

IN THE HIGH COURT OF SOUTH AFRICA  
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: CC169/07

DATE: 8 APRIL 2008

5 In the matter between:

THE STATE

And

DAVID LANDRINO PAULO

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J U D G M E N T

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FOURIE, J:

The accused is charged with the murder of the following  
15 persons; Charmaine Alfreda Mkona, the deceased in count 1  
("Charmaine"); Petronella Zande Furtak, the deceased in  
count 2 ("Petronella") and Latoya Mkona, the deceased in  
count 3 ("Latoya").

20 Charmaine and Petronella were adult sisters while Latoya was  
the 2-year-old daughter of Petronella. They resided in the  
family home in Guguletu, together with other members of the  
Mkona family. Petronella was formerly married to one Felix  
Furtak, hence her different surname.

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The State alleges that during the early morning of 21 June 2006 and at the Mkona family home, the accused unlawfully and intentionally killed Charmaine, Petronella and Latoya by shooting each of them with a firearm. It is alleged that each  
5 of the murders was planned or premeditated with the result that the provisions of Act 105/1997, read with part 1 of schedule 2 thereto, apply.

In count 4 it is alleged that the accused unlawfully had in his  
10 possession a firearm, the details of which are to the State unknown, without holding a licence, permit or authorization to possess such firearm.

In count 5 it is alleged that he unlawfully had in his possession  
15 ammunition, namely 9 mm bullets while not in lawful possession of a firearm capable of firing that ammunition.

The accused pleaded not guilty to all five counts against him and chose not to provide any plea explanation. He is  
20 represented by Adv Pothier while Adv Jonas appears on behalf of the State.

A pre-trial conference as is presently required in this Division, was held by the parties on the 19<sup>th</sup> of March 2008. The  
25 minutes thereof form part of the record as Exhibit A. In

paragraph (ii) thereof it was agreed that certain admissions were to be made by the accused which admissions were subsequently reduced to writing and handed in as Exhibits C, E, and G. The said exhibits relate to admissions made by the accused with regard to the three deceased respectively. It includes an admission of the correctness of the findings reflected in the three post mortem reports prepared by Dr Bouwer after performing autopsies on the bodies of the three deceased.

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The cause of death in regard to each of the three deceased was a gunshot wound to the head and the consequences thereof. In each case there was a single gunshot wound to the head of the deceased with the entrance wound in the case of Charmaine in the left frontal area, in the case of Petronella the entrance wound was in the left temporal area, while in regard to Latoya the entrance wound was in the right temporal area. In the case of Petronella the post mortem report also shows that she was pregnant with a foetus weighing 1.6kg present in the uterus.

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It is not in dispute that in the early hours of 21 June 2006 the three deceased were shot execution style while sitting in the lounge of the Mkona home. Charmaine was sitting on the couch facing the television, as depicted in photos 6 to 10 of

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Exhibit B. Petronella was found sitting in the chair also facing in the direction of the television with Latoya in her arms. As I have mentioned, each of the deceased had been shot once in the head.

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What has to be determined is whether the State has proved beyond a reasonable doubt that the accused was the person who had murdered the deceased. In its quest to discharge its *onus* the State in the main relies on evidence of a  
10 circumstantial nature.

A Court's approach in drawing inferences from circumstantial evidence was explained as follows in the well-known case of R v Blom 1939 AD 188 at 203:

15 "In reasoning by inference there are two cardinal rules of logic which cannot be ignored.

1. The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.
- 20 2. The proved facts should be such that they exclude every reasonable inference from them, save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must a doubt whether  
25 the inference sought to be drawn is correct."

In R v De Villiers 1944 AD 493 it was explained at 548 that it is not each proved fact which must exclude all other inferences; the facts as a whole must do so. In this regard reference was made to the following passage from Best on Evidence 5<sup>th</sup> Edition, at 298:

“Not to speak of greater numbers, even two articles of circumstantial evidence though each taken by itself, weigh but as a feather, join them together you will find them pressing on the delinquent with the weight of a millstone. It is of the utmost importance to bear in mind that when a number of independent circumstances point to the same conclusion, the probability of the justness of that conclusion is not the sum of the simple probabilities of the circumstances, but is the compound result of them.”

The appellate division in R v De Villiers added further at 508-9 that:

“The Court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together and it is only after it has done so that the accused is

entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way, the crown must satisfy the Court not that each separate fact is inconsistent with the innocence of the accused but that the evidence as a whole is beyond a reasonable doubt inconsistency with such innocence.”

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As stated in R v Saul 2004 (2) SACR 599 at 666H:

“An accused cannot be convicted unless on the proved facts the inference of guilt is not only a reasonable inference but is the only reasonable inference.”

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When it has to be decided whether proven facts allow for a reasonable inference other than the inference sought to be drawn by the State, it should be borne in mind that such other inference also has to be consistent with all the proved facts. In considering the effect of evidence, one need not be concerned with remote and fantastic possibilities, and it is not incumbent upon the State to eliminate every conceivable possibility that may depend upon pure speculation.

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25 The State is not obliged to indulge in conjecture and find an

answer to every possible inference which ingenuity may suggest any more than the Court is called upon to seek speculative explanations for conduct which on the face of it is incriminating. See S v Reddy and Others 1996 (2) SACR 1  
5 (A) at 10.

The evidence shows that the following facts are common cause or in any event not disputed by the accused.

- 10 1. The accused and Petronella were involved in a relationship with each other and Latoya was born of this relationship.
- 15 2. For a period of approximately two to three months during 2003 and 2004, the accused and Petronella had lived together in a room in the back yard of the Mkona home. Thereafter they left and went to live elsewhere, but in 2006 Petronella returned to live at the Mkona home. The accused was a frequent visitor to the Mkona home where he visited Petronella and Latoya.
- 20 3. On 20 June 2006 the accused visited Petronella and Latoya at the Mkona home during the day and later during the evening.
- 25 4. When the accused visited the Mkona home on the evening of 20 June 2006, all three deceased were present in the house. When the accused arrived, Nandi Mkona was already in the bedroom that she and her

cousin Tando had shared. When Wandile Mkona, who slept in the room in the back yard of the Mkona home, went to bed that evening, he left Petronella, Charmaine and Latoya behind in the lounge. When Zolani Mkona, who had watched a soccer game on television during that evening, went to bed, the said three deceased and the accused remained behind in the lounge of the Mkona home. On his own version the accused stayed at the Mkona home until 10 or 11 pm on 20 June 2006.

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10 5. After she had fallen asleep, Nandi was awoken by gunshots. This was in the early hours of the morning of 21 June 2006. After she had raised the alarm, Petronella, Charmaine and Latoya were found dead in the lounge, each with a single gunshot wound to the head. The accused was not on the scene, but he was apprehended at approximately 3:40 am on 21 June 2006 at Nyanga Junction which is approximately 20 minutes walking time from the Mkona home.

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20 I now turn to the evidence of the individual State witnesses upon which the State relies in establishing the guilt of the accused.

Zoliswa Dali was the first State witness and she is an immediate neighbour of the Mkonas. She was a frequent

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visitor to the Mkona home. On 20 June 2006 she visited the Mkona home during the morning, late afternoon and the evening, mainly to watch television. She confirmed that the accused also visited the Mkona home on that day, at  
5 approximately midday and during the evening.

