CASE NO: 436/99

In the matter between

MHLELI ARCHIE NDIKA — **1st Appellant**

THEMBEKHAYA TOSE — **2nd Appellant**

KWANELE TEZAPHI — **3rd Appellant**

NCEBA PATRICK BOBELO — **4th Appellant**

and

THE STATE

Respondent

CORAM: **MARAIS, CAMERON, *et* MTHIYANE JJA**

DATE HEARD: **16 NOVEMBER 2001**

DATE DELIVERED: **30 NOVEMBER 2001**

JUDGMENT

MARAIS JA/

MARAIS JA:

[1] At approximately 4.30am on 6 March 1995 an armed robbery of the two policemen who were on duty at the Ntabethemba police station took place. Six persons were subsequently charged with the crime in the High Court at Bisho. Accused No 4 was discharged at the close of the State's case and Accused No 1 was acquitted at the end of the trial. Accused No 2 (Mheli Architect (Archie) Ndika), Accused No 3 (Thembekhaya (Thembi) Tose), Accused No 5 (Kwanele (Rasta) Tezaphi) and Accused No 6 (Nceba Patrick Bobelo) were convicted and sentenced to imprisonment for 12 years of which 3 years were conditionally suspended. Leave to appeal against their convictions was granted to them and leave to appeal against their sentences was granted to the Director of Public Prosecutions. I shall refer to Accused Nos 2, 3, 5 and 6 as first, second, third and fourth appellants respectively.

[2] The appellants were all represented by the same counsel at their trial. Their heads of argument in this Court were prepared by the same counsel and

were filed before the assignment of a date of hearing. Before notice of the date of hearing was given the attorneys representing the appellants withdrew. The consequence was that notice of the hearing had to be given to the appellants personally. That was done. At the first hearing first, second and fourth appellants appeared in person. Third appellant failed to appear. The matter was postponed to enable the appellants to arrange for legal representation.

[3] When the matter came before the court for the second time first and second appellants had been granted legal aid and were represented by Miss Wright. Third appellant again failed to appear. Fourth appellant appeared in person. He had been refused legal aid on the ground that he did not qualify for assistance, presumably because he is a captain in the South African Defence Force and earns a salary large enough to disqualify him. His efforts to engage the counsel who had represented him at the trial and drafted his heads of argument for the appeal were also unsuccessful and he elected to present argument himself. There is no

explanation for the failure of third appellant to appear at either the first postponed hearing of which he received notice or the present hearing. Efforts made by the police to locate him have failed. Rule 13 (3) requires his appeal to be "dismissed for non-prosecution, unless the Court otherwise directs". See *S v Isaacs* 1968 (2) SA 184 (A) and *S v Moshesh and Others* 1973 (3) SA 962 (A). There is no good reason why the Court should direct otherwise and his appeal is dismissed for non-prosecution.

First and second appellants

[4] The convictions of first and second appellants rest upon confessions made by them to magistrates and, in the case of second appellant, evidence that some three to four weeks after the robbery had taken place he came to the house of one Mr Lufele with two of the rifles which had been stolen from the police station. The arguments for these appellants was, in essence, that the confessions should not have been received in evidence because the reasonable possibility that the

appellants had been unduly influenced to make them had not been excluded by the State, and that the evidence of Lufele should not have been accepted.

[5] The nature of the undue influence relied upon by the first and second appellants is the same: the prospect of their being used as witnesses for the State against the other persons involved in the robbery. It goes without saying that the claimed identical nature of the alleged undue influence does not relieve the Court of its duty to examine the cases of each appellant separately and individually. But that does not mean that the fact that (as will appear) they acted in unison and allegedly for the same reason in deciding to make statements must be disregarded. It is obviously highly relevant to the enquiry.

[6] At the trial Chemaly AJ conducted a trial within the trial in order to decide upon the admissibility of the statements made to the magistrates. A considerable body of evidence was led by the State. First and second appellants chose not to testify. Instead they called Mr Adams, the head of Sada prison in Whittlesea, in

support of their version (put in cross-examination) that, as part and parcel of the State's scheme to induce them to make statements, they were transferred to Fort Glamorgan prison in East London where they preferred to be because of proximity to their families. The impact of his evidence was that despite his having refused the two appellants' request to be so transferred and the opposition of the head of Fort Glamorgan prison to such a transfer, they were transferred as a consequence of the intervention of the police and Mr Mrwebi (the Deputy Director of Prosecutions who was the prosecutor in the case). Adams also testified that their safety was never raised as a reason for their transfer.

