THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1034/2013

In the matter between:

ALFRED ZWELIDUMILE GCAM-GCAM **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral Citation: *Gcam-Gcam v The State* (1034/13) [2015] ZASCA 42 (25 March 2015)

Coram: Cachalia and Shongwe JJA and Gorven AJA

Heard: **2 March 2015**

Delivered: **25 March 2015**

Summary: Criminal Law – Conspiracy and common purpose to commit robbery of a pay-point. Two vehicles involved – Plan abandoned but one vehicle proceeds to rob another pay-point – Whether occupants of the other vehicle guilty of common purpose to rob second pay-point. Confessions – Courts to be sceptical when suspects in police custody make confessions to police implicating themselves in serious crimes.

ORDER

On appeal from: Eastern Cape High Court, Mthatha (Smith J sitting as court of first instance):

The appeal is upheld and the convictions and sentences imposed on the appellant are set aside.

JUDGMENT

Cachalia JA (Shongwe JA and Gorven AJA concurring)

[1] The appellant was one of four accused indicted on ten counts in the Eastern Cape Division – Mthatha, following an armed robbery of a social-grant pay-point in the Mpozolo district of Willowvale on 4 June 2009. The robbers made off with an amount of R509 970. A police officer and four robbers lost their lives in an incident later that day.

[2] The appellant, who was accused three in the trial that followed, and his co-accused Vuyisa Velelo (accused 1), Elias Dotwana (accused 2) and Ntuthuzelo Ndabeni (accused 4) were charged with conspiracy to commit robbery in contravention of s 29 of Act 9 of 1983 of the Transkei Penal Code, robbery, five counts of murder and the unlawful possession of automatic firearms, other firearms and ammunition in contravention of the Firearms Control Act of 2000. They were convicted on all of the counts, and sentenced to ten years' imprisonment each for the conspiracy, twelve, eight and five years' imprisonment for each of the firearm related

offences and to life imprisonment for the murders. The appellant, Dotwana and Ndabeni received 15 years' imprisonment for the robbery, and Velelo twenty for his part in it. They are all serving effective sentences of life imprisonment. Only the appellant's appeal is before us, with leave of this court.

[3] The appellant and his co-accused were convicted mainly on the strength of confessions they made to police-officers following their arrest, and also on the testimony of an accomplice. The appellant's case is that he was wrongly convicted because the police improperly coerced and induced him to confess to these crimes, the accomplice's evidence against him was unsatisfactory, and his alibi defence was incorrectly rejected.

[4] The State sought to prove that the offences were committed in the following circumstances. In June 2009, the appellant and nine others agreed and conspired to rob a company contracted by the government to pay pension and social grants. Among the ten conspirators were three of the appellant's co-accused, four others who died in an incident after the robbery, a ninth person who became a witness for the State, and a tenth who went missing after the event. The company sets up various pay-points to make these payments to beneficiaries. The pay points that are the subject of this appeal were set up in the Mpozolo Adminstrative Area situated in the Willowvale district of the Eastern Cape.

[5] On 2 June 2009 two of the conspirators travelled to Willowvale to reconnoitre the pay-point they were planning to rob. The ten conspirators, including the appellant, then met at the home of Valephatwa Jam-Jam (one of the deceased suspects) in Ngolo village, Mthatha, the following evening, where they put the final touches to the plan.

[6] On 4 June, at about 03h00, they departed from Jam-Jam's home in two vehicles. The first vehicle, a Toyota van, had been hijacked the previous day to be

used in the robbery. It was driven by Thembela Mayisela, who became a state witness and was granted immunity from prosecution. There were seven passengers in this vehicle some of whom were armed. The second vehicle, a GWM ‘bakkie’, was driven by the appellant. Dotwana (accused 2) was a passenger. The GWM was to be used for their get-away after the robbery. The conspirators were armed with three automatic rifles (an R1 and two R5’s) an Uzzi, a 9mm pistol and a .38 revolver.

