

IN THE HIGH COURT OF SOUTH AFRICA

REPORTABLE

KWAZULU-NATAL, DURBAN

CASE NO: CC69/09

In the matter of:

THE STATE

Versus

- 1. MZWANDILE MKHIZE**
- 2. THAMSANQA KWEYAMA**
- 3. SANDILE SHABALALA**
- 4. MFUNDO GABELA**
- 5. MTHONKOSIZI MAKHANYA**
- 6. STEMBISO MKHOLO**

J U D G M E N T

CHILI, A.J.:

[1] The accused are Mzwandile Mkhize, Thamsanqa Kweyama, Sandile Shabalala, Mfundo Gabelo, Mthokosizi Makhanya and Stembiso Mkholo. For the purpose of this judgment they are going to be referred to as accused No's 1, 2, 3, 4, 5 and 6 respectively.

{1.1} Besides the fact that accused No 2 is the oldest, they (the accused) are relatively young men aged 21, 29, 16, 19 21 and 18 years respectively.

[2] All accused are charged with 3 counts. In count one they are charged with robbery with aggravating circumstances, in count two they are charged with murder and in count three they are charged with attempted murder.

{2.1} All these offences are said to have taken place on the same day i.e. on 19 April 2008 almost at the same time.

[3] The State alleges that the accused attacked STHEMBISO EMMANUEL MAPHUMULO the complainant in counts one and three, (hereinafter referred to as Maphumulo or the complainant), whilst he was seated with his girlfriend (the deceased) in a car. They (the accused) fired two shots at the car, one of which killed the deceased, and then took from them (Maphumulo and the deceased) a handbag with its contents together with a cellular phone belonging to the deceased, Maphumulo's waist belt as well as his wallet containing cash.

{3.1} The State alleges further that the accused attempted to murder the complainant (Maphumulo).

[4] When the charges were put to the accused, they pleaded not guilty and through their legal representatives, Ms Lazarus for accused No. 1, Mr Badri for accused No. 5 and Ms Gyapersad for accused No.'s 2, 3, 4 and 6, elected to remain silent and put the State to proof of allegations levelled against them.

[5] Addressing the Court in terms of Section 150 of the Criminal Procedure Act 51 of 1977 (hereinafter, "the Act") Ms Vahed for the State submitted that the State would be relying on the evidence of a single witness to prove its case against all 6 accused. That witness turned out to be Maphumulo.

[6] In agreement with counsel for the accused Ms Vahed handed up the following exhibits:

{6.1} **EXHIBIT A:** Admissions made by the accused in terms of S220 of the Act, dealing with the body of the deceased from the time it was removed

from the scene of crime to the time that a post mortem examination was conducted on it by Dr THRENESAN NAIDOO.

{6.2} **EXHIBIT B:** Post Mortem Examination Report by Dr THRENESAN NAIDOO, dealing with the examination done on the deceased's body on 21 April 2008.

{6.3} **EXHIBIT C:** Photograph album of scenes of the crime comprising photographs taken on 19 April 2008 by Sgt. RAMANNA, of various scenes including the deceased's body.

{6.4} **EXHIBIT D:** Ballistic Report compiled by Sgt. SHAMLALL dealing in the main, with two spent cartridges recovered at the scene.

{6.5} **EXHIBIT E:** Admissions by all accused made in terms of Section 220 of the Act in respect of (hereinafter I.R.O.) identification parades held at different times where the accused were identified by Maphumulo.

{6.6} **EXHIBIT F:** Notes of identification parade I.R.O. accused No. 1.

(6.6.1) **EXHIBIT G:** Photograph album relating to identification parade where accused No. 1 was identified.

{6.7} **EXHIBIT H:** Notes of identification parade I.R.O. accused No.'s 2, 3, 4 and 5.

(6.7.1) **EXHIBIT I:** Photograph album I.R.O. identification parade where accused No.'s 2, 3, 4 and 5 were identified.

{6.8} **EXHIBIT J:** Notes of identification parade I.R.O. accused No.6.

