THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case Number 43/07

In the matter between

MVUSELELO PAKANE	1st Appellant
TAMSANQA SIGAGAYI	2nd Appellant
KHAYELIHLE MAHOGO	3rd Appellant

and

THE STATE	Respondent

Coram: MTHIYANE, MAYA JJA et HURT AJA

Date of hearing: 30 AUGUST 2007

Date of delivery: 28 SEPTEMBER 2007

Summary: Murder – defeating the ends of justice – A police officer killing the deceased during a police patrol in the presence of his junior colleagues and subsequently concealing his actions to evade detection – convicted of murder and defeating the ends of justice and sentenced to 15 and eight year terms of imprisonment – his colleagues failing to report the incident and consequently convicted of being accessories after the fact to murder and sentenced each to eight years imprisonment – putative private defence raised by appellants rejected by the trial court – no misdirection by the trial court – the convictions and sentences confirmed on appeal.

Neutral citation: This judgment may be referred to as:
Pakane v The State [2007] SCA 134 (RSA)

JUDGMENT

MAYA JA

MAYA JA

[1] This appeal arises from events which occurred in the early hours of 13 December 1999 at Coffee Bay in the Eastern Cape. The appellants were at the time police officers of varying ranks, stationed at a local police station, Mapusi. At about 02h40, they were despatched in a police van driven by Sergeant Sokuyeka to investigate a report of a shooting incident near the backpackers' hostel in the village. The second appellant, then a sergeant, was the most senior officer in the group. Both his co-appellants were constables. During their foot patrol in the vicinity of the place where the alleged shooting occurred, the second and third appellants fired a volley of shots. Shortly thereafter, Mr Louis Fourie, a local resident ('the deceased') who, unbeknown to the appellants, had been patrolling the area, was found dead with gunshot wounds, in the nearby bushes. Several R4 and 9mm empty cartridges and a live bullet were subsequently recovered by the police at the scene.

[2] Some three and a half years later, the appellants were arrested in connection with the deceased's death. They were subsequently arraigned on charges of murder and of defeating the ends of justice. They denied guilt. The court below (Miller J in the Mthatha High Court) convicted the second appellant as charged. He was sentenced to 15 years imprisonment for the murder and eight years for defeating the ends of justice which was ordered to run concurrently with the 15 year sentence. His co-appellants were convicted only of being accessories after the fact to murder and were each sentenced to eight years imprisonment. They appeal against their convictions and sentences with the leave of this court.

[3] The issues on appeal are whether the evidence supports the convictions and the appropriateness of the sentences imposed on the appellants.

[4] From the evidence adduced from several witnesses at the trial, the following picture emerged. A Mr Lang, one of the deceased's neighbours, telephoned the police at 02h30 on the fateful morning to report that shots had been fired by unknown people in the Lagoon Hotel area. He requested police assistance. The appellants were roused from sleep in their police barracks and hastily despatched to the scene accompanied by another police van which conveyed their Station Commander, Captain Booi, and Sergeant Ngxumza. In addition to the State issued R4 rifle with serial number 806 295 A1 ('rifle 295') carried by the second appellant, they were each armed with Z88 9mm pistols. The two vehicles separated along the way as a strategy to close off all possible escape routes.

[5] According to the appellants, the only witnesses to the shooting which subsequently occurred, they heard the sound of gunfire as they approached their destination. To avoid an ambush, they decided to leave their vehicle, which was not armoured, in Sokuyeka's care some distance away and proceeded on foot. They walked in a tight single file along the southern edge of the tarmac road towards the Lagoon hotel, led by the second appellant. It was dark and overcast. 15 to 20 minutes later, about 200m from where they left their vehicle, the second appellant reported to his companions that he saw a figure carrying a big firearm standing in the middle of the road, about 12 to 15 paces away. The third appellant confirmed that he also saw the shadowy figure but the first appellant saw nothing because of poor night vision.

[6] There are a various contradictory versions regarding the next steps taken by the second appellant both in the confessions that he and the third appellant made to magistrates (admitted in evidence in terms of s 220 of the Criminal Procedure Act 51 of 1977 (the Act), albeit their subsequent allegations of duress by the investigating officers) and their oral testimony, a number of contrary

versions having been put to the trial court by the time the proceedings concluded. I will therefore confine myself to the evidence which the second appellant gave in court. He testified that having spotted the shadowy figure, he shouted a warning in English and in isiXhosa that they were police officers and ordered it to stop whereafter he fired warning shots with the rifle into the air. Seeing no reaction from the figure, he repeated the same process. The first and third appellants took cover in a ditch on the side of the road.