[7] The two vehicles made their way to Willowvale, which is apparently some distance from Ngolo, and arrived at the pay-point later that morning. The passengers in the Toyota alighted and opened fire. The security guards, who were guarding the pay-point, returned fire, as did a police officer who was also in the vicinity. But they were overpowered and ran away. The robbers got hold of the money and drove off. Where the GWM driven by the appellant was during the robbery was not mentioned in the summary of substantial facts.

[8] Mayisela and his co-robbers drove for some distance when they realised that there was a police helicopter nearby. They stopped, abandoned the vehicle and fled into the forest, separating into two groups that went in different directions.

[9] The police discovered the abandoned vehicle and entered the forest to search for the suspects. The robbers opened fire on the police killing Officer Mziwamandla Alfred Sibeko. The police returned fire killing one entire group comprising four of the robbers: Mthobeli Ndamase, Thoko Sigwinta, Elliot Puwana and Valephatwa Jam-Jam. The State invoked the common purpose doctrine in seeking to hold the appellant and his co-accused criminally responsible for the deaths of the police officer and the four robbers.

[10] The police found a R1 rifle, an LM5 and a 9mm pistol and cartridge cases in the forest. Only R71 120 of the amount stolen was recovered. A R5 rifle was also recovered from Dotwana the following day.

[11] On the evening of 4 June 2009, the second group of four robbers, including Mayisela, emerged from where they had been hiding in the forest. They phoned the appellant who, accompanied by Dotwana, arrived to collect them in his GWM. He drove them home to Mthatha.

[12] As I have said earlier the evidence against the appellant was a confession he made to the police and the evidence of Mayisela. The appellant confessed, following his arrest, to having been present on the evening of 3 June 2009, with the other conspirators before he drove to Willowvale to assist in the robbery. He had been promised an amount of R10 000. And further, that he had collected some of the people 'very late'. He surmised that something had gone wrong and that the others may be dead. He then drove the others back to Mthatha. For reasons I give later in this judgment, this evidence was inadmissible.

[13] In his testimony, Mayisela confirmed that the appellant had been present at Jam-Jam's home on the evening of 3 June, that he had driven the GWM vehicle behind the vehicle in which the others had been travelling to Willowvale, when they departed at 03h00 on the morning of 4 June 2009, and that he had arrived with Dotwana to collect the survivors later that evening.

[14] But of crucial importance to the murder and robbery convictions against the appellant was Mayisela's evidence on what happened soon after daybreak as they arrived at the pay-point they had planned to rob in Mpozolo. The pay-point was a short distance from the gravel road on which they were travelling. The men in Mayisela's vehicle noticed a police vehicle driving towards them. The GWM of the appellant had stopped nearby. Those in Mayisela's vehicle decided that the presence of the police made it risky to go ahead with the robbery. They, therefore, abandoned the plan to rob that pay-point and decided to drive home on the same road. Mayisela only saw the appellant's GWM again, at about 20h00 that evening, twelve hours later.

[15] Mayisela testified that the Toyota vehicle he was driving then headed home. En route they came across another pay-point, fortuitously it seems. They decided to rob this pay-point on the spur of the moment. They noticed a police vehicle parked amongst the other cars near the pay-point, but this did not deter them. Mayisela testified that he drove up to the vehicles and stopped. His passengers alighted and began firing, presumably in the direction of the pay-point. A police officer or several officers returned the fire. (It was not clarified whether the other 'police' may have been security-guards employed to protect the pay-point). Mayisela was struck twice, on the left arm and on his right leg, whilst still in the vehicle. The 'police' then fled from the scene. The robbers packed the money into a blue sports bag, got back into their vehicle and fled the scene, with Mayisela again at the wheel.

