IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEAL NO: A 15/2020

DPP REF NO: JPV 2007/23

1. Reportable: No
2. Of interest to other judges: No
3. Revised: Yes

(Signature)

In the matter between:

NKOMO, MAKHOSINI **Appellant**

and

THE STATE **Respondent**

Appeal against conviction of murder based on the evidence of a single witness. Appeal against conviction of unlawful possession and pointing of a firearm based on conflicting evidence. Appeal succeeds in part.

JUDGMENT

DE VILLIERS, AJ:

Introduction

[1] The appellant, then accused number 2, had been convicted on 31 August 2009 and sentenced on 02 September 2009 by the Honourable Moshidi J. Leave to appeal the conviction and sentence was granted by the Supreme Court of Appeal on 22 January 2018 on petition.

[2] The appellant was one of four accused persons. Accused number one (Mr Sheppard Ndlovu) died prior to the commencement of the trial, and accused number four (Mr Newman Mandla Makaila) escaped prior to the commencement of the trial.

[3] The appellant was convicted and sentenced as follows:[1]

First, events of 14 June 2006

[3.1] Count 1 - Kidnapping of Mr Welcome Thebe on 14 June 2006; Sentence six years imprisonment. There is no appeal pursued in respect of this conviction[2] and sentence. The sentence had to run concurrently with the sentence in respect of count 2;

[3.2] Count 2 - Attempted murder of Mr Welcome Thebe on 14 June 2006; Sentence eight years imprisonment. There is no appeal pursued in respect of this conviction[3] and sentence;

Second, events of 22 June 2006

[3.3] Counts 3 - Murder of a police reservist, Constable Antony Mthombeni on 22 June 2006; Sentence life imprisonment;[4]

[3.4] Count 4 - Attempted murder of Mr Thomas Lebese on 22 June 2006; Sentence ten years imprisonment;[5]

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[1] The exact description of the crimes with reference to statutory law, is not relevant to this appeal.
[2] The third accused (Mr Delay Moyo) was convicted too.
[3] The third accused (Mr Delay Moyo) was convicted too.
[4] The third accused (Mr Delay Moyo), obtained a discharge at the end of the case for the prosecution.
[5] The third accused (Mr Delay Moyo), obtained a discharge at the end of the case for the prosecution.

Third, events of 20 August 2006

[3.5] Count 7 - Unlawful possession of a firearm, a 9mm pistol, on 20 August 2006; Sentence five years imprisonment;

[3.6] Count 8 - Unlawful possession of 16 rounds of ammunition on 20 August 2006; Sentence three years imprisonment;

[3.7] Count 9 - Pointing of a firearm, the 9mm pistol, at Constable Andries Sehlabela on 20 August 2006; Sentence five years imprisonment;

Fourth, events between 1996 and 2006

[3.8] Count 13 - Unlawfully residing in the RSA between 1996 and 2006; Sentence two years imprisonment. There is no appeal pursued in respect of this conviction[6] and sentence;

Fifth, events of 17 October 2006

[3.9] Count 15 - Escaping from lawful custody on 17 October 2006; Sentence five years imprisonment. There is no appeal pursued in respect of this conviction and sentence.

[4] The appellant was represented by Adv Pillay throughout the trial. He denied the charges. His defence to the unlawful immigration charge, count 13, was that he had held a (valid) South African Identity document. He pleaded not guilty to the charge of escaping, count 15, as he allegedly only attempted to do so. Save as aforesaid, he gave no plea explanation.

The test to be applied with regard to the convictions

[5] The convictions in respect of counts one, two, three, four, thirteen and fifteen all rested on the evidence of a single witness. As will appear below, an issue in this appeal is if the ballistic evidence that supported the convictions on counts three and four, could be sustained as there was conflicting evidence with regard to the appellant's possession of that firearm. If not, the issue would be if the convictions on counts three and four could be sustained without such

[6] The third accused (Mr Delay Moyo) pleaded guilty to unlawfully residing in the RSA, count 14.

corroborating evidence. The assessment of the conflicting evidence is also relevant to the convictions on counts seven, eight and nine.

