IN THE NORTH GAUTENG HIGH COURT, PRETORIA /ES

(REPUBLIC OF SOUTH AFRICA)

REGISTRAR OF THE NORTH GAUTENG HIGH COURT, PRETORIA
PRIVATE BAG/PRIVAATSAK X67
JUDGE'S SECRETARY
2013 -10- 01
REGTERS KLERK
PRETORIA 0001
GRIFFIER VAN DIE NOORD GAUTENG HOË HOF, PRETORIA

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(3) REVISED. ✓

DATE 2/9/13 **SIGNATURE**

CASE NO: A3/2013
FULL BENCH NO: 39/2011

DATE: 1/10/2013

IN THE MATTER BETWEEN

HOWARD PAULOS MNYAKANE	FIRST APPELLANT
SONNY-BOY LUCKY MASHIFANE	SECOND APPELLANT
AND	
THE STATE	RESPONDENT

JUDGMENT

PRINSLOO, J

[1] On 4 June 2004 the two appellants were convicted in the Delmas circuit court on the following four counts:

(1) murder of a police officer the late Mpiwana Mthethwa;

(2) robbery with aggravating circumstances;

(3) the unlawful possession of a firearm or firearms, details of which were unknown to the state;

(4) unlawful possession of ammunition the quantity and calibre of which was unknown to the state.

[2] On the same day, 4 June 2004, the appellants were sentenced as follows:

(i) Appellant no 1 ("no 1"): fifteen years in respect of the murder, ten years in respect of the robbery, three years in respect of the unlawful possession of the firearms and two years in respect of the unlawful possession of the ammunition.

(ii) Appellant no 2 ("no 2"): life imprisonment in respect of the murder, ten years imprisonment in respect of the robbery, three years in respect of the unlawful possession of arms and two years in respect of the unlawful possession of ammunition.

[3] In respect of no 1, it was ordered that the sentences on counts 2, 3 and 4 would run concurrently with the sentence on 1, leaving no 1 with an effective prison sentence of fifteen years.

In respect of no 2 there was no pronouncement by the learned judge *a quo* that the sentences on the second, third and fourth convictions would run concurrently with

the sentence of life imprisonment, but it follows *ex lege*, so that the effective sentence for no 2 was one of life imprisonment.

[4] On 22 August 2011 this court, through VAN DER MERWE DJP, granted leave to appeal to the full court of this division in respect of both the convictions and the sentences. The trial judge, HUSSAIN J, was no longer available to hear the application for leave to appeal.

[5] When the appeal came before us, Ms Van Wyk appeared for no 1, Mr Van Wyngaard for no 2 and Mr Pruis for the state.

Brief overview of the evidence

[6] It is common cause that on the morning of 3 April 2003, at about 07:00, the deceased officer was standing outside his home in Etwatwa in the district of Benoni in full uniform, waiting to be picked up by a colleague to go to work. He was fatally shot in the head and according to the post mortem report, the cause of death was "gunshot skull". He died almost instantly. Someone, presumably the attacker or one of the attackers, bent over the body, robbed it of the police issue firearm worn by the deceased and fled. There was no eye-witness who could connect any of the appellants to the crime.

[7] The first state witness was Mr Ben Selosa. He resided in Etwatwa, section 8. On the day and time mentioned, he was walking to work. He heard a gunshot

behind him, looked around and saw a police officer falling down. He had walked past this officer while he was still standing there. The officer was in uniform. When the person fell, another person bent over him, then got up and started running away in a "bent position". He ran away and had something in his hands but the witness could not see what it was. The witness was terrified while he gave evidence. This much appears from the record when the learned judge kept on assuring him not to be afraid. The weight of the evidence suggests that, at least no 2, was a notorious gangster in the area and people were afraid to testify against him. Later the witness said that he saw the attacker removing the firearm of the deceased. He first said that he could not remember the colour of the clothing worn by the attacker but later he said he thought it was black. At a later identification parade, he was unable to identify any perpetrator.

[8] Sivuyile Victor Zozo was a police inspector at the time and had thirteen years experience. The deceased was his colleague. On the morning and at the time in question, he was on his way to fetch the deceased. He was travelling in a marked police van and he was alone. On his way, a person, unknown to the witness, told him that "there are certain youngsters who had shot a person". The person also said that one of the youngsters was wearing a black jacket with a hood. He indicated that the youngsters fled in the direction of the Barcelona station. The witness gave chase, noticed some youngsters, three in number, and one was wearing a black jacket fitting the particular description. The witness followed them and concentrated on the one who was wearing the particular jacket. He was

shorter than the others in the group. The witness stopped next to them whereupon the group fled. The witness could not catch them. He did not know which was the one in possession of the firearm. Later the witness attended an identification parade at the Benoni police station where he identified no 2 as the one who wore the black jacket.