[16] They drove for some time and covered some distance in this rural area. For how long they drove and what distance they covered was regrettably never clarified in the evidence. Be that as it may, Mayisela noticed that his vehicle was running out of fuel, and a helicopter was hovering in the vicinity. So, they decided to abandon the vehicle, split into two groups, and make their way into the forest nearby. Mayisela was accompanied by Velelo, Ndabeni (accused 1 and 4) and Bodi, who disappeared after these events. The other group of four made off in another direction with the bag of money. I shall return to Mayisela's evidence later.

[17] Later that day – again, we do not know the time – the police arrived and went in pursuit of the group with the loot. The evidence of the police officers about what transpired thereafter is far from clear. First, the dog unit consisting of five police officers entered the forest and after an exchange of fire they retreated and called for reinforcements from the National Intervention Unit (NIU).

[18] Captain Herston Thengiza Gwadiso from the NIU testified that he entered the forest with his team and called out to the suspects to surrender. He heard a sound of gunfire from inside the forest. The police responded by shooting, which was followed by an exchange of fire. The NIU penetrated further into the forest and came across

two people who had been shot, but he did not check whether or not they were alive. There was a bag of money and a pistol next to them. They walked for another 500 meters and heard more shots being fired. Warrant-Officer Sibeko was struck by a bullet. He was carried out of the forest by Captain Gwadiso's group, and airlifted by helicopter, but succumbed to his injuries.

[19] A second group of NIU members arrived and, after helping the first group airlift the injured Sibeko, they also entered the forest. This group was led by Captain Pumlani Lumbe. He also announced his arrival by calling on the suspects to surrender. More gunfire was heard and the NIU returned the fire. They proceeded further into the forest and noticed two more persons lying on the ground with R1 and ~~a~~ R5 rifles next to them. They appeared to be alive. Lumbe kicked away the firearms as a safety precaution and continued to look for other suspects, but found none.

[20] I pause to mention that it is troubling that there was no evidence at all on whether the four suspects were alive for any period after they had been shot or whether there was any attempt to obtain medical assistance for them. It appears that they died at the scene.

[21] I return to Mayisela's testimony. His group of four hid in the forest, apparently far removed from the events that had occurred in the other part of the forest. Later that evening, they emerged from where they were hiding. They walked until they reached a bridge from where Velelo phoned the appellant for assistance. The appellant, in his GWM, arrived with Dotwana at about 20h00. They left to search for their missing colleagues but found no evidence of their whereabouts. The appellant then drove them back to Mthatha.

[22] Assuming, only for present purposes, that Mayisela's evidence was correctly accepted, the question is whether the court was also correct in finding the appellant guilty on the robbery and the five murder counts. I shall deal with the remaining

counts, namely the firearms and ammunition charges, and the conspiracy charge separately.

[23] The high court rejected a submission by counsel for the defence that the robbery of the second pay-point and the subsequent events on the day were not part of the common purpose, and that therefore the appellant could not be held responsible for the robbery or the five counts of murder. The learned judge made the following finding:

‘I agree with Mr Siyo [the prosecutor] that they had planned to rob a pension pay-point on the day in question in the vicinity of Willowvale. They had all formed common purpose in this regard and this is exactly what they had achieved. The evidence has in my view clearly established that all of the accused were involved in the planning and execution of the robbery to a greater or lesser extent. They all had clearly defined roles and they persisted to act in accordance with this common purpose until after the shootout in the forest where four of their co-perpetrators and a police officer were killed.’

[24] It appears from the learned judge’s reasoning that the appellant was convicted on these counts because he was found to be party to the prior agreement to rob a pay-point in the vicinity of Willowvale and that he actively associated with the plan, presumably by driving the GWM to the first pay-point, and collecting the four survivors afterwards.

[25] In regard to the robbery conviction the judge seems to have misconstrued the evidence. The judgment records that Mayisela testified that after they had decided that it was too risky to rob the first pay-point they decided to drive towards another pay-point. But as I have said earlier, Mayisela’s evidence was that they had decided to drive home – not to another pay-point – and fortuitously came across the second pay-point, which they decided to rob on the spur of the moment. It is common ground that the appellant was not party to the decision to rob the second pay-point, and was not present when the robbery took place.