[6] Mbatha JA (Navsa and Dambuza JJA concurring) in *Y v S*[7] succinctly dealt with the test to be applied in criminal proceedings, including the approach to a conviction based on the evidence of a single witness:

> "*[45] In criminal proceedings, the State bears the onus to prove the accused's guilt beyond a reasonable doubt. Furthermore, the accused's version cannot be rejected solely on the basis that it is improbable, but only once the trial court has found on credible evidence that the accused's explanation is false beyond a reasonable doubt. (See: S v 2000 (1) SACR 453 (SCA) at 455B.) The corollary is that, if the accused's version is reasonably possibly true, the accused is entitled to an acquittal. It is trite that in an appeal the accused's conviction can only be sustained after consideration of all the evidence and the accused's version of events*.
>
> *[46] …*
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> *[48] The applicant was convicted on the evidence of a single witness, which in order to be sufficient to convict, must be clear and satisfactory in every material respect. (See: S v Saul*s *1981 4 All SA 182 (A).) It is trite that a court will not rely on such evidence where the witness has made a previous inconsistent statement, where the witness has not had a sufficient opportunity for observation and where there are material contradictions in the evidence of the witness. In Saul*s *it was held that there is no rule of thumb, test or formula to apply when it comes to the consideration of the credibility of a single witness. Rather, a court should consider the merits and demerits of the evidence, then decide whether it is satisfied that the truth has been told despite the shortcomings in the evidence".*

[7] *Y v S* [2020] ZASCA 42 para 45 and 48.

[7] A further principle to bear in mind is that court of appeal does not easily interfere with findings of fact by the court a quo. See *S v Mafaladiso en Andere*,[8] translated by BR Southwood in *Essential Judicial Reasoning:*[9]

> "*'It is true that a Court of Appeal will not lightly interfere with a factual finding of the trial court - even if it is an inference from proved facts. But this proposition is nothing more than a guideline and is not a legal rule. R v Dhlumayo and Another 1948 (2) SA 677 (A) op 695 in fine et seq) and where a Court of Appeal is satisfied that the Trial Court has made a wrong finding of fact it must rectify it. (See S v Mkohle (supra at 100e-j); President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC) in paras [78] - [81]).,"*

[8] In assessing the evidence, one has to have regard to all the evidence, and consider the evidence as a whole. See the judgment by Nugent JA (Marais JA and Zulman JA concurring) in *S v Mbuli* [2002] ZASCA 78 para 57:[10]

> "*It is trite that the State bears the onus of establishing the guilt of the appellant beyond reasonable doubt, and the converse is that he is entitled to be acquitted if there is a reasonable possibility that he might be innocent (R v Difford 1937 AD 370 at 373, 383). In S v Van der Meyden 1999 (2) SA 79 (W), which was adopted and affirmed by this Court in S v van Aswegen 2001(2) SACR 97 (SCA), I had occasion to reiterate that in whichever form the test is applied it must be satisfied upon a consideration of all the evidence. Just as a court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt so too does it not look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true. In similar vein the following was said in Moshephi and Others v R (1980-1984) LAC 57 at 59 F-H, which was cited with approval in S v Hadebe & Others 1998 (1) SACR 422 (SCA) at 426 f-h:*
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> > *"The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard*

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[8] *S v Mafaladiso en Andere* [2002] ZASCA 92:
"*Dit is natuurlik so dat 'n hof van appèl nie ligtelike met 'n feite-bevinding, selfs 'n afleiding uit bewese feite, van 'n verhoorhof sal inmeng nie. Maar hierdie stelling is niks meer as 'n riglyn nie en is nie 'n regsreël nie (R v Dhlumayo and Another 1948 (2) SA 617 (A) op 695 in fine ev) en waar 'n hof van appèl oortuig is dat die verhoorhof 'n verkeerde feitebeslissing gemaak het, moet hy dit regstel. (Sien S v Mkohle, supra, op 100 e - f; President of the RSA and Others v South African Rugby Football Union and Others [1999] ZACC 11; 2000 (1) SA 1 (CC) op 42, [78] - [81].)"*

[9] BR Southwood, *Essential Judicial Reasoning*, LexisNexis, Para 13.2.

