it was signed and commissioned. Ms Mazibuko submitted that the basis to follow through on the cross examination was laid however the statement should not be handed in as an Exhibit.

152. Ms Mazibuko referred K[...] to paragraph 13 and 14 of the statement, K[...]

conceded that he made the statement a month after the incident. He testified that he used to see Accused 6 going to the shops in a van. It was put to K[...] that Accused 6 does not own or possess a black bakkie, nor does he know how to drive. K[...] maintained that the person he saw was Accused 6, K[...]’s uncle. K[...] testified that sometimes it was a black bakkie, other times a dark grey bakkie. He conceded that he might have been mistaken about the vehicle driven, however Accused 6 was in the bakkie.

153. It was put it to K[...] that only his family members could have told the police that he might have some information regarding the deceased. K[...] testified that he does not know who informed the police that he had knowledge of how the deceased died.

154. Ms Mazibuko submitted that the statement despite not being handed in, forms part of the evidence as it was placed on the record. The court should consider the sections placed on the record and not the whole statement.

155. Ms Kabini submitted that the statement has not been handed in and the court cannot consider it, as it does not form part of the record.

156. K[...] testified that he does not know what happened to the stick used to assault the deceased. However, a similar looking stick was recovered on the Accused 1’s premises by children playing in the yard. The children brought the stick to his grandmother and told her it was used to assault the deceased.

157. The police officer that took his statement, detective Mngoma, was called to come and collect the stick. It was put to K[...] that when the assault happened, the deceased was not visible to him because of where he was standing. It was particularly put to him, that it is not possible for him to see that the deceased was tied up using shoelaces from where he was standing.

158. K[...] testified that he is not able to estimate the distance properly. However,

he was not standing very far. He maintained that from where was positioned, he could see that the deceased was tied up with ropes even though he could not tell what type of ropes were used to tie up the deceased, so he speculated it was with shoelaces.

159. It was put to him that he could not see what was happening with the deceased whilst at the street because at the time the community members had arrived and would have obstructed his view. K[...] testified that he could see that the deceased was tied up with some type of ropes.

160. It was put to him that he was not able to see and is testifying on what he has heard from his family members, the community members, and friends. Furthermore, it was put to K[...] that S[...] testified that she was with him and did not make mention of Accused 6's participation. K[...] testified that from where he was positioned, he could see what was happening.

161. K[...] further testified that he was not with S[...] all the time. While the deceased was being severely assaulted, S[...] was moving around calling the police. K[...] also testified that S[...] was no longer there when Accused 6 assaulted the deceased, as she had gone to meet up with the police. It was put to K[...] that he keeps on improvising and supplementing the evidence because he could not see everything. K[...] insisted that he was standing at a position where he could observe what was happening.

162. It was put to K[...] that he could not identify where the deceased was bleeding from, as he could not see what was happening. In response, K[...] testified that from where he was standing, he saw the blood at the back of the deceased's head, not his face.

163. Despite it being numerously put to K[...] that Accused 6 was not there on the day and did not assault the deceased. K[...] persisted that Accused 6 arrived last on the scene and was the last person to assault the deceased with a stick. It was put to

K[...], that Accused 6 learned late in that afternoon that the deceased was found inside the shack with two young girls, assaulted by community members and had passed on. K[...] denied the version put to him.

CROSS EXAMINATION ON BEHALF OF ACCUSED NUMBER 8:

164. It was put to K[...] that it is his evidence that S[...] did not rush to the scene where this girl was being raped. K[...] conceded that he and S[...] were told before anybody else about the incident taking place in the yellow shack. He further testified that the deceased could beat up someone as he used to do karate or take karate lessons and the deceased did not want anyone close to him. K[...] conceded that they were afraid of going into the shack.

165. It was put to K[...] that Accused 8 was never in the shack. K[...] testified that he did not see Accused 8 until he was assaulting the deceased. K[...] testified that Accused 8 kicked, dragged, and beat the deceased. It was put to K[...] that in his evidence he never said that Accused 8 had dragged and then assaulted the deceased. K[...] testified that he could not recall if he had mentioned this aspect in his testimony earlier or not.

166. It was put to K[...] that S[...] testified that Accused 8 dragged the deceased outside, however in cross-examination he conceded that she did not see Accused 8 dragging the deceased. K[...] maintained that he is testifying about things that he witnessed and cannot say what S[...] saw. K[...] testified that he did not see the dog that attacked his uncle. It was put to K[...] that Accused 8 was there to collect a child and did not partake in the assault. Moreover, Accused 8 will come to court to deny that he ever kicked and dragged the deceased. K[...] denied the version.

CROSS EXAMINATION ON BEHALF OF ACCUSED 10 AND 11:

167. It was put to K[...] that Accused 10's version is that she arrived alone entered Accused 1's yard and saw T[...] with other people in the middle of the yard. She tried

to establish what was happening from T[...] and did not get an answer. She would further testify that the deceased was inside the RDP house and she did not see him. K[...] testified that he saw Accused 10 and 11 together.

168. It was put to K[...] that he has identified Accused 10 as Ntombifuthi. However, according to the indictment, Accused 10 is Paulina Nurse Sibiya. K[...] testified that this is the name he knows her by and how refers to her. It was put to K[...] that it is Accused 11's version is that she arrived alone, stood outside in the street and did not assault the deceased. K[...] testified that he saw Accused 10 and 11 together and saw Accused 11 assault the deceased.

RE EXAMINATION BY THE STATE:

169. Ms Kabini commenced with re-examination. K[...] testified that Accused 10 and 11 left when T[...] was accompanying Accused 5 and K[...] to the hospital. This is the end of the state's evidence, and the state closed its case.

SECTION 174 APPLICATION FOR DISCHARGE:

APPLICATION ON BEHALF OF ACCUSED 5:

170. Mr Rakobela submitted the *locus classicus* in such applications is *S v Thebus 2003 ZACCC 12*, and the test to be applied is whether the Accused has anything to answer. If there is nothing for the Accused to answer to then there is no need for an accused to take the witness stand to testify. The second leg of the test is that the state cannot rely on the Accused to come testify and incriminate himself.

171. He submitted that Accused 5 was already at the hospital with T[...] when the deceased passed away. The witnesses have all testified that Accused 5 assaulted in different ways. He submitted that it casts doubt in the mind of the defence as the witnesses saw how the assault unfolded and what transpired. The question then is why they saw different situations unfolding. In *Thebus*, the court held that the basis of the evidence before it i.e. the principle of common purpose is applicable to the

facts. He further submitted that the court held that common purpose is applicable as there is no medical evidence to show when the deceased died and what is crucial, who participated in the assault?

172. He submitted that that there was no evidence suggesting that at all material times Accused 5 participated in different ways and on various occasions. In fact, the only evidence before the court indicates that Accused 5 participated on a single occasion and left with T[...] and K[...] afterwards.

173. Mr Rakobela submitted that Accused 5's participation is not adequately placed before the court. The state witnesses do not corroborate one another, the post-mortem report indicates that that the fatal blow was to the head and the witnesses did not testify that Accused 5 assaulted the deceased on the head.

MS KABINI FOR THE STATE:

174. Ms Kabini submitted that the court can only return a not guilty verdict if at the close of the state's case, there is no reasonable prospect of conviction. However, evidence indicates that Accused 5 participated in the assault, and that is the crux of the matter. There is a case for Accused 5 to answer. Contradictions can be dealt with in as far as they exist but the question remains whether such contradictions are so dire to the extent that a court can reject them.

APPLICATION ON BEHALF OF ACCUSED 6:

175. Ms Mazibuko submitted that the court ought to consider the credibility, reliability, trustworthiness, and corroboration of the evidence as Accused 6 is largely implicated by K[...], the child witness. The court must consider whether the evidence of the child witness can be relied on. Can it be trusted? Is it corroborated? Is it credible? She further submitted that there is no evidence that shows that the community members bore a caucus on how they were going to assault or deal with the deceased under the circumstances. There is also no evidence that Accused 6

asked around from the community members what had happened.

176. There is no evidence that somebody was busy beating or hitting the deceased. Accused 6 had no case to answer.

MS KABINI ON BEHALF OF THE STATE:

177. Ms Kabini's opposition was that there is a prima facie case for the Accused to answer. S[...] testified that when she left to go call the police, Accused 6 was holding a big stick whereas the evidence given by K[...] is that the deceased was assaulted with a big stick. She further submitted that it is only the child who witnessed and testified about Accused 6.

APPLICATION ON BEHALF OF ACCUSED 8:

178. Ms Monyakane submitted that the state has failed to establish a prima facie case. The evidence before the court is not enough to substantiate the two charges of kidnapping and murder. The evidence was mutually destructive, there were no similar incidences. There is no case that Accused 8 has to answer.

179. She further submitted that there was no design in the commission of the alleged crime. The people must agree to commit and show that through actions by association. There was no '*actus reus*' there, particularly the intention to kill. The principle of common purpose is not applicable to this case. The state is attempting to supplement its evidence with the accused's testimony.

MS KABINI ON BEHALF OF THE STATE:

180. Ms Kabini submitted that the application should fail as there is a prima facie case against Accused 8, and evidence that a court may convict Accused 8.

RULING ON SECTION 174 APPLICATION FOR DISCHARGE:

181. The 3 (three) applications were based on the submissions that there is insufficient evidence against the 3 Accused and they were entitled to a discharge. In respect of Accused 5, Mr Rakobela submitted that at the time that the deceased passed away, Accused 5 was at the hospital with T[...]. Mr Rakobela highlighted the discrepancies in the evidence of the state witnesses.

182. In respect of Accused 6, Ms Mazibuko also relied on the discrepancies of K[...]'s evidence and submitted that no other state witness implicated Accused 6 in the participation of the assault. However, S[...] did testify about Accused 6 participating in the assault.

183. In respect of Accused 8, Ms Monyakane submitted that there are many discrepancies in the evidence of the state witnesses.

184. Section 174 provides that at the close of the state case for the prosecution, if the court considers that there is no evidence that the Accused committed the offense charged with, the court may return a verdict of not guilty. The concept of no evidence was interpreted in the case of *Shein* 1925 AD 6, as no evidence on which a reasonable man could probably convict. The evidence referred to includes the evidence led by the state. I have had regard to *S vs Lubaxa* 2001 (2) SACR 702 (SCA) and the principles highlighted therein insofar as fairness is concerned against, or in favour of the 3 accused. In my view there is a *prima facie* case against Accused 5, 6 and 8. The applications in terms of section 174 on their behalf are accordingly refused.

EVIDENCE OF ACCUSED NUMBER 1:

185. Jacob Bhuti Mlambo, Accused 1, was sworn in, Accused 1 testified that on 24 September 2018, a public holiday, he and his family woke up and went to fetch firewood. At the time, Nothando Mlambo remained at the house as she had just had a baby. Accused 1 was accompanied by Happy Mashiane, Mufondo Mlambo,

Nomthandazo Mashiane, Siyabonga Mashiane, Mduduzi Mlambo and Hlungiwe. During the firewood collection, two of the children Mufondo and Nomthandazo asked to leave early as Nomthandazo was hungry and Mufondo had soccer to play.

186. After about an hour passed since the children left, on the way home, as the donkey cart was approaching a shop where they normally bought groceries, they saw Nomthandazo running towards them. Nomthandazo explained that the deceased was at their house, raping them. The deceased had stopped K[...] on the road. K[...] ran towards the house and the deceased ran after K[...]. Then Nomthandazo also ran into the house.

187. Accused 1 identified the house as a yellow shack with 3 rooms belonging to his younger wife Happy Mashiane. Nomthandazo arrived at the yellow shack first. K[...] entered the shack and locked the main door, ran to a bedroom with Nomthandazo. They closed the door and shortly after they heard the main door falling. Then the deceased simply entered the bedroom. They climbed on top of the bed and deceased climbed on top of the bed, got undressed and grabbed K[...]. Nomthandazo fled, screaming outside he is raping us. Then Sarah Mashiane, a front-opposite neighbour, came to see what is happening.

188. The evidence led by Accused 1 with regard to Nomthandazo, K[...] and Ms Mashiane was provisionally allowed on condition that Accused 1 will be calling them to testify. Then Nomthandazo ran to S[...], who she saw outside. Accused 1 further testified that Nomthandazo informed S[...] that the deceased had locked K[...] in the bedroom and is raping her. Accused 1 and Happy Mashiane upon arriving, went to the house where they found Accused 2 and 3 on the scene. Accused 1 testified that Accused 2 was bleeding on the side of his face. Accused 2 informed him that they grabbed the deceased to remove him off K[...] as he was already on top of her and placed him on the floor.

189. Accused 1 also testified that when he entered the yellow shack, the deceased was already tied up and K[...] was crying, half naked wearing a blouse on

the upper part of the body. The deceased was in a good state with blood stains on the front of both of the thighs, with his underpants at knee level. The blood stains looked similar to the blood stains coming out of K[...] from her thighs to her knees. Accused 1 agreed with Accused 2 that the deceased should be arrested. Accused 1 further testified that the deceased was carried out of the shack by himself, Accused 2 and 3. Accused 2 was carrying the upper body and Accused 3 was carrying the back while he was trying to chase away the people gathered.

190. Accused 1 testified that immediately after they took the deceased out of the house, P[...] arrived and kicked the deceased in the face. He pushed P[...] away from the deceased and the same people that carried the deceased from the shack, eventually carried him into the RDP house. Accused 1 testified that the reason the deceased was tied up was because he entered his home and attacked children while they were alone and raped. Furthermore, from watching the deceased grow up, he knew how dangerous it was to try and apprehend him. Immediately after putting the deceased in the house, Accused 2 and 3 went outside and Happy Mashiane took K[...] to a neighbour's house.