According to her she had left the Mkona home at approximately 9 pm that evening and when she left the accused was still there. She testified that later that night,  
10 approximately between 10 and 11 pm Petronella came to her house to buy cigarettes. She sold cigarettes to Petronella and gave her R7,00 change.

Apparently the arrangement between her and Petronella was that when the late night movie would start, Petronella would  
15 come and call her to view same at the Mkona home. However, Petronella did not return to call her for this purpose, but later that night, according to her it was past 11 pm, one Buti came to her home and said that Nandi had  
20 awakened him and told him that something had happened at the Mkona home. She investigated and found the front door of the Mkona home open, with the television still on.

She entered the home and found the three deceased in the  
25 positions that I have already described.

This witness also testified that when Petronella came to buy cigarettes from her, as I have already described, she, that is Petronella, said that the accused was still at the Mkona home; that she did not want him there and did not know what he wants there. In fact, according to the witness, Petronella described the accused as "that dog". This hearsay evidence of Zoliswa Dali was not admitted as proof of the truth of the contents thereof, i.e. to prove that the accused was still present at the Mkona home when Petronella visited Dali to buy cigarettes.

However, as will appear later, the need for the State to rely on this hearsay evidence has fallen away, as it in fact coincides with the evidence of the accused. Zoliswa described the clothes that the accused was wearing on the 20<sup>th</sup> of June 2006 as a brownish jacket and a pair of jeans, as well as a smallish black Panama hat. She also testified that when she left the Mkona home that night, the accused was sitting in the same corner where he always used to sit. When questioned by the Court she expanded on the relationship between the accused and the members of the Mkona household. She said that they were scared of the accused as they did not know what he might do to them. According to her there were instances in the past when Petronella did not want the accused there and had chased

him away. She then added that on the 20<sup>th</sup> of June 2006 Petronella had also chased him away but that the accused said that he will leave when he feels so. She also testified that in the past the accused would forcefully come into the house well knowing that Petronella was scared of him.

Mr Pothier criticized the witness for not mentioning earlier in her evidence that Petronella had allegedly chased the accused away on the 20<sup>th</sup> of June 2006, but the witness said that she had not mentioned it as she was not asked about it. She insisted that the argument which she had heard between Petronella and the accused when Petronella asked him to leave, happened before midday before the witness had left.

When confronted with her written statement to the police which also does not mention this argument between Petronella and the accused, she replied that the police did not ask her about it. She added that the police officer did not ask her everything that happened and that she was still in shock when she gave the statement. When asked why Petronella would have allowed the accused into the house during the evening, after she had an argument with him earlier, the witness responded by saying:

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"They are scared of him, they don't know what he might do."

The second witness for the State was Zolani Mkona, the son of  
5 Charmaine. He confirmed that in the past there had been arguments between Petronella and the accused and at times when the accused arrived at the Mkona home to visit her, she would ask them to say that she is not there.

10 He says that round about midnight on the 20<sup>th</sup> of June 2006 he was watching a soccer game between Manchester United and Liverpool on the television in the Mkona home. Petronella, Charmaine and Latoya were also in the lounge while Nandi and Tando were sleeping in the bedroom. There was a knock  
15 at the front door and when he asked who it was, the accused identified himself. The witness queried the purpose of the accused's visit at that late hour, but Petronella said that he should open the door for the accused. This he did whereupon the accused entered. The witness continued watching the  
20 soccer game, then went to sleep in a bungalow in the back yard of the Mkona residence.

The witness testified that while he was still in the lounge he overheard the accused saying to Petronella that she should go  
25 for an abortion. He also heard Petronella saying to the

accused that he is not maintaining Latoya, so he cannot tell her to terminate the pregnancy. The witness says that Charmaine then intervened as she was not in favour of the pregnancy being terminated. He added that Petronella also  
5 said to the accused that with the birth of Latoya, he, the accused, told her that he was not ready.

This witness also alluded to past violent behaviour on the part of the accused. According to him there were problems  
10 between the accused and Petronella, particularly in regard to Petronella's former husband, Felix Furtak. He testified that on one occasion when Felix had arrived at the Mkona home in his motor vehicle, the accused had smashed the vehicle with an iron bar.

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The witness testified that after he had gone to sleep, he was awakened by people calling his name from a neighbouring property. He then entered the Mkona home through the kitchen and upon entering the lounge he found the three  
20 deceased seated as I've already described. Then a search was mounted for the accused whereafter Wandile Mkona, some street committee people and the police returned with the accused.

25 Under cross-examination the witness said that he could see

that there was no friendliness between Petronella and the accused on the night in question. As he put it, there was no understanding between them. He also says that after he had gone to bed at approximately 1 am, Petronella had approached  
5 him with a request that he should go buy some cigarettes for her, which he was not prepared to do. He added that whilst he was in the house, earlier the evening, Petronella did not go out to buy any cigarettes. He said that prior to the arrival of the accused at the Mkona home that evening, Charmaine and  
10 Petronella were drinking Vodka in the lounge. However, in his opinion, Petronella was not drunk.

In re-examination he explained that he did not actually see Petronella and Charmaine drinking, but saw the bottle of  
15 Vodka in the lounge and therefore assumed that they were drinking. It was put to the witness that during his conversation with Petronella that evening the accused merely said that he was concerned as to how they would care for another child, but that he did not say that Petronella should  
20 have an abortion. The witness reiterated that the accused did say that she should have an abortion. I should add that the memory of this witness was rather vague on what the accused was wearing on the 20<sup>th</sup> of June 2006.

25 Nandi Mkona, the 18-year old niece of Charmaine and

Petronella, also testified on behalf of the State. She says that after retiring to her bedroom where she and her young cousin, Tando, slept that night, she was approached by Petronella, who said the following to her:

5                   “Nandi, if you wake up in the morning and I’m dead, or if something is wrong with me, you must know it is Landrino (the accused).”

She says that she did not pay much attention to the statement of Petronella as Petronella was under the influence of liquor.

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Thereafter she heard a knock on the front door and this person identified himself as the accused. She then got into bed and fell asleep. Subsequent thereto, she was awakened by the sound of four gun shots. She testified that from where she was lying in her bed, she could see into the lounge which was brightly lit. She saw the accused standing in the lounge. She heard someone in the lounge gasping for air, but was not sure whether this person was hurt or crying. She waited for approximately one minute, and after the accused had moved out of her sight, she woke Tando and asked him to close the bedroom door. This he did and then she jumped out of the bedroom window, ran to Wandile’s room at the back and alerted him. Thereupon Wandile went to investigate.

25 In her evidence in chief the witness was asked whether she

could have been mistaken in her identification of the accused. She answered in the negative, stating that the accused was wearing a brown leather jacket.

5 In cross-examination however, she conceded that she did not identify the accused as such, but the brown jacket normally worn by him. This was a dark brown leather jacket and she never saw anybody else wear such a jacket. She added that he frequently wore this jacket. It was put to her that the  
10 accused says that he did own two brown leather jackets, but when he came out of prison prior to June 2006, the jackets and other items of clothing had been stolen. It was further put to her that on the night in question, the accused was wearing a grey cloth jacket.

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She was shown a newspaper cutting with a photograph of the accused taken on his first court appearance, Exhibit J, in which he appears to be wearing a light coloured jacket. It was put to her that this was the jacket that the accused had  
20 worn on the night in question. The witness denied it, but conceded that in the circumstances it is possible that her recollection might not be reliable. However, she added that she never saw anyone else with that brown leather jacket worn by the accused.

