THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

CASE NO: 338/2001

In the matter between :

ABDURAGHMAN THEBUS First Appellant
MOEGAMAT ADAMS Second Appellant

and

THE STATE Respondent

—

Before: **OLIVIER, NAVSA JJA and LEWIS AJA**

Heard: **9 MAY 2002**

Delivered: **30 AUGUST 2002**

Summary: **Reliability of evidence of identification: alibi defence – approach to: sentence – Criminal Law Amendment Act 105 of 1997 – increase on appeal.**

—

J U D G M E N T

—

LEWIS AJA

LEWIS AJA:

[1] I have read the judgment of Navsa JA and regret that I do not agree with his finding that the conviction of the first appellant should be set aside.

[2] Navsa JA has concluded that because the evidence of Kiel was found to be unreliable in respect of the identification of the second and third accused, it is not to be relied upon in respect of the first appellant. The learned judge considers, however, that Kiel's evidence identifying the fourth appellant is reliable because it is corroborated by the evidence of David (Petersen), and by the car registration number taken down by witnesses to the shooting, and which led to the tracing of the fourth appellant.

[3] The principal difficulty with Kiel's evidence implicating the first appellant is that it is uncorroborated by any other evidence: he was the only member of the community who identified the first appellant, and the reliability of that identification must be weighed carefully with his alibi, and the

testimony of the two witnesses who supported it. The real issue is to decide whether Kiel's identification of the first appellant (which the court found to be reliable in the case of the other appellant, but which he did not accept in respect of the other two accused) proves his presence at the scene of the shooting in the face of the alibi evidence of Ms Van Rooy and Ms Jacobs. The further question that arises from this is whether an alibi which is considered to be fabricated can in fact corroborate in some way the identification of an accused by a single witness.

[4] Navsa JA has referred to the tests to be employed when determining the reliability of the evidence of a single witness as to the identity of an accused. I do not propose to repeat these. The Court *a quo* took into consideration the following factors. The first appellant was well-known to Kiel. They had grown up in the same area, and Kiel had seen him regularly over a number of years although they did not socialize together. He knew the nickname (Maantjie) of the first appellant. He had remonstrated with the first appellant, calling on him, by name, to stop the shooting because of the presence of children on the scene. When remonstrating he had been threatened with a firearm. He had seen a pickaxe in the hands of the first appellant. Moreover, the incident had occurred in daylight, where the perpetrators of the violence and the shootings were for the most part clearly visible. Kiel's description of the events tallied to a considerable extent with that of the other witnesses to the scene, although

there were some inconsistencies. These are easily attributed to the different times at which the various witnesses had seen the events, the different vantage points and their different powers of recollection.

[5] The reliability of the observations of Kiel must be considered having regard to the assessment of the trial Court of Kiel as an honest and impressive witness. It is true that the Court rejected his evidence implicating the two other accused: but it did so on the basis that he must have been mistaken in having placed them on the scene. The second accused was discharged after the close of the State's case because, although he was placed on the scene by Kiel, a State witness, Cedric Calton, gave him a plausible alibi. This was the position also in the case of the third accused where a plausible explanation of his whereabouts, supported by testimony, placed in doubt his presence on the scene and his complicity. The discharge and the acquittal were the result, in my view, of doubt having been cast on Kiel's evidence that placed those two accused on the scene, given that their versions were reasonably possibly true.

[6] As I have mentioned previously, Navsa JA has taken the view that if Kiel was found to have given unreliable evidence in respect of those two accused, then his evidence must be unreliable also in respect of the first appellant. This conclusion is based, in my respectful view, on two faulty premises.

[7] The first fallacy is that Kiel's evidence was equally strong in respect of all the accused, and that there is thus no reason to differentiate between his evidence identifying each. That is not the case. The two accused who were respectively discharged and acquitted were seen at a greater distance than was the first appellant. This is on its own of no great significance since Kiel testified that the distance was no more than eight metres. But they were on the other side of the road, whereas the appellants were on the same side. In particular, as I have mentioned, Kiel knew the first appellant well by sight and by reputation, and spoke to him on the scene, calling him by his nickname and asking him to desist from shooting. He did not speak to the other two accused. They were not said by him to have played any particular role in the shooting and its aftermath. I consider that there is no illogicality in the reasoning of Mitchell AJ that Kiel's evidence *may* have been less reliable in respect of those whom he had seen at a greater distance and with whom he had had no interaction.

[8] The second faulty premise is that Kiel could be right in respect of the fourth appellant because there was other evidence to corroborate his identification of him, but wrong where there was nothing other than a dubious alibi to support the identification of the first appellant. Kiel testified that he had never seen the fourth appellant previously. He recognized him

subsequently only by reason of his build and other physical characteristics (in respect of which he and David Petersen were inconsistent). His capacity to identify the fourth appellant was clearly thus not greater or better than his capacity to identify the first appellant. It is highly unlikely that he would be correct in respect of the man whom he did not know but incorrect in respect of the man whom he did know and to whom he spoke during the incident. Moreover, there was nothing to suggest that Kiel had any motive falsely to implicate any of the accused.

[9] The reason that Mitchell AJ acquitted the second and third accused was, as I have suggested, because of the reasonable doubt as to their presence on the scene, raised by plausible alibis – and not because Kiel was necessarily wrong.