191. T[...] arrived and spoke directly to the deceased about what has happened. Accused 1 testified that K[...]’s parents, Accused 4 and 5, came inside the house. Accused 1 testified that it was unsafe to release the deceased or let him go outside. Despite calling the police several times they only arrived after 17h00. Accused 1 testified that the deceased was taken out of the house by two males, unknown to him who were not present in the court. He advised T[...] to take the deceased to the police with his car as he was scared of the mob. Then the mob started throwing stones at the deceased and Accused 1 chased everyone out of the yard.

192. It was put to Accused 1 that S[...] testified that she saw Accused 1, 2 and 3 going to the yellow shack. Accused 1 testified that it is a blatant lie. It was further put to him, that S[...] testified that she saw Accused 1, 2 and 3 carrying the deceased out of the shack. Accused 1 conceded that S[...] is correct in that Accused 2 was holding him in the front while Accused 3 was holding the deceased by the ankles on each

side and he walked behind. It was put to him that S[...] also testified that she witnessed the deceased being kicked with booted feet. Accused 1 denied touching the deceased at all and testified that he would have never touched him.

193. It was put to Accused 1 that P[...] testified that he saw Accused 1 dragging the deceased whilst the deceased had a blue eye and was bleeding from the ear. Furthermore, that while Accused 1 was dragging the deceased, Accused 2 and 3 were kicking the deceased like a ball. Accused 1 testified that P[...] was lying and that it was in fact, P[...] caused the deceased to bleed as he was the first one to assault the deceased by kicking him.

194. When asked if he had a dog, Accused 1 testified that in the year of 2018 he did not own any dogs. However, he had puppies or small dogs, which were kept at the farm. He also testified that during 2017 he had a vicious dog which has since died. He further testified that P[...] was lying about being bitten by the dogs. He testified that P[...] has some anger issues with him and is he is trying to fabricate evidence because the deceased was his brother.

195. Accused 1 testified that prior to the incident he had no relationship with P[...] as P[...]’s attempts to become his son-in-law were unsuccessful. He had a relationship with P[...]’s father. Accused 1 testified that he would not stop P[...] from intervening, the only instance where he intervened was to speak to P[...] as he was assaulting his own brother. Accused 1 testified that danger was everywhere as the people were uncontrollable. That is when T[...] suggested that if the deceased leaves the premises, he leaves unbound. Alternatively, that the deceased does not leave or be taken out of Accused 1’s yard.

196. Accused 1 testified that he is a member of the traditional council, the chairperson of the SGB, member of the community clinic committee and a member of the agricultural community. Accused 1 further testified that his role in the community is to give protection to the children, the deceased, and to protect the community members from committing or continuing with deeds that they were doing.

CROSS EXAMINATION ON BEHALF OF ACCUSED 2:

197. Accused 1 testified that he is related to Accused 2 and that the conduct of Accused 2 was not that of assault towards the deceased. It was put to him that in his testimony, he said he did not ask why the deceased was tied up because he knew the type of person that the deceased was. Another reason is that the deceased had entered the house to attack the children when there was no-one at home. Accused 1 was asked whether in restraining the deceased Accused 2 acted lawfully. Accused 1 testified that Accused 2 was the first person to arrive on the scene and upon hearing what had happened at his arrest, he felt that it was necessary for Accused 2 to have acted the way that he did. It was put to Accused 1 that in his evidence in chief he testified that Accused 2 had an injury on his face.

198. Furthermore, in his inquiry he discovered that it was the deceased who kicked and beat Accused 2 while he was subduing him. Accused 1 also testified that when the deceased was being carried out of the yellow shack by Accused 2 and 3, P[...] disturbed them and they placed the deceased on the ground. He further testified that after they placed the deceased on the ground, he did not see Accused 2 doing anything to the deceased.

CROSS EXAMINATION ON BEHALF OF ACCUSED NUMBER 7:

199. Ms Mogale had no cross examination on behalf of Accused 7.

CROSS EXAMINATION ON BEHALF OF ACCUSED NUMBER 3:

200. Accused 1 confirmed that while he was in the yellow shack, he did not see Accused 2 and 3 assault the deceased. Accused 1 further testified that it is not possible to observe what is happening inside the room from the outside. Accused 1 also testified that after the deceased was taken into the RDP house, Accused 2 and 3 immediately left, although he has no idea where they went.

CROSS EXAMINATION ON BEHALF OF ACCUSED 5 AND 9:

201. Accused 1 testified that he didn't see Accused 5 assaulting the deceased in any manner at any stage. He also testified that he did not see Accused 5 carrying anything upon arrival. It was put to him that Accused 5 left the premises with the deceased's brother T[...]. Accused 1 agreed.

CROSS EXAMINATION ON BEHALF OF ACCUSED NUMBER 6:

202. Ms Mazibuko had no cross examination on behalf of Accused 6.

CROSS EXAMINATION ON BEHALF OF ACCUSED NUMBER 10 AND 11:

203. Mr Mahlangu had no cross examination on behalf of Accused 10 and 11.

CROSS EXAMINATION OF ACCUSED NUMBER 1 BY STATE:

204. It was put to Accused 1 that both S[...] and K[...] are telling the truth on the aspects that have been highlighted to Accused 1, which he has already confirmed. Accused 1 conceded they were telling the truth except for one part where the witnesses said he entered the yellow shack together with Accused 2 and 3. Despite it being numerously put to Accused 1 that at some point the witnesses were telling the truth that Accused 1, 2 and 3 ran into the yellow shack at some stage, Accused 1 insisted that is not true. It was further put to Accused 1 that the state witnesses at some stage saw all three of the Accused come out with the deceased bound both hands and feet. Accused 1 agreed.

205. It was further put to Accused 1 that S[...] and P[...] testified that he was the one dragging the deceased out of the yellow shack and according to K[...] that it was that him and Accused 3 who carried the deceased out of the yellow shack. Accused 1 testified that that was a blatant lie, that Accused 2 and 3 were carrying the

deceased out of the shack. He further agreed that upon his arrival at the shack Nomthandaso was no longer in danger and the deceased was no longer a threat. It was put to the Accused that in light of his status and position in the community, is there any act that, which he thinks was unlawful, in which he can make a civil arrest. The Accused testified that he was making a civil arrest.

206. Ms Kabini put it to the Accused 1 that his counsel had put it to S[...] in cross examination that he is going to come and testify that when he got into the yellow shack, Accused 2 and 3 were fighting with the deceased to subdue him. She further put to him that the version is not correct. The Accused agreed that he did not find the situation like that, that upon his arrival at the scene, there were people there and others standing outside the premises, while others standing by the fence and from his observation it looked like it was 10 people. Accused 1 testified that the 10 people includes himself, Happy Mashiane, Accused 2, 3, Nothando and other people unknown to him. It was put to him that the witnesses mentioned only six people. He testified that the other 4 were observing from the outside of the fence and Sarah Mashiane is one of the people that were observing from outside of the fence.

207. It was put to Accused 1 that according to his evidence the deceased was not injured when he got in the yellow shack, so the evidence of S[...], P[...] and K[...] was misleading the court when saying he was injured and bleeding from his face when he was taken out of the yellow shack. Accused 1 agreed. It was further put to Accused 1 that upon his arrival at the vicinity of the yellow shack, there was no one in the property except for those people he had mentioned as being inside the property. Accused 1 testified that although there were not a lot of people in the RDP yard when he entered the yellow shack, when they were taking the deceased out of the yellow shack, a lot of people were entering through the RDP gate. He further testified that he only saw Accused 4 and 5, together with T[...] in the RDP house. The deceased was bleeding from the injuries caused by P[...]. He testified that Accused 4 and 5 arrived when K[...] was no longer in the RDP house.

208. Accused 1 further testified that he did not see Accused 6, 7, 8, 10 and 11 at

the scene.

209. It was put to Accused 1 that the state witnesses insist that the deceased was never put in the RDP house. Accused 1 testified that they are lying. It was further put to Accused 1 that according to his evidence, 2 (two) unknown people that took the deceased outside of the yard. Accused 1 testified that at the time the deceased was taken out of the yard he had turned his back towards the scene and cannot tell who lifted and carried him out to take him to the street. Accused 1 testified that a lot of people had already gathered by the road.

210. Accused 1 testified that the deceased was never assaulted in the yard of the yellow shack. Accused 1 conceded that the police came with P[...] as he is the one that directed them to his house. Accused 1 further testified that he was not given the opportunity to inform the police about the two unknown people that carried the deceased out of the RDP house. Accused 1 further testified that after the deceased was taken out of the yard, there was a lot of noise coming from there. There was kicking, dragging which lasted for 10 to 15 minutes.

211. Ms Kabini presented Accused 1 with Exhibit A. Accused 1 confirmed photo 2 depicts the RDP house and photo 19 depicts the yellow shack. It was put to Accused 1 that the photos shown to him do not depict any stones. He was asked why he did not direct the policeman to come and take pictures of the stones that he refers to in his testimony as they are not depicted in the pictures. Accused 1 testified that the police did not ask for his assistance and did not want anybody around. They just chased everyone off when the photos were being taken. It was put to Accused 1 that from the evidence of the state witnesses there were no stones that were thrown at the RDP house. There was no danger that was posed to Accused 1.

212. It was put to Accused 1 that he is building up his evidence as he goes. Accused 1 denied it. It was put to Accused 1 that T[...] tried to speak to him, Accused 4 and 5. Accused 1 agreed. It was put to Accused 1 that when each of the co-Accused took turns in assaulting the deceased, he never intervened as he approved

of their actions and associated himself with their actions. It was further put to Accused 1 that according to his own version when the deceased was being assaulted by the crowd outside he did not intervene. Accused 1 denied associating himself, however he agreed that he did not intervene while the deceased was being assaulted.

213. Ms Kabini referred Accused 1 Exhibit B - photos 2, 5, 6, 13, 15 and 16. It was put to Accused 1 that the photos correlate with the witnesses' that when the deceased was taken out, he was bleeding from the head. The Accused denied it and testified that he got the injuries outside in the street. Accused 1 was further referred to photo 15 and 16. It was put to him that the deceased's injuries correlate with the use of a pipe. Accused 1 was asked if he could confirm that there was a pipe and he confirmed seeing a pipe.

214. It was further put to Accused 1 that photos 13 and 14 correlate with the kicking testified to. Accused 1 agreed. It was put to Accused 1 that P[...] testified that during the incident he was using crutches as he had an injury on his right leg. Accused 1 testified that on the day P[...] was walking, he was not using crutches. It was put to Accused 1 that his testimony is new evidence as the evidence before the court is that he was on crutches that day and it was not disputed. Accused 1 maintained that this is his evidence.

215. It was put to Accused 1 that according to the evidence of four witnesses, he was part of the whole thing from the beginning till the end and participated on that day. It was put to Accused 1 that P[...] did not fabricate the evidence before the court. Accused 1 continued to deny the versions that were put to him stating that it was his homestead, he could not go out and run away, he had to be there.

RE-EXAMINATION OF ACCUSED 1:

216. Mr Matshego put it to Accused 1 that when the deceased was taken outside of the yard, he failed to intervene. Accused 1 testified that he could not have gone

there. Accused 1 testified that they were threatening him from intervening, but out of respect for him, they told him to move out way as the deceased was not his child. Mr Matshego applied to have Accused 1's case stood down to allow additional witnesses to testify.

EVIDENCE FOR ACCUSED 2:

217. Mabusa Meshack Matshiya, Accused 2 testified that he resides at section A – Sekulule, two houses away from Accused 1's house. Accused 2 testified that while playing a game of Ludo, he heard shouting coming from Sarah Mashiane, saying that the deceased had chased children and these children had gone inside the shack belonging to Accused 1. Accused 2 jumped over the fence, until he arrived at Accused 1's yard.

218. Accused 2 testified that after he opened the main door he turned towards the room, located on the left-hand side. When he opened the closed door, he saw the deceased and K[...] on top of the bed. K[...] was laying on her back trying to fight off the deceased with her hands, and the deceased was kneeling in between K[...]. K[...] was wearing a dress which had been pulled up to her chest, with her panties removed and the deceased's underwear was pulled down to his knees. Accused 2 pushed the deceased and simultaneously pulled K[...]. He pushed the deceased towards the wall of the shack, the deceased came back and struck Accused 2 with a fist on his right eye. Accused 2 fell down and grabbed the deceased from behind at waist level whereafter the deceased hit him with the right elbow. Accused 2 bled from the side of his mouth and let go of the deceased. Accused 2 pushed the deceased back to the wall of the shack and attacked him at the corner so that he could not regain strength to beat him up.

219. Accused 2 testified that he called out for Accused 3 to help. Accused 3 came and brought the rope to bind the deceased. As Accused 3 was holding the deceased, Accused 2 pulled up his underwear then they bound the deceased. Accused 2 testified that Accused 1, whilst phoning the police, informed them that

they cannot leave the deceased in the yellow shack as the door is broken. Accused 2 testified that they bound the deceased so that when the police arrived, they would find the deceased nearby. Accused 2 also testified that they moved the deceased into the RDP house because the door of the yellow shack was broken. It was better for them to move him out from a place that is not safe and to take him to the RDP house.

220. Accused 2 testified that he was carrying the deceased with Accused 3 while Accused 1 was reprimanding the community members outside. As they approached the small gate which separates the property for the yellow shack and the RDP house, P[...] emerged and kicked the deceased on the face following which he observed blood on the deceased's mouth. Then they put the deceased on the ground.

221. It was put to Accused 2 that P[...] testified that when the deceased was being taken out of the yellow shack, he was injured and was bleeding from the ear. It was further put to Accused 2 that P[...] said he saw Accused 2 and 3 kicking the deceased like a ball. Accused 2 testified that P[...] is lying. After P[...] kicked the deceased, the deceased fought to get himself loose, they lost grip and placed him on the ground. Accused 2 testified further that P[...] told them to leave the deceased alone and let the law take its course.

222. It was put to Accused 2 that P[...] testified that he was limping and using crutches. Accused 2 was asked whether on that day he saw crutches and he testified that he did not. He also testified that P[...] was standing at the small gate, separating the yellow shack and the RDP house. As Accused 2 exited through the gate, P[...] balanced himself, with an iron rod by the gate, to kick the deceased.

