REPUBLIC OP SOUTH AFRICA

CASE NO 298/94

In the matter between:

MBONGISENI HADEBE	1st Appellant
KWENZA KHUZWAYO	2nd Appellant
MAJAJI MADONDO	3rd Appellant
DUMISANE MTHETHWA	4th Appellant

and

THE STATE Respondent

CORAM: VIVIER, MARAIS, JJA et STRETCHER, AJA HEARD:

12 September 1997

DELIVERED: 29 September 1997

J U D G M E N T

MARAIS JA/

MARAIS JA:

The four appellants were convicted in the Witwatersrand Local Division upon one count of murder, one count of attempted murder, one count of unlawfully possessing four firearms, and one count of unlawfully possessing a quantity of ammunition. They were all sentenced to death upon the murder count and imprisonment for five years upon the attempted murder count. The first three appellants were sentenced to imprisonment for two years, and the fourth appellant to imprisonment for three years, upon the counts of unlawfully possessing four firearms and a quantity of ammunition, the two counts being taken together for the purpose of sentence. The latter terms of imprisonment imposed upon the appellants were ordered to run concurrently with the sentence of five years' imprisonment imposed in respect of the count of attempted murder.

All of the appellants appeal against all of their convictions and the sentences of death, leave to appeal having been granted where necessary by the learned judge (Marais J) in the Court a quo. A special entry made at the request of the appellants is also before the court. I shall return to it in due course. The appellants were acquitted in the same proceedings upon another count of murder.

The State set out to prove the following case against the appellants. Count 1 (Murder)

The deceased, Sibusiso Nkosinathi Chonco, was shot dead at approximately 17:00 on Friday 6 November 1992 while in a Nissan Skyline motor vehicle at Chiawelo in Soweto. A large number of

shots were fired at the deceased and the vehicle in which he was seated. A red Nissan Sentra motor vehicle travelling at high speed

was seen in the vicinity of the Nissan Skyline at about the same time. On arrival at the scene of the shooting the police found and took possession of three spent cartridge cases. One was found in the street about 30 metres away from the Nissan Skyline; one was found inside the Nissan Skyline on the window ledge of the door next to the front seat on the passenger's side of the vehicle; and one was found approximately one metre away from where the deceased lay on the ground next to the Nissan Skyline. Photographs depicting the spent cartridge cases and the places where they were found were taken by Sgt Nieuwoudt at about 19:40 on the same day. The deceased had been shot repeatedly and five spent bullets were recovered from his body in the course of the post mortem examination. The State was unable to call any witness who could identify the person or persons responsible for shooting the deceased.

Count 2 (Murder)

In the afternoon of the following day, Saturday 7 November 1992, another shooting took place. One Fisher Makhoba was killed and one Jeffrey Flower Njikelani was wounded. They had been working on a vehicle at deceased's home at Senoane in Soweto with two other men when the shooting suddenly commenced. The latter two men managed to run away and so avoid being shot. The deceased and Njikelani were less fortunate. Both of them were shot and fell to the ground. While they were lying on the ground a person moved between them, bent downwards, and removed from its holster a 9 mm CZ pistol owned by the deceased. None of the witnesses was able to say who the person was. Further shots were fired at the deceased as he lay on the ground. Deceased succumbed to his many bullet wounds and died. Njikelani was hit only once in the buttock

and survived. A large number of spent cartridge cases as well as some bullet heads and a live bullet were found in the immediate vicinity. In addition, three spent bullets and the jacket of a bullet were recovered from the body of the deceased.