[26] Before us Mr Siyo, who appeared for the State submitted, as he had in the high court, that even though the first pay-point was the agreed target of the robbery, the second pay-point was located in the same area and was robbed at about the same time. The second robbery, he submitted, therefore fell within the ambit of the common purpose – a submission, as previously mentioned, that found favour in the high court.

[27] But I think the submission is devoid of merit. First, the State did not establish that the second pay-point was anywhere near the first pay-point. Second, even if one accepts that the two pay-points were in the same vicinity, the group's mandate was to rob the first pay-point, and not any other pay-point: they explicitly abandoned the plan to rob the first pay-point; and finally, the appellant was not aware of and played no role in the decision to rob the second pay-point or in any way actively associate with the group in carrying out the robbery, much less the events later in the forest when the police officer and the four robbery suspects lost their lives. He could therefore not have foreseen, and by implication did not foresee, that a second pay-point would be robbed or that anyone would lose their lives in the course of that robbery. The convictions on the robbery and murder counts therefore cannot stand.

[28] I should add that it is questionable whether the events in the forest, which gave rise to the murder charges can be said to have occurred in the course of the robbery, but this is not an issue I need decide in this appeal.

[29] Regarding the convictions on the arms and ammunition charges the court stated perfunctorily that the accused, including the appellant, 'possessed these jointly as a group and it therefore matters not which of them had carried the firearms on the day of the robbery'. It is not clear whether, in so finding, the learned judge had the principles of joint possession or the doctrine of common purpose in mind.

[30] It was not alleged in the indictment that they had a common purpose to possess the arms and ammunition. The common purpose or conspiracy pertained to the robbery. The fact that parties planning a robbery share a common state of mind that some of them will carry or use arms to achieve their objective is not sufficient to make them joint possessors under the Firearms Control Act 60 of 2000. This can only be established by inference, and it must be the only reasonable inference. In my view this was not established in this case.[1]

[31] In addition, it is not at all clear from the evidence whether the arms and ammunition used in the robbery were the same as those on which forensic tests were done. There was simply no proper 'chain evidence' to support this finding. So, the convictions on these counts cannot stand either.

[32] In preparing for this appeal I requested the parties to make written submissions on whether or not the appellant should nevertheless have been convicted as an accessory after the fact on either the robbery count or the five counts of murder on the ground of that he may unlawfully, and intentionally, after the completion of the crimes, have associated himself with the commission of these crimes by helping the perpetrators to evade justice. It will be recalled that he assisted Mayisela's group to leave the area where they had been hiding and drove them back to Mthatha later that evening.

[33] Section 257 of the Criminal Procedure Act 51 of 1977 provides that where the evidence against an accused does not prove the commission of the offence of which he has been charged but proves his guilt as an accessory after that offence he may

[1] *S v Mbuli* 2003 (1) SACR 97 paras 71-72.

be found guilty as an accessory after that offence.[2] For present purposes the offence may be treated as a competent verdict for robbery and murder.

[34] In *S v Morgan & others*[3] Corbett CJ explained that intention or dolus is an essential element of the offence of being an accessory after the fact. The prosecution must therefore show that the alleged accessory knew that the person whom he had helped had committed a crime. And for this purpose dolus eventualis would be sufficient to render the accused liable. However, it must be shown that the accused was aware of the facts indicating the possibility that a crime had been committed by the person to whom he had rendered assistance, and nonetheless proceeded, reckless of what the position was and with the required object.[4]

[35] We have now established that the appellant was not present either during the robbery or the events following the robbery after Mayisela's group had abandoned their vehicle. It is also apparent from Mayisela's testimony that when the appellant arrived to collect them later that evening none of them had any idea that their colleagues and a police officer had been killed. So – assuming that the high court was correct in its finding that those who participated in the robbery were also guilty of murder, which as I have said earlier, is questionable – the appellant would not have had knowledge of the relevant facts when he arrived in his vehicle with Dotwana to assist them later that evening.

