THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No 261/94, 59/96, 245/94, 230/94, and 320/94.

In the matter between:

PHILLIP MALEFANE	First Appellant (Accused 1 in Court a quo)
BONGINKOSI MCHUNU	Second Appellant (Accused 2 in court a quo)
JOHANNES MKHIZE	Third Appellant (Accused 3 in court a quo)
ARON LIGARABA	Fourth Appellant (Accused 4 in court a quo)
ERIC WILLIAMS	Fifth Appellant (Accused 5 in court a quo)
PA NGUBANE	Sixth Appellant (Accused 6 in court a quo)
DAVID NENE	Seventh Appellant (Accused 7 in court a quo)

and

THE STATE Respondent

Coram: Hefer, Olivier JJA et Farlam AJA.

Heard: 19 May 1998

Delivered: 1 June 1998

JUDGMENT

FARLAM AJA

On 15 July 1991, in front of the administration building at Shaft 6 of the Hartebeesfontein Gold Mine in the district of Klerksdorp a group of armed men robbed two employees of a security firm known as Fidelity Guards of six cashboxes and R7 220-00 in cash.

During the robbery one of the Fidelity Guards employees, Hendrik Willem Daniel Coetzee, was shot dead and another, Hendrik Willem Christiaan Kleynhans, the driver of the Fidelity Guards armoured vehicle from which the cash boxes were taken by the robbers, was seriously injured. Shots were fired at another Fidelity Guards employee, Royden Burger, who was then on the first floor of the administration building, but fortunately these shots missed him. In what follows I shall refer to the area in front of the administration building at Shaft 6 as "Scene 1".

The robbers loaded the cash boxes and the money they had taken onto

a Ford utility vehicle and drove away at great speed.

Two other persons in the employ of Fidelity Guards, Matthys Johannes Lourens, the manager of Fidelity Guards' Klerksdorp depot, and Edward van Reeuwyk, after receiving a radio message from Burger stating that the robbery had taken place and giving a description of the robbers' utility vehicle, drove in a Golf motor car in the direction of Scene 1. Before they reached Scene 1 they saw a Ford utility vehicle, which corresponded to the description Burger had given, approaching them from the opposite direction. After it had passed them, Lourens executed a U-turn and gave chase in the direction of Klerksdorp.

In a cul-de-sac in a residential area known as Dawkinsville in the municipal area of Klerksdorp the Ford, in which at the time there were four occupants, came to a stop. Lourens parked the Golf a short distance away. Shots were fired at Lourens and Van Reeuwyk. I shall refer in what follows

to the place where these shots were fired at Lourens and Van Reeuwyk as "Scene 2".

Two men ran from the Ford towards a nearby koppie where later that day members of the S A Police found a hidden AK 47 rifle which was subsequently ballistically linked with cartridge cases found at Scene 1.

The Ford with two persons in it was then driven away from the scene, once again at great speed, in an easterly direction along a tarred road known as the Old Cemetery Road. Thereafter one Emiel Carl von Zweel, a security officer employed at the Hartebeestfontein Gold Mine, accompanied by one Nkala, was patrolling the Old Cemetery road in a utility vehicle. He drew it across the road when he saw the approaching Ford so as to cut it off. The Ford, however, raced past Von Zweel's vehicle. While doing this the passenger put out his left leg and his sand shoe with blue laces fell off. Nkala picked it up. The Ford, having left the tarred road, drove through a wire

fence and across the veld before coming to standstill at a nearby railway track, whereupon its driver and his passenger ran away. Hattingh and Gunn, two mine officials, gave chase. Hattingh fired at them. One of the persons who ran away, subsequently identified as accused 1, was injured and fell down. The other fugitive was caught by Venter and Clement and subsequently identified as accused 2. I shall refer in what follows to the place where the Ford came to a stop as "Scene 3".

In the back of the Ford were found an AK 47 rifle, 5 of the stolen cash boxes and a piece of newspaper. Blood of the same group as accused 2's blood was found on one of the cash boxes and on the newspaper, as well as in the front portion of the Ford. The AK 47 rifle was subsequently ballistically linked with cartridge cases picked up at Scene 1. A finger print was discovered on one of the windows of the Ford and it was subsequently identified as that of accused 3.