[7] When the second warning shot was fired, the figure turned to face them and raised the firearm to a firing position. The second appellant shot at it and continued firing even after it disappeared until his rifle jammed. He attempted to clear the rifle without success. During this interval, the third appellant emerged from his hiding spot and fired a shot with his pistol towards the bushes across the road into which the figure had disappeared. In the meantime, the second appellant had dropped to the ground, drawn his pistol and fired shots in the same direction to discourage any other would-be attackers.

[8] Thereafter, the appellants regrouped where they had left their vehicle, without once crossing the road to the side where the figure had disappeared, and, on the instruction of the second appellant, drove back to the police station. There, the second appellant placed the rifle in the strong room and booked out another R4 rifle with serial number 806 291 A1 (‘rifle 291’). They then returned to the scene and joined Lang and his group and Captain Booi in the search for the deceased who had been reported missing. He was subsequently found already dead, lying on his back, by his night guard, Mr Beja, near the left edge of the road, at the turnoff point towards the hotel. Members of the Serious and Violent Crimes Unit (SVC ‘unit’) arrived from Mthatha and commenced investigations.

[9] Medical evidence led by the State established that the deceased had sustained two gunshot wounds (a) on the front left chest which lacerated his lungs and aorta, ruptured the heart and fractured his ribs with an exit on the right back chest and (b) on the right jaw into the mouth cavity. There was also a superficial V-shaped laceration on the right shoulder which the district surgeon (Dr Monahali) believed was probably caused during his fall. She described the lacerated star-shaped face injury as a contact wound inflicted from a distance of no more than 15cm away. According to the specialist forensic pathologist, Professor Scholtz, the special features of the wounds indicated that the one in the chest was inflicted by a high velocity R4 rifle and that the one in the jaw was inflicted at, close proximity, by a 9mm pistol. These views were also endorsed by the ballistics expert called by the State, Inspector Dreyer.

[10] The medical experts concluded that the chest wound was the mortal one. The order in which the wounds were inflicted could not be ascertained conclusively but Scholtz described the one in the face as ‘perimortem’ ie sustained at the most not long after death because there was sufficient vital reaction in the tissues. The fate of the bullet which caused the wound was unknown and the medical experts expressed a view that it possibly remained lodged in the deceased’s skull or had exited through his mouth cavity.

[11] Inspector Mithi of the SVC unit was the initial investigating officer of the case and one of the police officers who attended the scene directly after the incident. He testified that when found, the deceased had in his hands a torch and a big 12 bore protector firearm tied to his wrist. He personally emptied the firearm which had its safety catch on. He found bullets in its magazine and none in the chamber – a clear indication that the firearm was not ready to be discharged. He stated that he suspected from the onset that police may have been involved in the shooting but his enquiries from those present met no

response. In the course of his investigations he requisitioned all the service firearms belonging to Coffee Bay police station and sent those handed to him for ballistics testing.

[12] Two people were, at some stage, arrested in connection with the matter and kept in custody for two years before they were released without being charged. Investigations seem to have stalled thereafter and no further progress appears to have been made towards solving the case until December 2003, when it was reallocated to Inspector Coetzee of the East London SVC unit. Investigations commenced afresh. A reconstruction of the scene (made possible by the fact that the paint markings of the original scene still remained visible on the road) established amongst things that the most likely position from which some of the cartridges found there were discharged, was on the same side of the road from which the deceased's body was recovered, just a few metres behind the body.

[13] It is at this stage that it was discovered that two pages of the occurrence book relating to events of 12 December 1999 (which would have included entries of Lang's distress call to the police station and the appellants' departure from the station in response to that call) had been torn out and the relevant entries rewritten. In this regard, Ngxumza, who was on duty when Lang called, testified for the State that on his departure from the station, the second appellant merely took rifle 295 from the other duty officer, Sgt Mjindi, without booking it out (a version which the trial court correctly rejected having regard to the other relevant evidence). When he and Captain Booi heard the gunfire after the party separated, they looked for the appellants and followed their van to the station. Upon their arrival there, the second appellant instructed him to book out rifle 291 on his behalf and to rewrite the entries preceding Lang's call. It is then that he noticed that two pages had been torn out of the occurrence book, which was against procedure as they were required to correct mistakes only by cancelling and initialling them.