[10] *S v Mbuli* [2002] ZASCA 78 para 57

> *against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees.'*"

[9] Context is important in order to evaluate the evidence as a whole.

The evidence regarding the events of 14 June 2006

[10] The conviction of the appellant for the kidnapping and attempted murder of Mr Thebe on 14 June 2006 (counts one and two) is relevant to this matter only for contextual reasons, as the appeal is not persisted with. Context is important in order to evaluate the evidence as a whole.

[11] Mr Thebe testified that he was kidnapped at gunpoint, and assaulted by a group of assailants on 14 June 2006. He was questioned about the whereabouts of his brother, Sergeant Vusi Mbuyisa, a police officer. The reason for the kidnapping was that his brother had previously arrested (some of) his assailants. The inference is that the assailants sought revenge. Part of this group of assailants was "*Alex*"[11] and "*Shephard*". Mr Thebe managed to escape from his assailants, after he witnessed the appellant getting out of the second car involved in the kidnapping, firearm in the hand. Mr Thebe stated that the firearm was black. He was shot at, as he ran for his life. Later the appellant would deny having been in possession of a black firearm when arrested, the firearm that would link him ballistically to counts three and four.

[12] Sometime after the incidents of 14 June 2006, Mr Thebe called Sergeant Alfred Ndlovu, who worked with his brother, when he again saw accused number three, Mr Delay Moyo. This call led to the arrest of Mr Moyo. He also identified Mr Moyo and "*Shephard*"[12] at a subsequent identification parade. Sergeant Alfred Ndlovu testified that he had given his telephone number to Mr

[11] It is not clear from the record if this was a reference to the appellant's nephew, referred to below.
[12] Accused number one, Mr Sheppard Ndlovu.

Thebe to phone him should he come across his assailants, which he then did. Medical evidence supported Mr Thebe's version of having been assaulted. He also identified the appellant at an identity parade.

[13] The appellant's counsel put the appellant's version to Mr Thebe. The version was that the appellant knew Mr Thebe, who had met him at a game shop that belonged to "*Imbuyisa*"[13] and at a Nando's restaurant. Mr Thebe stated that the game shop belonged to his brother, and that he did not recall meeting the appellant. He insisted that he did not know the appellant.

[14] Mr Thebe was described by the court as scared. He was "*shaking like a reed*", the court remarked, although he denied being scared. Being intimidated is one reason why a witness could seem scared in the witness stand. I later address the evidence of intimidation of two more witnesses. Adding weight to an inference of witness intimidation is the brazen attempt to find Sergeant Vusi Mbuyisa by kidnapping and assaulting Mr Thebe, a step so brazen that intimidating state witnesses would not be an improbable further step. However, in order to accept the evidence of Mr Thebe, no finding of his intimidation needs to be made. His evidence was clear and satisfactory in every material respect.

[15] Contextually, in not persisting with the appeal on counts one and two, and in the light of the clear evidence by Mr Thebe:

[15.1] The appellant falsely denied knowing his co-accused. He associated himself with them. This lie that must be taken into account in assessing the remainder of his version;

[15.2] The appellant and his associates had done the unthinkable, they sought revenge against a police officer for arresting an associate and was prepared to murder Mr Thebe in so doing. This must be taken into account in assessing the remainder of his version;

[13] It is not clear from the record if this was a reference to Sergeant Imbuyisa who was present at the arrest of the appellant.

[15.3] In carrying out the crimes set out in counts one and two, the appellant was armed with a black firearm. He has not given an explanation what he did with this weapon, if he did not keep possession thereof.

The evidence regarding counts thirteen and fifteen

[16] These two convictions are addressed here, as their only relevance are that in respect thereof the appellant also gave a false defence. An appeal is not persisted with:

[16.1] The appellant was an illegal immigrant and had no explanation why his identity document reflected a town in South Africa as his place of birth. He could never have believed that he was legally in the country. He was properly convicted; and

[16.2] The appellant did not merely attempt to escape as he alleged, he escaped from the court room, although he was apprehended in the court building. He was properly convicted.