[6.8.1] **EXHIBIT K:** Photograph Album I.R.O. identification parade where accused No. 6 was identified.

[7] Before I deal with Maphumulo's evidence let me hasten to say that all identification parades were manned by Inspector Shabangu of Kwa Mashu police station. I intend commenting on the identification parades later on in my JUDGMENT.

[8] The evidence of Maphumulo can be summarised as follows:

{8.1} He was with the deceased on the day that they were attacked by the accused. They had been travelling in the deceased's motor and she (the deceased) was the driver.

{8.2} They had been at Newlands visiting a friend and at approximately 4 a.m. they decided to proceed to his place (Maphumulo's place) at F – Section, Kwa Mashu, to retire for the day. They got home at approximately 4:30 a.m.

{8.3} Before proceeding into the house, they parked off in the driveway for a couple of minutes, talking.

{8.4} In his evidence-in-chief Maphumulo seemed to suggest that when they were attacked they had just gotten to the driveway leading to his place. He told the court that the headlamps of his motor vehicle were burning and they shone in the direction towards the front of the motor vehicle. The motor vehicle they were travelling in was stationary at the time. He (Maphumulo) was seated in the passenger seat and the deceased was seated in the driver's seat.

{8.5} He then saw the six males walking past the sides of the motor vehicle and they stood at a distance of approximately 7 meters in front of the car. They had a brief discussion amongst themselves and thereafter confronted them (Maphumulo and the deceased).

{8.6} They split themselves into two groups of three each, the one group proceeding towards the driver's side and the other towards the front passenger side of the motor vehicle.

{8.7} Accused No. 1 was in the group that confronted the deceased. He was in possession of a firearm. As he got to the driver's side of the motor vehicle he tapped onto the side window with the barrel of the firearm and shouted "Open, open, open the window."

{8.8} Immediately thereafter two gunshots rang out, one after the other. The first bullet struck the side window of the driver's door and the other struck the driver's door.

{8.9} Maphumulo then alighted from the motor vehicle and as he did, he was confronted by the three people who were by his side. They demanded money and as they did, they searched him.

(8.9.1) Accused No. 2 took a wallet containing the bank card and cash in the amount of R120. Accused No.4 took the belt.

{8.10} Accused No. 5 took the deceased's bag from the boot of the car. Inside the bag was a cellular phone belonging to the deceased, a Motorola described in count one.

{8.11} According to Maphumulo, accused No.'s 3 and 6 did nothing besides advancing towards him with the group.

{8.12} The accused then fled the scene. At a distance of approximately 20 meters from the scene accused No. 1 fired a shot into the air.

{8.13} Immediately after the accused fled the scene, Maphumulo sought assistance of a neighbour who works at Prince Mshiyeni Hospital who came to the scene and confirmed the deceased dead.

{8.14} Questioned about the visibility at the scene at the time they were attacked by the accused, Maphumulo told the Court that it was good.

(8.14.1) He stated that the headlamps of the deceased's motor vehicle were on and they shone in the direction of where the accused were standing immediately before they launched an attack.

(8.14.2) In addition to that, so he testified, there was light coming from the bulb of a nearby house.

{8.15} Maphumulo told the court that he had never seen the accused before this horrific attack on them. It was for the first time for him to see them at the scene. He only saw them again when he was given the opportunity to identify them at different identification parades held at different times at Kwa Mashu police station.

{8.16} At the first identification parade held on the 4th of June 2008 he picked out accused No. 1.

{8.17} At the second identification parade held on 9 July 2008 he picked out accused No.'s 1, 2 and 5. He seemed to have some doubts about whether or not accused No. 4 was present in the line up but added that he (accused No. 4) was the person who removed his belt.

{8.18} At the third identification parade held on 15th of August 2008 he picked out accused No. 6.

{8.19} Like in the case of accused No. 4, Maphumulo seemed to have some doubts about the presence of accused No.'s 3 and 6 in any of the identification parades.