[14] It further came to light that rifle 295 was never submitted for a ballistics examination but that rifle 291 had instead been submitted and tested negative, for obvious reasons. Coetzee duly sent rifle 295 for ballistics testing and it was positively linked to some of the cartridges recovered at the scene. The second appellant's explanation for the omission was that Mithi only demanded and was given firearms set out in his own list which excluded rifle 295. He said that this rifle was kept back, in any event, because it was an exhibit in another case. Mithi denied this version on the basis that it was impossible for him, as an outsider with no connection to Mapusi police station, to have drawn an inventory of items of which he had no knowledge.

[15] Transcripts of the occurrence book relating to the R4 rifles show that amongst the items handed over by the previous duty officer, Sgt Kanyo, to Mjindi at shift change, when the latter reported for duty at 21h45 on 12 December 1999, was rifle 295, with 35 rounds of ammunition. No mention is made of rifle 291. At 02h30 a record of Lang's call is made and at 02h40 the appellants are shown to depart to investigate the complaint. 20 minutes later, at 02h55 the second appellant books out rifle 291 with 35 rounds of ammunition which he returns at 08h30 still loaded with 35 rounds of ammunition. Rifle 295 is mentioned again at the end of the shift, at 06h05, when it is handed over to the next duty officer, with no ammunition.

[16] The first and third appellants admitted their failure to report the shooting incident but justified it on the basis that they were not obliged to do so as their immediate superior, the second appellant, was present at the scene and that it was the latter's responsibility to report the matter to the relevant authorities. The second appellant, on the other hand, alleged that he had made an oral report at the scene to Inspector Voko who had since died at the time of the trial.

[17] It is against this factual background that the court below convicted the appellants. The trial judge was favourably impressed by the State witnesses and made adverse credibility findings against the appellants. After a comprehensive and careful analysis of the evidence, he rejected the defence version and concluded that the only reasonable inference[1] that could be drawn from the facts was that '[the second appellant] on seeing a figure, over-reacted and immediately fired at it with the intent of killing the target…'; that the appellants' evidence that they never crossed the road was false in the light of the contact wound which, on the probabilities could only have been inflicted by one of them. In the learned judge's view, the wound marked 'the beginning of a cover up of the shooting by [the second appellant]' upon ascertaining the deceased's identity and realising his mistake. He concluded that although there was no direct evidence as to who inflicted the contact wound, it could safely be inferred from all the facts that the appellants were together in close proximity when it was inflicted and that they all left the scene 'aware that the deceased was shot in the face at the closest of range'.

[18] The main contentions advanced on the appellants' behalf in attack of the convictions were that the court below had erred by drawing 'wide inferences' which totally ignored the defence version and the defences raised by the second appellant. While the numerous discrepancies (relating to material aspects of their testimony which did not redound to the appellants' creditworthiness) in the defence version and the appellants' appalling quality as witnesses were

[1] In drawing such inferences, the learned judge correctly relied on the guidelines set out in *R v Blom* 1939 AD 188 at 202-203 where it was held:
'(1)The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.
(2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.'

conceded, counsel contended that this did not warrant a complete rejection of their testimony.

[19] The thrust of the second appellant's defence at the trial was that he fired shots at the figure in the belief that his life and those of his colleagues were in danger. The defence thus raised in answer to the murder charge was that of private defence alternatively putative private defence. The requirements of these defences are trite. In the case of private defence use of force is justified if it is reasonably necessary to repel an unlawful invasion of person, property or other legal interest.[2] The test of whether the accused acted justifiably in defence is objective. Putative private defence may, on the other hand, be raised successfully for lack of intention where the accused acted defensively in the honest but erroneous belief that his life or property was in danger.[3]

[20] As the trial court found, I do not believe that the second appellant can rely on either defence in the circumstances of this case. I have extreme difficulty reconciling the appellants' evidence (whichever of their contradictory versions is chosen) as to precisely what occurred when the deceased was shot, with the objective facts. The evidence shows clearly that the deceased was aware that the police had been summoned by Lang and were, reportedly, on their way. It seems to me most unlikely that he would, with that knowledge, react by assuming an aggressive stance when warned of police presence as the second and third appellants would have it. This is particularly so if account is taken of the appellants' version that warning shots were fired with the rifle. One would imagine that the most natural reaction for a person in that situation, aware that he is covered with a powerful automatic rifle whether by the police or impostors (a suggestion was made on the appellants' behalf that the deceased

[2] Burchell and Hunt *General Principles of Criminal Law* 3 ed Vol 1 p 72; *S v Ntuli* 1975 (1) SA 429 (A) at 436D-E.
[3] *S v De Oliveira* 1993 (2) SACR 59 (A) at 63i-64a.

may well have tried to defend himself because he did not believe that the appellants were in fact members of the police) would be to surrender or flee.