That very afternoon, and quite co-incidentally, a police patrol encountered a red Nissan Sentra motor vehicle not far from the scene of the shooting. It excited suspicion but when the occupants of the police vehicle showed interest in it, it sped off. Despite pursuit by the police for a number of kilometres, the sounding of a siren, and the flashing of lights, the Sentra failed to stop. Eventually the driver lost control of it and it mounted an island in the middle of the road and came to a halt. In the car were the four appellants. Sgt Brits searched the vehicle and found on the floor in the front of the car a 9 mm CZ pistol (Exh 1) and a .38 Taurus revolver the serial number of which

had been obliterated (Exh 2). Cst Volschenk found in the back of the car two more handguns. They were another .38 Taurus revolver (Exh 3) and a 9 mm Browning pistol (Exh 4). It was subsequently found that the 9 mm CZ pistol (Exh 1) belonged to the deceased (Mr Makhoba). Furthermore, ballistic tests showed that some of the cartridge cases found at the scenes of both the shooting on Friday 6 November and the shooting on Saturday 7 November had been fired from the Browning pistol (Exh 4).

Both of the deceased persons had been involved in the business of operating taxis and the appellants were also so involved. The State contended that it had succeeded in proving beyond reasonable doubt the facts outlined above and that they gave rise to an irresistible inference that the four appellants had joined in a murderous attack upon Mr Chonco on Friday 6 November and upon Mr Makhoba

and Mr Njikelani on Saturday 7 November.

The four appellants denied that they were involved in any way in either of the attacks. Not all of them gave evidence upon oath but those who did (first and third appellants), said that they had given the police patrol no reason to take any particular interest in them; that there had been no pursuit of them in the manner described by the police; that they stopped on becoming aware that the police wished them to do so; that they were unaware of the presence in the vehicle of any handguns; and that there were good reasons why they were on the road together at that time.

The Court a quo considered the evidence tendered by the State in respect of the murder of Mr Chonco to be insufficient to justify a conviction and all the appellants were acquitted on that count. After a comprehensive review of all the evidence in the case the Court

a quo concluded that the circumstantial evidence against the appellants was so compelling, and their own evidence so improbable and unimpressive, that their conviction for the murder of Mr Makhoba, the attempted murder of Mr Njikelani, and upon the counts of unlawfully possessing the firearms and ammunition was justified.

Counsel for the appellants advanced a bold argument indeed in this Court. It amounted to a submission that the appellants had been the victims of a conspiracy hatched by the police in which virtually everybody who had anything to do with the investigation had knowingly participated. The foundation for the submission was a painstaking examination of the minutiae of the evidence for the State with a view to assembling as many inconsistencies and contradictions as could be found. These were said to be indicative of dishonesty and of the existence of such a conspiracy. The evidence of the appellants

who testified was submitted to have been acceptable evidence supported in material respects by one of the witnesses called by the State. To that too I shall return. At the very least, so it was contended, the Court a quo should have entertained real doubt as to whether or not there had been a conspiracy, and so acquitted the appellants.

More specifically, it was submitted that the police had embellished what they had been told about the car allegedly involved in the first shooting incident; that they had prompted the identification by one of the witnesses of the car involved in the incident on Friday 6 November as a red Nissan Sentra by showing her a photograph of the car in which the appellants were found by the police on Saturday 7 November; that their evidence as to the submission of the firearms and the ammunition or the remnants of it for ballistic examination was

shot through with falsehoods; that the inability to produce at the trial some of the cartridge cases was sinister; that the ballistic experts perjured themselves and pretended to have examined cartridges which they had never had; that the police alleged that firearms had been found in the car only after the appellants had been in custody for some hours; and that the police had concocted the allegation that the appellants had been pursued for a number of kilometres with a police siren wailing and lights flashing, yet had failed to pull over.

Before considering these submissions it would be as well to recall yet again that there are well-established principles governing the hearing of appeals against findings of fact. In short, in the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.

The reasons why this deference is shown by appellate courts to factual findings of the trial court are so well known that restatement is unnecessary.