[10] Was the first appellant's alibi of the same kind? Was it reasonably possibly true? I shall not traverse in detail the evidence of Ms van Rooy and Ms Jacobs. The version advanced by the first appellants and his two witnesses was that he had left Ocean View at about 13h00 and taken a taxi to the Fishhoek station. Ms Van Rooy, who also lived in Ocean View, was in the same taxi. They had both caught the 15h10 train to Wynberg. He and Van Rooy had parted ways there. He had gone to a mosque in Wynberg where he led the prayers. He had then proceeded to the home of Ms Jacobs, his second

wife, in Parkwood Estate. The first appellant and Ms Jacobs had been together all the time until the following day when he had left to return to Ocean View, save that he had gone alone to a mosque in Parkwood Estate. It was only when the first appellant returned to Ocean View that he had heard about the events of the previous day.

[11] Van Rooy testified, two years after the event, that she had caught the 15h10 train to Wynberg with the appellant, and that he had gone to the mosque in Wynberg. Ms Jacobs remembered, also some two years later, that the first appellant had arrived at her house at precisely 16h55. She could remember the exact time, she said, because she had been waiting for the first appellant to return her bank card to her so that she could do some shopping; and that she had been angry when he arrived too late for her to do this.

[12] I agree with the finding of Mitchell AJ in the court *a quo* that the two witnesses' versions of the first appellant's movements on the day in question were so consistent with each other, and with the evidence of the first appellant himself, and their ability to remember minute detail, such as timing and train schedules, so remarkable, that the suspicion must arise that the entire story was concocted for them and carefully rehearsed. That suspicion is not enough, however, to say that the first appellant's version is not reasonably possibly true.

[13] What is more telling, in my view, is that the version was raised only at the trial, some two years after the incident. It does not seem to me reasonably possible that the second wife of the first appellant, Ms Jacobs, and his acquaintance Ms Van Rooy, would not come forward immediately upon his arrest, or at least some short time later, and advise the police investigating the crimes, which had shaken the community as a whole, that he had been with them at the crucial times. It is equally not possible that the first appellant himself, having so cogent an alibi when arrested and charged, did not advise the police or the prosecution that this was the case. The only inference that can be drawn from his failure to advise the police, and from the other witnesses' failure to do so, is that the alibi had no truth in it at all.

[14] In my view, therefore, the evidence of Kiel identifying the first appellant as a participant in the crimes of murder and attempted murder is reliable and compelling. That he *may* have been mistaken in identifying the second and third accused as participants in the shooting spree does not detract from his clear identification of the other two accused. Kiel's evidence is supported, moreover, by the patent fabrication of an alibi by the first appellant. Accordingly there is no reasonable doubt, in my mind, that the first appellant was correctly convicted by the trial Court.

[15] I would thus also dismiss the appeal against the conviction of the first appellant.

[16] In so far as sentence is concerned, I agree with Navsa JA that the crimes committed by the appellants fall within the ambit of s 51 of the Criminal Law Amendment Act 105 of 1997, and in particular that the appellants were part of a group acting in furtherance of a common purpose. In the circumstances the prescribed minimum sentence is life imprisonment for each unless substantial and compelling circumstances, warranting the imposition of a lesser sentence, are shown to exist.

[17] I agree also with the views expressed by Navsa JA on the abhorrent nature of the crimes, and on the dangers of appearing to condone the conduct of the appellants in taking the law into their own hands. Vigilante action must be visited with severe consequences. But I consider that there are a number of factors which should be taken into account in determining whether the sentence of life imprisonment is disproportionate to the crime. In *S v Malgas* 2001 (1) SACR 469 (SCA) Marais JA, in discussing the meaning of the phrase 'substantial and compelling circumstances' said (at 481a—d):

> 'The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once the court reaches the point where unease has hardened into a conviction that an injustice will be done, that will only be because it is satisfied that the circumstances of the particular case render the prescribed

sentence unjust, or, as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If that is the result of a consideration of the circumstances the court is entitled to characterize them as substantial and compelling and such as to justify the imposition of a lesser sentence.'

The approach of this Court in *Malgas* was endorsed in *S v Dodo* 2001 (1) SACR 594 (CC).

[18] The imposition of life imprisonment on the two appellants leaves me with a sense of considerable unease, and a conviction that the sentences would be unjust. That does not mean that the two appellants should not be severely punished for their conduct. However, life imprisonment is the most severe sentence recognized by the law, and it seems to me that to impose it would be completely wrong in the circumstances of this case and in respect of the two appellants.

[19] It is useful, before dealing with the particular factors that I consider relevant, to set out the specific guidelines laid down in *Malgas* (in the Court's summary at 481j—482e), and that I consider pertinent in this case.

'D. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.
E. The Legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the

prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.
F. All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.
. . .
I. If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.'

[20] The killing of Crystal Abrahams, and the injuring of Riaan van Rooyen and Lester September was not premeditated. They were caught in the middle of the shooting by the vigilante group. The appellants, although guilty by virtue of being part of the group and having a common purpose, were not themselves the men who fired the shots. The first appellant stood at the scene of the shooting and the second collected spent cartridges. They did not have the direct intention to kill or injure but were guilty by virtue of dolus eventualis. Both were first offenders, and both had previously been regarded as respectable members of their community (I would add, however, that people who choose to take the law into their own hands and to participate in groups that deliberately damage property and cause severe injury and even death in the process can hardly be described as respectable members of society).