[9] Thulani Nicolas Vilakasi stayed in the vicinity in Mandela Extension 21. 0n the day and at the time in question, he was at home and sleeping with his wife. No 1, whom he knew, arrived. The witness also identified no 1 in court. No 1 also knew no 2. The witness knew no 2 who was having an affair with a sister of the wife of the witness. No 1 said he was looking for "Bashi" who was no 2. The witness reminded no 1 that the last time he saw no 2 was when he and no 1 were together at the home of the witness smoking dagga. The witness asked no 1 why he was looking for no 2 and "he said that they had shot a cop". He appeared to be afraid. He said he wanted the policeman's firearm. He was in the company of no 2 and one Bombei when the policeman was shot. No 2 was in possession of the police officer's firearm. The witness said that no 1 and no 2 were friends. The witness bore no grudge against any of them. Later the police came and arrested the witness. No 1 was present at the time. After three days the witness was released. The witness had a further conversation with no 1, when he said that it was him and Bombei that were together (presumably with the shooting) and no 1 did not mention no 2 at that stage. No 1 asked the witness not to mention the involvement of no 1 when he gave his version to the police. No 1 goes by the

name of Howard. Later in his cross-examination the following exchange took place between the witness Vilakasi and the cross-examiner:

> "And then Howard, he did tell you the name of the person who orchestrated this to kill a policeman? --- Yes, he mentioned Bomba.
>
> Do you know this Bomba? --- No.
>
> You never met him? --- No.
>
> Not even when you were arrested? --- No.
>
> Then what did he explain to you what did he say when he explained it to you? --- They said they had shot a policeman, that is all."

I assume that "Bomba" is the same person as "Bombei" referred to earlier.

[10] Johannes Hendrik Kruger was a captain in the South African Police Services and he started serving the police in 1980. He was stationed as a detective at Etwatwa. He was the branch commander. At one stage he got a report that one Bashan and one Bomba could have been involved in the murder and robbery of the late officer. A man hunt was launched and during May 2003 no 2 and a companion of his, one Busi, were arrested. The witness asked no 2 to tell him where the firearm was with which the police officer was killed. It appears that no 2 took the witness on a wild goose chase. He took him to someone called Benoni where a 9mm handgun was found but this could not be linked to the particular crime. Busi also took the witness to a certain house where a handgun was found, which, again, could not be linked to the crime. At one stage no 2 took the witness to Bomba

whom they found walking in Eislen Street in Etwatwa. Bomba took the witness to other premises where firearms were confiscated, but these could also not be linked to the crime. It is not clear to me why Bomba was not also charged with no 1 and no 2. No DNA tests were performed on no 2. In cross-examination the version of no 2 was put to him, namely that no 2 was not involved in the murder. The witness disputed this, and also denied that no 2 was taken to an open veld where he was assaulted.

[11] Johney Sam Lebese was a sergeant in the South African police stationed at the provincial head quarters under Crime Intelligence. He was on duty on 3 April 2003. While on patrol at about 07:20, he received a call and instruction to proceed to Barcelona in Daveyton where a policeman had been shot and killed. On his arrival at the scene he interviewed people who said they saw a young black male who may have been involved. They saw four young black males leaving the scene and running towards Etwatwa. This appears to be a different direction to Barcelona which is where Zozo was informed the perpetrators had run to. No information about the clothing worn by the presumed perpetrators was given to the witness. At Etwatwa he conducted enquiries. A lady informed him that she saw four black males running "across her shack". She knew two of the four, namely no 1 and no 2. No 2 had a black firearm in his right hand and "the other one she did not know, had a silver firearm". The lady was too scared to give her information or to agree to give evidence. The witness established where no 1 resided and went there to find four other people in the house. They indicated that

no 1 was not at home. They were unfriendly. The witness forced his way into the room of no 1 and found him hiding behind a wardrobe. When asked why he was scared, no 1 said he was scared because he was with no 2 who shot a policeman in the early morning of that day. No 1 told the witness that he was innocent and did not do anything. He was hiding because he was with no 2 when the incident occurred. No 1 was then arrested. The witness said, in cross-examination, that he came across the name of Bomba during his investigations. He did not know if Bomba was involved in the attack.

[12] When the state closed the case, which was based only on circumstantial evidence, both the legal representatives of the appellants applied for their acquittal in terms of section 174 of the Criminal Procedure Act, no 51 of 1977. The learned judge refused the application indicating that he would give reasons for his decision at a later stage.