One looks in vain for any such misdirection on the part of the Court a quo in this matter. The evidence given in the court below was fairly and accurately summarised in the judgment. Attention was given to the detailed criticisms of the evidence of the witnesses who testified for the State. They were evaluated in the context of the entire body of evidence before the Court and appropriate weight assigned to them in the light of all the evidence and the inherent probabilities and improbabilities of the case. Where caution was needed it was exercised and the court not infrequently preferred to place no reliance upon evidence for the State which might possibly not be accurate. That being the case, the credibility findings

and findings of fact of the trial court cannot be disturbed unless the recorded evidence shows them to be clearly wrong. In assessing whether or not such is the case, the approach which commended itself in Moshephi and Others v R (1980-1984) L A C 57 at 59 F - H seems appropriate in the particular circumstances of the matter:

> "The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the Appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual parts of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees."

It is so that there are aspects of the evidence given by some of the police witnesses which are not satisfactory but they relate in the main to peripheral issues and matters of detail. They are certainly not of a kind which point to the existence of a deliberate conspiracy to falsely implicate the appellants. Counsel for the appellants frankly and correctly acknowledged that, absent any reasonable possibility of such a conspiracy, the appeal against the convictions has to fail. I consider that the recorded evidence amply justifies the finding of the trial court that there is no reasonable possibility that such a conspiracy existed.

That the police who were patrolling the area in which the deceased (Makhoba) and the complainant (Njikelani) were shot on Saturday 7 November 1992 would have decided for no reason whatsoever to pick upon the four appellants who happened to be

driving along the road in an unremarkable manner, arrest them, and then later decide to fabricate a case of murder, attempted murder, and unlawful possession of firearms and ammunition against them is so far-fetched a hypothesis that it cannot be seriously entertained. Hence no doubt counsel for the appellant's concession during argument that it was proved at least by the State that when the car was searched after it had stopped two firearms were found in it, namely, a .38 Taurus revolver (Exh 3) and the 9 mm Browning pistol (Exh 4). That concession was no doubt made in an attempt to provide some rational explanation for the police having conspired to target the appellants (rather than someone else) in their attempt to bring the killers of Mr Makhoba and Mr Chonco to book. It was a concession rightly made for the evidence (including the evidence of contemporaneously made documentary entries in the police records) showed convincingly that

those two firearms were indeed discovered in the car in which the appellants were found very shortly after the attack upon Mr Makhoba and Mr Njikelani had occurred. Counsel for the appellants sought to persuade us that given the times testified to by some of the witnesses as to when the attack occurred, and the time given by the police as to when they saw and pursued the car, the firearms found in the car could not have been used in the attack. Apart from the fact that the times given in evidence were no more than estimates, the ballistic evidence (about which more anon) showed quite conclusively that some of the cartridge cases found at the scene of the shooting on Friday 6 November and some of those found at the scene of the shooting on Saturday 7 November had been fired from the same Browning pistol (Exh 4). The version given by the two appellants who did testify was that they and the second and fourth appellants had

borrowed the car in which they were travelling when the police accosted them. They claimed that the car was one of a number made available by a particular taxi organization for use by the members and their drivers to enable them to monitor the movements of taxis whose owners were members of the organization, and that they had set out that Saturday afternoon to do just that. They said that they had not seen any firearms in the car, that they did not race off at high speed as alleged by the police, that they were not pursued by the police in the manner described by the police witnesses, that they did not refuse to stop, and that they were not shown any firearms found in the car by the police. It was only much later at the police station that it came to their ears that firearms had allegedly been found in the car. One of the State witnesses, Mr Madlala, the secretary of the taxi organization of which the appellants spoke, gave what purported to be confirmatory

evidence of the making available by the organization of the car for the use of any member or taxi driver who chose to take it for the purpose of monitoring taxi movements and controlling taxi ranks. Before commenting upon the evidence I should dispose of some subsidiary matters.