The evidence regarding the events of 22 June 2006

[17] Mr Philane Ndlovu testified about the events on 22 June 2006, counts three and four. Mr Lebese and a police officer, the Constable Mthombeni were driving a Volkswagen Golf when an assassination was carried out on them. Constable Mthombeni was shot several times and died, Mr Lebese was shot twelve times and survived, severely injured. The incident happened in broad daylight in the Yeoville area.

[18] Mr Philane Ndlovu saw the pursuit on the Golf from his balcony, and heard gunshots. He saw the vehicles in Honey Street, Yeoville. The street ran past his flat. He saw the vehicles stop. He left his flat on the first floor, and went to the scene. He saw the left front passenger get out of the pursuing Corolla vehicle, armed with what looked like an AK47. It was Mr Sheppard Ndlovu, accused number one. Mr Sheppard Ndlovu shot at the Golf. He saw another person get out of the Corolla, armed with a handgun, also shooting at the Golf. He saw a third person get out of the Golf. He saw two more armed persons get out of the vehicle as weapons were distributed between them. He was about five metres away, he testified, and saw that he knew all of the attackers:

Mr Sheppard Ndlovu (accused number one), the appellant, "*Alex*", "*Mandla*",[14] and "*Intra*". They all shot at the Golf. The driver of the vehicle was "*Newman*".[15] The Corolla had to make a U-turn to leave, as the road was a dead-end.

[19] Afterwards 45 spent cartridges were picked up at the scene. The witness knew and saw the appellant. He also knew the deceased, the Constable Mthombeni, with whom he had worked before, and he also referred to him as "*Bafana*" Mthombeni. Afterwards the witness phoned Sergeant Alfred Ndlovu and "*Imbisa*"[16] to report the events.

[20] What were the problematic aspects of this evidence by Mr Philane Ndlovu?

[20.1] Running towards the scene of an assassination and standing there to observe the killing, constitute unusual conduct, especially the closer a person gets to the killing. Standing five metres away, would have been unusual. However, the accuracy of the distance estimate of five metres was not addressed in evidence or tested in cross-examination. In re-examination with reference to a photograph, the witness placed himself a greater distance away, at the intersection between Honey Street and Fifth Street. There was also a reference in cross-examination to 15 meters when the Corolla used by the assailants had to turn around to turn into Fifth Street. In re-examination the witness testified that he was able to identify the attackers when the Corolla made a U-turn and drove past him. In the end, I was satisfied that the first reference to five metres did not mean that the evidence by Mr Philane Ndlovu was unsatisfactory in that respect;

[20.2] In cross-examination Mr Philane Ndlovu testified that he called the number 10111, when one expected confirmation of his evidence that he had called Sergeant Alfred Ndlovu and Imbisa[17] to report the events. This contradiction was not clarified. Sergeant Alfred Ndlovu

[14] The fourth accused was Mr Newman Mandla Makaila. It is not clear from the record if this was a reference to him.
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[16] It is not clear from the record if this was a reference to the deceased Sergeant Imbuyisa.
[17] It is not clear from the record if this was a reference to the deceased Sergeant Imbuyisa.

> testified that the call was made to Sergeant Masalesa, who called him, and thereafter they talked to Mr Philane Ndlovu. This evidence did not support the evidence by Mr Philane Ndlovu. In cross-examination Sergeant Alfred Ndlovu testified that the call was made to Sergeant Imbuyisa. He then backtracked and said that he could not remember if the call was first made to Sergeant Imbuyisa or to him. The question is whether this slight contradiction is determinative of the matter.

[21] The evidence by Mr Philane Ndlovu was not inherently problematic. He did not contradict himself on the material facts, and his version remained consistent. The one aspect that raised a concern, was about a background fact that was not material. His evidence was clear and satisfactory in every material respect.

[22] The further question is if the appellant's defence could be reasonably possibly true.