[13] After a short adjournment, no 1 started giving evidence. He said he was at home on the fatal day helping to prepare a ten day feast after the passing away of his grandfather. The police arrived alleging that he was involved, with no 2, in the shooting of a policeman. He was arrested, His brother objected and the police assaulted the brother. The brother is called Andile. No 1 said he was also assaulted at the police station. The police wanted him to admit that he was with no 2. He declined, saying that he was not prepared to testify to something that he had no knowledge of. During the course of the assault, the police also pulled a

plastic bag over his face. At a later identification parade, only no 2 was pointed out. This must have been Zozo pointing out no 2 as I earlier explained. In cross-examination, he disputed the evidence of Vilakasi and Lebese. He denied being a friend of no 2, stating that they only played soccer together at school. He said Lebese had a reason to falsely implicate him because he wanted him to say that no 2 had fired the shot.

[14] No 1 called his brother Andile to give evidence. This witness gave rather elaborate evidence but he, broadly speaking, stated that no 1 was at home on 2 April and they watched a video until about 21:30 that night whereupon they went to sleep. The next morning no 1 was also at home and helped with certain chores, including the washing of blankets. The police came to arrest no 1. In the process, the witness was assaulted by Lebese and also by Zozo and he laid charges against them at Etwatwa police station. I do not consider it necessary to analyse all the evidence of this witness.

[15] No 2 also gave evidence. He said he was at home on 3 April. His mother, before going to work at about 07:00, left some money behind with instructions that he should go to the town mall to buy groceries. This he did by boarding a taxi at about 08:00. When he got back after 12:00 his sister told him that the police were there looking for "Bashan with dreadlocks". This was not him, and he was not wearing dreadlocks. The evidence is a bit confusing, but no 2 says the day he was arrested (presumably well after 3 April) he was taken to a shack where David

Moloi and others were in possession of a firearm. This must refer to the evidence of the witness Kruger. Moloi told him that the police wanted him to say that he, no 2, possessed the firearm. He disputed this at the time. No firearm was found in his possession. He said when they came back from David Moloi the police took him to a certain veld where they assaulted him. They wanted him to admit that he shot the policeman. He denied any knowledge about the incident. No 1 is not his friend although they played soccer together. On 3 April he did not see no 1. Bomba was also initially charged but later released. He denied ever owning a black jacket or "drimac". He also said he was not aware of the fact that Zozo pointed him out at the ID parade. In cross-examination he said he did not go to surrender himself at the police station when he heard they were looking for "Bashan with dreadlocks" because it was not him. There are other people in the township called Bashan. He said his sister was at home on 3 April and she got up before him. He only got up just before 08:00. This is when he went to buy the groceries. He denied that he took the witness Kruger to the place where the firearm was found. He admitted that he was taken with the police to that place. He travelled in a car and they handcuffed him and left him behind when they entered the house alone.

[16] The sister of no 2, Julia Mashifane, also gave evidence. She stayed at home with her brother, no 2, her two children and her parents. She does not know no 1. She does not know Vilakasi. On 3 April no 2 went to the Daveyton mall to buy groceries. On 3 April police arrived at home finding her busy cleaning. She said

she did not know a "Bashan with dreadlocks" that they were looking for. She told the police that her brother is also Bashan but he does not have dreadlocks. Her brother did not have a black drimac at the time. The police searched the house and also the clothing in the wardrobes. They also started assaulting her other sister, Lerato. They left without leaving a message. When no 2 came home she reported the incident to him. The police never came back to that home looking for no 2. No 2 left to buy groceries at about 08:00. She woke up first and went to the kitchen to care for her child. No 2 got up later and joined her in the kitchen. This evidence, broadly speaking, corresponds with the evidence of no 2. She also confirmed that the money from the groceries came from their mother.

[17] Because of the view I take of this matter, I do not consider it necessary to analyse this evidence in greater detail or more critically.

[18] So much for a brief summary of the evidence.

Arguments offered against the convictions on behalf of the two appellants

(i) Ms Van Wyk on behalf of no 1

[19] I deal first with submissions made with regard to the convictions on counts 3 and 4. As I already pointed out, these flow from charges to the effect that no 1 was in possession of a firearm or firearms, particulars of which were unknown to the state, without being the holder of a lawful licence for such possession. The charge was formulated in terms of the Arms and Ammunition Act no 75 of 1969

because the present Firearms Control Act no 60 of 2000 only came into operation on 1 July 2004.

[20] Similarly, count 4, involving the unlawful possession of ammunition, details and the quantity of which were unknown to the state, without the appellants being in possession of the required permits or licences so to possess, was preferred against the appellants in terms of the same Arms and Ammunition Act. In the case of count 3, it involved an alleged contravention of section 2 of that Act, and in the case of count 4, an alleged contravention of section 36 thereof.

