NORTH WEST HIGH COURT, MAFIKENG

CAF: 08/2012

In the matter between:-

THABO ELEKIA MATJEKE	**1st A PPELLANT**
BOSWELL MHLONGO	**2nd APPELLANT**
GEORGE SIPHO MAKHUBELA	**3rd APPELLANT**
ALFRED DISCO NKOSI	**4th APPELLANT**
THEMBEKILE MOAODZI	**5th APPELLANT**
SAMUEL SAMPIE KHYANYE	**6th APPELLANT**
VICTOR ZANDILE MOYO	**7th APPELLANT**

And

THE STATE	**RESPONDENT**

JUDGMENT

GURA J

Introduction

[1] The seven appellants, who were accused No. 1 to 5 and 7 to 8 at the trial, were convicted of the following offences:-

(1) Murder;

(2) Robbery with aggravating circumstances;

(3) Unlawful possession of a firearm; and

(4) Unlawful possession of ammunition.

On 22 July 2004 each of them was sentenced as follows:-

(1) Life imprisonment;

(2) Fifteen years Imprisonment;

(3) Three years Imprisonment;

(4) Three years Imprisonment.

[2] Leave to appeal against conviction and sentence was granted to the appellants on 12 November 2012 by the trial Judge. At the commencement of the trial in the court a quo, the accused were eight in all. During the proceedings, accused 6 failed to attend court and has since disappeared. Henceforth, former accused 6 will be referred to as Mphume.

Factual Background

[3] In the evening of 3 August 2002 at Mothutlung, Warrant Officer Dingaan Makuna, arrived at his house. His service pistol was tucked on his waist. In his premises were two motor vehicles: a bakkie and a Toyota Camry. Before he could enter the house, he was surprised by two men who entered the premises on foot, each armed with a firearm. He was then shot thrice and he died in hospital later that night during an emergency operation. Immediately after the deceased was shot, the Camry car alarm went off. The deceased's service firearm was never seen again.

[4] The greater part of the evidence lead at the trial consisted of a trial within a trial which involved appellants 1, 3, 6 and 7. As against appellant 1 he was alleged to have made a statement to the magistrate and a pointing out to the police. The admissibility of both these statements was challenged by appellant 1 on the grounds that:

(1) they were not made freely and voluntarily because there was undue influence and duress exerted by the police who assaulted him;

(2) a promise was made to him that if he co-operated, he would get a reward in the form of money or a release on bail. As against appellant 3, he made an exculpatory statement in terms of section 219A to the police. The admissibility of this statement was contested on the grounds that:

(1) he was forced and threatened with assault by the police to make the ~-statement;

(2) he was promised a monetary reward if he did make it. In respect of appellant 6 it was a statement to a magistrate and a pointing out to a police superintendent. The grounds for the challenge of admissibility of these two statements are that they were not made freely and voluntarily because he was under duress and not in his sound mind as he was assaulted by the police and promised money.

Appellant 7 also made an exculpatory statement which was also challenged on the grounds that:

(1) the police assaulted him and threatened him with more assault if he did not make a statement;

(2) he was further promised bail by the investigating officer;

(3) he was not the author of the statement in that it is the police who schooled him to say what was said in the statement.

[5] Appellant 1 in his statement told the magistrate that on the day of this incident, he, together with appellants 2, 3, 5 and 7 left Soshanguve for Mothutlung after appellant 6 had telephonically requested them to come. They were travelling in a Toyota Cressida car, the property of appellant 2. Appellant 5 and 7 were in possession of firearms. After their arrival at Tshipa's tavern in Mothutlung, appellant 6 told them that someone wanted them to rob another person of a bakkie. He assured them that he had already identified the potential victim. They drove and passed the

deceased's house where they saw a Camry and a bakkie. On the suggestion of appellant 7, they passed the scene of crime and stopped further down the street. Appellant 7, who was armed with a firearm, walked to the said house with appellants 3, 5, 6 and Mphume. After two shots were fired at the scene of crime, the five people came back running. Mphume then produced a firearm which he alleged was taken from the scene. In the pointing out statement, appellant 1 pointed the deceased's house to Captain Ncube. He further told him that he (appellant 1) together with appellant 2 and Patta remained in the Cressida when appellants 3, 5, 6, 7 and Mphume approached the deceased's house. When the five men rejoined them, appellant 5 had a third firearm which was allegedly taken from the victim.