[36] It seems likely though that at least one of those in Mayisela's group whom the appellant had come to help would have informed him of the robbery. But this was not explored during Mayisela's evidence. And there was no obvious indication that they had been involved in a robbery. In these circumstances I cannot find that the only

[2]'Accessory after the fact

If the evidence in criminal proceedings does not prove the commission of the offence charged but proves that the accused is guilty as an accessory after that offence or any other offence of which he may be convicted on the offence charged, the accused may be found guilty as an accessory after that offence or, as the case may be, such other offence, and shall, in the absence of any punishment expressly provided by law, be liable to punishment at the discretion of the court: Provided that such punishment shall not exceed the punishment which may be imposed in respect of the offence with reference to which the accused is convicted as an accessory.'

[3]*S v Morgan & others* 1993 (2) SACR 134 (A).

[4] Ibid 174E-G.

reasonable inference is that the appellant had knowledge of the robbery when he assisted Mayisela's group to make their way back to Mthatha. It follows that the appellant cannot be found guilty as an accessory after the fact of murder or robbery either.

[37] What remains is the conspiracy charge. The high court found all the accused, including the appellant, guilty of both conspiracy to commit robbery and robbery on the basis of a common purpose. In this regard it erred because once a person conspires to commit a crime and then commits the crime he cannot be guilty of both since the two crimes merge.[5] By convicting the accused, including the appellant, of both crimes the high court incorrectly duplicated the convictions. I have held that the robbery conviction cannot stand. So it is necessary to consider whether the evidence established a conspiracy to commit robbery.

[38] There are two critical pieces of evidence pointing to the appellant's involvement in the conspiracy: the appellant's confession and Mayisela's testimony that the appellant was present at Jam-Jam's house with the other conspirators on the evening before the robbery. As I have indicated earlier the appellant takes issue with both. The confession, he says was obtained improperly and Mayisela's evidence on this aspect cannot be accepted in the face of his alibi that he was working as an ambulance driver on night-shift that evening.

[39] I turn to consider whether his confession was properly held to be admissible against him. In this regard it is trite that for a confession to be admissible, the prosecution bears the onus to prove beyond a reasonable doubt that the accused made it freely and voluntarily, in his sound and sober senses, and in the absence of undue influence. In addition, even if a confession meets these requirements, it may still be excluded under s 35(5) of the Constitution if its reception would render the trial unfair or otherwise be detrimental to the administration of justice. This would occur, for example, if an accused is not informed of his constitutional right to remain

[5] C R Snyman *Criminal Law* 5 ed (2008) p 295.

silent and of the consequences of not remaining silent, and he then makes a confession that the prosecution seeks to use in evidence against him.[6]

[40] From the evidence adduced to determine the admissibility of the confessions it emerged that the appellant was arrested by members of the NIU at his home in Tsolo two days after the robbery at about 01h00 on 6 June 2009, which was a Saturday. Velelo and Dotwana were also arrested in the early hours of that morning. The three suspects were then driven to Mthatha where they were taken into the Embassy building used by the police. The appellant was interrogated briefly there and thereafter booked in at the Central Police Station with his co-suspects.

[41] Later that morning Mayisela was also arrested in Tsolo. It is of some significance that in his testimony he conceded under cross-examination that the police had assaulted him at the time of his arrest whilst they were interrogating him about the robbery. Ndabeni (accused 4) was arrested more than a month later, on 28 July 2009. All of the accused, including Mayisela, made confessions. And all of them, except Mayisela who testified for the State, contested their admissibility on various grounds, including the ground that they had been severely assaulted. Dotwana contested the admissibility of his confession only on the ground that the police led him to believe that he would be released on bail if he put his thumbprint on a document (the confession).