(8.19.1) After having been prompted with suggestive questions, he then said that accused No.'s 3 and 6 did take part in the identification parade, although it is not clear which identification parade he was referring to. That is as far as I can summarise the evidence of Maphumulo.

{8.20} Maphumulo was cross-examined at length by counsel for all accused. The Court also asked him questions. During cross-examination the accused versions were also put to him.

{8.21} The tenure of the cross-examination was to suggest that he (Maphumulo) was mistaken in his identification of the accused as their (Maphumulo and the deceased's) assailants. The accused alibi defences were also put to Maphumulo.

{8.22} I intend evaluating Maphumulo's evidence later on in my JUDGMENT.

(8.22.1) After the testimony of inspector Shabangu who was in charge of the identification parades as has been pointed out, Ms Vahed closed the case for the State.

(8.22.2) The evidence of Shabangu is neither here nor there and it really is not necessary to evaluate it.

[9] The accused gave evidence and they all denied having been party to the commission of the offences levelled against them.

[10] They all raised alibi defences stating that they were at their places of residence, sleeping at the time Maphumulo and the deceased were attacked. They all told the court that they retired for the day during the evening of 18 April 2008 and woke up the next day i.e. on 19 April 2008.

{10.1} Accused No.1 told the court that he went to bed at approximately 10h45 in the evening and woke up the next morning at approximately 07h00.

{10.2} Accused No. 2 went to bed at 9 p.m. and woke up the next morning at 08h00.

{10.3} Accused No. 3 went to bed before 8 p.m. and woke up the next morning at about 07h00.

{10.4} Accused No.'s 4 and 5 slept at accused No. 5's place. Although it was suggested to Maphumulo during cross-examination that accused No.'s 4 and 5

were at a tavern, celebrating accused No. 5's birthday at the time Maphumulo and the deceased were attacked, accused No.'s 4 and 5 recanted in that version when they testified and stated that they were at accused No. 5's place, sleeping during that time.

(10.4.1) It is not clear what time they went to bed during the evening preceding the attack on Maphumulo and the deceased, it is not clear what time they woke up either.

{10.5} Accused No. 6 told the Court that he went to bed at approximately 9:30 p.m. and woke up the next day at 8 a.m.

{10.6} All accused told the court that from the time they went to bed to the time they woke up the next morning, they never went anywhere.

{10.7} The accused were subjected to a thorough cross-examination by Ms Vahed, counsel for the State, and they turned out to be hopeless witnesses to say the least. The Court also asked them questions.

{10.8} With an exception of accused No. 3, we found the remainder of the accused to be lying about their alibi defences.

(10.8.1) Leading the group were accused No.'s 4 and 5. They were pathetic liars. They contradicted themselves in many material respects.

(10.8.2) As it has already been pointed out, during the cross-examination of Mr Maphumulo, it was suggested that they (accused No.'s 4 and 5) were partying at a tavern, celebrating accused No. 5's birthday at the time Maphumulo and the deceased were attacked.

(10.8.3) Confronted with that version by Ms Vahed, counsel for the State, accused No.'s 4 and 5 somersaulted and went to the extent of having to deny having given their counsel such instructions.

{10.9} It has to be borne in mind that before any evidence could be led, the Court cautioned the accused to listen carefully to the testimony of witnesses as they (the accused) would be given the opportunity as the trial progressed (and they were) to consult with counsel.

{10.10} It is not necessary to detail the contradictions in the evidence of the accused (accused No.'s 1, 2, 4, 5 and 6). Suffice it to say that they all lied about their alibi's.

(10.10.1) I find it important to note though, that not even a single one of them saw it fit to call a witness in support of their alibi defences. This despite the fact that they mentioned people who would confirm that on 19 April 2008 at approximately 04h00 – 04h30 a.m. they were at their places of residence, sleeping.

[11] I now turn to deal with the guilt or otherwise of the accused.

[12] It is trite that the onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond a reasonable doubt.

[13] The evidence there is before us is the evidence of Maphumulo. He is a single witness and he has given evidence of identification of the accused persons.