[23] The appellant's defence was he had been framed for the murder. The motivation was that his nephew Alex had escaped from custody after money had been paid to Sergeant Alfred Ndlovu to secure his release. Constable Mthombeni and Sergeant Alfred Ndlovu "*were threatening him*" to find Alex. He was unable to do so. He was given two weeks (at some stage) to find Alex, or to face "*arrest or death*".

[24] On the appellant's version, the pistol planted on him was the pistol of his nephew Alex (who must have been the "Alex" identified by Mr Philane Ndlovu). We know that the pistol is ballistically linked to the events described by Mr Philane Ndlovu. In the absence of a defence that could be reasonably possibly true, this is an immaterial matter with regard to the convictions on counts three and four, as the evidence by Mr Philane Ndlovu was clear and satisfactory in every material respect.

[25] Falsely accusing the appellant for the murder of Constable Mthombeni, would have needed the cooperation of Mr Philane Ndlovu. The question would be what benefit there would be in such conduct for Mr Philane Ndlovu. He was in custody when he testified and was no longer a police reservist (which he seems to have been at some stage). The appellant's counsel put the

appellant's version that he knew Mr Philane Ndlovu well, as he and Constable Mthombeni used to visit Mr Philane Ndlovu. Mr Philane Ndlovu denied this. The closer the relationship, the less likely a false accusation would be.

[26] The appellant's counsel put the appellant's version that he was a friend of Constable Mthombeni and of Sergeant Alfred Ndlovu. The appellant's version is that he and Sergeant Alfred Ndlovu would socialise, they were not mere acquittances. It seems improbable that:

[26.1] Someone would frame a friend for murder.;

[26.2] A police officer would take money, and be able to secure the release of a prisoner despite the paper trail and the different responsibilities of officials in the criminal justice system for such release; and

[26.3] When that person to be released through criminal conduct, escapes, the police officer would take the escape personal. Sergeant Alfred Ndlovu would later testify that the escape took place by Alfred getting hold of a gun and escaping through a prison kitchen. It was not a police bungle.

[27] Further the appellant was at least in the company of Mr Sheppard Ndlovu (accused number one) on 14 June 2006, despite his false denials of having committed the crimes on 14 June 2006 (counts one and two) and in respect of counts thirteen and fifteen.

[28] The defence raised by the appellant was not reasonably possibly true. Even without corroborating evidence of a ballistic link to the crimes, I cannot fault the conviction.

The evidence regarding the events of 20 August 2006

[29] On 20 August 2006 the appellant was arrested at his flat. There were four police officers present at the arrest, and three testified (Constable Sehlabela, Sergeant Alfred Ndlovu and Constable Masalesa). Sergeant Imbuyisa was killed before the trial.

[30] Constable Sehlabela denied that the appellant was found in possession of a Z88 pistol and ammunition (counts seven and eight) and denied that the

appellant pointed a firearm at him (count nine). The court in the end rejected the evidence by Constable Sehlabela, and convicted the appellant on all three counts.

[31] Constable Sehlabela testified that he was instructed by Sergeant Imbuyisa to assist with an arrest, the arrest of the appellant. Constable Masalesa was with the two of them in the vehicle. Sergeant Imbuyisa phoned Sergeant Alfred Ndlovu to be present too. Sergeant Alfred Ndlovu had a different version, he testified that he phoned Constable Sehlabela and Constable Masalesa, and that Sergeant Imbuyisa was with him in his vehicle. He then backtracked and said that Sergeant Imbuyisa could have made the call to the other two. Constable Masalesa was not asked to clarify this aspect of the case. Constable Masalesa did not testify about this background matter. It is not a material dispute.

[32] When the police officers arrived at the flat, and found that the appellant was not present, they decided to wait for him. Constable Sehlabela testified that there were three adults and one baby of between six months and a year old in the flat. The police officers split up. Constable Sehlabela stayed inside the flat. It was unclear from his evidence where Sergeant Imbuyisa waited inside the flat, but he testified that Constable Masalesa and Sergeant Alfred Ndlovu waited outside. Sergeant Alfred Ndlovu had a different version, and testified that Constable Sehlabela and Constable Masalesa stayed inside the flat. Constable Masalesa testified that Constable Sehlabela and Sergeant Imbuyisa waited inside the flat, which may accord with the evidence of Constable Sehlabela. This is also where the appellant later testified he found Constable Sehlabela and Sergeant Imbuyisa, namely, inside his flat. The conflicting evidence raises a concern, a concern that is of particular importance in assessing the conviction in respect of count nine. Such a conviction requires a finding about whom the witnesses were, and what they could and did observe.