[21] The appellants' version in this regard is further rendered more improbable by the fact that when the deceased was found the safety catch of his firearm was still on and he even held his torch in the other hand. Much was made by the appellants' counsel of Beja's evidence that he had seen a policeman from Mapusi police station removing bullets from the deceased's firearm before the arrival of the Mthatha SVC unit. This, in his submission (made for the first time in this court) suggested that 'the scene was contaminated and the firearm tampered with' before the SVC unit's arrival. It was therefore possible to infer that the deceased was readying himself to discharge his firearm when he was shot, so went the argument. The defence counsel also emphasized in support of this argument that the entrance wound caused by the rifle bullet was on the chest, arguing that this supported the proposition that the deceased had turned to face the appellants on hearing their warning.

[22] There is simply no merit in these submissions. The uncontested evidence of Sgt Paraffin stationed at Mapusi at the relevant time, who was the first and only officer to investigate the scene before handing it over to the SVC unit on their arrival, was that he found the scene guarded and did not at any stage touch the deceased or his firearm. This testimony, viewed with Mithi's explanation about the state in which he found the firearm, bearing in mind that both policemen were found satisfactory witnesses by the court below, puts paid to the suggestions made in this regard. The entrance wound on the chest takes the matter no further as it could as easily be inferred that he was already facing the appellants' direction when they confronted him.

[23] It is undoubted on the evidence that the deceased was not ready to shoot when he was shot. Accordingly I infer, as did the court below, that he could not have assumed a threatening position as alleged by the second appellant. In the circumstances, the second appellant had no reason whatsoever to believe that his group's lives were in danger and that it was necessary, in self defence, to shoot the deceased. The ineluctable conclusion is that he deliberately fired shots at the deceased when he posed no threat to them, without first ascertaining his identity and issuing any warning. His infliction of the fatal wound was thus unlawful.

[24] There is then the critical issue of the contact wound which the defence version woefully failed to explain. Contentions made on the appellants' behalf in this court differed materially from those made in the trial proceedings that he could have been shot by the unknown assailants. Here, it was argued that the medical experts' assessment of the wound conflicted, as the district surgeon's opinion was that the shot was not a contact wound as it was fired at about 15cm away. Monahali's testimony in this regard is set out above and counsel obviously misunderstood it. Suffice it to point out that all the experts agreed, without challenge, that the wound bore a classic feature of a contact wound, as evidenced by burnt edges around its entrance.

[25] Two questions now arise. Who inflicted the contact wound? When (and how) was it inflicted in the established chain of events? To my mind, it is highly improbable that the deceased was already shot when he met the appellants. On the appellants' version that it took them about 15 to 20 minutes to walk from their vehicle until they encountered him, this after they heard gunfire as they drove down towards Lagoon Hotel, the deceased would have been wandering in the bush with a severe wound to his face for that duration instead of returning home, nearby, to seek help. Significantly, neither Lang, who was in the vicinity

waiting with other neighbours for the police, nor Beja whom the deceased had recently left at his gate, heard any sound of gunfire other than that which prompted them to venture into the dark and conduct a search for the deceased, only to find him mortally wounded.

[26] Similarly, Booi, Ngxumza and Sokuyeka (who testified for the State in terms of s 204 of the Act and was at the conclusion of the trial granted immunity from prosecution in terms of the provisions of that section on a finding that he was a satisfactory witness) denied that they heard any gunfire as they approached the scene. It is, therefore, most peculiar that only the appellants attested to this earlier shooting episode. Moreover, Scholtz opined that judging by the blood patterns on the deceased's face, he was most probably shot whilst lying down in the position in which he was subsequently found. I am satisfied, in the circumstances, that the trial judge was correct to dismiss this hypothesis as a 'fabrication made in an attempt to create the impression that … unknown shooters [who] were trigger happy and in the close vicinity' had inflicted the contact wound.

[27] It is equally improbable that the deceased was shot in the face by an unknown person after being mortally wounded by the second appellant. Such a possibility would mean that the random shooter found and shot a corpse. This scenario is not supported by any of the evidence. Scholtz estimated the deceased's survival time after the infliction of the fatal wound between three to five minutes. The probabilities, especially considering Scholtz's description of the nature of the contact wound, and the fact that nothing was apparently taken from the deceased, inexorably lead to an inference that it was inflicted after the chest wound, obviously to ensure that the deceased was dead.