[42] The appellant's testimony on the admissibility of his confession was briefly this: After being booked in at the Central Police Station he was booked out some time later on the afternoon of 6 June and driven to Butterworth by police officers. At the police station he was questioned by Warrant-Officer Duncan Thembinkosi Bambalele, who did not advise him of his constitutional rights. He explained that a document that he had signed purporting to acknowledge that his rights had been explained to him, he was told, was for the return of his belt and shoelaces that were

[6] Sections 35(1)*(a), (b)* and *(c)* of the Constitution.

taken from him before he was detained in the cells. Bambalele refused to allow him to contact his lawyer. He was then taken back to his cell at Butterworth.

[43] Later that evening he was brought back to an office at the Sanlam Building where Bambalele asked him to sign a document. He signed it, he says, without reading it. This was the first written statement he made. The document was part of a pro-forma 'Statement Regarding Interview with Suspect' which the police are required to use when questioning suspects. It appears to be dated 7 June 2009, but the date 6 June 2009 also appears on the document twice. The document contains the usual information regarding the suspect being informed of the allegations against him, his constitutional rights and whether he is willing to make a statement. His recorded answers indicate that he understood what was being put before him and nevertheless wished to make a statement. It is recorded that the interview commenced at 17h40 and was completed a mere 15 minutes later, at 17h55. He was then taken back to his cell.

[44] Even later that evening, he testified that he was brought back to the Sanlam Building, and interrogated again. During the course of this interrogation, he says, he was hooded repeatedly with a plastic bag containing a white powdery substance. In the process he urinated in his pants. In the early hours of the morning they returned him to his cell. None of the police officers who were involved in the investigation were present on this occasion. He believes that they were from the NIU because of the red badges they had over their right breasts. He remained in his cell all of Sunday, 7 June 2009.

[45] On the morning of 8 June 2009 – Monday – Bambalele collected the appellant from his cell and took him to Captain Luyanda Sandile Mahobe's office at the Sanlam Building. There, he testified, Mahobe instructed him to sign a document and affix his thumbprint thereon. Mahobe told him that it was getting late and that he had to appear in court soon. He was told that he would not be granted bail without affixing his thumbprint to the document. The appellant says that he believed Mahobe and,

because he wanted to be released on bail, he complied with the instruction without reading the document.

[46] As with the first document he signed, this one was also a pro forma form indicating that the ‘deponent’ had his constitutional rights explained to him and that he wished to make a statement. Of some significance is his response to the question why he wished to make a statement as he had already made one to Bambalele. His recorded answer was that he wanted the statement to be written down. This response makes no sense as his statement to Bambalele earlier had also been written down. This document was also attached to the two-page written confession that the court held admissible as evidence. The documents record that the appellant was brought to Mahobe’s office at 08h10 and left at 09h02.

[47] The evidence of the police, briefly, was that the appellant was booked out for questioning in Butterworth on two occasions, ie, on Sunday morning, 7 June 2009 and again on Monday morning, 8 June 2009 before he appeared in court. He was fully informed of all of his constitutional rights and he made a statement to Bambalele on Sunday and another to Mahobe on Monday morning, voluntarily and without being unduly influenced to do so.

[48] It is not necessary to deal with the evidence of the police in any detail. And I accept that the learned judge was correct in finding that much of the appellant’s evidence was untrustworthy. But, I think he too readily accepted all the evidence of the police without properly analysing it, and did not properly consider those aspects of the appellant’s evidence that were reasonably possibly true despite his mendacity. In fact the judge misdirected himself by approaching the evidence of the appellant on the basis that he (and his co-accused) needed to ‘put up credible versions’ to refute the ‘overwhelmingly strong and convincing evidence’ of the police regarding the admissibility of the confessions. All that was required of the appellant was to present a version that was reasonably possibly true, even if it contained demonstrable falsehoods.