[6] Appellant 3, in an exculpatory statement, told Inspector Nkosi that on the day of this incident he, appellant 1 and 2 travelled to Mothutlung where they found appellant 6 who was in the company of three unknown men. All these people (appellants 1, 2, 3, 6 and the three strangers) travelled in the Cressida car which was being driven by appellant 2. Somewhere around a curve, appellant 2 stopped the car and appellants 1, 2 and 6 left on foot. The three strangers just stood outside next to the car whilst appellant 3 was on the driver's seat. About ten minutes after the three men had departed, they came back to the car, running. All of them got into the car and they travelled at high speed.

[7] Appellant 6 made a statement to a magistrate at Ga Rankuwa. He stated that in August 2002, before his arrest, he was approached by appellants 1 and 2 who asked him whether he knew where they could acquire an old Isuzu bakkie. They gave him their telephone numbers and told him to contact them when he sees such a motor vehicle so that they could come hijack it. Some days later, he saw such a bakkie in a certain yard at

Mothutlung. He telephoned them and appellants 1, 2 and 3 came and found appellant 6 at Tshipa's tavern. Appellant 6 then led them to the premises where he had seen the bakkie. They were travelling in appellant 2's car. Unfortunately for them, when they arrived there, the bakkie was not there. Appellant 1 and 2 were in possession of firearms. Thereafter, appellant 6 was then dropped at his place of residence and he does not know what happened thereafter. In the pointing out statement to Colonel Diale he (appellant 6) pointed out the house where the vehicle was supposed to be hijacked. However, he stated that he knew nothing about the killing of a police officer.

[8] The last statement was that of appellant 7 which he made to a magistrate. He also stated that he knew nothing about the killing of a police officer.

[9] After the court listened to evidence in a trial within a trial, it found the statements to be admissible. All these statements then became part of the evidential material before court. The State's case in the main trial was then closed.

[10] All the appellants testified. I set out below the evidence of appellant 1. Towards the end of July 2002 appellants 1, 2 and 3 drove to Tshipa's tavern at Moumong where they found appellant 6 in the company of three people. Later all six men went to a party where they remained until after 03H00. When they left, appellants 1, 2 and 3 drove to Stinkwater whilst appellant 6 and his three companions went to Moumong. He (appellant 1) does not know Mothutlung and he denied ever going to the latter place during that night. He knew nothing about the incident of 3 August 2002 when the deceased was allegedly killed. Appellant 2 in his testimony, totally denied ever being present at Mothutlung on 3 August 2002.

[11] Appellant 7, testified as follows:- He was not present at the scene of crime because towards the end of July 2002 he went to Seshego in Limpopo. He had been there ever since and on 3 August 2002, he was at a party of one Mapapo in Limpopo province. He called three defence witnesses – Francinah Kgwadi, Marinki Matlakala and Shadrack Kgwadi. These three witnesses confirmed that on 3 August 2002 appellant 7 was at a party at Seshego.

[12] When appellant 3 was supposed to testify, something totally unexpected happened. Counsel for appellant 1 applied to reopen his client's case so that he (appellant 1) could tell the truth. None of the counsels objected to this application except counsel for Mphume. However, the court allowed appellant 1 to reopen his case and to testify again.

[13] Appellant 1 confirmed under oath what he had told the magistrate. He testified further that after the two shots, he asked appellant 2 what was happening. The latter told him that the people were just doing some job there. The five men then came back running and they got into the Cressida vehicle. Appellant 2 started the car and he drove very fast. He did so on the instruction of appellant 7. As the car was speeding off, appellant 7 then requested appellant 6 to take out the firearm so that he could have a look at it. It was at that stage that Mphume then asked appellant 7 why he had to shoot the deceased. Appellant 7 explained that the deceased also had a firearm and he could have shot them. All of them looked at the firearm which they had taken from the deceased's premises. According to appellant 1, as he was listening to them talking in the vehicle, appellants 6 and 7 were looking for a vehicle to go to Pietersburg. With regard to his first evidence, he (appellant 1) stated that he was instructed by appellants 2 and 6 that he must relate that false version. During cross-examination in his first evidence he had stated that he did

not know Mphume, but that was not the truth. The truth is that he knows him. He had stated in his first evidence in chief that the names of appellants 5, 6, and Mphume were given to him by Inspector Mokgatle. That it is not true, because he was instructed by appellants 2, 6 and 7 to say what he said. He stated further that he was not telling the truth when he said Dirk, Mokgatle and Nkosi instructed him to say what he said in the statement to the magistrate, that all what he said in the statement is what he knew because he was present. He also said that his co-accused were always threatening him and they even assaulted appellant 3.