[14] In as much as I agree with Ms Vahed, counsel for the State, that the court can convict on the single evidence of a competent witness, I wish to add, that the court can only convict if it is satisfied beyond a reasonable doubt, that the evidence of a single witness is clear and satisfactory in every material respect.

[15] The question that follows therefore is, **is the evidence of Maphumulo clear and satisfactory in every material respect?**

[16] The stance we took in responding to this question is approaching Maphumulo's evidence with greatest dexterity and we do this for two reasons.

[a] Firstly, Maphumulo is a single witness. The guilt or otherwise of the accused depends on his evidence, and his evidence alone.

[b] Secondly the evidence he has tendered is evidence of identification.

[17] We have no doubt Maphumulo was an honest witness. He honestly believes that the people who attacked him during the early hours of 19 April 2008 are the accused before court.

{17.1} However honesty is not all that is required particularly, where the identification of the accused's persons is an issue. There are many other factors that the court must take into account when dealing with the evidence of identification.

[18] In **STATE v MTHETHWA** 1972 (3) SA766 (A) the Court had the following to say about how the evidence of identification should be approached:

“Because of the fallibility of human observation, evidence of identification is approached by the courts with some caution. It is not enough for the identifying witness to be honest. The reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait and dress; the result of identification parades, if any; and of course, the evidence by or on behalf of the accused. The list is not exhaustive.

These factors or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence and probabilities.”

[19] I share the view of my brother **Dowling J** in **R v SHEKELELE** 1953 (I) SA 636 (T) at 638 where he said

“witnesses should be asked by what features, marks or identifications they identify the person whom they claim to recognise. Questions relating to height, build, complexion, what clothing he was wearing and so on should be put.”

My emphasis: ***“A bald statement that the accused is the person who committed the crime is not enough. Such a statement unexplained, untested and uninvestigated, leaves the door wide open for possibilities of mistake.”***

[20] **First let me deal with how Maphumulo described the accused in court.**

[20.1] Describing **accused No. 1**, the main man who is said to have shot and killed the deceased all he could say was – “he was the tallest and was wearing a hooded jacket.”

{20.2} Describing **accused No. 2** all he could say was that “he was dark and short.”

{20.3} He described **accused No. 3** as short and light in complexion. He stated further that he was the youngest of them all, approximately 16 – 17 years old.

{20.4} All he could say about **accused No. 4** was that “he is light in complexion.” Further on during cross-examination he added that he is neither tall nor short. He is of medium height.

{20.5} Describing **accused No. 5** all he could say was that “he is tall and dark in complexion”.

{20.6} In his evidence-in-chief he did not describe **accused No. 6** at all but insisted that he identified him at the identification parade.

(20.6.1) Later on during cross-examination he then said “accused No. 6 is also not too tall and not too short. He is also light in complexion.”

{20.7} We hold the view that the description of the accused by Maphumulo was plainly dock identification.

(20.7.1) In the case of accused No.6 it is even worse because he appears to be the tallest of them all. Unfortunately for Mr Maphumulo, when he described accused No. 6, he (accused No. 6) was seated in the

dock and Maphumulo was obviously in no position to make out what his (accused No.6's) height was.

[21] I now turn to deal with visibility.

{21.1} This incident took place at night. Without any source of light providing artificial lighting it would have been difficult, if at all possible, to identify a person.

{21.2} In evidence-in-chief, Maphumulo created an impression that there was sufficient lighting for him to identify the accused, from the time they walked past the motor vehicle; stood in front of the motor vehicle; advanced towards the motor vehicle; fired shots and robbed them; up to the time that they fled the scene.

{21.3} He told the Court that lighting was provided by the headlights of their motor vehicle which were on throughout the incident as well as the light that came from the nearby house standing at a distance of approximately five meters from the car.

(21.3.1) He went on to say that that light from the neighbouring house went off at the time he was being robbed.

{21.4} As I have indicated earlier on in my JUDGMENT, Maphumulo created an impression that they had just gotten to the driveway leading to his house when they were attacked. That explains why the headlamps of the deceased's motor vehicle were on when it was stationary.