[28] The only reasonable inference then left to draw is that the deceased sustained both gunshot wounds in the shooting incident involving the appellants. This finding makes a lie of the appellants' version that they never crossed the road to the side on which the deceased's body was found – not surprisingly, having regard to the uncontradicted expert evidence placing the shooter, in relation to some of the R4 cartridges linked to rifle 295 found at the scene, on that side of the road, in stark contrast to their version. Although the evidence does not establish which of them inflicted the contact wound,[4] it is certain, however, on their own version that they remained together at all material times. In that case, it is inconceivable that any one of them left the scene unaware that the second appellant had seriously wounded the deceased and that one of them had then shot the deceased in the face at close range.

[29] It was contended for the first and third appellants that their convictions were flawed because their intention to assist the second appellant evade justice (or the fact that they were even aware that he had committed a crime) was not established. In this regard a number of submissions were made which the trial court correctly rejected. The court below also did not accept their excuse for not reporting the incident and convicted them of being accessories after the fact of the deceased's murder on the basis of their admitted failure to report the matter.

[30] *Dolus* is indeed an essential element of the offence of being an accessory after the fact and the State must accordingly establish that the alleged accessory knew that the person whom he helped had committed a crime.[5] In this case it was common cause that these appellants were aware of the shooting incident in which, as already mentioned, the third appellant even participated. It is not in

[4] In the view I take regarding the first and third appellants' convictions as accessories after the fact to murder flowing from the infliction of the chest wound, it is unnecessary to determine the question of their criminal liability for the infliction of the contact wound, which if established, would be a basis for a conviction as accessories after the fact to that offence as envisaged in the case of *R v Gani and others* 1957 (2) SA 212 (A), reaffirmed in *S v Jonathan* 1987 (1) SA 633 (A).

[5] *S v Morgan and others* 1993 (2) SACR 134 (A) at 174e-f.

doubt that as policemen, they had a duty to report the shooting incident. This duty flows from sec 205 (3) of the Constitution of the Republic of South Africa, 1996 which provides:

'The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.'

In *K v Minister of Safety and Security*[6] O'Regan J said:

'[P]art of the three policemen's work [is] to ensure the safety and security of all South Africans and to prevent crime. These obligations arise from the Constitution and are affirmed by the South African Police Service Act 68 of 1995.'

And in *S v Williams and others*[7] this court held:

'There is no doubt that a police officer has a duty to report a crime. It arises, *inter alia*, from the provisions of statute which, at the relevant time, was s 5 of the Police Act, 1958. In terms of this section one of the functions of the police is to investigate crimes. What remains for decision is whether the failure to carry out the duty results in criminal responsibility if the other requirements of accessorial liability are present. I have no difficulty in holding that it does. Any other answer would give rise to surprise and even indignation.'

[31] Failure by a police officer to report a crime with the intent to assist the main perpetrator to evade conviction thus renders him guilty of being an accessory after the fact of that crime. The first and third appellants' excuse for their failure was based on sec 13(2) of the Police Service Act which requires a police officer who 'becomes aware that a prescribed offence has been committed [to] inform his or her commanding officer thereof as soon as possible.' In this case their commanding officer, behind whose presence at the scene they seek to hide, was the very offender. In my view, their interpretation of the provisions of section 13 (2) is a brazen perversion of the section which cannot be countenanced, least of all from law enforcement officers, both whom had been in the police force for many years. They silently watched police

[6]2005 (6) SA 419 (CC) at 430B.
[7]1998 (2) SACR 191 (SCA) at 194c.

investigations flounder for three years and two innocent people languish in detention for two of those years. It would be absurd to accept that they honestly believed they had no obligation to report the shooting incident because they were with their commanding officer when it occurred. Their flagrant breach of their legal duty, patently intended to shield the second appellant from prosecution, rendered them accessories after the fact to the murder.