[14] Appellant 3 then testified. He denied that he was involved in the commission of these offences. He admitted that on the day of the incident, he, all the appellants and Mphume proceeded to appellant 6's place at Mothutlung. From there, appellant 2 was instructed to drive slowly by appellant 7. They drove to the crime scene. Appellant 7 said they should not stop there but that they should stop a distance away. Appellants 5, 6, 7 and Mphume alighted from the vehicle. He (appellant 3) remained in the car. When they alighted, appellants 5, 7 and Mphume were in possession of firearms. According to him, he saw the firearms for the first time at that stage. Of the four, one of them breached the firearm and went into the premises. Intially, when they (appellants 5, 6, 7 and Mphume) alighted and went into the premises he (appellant 3) also got out of the vehicle to pass water. He then heard two fire shots. Appellant 1 asked appellant 2 what was happening and he (appellant 2) said these people had "some job to do". Then the others came running and they drove off at high speed. He did not ask anything because he was scared. Appellant 7 said to appellant 6 that he should show him the firearm. That was when Mphume asked appellant 7 why he had to shoot the deceased and he said that he was in possession of a firearm and he was also going to shoot him. He also heard appellants 6 and 7 saying that they were looking for a

vehicle in order to drive to Pietersburg and according to him that was the first time he heard them talking about a car.

[15] Appellant 4 also testified that on that particular day he was selling vegetables in Pretoria and was never at Mothutlung. He denied that he was known as Patta. He called a witness, Christinah Nkosi, who is his mother. She confirmed that he is a vegetable vendor and that he is known by the name of Disco. The evidence of Appellant 5 is to the effect that he was at home on 3 August 2002 and was never at the scene of crime. Appellant 6's defence is also an alibi. He says on that day he was at the golf course at Brits where was working. His version is that he pointed out Tshipa's tavern because they were forcing him to do so and to say that he was with appellant 1 (at Tshipa's tavern). He was assaulted and he showed them Bra Barrack's place. The reason why he was taking them there was for the purpose of informing them that Bra Barrack was his witness.

The Issues

[16] The decision of the court a quo was challenged on the following grounds:

(1) There is an irregularity in the proceedings in that the State closed its case before the court could make a ruling on reception of hearsay evidence against appellants 1, 3, 6 and 7.Reliance was placed on par. 18 of page 338 of the decision in **S. v. Ndhlovu and Others** 2002 (2) SACR 325 (SCA).

(2) The sequence of the appellants was not followed when they (appellants) gave evidence. This procedure was prejudicial to the other appellants.

(3) No valid reason exists why appellant 1 was allowed to reopen his case and give evidence in chief for the second time. This led to serious prejudice to the other appellants.

(4) The statement to the magistrate and the pointing out to the Police officer by appellant 1 were precipitated by undue influence, first in the form of assault and secondly, a promise for reward.

(5) Before he allegedly gave Inspector Nkosi self incriminating evidence, appellant 1 was not warned about his right not to incriminate himself.

(6) Appellant 1 (being one of the appellants who implicated appellant 2) was a dishonest witness in that his second evidence in chief is a contradiction of (1) his first evidence in chief; (2) his statement to the magistrate and (3) his pointing out statement to Captain Ncube.

(7) The court failed to apply the cautionary rule when dealing with the evidence of appellants 1 and 3.

(8) Appellants 1, 2 and 3 were implicated by other appellants in their extra-curial statements which they later disavowed. The use of hearsay evidence is contrary to the principle laid down in **S v Molimi 2008 (2) SACR 76 (CC) at 77h-i**. The result was that appellants 1, 2 and 3 did not receive a fair trial.

Failure by the court to give a ruling on reception of hearsay evidence before the close of the State case.

[17] Just before the close of the State case in the main trial, Mr Ndimande for the State, applied that the statements by appellants 1, 3 and 6 which were made to magistrates and (some) to police officers, should be admitted as evidence against appellants 2, 4 and 5. After addressing court, but before any response from counsels for the affected appellants, and before any ruling by the Court, the State case was closed. However, immediately

when Mr Ndimande took his seat, the court addressed counsel for appellant 2.

"Yes, Mr. Moja?"

Counsel for appellant 2 then addressed court on the application by the State. The same applied to other counsels. The court then ruled that the said statements were admissible in the interest of justice. What followed was an application for the discharge of appellant 4 which was unsuccessful. Thereafter appellant 1 testified.