In consequence of the chain of incidents which I have summarised in the preceding paragraphs seven persons were indicted before M J Strydom J and two assessors in the Western Circuit Local Division of the Supreme Court sitting at Klerksdorp.

The indictment contained ten counts.

Count 1 related to the murder of Coetzee, the Fidelity Guards employee, who was shot dead at Scene 1.

Count 2 related to the armed robbery which was committed at Scene 1.

Count 3 related to the attempted murder of Kleynhans, the Fidelity Guards driver, who was seriously injured at Scene 1.

Court 4 related to the attempted murder of Burger, the Fidelity Guards employee, at whom shots were fired at Scene 1.

Counts 5 and 6 related to the attempted murders of Louwrens and Van Reeuwyk at whom shots were fired at Scene 2.

Count 7 related to the theft of the Ford abandoned at Scene 3, which, it was alleged, had been stolen in Pretoria on 2 My 1991 some two weeks before the robbery at Scene 1.

Count 8 related to the unlawful possession of the two AK 47 rifles involved in the robbery, one of which had been found hidden near Scene 2, while the other was found in the back of the Ford at Scene 3.

Count 9 related to the unlawful possession of firearms of unknown manufacture, which it was alleged were also used in the robbery: in this regard the State alleged that at least six firearms were used in the robbery, with the result that, apart from the rifles forming the subject of Count 8, the robbers must have been in possession of another four firearms.

Count 10 related to the unlawful possession of at least 25 bullets designed to be fired from a machine gun or similar weapon, 25 empty cartridge cases having been found at Scene 1.

All the accused were acquitted on Count 7. Accused 4 was acquitted on all the other counts with the exception of Count 2 on which he was convicted of being an accessory after the fact to the crime of robbery with aggravating circumstances. Accused nos 1,2,3 and 6 were convicted on all the counts except count 7 on which they were, as I have said, found not guilty. Accused nos 5 and 7 were convicted on all counts except counts 5 to 7 on which they were acquitted.

Accused 4 was sentenced to a fine of R5 000 or 3 years imprisonment.

All the other accused were sentenced to death on counts 1 and 2.

Accused 1, 2 and 6 were sentenced as follows on counts 3 to 6 and 8 to 10:

Count 3: 8 years imprisonment;

Count 4: 5 years imprisonment;

Count 5: 6 years imprisonment;

Count 6: 6 years imprisonment;

Count 8 : 7 years imprisonment;

Count 9 : 2 years imprisonment;

Count 10: 2 years imprisonment.

The trial court ordered that the sentences on counts 5 and 6 and those on counts 8 to 10 should be served concurrently.

The sentence imposed on accused 3 was the same as that imposed on accused 1,2 and 6, except that he was sentenced to 8 years imprisonment on count 8.

Accused 5's sentences on counts 3,4, 8,9 and 10 were the same as those imposed on accused 1,2 and 6 except that in his case only the sentences on counts 8 to 10 were ordered to be served concurrently.

The sentences imposed on accused 7 were the same as those imposed on accused 5 except that he was sentenced to 8 years imprisonment on count 8.

All the accused now appeal to this Court against their convictions and

all except accused 4 against the sentences imposed upon them.

All the accused made statements to police officers after they were arrested and all of them, except accused 4 and 5, pointed places out to police officers and made further statements in the course of such pointings out.

At the trial the accused alleged that evidence of the statements they made and of the pointings out was inadmissible as they were, so they said, assaulted and threatened and told what to say and point out.

Trials-within-the-trial were held in respect of these allegations and the trial court held in the case of each accused that the statements made were admissible and similar decisions were given in relation to the pointings out.

A substantial part of the trial consisted of the two trials-within-the-trial relating to the admissibility of the statements made by the accused to various police officers and the pointings out done by accused nos 1, 2, 3,6 and 7. In the judgment given at the end of trial the trial court gave full reasons for

its decision that evidence of these statements and pointings out was admissible. The evidence led at the two trials within the trial was fully and accurately summarised and cogent reasons were given for the conclusions to which the court came.