[21] I do not consider that the frustration allegedly felt by the community of Ocean View at the inability of the police to deal with gangsterism and drug-dealing is a factor that should be regarded as mitigating. Nor do I accept the approach of the trial judge that the entire community shouldered responsibility for the tragic events that occurred when the vigilante group descended on Ocean View. Indeed, I agree with Navsa JA that the conduct of the group would have added to the fear felt generally by people living in Ocean View. And the argument that members of the group were provoked by Cronje is illogical given that the group had first attacked his property.

[22] However, the other circumstances must weigh heavily in determining the appropriate punishment for the appellants. Their participation in the actual shooting was not a direct cause of the death of the deceased or the injuries to the complainants. That they are legally responsible for the death and injuries that resulted is not in question. Nor is their moral responsibility doubted. They participated in violent action that they must have known could lead to injury and death. But they did not actually shoot and neither was seen using a firearm. Such a difference in the degree of participation is not marginal – it is, in my view, significant. I have no doubt that it would be unjust to impose a sentence of life imprisonment on either of the appellants given that their participation in the commission of the crimes charged was limited. That the

appellants were first offenders, were employed and have families to support are factors that must also be taken into account.

[23] I consider therefore that there are substantial and compelling circumstances that justify a lesser sentence than life imprisonment. But the appellants' conduct is such as to warrant a lengthy sentence of imprisonment. They were responsible for the death of a child and the injuries of others. They showed a contempt for the administration of justice, and of the police who are charged with dealing with the prevention of crime, in a reckless and unconscionable fashion. The sentence imposed by the trial court was in the circumstances grossly inadequate for the punishment of the appellants and as a deterrent to others who might take it upon themselves to deal with criminal conduct by perpetrating crimes themselves.

[24] In all the circumstances I consider that a sentence of imprisonment of 15 years for each appellant is appropriate.

[25] The appeals of both appellants against their convictions are dismissed, and the sentences of suspended imprisonment subject to conditions in respect of both appellants are replaced with the following:

'The first and fourth accused are each sentenced to imprisonment of 15 years.'

CAROLE LEWIS
ACTING JUDGE OF APPEAL

OLIVIER JA CONCURS

NAVSA JA:

[1] During 1998 lawlessness reigned in the suburb of Ocean View, Simonstown, in the Western Cape. Drug dealers lived in the community and plied their trade openly. The police were unable to fight this scourge. The community itself was largely uncooperative in the fight against crime. On the 14 November 1998 a group of vigilantes decided to act against those whom they suspected of being drug dealers. The vigilantes armed themselves and called at addresses of suspects. They engaged in unlawful assaults and wantonly destroyed property. Members of the group were driving in a motorcade at an intersection close to populated blocks of residential flats when Grant Cronje ("Cronje"), a person suspected of being a drug dealer and whose house had been damaged by them earlier that day, discharged his firearm in their direction. The motorcade stopped. Members of the group, who emerged from motor vehicles, stood in the street and returned fire. A seven year-old girl, Crystal Abrahams ("the deceased"), who was on her way home from the shops walked into the crowd which had gathered to observe

events. Almost immediately thereafter she was struck by a bullet and killed. Riaan Van Rooyen ("Van Rooyen"), 15 years old at the time and present in the vicinity was wounded in his right buttock. Lester September ("September"), an adult who was also in the vicinity, sustained a flesh wound. It is not disputed that a person or persons from the motorcade discharged the bullets that caused the deceased's death and wounded Van Rooyen and September. Flowing from these events, the appellants and two others were each charged in the Cape High Court, with murder, public violence and two counts of attempted murder. The first and second appellants were the first and fourth accused respectively. At the end of the State's case all the accused were acquitted on the charge of public violence and the second accused, Moegamat Raven ("Raven"), was acquitted on all the remaining charges. The third accused, Fadiel Peterson ("Peterson"), was acquitted on all the remaining charges at the end of the trial. The appellants were each convicted of murder and on the two counts of attempted murder. The charges were considered as one for purposes of sentencing. Each of the appellants was sentenced to eight years' imprisonment, suspended for five years on the following conditions:

> "1. That you are not found guilty of a crime involving the use of violence or a crime against the State committed during the period of suspension.
> 2. That each of you perform community service without remuneration for a period of eight hours per week for a period of three years. Mr Thebus, you at the Ocean View police station. Mr Adams, you at the Athlone police station or such other police station to which either of you may be assigned should you change your address and where you will perform such

> administrative duties as are assigned to you from time to time by the officer commanding that police station."

The State applied in terms of section 316 B of the Criminal Procedure Act 51 of 1977 for leave to appeal against the sentences imposed by the Court below, contending that they were unduly light and induced a sense of shock. On 29 September 2000 the Court below granted the State leave to appeal to this Court. The appellants in turn applied for leave to appeal against their convictions. On 30 March 2001 the Court below granted them leave to appeal to this Court against their convictions on all three counts. Before us the two appeals were heard together. For the sake of convenience I will in respect of both appeals refer to the parties as they are in the appeal against conviction.