Some reference was made in the heads of argument to the behaviour of the learned judge in the Court a quo. It was suggested that he had displayed impatience, that he had not allowed counsel to pursue particular questions and lines of enquiry, and that he had been discourteous. Further submissions were made relating to an alleged descent by the learned judge into the arena by way of what were said to be unduly testing questions put by him to first and third appellants and to a State witness who gave evidence ostensibly favourable to the appellants. A special entry which had been made was also canvassed

in the heads of argument: it rested upon the premise that the prosecutor in the Court a quo had failed to make available to the defence counsel the pre-trial statements made by four of the policemen who testified at the trial in circumstances in which he should have done so, and that prejudice to the appellants had resulted. Yet another alleged irregularity was raised in the heads of argument, namely, the alleged making by the prosecutor of a communication, in the absence of defence counsel, to the trial judge of the unavailability of a witness on a particular day.

During the course of oral argument in this Court counsel for the appellants wisely abandoned all these points. It is unnecessary to say more than that they were devoid of any merit, that far from the trial judge having behaved irregularly or discourteously, he conducted the proceedings with exemplary patience, and that his interventions

were entirely proper and fully justified.

I return to the evidence. I leave aside for the moment the evidence that another two firearms, namely, the 9 mm CZ pistol (Exh 1) and a .38 Taurus revolver (Exh 2) were also found in the car and that the 9 mm CZ pistol (Exh 1) was proved to have been the pistol taken from the deceased (Mr Makhoba) as he lay on the ground. The defence submission was that these were not found in the car but acquired somehow or other by the police and falsely tendered as having also been found in the car.

No less than three ballistic experts from the police forensic laboratories testified for the State. Each had examined and conducted experiments with different exhibits. The effect of all their evidence when pieced together amounted to this. Some of the spent 9 mm cartridges found at the scene of the shooting of Friday 6

November and some of those found at the scene of the shooting of Saturday 7 November were fired from the same 9 mm Browning pistol

(Exh 4). Despite the fact that there was no cross-examination of these , witnesses designed to show that they were individually or collectively parties to a conspiracy to give perjured evidence to secure the conviction of the appellants, and despite the absence of any serious , challenge when the matter was argued in the Court a quo to the accuracy of the conclusions reached by these witnesses, it was submitted in this Court for the first time that the ballistic experts were part of such a conspiracy. This submission presupposes that when the police decided to accuse the appellants of these killings and to send the firearms and ammunition to the ballistic department for examination and testing, they had already arranged for no less than three ballistic experts to participate in the conspiracy. Why the police

should have found it desirable to involve so many in so nefarious an enterprise when one would have sufficed, was not satisfactorily explained. Nor for that matter were the many negative results to which the same experts testified. Moreover, the firearms were available at the hearing and so were many of the spent cartridges. Thus any attempt by the experts to fabricate results could potentially have been easily exposed. Much was sought to be made of the fact that some of the cartridges allegedly found by the police were no longer available at the trial. Here again, that is hardly a pointer to a conspiracy. If they never did exist, why would the police have claimed that they did exist while knowing that, if challenged, they would not be able to produce them? If they did exist, but ballistic tests were negative, what would be the point of "losing" them when so many other spent cartridges which yielded negative results were safely

kept and available at the hearing? In short, there was no basis for entertaining as reasonable the possibility that these experts were parties to a conspiracy.

The explanation advanced in argument for the presence in the car of the two firearms which it was conceded were proved to have been found, was that they had either been left intentionally in the * car by the persons who had them in their possession before the appellants took the car, or that those persons had inadvertently left them in the car. Neither suggestion has any plausibility. That they were deliberately left in the car despite its availability to all and sundry provided only that they were members of the taxi organization or drivers of taxis (there were 800 such members and 3500 such drivers) is too unrealistic a possibility to be countenanced. That each of the persons in whose possession each firearm was should have

simply forgotten to remove it when leaving the car is also so highly unlikely that it can be safely discounted. Moreover, the evidence given by the appellants who testified as to when they took possession of the car is such that the 9 mm Browning pistol (Exh 4) could not have been used at the scene of the shooting of the deceased, Mr Makhoba, and the complainant, Mr Njikelani, if the appellants' evidence is true. Yet the ballistics evidence shows irrefutably that the Browning pistol was indeed so used. The evidence of the State witness, Madlala, was patently untrue. Apart from its inherent improbability, he purported to be able to recall eleven months after the event that two of five vehicles belonging to the organization were used for monitoring purposes on Saturday 7 November 1992 and also purported to be able to recall the movements of the organization's vehicles on other days. He created "the poorest impression" upon the

Court a quo and a perusal of his evidence fully vindicates that assessment of him as a witness. Neither the second nor the fourth appellant gave evidence at all.