[18] In **S v Ndlhovu** supra at par. 18 Cameron JA (as he then was) made the following observation:-

> *"Third, an accused cannot be ambushed by the late or unheralded admission of hearsay evidence. The trial court must be asked clearly and timeously to consider and rule on its admissibility. This cannot be done for the first time at the end of the trial, nor in argument, still less in the court's judgment, nor on appeal. The prosecution, before closing its case, must clearly signal its intention to invoke the provisions of the Act, and,* ***before the State closes its case, the trial Judge must rule on admissibility****, so that the accused can appreciate the full evidentiary ambit he or she faces."* **(my emphasis)**

[19] In the present case, the ruling was not made before the close of the State case but only thereafter. My view is that, in line with Cameron JA's remarks, what is important is that the ruling must be made before the accused makes his decision whether or not he will testify or call witnesses. It could never have been the view of the SCA that once a

ruling is made after the close of the State case but before the accused testifies, it constitutes an irregularity. The reason is not hard to find. In either case, when the accused makes the decision whether or not to testify or to call witnesses, he is already aware of "*the full evidentiary ambit he or she faces.*" It is my view therefore, the procedure which was followed by the trial court is in line with par. 18 of that judgment **(Ndlhovu)**. No irregularity was therefore committed.

Should several accused give evidence in numerical order?

[20] Appellant 1 gave evidence first and closed his case. After appellant 2 had testified, the trial court allowed appellant 7 to give evidence, followed by his (appellant 7's) three defence witnesses. Only thereafter did appellant 1 apply to reopen his case and to give evidence again. His application was granted and he testified. Thereafter, appellant 3 gave evidence.

[21] Mr Skibi submitted that this amounts to an irregular procedure rendering the trial of the other appellants unfair because it was prejudicial to them. It is this procedure, which gave appellant 1 the opportunity to reconsider his version and to adjust it.

[22] In **S v Swanepoel en 'n Ander** 1980 (2) SA 81 (NKA) Basson J held that the court can, in suitable circumstances, allow the order in which several accused present their evidence to be varied in the interest of justice, right and fairness. This decision was followed and applied in **S v Ngobeni** 1981 (1) SA 506 (BH) where the court stated at 507 H:-

> *"Section 151 of Act 51 of 1977 does not prescribe the order in which several accused should respectively put their cases to the court but, over the years, it has become an established procedure*

that the several accused should put their cases to the court in numerical order and this practice can only be departed from in the event of it being so ordered by the court after one of the parties has applied for such a departure and the court is of the opinion that none of the parties would be prejudiced thereby. Further, it should only be in the interests of fairness and justice that such departure is ordered."

See also **S v Mpetha and Others** (1) 1983 (1) SA 492 (CPD)

[23] On page 644 of the case record, appellant 2 closed his case just before 13H00 and the court adjourned until 14H00. When the court resumed, counsel for appellant 7 Stated:

"...During the lunch adjournment, I managed to phone Inspector Nkosi and the other witness. ... I beg leave to call appellant 7." Appellant 7 then testified. No reason was given why a deviation from the normal sequence was followed. Although it is desirable that there should be a reason for such a procedure, none of the counsels objected against this development. Not even the trial Judge questioned it. My view is that the court was legally entitled to exercise its discretion to allow this deviation from the normal procedure if there was such a need. Clearly, none of the appellants suffered irreparable prejudice in consequence thereof. It is only appellants 2 and 7 who had already testified when appellant 1 gave evidence again. Later in the proceedings, appellant 2 was allowed to reopen his case and to challenge (under oath) accused1's latest evidence. Appellant 7 never applied to follow the same avenue.

[24] The reason which was given when appellant 1 applied to reopen his case was that he wanted to tell the truth because thus far he had not told it. In

listening to evidence for hours and even days, in a trial, a court is in search of the truth. The findings of this court is that the trial court acted properly in allowing appellant 1 to testify again because there was a potential that more information would emerge which might assist the court to reach a just decision.

The admissibility of a statement to the magistrate and the pointing out by appellant 1.