[2] The principal question in the appeal against the convictions is whether the State proved beyond a reasonable doubt that the appellants were part of the vigilante group from which the gunfire emanated resulting in the consequences described earlier. It was contended on behalf of the appellants that, in the event of this question being decided against them, we should conclude that they did not have a common purpose with the persons who fired the shots that killed the deceased and injured the other two, and that if we were disinclined to so conclude, we should hold, in the totality of circumstances, that the vigilante group acted in self-defence. On the question of sentence the State contended that considering the seriousness of the offences, and the circumstances in which they were committed, the sentences

were wholly inappropriate, did not serve as a deterrent to vigilantism and did not address society's interests. The appellants on the other hand contended that the sentences were innovative and appropriate.

[3] At the commencement of their trial before Mitchell AJ and two assessors, in the Court below, the appellants and their co-accused denied their presence at the scene at the material time. I proceed to deal with the material parts of the evidence adduced in the Court below.

[4] The first and main witness for the State was Gregory Edward Kiel ("Kiel"). A summary of his evidence follows. On the day in question, at approximately 17h00, he was watching television when his daughter drew his attention to a crowd of approximately thirty people, which was moving past the block of flats in which he resided. He went down the stairs and saw Cronje at the head of the crowd, brandishing a pistol and firing in the direction of the intersection of Aries Avenue and Milky Way where five vehicles were parked. Cronje's fire was returned and he took flight. There were four people in the street at the point from which Cronje was fired upon. One of them was on his haunches brandishing a firearm, which he discharged in the direction of a library and a block of flats. The other three were behind him. One of them was picking up spent bullet cartridges. Another was standing with a pick-handle in his hand. The remaining member of the quartet went to a vehicle and placed a shotgun in the boot. There were people in the five vehicles parked close to the four people in the street. Initially, when Cronje

was being fired upon, Kiel was lying flat on the tar surface. While members of the group of four were still firing, he arose with his arms in the air and walked towards them. He pleaded with them to stop firing and told them that a bullet had struck a child. One of them ordered him to shut up or face being shot. This person who had been picking up spent cartridges slapped Kiel in the face. He was brandishing an automatic pistol. Kiel identified the first appellant as the person who held a pick-handle in his hand and the second appellant as the person who had picked up the spent cartridges and who slapped and threatened him. According to Kiel he was in the presence of the first and second appellants for approximately 4 – 5 minutes. Kiel testified that the other two members of the group of four were not amongst the accused in the Court below. The first appellant is a resident of Ocean View whom Kiel has known for more than thirty years. Kiel testified that when he first addressed the group of four he spoke directly to the first appellant and called him by his nickname, "Maantjie". Kiel did not know the second appellant before the shooting incident and recognised him as having been on the scene by his moustache and physical build, which was altered slightly because he had lost some weight in the time between the shooting incident and the trial. Kiel testified that Raven and Peterson were present at the intersection and were at some stage in the vehicles parked approximately 6 - 8 metres away (across the street) from where he observed them. They were initially standing at the intersection before entering the motor vehicles. Peterson sat in the

driver's seat of a bakkie with the driver's window rolled down. There were other people in the bakkie with him. Kiel testified that when he walked back towards the deceased, after she had been fatally wounded, he saw Peterson drive the bakkie close to the point where she lay. A witness to events, named at the beginning of the next paragraph, shouted at the police that the bakkie was connected to the shooting. At that point Peterson drove away. Kiel knows Peterson and saw him in Ocean View more than once every week. Peterson regularly drove around Ocean View selling soft drinks. Kiel repeatedly stated that he was certain that Peterson was the person in the bakkie. Kiel testified that Raven sat in the motor vehicle in which the shotgun was placed. Kiel knew Raven and his parents and their address in Ocean View. For some time he lived in the same block of flats as did Raven and his parents.

[5] David Petersen testified in support of the State's case. I will refer to this witness as "David" so as to avoid confusing him with Peterson, the appellant's co-accused in the Court below. David had rushed to Cronje's house when he heard that a vigilante group had caused damage to it earlier that day. When he reached the house he found the door kicked in and the windows smashed. A bakkie on the premises was damaged. Cronje arrived shortly thereafter and walked past his house, accompanied by two other persons and followed by a growing crowd. He made his way across a veld as a motorcade, in which members of the vigilante group drove, wound its way

through the intersection. Cronje fired on the motorcade causing the vehicles to stop. Some of the occupants got out and returned fire, causing Cronje to flee. David corroborated Kiel's evidence of how he approached the group at the intersection. He confirmed that the second appellant had picked up spent cartridges. Like Kiel, David had not seen the second appellant before the day in question. When the shooting subsided David approached the group with his arms in the air. He spoke to the person with a shotgun and saw a man slap Kiel. Peterson sat in a bakkie approximately six metres away. David knew it was Peterson in the bakkie because he looked directly in his face at the time he spoke to the person with the shotgun. He knew Peterson as someone who sold soft drinks in Ocean View and has known him for a number of years ("'n goeie paar jaar al"). David was a friend of Peterson's brother. In response to a question about how often he saw Peterson in Ocean View he replied: "Baie, vreeslik baie." Later he clarified it by saying that he saw him at least once a day and more than once on Sundays. David accepted that people sometimes confused Peterson with his uncle but was emphatic that he was not mistaken about Peterson being in the bakkie. He stated repeatedly that he was certain that Peterson was in the bakkie. When it was put to him that Peterson was not in Ocean View at the material time his response was as follows: "Met hart en siel sal ek daarmee stry." David testified that he would never forget the second appellant's face because he watched him as he picked up the spent cartridges

three metres away. David did not see a difference in the second appellant's physical build from the time of the incident to the time of the trial.