[21] Ms Van Wyk relied on a leading judgment on this subject, *S v Mbuli* 2003[1] SACR 97 (SCA). In paragraph [71], at 114h-115e the learned Judge of Appeal revisits the requirements to be established by the state in order to bring about a conviction in terms of these charges. The learned judge quotes with approval the following remarks by MARAIS J in *S v Nkosi* 1998[1] SACR 284 (W) at 286h-i:

> "The issues which arise in deciding whether the group (and hence the appellant) possess the guns must be decided with reference to the answer to the question whether the State has established facts from which it can properly be inferred by a court that:
>
> (a) the group had the intention (*animus*) to exercise possession of the guns through the actual detentor and
>
> (b) the actual detentors had the intention to hold the guns on behalf of the group.

> 0nly if both requirements are fulfilled can there be joint possession involving the group as a whole and the detentors, or common purpose between the members of the group to possess all the guns."

The learned Judge of Appeal remarked that the last reference to common purpose by MARAIS J was misplaced.

[22] See also *S v Molimi and another* 2006[2] SACR 8 (SCA) at 21a-g.

[23] In this case, there is no evidence whatsoever directly linking no 1 to any firearm or ammunition. The learned judge found that the state had proved beyond reasonable doubt that the deceased was shot by no 2 who also picked up the firearm and fled, in the company of no 1 and two others. He also goes on to find that he is satisfied that the state proved beyond reasonable doubt

> "that the four young men had planned to rob the policeman of his firearm, each of them was aware that accused 2 had a firearm and that it was going to be used to rob the police officer. They must have at least foreseen, if not known, that accused 2 will use the firearm to shoot the police officer."

In my view, there is no evidence to support this conclusion. Even if there was such evidence, the requirements restated in *Mbuli*, were not met. See also *S v Motsema* 2012[2] SACR 96 (GSJ) at 102 paragraph [29].

[24] In the result, I am of the view that the appeal by no 1 against his convictions on counts 3 and 4 ought to be upheld.

[25] I turn to the convictions on counts 1 and 2.

[26] Again, there is no evidence directly linking no 1 to the murder or the robbery. No 1 disputes the evidence of Lebese, but even if that evidence were to be accepted, Lebese testified that no 1 denied any involvement in the killing and said that no 2 had shot the deceased. The evidence of Vilakasi to the effect that he had said that "they had shot a cop" is disputed. Even on Vilakasi's version, no 1 did not say who he was referring to when he said "they shot a cop". On Vilakasi's evidence, no 1 said it was no 2, Bombei and himself. Later he only referred to Bombei or Bomba.

[27] The learned judge found that the murder had been planned. There is no such evidence. Indeed, Vilakasi said that when no 1 and no 2 had dagga at his premises the night before, they did not mention anything about a plan to kill the deceased. Vilakasi was also not part of such plan.

[28] Where there was no direct evidence linking no 1 to the killing or the robbery, and where the state relied on circumstantial evidence, the learned judge had to rely on the doctrine of common purpose as appears from the passage from his judgment

which I quoted. He did not explicitly refer to this doctrine, but I assume that that is what he had in mind.

[29] In *S v Safatsa and others* 1988 1 SA 868 (A) at 896C-E the learned Judge of Appeal confirmed recognition of the principle that in cases of common purpose the act of one participant in causing the death of the deceased is imputed, as a matter of law, to the other participants "provided, of course, that the necessary *mens rea* is present". In the present case, it has not been proved, in my view, that no 1 had the necessary *mens rea* to kill the deceased. This is not the only inference that can be drawn from the disputed evidence of Vilakasi, and, on the disputed evidence of Lebese (if accepted) no 1 made an exculpatory statement to him denying any liability or complicity. The principle laid down in *Safatsa* is also re-affirmed by the constitutional court in *S v Thebus and another* 2003[2] SACR 319 (CC) at 341d-h where the following is, *inter alia*, said:

> "The doctrine of common purpose dispenses with the causation requirement. Provided the accused actively associated with the conduct of the perpetrators in the group that caused the death and had the required intention in respect of the unlawful consequence, the accused would be guilty of the offence ..."

There is insufficient evidence, in my view, to find that the state managed to prove that no 1 actively associated with the conduct of the "perpetrators in the group that

caused the death and had the required intention in respect of the unlawful consequence ..."

Moreover, where the state relied on circumstantial evidence, I am also of the view that the test laid down in the well-known case of *R v Blom* 1939 AD 188 at 202-203 has not been met in this case:

> "In reasoning by inference there are two cardinal rules of logic which cannot be ignored: (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn. (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."