CROSS-EXAMINATION FOR ACCUSED 1:

223. Mr Matshego had no cross- examination questions.

CROSS-EXAMINATION FOR ACCUSED 3:

224. When asked if Accused 2 had noticed if the deceased had hit anything. Accused 2 testified that inside the room there was a bed, wardrobe, boxes and clothes. Accused 2 testified that when he left the RDP house, he did not see where Accused 3 went.

CROSS-EXAMINATION FOR ACCUSED 4:

225. Mr Mathunzi, on behalf of Accused 4, had no cross-examination questions for Accused 4.

CROSS-EXAMINATION FOR ACCUSED 5 AND 9:

226. Mr Rakobela on behalf of Accused 5 and 9, had no cross-examination questions.

CROSS-EXAMINATION FOR ACCUSED 8:

227. Ms Monyakane on behalf of Accused 8, had no cross-examination questions on behalf of Accused 8.

CROSS-EXAMINATION FOR ACCUSED 10 AND 11:

228. Mr Mahlangu on behalf of Accused 10 and 11, had no cross examination questions for Accused 2 on behalf of Accused 10 and 11.

CROSS-EXAMINATION FOR THE STATE:

229. Accused 2 was asked how he had called Accused 3? Accused 2 testified that he called Accused 3 by telling him to come quickly as the deceased is defeating him and he is running out of power. It was put to Accused 2 that in his evidence he said the deceased attacked him and he fell, then stood up and he attacked the

deceased. Accused 2 agreed that this meant that there was a fight between him and the deceased. It was put to Accused 2 that this explains the deceased's injuries. Accused 2 conceded.

230. It was put to Accused 2 that he is trying to build his evidence as he goes.

231. It was put to Accused 2 that he is adding to his evidence and that he did not talk about the dog, and he is trying to shape his evidence. He testified that he heard the word uttered by the crowd from inside the shack while Accused 1 was on the phone calling the police. It was put to the Accused that after the deceased was subdued by Accused 2 and Accused 3, there was no danger anymore. Accused 2 conceded this. It was put to the Accused that from the evidence which unfolded in the courtroom, it became clearer that there was no rape at all of K[...]. Accused 2 testified that the information is unknown to him.

232. It was put to Accused 2 that it is P[...]'s version that the deceased was bound when he was taken out of the shack. Accused 2 agreed. It was put to Accused 2 that it is T[...]'s evidence that when he left the scene to take K[...] to the clinic, Accused 1, 2, 3, and 4 remained at the scene. Accused 2 disputed this. It was further put to Accused 2 that it is P[...]'s evidence that he only managed to stand after the dogs had attacked him and the deceased was dragged outside of the gate leading to the street.

233. Furthermore, that it is P[...]'s evidence that the Accused was standing next to him when he asked *"Why are you doing this? In South Africa we have police whenever incidents like this transpire, we call them."* Accused 2 denied having knowledge of P[...] being bitten by the dogs or speaking to him. Accused 2 further testified that when they exited the yellow shack, the people that were present was himself, Accused 1, Happy and Accused 3. He further testified that he did not notice Nomthandazo. The Accused agreed that in total it was 5 people. Accused 2 further testified that when he exited the gate, he stumbled and fell then his wife came to rescue him by taking him away. Accused 2 testified that he could see a lot of people

gathered by the gate, however, he could not make up how many as he was dizzy. He also testified that he did not see S[...] and K[...].

234. It was put to Accused 2 that when he pushed the deceased inside the shack he associated himself with the act. Accused 2 testified that it does not make sense for him to bind the deceased, leave him inside the shack, only to assault him outside of the shack. Accused 2 further testified that there were people standing inside and outside of the yard when they exited the yellow shack. Accused 2 further testified that the crowd was throwing stones from outside of the yard. It was put to the Accused 2 that he is fabricating his story because he wants to get out free. Accused 2 testified that he is not guilty as he did not kill anyone.

RE-EXAMINATION FOR ACCUSED 2:

235. Accused 2 was asked to elaborate on what he meant by attacked. Accused 2 testified that after pushing the deceased against the wall he did not afford him space to do anything else. Accused 2's case stood down so Nomthandazo and K[...] could testify.

EVIDENCE FOR ACCUSED 3:

236. Innocent Mfundo Mlambo, Accused 3. Accused 3 testified that on the morning of the incident, he was at his parental house and they had gone to the bush as a family. He returned from the bush between 12:30 and 1:00 o'clock in the afternoon. He then went to Accused 2's place and they played a game of Ludo. While playing they heard Sarah screaming "*Please help, Please help!*", that is when Accused 2 jumped to go and assist. Accused 3 testified that he followed Accused 2 but used the gate.

237. Accused 3 testified that they were followed by some neighbours that lived on the same street. Upon arriving at his parental home, he went to the door of the yellow shack and that is where he stood. He entered the shack after Accused 2

called him to come help as he was too scared to go in. He further testified that he stood at the door for approximately 2 minutes after K[...] had come out running. Accused 3 testified that Accused 2 called out to him in a loud voice and there was noise from the corrugated iron of the shack because of the struggle inside.

238. Accused 3 testified that after being called, he waited for 20 seconds, and he grabbed the deceased's feet so that he could not kick them. Accused 2 had pressed the deceased in the corner so that he could not move but the deceased continued kicking till they subdued him on the ground. When the deceased was laying on the ground, Accused 2 asked him to look for a rope so that they could tie up the deceased. Accused 3 found the rope in the dining room of the yellow shack and people started entering after they had tied up the deceased. The first person to enter the house was Siphiwe and Accused 1 followed. Accused 3 further testified that the mob was throwing stones shortly after Accused 1 entered the yellow shack.

239. Accused 1 informed them to take the deceased from the shack since the door is broken and take him to the RDP house where the police will find him. Accused 3 testified that he and Accused 2 took the deceased out of the yellow shack while Accused 1 was shifting people from the yard of the shack. As they carried the deceased out, P[...] kicked the deceased on the face. They placed the deceased on the ground and that is when the Accused 2 informed Accused 3 that he was not holding the deceased properly so he must hold the deceased at the head. He held the deceased in front, underneath his arms with the deceased's head facing upwards.

240. Accused 3 testified that he saw Sarah Mashiane at the crossroads as he emerged from Accused 2's gate. People were drawn to the screaming, about 5 people walked behind him on road A and he does not know how many approached on road B. Accused 3 testified that at the time he entered the yellow shack Accused 2 had pushed the deceased against the corrugated iron and the deceased was bleeding from the mouth.

241. It was put to the Accused that he is building his evidence as he goes along. Accused 3 denied it. It was put to Accused 3 that according to P[...]’s evidence he was injured on his right leg, and it is impossible for him to have kicked the deceased. Accused 3 testified that he cannot explain whether P[...] was holding the gate or a pole as he kicked the deceased.

242. Accused 3 testified that there was five people in the RDP house when he left the RDP house for the shop and T[...] was not there. He saw T[...] when he came back from fetching his soccer boots at the pink shack next to the RDP house.

243. Accused 3 testified that when he left, the deceased was inside the RDP house. It was further put to the Accused that all of the state witnesses testified and denied that the deceased was ever put inside the RDP house. Accused 3 testified that the witnesses were lying. It was put to Accused 3 that it is S[...] and K[...]’s evidence that he was still there when the deceased was outside the yellow shack and when the deceased was taken out of the RDP yard. Accused 3 testified that when he was there, they placed the deceased inside the RDP house. However he was not there when the deceased was taken out.

244. Accused 3 further testified that he is familiar with all of the Accused in court in that Accused 4 and 5 are K[...]’s parents. He knows Accused 6 by sight and Accused 7 is friends with his mother. Accused 8 is K[...]’s brother. Accused 9 he only knows as a resident of the community. Accused 10 and 11 he is familiar with because he used to play soccer with their brother. Accused 3 testified that he did not see any Accused at the scene on that day, except for Accused 1 and 2. It was put to Accused 3 that Accused 2 would be able to identify his neighbours and Accused 3 testified that he does not know as Accused 2 has only lived in the community for less than four months and as a truck driver Accused 2 spends a lot of his time away from home. It was put to Accused 3 that he is trying to build his evidence and the evidence of Accused 2 so he is confusing himself. It was further put to him that the version of events as he testified, is not correct.

EVIDENCE OF ACCUSED NUMBER 4:

245. Phillip Madoda Jwara, Accused 4, testified that on the day of the incident, he was with his wife and last-born son who was playing a game on the phone. After he exited the house to go to the toilet situated outside the house, he heard Sarah Mashiane screaming for K[...]’s mother to please come out. He testified that Sarah Mashiane was standing at the gate of their homestead when she called out. When he came out of the toilet he saw Accused 5, his son and Sarah Mashiane leaving the premises then he went inside the house, put on his sandals and followed them.

246. Accused 4 testified that there were a lot of people who had gathered at Accused 1’s gate. He did not mind the mob and proceeded to enter the premises and found Accused 5 together with T[...]. He overheard a conversation between T[...] and Accused 5 about K[...].

247. Accused 4 testified that he asked Accused 1 who is the one committing these offences against the children. Accused 1 informed him it’s the deceased in the RDP house. Accused 4 testified that while he spoke to Accused 1 he had his back turned towards the gate and he was facing the inside of the RDP house and Accused 1 was facing towards the gate while standing at the door.

248. As Accused 4 was leaving the premises of Accused 1, he noticed T[...] standing outside of the gate. As he was going towards T[...] and Accused 5, they were coming towards him. Accused 5 informed him she had spoken to T[...] about taking the child to the doctor. They got in the car and drove off. Then he proceeded to search for his younger son who came to the scene in Accused 5’s company. He testified he could not find him as he left his phone at the house, so he left the scene to go to his house. Accused 4 testified that his sons were playing phone games when he went to go buy airtime. He told Sipho not to leave until he came back. He called Accused 5 and she informed him that she is still at the police station waiting.

249. Accused 4 further testified that it was getting late so he prepared supper.

When he saw the police, he returned to the scene and saw the deceased laying in the street. He didn't spend too much time at the scene and went back home as he was busy cooking. He realised how late it was, so he phoned Accused 5 again. Accused 5 informed him that they were no longer in Bronkhorstspuit and were at Ekangala for a consultation with the doctor. At approximately 21h00, he received a call from Accused 5 from an unknown number who told him that the police officers who took them to Ekangala would take them back to Bronkhorstspuit.

250. Accused 4 testified that he didn't see S[...], K[...] and P[...] at the scene. It was put to the Accused that there is evidence that he was seen assaulting the deceased and partaking in the assault of the deceased by kicking him. Accused 4 denied assaulting the deceased. It was further put to him that the state witnesses testified that he arrived at the same time with Accused 5. Accused 4 denied it and testified that Accused 5 arrived first and he arrived afterwards.

251. There was no cross-examination from Mr Matshego, Ms Mogale, Mr Motshweni and Mr Mathunzi.

CROSS-EXAMINATION FOR ACCUSED 5 AND 9:

252. Accused 4 testified that although he followed Accused 5, he arrived approximately 4 or 5 minutes after. He only lost sight of Accused 5 when he was inside the yard of Accused 1 speaking to Accused 1. It was put to Accused 4 that it is S[...]’s evidence that Accused 4 and 5 passed her standing by the gate. Accused 4 testified that he was focused on where he was going and not the mob. It was further put to Accused 4 that it is S[...]’s evidence that upon arriving Accused 4 and 5 assaulted the deceased by kicking him and using open hands. Accused 4 testified that is a lie. Accused 5 did not stay at the scene for a long time and she left with K[...] for the hospital and the deceased was still inside the RDP house. Despite it being put to Accused 4 that he is not being truthful, he maintained that the deceased was still in the RDP house when he left the yard. It was put to Accused 4 that Accused 5 will come and testify that she arrived at the scene with Accused 4 and that upon her

arrival the deceased was already outside, and the deceased was assaulted at that particular time. Furthermore, that she informed Accused 4 that K[...] had been taken to another property for safety. Accused 4 denied it.

253. Ms Mazibuko has no cross-examination questions.

254. Ms Monyakane recommenced with cross-examination. Accused 4 testified that after he arrived at home, Accused 8 came with the child. The Accused conceded to leaving the scene without the child as he did not have a phone on him. He testified that Accused 8 informed him that he decided to take the child as there was a crowd there. The child at the time was 7 years old.

255. There was no cross-examination questions by Mr Mahlangu.

CROSS-EXAMINATION FOR THE STATE:

256. It was put to Accused 4 that evidence suggests that the Accused had to pass by S[...]’s house and turn left at the corner before entering into Mr Mlambo’s homestead. It was further put to Accused 4 that K[...] was standing at the first corner of Accused 1’s house, to the right of the RDP and if he was standing there, where the Accused passed, Accused 4 ought to have seen him.

257. The Accused also testified that there was no other person in the yard except for Accused 1, Accused 5 and T[...]. He did not see what was happening in the yellow shack and asked where the deceased is because he just wanted to know. He wanted to check on K[...]. It was put to the Accused 4 that Accused 1, 2 and 3 are lying to the court when they say there were other people inside the RDP yard other than the ones he mentioned. Accused 4 testified that they were not lying as Accused 5 and T[...] were there.

258. It was put to Accused 4 that Accused 5’s evidence is that when she arrived the deceased was outside the RDP house which tallies with the evidence that is

before the court. Accused 4 testified that when he arrived the deceased was inside the RDP house. During his search for the child he heard a noise from behind. It was put to Accused 4 that he is trying to distance himself from what he had initially said. It was further put to Accused 4 that it was his version that it was not possible for him to kick the deceased as he was wearing sandals. Accused 4 testified that he was present when T[...] was being questioned about what he was wearing, and he said he could not recall.