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In reaction to questions put by the Court, the witness confirmed that the jacket was the key to her identification of the accused, but that it was not an unusual jacket. She also conceded that she only had a side on view of the person for a  
5 very small number of seconds and did not see his face.

In our view Nandi was an intelligent and honest witness. She has an excellent command of the English language and did not require the assistance of an interpreter. Her honesty is in our  
10 view, underscored by her concession that given the circumstances in which she had to make this identification, her identification is open to doubt. These circumstances include her awakening from a deep sleep; being in a dark room and looking into the brightly lit lounge; having only a very few  
15 seconds to make the identification; having only a side on view of the person; not seeing the person's face, and basing the identification solely on the brown jacket. If one adds to this the difference there appears to be between her and Wandile's description of the jacket, it becomes clear that it would be  
20 dangerous to rely on Nandi's evidence of identification of the accused.

In S v Charzen and Another 2006 (2) SACR 143 (SCA), Cameron, JA, put it as follows at 147 i to 148 a:

25 "But, as our courts have emphasized again and

again in matters of identification, honesty and sincerity and subjective assurance are simply not enough. There must in addition be certainty beyond reasonable doubt that the identification is reliable and it is generally recognised in this regard that evidence of identification based upon a witness's recollection of a person's appearance, can be dangerously unreliable and must be approached with caution."

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The next witness for the State was Lindiwe Mkona, a sister of Charmaine and Petronella. She testified as to the stormy relationship between Petronella and the accused. According to her the accused had ceased staying at the Mkona residence as he had fights with and assaulted Petronella. She says that on such occasions the accused would force his way into the house and once had threatened them with acid. She says that this was an ongoing occurrence and that they had been threatened by the accused armed with a syringe. According to her there was also an occasion when he assaulted Petronella's ex-husband, Felix.

The witness recounted a meeting which she had with the accused at Nyanga Junction during the morning of the 20<sup>th</sup> June 2006. He had asked her whether she was aware of the

fact that Petronella was pregnant and she answered affirmatively. The accused asked her how many months Petronella was pregnant and who had impregnated her. She answered that she did not know for how many months  
5 Petronella had been pregnant, but said that the only person that was involved with her at the time was the accused. The accused demanded to know why they were allowing Petronella to be pregnant, whilst knowing that she is irresponsible. He added that he was going to take Latoya as Petronella is  
10 pregnant and who is going to maintain the child. He said that as Petronella would not be in a position to look after the child, why did she and her sister not make a plan to terminate the pregnancy. He then said if they did not make a plan to terminate the pregnancy, "he will show me something." He  
15 then left.

Upon her arrival at home, Lindiwe informed the members of the Mkona household what had happened at Nyanga Junction. Approximately an hour later the accused arrived. He informed  
20 Petronella that he wanted Latoya. Petronella advised him that she was not in a position to hand the child to him as she was still washing the child's clothes. The accused remained there playing with the child. The witness says she then went to buy eggs and bread across the road and when she came back the  
25 accused had left. She sat down with Petronella who told her

that she is scared as the accused had said to her that he would shoot her.

This latter part of the witness's evidence was admitted as  
5 proof of the contents thereof. My reasons for admitting same  
are to be furnished later in this judgment. The witness  
testified that when Petronella told her this, she appeared to be  
very scared and as it was during the morning while she was  
still cleaning her house, Petronella was not under the influence  
10 of intoxicating liquor.

During cross-examination it was put to Lindiwe that the  
accused did meet her at Nyanga Junction where they had a  
conversation, but that he was not cross and did not tell her  
15 that Petronella was irresponsible. In addition it was put to her  
that the accused denies that he suggested that they should  
make a plan regarding Petronella's pregnancy.

In response to a question as to what she thought the accused  
20 meant by saying that if Petronella does not have an abortion,  
he would show her something, she stated that she thought the  
accused would assault Petronella or do something bad or  
painful to her. She says that she regarded this as a serious  
threat, with the result that she cancelled a practise session  
25 which she had scheduled and went straight home to tell the

others.

It was put to the witness, with reference to her written police statement, that she was confused and that she had actually  
5 heard from Petronella that the accused had told her that she must not push him to do something that nobody would like. The witness reiterated that it was the accused who had conveyed a threat to her at Nyanga Junction, but she could not explain why it was not included in her police statement as she  
10 said that she is sure that she had told the police about it.

The witness rectified her evidence in chief by stating that when she returned from the shop where she had bought the milk and bread, the accused was still present at the Mkona home. She  
15 says that during her evidence in chief she wanted to correct this, but the prosecutor had already continued asking her other questions, and she accordingly did not have the opportunity to do so. She added that the accused was then busy playing with Latoya and thereafter stood up and said that Petronella  
20 had to prepare the child for him as he will come back later to fetch her. The accused then left. It was then that Petronella told her that the accused had threatened to shoot her. She says that she then tried to calm Petronella, by assuring her that nothing would happen to her. She said that she did not  
25 think that the accused would implement his threat to shoot her

or anyone else, as Petronella was pregnant and in the past he had made a number of threats apparently without executing same.

5 Lindiwe testified that she did mention this threat of the accused to Charmaine, but not to Wandile. She only mentioned it to the latter after the murders were committed. Upon being questioned as to any other boyfriends which Petronella may have had, she stated that apart from an affair  
10 in the early 90's, Petronella married Felix and after her divorce the accused was her only boyfriend.

With regard to the clothing worn by the accused, the witness said when they met at Nyanga Junction during the morning of  
15 20 June 2006, he was wearing a brown leather jacket. She recalls that he wore mustard coloured boots as well. She testified that when he visited the Mkona's during the evening of that day, he was wearing the same jacket as it was cold and the jacket was closed, with the result that she could not see  
20 what he was wearing underneath.

In re-examination she confirmed that she was very familiar with this brown jacket of the accused which he had the habit of wearing for a long period before the incident, probably for  
25 more than a year.

Before dealing with the next State witness, I now furnish my reasons for admitting the hearsay evidence tendered by Lindiwe. This concerns the hearsay evidence of Lindiwe that Petronella had told her that the accused had said to her that  
5 he would shoot her. This hearsay was admitted in the interests of justice as provided in Section 3(1)(c) of Act No. 45 of 1988. This section lists seven factors which the Court should take into account in considering whether hearsay evidence should be admitted in the interests of justice.

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I now deal with the seven factors mentioned in the section.

1. The nature of the proceedings

15 These are criminal proceedings and the Court should be hesitant to allow hearsay evidence against an accused as it infringes upon the right of an accused to a fair trial, including the right to challenge evidence. However, it should be borne in mind that Act No. 45 of 1988 creates a framework for the  
20 admission of hearsay evidence if it is regarded to be in the interests of justice.

2. The nature of the evidence

25 The question to be asked in this regard is whether the

evidence is sufficiently reliable to be admitted against the accused. Put differently, the question is whether there are factors safeguarding the trustworthiness of the evidence.

5 Firstly, in this regard I was of the view that this was not the type of statement Petronella would have made in jest. It seems to me to be the type of statement which a person who was sincere would have made and it has to be borne in mind that shortly after making this statement to Lindiwe, Petronella  
10 was in fact fatally wounded. I was also of the view that there was no basis for a finding that Lindiwe had fabricated her evidence in this regard.