[7] The trial judge ruled the statements to be admissible at the conclusion of the trial within the trial. He had before him at that stage (apart from the evidence of Adams) only the evidence of the witnesses called by the State. That evidence amounted collectively to this. The two appellants had initiated discussions with the police officers investigating the robbery with a view to making themselves

available as witnesses for the State. The police approached the Director of Public Prosecutions who instructed them to inform the two appellants that it was their choice as to whether or not they made statements and that no commitment to using them as State witnesses could be made. However, the prospect of them being so used was not entirely ruled out. The magistrates testified that they had asked the appellants whether any influence had been brought to bear upon them or any benefit held out to them to induce them to make statements and whether they expected any benefit if they did so. Both replied in the negative. When asked how it had come about that they had come to the magistrates' offices to make a statement, first appellant said that while in custody at Sada prison he asked the prison authorities to ask the investigating officer to visit him "because there are people who know nothing about the case who are being included in it, and I wanted to tell him about this case". He said that that led to a visit by Inspector Nyila who told him that he could tell a magistrate "about this whole

thing". Second appellant's explanation was: "Ek wil 'n ander lewe lei. Verkeerde persone is vir 'n misdryf gearresteer. Ek het toe die polisie laat kom." In both instances the magistrates told the appellants that they should expect no benefit whatsoever if they should make statements and the magistrates required to be assured that the appellants fully understood that. They replied in the affirmative.

[8] What was put in the course of the cross-examination as being the version of the two appellants was not that they had been assured that they would be used as State witnesses but that they were "under the impression" that the Director of Public Prosecutions "was interested" in using them as witnesses for the State. It was also put that they had been influenced by a promise made to them that, if they were used as witnesses for the State and a pending appeal against their conviction and sentence in another case were to fail, the Director of Public Prosecutions would write to the prison authorities in support of their early release

on parole. That allegation was firmly denied by the witnesses to whom it was put.

[9] It was not argued, nor could it have been argued successfully, that the trial judge's decision to admit the statements in evidence at the conclusion of the trial within the trial was wrong. What was contended, was that after all the evidence at the trial had been led, including the evidence of the appellants themselves, the trial court should have reversed its ruling and declared the statements to be inadmissible. I am unable to accept that submission.

[10] The evidence given by the two appellants in support of their attack upon the reception in evidence of the statements and upon the veracity of what was said in the statements was, as regards the former, in material and vital respects very different from the versions put by their counsel in the course of cross-examination, and as regards the latter, so obviously untrue that counsel for first

and second appellants found herself unable to contend that it might reasonably possibly be true.

[11] They denied that they had made any overtures to the police. They claimed that they had been approached by the police and had definitely been promised that they would be used as witnesses for the State despite their having told the police previously that they knew nothing about the robbery; that they were schooled by the police as to how they should respond to the questions which magistrates customarily put to persons who are brought to them to make statements, and were also schooled as to how they should implicate others. None of this was put in cross-examination to the police at any stage of the trial.

[12] It is quite clear that the initiative regarding the making of statements was taken by the two appellants themselves and that their evidence that it was the police who approached them in that regard is untrue. It was specifically put by counsel for the appellants during cross-examination that "they (first and second

appellants) will say that on the first occasion they called for some --- the first occasion that you went there it was at the request of them that they had called an investigating officer to come to the prison". That was of course in entire conformity with the evidence of the police. Moreover, both of the appellants said in their statements to the magistrates that they had called the police to the prison to talk to them.

[13] The nature of some of the replies given by the appellants to the preliminary questions put to them by the magistrates gives the lie to the possibility that the police devised the replies for them. The replies quoted in para [7] of this judgment are examples. Second appellant's vacillation when asked by the magistrate whether he wished to have a legal representative present is also quite inconsistent with second appellant having followed a script provided by the police. Having initially answered in the negative, he was warned by the magistrate that what he might say could be used in evidence against him. He

thereupon said: "Ja ek wil nou 'n prokureur aanstel. Ek sal aansoek doen om regshulp." Upon being told that it would not be possible to take a statement from him until that had been done, he changed his mind and decided to dispense with the presence of a legal representative. It is scarcely conceivable that, if he was indeed intent upon faithfully carrying out the unsavoury task allegedly set him by the police, he would have responded in that way.