Counsel for all the accused (except accused no 4) contended on appeal that the trial court's decisions on the admissibility of the statements and pointings out were incorrect. Apart from contentions advanced by counsel for accused 2 and accused 3 relating to the interpretation of the statements allegedly made by the accused whom they represented, with which I shall deal presently, the main attack levelled by counsel for the accused before this Court on the trial court's judgment on the admissibility of the statements and the pointings out done by them related to the trial court's findings regarding the credibility of the various witnesses who testified at the trials within the trial.

In its judgment the trial court found that the evidence given by the main

State witnesses who testified at the trials-within-the-trial was satisfactory and that the evidence given by the accused was to be rejected as untrue.

It is not contended that there were any misdirections of fact by the trial court. Applying the principles in R v Dhlumayo and Another 1948 (2) SA 677 (A) we have no reason to interfere. On the contrary it is clear from the transcript of the evidence led at the two trials-within the-trial that the trial court's views regarding the acceptability of the evidence of the State witnesses and the unacceptability of the evidence of each of the accused are fully justified.

Mr Gerber who appeared for accused nos 2 and 3, contended that Constable M J Mboweni, who acted as the interpreter when accused 2 made his statement to Captain P R Bredenkamp, did not have sufficient knowledge of Zulu and Afrikaans to interpret properly what accused no 2 said to Captain Bredenkamp and what the captain said to the accused.

3 Mboweni testified that he and accused 2 understood each other in Zulu.

Accused 2 confirmed this in his evidence although he said that Mboweni "is

nie so baie goed in Zoeloe nie".

For this simple reason the objection based on S v Sheehama 1991 (2) SA 860 (A) falls away.

In his argument on behalf of accused 3, Mr Gerber contended that the evidence of accused 3's alleged statement was in the nature of hearsay and was wrongly admitted by the trial court because the interpreter who interpreted accused 3's statement to Lieutenant De Klerk, the police officer who recorded it, was not called at the trial as he had died in the interim.

Mr Gerber submitted that the evidence in question should have been excluded because the interests of accused 3 (for whom the evidence was highly prejudicial) were not properly taken into account.

There is no substance in this point because accused 3 was afforded the

opportunity to read the statement himself. He stated that he could read and the statement was given to him and he read it himself without the assistance of the interpreter, after which he said that he was satisfied that his statement was correctly recorded.

In the circumstances I am satisfied that the trial court's decision to rule evidence of the statement admissible was correct.

It follows from what has been said that the statements made by all the accused and the pointings out done by some of them were rightly admitted by the trial court.

I turn now to consider the appeals by the various accused against their convictions. As accused 4's position differs radically from that of the other accused I shall consider his appeal against his conviction after I have considered those of the other accused. <u>Accused 1</u>

Accused 1's statement was to me effect that he was involved in planning the robbery, that he drove the Ford and was involved in the incidents described above at Scenes 1, 2 and 3 and that he was shot and captured near Scene 3 while trying to make his escape.

His defence that he acted throughout under duress was rightly rejected by the trial court.

In my view the trial court was entirely correct in finding that accused 1 was a party to a common purpose to rob and that in all the circumstances he foresaw homicide as a possible consequence of the execution of the plan to rob and that he associated himself with that possibility in a reckless fashion: See S v Majosi and Others, 1991 (2) SACR 532 (A) at 537 j - 538 e. It follows that the convictions on counts 1 and 2 were clearly correct.

Mr Klein, who appeared for accused 1, submitted that the trial court erred in convicting accused 1 on count 4 (the court relating to the attempted

murder of Burger). He contended that the shooting at Burger was intended

to eliminate his resistance so that he would be submit to the taking of the money and cash boxes and was accordingly one of the elements of the robbery. This submission runs counter to the decision of this Court in S v Moloto, 1982(1) SA 844 (A) in which it was accepted that an accused may be convicted of robbery and attempted murder where it is proved beyond reasonable doubt that he also had the intent to kill and not only to use violence, as was the case here.