[25] Mr Nkhahle submitted that appellant 1's version was corroborated by two witnesses whose evidence the court did not reject. He referred specifically to the evidence of the prison head Mr O.J Siele, Mr Raborife and the court interpreter. I do not think it is entirely correct to say that Mr Raborife and the court interpreter corroborated appellant 1 that he was assaulted by the police. Mr Raborife, a magistrate of Ga Rankuwa, was called to testify about a different case – a case emanating from Temba police station where appellant 1 was involved. This is the case which was being investigated by warrant officer Mokgatle, the same Mokgatle who is also involved in the present case before us (the Ga Rankuwa police station case). Appellant 1 called Mr Raborife and the court interpreter of Temba Magistrate's court to corrobate him in regard to the Temba case. All Mr Raborife said was that he does not remember if appellant 1 was ever brought to him for a confession prior to 30 October 2002. The magistrate (Raborife) then explained that if any accused or suspect is brought to him for the purpose of the confession and he/she alleges threats, violence or assault by police, he would never take down the statement. The court interpreter of Temba, Sannah Monyai, also testified that she does not remember that appellant 1 ever came to the magistrate's office for a confession during October 2002 or whether the magistrate

refused to take the confession due to allegations of assaults. Sannah Monyai, did not corroborate appellant 1's version.

[26] The prison head, Jackson Siele, is the one who corroborated appellant 1 to the effect that there was no advertisement for a reward (for anyone who would reveal the killers of warrant officer Makuna) which was placed on the Pretoria Prison precinct. But the evidence of the State that the advertisement was also placed in the electronic and print media was not challenged by either appellant 1 or Siele. Apart from the three defence witnesses mentioned above, appellant 1 also called Mokgadi Makato, appellant 6's lover, and Martha Matjeke, appellant 1's grandmother as witnesses in the trial within a trial. Both confirmed that appellant 1 was assaulted at Ga Rankuwa police station. Mokgadi said that he (appellant 1) was assaulted for two consecutive days in her presence. On the second day, she said, the assault took place in the presence of Martha. The latter confirmed that appellant 1 was assaulted in her presence by police but she later somersaulted and said she did not personally witness the assault, but all she heard were appellant 1's screams. Thereafter, appellant 1 came out of the police station crying and his mouth was swollen. He (appellant 1) together with Martha then proceeded to Brits with the police where appellant 1 was taken to the magistrate.

[27] In my view, it is rather unthinkable that the police would torture a suspect/an accused in the presence of his relatives or acquaintances. This would have been a foolish act on their part. Mokgadi and Martha were not impartial and independent witnesses. What is further surprising about their version (Mokgadi, Martha and appellant 1) pertaining to the alleged assault, is that on that very same day of the assault, when his face and mouth were swollen, the magistrate of Brits did not see this injury. All that the magistrate saw was a cool and composed appellant 1. Later that

very same day, Captain Ncube – who led the pointing out by appellant 1 did not see the swollen face and mouth but he saw a relaxed and co-operative appellant 1. Appellant 1 failed, twice on that day, when he was asked specifically about threats of violence, undue influence or assault to reveal the alleged improper behaviour of the police.

[28] The trial court found that there were material contradictions in the evidence of appellant 1 and his defence witnesses with regard to how the assault took place. What it found strange is that appellant 1 was allegedly assaulted so that he could make statements and at the same time he was promised a reward for making the very same statements. Relating to the promise to be given money or to be released on bail, appellant 1 never insisted (after he had made the two statements) that the police should now give him his money or release him on bail as they had promised. The court further stated that had the appellant been assaulted he could have reported to the police cell officer who visited the cells daily. He failed to open a case of assault against the police. He was accordingly found to be a liar. Finally, the trial court was impressed by all the police witnesses who were honest and reliable. I cannot find any fault with this reasoning.

Failure by warrant officer Nkosi to warn appellant 1 against self incriminating evidence

[29] The evidence which the trial court accepted is that as at 30 October 2002 the police had no clue about who could have killed the deceased. On that day, appellant 1 telephoned warrant officer Nkosi and introduced himself to him. Appellant 1 told Nkosi that he was a prisoner in Pretoria prison for another case. It had come to his knowledge, he said, that there was a reward for anyone who would come up with information relating to who killed warrant officer Makuna. He told Nkosi that he had such

information. Nkosi accordingly made an appointment with him to fetch him from prison the subsequent day.

[30] Indeed, on 31 October 2002 he conveyed appellant 1 from prison to his office. He then started to tell the investigating officer what he knew. Nkosi says after he listened to the whole story, he formed the view that appellant 1's hands were also not clean. He warned him that he was under arrest and accordingly charged him with the present offences. Only then were his rights in terms of section 35 of the Constitution of the Republic of South Africa, Act 108 of 1996 explained.