[14] As for the statements themselves, they are replete with a wealth of detail a good deal of which is either of peripheral relevance or of no relevance to the task with which the police had allegedly burdened them. Quite apart from the extraordinary feat of memory which would have been entailed in memorizing such a mass of both significant and insignificant fictitious facts, many of the facts recited are facts which the police could have had no possible interest in including in the statement. Hence, as I have said, the wise decision of counsel for both appellants to abstain from attempting to argue the contrary.

[15] While it is so that there was some interest shown by the police and the prosecuting authority in the possibility that first and second appellants might be used as witnesses for the State, that was an interest aroused by the two appellants' own actions. The trial judge's finding that no promises in that regard were made to them and his rejection of their evidence that they were threatened with lengthy terms of imprisonment if they did not co-operate and that a transfer to Fort Glamorgan prison was held out as an inducement to them to co-operate cannot be faulted. The circumstances which must exist before an appellate court will interfere with a trial court's findings of fact are entirely absent in this case. (See *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645 e-f.)

[16] If, despite the absence of any assurances given by the police or the Director of Public Prosecutions, despite being told that the latter would not commit himself and that it was for them to choose whether or not to make statements, and despite being warned by the magistrates that they should not

expect to benefit in any way should they choose to make statements, they nonetheless did so, they cannot be said to have been unduly influenced. A self-induced expectation of a benefit which expectation is persisted in even in the face of both a refusal by the State or its functionaries to commit itself to extending it and an admonition by a magistrate that the prospect of any benefit should be eliminated from one's mind, cannot qualify as an influence which is undue within the meaning of s 217(1) of the Criminal Procedure Act 51 of 1977. Nor is it one which renders the admission of a statement made as a consequence of it unfair and therefore unconstitutional. In saying this, I do not mean to convey that I accept that the first and second appellants did in fact have such an expectation; I am sceptical of their evidence that such was their motivation. Be that as it may, even it be assumed that such was indeed their motivation for making the statements which they did, I do not consider that that should lead to the exclusion of their statements for the reasons I have given.

[17] The admission in evidence of the statements of the two appellants puts paid to any reasonable possibility that the alibis which they advanced at the trial might be true. There is no reason to doubt the veracity of the statements in so far as the appellants implicate themselves and there is an abundance of evidence *aliunde* to prove both the commission of the crime and to confirm the confessions in material respects. It was not contended otherwise. The appeals of first and second appellants therefore fall to be dismissed.

Fourth appellant

[18] Having benefited no doubt from hearing his counsel cross-examine and argue his case at the trial, fourth appellant argued his case competently and crisply. We have also taken into consideration the submissions made on his behalf in the written heads of argument which were prepared by his then counsel. The case against fourth appellant rested upon the identification of him as one of those who participated actively in the robbery by Constable Due and a fragment

of evidence connecting him with second appellant and two of the rifles which had been stolen from the police station.

[19] The principal contentions of fourth appellant were these. The circumstances in which Constable Due made the observations which led him to identify fourth appellant were not conducive to accurate and reliable identification. His failure to say in the first written statement which he made after the incident that he could furnish a description of and identify, if seen again, one of the robbers cast doubt upon his subsequently professed ability to do so. The description subsequently given in a further statement was not compatible with the actual appearance of fourth appellant. Constable Due's first identification of fourth appellant as the person he had seen and described was in consequence of eight photographs having been placed before him by the police officers investigating the case and not in consequence of a customary identification parade with its attendant safeguards against abuse. The

photographs were not sufficiently similar to be challenging. Constable Due was a single witness whose evidence did not justify the rejection of fourth appellant's alibi which should have been found to be reasonably possibly true.

[20] It is of course so that the honesty of a witness in identifying a person is not by itself a guarantee of its correctness. The objective circumstances attending the observation of the person and the state of mind of the observer is just as critical. The objective circumstances were these. Eight armed men burst into the charge office. They were not masked. The charge office was well lit with fluorescent lights. The intruders were intent upon gaining access to a locked strongroom. Constable Due and Constable Landu were ordered to lie face down on the floor. An overcoat was thrown over Landu's head. He was unable to identify any of the intruders. They were shepherded into the strongroom where they again lay face down on the floor. One of the robbers bent down to intimidate them by showing them he had a grenade in his hand. It was then that Due lifted his head and

observed the facial and other physical features of that person. The strongroom was also well lit by a conventional electric globe. He noted during the "longish time" (which he estimated to be ten seconds) for which he had the person's face under observation that he had a big flat nose, a moustache and beard, a medium sized body which was neither slender nor stout, and a leather hat and lumberjacket. He judged him to be "possibly --- taller" than himself. It was a person he had never seen before. When this person noticed that Due was looking at him he kicked him in the face and demanded to know why he was looking at him. Due was not able to observe him further. He and Constable Landu were locked in the strongroom after the robbers had removed a safe, three rifles and some bulletproof vests.