Mr Klein also argued that the trial court erred in convicting accused 1 on counts 5 and 6. He contended in this regard that the State did not prove beyond reasonable doubt that accused 1 shared a common purpose with accused nos 3 and 6 (who according to him shot at Louwrens and Van Reeuwyk) to attempt to murder the two complainants on these counts.

In my view there is no substance in this submission. It must have been

an inherent part of the plan hatched by accused 1 and his confederates to use the firearms which they assembled for the purposes of the robbery not only to overcome resistance so that they could obtain cash boxes and the money they contained, but also to ensure their successful flight. They must have foreseen that someone might give the alarm, that they or some of them might be pursued and that shots might well be fired at their pursuers so as to enable them to escape. In the circumstances I am satisfied that the acts of those robbers who shot at Van Reeuwyk and Lourens must be regarded also as the acts of accused 1 with the result that he was rightly convicted in respect thereof: see S v Shaik and Others 1983 (4) SA 57 (AD) at 65 A.

It follows that the trial court correctly convicted accused 1 on counts 5 and 6.

On counts 8, 9 and 10, those relating to the unlawful possession of firearms and ammunition, Mr Klein submitted that the trial court erred in

convicting accused 1, on the basis of the doctrine of common purpose, of possession of firearms and ammunition. He relied on the decision of Mullins J (with whom Zietsman J concurred) in S v Fibi and Others 1990 (2) PH,H 142 (E), which has recently been followed in the Witwatersrand Local Division in S v Nkosi, 1998 (1) SACK 284 (W).

In the present case the finding of common purpose liability against accused 1 is based on a prior agreement to which he was party that an armed robbery would be committed in circumstances where it is clear that the arms to be used were not lawfully possessed by the users. In other words the commission of the crimes of unlawful possession of firearms and ammunition by some at least of the robbers fell within the common design. I can see no basis - nor was one suggested in argument - why all persons who were party to the common purpose would not be guilty of all crimes committed in pursuance of the common purpose. It follows in my view that accused 1 was

rightly convicted on counts 8, 9 and 10.

Accused 2

Parts of accused 2's statement were exculpatory. Blood found on one of the cash boxes and a newspaper in the back as well as the front of the Ford corresponded with his blood group but not with the blood group of any of the other accused.

According to the evidence rightly accepted by the trial court he was the passenger in the Ford who was captured near Scene 3. The sand shoe which was picked up by Nkala belonged to him.

In my view the trial court correctly found on the basis of stains of what was clearly his blood both at the back of the Ford and in front that he was injured at Scene 1, climbed into the back of the Ford and later into the front and that thereafter, when he was accused l's only passenger, he attempted to make his escape at Scene 3.

In the circumstances it is clear that he participated in the robbery at Scene 1 and was present at Scene 2 when shots were fired at Lourens and Van Reeuwyk. For the reasons given above in relation to accused 1 I am satisfied that he was correctly convicted on the basis of the doctrine of common purpose on counts 1, 2,3,4, 5, 6, 8,9 and 10.

Accused 3

Accused 3's testimony at the trial was patently false. He denied that his fingerprint was found on the window of the Ford. The trial court, despite some confusion in the evidence of Warrant Officer Swart, accepted the State's evidence that it was. He also raised an alibi defence. This was correctly rejected by the trial court.

In my view the trial court correctly found that he was at Scene 1 and that he fired shots from an AK 47 firearm.

What has been said above in relation to accused l's guilt on counts 4, 5,

6,8,9 and 10 is also applicable to him. In the circumstances I am satisfied

that he was correctly convicted on counts 1, 2, 3,4, 5, 6, 8, 9 and 10.

Accused 5

The only evidence against accused 5 was the statement he made which was rightly admitted. According to

the statement he was the driver of one of the vehicles involved in the robbery.

In my opinion the trial court correctly found him guilty, on the basis of that statement and the other evidence admissible

against him relating to the various offences, on counts 1,2,3,4, 8,9 and 10. Accused 6

The evidence on which accused 6's conviction was based consisted in the main of the statement he made to

Lieutenant Heyliger and pointings out he did to Major Maas.