[33] Constable Sehlabela testified that when the appellant returned and entered the flat, he was followed by Constable Masalesa, and both Constable Masalesa and Constable Sehlabela told the appellant to surrender, which he

did. He did not resist arrest and did not point a firearm at him. The appellant agreed with this evidence. Constable Sehlabela testified that Constable Masalesa searched the appellant, and found a firearm in his possession. Constable Sehlabela described this firearm as a small, brown firearm of about five centimetres long, with its serial number filed off. He was shown a firearm, a Z88 pistol, but denied that it was the firearm in the appellant's possession. The explanation given by the appellant during his arrest was that he was given the firearm by Constable Mthombeni. The appellant disagreed with this evidence. According to him he only had a (CZ75) magazine and ammunition in his flat. The two other policemen present had a different version.

[34] Constable Sehlabela testified that the appellant had a child with him, which he left standing at the door. Sergeant Alfred Ndlovu testified that the appellant was carrying a small child, but one old enough to be able to walk. Constable Masalesa confirmed that the appellant was carrying a baby. The appellant disagreed, and testified that he had a ten-year old child with him. It is not a material dispute, but the three policemen agreed that the appellant's version was false.

[35] According to Sergeant Alfred Ndlovu, the appellant drew a gun and pointed it at Constable Sehlabela, raised it in his direction, when he entered the flat. Constable Masalesa confirmed the evidence stating that this happened when the two police outside the flat "*were just next to the door*" and after the appellant had seen them. They testified that the appellant threw the pistol on the ground. The pistol was a Z88, 9 mm parabellum, with 15 rounds in the magazine and one in the chamber Constable Masalesa confirmed this evidence. This pistol was then booked in for ballistic testing.

[36] The appellant's counsel put the appellant's version to Sergeant Alfred Ndlovu that after the appellant's arrest, Sergeant Imbuyisa went to his motor vehicle at the police station, and returned with a firearm. He then said to those present, that they should charge the appellant (with possession) of that firearm. Sergeant Alfred Ndlovu denied the appellant's version. Constable Sehlabela and Constable Masalesa were not asked to comment on this version.

[37] Importantly Constable Sehlabela confirmed that the pistol found on the appellant was booked in for ballistic testing. No record of any pistol other than the Z88 was produced.

[38] Although it is common cause that the appellant was arrested by the police officers, including Constable Sehlabela, Constable Sehlabela inexplicably was unable to identify him in the dock and was adamant that he would have been able to identify the person whom they had arrested. He did deny the appellant's version that he was only in possession of a magazine for a CZ75 pistol.

[39] The evidence of Sergeant Alfred Ndlovu had the following problematic aspects:

[39.1] It remained unclear where he was in relation to the appellant when the appellant was alleged to have drawn his weapon. The appellant was inside the flat. According to Sergeant Alfred Ndlovu, he and Sergeant Imbuyisa were outside, on opposite ends of the door to the flat, which they approached in a tactical manner, and entered the flat side-by-side. Unless it was a wide door, this would not be easy to do. Later he testified in cross-examination that he did not enter the flat, but was at the door when his other <u>two</u> colleagues went into the flat. The discrepancy in his version was not clarified with him. In cross-examination he stated the obvious, he could not see the police officers inside the flat when the appellant entered the flat. The question is, how could he have observed the pointing of the firearm? It also seems improbable that the weapon would not be pointed at the approaching police officers, but at one inside the flat; and

[39.2] Sergeant Alfred Ndlovu testified that the appellant dropped a loaded pistol on the floor, when ordered to do so. The appellant stood upright when he did this. This is a dangerous thing to do with a loaded weapon. However, this was not explored in cross-examination.