[6] Van Rooyen testified that he and the deceased were making their way home from the shops to the block of residential flats close to the intersection when they walked into the crowd following Cronje. He saw Cronje fire at the motorcade. The vehicles stopped and occupants who got out fired back. He saw the deceased fall and attempted to carry her to safety when he felt his legs go lame. He knew Raven and Peterson but did not see them at the scene.

[7] September testified that he was on his way home after visiting a friend when he was struck by a bullet in the vicinity of a block of flats close to the intersection and saw people scurrying away, seeking safety. He did not see Cronje at the scene nor did he see who fired the shots. He sat down and saw the deceased making her way home from the direction of the shops. He told her to sit by him so as to avoid danger. She did not heed his advice and departed. Thirty seconds later he received a report that she had been shot and went to where her body lay.

[8] Kiel and David and people in the crowd following Cronje identified members of the vigilante group responsible for the death of the deceased and for the injuries caused to Van Rooyen as being part of an organisation called Pagad. Kiel and David's evidence in this regard was unchallenged. It is not disputed that during the course of the day in question, before the shooting

incident, members of the vigilante group engaged in violent acts and assaulted people in Ocean View.

[9] The Court below had regard to evidence by persons who had witnessed events in Ocean View earlier that fateful day and who recorded in writing the registration number of a motor vehicle used by the vigilante group as they went about their violent business. The registration number led the police to the second appellant. It is common cause that the second appellant is the owner of the vehicle bearing the relevant registration number.

[10] I turn to deal with the first appellant s alibi evidence. He testified that at the material time he was travelling to visit his second wife, Faranaaz Jacobs ("Jacobs"), who lived in Parkwood Estate. He gave an account of how, at approximately 13h00 on the day in question, he took a taxi to Fishhoek station and from there boarded a train to Wynberg where he attended afternoon prayers at the Wynberg mosque before proceeding to Jacobs' house. He testified that Brenda Van Rooy ("Van Rooy") was a fellow commuter on the taxi and the train. Van Rooy and Jacobs testified in support of the first appellant's alibi.

[11] The second appellant was the only accused who admitted to being a member of Pagad. He denied being present in Ocean View on 14 November 1998. He testified that on the day in question he travelled alone in his motor vehicle to Perdekloof at the instance of the security division of Pagad to ensure the safety of a location at which a Pagad meeting was to take place the

following day. Against this version the Court below considered the evidence of sergeant Mcdonald ("Mcdonald"), who testified that when he asked the second appellant where his motor vehicle had been on the 14 November 1998, the latter replied that he and his family had been visiting a resort in Montagu. Upon investigation it was discovered that the second appellant and his family booked into the resort the day after the shooting incident. The second appellant denied that he had been asked about the whereabouts of his car in relation to a specific date. He testified that Mcdonald asked him where his motor vehicle had been two or three weeks earlier and that he responded by stating that he had been at a resort in Montagu.

[12] The Court below was impressed by Kiel, describing him as a brave person who put his life at risk when he approached the group of four and their comrades who were in and around the motor vehicles. Kiel was found to be forthright and honest. The Court below considered that in respect of the identification of the first appellant, Kiel was a single witness, but held that his evidence that the first appellant was present at the intersection could not be rejected. The Court below concluded that the identification of the two appellants by Kiel and David was "probably" reliable. There are some inconsistencies between Kiel’s and David's descriptions of the activities and positions of the four persons who stood in the street at the intersection. Mitchell AJ stated that it would be surprising if there were none and that the discrepancies that existed were not such as to effect the reliability of their

identification of the appellants as members of the vigilante group. The Court was persuaded that Kiel was sufficiently close to the appellants at the material time so as to make his identification reliable, stating that it may be that his identification of persons who were on the other side of the road was less reliable.

[13] The Court below found that Jacobs and Van Rooy's evidence dovetailed too neatly and precisely with the first appellant's version of events. The Court held it against the first appellant that his alibi was not revealed to the police after his arrest and that it emerged for the first time at the trial. His alibi was rejected. It concluded that the first appellant's guilt had been proved beyond a reasonable doubt.

[14] In evaluating the second appellant's version that he was not in Ocean View at the relevant time, the Court was persuaded that sergeant Mcdonald's version, of how he offered his stay at Montagu Springs as an alibi in relation to a question about his whereabouts on 14 November 1998, was to be preferred to the appellant's version that he was merely responding to a general question as to his whereabouts a few weeks previously. The Court below found it unlikely that the question would have been posed in a general and vague manner.

[15] In dealing with the evidence concerning the registration number of the second appellant's motor vehicle the Court below was critical of the police for failing to preserve the paper on which the number was taken down, and had

some reservations about the evidence of the chain of events leading up to the number being traced. It nevertheless took this evidence into account against the first appellant and concluded that the State proved beyond reasonable doubt that the second appellant had been in Ocean View on 14 November 1998 and associated with the group from which the shooting emanated which killed the deceased and wounded Van Rooy and September. **[16]** With reference to ***S v Mgedezi*** **1989 (1) SA 687 (A)** the Court below convicted the two appellants on the basis of the doctrine of common purpose. It reasoned that members of the group were armed and that no member who participated in or associated with its actions on the day in question could be heard to say that he or she did not contemplate the possibility of violence erupting and that the arms carried by members of the group would be used and that persons might be killed. It held that the people who fired the shots and those associated with them had the requisite intention in the form of *dolus eventualis*. The Court below rejected the submission on behalf of the appellants that members of the group were acting in self-defence, stating that it was clear from the evidence that the group returned Cronje's fire after he had fled.