(21.4.1) That version changed though during the course of the cross-examination by Mr Badri. He then told the Court that the motor vehicle had been stationary for approximately 15 minutes before they were attacked and by that time they were busy talking with the deceased in the car.

(21.4.2) He then stated that as the motor vehicle was stationary for that period (for a period of approximately 15 min) its headlights were off. The deceased only switched them on when they saw these suspicious young men walking past the motor vehicle.

{21.5} It must be said that that was new evidence.

{21.6} Mr Maphumulo wanted the Court to believe that the deceased first switched the lights of the motor vehicle on, and then attempted to start the motor vehicle (meaning to turn the engine on). He further wanted the Court to believe that after the deceased unsuccessfully made an attempt to turn the engine on, she (the deceased) left the head lights of the motor vehicle on.

{21.7} We were not there, we do not know whether that is exactly what happened, but it is worth noting that that piece of evidence was again new evidence that only surfaced during the course of cross examination.

{21.8} It is clear from photographs in Exh. "C" in particular photographs 1, 2, 4, 6, 7, 8, 11 and 12, that without any source of light, it would be difficult, if at all possible to identify a person, especially a person you have no prior knowledge of, at the time the incident is said to have taken place i.e. approximately 4 to 4:30 in the morning.

(21.8.1) It is common cause that these photographs were taken at approximately 05:20 in the morning of the day of the attack on Maphumulo and the deceased, and the background of the scenes that are photographed is clearly dark, without any source of light.

[22] I now turn to deal with **moment of observation and surrounding circumstance.**

{22.1} We are of the view that Maphumulo had very little time within which he had to identify the six individuals particularly taking into account the prevailing circumstances at the time.

{22.2} We are not convinced that he was able to identify the assailants when they walked past the motor vehicle as he claimed in his evidence-in-chief. They didn't do anything to arouse his suspicion as they walked past.

{22.3} We are of the view that as they walked past the motor vehicle the headlights of the motor vehicle were off. We arrive at this conclusion having had regard to the admission made by Maphumulo during cross-examination that the deceased only switched the lights of the motor vehicle on after their assailants walked past (the motor vehicle).

{22.4} Even if the light from the neighbouring house was on, Maphumulo had no reason to take particular notice of how these people looked like as they walked past the motor vehicle.

{22.5} What may have aroused their (Maphumulo and the deceased's) suspicion was the grouping of the assailants in front of their motor vehicle.

{22.6} In his own version, Maphumulo told the Court that they (the accused) stood in front of the motor vehicle for approximately two minutes before attacking them (Maphumulo and the deceased).

{22.7} Given the circumstances surrounding the attack on Maphumulo and the deceased, it is our view that three minutes was not sufficient time for Maphumulo to indentify all of his assailants.

(22.7.1) Within that period of time, Maphumulo's assailants:

- (a) appeared in front of their motor vehicle and put their heads together;
- (b) split themselves into two groups and approached the motor vehicle on opposite sides;
- (c) fired two shots at the motor vehicle;
- (d) removed the key from the ignition;
- (e) opened the boot;
- (f) took the deceased's bag;
- (g) searched him (Maphumulo) and took from him the wallet and his belt and then,
- (h) fled the scene in turns.

{22.8} Although it is understandable, and we accept, that this happened very fast, the fact remains that too many things happened within a very short space of time.

{22.9} These events must have made it extremely difficult if at all possible, for Maphumulo to be able to identify all six of his assailants, regard also had to the limited time within which he had to do so.

[23] **I now turn to deal with the events leading to the arrest of the accused.**

{23.1} In the matter heard by the Supreme Court of Appeal, a reportable JUDGMENT, case No. 201/06, a matter between **XOLANI NQIWA and THE STATE** heard on 14 September 2006, the court at page 3 paragraph 4 regarded as a significant factor, the fact:

- *“that the appellant [the accused] was not shown to have been arrested on the strength of a description provided by the complainant,”* and further,
- *“that there was no evidence that the complainant gave the police a description [of the appellant] or if he did, what description it was [he so gave the police.]”*

{23.2} There seems to be a huge gap between the events leading to the arrest of the accused and the holding of the identification parade pursuant to their arrest.