259. It was further put to the Accused that it tallies with the anger he already testified about. The Accused conceded to being angry but denied ever lifting his hand or raising his voice to anyone. Accused 4 testified that a number of people were gathered with more still coming and most of them were youth. The people were saying Accused 1 should take out the deceased and let him come to the street. He further testified that he did not see Accused 7, 8, 9, 10 and 11 at the scene.

260. Mr Rakobela put to Accused 4 that when Accused 5 left for the hospital together with T[...], the deceased was already outside. The Accused testified that maybe they had taken him out by that time because he heard noise while walking down the street.

261. There was no re-examination question by Ms Monyakane, Mr Mahlangu and Mr Mathunzi.

EVIDENCE FOR ACCUSED NUMBER 5:

262. Fihliwe Lettie Masango, Accused 5 testified that she was in her house with Accused 4 and her son when Sarah screamed for Sarah's mother to come out. When she came out, Sarah informed her that the deceased was raping K[...]. Upon her arrival at Accused 1's place, she saw Accused 1 standing at the door of the RDP and inquired what was happening from him. She saw the deceased inside the RDP house laying on the floor on his back facing upwards wearing his underwear only. She looked down at his knees saw blood spats. She wanted to jump over to hit the

deceased when Accused 1 grabbed her from behind.

263. She then spoke to T[...] about K[...] and he suggested they take his car to go to the clinic. She found K[...] crying at Bagiswane's place. She took K[...] by the hand and left the Bagiswane yard. As she was turning towards T[...]’s car, she saw the deceased being assaulted by many people. She left and proceeded to lay a charge against the deceased and while at the police station, T[...] received a call that his brother has passed on.

264. T[...] left immediately and left Accused 5 and K[...] behind. While at Bronkhorstspuit, a female police officer came out with two pills for K[...] to drink. From Bronkhorstspuit they went to Ekangala. It was put to Accused 5 that there is evidence before the court indicating that she had assaulted the deceased with stones. She testified that when the deceased was beaten with stones, she was leaving with T[...] in the car and never got close to the deceased.

265. Ms Mogale commenced with cross-examination. The Accused testified that K[...] was 14 years at the time of the incident.

266. There was no cross-examination from Mr Motshweni, Mr Mathunzi and Ms Mazibuko.

CROSS-EXAMINATION FOR ACCUSED 8:

267. Accused 5 testified that she is related to Accused 8 and does not know how she got separated from her youngest son. Furthermore, that she was not there when Accused 8 came for her son.

CROSS-EXAMINATION FOR ACCUSED 10 AND 11:

268. It was put to Accused 5 that she has placed it on the record that when she first saw the deceased he was in the RDP house. Furthermore, that when there are

two people at the same place at the same time and they have different versions of one incident, one must be misleading the court. Accused 5 testified she found the deceased inside the RDP house when she arrived at Accused 1.

CROSS-EXAMINATION BY THE STATE:

269. Accused 5 testified that when she left the house she was running with Sarah Mashiane, at Accused 4 coming behind. When Sarah was screaming, Accused 4 was not in the house. It was put to the Accused 5 that she had testified that the crowd in the yard was assaulting the deceased. She never witnessed Accused 4 assaulting the deceased. She witnessed stones were being thrown at the deceased however could not tell which direction the stones were being thrown from. It was put to Accused 5 that she threw stones at the deceased because K[...] saw her doing it.

270. Accused 5 denied throwing stones. It was also put to Accused 5 that she and Accused 4 assaulted the deceased while the deceased was inside the RDP yard and they also assaulted the deceased outside the yard. The Accused denied both the versions, testifying that she left when the deceased was inside the RDP yard.

271. There was no re-examination questions by Mr Matshego, Ms Mogale, Mr Mathunzi, Mr Rakobela, Ms Mazibuko, Ms Monyakane and Mr Mahlangu

CONTINUANCE OF ACCUSED 1'S CASE:

272. Nomthandazo Betty Mashiane testified that she was 17 years turning 18 on 20 February 2022, doing Grade 12. On the day of the incident, she was home outside the house. She testified that she took food to sit under the shadow of a tree and K[...] passed by and greeted. After a short space, she came back running and looked like she was somehow scared. When she asked K[...] what was happening, she did not respond.

273. Then she saw the deceased coming behind K[...] and decided to get up and

get into the house. She then closed the door with K[...] and the deceased hit the door. After he kicked the door, they ran into one of the bedrooms and did not have ample time to close the door. They climbed on top of the bed then the deceased came and stood in front of her while smoking a cigarette. The he started taking off his trousers and his jockey underwear.

274. The deceased pulled K[...] towards him and she escaped, ran outside asking for help. Sarah came and asked what was happening. That is when she informed her that the deceased is busy with K[...] in the shack and Sarah helped her scream. That is when Accused 2 jumped over the fence and went into the shack then Accused 3 through the gate and also followed but she did not look where he was going.

275. When she turned, she saw Dyna standing at the gate of the homestead. She testified that Dyna is S[...]. She told S[...] that the deceased is busy with K[...], and she ignored her. When she looked at the street towards the shop, she could see her father coming and she ran to them to inform them what was happening at home. Then they all ran to the homestead. There were a lot of people inside and outside the yard.

276. Then Accused 1 and Happy Mashiane went into the shack and she went into the RDP house in her sister's room.

CROSS EXAMINATION FOR ACCUSED 2:

277. Nomthandazo testified that the Accused 2 entered the shack alone.

CROSS EXAMINATION FOR ACCUSED 3:

278. Nomthandazo testified that Accused 3 entered the shack while Accused 2 was already in the shack.

CROSS EXAMINATION FOR THE STATE:

279. Nomthandazo clarified that Nomthando was at home with her child. She confirmed that as she was running and screaming, she only saw S[...] not K[...]. It was put to her that Accused 1 testified that all three of them ran into the shack and Accused 1 was not telling the truth. She testified that she did not run into the shack and knows nothing about what transpired inside the yellow shack as she was outside the RDP house. She testified that she and Accused 3 passed each other in the yard as she was going out the yard. Accused 1 closed his case.

EVIDENCE FOR ACCUSED NUMBER 6:

280. Thomas Moses Kabini, Accused 6, testified that he resides in the area and is related to Accused 4 and 5. He arrived at the tavern at 10 am. At around 1pm he was still at the tavern with Anthony and Rocks drinking alcohol when people ran out saying a child is being raped. It was between 2 and 3 pm when they stood up to go see. At the crossroads he spoke to a lady he does not know and learned that Accused 5 and K[...] were no longer at the scene. Afterwards he went back to Anthony and Rocks and they went back to the tavern. He inquired from Accused 5 where they are, and she told him they had left in a car.

281. It was put to Accused 6 that K[...] testified that after he assaulted the deceased he left and came back with a stick where he then assaulted the deceased, while he was laying down, three times on the head. Accused 6 testified that he knows nothing about that. It was further put to the Accused that after he assaulted the deceased, the deceased stopped moving. The Accused testified that he knows nothing about that.

282. It was further put to Accused 6 that it was K[...]’s evidence that he could identify him because he saw him driving a bakkie. Accused 6 testified that his uncle has a bakkie, a grey ranger but he cannot drive.

283. There were no cross-examination questions from Mr Matshego, Ms Mogale, Mr Motsweni, Mr Mathunzi, Mr Rakobela, and Mr Mahlangu

CROSS EXAMINATION FOR THE STATE:

284. Accused 6 testified that he lives 200 metres from the scene of the crime and the distance between the tavern and where the incident occurred is 200 to 300 metres. It was put to Accused 6 that S[...]’s evidence only made mention of Anthony. Accused 6 testified that maybe the attorney forgot to mention Rocks.

285. Accused 6 also testified that he came from S[...]’s direction, ended at the crossroads and went back to the tavern. It was put to Accused 6 that it is S[...]’s evidence that he was seen with a stick. Accused 6 testified that S[...] was mistaken. It was put to Accused 6 that his counsel placed it on the record that he picked up a stick and threw it elsewhere. Accused 6 testified that he told his counsel that he never carried a stick.

286. Accused 6 testified that there were 8 people on the deceased’s side and an additional 30 to 40 people at the scene. Accused 6 further testified that he did nothing and saw the deceased amongst the people. It was put to Accused 6 that it is K[...]’s evidence that he saw him and he saw him assaulting the deceased with a very big stick. He was the last person to assault the deceased. Accused 6 conceded that K[...] might have seen him however he denies assaulting the deceased. It was put to the deceased that when he arrived at the scene he found people, he associated himself with what was happening there and took the law into his own hands. The Accused denied it and also denied going back to the scene after he left.

287. There were no re-examination questions by Ms Mazibuko.

EVIDENCE OF ACCUSED NUMBER 7:

288. Paulinah Zanele Masango, Accused 7, testified that she was going out of the second gate from the Indian shop then she met K[...] going to the shop. She asked K[...] what was happening and K[...] ignored her. She then continued and came

across Mtswane who informed her that K[...] had been raped by the deceased. Mtswane stays within the vicinity of K[...]’s house.

289. She then left and ran towards the scene. She testified that she saw Accused 3 assaulting the deceased as she was approaching where the group was gathered. She found people assaulting the deceased by kicking and throwing stones. She further testified that the people did not give her space to approach the deceased to assault him. She then saw a pipe lying on the grass, took the pipe and assaulted the deceased on his privates asking why he assaulted K[...].

290. She further testified that she hit him three or four times while the deceased was in the street. Afterwards her hand hurt so she decided to go back home. She testified that she saw K[...] with Accused 5 and they were holding hands while getting into T[...]’s car.

291. It was put to Accused 7 that it was S[...] and K[...]’s evidence that they saw her in possession of a pipe assaulting the deceased on his privates. The deceased while being assaulted, was moving from side to side even though his hands and feet were tied, trying to block the blow. Accused 7 conceded to S[...]’s evidence and seeing her standing by the gate. However, she cannot recall if she saw K[...] after she passed him while he was going to the shop.

292. It was put to Accused 7 that it is T[...]’s evidence that he saw her assaulting the deceased all over the body. She testified that when she arrived at Accused 1’s place, T[...] was driving away in his car with Accused 5. It was put to Accused 7 that she is presently facing a murder and kidnapping charge. Accused 7 testified that she was not trying to commit an offense and was only reprimanding the deceased. She further testified that while they were assaulting the deceased, he moved from side to side laying there.

293. There was no cross-examination from Mr Matshego.

CROSS EXAMINATION FOR ACCUSED 3:

294. It was put to Accused 7 that the Accused 3 returned to his homestead when the police were there. Accused 7 testified that she does not know that because she was not there when the police arrived.

295. There were no cross-examination questions by Mr Mathunzi, Mr Rakobela, Ms Mazibuko, Ms Monyakane and Mr Mahlangu.

CROSS EXAMINATION FOR THE STATE:

296. Accused 7 testified that Accused 5 is her older sister. It was put to Accused 7 that on the day she took the law into her own hands, she committed an offense. She testified that on the day she was controlled by emotions and was reprimanding the deceased. She estimated that when she arrived at the scene the deceased was being assaulted by approximately 20 people who were throwing stones, kicking him and hitting him with a pipe.

297. It was put to Accused 7 that there is no evidence that suggests that when the deceased was outside the Accused 1's yard, Accused 1 ever reprimanded anyone. She testified that she heard him. It was put to Accused 7 that the position of the deceased in Exhibit C would have not been that position if he had been assaulted by more than 20 people with sticks and stones. The deceased would have had more injuries than the one's depicted on the post-mortem and on the photos.

298. Accused 7 testified that she is not protecting any of the Accused persons before the court. She never saw them on the day in question and only saw them when they were arrested. Despite it being put to Accused 7 on numerous occasions that it is T[...]’s evidence that when he looked back he saw Accused 7 assaulting the deceased. The Accused denied it and insisted that when she was arriving at the scene T[...] was in the car driving off with Accused 5.

299. She testified that she was not associating herself with them and was only hitting him to know why he raped the child. The intention was not to kill the deceased nor did she keep him hostage. Accused 7 was referred to Exhibit C photos 1 till 10 and she confirmed that there were no stones captured. It was put to Accused 7 that she is trying to mislead the court that stones were thrown at the deceased. The Accused testified that she does not know but there were stones there.

RE EXAMINATION FOR ACCUSED 7:

300. Accused 7 admitted that she assaulted the deceased on his private parts.

EVIDENCE FOR ACCUSED 8:

301. Lancelot Sipho Mthimunye, Accused 8, testified that Accused 5 is his mother. He left his place to follow the noise coming from the street. When he went to go see what the noise was about, he saw Accused 5 running with the child following her. He used another street to get to where they were going. He found the child at the crossroads and asked what was happening.

302. The child informed him that K[...] had been injured and Accused 5 and K[...] went to the neighbour's house. He then asked the child about his phone and the child said he left the phone at home and did not charge it. He took the child by hand and went home to make sure the phone is safe. He remained at home and did not go where the people were because there was no one at home.

303. It was put to him that it is S[...]’s evidence that he assaulted the deceased after Accused 4 and 5 before Accused 9. Accused 8 testified that it not true. It was put to Accused 8 that it is P[...]’s evidence that the Accused was inside the RDP yard and assaulted the deceased inside and outside the compound. Accused 8 testified that he never went to Accused 1’s compound nor did he assault the deceased.

304. It was put to Accused 8 that there is evidence that he assaulted the

deceased for close to an hour using a pipe exchanging it with others. Accused 8 testified that he fetched his younger brother and went away. It was put to Accused 8 that there is evidence that he saw him hitting and dragging the deceased outside the RDP yard. Accused 8 testified that he knows nothing about that. Accused 8 testified that he was arrested 5 months after the incident and was surprised by his arrest because he was never at the scene.

305. The was no cross-examination by Mr Matshego, Ms Mogale, Mr Motsweni, Mr Mathunzi, Mr Rakobela, Ms Mazibuko and Mr Mahlangu.

CROSS EXAMINATION BY THE STATE:

306. Accused 8 testified that he found his little brother at the crossroads by Accused 1's place. He went to the scene because of the screaming. When he got to the crossroads he saw Accused 5 running with his younger brother and wanted to know where they were going. He was informed by his younger brother that K[...] had been injured. He wanted to get his phone to assist telephonically should there be a need.