[31] In my view, there is nothing improper in Nkosi's failure to explain appellant 1's rights before he could relate his story. How else could Nkosi have known, before appellant 1 gave him the information, that this is a suspect? My view is that the duty rests upon any police officer to explain the rights of a suspect/accused only when he/she (the police officer) knows that this is a suspect/accused.

An accused person as a witness against his co-accused

[32] The evidence of an accused person who testifies against his/her co-accused is treated on the same basis as that of an accomplice. The evidence of an accomplice must be approached with caution. Holmes JA in **S v Hlapezulu and Others 1965 (4) SA 439 (A) at 440 D-E** sets out the rationale behind this caution:-

> *"First, he is a self-confessed criminal. Second, various considerations may lead him falsely to implicate the accused, for example a desire to shield a culprit or, particularly where he has not*

been sentenced the hope of clemency. Third, by reason of his inside knowledge, he has a deceptive facility for convincing description – his only fiction being the substitution of the accused for the culprit".

[33] In my view, a judicial officer will always keep in mind that no accomplice is absolutely perfect. In **S v Francis 1991 (1) SACR 198 (A) at 205E** it was held that:-

"It is not necessarily expected of an accomplice, before his evidence can be accepted, that he should be wholly reliable or even wholly truthful, in all that he says. The ultimate test is whether, after due consideration of the accomplice's evidence with the caution which the law enjoins, the court is satisfied beyond reasonable doubt that in its essential features the story that he tells is a true one ...."

See also **S v Vreden 1969 (2) SA 524 (N) at 532 E.**

[34] A rule of practice has evolved in terms of which some form of corroboration of an accomplice's evidence is necessary. Such corroboration takes the form either of evidence corroborating the accomplice's evidence in a material respect or evidence implicating the accused in the commission of the offence (**S v Khumalo 1998 (1) SACR 672 (NPD) at 679B).** Where an accomplice or a single witness or any other witness has made a previous inconsistent statement, he/she must give a convincing account for such different explanations.

[35] Let me spend time now examining the nature of the evidence which emerged from appellant 1. First, the statement which he made to the magistrate is not a confession but it contains some admissions. The pointing out and the accompanying statement which he made is also not a confession. He gave evidence in chief twice. (At this stage, I will not deal with the admissibility of hearsay evidence contained in the statements because this will enjoy special attention later). It is important now to examine whether there is some consistency in all what he is alleged to have said. In his first evidence in chief, he totally denied any knowledge or participation in the robbery and the killing of the deceased. This evidence is a total contradiction of what he is alleged to have told the magistrate and captain Ncube. Again his first evidence is a total contradiction of his second evidence in chief. The magnitude of the difference between his first and second evidence in court is significant.

[36] In my view, appellant 1 is not only an unreliable witness but he is also a reckless liar. In fact, he is a self confessed liar. It is a risky exercise for any court to rely on the uncorroborated evidence of such a witness in order to convict any co-accused. His second evidence in chief does not contain the whole truth which he had the second chance to tell. His version that he told lies in his first evidence in chief because he feared for his life appears to me to be a recent fabrication. After all, what makes him now not to fear his co-accused like he did earlier? As counsels for the defence submitted, correctly in my view, appellant 1 gave three contradictory versions. His second evidence in chief is that he did not know about any plan to rob a person that night. Yet he was part of 8 men who travelled in a Cressida sedan that night, looking for the victim. Clearly, he was aware about the plan and he was part of the plan. The fact that he did not pull the trigger does not absolve him from liability.

[37] Appellant 3 on the other hand confirmed that he was part of the crew of the Cressida to Mothutlung. He denies that he was aware of any plan to rob anyone. The probability is that the plan to rob was discussed amongst all men. Why would anyone, who was not part of this plan, be taken along? They were 8 in all in a sedan vehicle for the purpose of committing crime. His version is not reasonably possibly true. Appellant 2's vehicle – the Toyota Cressida, is the one which was used by the robbers as a get-away car. He was personally driving it from Stinkwater to Soshanguve and then to Mothutlung. After this whole incident, his behaviour was not that of a man who was surprised but he co-operated with the deceased's killers by speeding from the scene of crime. Appellant 2 is implicated by appellant 1 and 3. These two knew him, and, they spent the best part of the day and the evening with him. His defence of an alibi is also clearly not reasonably possibly true. Appellant 4's defence is also an alibi. But appellant 3 placed him at Mothutlung that night although he does not say what role he played. Appellant 1 also testified that when they left from Soshanguve to Mothutlung they were with appellant 4. But after their arrival at Mothutlung nothing is said about either the presence of this man there or the role which he played.