[32] The State not only opposed the appeal but persisted with argument advanced without success in the court below, that this court should alter the convictions of the first and third appellants to murder on the basis of common purpose. State Counsel argued further that at the very least, the conviction of the third appellant, who admitted firing a shot at the scene, should be altered to that of attempted murder. In his submission, the fact that the State had not lodged a cross-appeal was no impediment as this court is vested with the necessary powers by sec 322 of the Criminal Procedure Act.[8] This section empowers a court of appeal to alter a conviction where it is convinced that the trial court, because of a wrong finding of fact or a mistake of law, convicted the appellant of a less serious offence than that which, in terms of the indictment, he should have been convicted of.[9]

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[8]Section 322 is in the following terms:
'In the case of an appeal against a conviction or of any question of law reserved, the court of appeal may-(a) allow the appeal if it thinks that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was failure of justice; or
(b) give such judgment as ought to have been given at the trial or impose such punishment as ought to have been imposed at the trial; or
(c) make such other order as justice may require:
Provided that, notwithstanding that the court of appeal is of the opinion that any point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to the court of appeal that a failure of justice has in fact resulted from such irregularity or defect.'

[9]*S v E* 1979 (3) SA 973 (A); *R v Mkhwanazi and others* 1948 (2) SA 686 (A) at 690. It is important to note that in *S v E* , the appeal court gave the appellant prior notice of the fact that it might consider altering conviction, while in *Mkhwanazi* the conviction was altered but the sentence remained unaffected. The practice is that an appellant should not be placed in jeopardy of having his or her conviction converted to a more serious one, the sentence increased unless there has been prior notice from the appeal court to show cause why this should not be done. There has been no such notice in this case.

[33] I do not propose to dwell on this aspect. As the court below found, there is no evidence to support a finding that the appellants had a prior agreement to lie in ambush with the intention of shooting people on sight. The trial judge gave the submission thorough consideration and gave full reasons, with which I agree, for its rejection. Neither is there any evidence that the third appellant fired a shot at the deceased. The State's contentions in this respect similarly lack factual basis and cannot stand.

[34] I turn to deal with the second appellant's challenge of his conviction for defeating the ends of justice. This offence consists in unlawfully and intentionally engaging in conduct which defeats the course or administration of justice.[10] In this respect the State relied on the following - the contact shot, the swapping of the R4 rifles, the torn pages of the occurrence book and second appellant's instructions to Ngxumza to rewrite entries without informing a superior officer about the state of the book. State counsel argued that the appellants had fabricated a version for their return to the police station, knew that rifle 295 would be swapped and that documentary evidence linking the second appellant to it would be altered or destroyed with the deliberate intent to defeat the course of justice. Appellants' counsel, on the other hand, contended that the State had done no more than adduce circumstantial evidence which the court below should have rejected as the second appellant had given a plausible account.

[35] Regarding the first and third appellants' role in the events following the contact shot, the court below found although it was clear that they had assisted their co-appellant in his endeavour to evade justice, it would be inappropriate to convict them for defeating the course of justice because to do so would amount to a duplication of convictions as it had convicted them for their failure to report

[10] *S v Burger* 1975 (2) SA 553 (C).

the crime. I agree. There is in our law generally no distinction between accessorial liability and defeating the course of justice.[11] The State's bid to have them convicted on this charge on the basis of common purpose must also fail.

[36] However, the second appellant's position is a different matter. First, as regards the swapping of the rifles, he gave a completely different reason to the magistrate during his bail proceedings. In that court he said nothing at all about rifle 295 jamming up and stated instead that he did it because he was in shock and panicked because it was the first time he found himself in that situation. Furthermore, one wonders why he would choose to return to his base which was about 2km away to fetch another rifle leaving the trail to get cold instead of calling Sokuyeka, Booi and Ngxumza, who were in the vicinity, for reinforcement. It must follow that the version that the rifle jammed, which he surprisingly did not report to the duty officer Mjindi when he booked out rifle 291, was false.

[37] Second, regarding the alleged oral report he made to the late Voko, it was common cause that the latter did not submit a formal report to his superiors about the shooting incident as he was enjoined by the relevant regulations governing police duties, including their use of firearms. On the facts, it is highly improbable that Voko would have allowed the investigation to take the course it did with the knowledge that the deceased had probably been shot by a member of his unit acting in private defence. Surprisingly, the second appellant did not mention the alleged report to Voko in his confession to the magistrate. His explanation there was that he had not reported that they had fired shots at the scene because it was his first time to experience such a situation. It is State counsel's challenge to him to explain the glaring contradiction between this explanation and his oral testimony in court which prompted his attempted

[11] *S v Williams and others* 1998 (2) SACR 191 (SCA) at 194i.

disavowal of the statement (voluntarily admitted in evidence by his own legal representative) on claims made for the first time at that stage which were not even put to Coetzee when he testified, that he was ill-treated and told what to say by the police! I have no hesitation rejecting his version that he did report the shooting incident as a complete fabrication.