Secondly, I was satisfied that there were sufficient safeguards  
15 for admitting this evidence as reliable evidence. The factors which in my view safeguarded the trustworthiness of the evidence were the following:

(a) Lindiwe testified that immediately before making this statement to her, Petronella  
20 informed her that she was scared. This underscores the sincerity of Petronella in making this statement to Lindiwe. I should add that during the subsequent examination of Lindiwe, after the admission of this hearsay  
25 evidence, she confirmed that Petronella had



5 appeared to be very scared when she made the statement to her. It was during the morning of 20 June 2006 that Petronella made this statement to her while she was her normal self and had not yet had anything to drink.

10 (b) This was a brief, simple statement conveyed by Petronella to Lindiwe. In my view it is improbable that Petronella had misunderstood it when it was made by the accused. It is, in my view, also improbable that when Petronella conveyed it to Lindiwe, Lindiwe would have misunderstood it. It would not have taxed  
15 either Petronella's or Lindiwe's powers of observation and attention, to memorize, retain and convey this simple statement. It was not, for example, a long explanation given by the accused to Petronella which she may have  
20 had difficulty in remembering or which Lindiwe may have had difficulty in remembering and conveying. There was also not a lapse of a long period of time between the time that the accused had said this to Petronella and her  
25 conveying it to Lindiwe.

(c) The making of a threat of this nature seemed to fit in with the evidence of the past conduct of the accused. As alluded to in the evidence of the members of the Mkona family, there was a history of violence on the part of the accused and he was feared by them. On 20 June 2006 there was an argument – or at least a difference of opinion between him and Petronella - regarding her pregnancy. During the morning of 20 June 2006 at Nyanga Junction, the accused threatened Lindiwe, that if they did not make a plan with Petronella’s pregnancy, he would “show her something”. The accused admits that he was in the Mkona home during the morning and during the evening of 20 June 2006 and acknowledges that there was a conversation between him and Petronella regarding her pregnancy. He also confirms that there was a conversation between him and Lindiwe at Nyanga Junction that morning, although he denies that he insisted that they should convince Petronella to terminate her pregnancy or that he uttered a threat of the nature testified to by Lindiwe, if the pregnancy

were not to be terminated.

- 5 (d) When Nandi retired to her room that evening, Petronella came to her and said: “If you wake up in the morning and I am dead or something is wrong with me, you must know it is Landrino.” One would expect a statement of this nature to be made by a person who had been threatened with physical harm by the accused.
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- (e) Petronella’s intake of alcohol would not necessarily have precluded her from remembering and conveying this brief, simple threat to Lindiwe. According to the scientific analysis she had 0,12 grams of alcohol per 100 ml of blood in her body at the time when she was shot. Although this exceeds the present legal limit for driving a motor vehicle,
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- 20 it should be borne in mind that a few years ago a person was regarded as fit enough to drive a vehicle with this amount of alcohol in his or her blood.
- 25 (f) The accused had a full opportunity to cross-

5 examine Lindiwe on the making of the statement by Petronella. He also had the opportunity of cross-examining Lindiwe in regard to Petronella's emotional state, physical condition and the circumstances in which Petronella had made the statement to her.

3. The purpose for which the evidence is tendered

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In the instant case it was tendered by the State to prove that the accused intended to do Petronella harm. Although it was not tendered to prove that the accused actually committed the murder, it was intended to prove a fundamental issue in this case. Although I was of the view that a Court should not easily be persuaded to admit hearsay evidence against an accused, due to the prejudice that it may have for the accused, it should be borne in mind that the evidence was tendered for a compelling reason which should make it more likely to be received than evidence which merely goes to a side issue or for a doubtful purpose.

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4. The probative value of the evidence

25 I considered what the hearsay evidence will prove, if admitted,

and whether it would do so reliably. I have already said that the evidence would prove a fundamental issue in this case, but in view of the abovementioned safeguards, I was satisfied that there was justification for admitting this hearsay evidence.

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In regard to the next factor, namely the reason why the evidence was not given by the person on whose credibility the probative value thereof depends, it is common cause that Petronella, who had made the statement to Lindiwe, is dead.

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In regard to the final factor, i.e. the question whether any other factor requires the admission of the evidence, it should in my view be borne in mind that the only other persons who were present during the murder, namely Latoya and Charmaine, were also dead and could obviously not assist the State in its attempt to discharge its *onus* of proving the guilt of the accused.

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In considering all these relevant factors, I concluded that notwithstanding the prejudice to the accused, in admitting hearsay evidence, there were sufficient safeguards in this instance for the trustworthiness of the evidence and I accordingly admitted same.

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25 I now return to the next witness called by the State, namely

Wandile Mkona. He is the brother of Charmaine and Petronella. He says that on the evening of the 20<sup>th</sup> of June 2006, he returned to the Mkona home and went straight to bed. He slept in the room in the back yard. He confirms that he  
5 was subsequently awoken by Nandi who told him that she had heard shots in the house and people breathing or snorting. Upon being asked whether Nandi had identified any person to him he said that she had told him that she had left the accused in the house and he can be the one who could have done it.  
10 Wandile asked her whether the accused was the perpetrator, but she said that at the time she could not see as she was afraid of showing her face.

The witness then saw a shape moving around in the house  
15 whereafter he, the witness, jumped over the fence to Zoliswa Dali's house and asked her to inform the police what had happened in the Mkona home. He could not identify the shape he had seen moving around in the home.

In cross-examination the witness said that he had suspected  
20 the accused might be involved in doing something bad to the Mkona's as he had been involved in many prior incidents. He also confirmed that Lindiwe had that day told him that the accused had told her to talk to Petronella, "to take the baby out of her tummy."

Upon being asked about the relationships of Petronella, the witness confirmed that Felix and the accused were her only two boyfriends. In answer to a question as to what the accused was wearing on the evening in question, he replied, 5 that he thought that it was a brown leather jacket with patches, as well as blue jeans and yellowish boots. According to him he was familiar with this jacket of the accused and it was made of soft leather consisting of different colours of patches. The jacket, however, was predominantly brown in colour. The 10 witness further testified that he directed the police where to look for the accused, in particular at NY58 No 30, Gugulethu.

Three police officers also testified on behalf of the State. The first was Captain Matentamo, the investigating officer. He 15 saw the accused in the police cells during the day of 21 June 2006. He says that the accused informed him that he does not know anything about this matter and that he had only visited the Mkona home at 10 am. on 20 June 2006. He informed the investigating officer that on the night of 21 June 20 2006 he had slept at NY3A No 2A Gugulethu. He accompanied the accused to this address, which transpired to be a workshop where one Domingoz, to whose evidence I will in due course refer, conducts his business of repairing refrigerators and other equipment.

In the presence of the accused he asked DomingoZ whether the accused had slept there on the night in question and DomingoZ answered in the negative, as he had locked the premises that evening and unlocked same the next morning.

5 He said that DomingoZ confirmed that the accused had helped him to repair certain equipment and that the clothes of the accused were kept at this address. The house was then searched and a suitcase was found which apparently belongs to the accused.

10

According to the witness nothing belonging to the accused was found in the suitcase, but credit cards and a licence belonging to other persons were in the suitcase. No item of relevance to this case was found during the search. According to the  
15 witness he conversed with the accused in English and also explained his rights to him. His impression was that the accused understood this explanation but he found the accused to be difficult and uncooperative during the search.