307. His little brother was 7 at the time of the incident and because he had left the phone with the little brother he was concerned and wanted to know where the phone was. Accused 8 further testified that he was employed by Love Life and knows the procedures to be followed when someone has been raped or sexually abused. It was put to Accused 8 whether a person who worked for Love Life concerned about people who have been sexually violated, go home and find their phone to just sit there. He testified that he informed 3 people on WhatsApp that he was having a challenge and asked them for assistance and spoke to one of them about providing K[...] with counselling.

308. It was put to the Accused that he assaulted the deceased in daylight without caring whether the witnesses were watching. It was put to Accused 8 that he associated himself with the actions of other Accused and intended for the deceased

to die. Accused 8 denied it. The little brother's name is O[...], referred to as child.

309. There was no re-examination by Ms Monyakane.

EVIDENCE FOR ACCUSED 9:

310. Simon Patrick Nxumalo, Accused 9 testified that he stays 3 houses away from Accused 1's house. He was driving back home with his wife, who was struggling to walk. She opened the gate for him, he drove into the yard and parked the car next to the water tank. He saw people running to Accused 1's house and his wife followed the people to Accused 1's house as they could not find their child. He followed and passed her because she was walking slowly. He stopped at the crossroads and saw a group of people in front of the small gate with a dark man, tied up on the ground.

311. He saw that his daughter was not amongst the people and asked Accused 1, who was standing at the door what was happening. As he got closer to the crowd, he realised that he didn't have his cell phone. The he ran back home rushing to his wife as his wife was struggling to walk. He went back home, encountered his wife, and asked if she'd heard anything about Zintle's whereabouts.

312. Accused 9 testified that he went to Accused 1's yard is because he was informed that a girl had been raped and his daughter was not home. At the time Zinhle was 11 years old. He testified that his wife was somewhere at the back as he never saw her at the intersection. It was put to Accused 9 that it is S[...]'s evidence that she saw Accused 9 assaulting the deceased.

313. Accused 9 testified that he did not assault the deceased as there was no reason for him to do so. He was new in the area and did not know a lot of people. It was put to Accused 9 that it is K[...] and P[...]s evidence that he assaulted the deceased. He was riding a bicycle and gave it to K[...] to hold. He went to assault the deceased, took the bicycle and went home.

314. Accused 9 testified that he did not use a bicycle that day. He testified that he saw P[...] passing when he was washing his car after he had returned home. He knows P[...] from the pond where they fetch water, and he was certain it was P[...] because of the way he walked. Furthermore he did not see the people that assaulted the deceased.

315. There was no cross-examination by Ms Mogale, Mr Motsweni, Mr Mathunzi, Ms Mazibuko and Ms Monyakane.

CROSS EXAMINATION FOR THE STATE:

316. It was put to Accused 9 that it is S[...]’s evidence that after he inquired what happened, he took a pipe and assaulted the deceased. Accused 9 denied it. It was put to Accused 9 that it is T[...]’s evidence that the people that were assaulting the deceased were all family except for the accused. Accused 9 testified that he did not assault anyone.

317. It was put to Accused 9 that it is K[...]’s evidence that he arrived on a bicycle, made K[...] hold it and went to where the deceased was. He asked him what the deceased did, took a pipe and assaulted the deceased. The Accused testified that although he remembers what was said, he was not using his bicycle that day and his garage was locked. Maybe his daughter was using the bicycle. He did not assault anyone.

318. On 09 February 2022, it was discovered in court that Mr Mahlangu had been suspended on 14 May 2021 by the LPC. I requested documentary confirmation thereof. Accused 10 was satisfied to be represented by Ms Monyakane onwards and Accused 11 was satisfied with Ms Mazibuko as their new counsel. There being no legal issue or prejudice to Accused 10 and 11 and no objections by any counsel, I permitted the trial to continue on this basis.

STATEMENT BY K[...]:

319. Ms Mogale made an application to introduce a section 220 statement by K[...]. Mr Mathunzi raised an objection to the statement requesting that the witness come and testify. It was placed on record that the state and other counsel do not have a problem with the contents or correctness of the statement. Mr Mathunzi was granted leave to consult with his client on the proposed statement and revert with his instructions.

EVIDENCE OF CONSTABLE CHAUKE:

320. Constable Wisane David Chauke testified on the statement provisionally handed in as Exhibit H. He testified that he has been a constable for 5 years. During the time he was working at the police station in Bronkhorstspuit. He took down S[...]'s statement in front of community members and the owners of the house he thought encouraged the killing of the deceased. He took down the statement and read it to S[...] to confirm if she was satisfied or not. S[...] signed the statement after it was read back to her.

CROSS EXAMINATION FOR ACCUSED 1:

321. The constable testified that he knows Tsonga and Sepedi. S[...] spoke Sotho and he spoke Sepedi, they understood each other so there was no problem in communication. In 2018 he had 2 years' experience in the police force and taking statements. It was put to the constable that it was S[...]'s evidence that the statement was never read back to her after it was taken down. The Constable testified that it is procedure to inquire from the person after taking down the statement, and to read it back to them before it is signed.

322. There was no cross-examination from Ms Mogale, Mr Mathunzi, Mr Rakobela and Ms Mazibuko.

CROSS EXAMINATION BY ACCUSED 3:

323. It was put to the constable that S[...] testified in isiZulu however the constable said she testified in Sesotho. The constable testified that he informed S[...] that he is Tsonga and the only other language he is able to speak is Sepedi. Then she informed him that she is also a Sotho speaking person so there will be no problem in them communicating. He listened to S[...] and reduced the contents to English. He asked if he should read the statement back to her? She told him not to as she is able to read. She will read the statement on her own. If there were any mistakes, she would be able to identify them. She did not rectify anything on the statement. This evidence places Constable Chauke's evidence in doubt.

CROSS EXAMINATION FOR THE STATE:

324. Ms Kabini put it to the constable that he did not read the statement back to S[...] because in his testimony he said he gave her the statement to read. The constable testified that he gave the statement to her and that S[...] did not read it aloud. He further testified that he does not know the evidence put before the court. However, S[...] did inform him that she speaks Sesotho. Constable Chauke testified that S[...] would narrate to finish the sentence, then he would reduce it in writing. When he was finished, he would ask her to continue till the end of another sentence.

325. When he got back to the police station, he stamped the statement and signed it, so he did not administer the oath to S[...].

326. After hearing short submissions from Mr Motsweni, Ms Kabini and Ms Mazibuko, Exhibit H was admitted as evidence for the court to deal with its evidentiary value in the judgment.

EVIDENCE FOR ACCUSED NUMBER 10:

327. Paulinah Nurse Sibiya, Accused 10, testified that while she was at her

parental home, she saw people running past. Ladies selling brooms shared a rumour that a child had been raped in the downward area of Accused 1. She then ran approximately 200 metres to Accused 1's yard and entered the gate.

328. She asked T[...] what was happening, and he threw his hands up in the air. She heard from someone called Gogo Nthuli that the deceased has raped K[...]. She exited the yard to sit on the grass located on the right-hand side of the fence. Simangele came to her and gave her the phone to call the police as she was sad and shaking. She testified that she does not know for certain if she called the police. Then she overheard T[...] saying to Accused 5, the deceased had not yet raped K[...].

329. Accused 11 arrived and asked her why she is seated like that and she replied that it was because of the allegations she heard about K[...] being raped. Afterwards Accused 5 emerged from Bangiswane's homestead, opposite the deceased's homestead. Bangiswane is Accused 1's brother-in-law. They followed them but before they could reach them, they got in the car, and drove off. It was put to Accused 10 that it is S[...]’s evidence that she saw the Accused 10 assaulting the deceased with a pipe. She denied it and testified that she did not see the deceased while she was at Accused 1's homestead.

330. It was put to Accused 10 that she and Accused 11 arrived at the scene and assaulted the deceased together. Accused 10 testified that she arrived alone. She further testified that she holds a diploma in teaching and is currently employed as a temporary teacher at Makande Primary School. It was put to Accused 10 that it was placed on the record that she assaulted the deceased with a pipe. Accused 10 denied the assault.

331. There was no cross-examination by Ms Mogale, Mr Motsweni, Mr Mathunzi and Mr Rakobela.

CROSS EXAMINATION FOR THE STATE:

332. It was confirmed through the sketch plan that from Accused 1's house if you are facing outwards, S[...]s homestead is on the right and diagonally across Accused 1's yard is Bangiswane's house. It was put to Accused 10 that she when entered Accused 1's yard people were exiting. She testified that she did not see Accused 4 at the scene however confirms seeing Accused 5 and T[...].

333. It was put to Accused 10 that the 3 witnesses have placed her at the scene assaulting the deceased and she is related to Accused 5. It was put to Accused 10 that she is not being implicated because she is a relative to Accused 4 and 5. She testified that she did not assault the deceased nor did she see the deceased.

334. There was no re-examination by Ms Monyakane.

EVIDENCE OF CONSTABLE SELAHLE:

335. Ms Monyakane called Mosibudi Alice Selahle. She testified that she is a Sergeant and had been one for three months. On the 24th of September 2018 she was a constable and had been a constable since 2010. She recorded the statement of P[...] S[...] and wrote the original document. She would let the witness speak a sentence and he will stop speaking so that she can reduce it to writing. She identified the signature at the bottom of page one and two as P[...]s signature. She testified that the statement was read back to P[...]. The statement was, however, stamped at the police station.

CROSS EXAMINATION FOR ACCUSED NUMBER 3:

336. Ms Selahle testified that she understood what the witness said clearly, and she reduced that to writing despite not being able to recall what language P[...] spoke and she explained that the statement was written down in English. She read the statement back to him, inquired whether he understood and he said yes. She informed him that she would sign his statement when she reached the police station as the stamp is kept there. She did not have insight to the contents of statements

they took from other witnesses.

CROSS EXAMINATION FOR ACCUSED NUMBER 2 AND 7:

337. It was put to Ms Selahle that there is a procedure for police officers to guide them with taking down statements and then go to the police station and transfer what was written on a piece of paper. She testified that she does not know anything about a notebook and only carries stationery she uses to write down statements.

338. There was no cross-examination by Mr Motsweni, Mr Mathunzi, Mr Rakobela and Ms Mazibuko.

CROSS EXAMINATION BY STATE:

339. Ms Selahle confirmed that the only thing that was done at the police station was the stamping of the statement.

RE EXAMINATION FOR ACCUSED 8:

340. It was sought from Ms Selahle whether it is possible that P[...] may have told her something else not contained in his statement. For purposes of clarification the court assisted in resolving confusion about a notebook. Following this Ms Selahle's testified that she carries a pocketbook which she writes in. The pocketbook is small in size and she does not write in it in front of the complainant but at her own time. The pocketbook records a summary of all the events happening throughout the day and that she did not take it out from her pocket at the scene.

341. There was no further cross-examination questions by Mr Motsweni, Mr Mathunzi, Mr Rakobela, Ms Mazibuko and Ms Kabini.

EVIDENCE OF MS MBHELO:

342. Virginia Smangele Mbhelo testified that she was scared of appearing in court. When she arrived at the scene she found Accused 10 seated on the grass leaning against the fence, who informed her that K[...] had been raped. She told her she does not have strength so she must phone the police for help.

343. While attempting to call Bronkhorstspuit police station, Accused 11 arrived. They saw K[...] with Accused 5 walking towards T[...]’s car. After Accused 5 and K[...] left there was no longer a reason for them to be there so they left.

344. It was put to her that it is K[...] and S[...]’s evidence that they saw Accused 10 assault the deceased. She testified that Accused 10 did not do anything while she was with her. She confirmed that she is the one that saw Accused 5 and alerted Accused 10 and 11.

345. Accused 11 arrived after Accused 10 had given her the phone to call the police. It was put to Ms Mbhelo that there is evidence before the court that Accused 10 and 11 arrived at the same time. She denied it and testified that she found Accused 10 sitting on the grass and Accused 11 emerged from the direction of her parental house. It was put to Ms Mbhelo that according to her evidence she went to the scene of the crime and there was nothing obscuring her vision yet she did not see the deceased. She testified that she was not interested in the deceased. She also testified that she called the police and the police wanted to help but she ended the call when she saw K[...].

CROSS EXAMINATION FOR THE STATE:

346. Ms Mbhelo testified that she is a neighbour to Accused 10 and 11. Upon arriving at the scene she went straight to Accused 10 and not Accused 1’s property or yard. The purpose of cross-examination was to establish how long Accused 10 was at the scene prior to her arrival and afterwards.

EVIDENCE FOR ACCUSED NUMBER 11:

347. Tryphina Sibiya, Accused 11 testified that she was staying at Siyabuswa campus as a first-year student doing a Bachelor of Education Degree. She arrived at the scene after lunch. She arrived at the premises of her parental house to find her mother outside. She asked her mother where all the people are going. Her mother told her that her sister had gone to see what is happening.

348. As she was approaching the crossroads of Accused 1's yard, she saw that there were people and could see her sister sitting outside the yard. She testified that Accused 10 was sitting down leaning against the fence with both her hands on her thighs looking like she had lost her strength. When asked where K[...] is, she told her that she was at Bangiswane's place and before she could finish, K[...] emerged with Accused 5.

349. It was put to Accused 11 that there is evidence before the court that she arrived at the scene with Accused 10. Furthermore, that there is evidence that she used a pipe to assault the deceased on his body. She testified that is not true and she did not see the deceased and was not carrying anything with her.