The weight of this circumstantial evidence is so great, and the plausibility of the defence version so weak, that the well-known tests set forth in R v Blom 1939 AD 88 and amplified in R v de Villiers 1944 AD 493 are fully satisfied. When one adds to the web of circumstantial evidence the further fact that one of the other two firearms found in the car was Mr Makhoba's CZ pistol (Exh 1), the case against the appellants is well nigh unarguable. It was contended that this fact was not proved beyond reasonable doubt and we were referred to various aspects of the evidence which, it was suggested, showed that this firearm had not been found in the car, and that the police had acquired it somehow from some other source. In this

connection, it was pointed out that no one had been able to identify the person who removed Mr Makhoba's pistol from its holster as he lay upon the ground, and that it might have been one of the other three persons who were present when he was shot, who removed it, and then handed it to the police. The suggestion is fanciful. The murderous attack upon the deceased and his companions was sudden and unexpected. A veritable fusillade of shots was fired at them. Understandably, those that could, scattered and ran for their lives. That one of them would have remained behind long enough, and been intrepid enough, to brave the fusillade until the deceased had been hit and had fallen to the ground, and until he had succeeded in removing the deceased's pistol from its holster, is in the highest degree improbable. And assuming that one of them had done so and had handed it to the police, was he too party to a conspiracy to represent

that the pistol had not been taken by him at the scene and given to the police, but found in the car by the police? That was not suggested and again it is inherently improbable. If he was not a party to a conspiracy, the police would have been taking a very considerable risk in falsely claiming they had found the pistol in the car when they were aware that there was a witness who could flatly contradict them.

I do not consider it necessary to discuss the evidence in any greater detail given the absence of any misdirection by the Court a quo, and given that Court's full and careful consideration of all the criticism of the State's evidence raised by defence counsel. It suffices to say that this is certainly not a case in which a thorough reading of the recorded evidence leaves me in any doubt as to the correctness of the trial court's factual findings.

It was not disputed that, if the trial court's primary

findings of fact remain undisturbed, the inference that each of the appellants was knowingly a party to a common purpose to kill the deceased (Mr Makhoba), and to attempt to kill Mr Njikelani, would be inescapable. It was also rightly conceded that each of the appellants would have failed to discharge the onus cast upon him by sec 40 (1) of the Arms and Ammunition Act 75 of 1969 of proving that he was not in possession of any one of the four firearms and the ammunition in it. See S v Mtshemla and Others 1994 (1) SACR 518 (A).

The appeal of the appellants against their convictions must therefore fail. <u>The Sentences:</u>

The sentence of death imposed upon the appellants in respect of Count 2 (murder) must be set aside as a consequence of the decision of the Constitutional Court in S v Makwanyane and

Another 1995 (3) SA 391. There is no appeal against the sentences imposed in respect of the count of attempted murder and the counts relating to the unlawful possession of arms and ammunition. The case will be remitted to the Court a quo to enable it to consider an appropriate substitute for the sentence of death.

In the result, the appeal of the appellants against their convictions is dismissed. The appeal against the sentence on Count 2 is upheld, the sentence of death imposed in respect of Count 2 is set aside and the case is remitted to the Court a quo for further hearing and the imposition of an appropriate substitute for the sentence of death.

R M MARAIS
JUDGE OF APPEAL

Vivier JA) Concur
Streicher AJA)