[21] It was on the strength of that observation that he recorded in a written statement on 23 April 1996 a description of the person and on 14 August 1996 identified a head and shoulders photograph in a batch of eight head and shoulders

photographs of different people as being that person. It is common cause that the photograph he identified is a photograph of fourth appellant. He was taken to task in cross-examination for the absence in a statement which he made a day after the robbery of anything which suggested that he would be able to identify one of the robbers if he were to see him again. To that I shall return.

[22] It is true that the opportunity for observation of the physical features of the person whom he professed to be able to identify was relatively short but that is certainly enough time for a person such as Due (a policeman under personal threat of harm from another) to register facial and other physical characteristics of that person. All the more so when a conscious and deliberate attempt was made by him to do just that. It is certainly not a case of a fleeting glance in the course of fast moving and frantic action. The lighting was good and, apart from the relative shortness of the period of observation and the fact that the person was not previously known to him, the circumstances favoured reliable identification.

The very fact that Due was able on 23 April 1996 to give a description (albeit linguistically more generic than specific) before an arrest had been made is consistent with his evidence that at the time of the incident he consciously and deliberately set about making observations which would enable him to identify the particular person. That such a description did not appear in his first statement is of no real moment. His honesty as a witness was not seriously attacked and he gave plausible possible reasons as to why a description was not recorded then.

[23] The criticism of the photographic identification "parade" is not without merit in so far as it concerns the general principle of such methods of identification. Indeed, this Court in *S v Moti* 1998 (2) SACR 245 at pp 254h-256c drew attention to the undesirable aspects of such procedures. It is unnecessary to recapitulate them. What is clear however is that, if such a method has been used, it is not axiomatic that the results are to be ignored. All will depend upon whether there is a reasonable possibility that improper conduct has

tainted the reliability of the identification or that, even in the absence of any improper conduct, the objective circumstances attending the photographic identification were not conducive to accuracy and reliability.

[24] In the present case there is no reason to suspect foul play on the part of those conducting the "parade". Due's evidence was obviously honestly given and it excluded any possibility of foul play in the sense that the police contrived to steer him in the direction of identifying the particular photograph which he did rather than some other photograph. As for the intrinsic reliability of the identification, no doubt a larger spread of photographs than the eight which were placed before him would have given even more assurance but eight photographs meant that there were seven other definitely innocent persons whom Due would have to exclude. There was thus a considerable margin for error and the possibility that he might by sheer luck avoid seven possible errors was somewhat remote.

[25] The complaint that the other seven photographs were too dissimilar to the one identified by Due is insubstantial. It was inherent in the cross-examination of Due that he really had no opportunity to make reliable observations. If that were indeed so, it would follow that no single photograph among the eight would be more likely to be identified than any other. However, if one accepts, as I think one must, that Due did have a good recollection of what the holder of the grenade looked like, he is unlikely to have singled out the photograph which he did if it did not really conform to his recollection simply because the other seven conformed even less.

[26] I have addressed these issues one by one but of course that was simply in order to deal with them methodically. Ultimately, it is their cumulative impact which has to be assessed together of course with all other evidence relevant to the question of whether the identification was correct. To my mind there is other evidence which excludes the risk of Due's identification having been wrong.

[27] The evidence of Mr Lufele was that in April 1996 some three to four weeks after the robbery second appellant arrived at his house in Ezibeleni together with a young woman. He had two firearms with him and a note from “Bobelo” (fourth appellant) asking him to give them a place to sleep and saying that he would contact Lufele at a later stage. The firearms were a G3 rifle and an R1 rifle. (It was clearly established on the evidence that they were two of the rifles which had been stolen from the police station.) It is unnecessary to recount what subsequently occurred. If Lufele’s evidence was true that second appellant arrived at his house with two of the rifles stolen from the police station and a note from fourth appellant to accommodate him and his companion until fourth appellant made contact with him, it would be a remarkable coincidence. The chances are remote of Due having, by a sheer fluke, picked out of eight photographs of men unknown to him a photograph of a person who, *mirabile*

dictu, turned out to be associated with the possessor of two of the rifles stolen from the police station.