350. There was no cross-examination by Mr Matshego, Ms Mogale, Mr Motsweni, Mr Mathunzi and Ms Monyakane.

CROSS EXAMINATION FOR THE STATE:

351. It was put to her that it was T[...]’s evidence that she wanted to assault the deceased and wished that he was not there so that she can deal with the deceased. She testified that she did not see T[...] and did not enter Accused 1's yard. She only spoke to Accused 10 and Smangele at the scene. It was put to Accused 11 that it is S[...]’s evidence that she assaulted the deceased with a pipe. Furthermore, that she found the deceased being assaulted and joined in the assault of the deceased. The Accused testified that she *“does not know why can she (S[...]) come and create such a thing because they were not even used to each other and then we are not friends to each other”*.

APPLICATION IN TERMS OF SECTION 220 OF THE CPA ON BEHALF OF ACCUSED 2:

352. There was an application in terms of section 220 by Ms Mogale to re-open Accused 2's case with the purpose of submitting a statement which was objected to by Mr Mathunzi on behalf of Accused 4. Mr Mathunzi maintained his objection to the application on 2 grounds previously placed on record. The first reason is that the statement does not comply with the Act and that the proposed statement of K[...] would be hearsay and inadmissible. In support of the application Ms Mogale referred to the case of *R v Gani* 1958 (1) SA 102 A.

353. Ms Mogale made submissions that a trial court may permit the defence to intervene when the prosecutor is busy addressing the court, after both parties had closed their cases, in order to lead further evidence. The court has to consider the extent of the exclusion. It might cover a wide range of issues that could be favourable to the defence and if it would be the case of the Accused himself he would not be permitted to give evidence in his defence. She submitted that it is in the interest of justice that the court allow the Accused to reopen his case. She further stated that Nomthandazo was called to corroborate the version and there was no dispute by the state, Mr Mathunzi and any other counsel relating to what happened inside the shack.

354. Ms Mogale made the submission that according to the Criminal Procedure Act section 3(1)(a) act 45 of 1988, hearsay evidence may be admitted by consent. Failure to object to hearsay evidence may be regarded as consent between counsel for the Accused and the state. She further made reference to section 3(1)(c)(i) where it is quoted that: *"The court may hear evidence including evidence with regard to hearsay, notwithstanding that such evidence might otherwise be inadmissible, provided that such evidence will not render the trial unfair."* She submitted that all the counsel can agree to the effect that the statement is not going to render the trial unfair.

355. She further relied on *S v Mpofu* 1993(2) SACR 109 (N), and she made the submission that in the judgment, Alexander J highlighted that the court stressed that: “The important criteria in determining admissibility of hearsay evidence must be truthful and reliable and truthfulness and reliability are in essence one criteria that is examined when looking at the nature of the evidence.”

356. There were no objections to Ms Kabini handing in the statement of Captain Moshoeshoe as annexure K1 to K3 and all the parties agreed to the correctness of the annexures. Mr Mathunzi made amendments to the statement of K[...] in compliance with the provisions of section 213, and included a statement that favours Accused 4 following which Mr Mathunzi withdrew the objection.

357. The statement of Khanyisile was cured in terms of the provisions of section 213. The provisions of 213(1) was read into the record together with the affidavit.

CLOSING STATEMENT FOR THE STATE:

358. The 11 Accused are facing two counts, count 1 of murder read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 in that the death of the deceased was caused by the Accused and their execution. According to the post-mortem report, the findings made by Dr Paul Lombard were hands and feet were tied with a rope, with multiple bruises and abrasions over the body. There is a 8cm deep laceration over right temporal and optical area with underlying skull fracture, right temporal ossicle bone and the cribriform is also fractured. According to the doctor, the deceased had multiple bruises and abrasions over the body.

359. Ms Kabini placed the doctor’s definitions of the injuries sustained by the deceased on the record. Ms Kabini defined a bruise as an injury appearing at an area of discoloured skin and referred to examples of photos 15 and 16 of Exhibit B. Ms Kabini then defined abrasions as an area damaged by scraping or wearing away.

She defined a temporal optical ossicle area as a complex brain territory heavily involved in several high level neurological functions such as language, visual, spatial, recognition, writing, reading, calculation, self-professing, working memory, musical memory and face and object recognition.

360. She followed this by submitting that according to the doctor, the underlying skull was fractured together with the cribriform. The cribriform is a V-like structure between the anterior cranial fossa and the nasal cavity which means it is an area around the face and nose. The purpose of the definitions was to show that the skull and nasal area were fractured. She submitted that in as far as the post-mortem is concerned none of the lower areas of the deceased were injured except for the head. She further pointed out that the evidence by the state witnesses is that the deceased was dragged from one yard to the other, assaulted by open hands, kicked and hit with objects.

361. It is particularly S[...]’s evidence that Accused 1 assaulted the deceased with an object after dragging him while Accused 2 and 3 followed. Then Accused 4 and 5 arrived at the same time and assaulted the deceased all over his body. According to her evidence when P[...] arrived Accused 1, 2 and 3 were at the scene and she overheard P[...] saying: “Stop assaulting him. Let us rather call the police.” It was her submission that this is an indication that the deceased whilst being dragged from the yellow shack to the dividing line of the shack was being assaulted.

362. When Accused 7 arrived, the deceased was already lying outside the yard of the RDP house and that Accused 7, 8, 9, 10 and 11 had assaulted the deceased. Accused 2 dragged the deceased to the street from the RDP house. Accused 6 arrived at the scene with a long stick which the Accused conceded to when put to him and he was the last one to arrive. When he arrived, the deceased was still alive. She further submitted that the second charge of kidnapping is when you curtail the person’s movements. The deceased was bound and could not move. According to P[...]’s evidence the deceased had a blue eye and was bleeding from his ear which is an indication that there was an assault that took place before the deceased was

dragged from the RDP premises.

363. Ms Kabini's submission is that it was P[...]’s evidence that the deceased was already outside the yard when Accused 8 was assaulting him and Accused 1 warned P[...] not to interfere as, what is happening to the deceased will happen to him, when Accused 8 was assaulting the deceased and that is a contradiction of Accused 1’s evidence that at all relevant times he was standing at the door of his RDP house. Ms Kabini further summarised P[...]’s evidence as to when he returned with the police, Accused 1, 2 and 3 were still at the scene. He did not see Accused 4, 5, 8 and 9.

364. Ms Kabini's submission is that it is T[...]’s evidence that when he arrived, he found Accused 1 to 5 and Accused 8 in the premises of the RDP yard. T[...] testified that Accused 8 was the one hitting the deceased on the head. While Accused 4 was assaulting the deceased, Accused 5 joined in the assault. Then Accused 9 arrived and asked what they say he did and started assaulting the deceased while Accused 7 and 8 were assaulting the deceased as well. It is T[...]’s evidence that he was in communication with all six Accused persons that were there.

365. Ms Kabini made the submission that it is K[...]’s evidence that Accused 4 and 5 assaulted the deceased together. This is indicated in S[...] and T[...]’s evidence. It was her submission that it can be inferred from K[...]’s evidence that when Accused 6 arrived at the scene the deceased was still alive. It was her submission that there are contradictions in the evidence by the witnesses however the contradictions are minor and do not affect the evidence of the witnesses.

366. To address the contradictions reference was made to *S v Mkohle* 1999 (1) SACR 95 (A) page 95: In each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witnesses’ evidence. Ms Kabini also made reference to *S v Jochems* 1991 (1) SACR 208 A wherein the court addressed contradictions between the evidence of witness on details, what each of them did, and so on and held that the differences in question is not of itself a

sufficient grant for rejecting the evidence of the witnesses. What the trial court has to do is to consider the significance or otherwise of such difference and to evaluate the evidence of each of the witnesses. Thus if a good witness is contradicted by a different one, there is no reason for rejecting the evidence of the former. She further referenced *S v Mafaladiso en Andere* 2003 (1) SACR 583HHA.

ACCUSED 1'S CLOSING STATEMENT:

367. Mr Matshego relied on the judgment of *Thebus v S* CCT 36/2002, particularly paragraph 2 of the judgment and placed emphasis on the distinction in the background facts, from the case. He submitted that in the present case there could not have been common purpose on the part of Accused 1. He submitted that this is with reference to paragraph 18 of the judgment which defined the doctrine of common purpose as a set of rules of common law, that regulate the attribution of a criminal identity to a person who undertakes jointly with another person or persons in the commission of the crime. He submitted further that the manner in which the kidnapping offense was committed should be separated. He further placed emphasis on K[...]’s statement, and the offenses committed by the deceased.

368. He submitted further that several factors must be considered: the accused’s intention, accused’s association with the perpetrators of the assault, the roles of the Accused in relation to the kidnapping and murder charge. The court is at liberty to have regard to the competent verdicts and lastly the state has failed to make out their case against Accused 1.

ACCUSED 2 AND 7'S CLOSING STATEMENT:

369. Ms Mogale submitted that it is common cause that the crime was not premeditated. According to the charge sheet, the murder charge is framed in terms of section 51(1) of the Amendment Criminal Act 51 of 1977, thus if the crime was not premeditated then section 51(1) does not find application.

370. She submitted further that the murder was spontaneous, and the provisions of section 51(2) are applicable. Ms Mogale conceded Accused 2 deprived the deceased of his freedom of movement by subduing him but submitted it was “*material*” as Accused 2 was in imminent danger, as the deceased was hitting and overpowering him. Accused 2 had no “*reasonable legal alternative*” other than committing the offense.

371. On behalf of Accused 7, Ms Mogale submitted that the discrepancies in the evidence contained in the record of all state witnesses as opposed to the statements must be rejected. It is improbable for witnesses to sign a statement without it being read. Furthermore, that Accused 7 rejects T[...]’s version because of the improbabilities.

ACCUSED NUMBER 3’S CLOSING ARGUMENT:

372. Mr Motsweni submitted that Accused 3 was not there. He left the scene to go to the shop as his parents were there. He further submitted that the state witnesses discussed the matter and their evidence is unreliable. S[...] testified that P[...] reprimanded the Accused when he was not present. Furthermore, P[...] was an evasive witness when he was cross-examined. Therefore the court should not find Accused 3 guilty of kidnapping and murder.

ACCUSED 4’S CLOSING ARGUMENT:

373. Mr Mathunzi submitted that the evidence of the state witnesses do not corroborate each other and made reference to *S v Gentle* 2005 (SCA). He submitted that the court should apply caution in light of the relationship between the witnesses and deceased. In dealing with the doctrine of common purpose the test applied is *culpa* or negligence. He submitted that common purpose would be applicable if Accused 4 became part of the assault after learning what was happened. Counsel made reference to *Mgedezi* and *Safasa* particularly with reference to joint groups and meeting of minds. The evidence of the state witnesses is unreliable and not

credible, the doctrine of common purpose must fail as there is no evidence to show that Accused 4 conspired or formed a syndicate with anybody.

374. The court in assessing the evidence should consider *S v Chabalala* 2003 (1) SACR 134 (SCA) which considers the following: the sincerity of the witness, the witness' candour and demeanour in the witness box, the witness's biasness, the internal contradictions of his or her evidence, the external contradictions by examining all crucial statements; the probability or improbability of his or her version, the calibre and cogency of the witness' performance. This is inclusive of the witness's opportunity to observe the event and the quality and integrity of the witness to recall the event.

ACCUSED 5 AND 9'S CLOSING STATEMENT:

375. Mr Rakobela submitted that K[...] had a legitimate expectation of being protected by her parents. The purpose of their association was to know what happened to their child. Furthermore, there is no evidence before the court indicating how Accused 5 participated. He submitted that the discrepancies in the witnesses' evidence is material as they were witnessing the same incident at the same time. If the statements were taken down at the scene, the events of the incident were still fresh in the witnesses' minds. It remains undisputed evidence before the court that Accused 5 received the information about the passing of the deceased when at the hospital.

376. Mr Rakobela submitted that all the witnesses testified that Accused 9 took the stick, assaulted the deceased and went away. Therefore, when the deceased died Accused 9 was no longer there. Mr Rakobela made reference to *Jacobs & Others v The State* 2019 ZACC 4 BCLR at 562 CC wherein the deputy chief justice referred to Mgedezi's requirements of awareness, presence and participation. It was his submission that not all the Mgedezi requirements were present and there is no evidence before the court to suggest that there was a stage where the community members stopped assaulting the deceased. Both Accused 5 and 9 were not present

when the deceased died. The state did not prove its case beyond reasonable doubt.

ACCUSED 6 AND 11'S CLOSING ARGUMENT:

377. Ms Mazibuko referred to *S v Chabalala supra*, it was her submission that the court had laid a basis of how the evidence should be treated and the reliability of the witnesses' evidence in examining the: sincerity of the witnesses, the witness' candour and demeanour in the witness box, the witnesses' biasness, the contradictions by examining crucial statements, the probability or improbability of the version. The assault occurred as a result of individuals who came individually at their own time. Furthermore, precautions should be applied to the evidence of the state witnesses as they have a direct interest in the matter as the deceased's relatives.

ACCUSED 8 AND 10'S CLOSING STATEMENT:

378. Ms Monyakane submitted that the elements of common purpose were not satisfied. T[...], S[...] and P[...]’s evidence cannot not be trusted. Furthermore, K[...]’s evidence cannot be accepted without applying precautions as he is a child. It was her submission that there was no corroboration between the evidence of 4 witnesses against Accused 8. Furthermore, there were inconsistent versions from the witnesses.

379. Ms Monyakane made reference *S v Mathonsi* 2012 (1) SACR at pg 335 at paragraph 33, which reads that the time has come for a rule limiting the use of prior inconsistent statements to impeach the credibility of witnesses and a new rule to be introduced recognising the change, means and methods of a concept proved “in modern society”. She submitted that previous inconsistent statements cannot justify the guilt of an accused person and that the principle is applicable to this case.

380. Ms Monyakane further referred the court to Evidential Aspects of Law Enforcement, chapter 10, page 119, which reads that the reason why a court will approach the testimony of a child with caution lies in the fact that children are less

capable of distinguishing between real facts and imagined facts. Further reference was made to *S v Mthethwa* 1972 (3) SA pg 766 and *R v Mputing* 1960 (1) SA 785 (T) which lays down the precautions with regards to the evidence of identity and situations where the mobility of the scene affects the results of identification.