[17] In evaluating the correctness of the conclusions reached by the Court below it is necessary, at this stage, to examine the Court below's reasons for acquitting Raven and Peterson.

[18] It will be recalled that both Kiel and David identified Peterson and that Kiel was the only witness who identified the first appellant and Raven. In acquitting Raven the Court below considered the evidence of Sedric Calton ("Calton"), a witness for the State, who testified that on the day in question, when he was travelling to Raven's house in Ocean View to continue working on the exhaust system of his motor vehicle, he saw shooting take place at the intersection and when he arrived at Raven's home the latter was there. He told Raven about the shooting. In light of Calton's evidence the Court concluded that Kiel must have been mistaken when he testified that he saw Raven in a vehicle at the intersection.

[19] In acquitting Peterson the Court had regard to his evidence that at the material time he was selling soft drinks elsewhere. He was corroborated by the evidence of Mr Gennison who was employed by him and by Mr Davids who testified that on the day in question he purchased soft drinks from Peterson in Kalk Bay to serve as part of the refreshments at a function celebrating his father's 65th birthday. Peterson was also supported by his delivery book, which, although it contained an error in recording some dates relative to the days of the week, resembled similar entries to other Saturdays. Peterson's alibi was disclosed to the police when he was arrested. In consequence they obtained statements from witnesses soon after the event. In their testimony the witnesses did not depart from their statements in any material way. The Court below concluded that in light of this evidence Kiel

and David must have been mistaken in placing Peterson on the scene and consequently acquitted him on all the remaining charges.

[20] The first appellant's conviction was based on Kiel's identification and on his fabricated alibi. It is trite that the evidence of a single witness must, in order to lead to a successful conviction, be satisfactory in every material respect. In Hoffmann and Zeffertt's ***The South African Law of Evidence*** (4th ed) the learned authors remind us at **612 - 613** that appellate courts have frequently observed upon the dangers of relying on the identification of a single witness. Reference is made to ***R v T*** **1958 (2) SA 676 (A)** where an accused was picked out at an identification parade by the complainant and was convicted and sentenced to death. There was no other evidence against him. This Court accepted the trial court's finding that the complainant was completely truthful and genuinely believed that the accused was the man who raped her but upheld the appeal because the evidence of identification was left open to a reasonable doubt. The complainant was in a shocked state, her opportunity for observation was limited and the light was poor. The learned authors, at 613, state the following:

> **"In such cases it is not unlikely that a guilty man is allowed to go free, but the possibility of error is too great to justify a conviction."**

[21] Calton was a State witness who was not impeached. His evidence concerning Raven stands unchallenged. The alibi evidence of Peterson was rightly not faulted. It is not open to the State to argue that Raven and Peterson

were wrongly acquitted and that Kiel was in fact a reliable witness in his identification of them. It is not a satisfactory explanation, in seeking to justify Kiel and David's evidence in respect of the appellants, to say that they were closer to Kiel than were Raven and Peterson. On Kiel and David's evidence Raven and Peterson were between 6 - 8 metres away; close enough to be identified. According to David he had a second opportunity to identify Peterson when the latter drove the bakkie close to the deceased's body. Furthermore Kiel and David were identifying individuals whom they knew very well.

[22] Counsel on behalf of the State submitted that Kiel's evidence in respect of the first appellant had the distinguishing feature that Kiel called him by his nickname and that they grew up together. There is no indication anywhere in the record that the first appellant acknowledged his nickname or the longstanding relationship. All the indications are to the contrary. If Kiel had called out Raven and Peterson's names and had received no acknowledgement, his identification of them would not, against the other evidence, have proved more reliable. The following words by Dowling J, in ***R v Shekelele*** **1953 1 SA 636 (T)** at **638 G**, concerning the identification of persons said to

be well known by witnesses, are apposite:

> **"An acquaintance with the history of criminal trials reveals that gross injustices are not infrequently done through honest but mistaken identifications. People often resemble each other. Strangers are**

> **sometimes mistaken for old acquaintances. In all cases that turn on identification the greatest care should be taken to test the evidence."**

[23] In ***S v Mehlape*** **1963 2 SA 29 (A) 32 H** Williamson J in dealing with the possibility of error in identification said:

> "The manner of removing any reasonable possibility of error in any given case is a matter entirely to be governed by the circumstances of the case."