[28] Second appellant admitted in his evidence that he did indeed arrive at Lufele's house with a young woman but denied that he had any firearms with him. He also alleged that it was Mrs Bobelo (the wife of fourth appellant) who had sent him there. For good and sufficient reason his evidence was rejected. While Lufele was prepared to concede that he could not say the note he was shown was in fourth appellant's handwriting because he was unfamiliar with it, he was adamant that the tenor of the note made it clear that the message emanated from fourth appellant. There is no reason to doubt Lufele's veracity when he says that the rifles were brought to his house. The police found one of them there and the other as a result of information he gave them. The only question is whether it is reasonably possible that he falsely accused second appellant of bringing them there. No conceivable reason why he would have

chosen to falsely select second appellant as the culprit was suggested. He could just as easily have said that an unknown third party had brought them there.

[29] The matter does not end there. The nature of the alibi presented by the fourth appellant has also to be taken into account. There was of course no onus of proof upon him. It was for the prosecution to prove that it could not reasonably possibly be true. The State led evidence that he was absent without explanation from parade the morning of the robbery in order to support the allegation that he was involved in the robbery. Although his counsel cross-examined the witness who gave this evidence along the lines that the evidence was derived from an attendance register and that she could not say of her own knowledge that he was absent, when the fourth appellant himself gave evidence he admitted that he had not attended the parade and alleged that he had been in the sick-bay. This was the first inkling that the State or the police or the court was given of his whereabouts at that time. Understandably, the trial judge

considered that an alibi so easily capable of independent verification would have been raised long ere the trial if there had been any truth in it.

[30] When all these factors and their respective bearing upon one another are considered, the quibbles about the lack of resemblance of the other photographs to fourth appellant pale into insignificance and there can be no doubt that Due was accurate in his identification of fourth appellant. His appeal against his conviction must also fail.

The cross-appeal against the sentences

[31] The cross-appeal against the sentence remains to be considered. The four appellants are respondents in that appeal. The failure of the third appellant to prosecute his own appeal cannot of course stultify the State's right to have its appeal against his sentence heard. The approach to an appeal by the State against the alleged leniency of a sentence is well-established and set forth in *S v Shapiro*

1994 (1) SACR 112 (A) at 119j to 120c and *S v Sadler* 2000 (1) SACR 331 (SCA) at 334 par [6] to 335 par [10].

[32] I am unpersuaded that the trial judge misdirected himself in any material respect in imposing sentence. His criticised reference to the absence of violence must be interpreted in the context of the facts of the case. He acknowledged that "the threat of violence and force was used, the accused being armed with various firearms". He rightly regarded the use of firearms and a hand-grenade as aggravating factors. He regarded it as mitigating that notwithstanding the fact that the accused were armed nobody was injured. The reference to the absence of violence clearly was meant to convey that no one was physically injured in any significant way.

[33] The factors which the trial judge took into account in imposing sentence were all legitimate factors and the State's complaint is really that the respective weights assigned to the various factors were inappropriate. It

is necessary to point out once again that the weight to be assigned to each of the many factors which are germane to the assessment of an appropriate sentence in a given case is the prerogative of the trial court. Unless its weighting of the factors is plainly wrong or rests upon faulty reasoning, it is not for an appellate court to substitute its own weighting of those factors.

[34] I cannot say that the trial judge's weighting of the relevant factors was plainly inappropriate nor can I say that it is the product of faulty reasoning or vitiated in any other way. The sentences imposed include substantial and relatively lengthy terms of direct imprisonment and interference with them would, in my view, not be justified. They are not disturbingly lenient. However, they require modification in two respects. The trial judge inadvertently failed to specify the period for which three of the twelve years imprisonment he imposed were to be suspended and circumscribed the conditions of suspension too narrowly in one respect and too widely in another. I shall rectify that.

[35] In the result:

1. **The appeal of the first, second and fourth appellants against their convictions is dismissed. The appeal of the third appellant is dismissed for want of prosecution.**

2. **The appeal of the State against the sentences imposed upon the four appellants is dismissed.**

3. **The sentences imposed by the trial judge are amended to read:**

   "Twelve (12) years imprisonment of which three (3) years are suspended for five (5) years on condition that the accused is not convicted of a crime committed within the period of suspension in which dishonesty or violence towards the person of another or any attempt thereat is involved and for which he is sentenced to unsuspended imprisonment without the option of a fine."

R M MARAIS
JUDGE OF APPEAL

CAMERON JA)

MTHIYANE JA) CONCUR