ANALYSIS OF EVIDENCE ON BEHALF OF THE STATE:

381. All of the witnesses on behalf of the state were eyewitnesses. They each testified as to what they saw from their own perspective, their observations and experience of the events. In my view each of the witnesses for the state came across as reliable and they made a good impression upon the court. None of these witnesses were evasive and maintained that their respective evidence constituted what each of them had separately and personally witnessed.

382. Although there were a few discrepancies between the witnesses for the state, which is evident from the evidence which is summarised above, it is in my view that these discrepancies are not material enough to justify rejecting the evidence of any of the state's witnesses.

383. Insofar as K[...] is concerned I reject the submissions that he is young and that the cautionary rule must apply against him. His evidence was forthright and he too, made a good impression on the court.

384. It is common cause that the events took place at a rapid pace and in a short space of time. It cannot be expected of anyone faced with the events to be precise about distances, time and to have kept an eye on every possible sequence of events.

385. I am satisfied that the evidence of all the state's witnesses should be accepted. The witnesses were all able to identify each of the Accused and their actions and participation in the assault on the deceased. The state has proven the charges 1 and 2 beyond a reasonable doubt, as I will indicate hereunder.

ANALYSIS OF THE EVIDENCE OF ACCUSED NUMBER 1:

386. There is no dispute that Accused 1 carries a lot of weight in the particular community involved. He has held, and continues to hold, the authority to approve or disapprove any outsider wishing to join that community to find a suitable home. This evidence was supported by Accused 9 who testified that he only knew Accused 1 and no one else in the community.

387. Accused 9 was clear that if he did not know Accused 1 he would not have been able to secure a suitable home for him in that community. The position and authority of Accused 1 was not disputed by any of the Accused and I must consequently accept that members of the community would be loath to go against the will of Accused 1.

388. Accused 1 denied any assault on the deceased and maintained that he simply assisted Accused 2 and 3 to subdue the deceased because he was “doing something unlawful”. This proposition was put to the state witnesses by counsel for Accused 1. However, on the version of Accused 1 he entered the yellow shack after Accused 2 and 3 and by that stage K[...] had already run out of the yellow shack.

389. He testified that when he entered the yellow shack the deceased had already been tied up and that he had agreed with Accused 2 that the deceased should be arrested. He testified that he assisted Accused 2 and 3 to carry the deceased out of the yellow shack and Accused 2 was carrying the deceased from his upper body and Accused 3 was at the back of the deceased.

390. He said he was trying to chase away people who had gathered. Accused 1 admitted pushing P[...] away from the deceased because P[...] kicked the deceased in his face. According to Accused 1 the deceased was carried into the RDP house by Accused 2, 3 and Accused 1. Accused 1 denied owning dogs who had allegedly bitten P[...] and notwithstanding P[...]’s evidence that it was Accused 1’s daughter

who assisted P[...] with the dogs. Accused 1 did not call his daughter to corroborate his evidence as far as the dogs are concerned.

391. According to Accused 1 his role in the community is to protect children, including the deceased and to protect the community members from committing or continuing with unlawful conduct. It is the basis of this evidence that I must reject the evidence of Accused 1 that he had no control over the community members and that two men who he could not identify had entered his RDP home and removed the deceased.

392. It is also common cause how the deceased was tied up. The explanation proffered by Accused 1 and some of the other Accused, to which I will refer to later, is that they had to subdue the deceased because he had become violent. However, what must be considered is the necessity to have tied up the deceased by tying his ankles together and his hands behind his back, and to go further by tying the bound hands, and the bound feet, together behind the deceased's back. Accused 1 explained that he had agreed that the deceased was to be arrested.

393. There was no arrest of the deceased by any of the accused. The evidence of S[...] and P[...] is that when the deceased was dragged and removed from the yellow shack, he was bleeding from his ear. It must follow that there was an assault on the deceased in the yellow shack by either Accused 1, 2 or 3 alternatively all 3. Accused 1 maintained that it was P[...] that kicked his own brother but this was not the evidence of S[...] or T[...] or K[...] for that matter.

394. A further factor which supports my view that the version of Accused 1 cannot be accepted as being reasonably and possibly true is his failure to call Happy Mashiane to corroborate his evidence as to what transpired in the yellow shack prior to any of the first 3 Accused entering the shack. This evidence must accordingly be rejected.

395. Although Nomthandazo was called to corroborate the version of Accused 1,

her evidence was limited to a few aspects. One is that she observed Accused number 1 and Happy Mashiane moving towards the yellow shack. Nomthandazo further testified that the deceased had followed K[...] into the yard and ultimately both into the yellow shack. She managed to escape and run outside to ask for help when the deceased pulled K[...] towards him.

396. She asked Sarah for help and that's when Accused 2 jumped over the fence
397. and went into the shack. Accused 3 came through the gate. She saw S[...] standing at the gate of the S[...] homestead and told her that the deceased is busy with K[...].

398. Nomthandazo further testified that when she looked at the street towards the shop, she saw her father coming and she ran to them to inform them what was happening at home. Then they all ran to the homestead and there was a lot of people inside and outside the yard.

399. Then Accused 1 and Happy Mashiane went into the shack and she went into the RDP house into her sister's room.

400. Accused 1 did not make a good impression upon the court. Under cross-examination by the state he was unable to explain why he did not testify initially that P[...] had kicked the deceased and that on the day he was not carrying any crutches. This notwithstanding the fact that P[...] testified that he had used crutches on the particular day. It is my view that Accused 1 was evasive and opportunistic in supplementing his evidence in chief during cross-examination.

401. His demeanour appeared to the court that simply denying the versions put to him by the state advocate. His counsel asked the court to stand the case down over a weekend so that Accused 1 could refresh his memory with reference to the record, before testifying further. This is to me indicative of an intention to supplement or alter one's evidence to run in line with the record at that stage.

402. I have already referred to his powerful role in the community and seriously

question his evidence as to the members of the community who respected him but threatened him from intervening on the basis that K[...] is not his child, and he should simply move out the way. This is in direct conflict with his own earlier evidence and that of Accused 9. Mr Matshego at the end of his re-examination of Accused 1 requested the case against Accused 1 to stand down so that he could arrange the other witnesses who would corroborate the hearsay evidence of Accused 1. Low and behold except for Nomthandazo, no one was called to corroborate the evidence of Accused 1.

403. Most crucially a great deal of his evidence was about what his daughter had told him of what transpired in the yellow shack. Nomthandazo was called to corroborate this evidence to the extent that Accused 1 and Happy Mashiane entered the shack.

404. In respect of charge number 2, Accused 1 simply relies on an alleged arrest in respect of which no evidence was led, to justify the tying up of the deceased. This to me, under the prevailing circumstances and the overwhelming evidence against him, holds no water and I accordingly reject this evidence as not reasonably or possibly true.

405. I accordingly find that the version of Accused 1 on the main charge, in the absence of any other credible evidence that the deceased was at any stage inside the RDP house, to be not reasonably and possibly true. I must emphasise that the community is a small community and I find it highly unlikely that two unknown male persons would simply enter the property of Accused 1, enter his RDP house and remove the deceased in Accused 1's presence.

ANALYSIS OF THE EVIDENCE OF ACCUSED NUMBER 2:

406. Accused 2, according to him, was the first to enter the yellow shack and found the deceased on top of K[...]. He pushed the deceased towards the wall of the shack and was then struck by the deceased. According to him he struck the

deceased and pushed him against the wall of the shack so that the deceased could not regain any strength to retaliate.

407. He then called out for Accused 3 to help him and it was Accused 3 who brought the rope with which they bound the deceased. This evidence is in direct conflict with that of Accused 1. After the deceased was bound, Accused 2 testified that they could not leave him inside the yellow shack because the door of the shack was broken and the reason for binding the deceased was that the police could find him easily.

408. The reason for moving the deceased however to the RDP house was because the door of the shack was broken, and it was better for them to move him out of the shack which was not safe and to take him into the RDP house. This does not make any sense to me. If the intention was to guard the deceased until the police arrived, Accused 1, 2 and 3 could have done exactly that. The version of placing the deceased inside the RDP house must be rejected as being not reasonably and possibly true.

409. While he, together with Accused 1 and 3 were moving the deceased towards the RDP house, P[...] arrived and kicked the deceased. Accused 2 admitted that P[...] had told him to leave the deceased alone and let the law take its course. Accused 2 conceded under cross-examination by the state that he had injured the deceased inside the yellow shack. Accused 2 also conceded that after the deceased had been tied up, there was no danger to anyone from the deceased.

410. What appears puzzling is that Accused 2 testified that he did not notice Nothando who assisted P[...] by calling off the dogs who were biting him and conceded that the total number of people around the deceased at the time were five. Accused 2 testified that a crowd was throwing stones from outside the yard towards the property of Accused 1 however, there is no corroboration for the proposition that there were stones in and around the area and the photographs depicting the relevant areas do not reflect any stones lying anywhere in or around the area.

411. Again, counsel for Accused 2 requested that the case relating to Accused 2 stand down so that K[...] could be called to testify. She was unable to take the stand and could be called at a later stage. This did not happen and to the extent that Accused 2 testified about K[...] this evidence must be rejected as hearsay.

412. Accused 2 did not make a good impression upon the court. On the contrary, he was evasive and his description of the sequence of events simply did not make sense given the evidence against him. I accordingly find that the version of Accused 2 is also not reasonably or possibly true and I reject his version.

ANALYSIS OF THE EVIDENCE OF ACCUSED NUMBER 3:

413. Accused 3 testified that on the morning of the incident, he had gone to the bush with his family and returned from the bush between 12:30 and 1 o'clock in the afternoon. While playing Ludo at Accused 2's house they heard a cry for help. Accused 2 jumped the fence to go assist and he followed Accused 2 but used the gate. Nomtandazo's evidence corroborates that the Accused used the gate to enter his parental home.

414. Accused 3 testified that he entered the shack after Accused 2 called him to come help as he was too scared to go in. Despite being scared he eventually went in and found Accused 2 with the deceased pressed into the corner. He further testified that together with Accused 2 they subdued the deceased on the ground. Accused 3 further testified that he found rope in the dining room of the shack which they used to tie up the deceased. The first person to enter the house was Sipiwe and Accused 1 followed. Accused 3 further testified that a mob was throwing stones at the shack. However there is no corroboration for the proposition that there were stones in and around the area and the photographs depicting the relevant areas do not reflect any stones laying anywhere in or around the area.

415. Accused 3 testified that he and Accused 2 took the deceased out of the

yellow shack while Accused 1 was shifting people from the yard of the shack. It is accepted that this accords with S[...], K[...] and P[...]’s evidence that the deceased was taken out of the shack with his hands and feet bound together behind his back. It is Accused 3’s evidence that while carrying the deceased, P[...] kicked the deceased on the face. This evidence is corroborated by Accused 1 and 2. However it is rejected that this evidence is reasonably and possibly true as Accused 3 testified in his own version, when he entered the yellow shack Accused 2 had pushed the deceased against the corrugated iron and the deceased was bleeding from the mouth. Notwithstanding that it was P[...]’s evidence he was injured on his right leg, and it would have been impossible for him to have kicked the deceased.

416. Accused 3 testified that when he left, the deceased was inside the RDP house. However, all of the state witnesses testified and denied that the deceased was ever put inside the RDP house. It is on this basis that Accused 3’s version is rejected as being not reasonably and possibly true.

ANALYSIS OF THE EVIDENCE OF ACCUSED NUMBER 4:

417. Accused 4 testified that he asked Accused 1 who had committed the offence against the children and was informed that it was the deceased who is inside the RDP house. Accused 4 testified that he was not interested in the deceased and while talking to Accused 1 his back was turned towards the gate facing the RDP house and he then left the premises of Accused 1.

418. There was some debate and Accused 5 informed Accused 4 that she had spoken to T[...] with a view to taking the child to a doctor. They entered the motor vehicle and drove off. Again, given the overwhelming evidence against Accused 4 and the evidence Accused 5 to the effect that she does not care if she rots in jail shows that Accused 5 accepted that she assaulted the deceased.

419. I cannot accept the version as reasonably and possibly true. Under cross-examination by the state Accused 4 testified that there was no other person in the

yard at that stage except for Accused 1, Accused 5 and T[...]. He did not see what had happened in the yellow shack and all that he wanted to know is where the deceased is and then he would go and check on his child.

420. Accused 4 was confronted by the state advocate that there was no credible evidence that the deceased was placed in the RDP house. This notwithstanding the Accused maintained that when he arrived the deceased person was inside the RDP house. This in direct conflict with his earlier evidence that the only manner in which he knew that the deceased was in the RDP house is when he asked Accused 1. This was not corroborated by Accused 1. There is no evidence to suggest that Accused 4 actively participated in depriving the deceased of his freedom of movement and he must accordingly be acquitted of the kidnapping charge.

ANALYSIS OF THE EVIDENCE OF ACCUSED NUMBER 5:

421. Despite the testimony of T[...] to the effect that he witnessed Accused 5 and 4 assaulting the deceased while he lay in the yard. Accused 5 testified that when she was called by Ms Mashiane, she noticed Accused 1 standing at the front door of the RDP house. She enquired from him what had happened and noticed the deceased on the floor inside the RDP house. She testified that her immediate reaction was to lunge out to approach the deceased. Accused 1 held her back. Then she left to go to her daughter K[...], who, according to Accused 1 was at Bangiswane homestead. The homestead is close to Accused 1 and S[...]’s home.

422. It was T[...]’s evidence that while Accused 5 was assaulting the deceased, she said to him she does not care if she goes to jail. T[...] further testified that while Accused 4, 5, 7 and 8 were assaulting the deceased. T[...] asked her to stop them and Accused 5 asked what is she going to gain? T[...] offered his car to take K[...] to the clinic to get checked in exchange the assault to stop. Notwithstanding Mr Rakobela’s attempts in cross examination to have T[...] contradict himself, T[...] maintained that he spoke to Accused 5 so she could reason with various Accused as K[...]’s mother. It is for this reason that I reject Accused 5’s version as not being

reasonably and possibly true. However, there is no evidence to suggest that Accused 5 actively participated in depriving the deceased of his freedom of movement and she must accordingly be acquitted of the kidnapping charge.