[49] When confronted with confessions made by suspects to police officers whilst in custody – even when those officers are said to be performing their duties independently of the investigating team – courts must be especially vigilant. For such people are subject to the authority of the police, are vulnerable to the abuse of such authority and are often not able to exercise their constitutional rights before implicating themselves in crimes. Experience of courts with police investigations of serious crimes has shown that police officers are sometimes known to succumb to the temptation to extract confessions from suspects through physical violence or threats of violence rather than engage in the painstaking task of thoroughly investigating a case. This is why the law provides safeguards against compelling an accused to make admissions and confessions that can be used against him in a trial.

[50] In addition, courts must be sceptical when the State seeks to use a confession against an accused where he repudiates it at the first opportunity he is given. Because ordinary human experience shows that it is counter-intuitive for a person facing serious charges to voluntarily be conscripted against himself. Often it is said that the accused confessed because he was overcome with remorse and penitence; 'a desire which vanishes as soon as he appears in a court of justice'.[7] That is sometimes true, but is usually not.

[51] In this case not even that explanation was advanced for why the appellant confessed. It was simply said that the appellant was asked during his questioning whether he wished to make a statement, and he agreed. The statement was taken from him and reduced to writing. And when he was asked whether and why he wished to make a second statement, (which the State used against him in the trial) having already made one, the answer appearing on the police record of what was said was that he wanted it to be 'written down'. This nonsensical answer should have caused the court to approach the matter with heightened scepticism.

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[7] *Rex v Nchabeleng* 1941 (A) 502 at 507 citing the remarks of Cave J in *Queen v Thompson* 1893 (2) QBD 12 at 18.

[52] There are several reasons why the appellant's complaint that his confession was improperly obtained from him rings true. First, three of the accused, testified that they had been severely assaulted before making confessions. Mayisela, whose evidence the court accepted as satisfactory in all material respects, said that he too had been assaulted at the time of his arrest. The fact that four of the five suspects who were arrested all claimed to have been assaulted indicates that the appellant's testimony on this aspect may be true.

[53] Secondly, the three accused, who contested their confessions in the 'trial-within-a-trial' all said that they were not warned of their constitutional rights. The police version was that the appellant's rights were explained to him on four separate occasions: first, when he was booked out of his cells and made to sign a document explaining his rights; second when he was first interrogated by Inspector Nombe, and Warrant-Officers Maneli and Bambalele, third when Bambalele took the appellant to his office to reduce what he had said earlier to writing, and finally on the morning when Mahobe took his statement before he appeared in court.

[54] The appellant's testimony, which is not unlikely, was that on the first occasion when he was booked out of the cells, the document he signed purporting to explain his rights, he was told, and he believed, he was signing for the return of his belt and shoe laces.

[55] On the second occasion, before the three officers questioned him, it was Nombe's evidence that when he asked the appellant whether he wanted an attorney before they commenced interrogating him, he responded by saying that he would only require one when he appeared in court, which is also what Nombe testified that Velelo had said. And Bambalele's evidence was that Ndabeni also responded in this way. It seems odd, and unlikely, that three suspects who are being told that they are

entitled to the services of a lawyer would all respond in exactly the same manner. The evidence of the police in this respect seems contrived.

[56] But Bambalele's evidence as to what happened after the appellant had apparently freely admitted his involvement in these offences is even more unlikely: he testified that immediately after the appellant had confessed orally he took the appellant to his office to write down his statement. And before the appellant made the statement, he produced his appointment certificate to identify himself as a police officer, and again explained his rights to him. But, on the police version the appellant had already been warned of his rights and Bambalele was present during the questioning. So what would the purpose of this testimony be unless the Bambelele was trying to embellish his evidence?

[57] The third reason why I think the high court was wrong to admit the confession is because of what it was recorded the appellant had said in Mahobe's office on the morning of 8 June 2009. I find it improbable that the appellant would have told Mahobe that he wished to make this statement so that it could be written down, when he previously had a statement written down by Bambelele. And there is nothing improbable in his testimony that Mahobe said he was in a hurry because the appellant had to appear in court and that he would not get bail if he did not affix his thumbprint to the document. It bears mentioning that Dotwana challenged the admissibility of his statement on the same basis.