20 During cross-examination it was put to the witness that he did not inform the accused of his rights, to which the witness responded that the accused is lying. It was also put to the witness that the accused had told him that he had visited the Mkona home the previous night, to which the witness reiterated  
25 that the accused had told him that he was only at the Mkona



home during the morning at approximately 10 am, but that night he was not there. It was also put to the witness that during the search of the workshop the accused had shown him his mattress, blankets and place where he was sleeping. He  
5 responded that the accused did show him a suitcase and clothing but no mattress or blankets. According to his observation there was in any event no space for a mattress to enable one to sleep in the workshop.

10 He was also asked about a red sports bag which the accused maintains was in the workshop, but the witness could not remember seeing it. The witness did recall finding a document on the premises which belonged to the accused. In regard to the credit cards and licence found in the suitcase of  
15 the accused, the witness testified that same were linked to a theft in Table View. He denied that any other documentation of the accused and photos belonging to him were found on the premises.

20 This witness further confirmed that gunshot residue tests were done on the hands of the accused to determine whether he had recently discharged a firearm. He says that the results were negative as no gun shot residue was found on the accused. It was put to him that this was an indication that the accused did  
25 not fire a firearm in the past 24 hours, but he disagreed as in

his knowledge such a test has to be done within two hours after the discharge of the firearm and a person can in any event wash it off his or her hands. It was also put to the witness that after his arrest, before and after this witness had  
5 seen him, the accused was assaulted by various police officers. This the witness denied. He also denied that untoward methods were used to attempt to force the accused to speak.

10 In re-examination the witness said the accused had told him that he resides at the said workshop and that at the night of the incident he was in fact sleeping there. The witness added that the accused told him that he used to stay in Philippi but that he had moved to this address in Gugulethu where he is  
15 now residing, i.e. NY 3A no. 2A.

The next police witness who testified on behalf of the State was Constable Tikayo. He is a member of the Cape Metro Police Stationed at Philippi. He was the driver of the police  
20 vehicle on patrol during the early hours of the morning of 21 June 2006. They were alerted over the police radio that a shooting had taken place at the Mkona home. Upon their arrival at the scene, family members of the deceased informed them that a foreigner is suspected as the perpetrator, whom  
25 they identified as Paulo, that is the surname of the accused.

They then patrolled the area in search of the suspect.

Constable Tikayo patrolled the area, searching for the accused at Nyanga Junction at approximately 3:40 am. He noticed a  
5 man in a phone booth. It was the accused. He greeted the accused in Xhosa, but received no response. However, when he spoke English, the accused responded. He asked the accused what he was doing there and he responded by saying that he was calling friends as he was on his way to Cape Town  
10 and Epping. He asked him what kind of transport he was going to use and the accused said that he intended using the train, upon which the witness responded by saying that at that time of the morning there were no trains. The accused said that he had woken up very early, did not have a telephone, and  
15 thought it was the right time. According to the witness the accused did not have a phone card or money on him and when the police vehicle stopped, he placed the telephone on the receiver with the result that he could not establish whether he was in fact speaking to a friend.

20

The witness then enquired from the accused where he stays. He says the accused said that he resides at NY58 no. 30. As the witness had in the meantime heard over the police radio that members of the family of the deceased were on their way  
25 to NY58 no. 30, he asked the accused to accompany and direct

him to this address. While driving with the accused in the vehicle he noticed that the accused was shaking as if he was cold and was also looking around as if he wanted to run away. This behaviour caused the witness to suspect that the accused  
5 had been involved in the murders. He asked the accused whether he had a girlfriend in Gugulethu to which the accused responded in the negative and said that he had no girlfriend in South Africa.

10 Upon their arrival at NY58 no. 30, they met a police bakkie there and thereafter a second police bakkie arrived with the members of the family of the deceased, including Wandile Mkona and Kenneth Mkona. Upon their arrival Wandile asked the accused why he had killed his sister. According to the  
15 witness the accused did not respond and looked like a sad person, like someone who is remorseful. However, he did not deny this accusation of Wandile. Thereafter the accused was taken to a police van. The witness denied that the accused was ever assaulted in his presence. When asked if he was  
20 familiar with NY3A no. 2A, that is the workshop where the accused maintains that he slept on the night of 20 June 2006, the witness said that he has no knowledge thereof and that the accused did not mention that he stayed there. When asked to comment on the statement of the accused at the phone booth,  
25 that he was on his way to Cape Town at Epping, the witness

said that it amazed him as Cape Town and Epping are two different places. In regard to the statement of the accused, that he does not have a girlfriend in Gugulethu or South Africa, the witness said that the accused added that the reason for  
5 this is that South African girls like money very much.

During cross-examination the witness confirmed, as appears from his written statement made at 5 am. on 20 June 2006, that upon his arrest the accused was wearing a grey jacket,  
10 check shirt, black shoes and black trousers. I should add that the photographs taken of the accused after his arrest, which were subsequently handed in as Exhibit O, confirmed this evidence of the accused. It was put to the witness that when he noticed the accused in the phone booth, he was in fact  
15 phoning a friend as he was on his way to Cape Town to work. The accused denies that he said that he was also on his way to Epping and this is borne out by the written statement of the witness in which he says that the accused had informed him that he was on his way to Cape Town to work. It was also put  
20 to the witness that the accused was on his way to Cape Town to take up a job as a mechanic, but the witness said that the accused did not mention this to him. It was also put to the witness that the accused says that he had money as well as a cell phone, but that his airtime had run out, therefore he used  
25 the public phone. The witness responded by saying that he

did not see any money or a phone card on the accused. When it was put to him that he saw the accused using the phone, and no one would use a phone without money, he responded by saying that this was a card phone and the accused had no card  
5 on him. It was then put to him that the accused informed him that he has a girlfriend in Gugulethu and that he gave him Petronella's address. The witness reiterated that the accused said that he had no girl friend in Gugulethu or South Africa.

10 Mr Pothier further put it to the witness that the accused was in fact taking them to his residence at NY3A no. 2A, but when they passed NY58 no 30 and saw the police bakkie there, the witness stopped. According to the accused he was taking the police along NY58 to NY3A no. 2A which joins up with NY58.  
15 This was denied by the witness who says that he was informed by the accused that he resides at NY58 no. 30 and did not mention anything about NY3A no 2A.

In re-examination it was established that the witness was  
20 unfamiliar with the area and that the accused was directing him. He reiterated that at NY58 no. 30 the accused said that he was staying there. In response to a question by the Court the witness said that the initial report which he had received, merely referred to the crime of murder and that he does not  
25 recall any reference to any other crimes such as

housebreaking, robbery or theft having been committed that night at the Mkona home.

In further examination by Mr Pothier it was put to the witness  
5 that when Wandile accused him of killing his sister, the  
accused responded with words to the effect that Wandile was  
talking nonsense. The witness says that this did not take  
place in his presence. Finally, in response to a further  
question by Mr Jonas, the witness said that if the initial report  
10 had referred to other crimes that had been committed at the  
scene, he would have remembered same.

Constable Cino of the SAPS Flying Squad, Maitland, testified  
that upon receipt of a report during the early hours of the  
15 morning of 21 June 2006, he went to the Mkona home. There  
he found the three deceased and a family member told him  
that the person who had committed the offences is the lady's  
boyfriend, who had apparently run in the direction of NY21. A  
family member, Kenneth Mkona, directed him to a house in  
20 NY21 but the perpetrator could not be found there.