[24] The Court below's reasons for rejecting the first appellant's alibi cannot be faulted. Accepting that the first appellant's alibi was fabricated does not mean that in the circumstances of the present case his presence at the scene has been proved beyond a reasonable doubt. There is no formula as to the weight and effect of a witnesses' false evidence. There are cases in which false evidence may prove decisive and others in which it may not. In ***S v Mtsweni*** **1985 (1) SA 590 (A)** at **593 I - 594 D** Smalberger AJA said the following:

> "Terwyl die leuenagtige getuienis of ontkenning van 'n beskuldigde van belang is wanneer dit by die aflei van gevolgtrekkings en die bepaling van skuld kom, moet daar teen gewaak word om oormatige gewig daaraan te verleen. Veral moet daar gewaak word teen 'n afleiding dat, omdat 'n beskuldigde 'n leuenaar is, hy daarom waarskynlik skuldig is. Leuenagtige getuienis of 'n valse verklaring regverdig nie altyd die uiterste afleiding nie. Die gewig wat daaraan verleen word, moet met die omstandighede van elke geval verband hou. Hierdie benadering is onlangs bevestig in *S v Steynberg* 1983 (3) SA 140 (A) waarin die denkrigting in *R v Mlambo* 1957 (4) SA 727 (A) op 738B-D en die aanvaarde uitgangspunt in *Goodrich v Goodrich* 1946 AD 390 op 396 in oënskou geneem is, en die korrekte toepassing van die

Mlambo-benadering toegelig is. By die beoordeling van leuenagtige getuienis deur 'n beskuldigde moet daar, onder meer, gelet word op:

(*a*) Die aard, omvang en wesenlikheid van die leuens, en of hulle noodwendig op 'n skuldbesef dui.

(b) Die beskuldigde se ouderdom, onwikkelingspeil, kulturele en maatskaplike agtergrond en stand in soverre hulle 'n verduideliking vir sy leuens kan bied.

(c) Moontlike redes waarom mense hulle tot leuens wend, byvoorbeeld omdat in 'n gegewe geval 'n leuen meer aanneemlik as die waarheid mag klink.

(d) Die neiging wat by sommige mense mag ontstaan om die waarheid te ontken uit vrees dat hulle by 'n misdaad betrek gaan word, of omdat hulle vrees dat erkenning van hulle betrokkenheid by 'n voorval of misdaad, hoe gering ook al, gevare inhou van 'n afleiding van deelname en skuld buite verhouding tot die waarheid."

[25] Kiel cannot be said to be a satisfactory witness in all material respects. His emphatic and adamant identification of both Raven and Peterson was shown conclusively to be unreliable. The equally emphatic and adamant David supported Kiel's identification of Peterson. When supported by another witness Kiel was proven wrong. How can this Court be certain that he is not in error once again? Why, it may be asked, when supported by a false alibi, instead of David, who impressed the Court, does Kiel become more reliable? In the present case one cannot discount the possibility that the first appellant contrived the alibi evidence as an act of desperation. It might also be that he resorted to an alibi because his co-accused had the comfort of their alibis. The danger of a wrong conviction is real.

[26] In dealing with alibi defences when identity is put in issue, Schmidt in ***Bewysreg*** (4de uitg.), with reference, *inter alia*, to ***R v Hlongwane*** **1959 (3) SA 337 (A)** at **341A** states:

> "Vandag word tereg aanvaar dat 'n alibi nie 'n soort spesiale verweer is wat deur die beskuldigde bewys moet word nie. Die staat moet bewys dat die beskuldigde die misdaad gepleeg het en moet derhalwe die alibi weerlê; en die alibi skep nie 'n geskilpunt wat afsonderlik beoordeel moet word nie: 'The correct approach is to consider the alibi in the light of the totality of the evidence of the case, and the Court's impressions of the witnesses.' "

In my view, upon a consideration of the totality of the evidence, there is a reasonable possibility that the first appellant was not present at the intersection at the material time.

[27] In respect of the second appellant different considerations apply. The Court below rightly concluded that sergeant Mcdonald's evidence concerning the enquiry about his whereabouts is to be preferred to his version of events. What distinguishes the second appellant's case is the registration number of his motor vehicle. Counsel for the appellants attempted to persuade us that it was coincidental that the registration number (which he submitted may have been incorrectly read or recorded by the witnesses concerned) led to the second appellant, who just happened to be a Pagad member. The Court below correctly chastised the police for not retaining the document on which the registration number was recorded. The Court was correct, however, to accept the evidence that the witnesses recorded the number of the motor vehicle in

question. Counsel for the appellants did not contend that the police or the witnesses manipulated the evidence concerning the registration number or in any way contrived to implicate the second appellant. The second appellant was an admitted Pagad member. His motor vehicle was positively identified as having been on the scene going about Pagad business. He was in an ideal position as a member of Pagad who was entrusted with security matters to dispute their presence or operation in the area on the day in question. He did not do so. He did not at any stage assert that someone else used his car on the day in question or at any other time. In fact, he stated positively that no one else had the use of his motor vehicle. In the face of the incontrovertible objective evidence of the registration number it is safe to conclude that he was present in Ocean View on the day in question. The conclusion is compelled that the second appellant was involved in and associated with the vigilante group's activities in Ocean View on the day in question.

[28] By coming to Ocean View armed and behaving in the manner described earlier in this judgment members of the vigilante group were demonstrating that they were intent on confrontation and violence. By stopping and standing in the middle of a populated area, firearms blazing away wild-west style, members of the group placed themselves and others in the community in danger. It is clear that members of the vigilante group acted in concert as they went about their business in Ocean View. No member of the group whether in motor vehicles or in the street dissociated himself from violent actions

perpetrated by others in the group. I am satisfied that the requirements for holding individuals liable for acting in common purpose with others on the basis set out in the ***Mgedezi*** case, *supra*, at **705 I – 706 C** have been satisfied insofar as the second appellant is concerned. The second appellant's conviction in the Court below is, in my view, well founded.