(23.2.1) We do not know how the accused were arrested and what caused them to be arrested. We do not know whether they were arrested on the strength of what Maphumulo told the police or they were arrested for something else and by coincidence, they were linked to the attack on Maphumulo and the deceased.

{23.3} When the complainant was cross-examined by Mr Badri on the statement he made to the police on the **6th of May 2008**, pursuant to the

incidents referred to in counts 1 to 3, no mention was made of whether or not he described his assailants and if he did, how.

{23.4} Regardless of the fact that the statement made by Maphumulo was not handed up in evidence we are persuaded to believe that indeed, there is no mention in that statement of how he (Maphumulo) described his assailant.

{23.4.1} Without that information in the witness statement, we fail to understand how the accused were picked up.

{23.5} A reportable matter heard by the **Supreme Court of Appeal on 19 May 2005**, the matter between **PETRUS LIEBENBERG and THE STATE** at page 3, paragraph 6, sets out a good example of the manner in which an accused person should be described before arrest. Without any description at all in witness statements there is no *nexus* between the arrest of the accused and their subsequent identification by Maphumulo.

[24] I now turn to deal with the identification parades.

{24.1} As I have already indicated earlier on in my JUDGMENT, the only people that Maphumulo was able to identify when he gave evidence during examination in chief, without being prompted with questions, as people he picked out at different identification parades are accused No.'s 1, 2 and 5.

(24.1.1) This against the backdrop that he identified all six accused at different identification parades.

{24.2} We accept the fact that Maphumulo was confused and understandably so. But, even that confusion alone, opens up room of a possibility of mistaken identification.

{24.3} Regardless of the fact that the notes of the identification parades and the photograph albums comprising photographs taken at these identification parades were admitted into evidence unchallenged, we are concerned about the manner in which these parades were conducted.

(24.3.1) The first parade in particular, where accused No. 1 was picked out, leaves a lot to be desired.

{24.4} In **STATE v MOHLATHE** 2000 (2) SACR 530 SCA at 541 paragraphs A – D **SCOTT JA** made the following comments about conducting identification parades:

“Common sense dictates that the non-suspects participating in an identification parade should be similar to the suspect in general appearance.”

He goes on to say that people taking part in the identification parade should be

“about the same height, build, age and appearance as the suspect in question.”

{24.5} If one looks at the photographs contained in **Exh. “G,”** a photograph album comprising photographs taken at the identification parade where **accused No. 1** was picked out, it is glaringly obvious that there is only one person that is almost the same height as him.

{24.6} The number of people in the line up alone is questionable. Although the manner in which identification parades are held is a matter of police procedure, I am of the view that a number of five people in the line up is too few to render the identification parade free from prejudice.

{24.7} Mr Maphumulo identified **accused No. 1 by height**. Asked by Ms Vahed to describe him he said “he was the tallest,” [... of them all] **my addition**. There being only two tall people in the line up consisting of only five people, made it very easy, in my view, for Maphumulo to pick **out accused No. 1**.

{24.8} **Scott J A in MOHLATHE** *supra*, goes on to say the following about the identification parade involving many suspects:

“Where the parade includes several suspects whose general appearance is markedly different, whether on account of height, build, age or otherwise, care should be given to ensure that there are sufficient non-suspects whose general appearance approximates that of each suspect.

In such circumstances it may be advisable to hold more than one parade, particularly if the number of non-suspects that would be required would result in the parade being unduly large and cumbersome”.

(24.8.1) I am of the view that in the identification parade held on 09 July 2008 where accused No.’s 2, 3, 4 and 5 were picked out (according to the identification parade notes Exh. H) Inspector Shabangu who was manning the parade, ought to have conducted at least more than one parade.

(24.8.2) Over and above that, I hold the view that he ought to have given the suspects the opportunity to change their positions in order to ensure reliability of the identification of the accused by Maphumulo.