[38] Appellant 5 also denied that he was ever at the scene of crime. Appellant 3 implicated appellant 5 as one of the men who walked to the deceased's house and that he (appellant 5) had a firearm. Appellant 1 also testified that appellant 5 was with them in the vicinity of the scene and that he (No. 5) is one of the men who went to attack the deceased. Appellant 5 was not a stranger to appellants 1 and 3. They spent the best part of the day with him on 3 October 2002. His defence of an alibi also cannot be reasonably possibly true. Appellant 6 has been implicated by his own statement to the magistrate which is also not a confession. He is the one

who was given the task by appellants 1 and 2 to look for someone with an old Isuzu bakkie. He knew that appellants 1 and 2 wanted to hijack it. Once he had seen it, he telephoned appellants 1 and 2. Appellant 1 confirmed that indeed, appellant 6 phoned them on the date in question. Appellant 6 further pointed the deceased's house to Col. Diale. His latest defence of an alibi, is to me an after thought. In fact, he is the one who arranged the whole robbery. Appellant 7 did not implicate himself in the statement which he made to the magistrate. He called three witnesses to corroborate his version that he was not at the scene of crime. The photos which were handed in for the purpose of proving that appellant 7 was at the wedding were of little help to the trial court because his (appellant 7) picture did not appear clearly thereon. On the other hand, appellant 7 has been implicated by appellants 1 and 3. Appellant 3's evidence is to the effect that in fact appellant 7 was giving instructions to the driver to drive slowly, the direction which he had to take and where he eventually had to stop.

[39] I am convinced beyond reasonable doubt that appellant 7 was not at the wedding that night but at the scene of crime. Appellant 3 is a consistent witness because his statement to Inspector Nkosi is not entirely contradictory to his evidence in chief. The probability is that appellant 7 went to Limpopo province after the night of the incident. In fact, appellants 1 and 3 testified that after the robbery, they heard appellants 6 and 7 talking amongst themselves that they wanted a vehicle in order to travel to Pietersburg in Limpopo province.

Hearsay evidence

[40] Part of the evidence on which appellants 2, 4 and 5 were convicted, is based on what appellants 1, 3 and 6 said in their various extra-curial

statements immediately after arrest. The trial court ruled that this evidence is admissible in the interest of justice.

[41] Section 3 (1) of the Law of Evidence Amendment Act, No 45 of 1988 (the Act) provides:

> *"Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –*
>
> *(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;*
>
> *(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceeding; or*
>
> *(c) the court, having regard to-*
>
> *(i) the nature of the proceedings;*
>
> *(ii) the nature of the evidence;*
>
> *(iii) the purpose for which the evidence is tendered;*
>
> *(iv) the probative value of the evidence;*
>
> *(v) the reason why the evidence is not given by the person whose credibility the probative value of the evidence depends;*
>
> *(vi) any prejudice to a party which the admission of such evidence might entail; and*
>
> *(vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interest of justice."*

It is clear that hearsay evidence may be admitted in criminal and civil proceedings only if the parties agree thereto or if it is in the interest of justice.

[42] In **S v Ramavhale** 1996 (1) SACR 639 (A) the court held that a Judge should hesitate long in admitting or relying on hearsay evidence which plays a decisive or even significant part in convicting an accused unless there are compelling justifications for doing so. In **Makhatini v Road Accident Fund** 2002 (1) SA 511 (SCA) the court stated that a court which applies section 3 (1) of the Act must take a contextual approach, i.e it should look at the evidence in its global form – like a tree which has various parts – the leaves, the branches, the buck, the stem and the roots. In essence, it means that this is one mosaic which has different colours. In admitting hearsay evidence, in **S v Mbanjwa** 2000 (2) SACR 100 (D), the court was persuaded by the fact that there were some positive objective facts which virtually guaranteed the reliability of hearsay evidence.

[43] In **S v Ndlovu's** case, supra, at page 342 par. 29 the court made the following remarks:-

> *"... when hearsay evidence is tendered the person on whose credibility the probative value of the hearsay depends may*
>
> *(i) testify and confirm its correctness;*
>
> *(ii) not testify;*
>
> *(iii) testify but deny ever making the hearsay statement;*
>
> *(iv) testify and admit making the hearsay statement but deny its correctness;*

(v) Testify but neither confirm nor deny making the statement."