[29] It is true, as submitted on behalf of the appellants, that the Court below, in rejecting the contention that the bullets which caused death and injury were fired in self-defence, erred in concluding that the shots were fired only after Cronje departed the scene. This is apparent when one considers the evidence of David and Van Rooyen. It does not mean that the conclusion that the group did not act in self-defence is wrong. There is no indication that any of the shots fired damaged any of the vehicles in the motorcade. There is no evidence that the occupants of the vehicles were in any real danger. There is no indication that anything prevented any of the motor vehicles in the motorcade from departing the scene thereby avoiding continued or further confrontation with Cronje. This case clearly demonstrates that law and order break down even further with catastrophic consequences when vigilante action is resorted to. The picture of the innocent 7 year-old deceased that forms part of the record is a terrifying reminder of a lesson history has taught us repeatedly and that we repeatedly forget, namely, that ignoble methods can never serve an ostensibly noble cause. Law enforcement agencies will do well to note that inaction and apathy on their part lead to this kind of behaviour.

[30] It follows from the conclusions reached by me that I would uphold the first appellant's appeal against his conviction and would dismiss the second appellant's appeal. I turn to the question of the sentence imposed on the second appellant. The offences in question were committed after section 51 of the Criminal Law Amendment Act 105 of 1997 ("the Act") came into operation. Section 51 (1) of the Act obliges a court which convicts an accused person of committing murder, as part of a group acting in the execution or furtherance of a common purpose or conspiracy, to impose a sentence of life imprisonment, unless in terms of section 51 (3) "substantial and compelling circumstances" exist, justifying the imposition of a lesser sentence. The Court below in sentencing the appellants was influenced by the fact that no one had testified that the appellants were armed and that Cronje had started firing shots, which caused the retaliation by members of the group. Mitchell AJ reasoned that police inaction and community apathy whilst not excusing the group's behaviour at least explained it. Mitchell AJ concluded that these factors taken together with the appellants' personal circumstances constituted substantial and compelling circumstances justifying the sentences imposed by him. Mitchell AJ stated that he is not at all satisfied that the case before him was the type that the legislature had in mind when it prescribed life imprisonment for a conviction of murder based on an individual acting with a group in the furtherance of a common purpose. In my view, Mitchell AJ misdirected himself fundamentally when he considered that this was not the

kind of case provided for by section 51 (1) of the Act. The contrary is true – this is precisely the kind of case that the legislature had in mind. The legislation is directed against mob and gang rule and general lawlessness. The second appellant and his comrades were intent on violence. They went about their business in the most violent and dramatic manner. With the intention of rooting out drug dealers who terrorised a township they then proceeded to terrorise the community even further. It is surprising that more people were not killed or injured. No member of the group can now be heard to say that he or she did not foresee the possibility of the violence and mayhem that ensued. It was all too predictable. In my view, it is fallacious to lay any blame for what transpired at Cronje's door. Armed, the group intended to tackle drug dealers. Members of the group could have been under no illusion that those targeted by them would be meek and submissive. In my view, the Court below erred in finding that there were substantial and compelling circumstances justifying a sentence less than that prescribed by section 51 (1). The group as a whole displayed a bloody-mindedness. The individuals in the group did not and now cannot distance themselves from group behaviour. They associated themselves fully with the group's methods and purpose.

[31] The second appellant's personal particulars are set out in the judgment of the Court below. He has a family dependant on him for support. He has stable employment, does voluntary community work and is a first offender. The offences in question are undoubtedly serious. Because of the nature of

the defence there has been no demonstrated remorse. Given the circumstances of the case any sentence imposed must serve as a deterrent and must protect societal interests. I agree that the offences, flowing from one incident, should be taken as one for the purposes of sentencing. There are, however, in my view, for the reasons stated earlier, no substantial and compelling circumstances justifying a lesser sentence than that prescribed.

[32] There is no substance in the submission on behalf of the appellants that because of the ground set out in the notice of appeal, namely, that the sentence was unduly light and induced a sense of shock the respondent could not now argue that the learned judge in the Court below misdirected himself by concluding that there were substantial and compelling circumstances, which warranted the imposition of a sentence less than the prescribed minimum. The notice of appeal states unambiguously that the judge in the Court below erred in underemphasising the seriousness of the offence and did not properly appreciate that the offences flowed from vigilante action and that the victims were innocent bystanders. It is clear from what is set out in the preceding paragraphs that the Court below misdirected itself materially in the manner set out in the notice of appeal and in other respects. This Court is therefor at large to alter the sentence and to substitute therefor an appropriate sentence including, if applicable, the prescribed minimum sentence.

[33] In my view the prescribed sentence is in the totality of the circumstances of this case an appropriate one. Innocent members of society

are entitled to walk the streets of their community without the fear that they might at any time be caught up in a shooting war. The message must go out that those who are intent on bringing their own brand of justice to bear on communities, without regard for the lives of innocents and the breakdown of law and order, will face the full force of the law.

[34] Following on the conclusions reached by me I propose the following order:

1. The first appellant's appeal against his convictions is upheld and his convictions and sentence are set aside;

2. The second appellant's appeal against his convictions on the three counts is dismissed;

3. The State's appeal against the second appellant's sentence is upheld;

3.1 The second appellant's sentence is set aside, and the following is substituted:

"The fourth accused is sentenced to life imprisonment."

_____

M S NAVSA

JUDGE OF APPEAL