Thereafter they went to NY58 no. 30 where another family  
member, Wandile Mkona, pointed out the accused. According  
to him the accused appeared confused as if he did not know  
25 what he was looking for. The witness says that he knows the

area well and that walking time from the Mkona home to NY58  
no. 30, would be approximately 15 to 20 minutes. In  
response to questions put by the Court, he said that at the  
murder scene nobody had actually seen the perpetrator and  
5 there was only speculation in this regard.

Mr John Domingoz, the owner of the workshop at NY 3A no 2A,  
was also called by the State as a witness. He confirmed that  
for a period of four weeks prior to 21 June 2006, the accused  
10 had worked for him. He said that he had no agreement with  
the accused authorising him to stay at the workshop.  
However, he was aware that the accused stored a suitcase at  
the workshop as well as his clothes.

15 He also confirmed that the accused had a piece of sponge or  
foam rubber at the workshop, which could be used as a  
mattress. In addition there was a blanket of the accused.  
There was also a place to cook and cooking utensils. The  
witness initially denied that the accused had slept at the  
20 workshop, as he said that he had the only key with the result  
that the accused could only have slept there if he had  
unlocked the door for him.

It was put to him that the accused would say that the witness's  
25 partner, one Vuyo, had a second key for the workshop which



he had given to the accused. According to the accused he had for two or three nights prior to 21 June 2006, come into the workshop after the witness had left and slept there for the night. The witness said that he had no knowledge thereof but  
5 confirmed that if Vuyo had given the accused a key, he would have been able to gain entry to the premises. He also confirmed that the accused had asked him whether he could keep his clothes at this address as he had no place to sleep and that he had agreed thereto.

10

When it was put to him by Mr Pothier that the accused also kept a red sports bag on the premises, which contained photographs and documents of the accused, the witness said that he could not recall same. He confirmed that on 20 June  
15 2006 the accused was at his workshop from approximately 1 pm. to approximately 5 pm. Vuyo was also present. The witness said that he, the witness, closed the shop at approximately 5:30 to 6 pm. and reopened it at approximately 8 am the next morning.

20

The witness also confirmed that the police had searched his premises but says that they did not threaten him and that he had only heard them talk about a gun that they were looking for. He could not remember whether the police had in fact  
25 taken away a sports bag of the accused with documents.

Upon being questioned about the physical condition of the accused, who accompanied the police during the search, the witness says that he did notice that there was blood dripping from the nose of the accused. He also said that the clothes of  
5 the accused were, as he put it, not correct, by which I understand him to say that the accused appeared disshelved and he agreed that the accused did look like someone who could have been beaten.

10 With regard to the clothing of the accused, this witness testified that when the police brought him to the premises, the accused wore a check shirt and he couldn't remember whether the accused had worn a jacket. He confirmed that the previous afternoon the accused had worn the same shirt but he  
15 did not see him wearing a jacket. He confirmed that after the accused had come out of prison, he told him that some of his clothing had been stolen. He could not recall whether the accused had told him that his brown jacket had also been stolen, but agrees that the accused did then give him his black  
20 jacket.

In re-examination, when asked whether there was sufficient space for the accused to sleep at the workshop, the witness said that one can try and squash yourself in there, but in his  
25 view there was too much stuff around for a person to sleep in

the workshop. When asked whether he would have expected Vuyo to have told him about an arrangement with the accused to sleep at the workshop, he said that he did not expect Vuyo to have told him.

5

On the issue of the brown jacket of the accused, Domingoz was required to produce the jacket. The brown jacket that he referred to appeared to be a suedish light brown jacket with removable sleeves. According to the witness it was not the  
10 same brown leather jacket which the accused had previously worn and which he alleges had been stolen. The light brown suede jacket which the witness produced, was used by the accused when working for the witness. The witness also confirmed that the accused owned a grey cloth jacket.

15

The witnesses Wandile and Nandi Mkona were recalled on the issue of the jacket. When shown the aforementioned light brown suede jacket, Wandile, after some hesitation, stated that this was not the dark brown leather jacket which the accused  
20 was fond of wearing. He said that the accused had many different jackets and the evidence shows that he did previously trade in the sale of jackets.

According to Wandile, on the night of 20 June 2006, he noticed  
25 that the accused was wearing a brownish jacket and accepted

that it was the one he had normally worn. However, he stated that he could not be sure. He added that he did not see the accused wear a jacket of the type of fabric of the light brown suede jacket presently before the Court.

5

Nandi stated emphatically that she had never seen the accused wear this light brown suede jacket with removable sleeves. In regard to Domingoz, I should add that in cross-examination he confirmed that on one occasion, one Paul, a  
10 mechanic, came to the workshop and spoke to the accused about the possibility of employing the accused as a mechanic.

The State then closed its case.

15 The accused testified in his defence and called one witness, namely Inspector Manuel of the SAPS, who is an official forensic field worker of crime scenes, stationed at the local Criminal Record Centre, Mitchell's Plain.

20 The accused is an Angolan citizen, born in 1971 and he says that he came to South Africa in 1993. He is the holder of a refugee permit which is renewed from time to time. He described to the Court how he had met Petronella in 2000 and a relationship developed between them. He had a good  
25 relationship with her, but the family was not willing to accept

him as her boyfriend, *inter alia*, because he is a foreigner. This relationship lasted for approximately two years, but Petronella also formed a relationship with Felix Furtak, whom she married in 2003. There was one child born of their  
5 marriage, namely Tando. However, Petronella subsequently returned to him and they continued their relationship and Petronella divorced Felix.

According to the accused, he had a good relationship with  
10 Petronella, but problems between him and her family members continued. It is clear from his evidence, as well as the evidence of the State witnesses, that the accused was not on good terms with most of the members of the Mkona household. As I previously mentioned, he also had a strained relationship  
15 with Furtak and ended up in jail after attacking Furtak and damaging his vehicle. The accused says that notwithstanding these problems, he had a good relationship with Petronella, although he frequently had to speak to her regarding her excessive smoking and drinking. This was especially the case  
20 when Petronella fell pregnant with Latoya. The accused conceded that during their relationship he did at some stage physically manhandle Petronella by pushing her. The accused says that he was very pleased when he heard that Petronella was pregnant with Latoya and after her birth he was very fond  
25 of her and often played with her. According to him he was

always there for the child and contributed to her maintenance.

The accused recounted that upon his release on bail from jail in February 2006, he discovered that his possessions including  
5 clothing which he had left at his residence in Philippi, had been stolen. He then rented a room at NY59 in Gugulethu and lived there for approximately two months. He commenced working for John Domingoz at his workshop at NY3A No 2A in Gugulethu. Due to problems with his lessor he requested  
10 Vuyo, the partner of Domingoz, to give him the keys to enable him to sleep at the workshop. Vuyo agreed and he slept at the workshop for approximately a week, which would be the week prior to and including 20 June 2006.

15 He testified that during the morning of 20 June 2006 he met Lindiwe at Nyanga Junction. He asked her to tell Petronella to prepare Latoya for him. He wanted to buy Latoya a present. He denies that he discussed Petronella's current pregnancy with Lindiwe or that he had made any threats to her  
20 in this regard. He says that when Petronella had fallen pregnant she had told him and he was very happy to have another child. The accused described how he then went to Petronella's house, to fetch Latoya, but as she was still sleeping he had to wait. After the child had awoken he played  
25 with her, waiting for Petronella to finish cleaning the house, so

that she could prepare Latoya for him.