(24.8.3) Paragraph 26 of Exh. “H” provides for giving suspects the opportunity to change positions. Over above that, when given that opportunity, they have to be satisfied with the positions they have taken. That paragraph is crossed out and the only inference that can be drawn in the circumstances is that the accused No.’s 2, 3, 4, and 5 were never given the opportunity to change positions.

{24.9} Although we found accused No. 5 to be lying about his alibi we were tempted to believe that there is merit in the suggestion that he was previously arrested together with accused No. 1 and others, and later released because of uncertainty on the part of Maphumulo, that he (accused No. 5) was one of his (Maphumulo’s) assailants.

(24.9.1) The reason why we had to consider this piece of evidence is because it was pursued by the court and when counsel were given the opportunity to question accused No. 5 about it, no one did.

[25] I conclude my evaluation of the State’s case by making a few comments on **corroboration**.

{25.1} The danger in the State case is that there is nothing to corroborate Maphumulo’s evidence. Besides his genuine belief that the people who attacked him and the deceased on 19 April 2008 are the accused, there is nothing else to support that evidence.

{25.2} Of course the accused (**accused No.'s 1, 2, 4, 5 and 6**) have lied about their alibis and we have no doubt about that. **But does the fact that they lied about their alibi's rectify the problems in the State case?** I do not think so.

{25.3} We have been careful not to allow ourselves to be misdirected by the fact that the accused lied about their alibi defences. It is trite that the accused person's alibi should not be viewed in isolation.

{25.4} As **Holmes AJA** said in **R v HLONGWANE** 1959 (3) SA 337 at 341 paragraph A....

*“the correct approach is to consider the alibi in light of the totality of the evidence in the case and **the court's impression of the witnesses.**”*
[my emphasis]

{25.5} The danger of relying on the evidence of Maphumulo, uncorroborated as it is, is that there is a reasonable possibility that he is making a mistake about his identification of the accused as the people who attacked him and the deceased during the early hours of 19 April 2008.

I say this having had regard to the following factors:

(25.5.1) The limited time (three minutes) within which Maphumulo observed the assailants;

(25.5.2) The fact that he (Maphumulo) had no prior knowledge of the accused;

(25.5.3) The visibility at the time (as have been dealt with earlier on in this judgment) (paragraph 21);

(25.5.4) The prevailing circumstances (paragraph 22 above refers);

(25.5.5) The possibility that he (Maphumulo) was shocked by these unexpected events;

(25.5.6) The time lapse between the date of the incident 19 April 2008 and the date that he (Maphumulo) made his statement to the police (06 May 2008), a period of approximately 2 weeks.

(25.5.7) The time lapse between the date of the incident (19 April 2008) and the dates during which he (Maphumulo) subsequently identified his assailants at different identification parades;

(a) a period of approximately 6 weeks in respect of the 1st identification parade held on the 04 June 2008 (where he identified accused No. 1);

(b) a period of approximately 2 ½ months in respect of the 2nd identification parade held on 09 July 2008 where he identified accused No.'s 2, 3, 4 and 5; and

(c) a period of approximately 4 months in respect of the 3rd identification parade held on 15 August 2008 where he identified accused No. 6.

(25.4.8) The unsatisfactory manner in which the identification parades were held;

(25.4.9) The witness (Maphumulo's) demeanour on the witness stand;

(25.4.10) Lack of corroboratory evidence; and of course

(25.4.11) The denial by the accused.

{25.6} In as much as we have no doubts in our minds that the accused **(accused No.'s 1, 2, 4, 5 and 6)** are lying about their whereabouts on the day Maphumulo and the deceased were attacked, we at the same time take the view that it would be a hazardous exercise for this court to rely on the uncorroborated evidence of Maphumulo's identification of the accused as his attackers.

[26] In the circumstances therefore, we are obliged to give the accused the benefit of the doubt.

[27] **All accused are therefore found NOT GUILTY and DISCHARGED on ALL THREE counts.**