ANALYSIS OF THE EVIDENCE OF ACCUSED NUMBER 6:

423. Despite the evidence of K[...] that he witnessed Accused 6 assaulting the deceased with a stick and S[...]’s evidence that she saw Accused 6 holding a stick, Accused 6 testified that he was at the tavern at 10 am, and at around 1pm people ran out of the tavern saying a child is being raped. Accused 6 testified that he stood up with Anthony and Rocks to go see this was about 2 and 3 pm. He arrived at the crossroads and upon hearing that Accused 5 had left with K[...] he returned to the tavern. Despite Accused 6’s evidence that K[...] is mistaking him, K[...] identified Accused 6 in court and placed him at the scene on the day.

424. It is on this basis that Accused 6’s version is rejected as being not reasonably and possibly true. However, there is no evidence to suggest that Accused 6 actively participated in depriving the deceased of his freedom of movement and he must accordingly be acquitted of the kidnapping charge.

ANALYSIS OF THE EVIDENCE OF ACCUSED NUMBER 7:

425. All three witnesses, S[...], K[...] and T[...] observed Accused 7 assaulting the deceased. The witnesses placed the Accused at the scene assaulting the deceased. Notwithstanding Accused 7’s version being put to S[...] that she will come and testify that she never assaulted the deceased, Accused 7 in her evidence in chief testified that she assaulted the deceased 3 to 4 times on his genitals. Later, her section 220 admission followed.

426. There is no evidence further to suggest that Accused 7 actively participated in depriving the deceased of his freedom of movement and she must accordingly be acquitted on the kidnapping charge.

ANALYSIS OF THE EVIDENCE OF ACCUSED 8:

427. It is Accused 8's evidence that he left his place to follow the noise, then he saw Accused 5 running with the child following her. He found the child at the crossroad and the child informed him that K[...] had been injured. After learning that Accused 5 and K[...] went to the neighbour's house he took his younger brother and went away. There is evidence by P[...], T[...], K[...] and S[...] that Accused 8 assaulted the deceased inside and outside the RDP yard in the presence of Accused 4 and 5. It was particularly K[...]’s evidence that Accused 8 dragged, kicked and assaulted the deceased with a pipe.

428. It is also P[...]’s evidence that he saw Accused 8 assaulting the deceased with a pipe and continued assaulting him even after T[...] got Accused 4 and 5 to stop. Furthermore, it was T[...]’s evidence that he informed Accused 4 of his dissatisfaction with the manner in which Accused 8 was assaulting the deceased.

429. It is for this reason that Accused 8's version is rejected as being not reasonably and possibly true. However, there is no evidence to suggest that Accused 8 actively participated in depriving the deceased of his freedom of movement and he must accordingly be acquitted on the kidnapping charge.

ANALYSIS OF THE EVIDENCE FOR ACCUSED NUMBER 9:

430. Despite S[...] and K[...]’s evidence that Accused 9 walked over to the deceased, inquired what they said the deceased did, took a pipe and assaulted him. Accused 9 testified that he went to Accused 1's yard because he was informed a girl had been raped and his daughter was not home. He testified that he didn't see his daughter at the crossroads and turned back after briefly talking to Accused 1 over the fence.

431. It is K[...]’s evidence that Accused 9 arrived on a bicycle, made him hold it,

went to where the deceased was and asked what the deceased did. He then took a pipe and assaulted the deceased. Furthermore, it is T[...] and P[...]’s evidence that Accused 9 assaulted the deceased. Accused 9 testified that he was new in the area and did not know a lot of people. He did not assault the deceased as there was no reason for him to do so.

432. It is for this reason that Accused 9’s version is rejected as being not reasonably and possibly true. However, there is no evidence to suggest that Accused 9 actively participated in depriving the deceased of his freedom of movement and he must accordingly be acquitted on the kidnapping charge.

ANALYSIS OF THE EVIDENCE FOR ACCUSED NUMBER 10:

433. It is Accused 10’s evidence that she went to Accused 1’s yard and entered the gate. She asked T[...] what was happening, and he threw his hands up in the air. Then Gogo Nthuli told her that the deceased had raped K[...]. She exited the yard and sat on the grass by the fence. Then Simangele came to her and she gave Simangele her phone to call the police as she was sad and shaking. After Accused 11 arrived and Accused 5 emerged from Bangiswane’s homestead with K[...], they followed them but before they could reach them, they got in the car and drove off. So, they also left.

434. However, it is S[...]’s evidence that she saw Accused 10 assaulting the deceased. K[...] also testified that the Accused arrived with Accused 11 and upon their arrival, they assaulted the deceased using a black pipe. Despite K[...] testifying to the actions of Accused 10 under the name Ntombifuthi, he clarified that is the name she is known by and identified her in court.

435. Ms Simangele Mbhelo was called to testify. She testified that she found Accused 10 seated by the fence. She further testified that Accused 11 arrived after Accused 10 had given her the phone to call the police. She maintained that Accused 11 emerged from the direction of her parental house and testified further that when

she asked Accused 11 where she was coming from, she told her, from her parental house. She then saw Accused 5 and alerted Accused 10 and 11. Ms Mbhelo further testified that she found Accused 10 already there. There was not many people there when she arrived. However she denied seeing the deceased despite being seated on the side of S[...]’s homestead and being able to see Accused 5 from Bangiswane’s homestead.

436. Accused 10’s version is rejected as being not reasonably and possibly true. However, there is no evidence to suggest that Accused 10 actively participated in depriving the deceased of his freedom of movement and she must accordingly be acquitted on the kidnapping charge.

ANALYSIS OF THE EVIDENCE FOR ACCUSED NUMBER 11:

437. Accused 11’s evidence is, as she was approaching the crossroads of Accused 1’s yard, she saw her sister and other people sitting outside the yard. She testified that Accused 10 was sitting down leaning against the fence with both her hands on her thighs. It was T[...]’s evidence that she wanted to assault the deceased and wished that he was not there so that she can deal with the deceased. She testified that she did not see T[...] and did not enter Accused 1’s yard. She only spoke to Accused 10 and Simangele at the scene. She testified that she left the scene because K[...] was leaving to get help and because she was scared. She further testified that she did not see the deceased. However it is K[...] and S[...]’s evidence that Accused 11 assaulted the deceased.

438. Accused 11’s version is rejected as being not reasonably and possibly true. However, there is no evidence to suggest that Accused 11 actively participated in depriving the deceased of his freedom of movement and she must accordingly be acquitted on the kidnapping charge.

ADMISSABILITY OF WITNESSES STATEMENTS:

439. The statements of the state witnesses were all provisionally admitted but not ruled upon, pending the evidence of the police officers involved and aspects which I shall deal with now. All the state witnesses testified that they were not given an opportunity to read their statements and simply asked to sign.

440. The statements purport to be affidavits, bearing the office stamp for commissioning affidavits by the SAPS. It is common cause that the statements were not signed at the police station and then purportedly commissioned at the police station.

441. The *viva voce* evidence of the state witnesses did not accord with their respective statements and the cross examination was tirelessly pursued on the different reasons between the statements and the *viva voce* evidence.

442. In P[...]’s case, he maintained that his statement made to the SAPS contained only what the police officer has asked of him, namely: “who started this incident”, and thus limited to Accused 1, 2 and 3.

443. The evidence of the police officers in relation to the statements were of little assistance to the court. The evidence was aimed at confirming that the contents of the statements contained everything reported by each witness for the state. Regard being had to the statements it can hardly be accepted they diligently met the standard of acceptable investigation of the serious charges. How the officers were able to recollect with such precision that all the statements contain the precise information conveyed to them by the witnesses is troubling.

444. There was evidence that one of the officers had made notes in his pocketbook, then prepared statements back at the police station and returned to the witnesses for signature. The witnesses were adamant that neither of them were afforded an opportunity to read the statements. The witnesses were furthermore sure about what they had told the police officers. In P[...]’s case he told the police officer what they asked of him.

445. I accordingly find that the state witnesses' statements are inadmissible.

446. In K[...]’s case, her affidavit was also handed up provisionally however she did not attend court to testify. Regretfully, the statement is similarly inadmissible.

DOCTRINE OF COMMON PURPOSE:

447. The doctrine of common purpose may be defined as when two or more persons agree to commit a crime by prior agreement, either expressed or implied or where there is no prior agreement by actively associating in the commission of the crime.

448. The application of the doctrine common purpose, and in particular the proper legal foundation of the doctrine as well as the question whether an accused can be convicted of murder on the strength of this doctrine without having caused or contributed causally to the deceased’s death, have been controversial issues over many years. In the leading case of *S v Safatsa* 1988 (1) SA 868 (A), the Appellate Division emphasised the aspect of active association and also held that proof of causation is not a requirement for a conviction of murder in terms of the doctrine.

449. In this case the court stated that if a number of people have a common purpose to kill, the act of that participant to the common purpose who actually caused the death of the deceased is imputed to the other participants who actively associated themselves with the attainment of the common purpose. The participants who actively associated themselves with the common purpose to kill can thus be convicted of murder, provided they also had the necessary *mens rea* (culpability) in respect of the offence.

450. Common purpose and *dolus eventualis* in respect of death: In *S v Madlala* 1969 (2) SA 637 (A) 640 the court stated that an accused will be guilty of murder, *inter alia*, if there is proof that he was a party to a common purpose to commit some

other crime (such as assault, robbery or housebreaking), and he foresaw the possibility of one or any of the participants to the common purpose causing the death of someone in the execution of the plan, yet he persisted, reckless of such fatal consequence, and it occurred.

451. In *S v Mgedezi* 1989 (1) SA 687 (A), it was held that the accused must have consciously shared the common purpose. It is not sufficient that two or more people independently or by coincidence had the same purpose. In other words, it was held that in order to be liable in terms of the doctrine the accused must have collaborated.

452. The fact that the Accused must have consciously shared the common purpose does not mean that the accused must know each other's identity. In cases of murder and culpable homicide, the accused must have actively associated himself with the common purpose while the deceased was still alive and before the deceased had been fatally wounded.

453. In *S v Singo* 1993 (1) SACR 226 (A) at 233C-G, the Appellate Division clarified the principles relating to withdrawal from the common purpose where the common purpose did not arise by means of a prior agreement. The court (per Grosskopf JA) stated:

"If these two requirements (active association and intent) are necessary for the creation of liability on the grounds of common purpose, it would seem to follow that liability would only continue while both requirements remain satisfied or, conversely, that liability would cease when either requirement is no longer satisfied. From practical a point of view, however, it is difficult to imagine situations in which a participant would be able to escape liability on the grounds that he had ceased his active association with the offence while his intent to participate remained undiminished. One must postulate an initial active association to make him a participant in the common purpose in the first place. If he then desists actively participating whilst still retaining his intent to commit the substantive offence in conjunction with the others, the result would normally be that his initial actions would constitute a sufficient active association with the attainment of the common purpose

to render him liable even for the conduct of others committed after he had desisted. This would cover the case, of a person who, tiring of the assault, lags behind or stands aside and allows others to take over. Clearly, he would continue to be liable. However, where the participant not only desists from actively participating, but also abandons his intention to commit the offence, he can in principle not be liable for any acts committed by others after his change of heart. He no longer satisfies the requirements of liability on the grounds of common purpose.”

APPLICATION OF THE DOCTRINE OF COMMON PURPOSE IN THIS CASE:

454. All the Accused were placed at the scene of the crime. According to the eye witnesses they all partook in the assault on the deceased at various stages. On the facts before me, they all formed an intent, at the very least in the form of *dolus eventualis* and must have foreseen that the continuous attack and assault on the deceased, and their participation therein, would lead to his death.

455. In *S v Khumalo* 1991 (4) SA 310 (A) it was stated that an accused must actively associate himself with conduct which constitutes the offence of which he is charged. On the facts before me I accordingly find that all the Accused actively associated themselves with the assault and stand to be convicted on charge number 1, namely, murder (read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997) in that the death of the deceased was caused by the accused, acting in the execution, or furthering of common purpose.

456. On the second charge, based on the facts before me, I find that only Accused number 1, 2 and 3 were actively involved in depriving the deceased unlawfully and intentionally of his freedom of movement. Accused 1, 2, and 3, accordingly stand to be convicted on count number 2 in addition to count number 1.

ORDER AND CONVICTION:

457. The Accused 1 to 11 are hereby found guilty of murder (read with the

provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997) in that the death of the deceased was caused by Accused 1 to 11, acting in the execution, or furthering of common purpose.

458. Accused 1, 2, and 3 are hereby found guilty of being actively involved in depriving the deceased, unlawfully and intentionally, of his freedom of movement.

459. Accused number 4 to 11 are acquitted on the second charge.

G.T. AVVAKOUMIDES
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

REPRESENTATION FOR PARTIES:

FOR THE STATE: Ms E Kabini

Instructed by NDPP

FOR ACCUSED 1: Adv O Matshego

Instructed by: Legal Aid

FOR ACCUSED 2 AND 7: Adv Mogale

Instructed by: Legal Aid

FOR ACCUSED 3: Adv P D Motsweni

Instructed by: Legal Aid

FOR ACCUSED 4: Adv Mathunzi

Instructed by: Legal Aid

FOR ACCUSED 5 AND 9: Adv Rakobela

Instructed by: Legal Aid

FOR ACCUSED 6 AND 11: Adv N Mazibuko

Instructed by: Legal Aid

FOR ACCUSED 8 AND 10: Adv N Monyakane

Instructed by: Legal Aid

FOR ACCUSED 10 AND 11: Adv BA Mahlangu and later replaced by Adv Mazibuko and Adv Monyakane, respectively

Instructed by: Legal Aid