It was then, he says, that he received a telephone call from Paul regarding a job offer. He explained that he had met Paul  
5 at the workshop the day before and that Paul had told him that his employer requires three mechanics. He asked Paul to speak to his supervisor and to come back to him. According to the accused Paul told him during the telephone conversation that he was at the workshop of Domingoz and the accused  
10 undertook to leave immediately and to meet him there to discuss details of the job offer. He left without Latoya but when he arrived at the workshop, Domingoz informed him that Paul had already left.

15 He became involved with other work at the workshop, and although he was in possession of Paul's cell number, he forgot to phone him. He then described how Petronella had phoned him after work to invite him to her home. He accepted the invitation and arrived at the Mkona home past nine pm. He  
20 says that he wore black trousers and a striped shirt and a grey jacket. In addition he wore a typical Andy Cap cap with which Latoya was fond of playing.

He confirmed that on his arrival at the Mkona home that  
25 evening, the door was closed and he had to knock and identify

himself before he was let in by Zolani on the instructions of Petronella. According to him Petronella had invited him to sleep over as Charmaine was on her way out with her boyfriend. He sat in the lounge with the other members of the  
5 Mkona family, but Charmaine's boyfriend did not arrive and he eventually decided to leave. He confirmed that prior to him leaving, Petronella did leave the house to buy cigarettes and returned with the cigarettes, which they smoked. In fact, he says, he provided her with the money to buy the cigarettes.

10

The accused denies that he at any stage insisted that Petronella should have an abortion. According to him he left the Mkona home between 10 and 11 pm. He says he then walked to the workshop which, on his evidence, would have  
15 taken him in the vicinity of 20 minutes to reach. At the workshop he prepared the place where he usually slept and fell asleep. However, he awoke in the early hours of the morning before 4 am., remembering that he had not yet contacted Paul. As he had run out of cell phone airtime, he decided to walk to  
20 Nyanga Junction where there were two public phone booths. This is approximately one street block from the workshop.

According to the accused he attempted to contact Paul on the public pay phone, but there was no reply. It was then that he  
25 was approached by the police, in particular Constable Tikayo,



as I have already described. He says that he told Constable Tikayo that he was phoning a friend regarding a job, to say to him to meet him at Cape Town Station as he didn't know what the friend's address is. He confirms that upon the request of  
5 the policeman he provided his name and directed the police to his place of residence at the workshop.

On the way, he says, they passed NY58 No 30 where they encountered a police bakkie. They stopped and Wandile and  
10 Kenneth were there too. Wandile asked him why he had killed his sister and he said: "You are talking nonsense." He was then apprehended by the police and in due course assaulted and tortured by them. He recalled that at one stage "things were taken from his hands" which was probably the gun shot  
15 residue test performed on his hands. He also informed the Court that he does not own a firearm, nor is he the holder of a licence to own a firearm.

In his evidence in chief he was asked whether he had any idea  
20 who else could have committed the murders, to which he responded in the negative. However, when pressed on this issue in cross-examination, he said that Petronella's former husband, Felix Furtak, was a likely candidate.

25 In regard to the whereabouts of Paul, the accused said that he

does not have his phone number anymore, but maybe Domingoz should be asked whether he has it. It does, however, appear that Domingoz and Paul did not do business with each other. I should add that the partner of Domingoz to whom reference has been made, namely Vuyo, has subsequently passed away. I should also mention that notwithstanding several attempts, Mr Pothier, with the assistance of the Portuguese interpreter, Mr Manuel, was unable to trace Paul.

10

Inspector Manuel, to whom I have already referred, was called as a witness by the accused. He conducted the gunshot residue test on the hands of the accused at 4:20 am. on 21 June 2006 i.e. two hours and ten minutes after the estimated time of the murder of the deceased. He confirmed that the test was negative although it was done within the two to two and a half hour period required for the obtaining of reliable results.

20 He also informed the Court that no test was done on the clothing of the accused for the presence of any gunshot residue. He confirmed that a person may wash or otherwise clean the residue from his or her hands. In this case he could not say whether the accused had washed his hands or not.

25 He took photographs of the accused, Exhibit O, which show

that after his arrest he was wearing a grey jacket, checked shirt, black trousers and black shoes. It also shows that the accused possibly had injuries to his left eye and forehead.

5 The witness also said that he found the position of the bodies at the scene to be unusual, as if they had been shot execution style. Finally he testified that Gugulethu is a crime hotspot. In fact, it has the third highest murder rate in the Western Cape.

10

This concluded the case for the accused.

The aforesaid analysis of the evidence shows that insofar as the actual shooting of the deceased is concerned, there is no  
15 reliable, direct evidence linking the accused to the commission of the crimes. He has not reliably been identified as being on the scene when the shots were fired. In fact, in an effective exhibition of cross-examination as to identity, Mr Pothier demonstrated that Nandi did not identify the accused, but only  
20 saw a person wearing a brown leather jacket, which jacket she believed to be similar to the one which the accused was fond of wearing.

As I have already mentioned, she conceded that the key to her  
25 identification was the jacket and, having regard to the

circumstances prevailing, that her recollection might not have been reliable. In addition thereto, no firearm was found in the possession of the accused, linking him to the commission of the crimes. Nor, as I have also mentioned, was any gunshot  
5 residue found on his hands. Also, when the accused was subsequently apprehended at Nyanga Junction, he was wearing a grey cloth jacket and not a brown leather jacket. As I have mentioned, in any event, the two witnesses upon whom the State relies in this regard, do not seem to describe  
10 the same jacket. Nandi describes it as a not unusual brown leather jacket, while Wandile describes it as a brown jacket consisting of patches.

In view thereof, the State is left with a case based entirely on  
15 circumstantial evidence. As was the case in R v Blom, supra, the circumstantial evidence on which the State relies, can be arranged under three heads, namely:

- 20 1. Evidence of the conduct of the accused before the event, showing that he has a violent nature and had conducted himself in a manner showing that he had a motive for, and intended, killing the deceased;
2. Evidence to show that the accused had an opportunity to kill the deceased; and
- 25 3. Evidence of the conduct of the accused after the

event pointing to his involvement in the murders.

I will deal with each of these categories of evidence and consider same in conjunction with the evidence as a whole, including that of the accused, to determine whether an inference that the accused had committed the murders, is consistent with all the proved facts and whether the proved facts exclude any other reasonable inferences, particularly the inference that someone else, and not the accused, may have committed these murders.

I have to a certain extent already dealt with the conduct of the accused prior to the murders, including his conduct on the day and evening of 20 June 2006. It is clear to us that the evidence shows that the accused has an aggressive, even violent, nature. This was described by virtually all of the members of the Mkona family, as well as Zoliswa Dali, and is illustrated by his attack on Furtak and his vehicle. In our view the evidence also shows that he has a possessive nature, particularly insofar as Petronella and Latoya were concerned.

On the 20<sup>th</sup> of June 2006 he threatened Lindiwe and according to the hearsay evidence which was admitted, he threatened to shoot Petronella. The pattern which emerges from the evidence is, in our opinion, clear. Here is a man who

conducted himself in a manner showing that he could erupt and commit crimes of violence. The evidence of the State witnesses, that he wanted Petronella to terminate her pregnancy, is convincing and the State witnesses corroborate  
5 each other in this regard.