When the declarant does not testify at all, said the court, he/she is in the same position as a declarant in categories (iii) to (v) above. The main reason for disallowing hearsay evidence is that it may be untrustworthy, since it cannot be subjected to cross examination (Par. 30). At par 34 the court concluded:-

> *"In these circumstances I conclude that the provision deals differently with the situation where hearsay evidence is subsequently affirmed under oath at the proceedings (situation (i) in par. (29) above) from where it is not (situations (ii) to (v)). Its admission is in the first case governed by ss (1) (b); in the others by ss (1) (c), and whether or not the hearsay declarant testifies but fails to confirm the prior statement is irrelevant to the application of ss (1) (c). The admissibility of all hearsay evidence not affirmed under oath at the proceedings in question therefore depends on whether the interests of justice require it."*

[44] Appellants 1 and 3 testified under oath and they were cross-examined. They placed all the appellants at the scene of crime. There is a startling similarity between their testimony regarding the identity of the people who walked to the deceased's premises: appellants 5, 6, 7 and Mphume. This, in my view is not hearsay evidence but evidence envisaged in section 3 (1) (b) of the Act. Once the declarant of the statement confirms it under oath, the evidence becomes automatically admissible. The question of whether the interest of justice require it, has no application here.

[45] Appellant 6's statement to the magistrate in which he implicated appellants 1, 2 and 3 falls into the category of (ii) to (v) above, because he totally disavowed it (statement) in the witness box. His hearsay statement can only be admissible against his co-appellants if that is in the interest of justice in line with ss (1) (c) (i) to (vii) of section 3 of the Act. The following factors constitute objective facts or positive pointers to the fact that the hearsay evidence by appellant 6 against appellant 2 is reliable:-
(1) Whereas appellant 6 said that appellant 3 was also at Mothutlung that night, appellant 3 personally confirmed this under oath.
(2) Whereas appellant 6 said that appellant 1 was present at Mothutlung that night, appellant 1 personally confirmed under oath that he (appellant 1) was at Mothutlung and that he was with the seven men in the Cressida. What is most important is that appellant 1 and 3 confirmed under oath that appellant 2 was with them at Mothutlung. In my view, the hearsay evidence contained in appellant 6's statement was admitted properly in the interest of justice. Clearly, the evidence against appellant 2 amounts to a complete mosaic justifying his conviction. After the robbery, he (appellant 2) conveyed most of his companions to their homes. None of them distanced himself from the criminal acts which had been committed. I am satisfied beyond reasonable doubt that all the appellants participated in the commission of the offences for which they were convicted.

Sentence

[46] The duty to impose sentence is primarily a matter which is within the discretion of the trial court, and a court of appeal will not lightly interfere with the exercise of that discretion. Only in limited circumstances will a court of appeal interfere (**S v Malgas** 2001 (1) SACR 469 (SCA))

[47] The trial court took into account that at the time of the commission of the offence, none of them could be classified as a youthful offender; that the crime had been planned; the prevalence of violent crimes involving firearms and the fact that the victim was shot more than once. Having taken into account their personal circumstances and the interest of society, it concluded that there were no substantial and compelling reasons why the mandatory minimum sentence (in respect of counts 1 and 2) should not be imposed.

Conclusion

[48] There is no indication, throughout the trial, that any of the appellants showed any remorse. The deceased was shot in the presence and in full view of his daughter. When he saw the assailants approaching him, he asked them not to harm her but rather to kill him. The deceased's widow testified that her daughter and the family were very traumatised by this event. The deceased was the breadwinner, because his wife was engaged in casual type of work. Under the circumstances, and keeping in mind the decision of **S v Matyityi** 2011(1) SACR 40 (SCA) at 53 c-g (par 23- 24), I am of the view that the trial court exercised its discretion properly by finding that there were no substantial and compelling reasons which justified a lesser sentence. The rest of the sentences are in keeping with the circumstances of this case.

Order

[49] Consequently, the following order is made:

1. The appeal against conviction and sentence by all the appellants is dismissed.

2. The conviction and sentence are confirmed.

SAMKELO GURA
JUDGE OF THE HIGH COURT

I concur

HENDRICKS R
JUDGE OF THE HIGH COURT

I concur

GUTTA N
JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING:	07 DECEMBER 2012
DATE OF JUDGMENT:	18 APRIL 2013
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