[38] Third, as to the swapping of the rifles, it was argued on the second appellant's behalf that the State did not prove that he tampered with the occurrence book or tried to conceal the fact he had rifle 295 in his possession during the mission. It seems a remarkable coincidence having regard to the sequence of events that the second appellant, who was not the most senior member in the station, would be the one to present the duty officer with a torn book with instructions to perform an irregular act. Equally striking is the fact the torn pages related to fresh events of that very morning. A perusal of the relevant entries, starting from the previous evening, shows that but for the Lang report, it was an uneventful shift. For what conceivable reason then could one remove the missing pages and who else (except someone involved in the contentious shooting incident) in the circumstances would have an interest in those pages? I have difficulty with the second appellant's claim that he did not book out rifle 295 because they left in a hurry yet he managed to book out rifle 291 on their return, when there was greater cause for urgency. There is no doubt in my mind that his version in this regard is false. I agree with the conclusion of the court below that he tampered[12] with the occurrence book to remove proof that he had booked out rifle 295, which, very conveniently, was subsequently not sent for a ballistics test. Therefore, his conviction for defeating the course of justice was proper.

[12]That the book was tampered with and the entries 'rewritten' by Ngxumza on his orders were inaccurate is clearly illustrated, for example, by the entry mentioned in para [15] above that the second appellant booked out rifle 291 at 02h55 when according to an earlier entry they left the police station in response to Lang's call only twenty minutes earlier, at 02h40 – an impossibility, considering the evidence their destination was 2km away from the station and that it took about 20 minutes just walking from their vehicle to the spot where they encountered the deceased.

[39] The principles governing the adjudication of appeals are well established. In the absence of demonstrable and material misdirections by the trial court, its findings are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.[13] As indicated above, the credibility findings made by court below were not challenged, correctly so, in my view. Neither have I found any misdirection in its reasoning and findings of fact. None of the inferences it drew conflict with the proven facts. No cogent argument was advanced on the appellants' behalf to persuade us otherwise. In testing the appellants' version against the inherent probabilities, I took into account that it cannot be rejected merely because it is improbable; that it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.[14] In my opinion, no fault can be found with the rejection of their evidence. I am satisfied not only that their version is improbable but that beyond any reasonable doubt it is false. The convictions should, therefore, not be disturbed.

[40] It now remains to consider the sentences. The question which this court must determine in this respect, which if answered in the affirmative will entitle it to interfere, is whether there was material misdirection by the trial judge in his assessment of the factors relevant to the determination of sentence or, if not, whether the sentences imposed are so shockingly inappropriate as to give rise to the inference that he failed to exercise his discretion properly.[15]

[41] With regard to the murder conviction, the court below considered the provisions of sec 51 of the Criminal Law Amendment Act 105 of 1997 which prescribe a minimum sentence of 15 years imprisonment absent substantial and

[13] *S v Mkohle* 1990 (1) SACR 92 (A); *S v Hadebe and others* 1997 (2) SACR 641 (SCA) at 645e.
[14] *S v Shackell* 2001 (2) SACR 185 at para 30.
[15] *S v Abrahams* 2002 (1) SACR 116 (SCA) at para 15; *S v Malgas* 2001 (1) SACR 469 (SCA) at para 12.

compelling circumstances justifying a lesser sentence, and found that none existed. The criteria which a sentencing tribunal should consider in determining whether or not such circumstances exist were enunciated in *S v Malgas.*[16] Those particularly pertinent for present purposes are: that a court has to consider all the circumstances traditionally taken into account by courts when sentencing offenders; that for the circumstances to qualify as circumstantial and compelling they need not be exceptional in the sense of seldom encountered or rare and that though the prescribed sentences require a severe, standardised and consistent response from courts unless there were, and could be seen to be, truly convincing reasons for a different response, the statutory framework still left the courts free to continue to exercise a substantial measure of judicial discretion in imposing sentence.[17]

[42] The appellants' counsel did not draw our attention to any specific misdirection in the reasoning of the court below (in respect of any of the sentences) and argued merely that they were too harsh. Clearly, there are weighty mitigating factors in the second appellant's favour. He is in the prime of his life. He is a first offender with a long unblemished record with the police force. He is married with young children and is the sole breadwinner of a large extended family with a myriad of responsibilities attaching to that mantle. The case must have had a devastating effect on his personal life. His devotion to his calling is evident from his rise through the police ranks. He was not even on duty on the day in question but dutifully answered the order to embark on a dangerous mission in the dead of the night. It is also a fact that the deceased's killing was not premeditated and that he bore him no ill-feeling. The offence was committed in the course of duty in pursuit of armed and potentially dangerous individuals.