[40] The evidence of Constable Masalesa had the following problematic aspects:

[40.1] On his own version he could not see into the flat when the appellant drew the pistol;

[40.2] He also testified that the appellant threw a loaded pistol on the floor. Again, this was not explored in cross-examination.

[40.3] On his version, he and Sergeant Alfred Ndlovu approached the flat side-by-side in the passage and thus not from opposite ends.

[41] The evidence of Constable Sehlabela had the following problematic aspects:

[41.1] His refusal to accept a common cause fact, that he helped to arrest the appellant, places doubt on all his evidence;

[41.2] His version about a second illegal pistol that then disappears without trace after having been booked in for ballistic testing, is highly improbable.

[42] Sergeant Alfred Ndlovu testified that Constable Sehlabela was detained in the same prison as the appellant, and endeavoured to give this as a reason for the conflicting evidence by Constable Sehlabela. Constable Sehlabela was held in prison for a year on a charge of hijacking a vehicle when he did not follow procedures in booking a hijacked vehicle into custody. Inspector Magongo confirmed the period of detention. Witness intimidation may have played a role:

[42.1] The court a quo observed that Mr Philane Ndlovu appeared to be scared. Inspector Magongo testified that the family of Mr Philane Ndlovu were placed under police protection after alleged threats by accused number four, Mr Newman Makaila;

[42.2] Sergeant Alfred Ndlovu received an intimidating call. He testified that he received a call during the investigation from someone who identified him as “Bafana Mthombeni”, the nickname of the constable killed on 22 June 2006. This person said that he was at the mortuary, and wanted to know when Sergeant Alfred Ndlovu would join him there. He thereafter said that he would kill Sergeant Alfred Ndlovu with the same AK47 that was used to kill Constable Mthombeni and to shoot his informant, “Thabo”.

[43] However, one cannot beyond reasonable doubt find that Constable Sehlabela gave false evidence as he had been intimidated. It is not necessary to make such a finding in assessing his evidence.

[44] The court a quo was in a better position to evaluate the evidence, but on the record, I believe one cannot find a sufficiently coherent case that the appellant raised a firearm in the direction of Constable Sehlabela. I believe that this conviction in respect of count nine cannot stand. I do not make a finding that the evidence in this regard by Sergeant Alfred Ndlovu and Constable Masalesa is false, only that the evidence to sustain the conviction is insufficient.

[45] With regard to counts seven and eight, any conviction would require a finding that the evidence by Sergeant Alfred Ndlovu and Constable Masalesa discharged the onus to prove the accused's guilt beyond a reasonable doubt on credible evidence, and the accused's explanation is false beyond a reasonable doubt.

[46] The appellant's version is that before this incident, in May or June 2006, he paid R3 000.00 to Sergeant Alfred Ndlovu to secure the release of Alex, who had himself had sourced the other R9 000.00 demanded by Sergeant Alfred Ndlovu. Alex was then released three weeks later, and re-arrested three weeks thereafter. (This date is presumably 14 June 2006.) Thereafter, the appellant gave Sergeant Alfred Ndlovu a further R4 000.00 to secure the release of Alex. When this did not happen, Sergeant Alfred Ndlovu returned the money. In this enterprise (to take money to ensure the release of Alex), Sergeant Alfred Ndlovu worked with Constable Ntombeni. Later, after Alex's escape, Sergeant Alfred Ndlovu asked for his help to find Alex. He gave him two weeks to do so. Sergeant Alfred Ndlovu denied the appellant's version, and said that he was involved in the shootout in which Alex was killed

[47] The appellant took issue with the following facts in the case for the prosecution:

[47.1] A person not known to him was outside his flat when he returned thereto on the day of his arrest. He greeted this man who followed him and produced a gun. That man did not testify at his trial. On his version, it could not have been one of the people he allegedly knew,

Sergeant Alfred Ndlovu and Sergeant Imbuyisa, or the witnesses Constable Masalesa and Constable Sehlabela. None of the police officers agreed that there were more police officers on the scene, and no further defence witnesses were called. This version was not put to witnesses for comment;