The argument which, according to the State witnesses, ensued in regard to Petronella's pregnancy, could have served as the flame to ignite his short fuse. Although we accept that the  
10 accused probably loved Petronella and Latoya, we believe that in view of the peculiar circumstances prevailing this day and evening, as well as the evidence of his conduct leading up to this terrible event, we are justified in inferring that he was capable of committing these murders.

15

Turning to the second category of evidence, it is clear that the accused did have the opportunity to kill the deceased. On his own version he was in the Mkona home until late on the night of the 20<sup>th</sup> of June 2006. He says that he left between 10 and  
20 11 pm, but nobody saw him leave. He could just as well have remained in the house and have committed the murders which took place shortly thereafter.

It follows that the evidence is capable of supporting the  
25 inference that the accused did have the opportunity of killing

the deceased. By the same token, however, the evidence may also support an inference that he was not on the scene at the time of the shooting. That was his evidence and as already mentioned, there is no reliable evidence linking him to the  
5 actual shooting of the deceased, or proving that he was present when the shooting took place.

In considering the conduct of the accused after the deceased had been murdered, there are, in our view, certain  
10 unsatisfactory aspects in his evidence. We are not at all convinced of the truthfulness of his account of what had transpired after he had left the Mkona home that night. A few examples will suffice:

15 His unconvincing explanation as to how he had forgotten to phone Paul regarding the job interview; his strange behaviour in attempting to phone Paul at approximately 4 am. to arrange the job interview; his total ignorance as to the location and nature of  
20 his proposed future employment, yet he attempts to phone Paul at 4 am to arrange to meet him at Cape Town Station; his failure to inform his close friend and good Samaritan, John Domingoz, of the fact that he is sleeping at the workshop without  
25 Domingoz's consent; and, finally, providing the

police with information which conflicted with his evidence.

The question, however, is whether this subsequent conduct of  
5 the accused justifies the conclusion that he was involved in the  
murders. These discrepancies in his evidence would probably  
not justify such a conclusion on their own, but the questionable  
conduct of the accused after the murders of the deceased,  
should be placed in the scale in determining whether in the  
10 light of all the evidence an inference that the accused was  
involved, is justified.

It is our considered opinion that the evidence as a whole  
justifies the reasonable inference that the accused was  
15 involved in these murders. However, that is not the end of the  
enquiry. What also has to be decided, is whether the  
evidence as a whole excludes the drawing of any other  
reasonable inference. In particular, do the proved facts  
exclude the drawing of an inference, as a reasonable  
20 inference, that it was not the accused, but some other person  
or persons, known or unknown, that had committed the  
murders.

In this regard it should, once again, be borne in mind that  
25 there is no direct evidence linking the accused to the



commission of the crimes. He was not identified as being on the scene. No gun was found in his possession and no gunshot powder residue was found on his hands. We also have to take into account the fact that when he was arrested 5 shortly thereafter, he was not wearing a brown leather jacket, but a grey cloth jacket. When approached by the police at the phone booth, he did not attempt to flee and, upon request, provided his correct name. At the time of his arrest, his sleeping gear and possessions were at the workshop of 10 Domingo and the latter confirmed that Paul did visit the workshop to discuss a workshop offer with the accused.

If one departs from the premise that the murders were committed by one person, who was known to the Mkona's and 15 allowed by them to enter the house, the question arises who, apart from the accused, may have been in such a trusted position and have had the necessary motive to kill the deceased. In particular, it has to be considered whether, as suggested by the accused, that it was not him, but Felix Furtak 20 who may have committed these crimes.

Turning to Furtak, we know that he is the ex-husband of Petronella, who had left and divorced him to return to her former lover, the accused. It is also clear that Furtak was still 25 actively involved in the affairs of Petronella. The evidence

shows that he tried to win Petronella back to the extent that, according to the accused, he had tried to persuade Petronella and the accused that she should spend time with him, even on Valentine's Day. He was in the habit of sending the accused  
5 messages in this regard. According to the accused, Furtak even hosted parties at the Mkona home while the accused was in jail.

Furtak, the accused says, also wanted custody of Tando. He  
10 is the father of Tando, but apparently the authorities caused the removal of Tando from his care shortly before the fateful events of this night and placed the boy in Petronella's care. This is confirmed by the contents of the newspaper article, Exhibit J. According to the accused, Furtak also wanted to  
15 have custody of Latoya, the child of Petronella and the accused. There is also the strange message which the accused said he had received from Furtak, namely, that they should meet in a public place before it is too late.

20 It should also be borne in mind that Furtak and the accused had previously been involved in a physical confrontation which resulted in the accused spending some time in jail. We also have no evidence, especially from Furtak, to gainsay this evidence of his emotional involvement in the lives of  
25 Petronella and the accused.

In our view, it is, in these circumstances, reasonable to infer that Furtak may have had the motive and also the opportunity to have committed these crimes. This obviously does not amount to a finding that Furtak was actually involved in  
5 committing these crimes, but in our opinion the evidence as a whole reasonably permits this inference to be drawn.

Our considered view, however, is that the inference that the accused had committed these crimes, is, on the evidence  
10 before us, and based on the premise that only one person was involved, clearly the more probable or plausible inference to be drawn from the evidence as a whole.

On the other hand, however, there is evidence which tends to  
15 show that the murders may have been committed by more than one person. Three shots were fired, each killing one of the deceased. Ballistic tests done on the spent cartridges found on the scene, as well as some fragmented bullets and bullet jackets recovered from the bodies of the deceased, are  
20 inconclusive as to whether the shots were fired in the same or different firearms. Also the positions in which the three deceased were found, indicate that they had made no attempt to move out of harms way, nor did they make any attempt at all to protect themselves, for example by shielding themselves  
25 with their arms or hands.

As suggested by Inspector Manuel, it appears as if they were shot execution style with more than one perpetrator involved, which resulted in them not fleeing or having an opportunity to take evasive action. If the murders had been committed by  
5 one person only, logic seems to dictate that after the first shot had been fired, the remaining two victims would have at least made some effort to move out of harm's way.

It follows, in our view, that there is also room for the drawing  
10 of a reasonable inference that the murders were committed by more than one unknown persons, who had gained access to the house. It should be borne in mind that, according to the evidence, this is an extremely dangerous area. Inspector Michael described it as one of the most dangerous areas in the  
15 Western Cape, with the result that an inference that other perpetrators had committed the murders cannot be rejected as mere speculative or fanciful.

We are, however, of the view that the inference that the  
20 accused had committed the crimes, remains the more probable or plausible inference to be drawn from the evidence as a whole. In a civil trial, where the *onus* is discharged on a balance of probabilities, we believe that a decision in this case would in all likelihood have gone against the accused. But  
25 this is a criminal trial, in which the State has to prove beyond

a reasonable doubt that the accused had committed the crimes.

In view of our finding that the evidence permits the drawing of  
5 other reasonable inferences, we are bound to allow the  
accused the benefit of the doubt and to find that the State has  
not proved his guilt beyond a reasonable doubt.

Mr Paulo, you are accordingly found NOT GUILTY AND  
10 DISCHARGED ON ALL FIVE COUNTS AGAINST YOU.

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FOURIE, J