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[16] 2001 (1) SACR 469 (SCA) at para 25.
[17] *S v Abrahams* 2002 (1) SACR 116 (SCA) at para 13; *S v Fatyi* 2001 (1) SACR 485 (SCA) at paras 4 and 5.

[43] However, these factors cannot be viewed in a vacuum and must be weighed against the aggravating features of the case; the serious nature of the offence especially when committed by a police officer who has a legal duty to protect the public and his lack of remorse, amply demonstrated by his iron resolve to conceal the truth to the bitter end – from the elaborate steps he took to cover up and hamper police investigations; the shooting of the deceased in the head of which, if not perpetrated by him, he was nonetheless aware and should have prevented especially as the leader of the mission; knowingly and silently watching innocent people languish in jail for two years for a crime he committed, the false statements made to the magistrate and police disciplinary tribunal and giving false testimony in court.

[44] These are all factors which the court below took into account in its judgment. I am satisfied that it properly applied the sentencing guidelines in *S v Malgas* and carefully considered whether there were truly convincing reasons for departing from the prescribed minimum sentence in reaching its conclusion. The imposition of the prescribed sentence of 15 years was, therefore, appropriate in the circumstances.

[45] The same considerations apply in respect of the other sentences, including those of the first and third appellants whose personal circumstances replicate those of the second appellant. They had no compunction contriving with their compatriot to conceal the true facts and make false statements, in perversion of the administration of justice which they were legally bound to enforce and uphold. Their conduct denigrated their duty to protect the South African citizenry and inspire its confidence in the police force especially when their country is ravaged by intolerable levels of crime. Integrity and honesty are the cornerstone qualities of an effective police officer without which law and order cannot be maintained. There is no place for dishonesty in the police force

and such conduct deserves the strictest censure. In the words of Olivier JA,[18] 'a police officer who places supposed loyalty to colleagues committing crimes above his or her police duties should know that the courts of law will take an extremely serious view of such conduct and will not hesitate to impose a severe sentence'. Weighing all the circumstances of this case, it seems to me that sentences of eight years imprisonment imposed on them are reasonable and justified.[19]

[46] There is, finally, a statutory question relating to the sentences to be dealt with. Section 276B of the Act[20] provides:

'(1) (a) If a court sentences a person convicted of an offence to imprisonment for a period of two years or longer, the court may as part of the sentence, fix a period during which the person shall not be placed on parole.

(b) Such period shall be referred to as the non-parole-period, and may not exceed two thirds of the term of imprisonment or 25 years, whichever is the shorter.

(2) If a person who is convicted of two or more offences is sentenced to imprisonment and the court directs that the sentences shall run concurrently, the court shall, subject to subsection (1) (b), fix the non-parole period in respect of the effective period of imprisonment'.

[47] This court has previously balked at fixing non-parole periods. In S *v Botha*[21] the court described the exercise as 'an undesirable judicial incursion into the domain of another arm of the State, which is bound to cause tension between the judiciary and the executive… [as] courts are not entitled to prescribe to the executive branch of government how long a person should be detained, thereby usurping the function of the executive'. In an earlier precedent, *S v Mhlakaza*[22] Harms JA expressed similar reservations pointing out that 'sentencing jurisdiction is statutory and courts are bound

[18] *S v Phallo and others* 1999 (2) SACR 558 (SCA) at para 42.
[19] *S v Phallo* (supra) at para 41.
[20] Inserted by sec 22 of the Parole and Correctional Supervision Amendment Act 87 of 1997.
[21] 2006 (2) SACR 110 (SCA) at para 25 (decided on 28 May 2004).
[22] 1997 (1) SACR 515 (SCA).

to limit themselves to performing their duties within the scope of that jurisdiction'. It is well to bear in mind both judgments were decided before sec 276B came into effect, on 1 October 2004. It seems to me that the Legislature enacted the provisions to address precisely the concerns raised therein by clothing sentencing courts with power to control the minimum or actual period to be served by a convicted person (although controversy may nevertheless still remain in other respect alluded in *Mhlakaza* such as possible tensions between sentencing objectives and public resources).

[48] For all these reasons, the appeals of the first, second and third appellants are dismissed. In accordance with the provisions of s 276B (2), it is ordered that the second appellant shall serve a non-parole period of not less than ten years.

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MML MAYA

JUDGE OF APPEAL

CONCUR:

MTHIYANE JA)

HURT JA)