[47.2] He identified the police officers at the flat as reflected in the record as “Mbesa” (I assume he meant Sergeant Imbuyisa) and Constable Sehlabela. According to him Sergeant Alfred Ndlovu only arrived later. He did no see Constable Masalesa. None of the police officers agreed and this version was not put to witnesses for comment;

[47.3] During this interrogation he was hit with a four-pound hammer. I would have expected that such an assault would have left a victim with visible injuries;

[47.4] After his arrest, at the police station, Sergeant Alfred Ndlovu asked Sergeant Imbuyisa with what crimes they should charge the appellant. Sergeant Imbuyisa suggested that he should be charged with possession of the firearm of his cousin, which they had found at the cousin’s house (two weeks earlier). This version was not put to witnesses for comment. Sergeant Imbuyisa fetched the firearm from his vehicle. It is improbable that the police would after an unsuccessful attempt to arrest Alex two weeks earlier, not hand in the weapon for ballistic tests;

[47.5] He knew Constable Mthombeni well, as they were from the same village in Zimbabwe. Through him he got to know Sergeant Alfred Ndlovu very well. The two of them would socialise and drink together. He gave Sergeant Alfred Ndlovu the balance required to make up R12 000.00 for Alfred to be released (R3 000.00). Alex was then released, but re-arrested. This time a balance of R4 000.00 was required. He met Constable Mthombeni and gave “them” the R4 000.00, but this time Alex was not released. He demanded an answer, and Constable Mthombeni returned the money. This version is materially different to the one put to Sergeant Alfred Ndlovu for

comment in that Constable Mthombeni was not mentioned, and he did not mention that the money was returned. I find it improbable that a corrupt police officer would have returned the alleged payment;

[47.6] Mr Philane Ndlovu falsely implicated him. He had been a police reservist, and had worked with Constable Mthombeni and Sergeant Alfred Ndlovu. This version was not put to witnesses for comment; and

[47.7] He had in his possession when he was arrested an extended magazine and 22 rounds of ammunition for a lost firearm, a CZ75 pistol.

[48] A conspiracy against the appellant would have had to involve at least Mr Thebe, Mr Philane Ndlovu, Sergeant Alfred Ndlovu, Constable Malasela, and the procurement of an unlicensed firearm (linked to the murder of Constable Mthombeni by ballistic evidence). It is an improbable long chain, requiring fine timing to have had commenced at the latest on 14 June 2006 when Mr Thebe was kidnapped. It is extremely unlikely.

[49] The court a quo found the appellant an unimpressive witness. It seems to be an understatement. Almost on every objectively determinable fact, he gave false evidence. It is clear that he had not put a proper version to witnesses, and that his evidence did not accord with the version put to the prosecution witnesses. His version depended on a large number of improbabilities. In my view the court a quo correctly rejected the appellant's defence as false beyond a reasonable doubt.

[50] Having regard to all the evidence, one can find that the appellant was found in the possession of the firearm and ammunition as charged. The limited matters that concerned me about the evidence by Sergeant Alfred Ndlovu and Constable Masalesa are not enough to find on appeal that the court a quo erred in believing them in this regard, and disbelieving Constable Sehlabela.

[51] As such the appellant was properly convicted on all charges (one, two, three, four, seven, eight, thirteen and fifteen), but not on count nine.

Sentencing

[52] In as far sentencing is concerned, a court of appeal should only interfere in the limited cases. See the judgment by Holmes JA (Corbett JA and Kotzè AJA concurring) in *S v Rabie*:

> *"1. In every appeal against sentence, whether imposed by a magistrate or Judge, the Court hearing the appeal -*
> *(a) should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial Court"; and*
> *(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised".*
>
> *2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate."*

[53] This is not such a case.

[54] Accordingly, I propose the following order:

1. The appeal against the conviction and sentence in respect of count nine is upheld and the conviction and sentence are set aside;
2. The remainder of the appeal is dismissed

DP de Villiers AJ

I agree and it is so ordered

NP Mngqibisa-Thusi J

VT Mtati AJ

Heard on:	15 June 2020 by written submission at the election of counsel
Delivered on:	17 August 2020 by uploading on CaseLines and by e-mail

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