[58] Because the evidence of the appellant was unsatisfactory in several respects, I am unable to find – and I do not find as a fact – that he was assaulted in the manner he claims to have been, that his rights were not explained to him before he made his confession or that he was unduly influenced to make the written confession before he went to court. But I do find that his version on each of these aspects is reasonably possibly true. Accordingly, I hold that the high court erred in admitting the statement against the appellant.

[59] This then disposes of the first piece of evidence implicating the appellant in the conspiracy. The second piece of evidence, as mentioned earlier, was given by Mayisela who testified that the appellant was present at Jam-Jam's house on the evening before the robbery, and when they departed at 03h00 the following morning.

[60] The appellant denied this. He testified that he was an ambulance driver at St Lucy's Hospital in Tsolo, where he was on duty on the night of 3 June 2009. When he is on night shift, as he was on that night, he commences work at 19h00 and finishes at 05h00 the following morning, but on that morning he finished off at 07h00. He also testified that an Emergency Medical Services register, which is readily available, would show that he was on duty that night. It is common cause that he was employed at the hospital.

[61] The high court rejected his alibi because, in the learned judge's view, the appellant could not explain why he had not made this evidence available to the court and inform the police of its existence. But again, the judge incorrectly cast the onus on the appellant to disprove his alibi, whereas the onus remained on the State throughout, not on the appellant.[8]

[62] The appellant raised a concrete verifiable alibi, the details of which he disclosed during the State case. The prosecution failed to adduce any evidence to disprove the alibi. It could and should have applied for an adjournment to investigate the alibi and in particular the existence and entries of the Emergency Medical Services register before concluding its cross-examination. And if necessary it could have applied to reopen the State case once the appellant had furnished more detail of the alibi during his cross-examination. Its failure to do so meant that the appellant's alibi could not have been summarily rejected, and the court erred in doing so. So, the conspiracy conviction against the appellant also falls to be set aside.

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[8] *R v Hlongwane* 1959 (3) SA 337 (A) at 340F-340B.

[63] It follows that the appeal succeeds and the convictions against the appellant on all counts must be set aside. I regret this result because it is not at all clear that the appellant is innocent on all the charges against him. What is even more regrettable is that the case against him and his co-accused was poorly investigated and prosecuted. There was very little evidence of a proper investigation; instead the State relied mainly on confessions extracted from the accused in dubious circumstances, and the evidence of an accomplice, who himself had been assaulted by the police.

[64] The appellant and some of these conspirators knew each other, according to Mayisela, and communicated with each other by cell phone. Those cell phones were taken by the police when they were arrested. But no explanation was given as to why the records of the cell phone communication between them and the other alleged conspirators were not produced in evidence. This would have been the simplest and clearest way to negate the protestations of innocence of the appellant and his co-accused.

[65] Another troubling aspect of the matter was the evidence that only R71 120 of the R509 970 that was stolen was recovered in the bag. This was after the police had gone into the forest in pursuit of the robbers when five people lost their lives. Mr Siyo, who appeared before us for the State, was not able to tell us what happened to the money.

[66] Even more troubling is that there was evidence that some of the deceased may have been alive after they had been shot, despite which there appears to have been no attempt by the police to secure any medical assistance for them as they had done in the case of Warrant-Officer Sibeko, who died after he was airlifted from the scene. The suspects all died at the scene.

[67] I shall therefore ask the registrar of this court to make this judgment available to the Minister of Police and the Independent Police Investigative Directorate for further investigation.

[68] I make the following order:

The appeal is upheld and the convictions and sentences imposed on the appellant are set aside.

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A CACHALIA

JUDGE OF APPEAL

APPEARANCES

For Appellant:	D J Taljaard
	Instructed by:
	Mdledle-Malefane & Associates, Mthatha
	Messrs Webbers Attorneys, Bloemfontein
For Respondent:	M W Siyo
	Instructed by:
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