It is clear from the statement that he admitted being involved in the

planning of the robbery, being in possession of a firearm at Scene 1 and using

it, taking part in the robbery and firing his firearm again at what can only be

Scene 2.

The trial court carefully considered the alibi he put up and rejected it. No basis was suggested in argument as to why the

trial court's findings in this regard should be overturned.

I am satisfied in all the circumstances that he was correctly found to have participated in the robbery which forms

the subject of count 2.

It is also clear from his statement, read against the background of the conclusions to which I have come in relation

to the submissions advanced by Mr Klein on behalf of accused 1 that he was correctly convicted on counts 1, 3,4,

5,6,8,9 and 10. Accused 7

In accused 7's statement he admitted being involved in the planning and

execution of the robbery and that he was one of those who fired shots at Scene 1.

In his evidence he raised an alibi defence. His evidence and that of his alibi witnesses were rightly rejected by the trial court.

Mr Meyer, who appeared on behalf of accused 7 contended that accused 7 did not have a fair trial. The points he raised in this regard were so entirely without substance that it is not necessary to deal with them.

In my view the trial court was correct in convicting accused 7, on the basis of his statement, the pointings out he did and the State evidence regarding the commission of the various offences at Scene 1 and the firearms and ammunition which were used on counts 1,2,3,4, 8,9 and 10. Accused 4

Accused 4, it will be remembered, was convicted of being an accessory after the fact to robbery with aggravating circumstances in respect of count 2.

His conviction was based on his statement to Lieutenant Barkhuizen and the State evidence which, the trial court held, confirmed that statement in material respects. He himself closed his case without giving or leading any evidence.

His statement was to the effect that he drove accused 5 to a spot near Scene 1 and later back to Johannesburg after accused 5 had told him that he had been involved in a robbery and that the police were on his track.

His counsel's argument that his intent to obstruct the course of justice has not been proved can plainly not succeed.

The same applies to the argument that Section 209 of the Criminal Procedure Act 51 of 1977 had not been complied with. Material parts of his statement, including his endeavours to assist accused 5 to escape, are confirmed by the evidence led at the trial. He was accordingly correctly convicted.

I turn now to deal with the sentences imposed on accused nos 1,2,3,

5,6 and 7.

The death sentences imposed on accused 1,2,3,5,6 and 7 on counts 1 and 2 have to be set aside in view of the Constitutional Court's decision in S v Makwanyane and Another 1995(3) SA 391 (CC) that capital punishment is unconstitutional.

Since the accused in this case were sentenced, the trial judge has died.

This Court is empowered in terms of section 322 of Act 51 of 1977 to impose on appeal the sentence which the trial court should have imposed. In view of the death of the trial judge it is appropriate for this Court to impose sentence on the accused in place of the death sentences which have to be set aside and counsel for the accused have all indicated that they have no objection to this Court's doing so. It is clear from the sentences imposed by the trial court on counts 1 and 2 that it considered that the crimes committed by the

accused nos 1,2,3,5,6 and 7 were so serious that it was necessary to remove

them permanently from society.

That the crimes they committed in respect of which they were convicted on counts 1 and 2 were serious is undisputable. By planning and executing an armed robbery on this scale they in effect declared war on their fellow citizens and showed that they represent so serious a threat to society that it is clearly necessary that they be rendered incapable of endangering law and order in the community ever again. In my view the only way of ensuring this is for sentences of life imprisonment to be substituted for the death sentences imposed by the trial court and for it to be ordered that the sentences imposed on the other counts should run concurrently with the life sentences imposed on counts 1 and 2.

The following order is made : 1. The appeals in respect of the convictions are dismissed and

the

convictions of all the accused are confirmed.

2. The appeals in respect of the sentences imposed on accused nos 1, 2, 3, 5, 6 and 7 on counts 1 and 2 are allowed : the sentences imposed on those counts are set aside and replaced by life sentences on both counts, which sentences shall run from 3 May 1994. It is further ordered that the sentences imposed on each of the accused on the other counts on which they were convicted shall run concurrently with the life sentences imposed on counts 1 and 2.

IG FARLAM Acting Judge of Appeal.

HEFER JA)
OLIVIER JA) Concur.