[30] In the result, I have come to the conclusion that the appeal of no 1 against his convictions in respect of counts 1 and 2 should also be upheld.

(ii) Mr Van Wyngaard on behalf of no 2

[31] In the course of his judgment, and in order to arrive at the conclusions he came to, the learned judge *a quo* relied heavily on the provisions of section 3 of the Law of Evidence Amendment Act, no 45 of 1988. In his judgment, the learned judge also quoted the provisions of this section. It is convenient to quote part thereof:

"Hearsay evidence

(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless:

(a) ...

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court having regard to:

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party, which the admission of such evidence might entail; and

(vii) any other factor which should, in the opinion of the court, be taken into account

is of the opinion that such evidence should be admitted in the interests of justice.

(2) ...

(3) Hearsay evidence may be provisionally admitted in terms of sub-section (1)(b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings, provided that if such person is not going to testify in such proceedings the hearsay evidence shall be left out of account, unless the hearsay evidence is admitted in terms of paragraph (a) of sub-section (1) or is admitted by the court in terms of paragraph (c) of that sub-section.

For the purpose of this section hearsay means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person, other than the person giving such evidence."

[32] In his judgment, the learned judge then points out that the state argued that the hearsay evidence tendered in this case should be accepted in terms of section 3(1)(c). The learned judge agreed with this submission by the state. He said "Having taken into account the nature of the proceedings and the nature of the evidence and the purpose for which it is tendered, I am satisfied that it is in the interest of justice that the evidence be admitted."

[33] It was not in dispute before us that the first time the possibility of applying the provisions of section 3 was raised in this case, was when the state contended for its application in the closing address. On a general reading of the record, there is

no indication that the question of applying section 3 was raised at any earlier stage. The addresses by the various counsel, at the conclusion of the evidence, was not transcribed.

[34] Having decided to accept the hearsay evidence, the learned judge accepted the evidence of Lebese that the lady had told him that she saw no 1 and no 2 running past her, with no 2 carrying two firearms and that they were in the company of two others.

On the same basis, the learned judge accepted the evidence of Lebese that no 1 had told him that no 2 had shot the police officer. It was held that this evidence is admissible as against no 2. It is not clear whether the learned judge also accepted the hearsay evidence by no 1 to Vilakasi to the effect that no 2 was also involved in the shooting. The learned judge did not say anything to this effect in his judgment.

[35] The learned judge referred to "an analysis of the law" in *S v Ndhlovu and others* 2002[2] SACR 325 (SCA). However, the learned judge did not deal with what was said in this judgment and only referred thereto.

[36] The application of section 3 to allow hearsay evidence in criminal trials comes under scrutiny in the judgment – see the discussion from 333i-341c.

[37] The main thrust of Mr Van Wyngaard's argument is based, *inter alia*, on what is said at 338a-c:

> "Third, an accused cannot be ambushed by the late or unheralded admission of hearsay evidence. The trial court must be asked clearly and timeously to consider and rule on its admissibility. This cannot be done for the first time at the end of the trial, nor in argument, still less in the court's judgment, nor on appeal. The prosecution, before closing its case, must clearly signal its intention to invoke the provisions of the Act, and, before the State closes its case, the trial Judge must rule on admissibility, so that the accused can appreciate the full evidentiary ambit he or she faces."

[38] In essence, the same approach was adopted by the constitutional court in *S v Molimi* 2008[2] SACR 76 (CC).

I quote a few extracts from what is stated on the subject particularly at 96g-97g:

> "As the Supreme Court of Appeal correctly observed, both the prosecutor and the trial judge failed to discharge their legal duties. There is no obligation on the defence to assist the prosecution in the execution of its duties and the advancement of its case. If that was so, an unwarranted burden would be imposed on the accused who has to contend with the allegations levelled against him or her ..."

And:

> "A timeous and unambiguous ruling on the admissibility of evidence in criminal proceedings is, as correctly contended by the *amicus*, a procedural safeguard."

And:

> "It is not open to question that a ruling on the admissibility of evidence after the accused has testified is likely to have an adverse effect on the accused's right to a fair trial. It may also have a chilling effect on the public discourse in respect of critical issues regarding criminal proceedings ... and for example, when a ruling on admissibility is made at the end of the case, the accused will be left in a state of uncertainty as to the case he is expected to meet and may be placed in a precarious situation of having to choose whether to adduce or challenge evidence. In the circumstances, I do not agree that the late admission of hearsay evidence against the applicant was not prejudicial to him and in the interest of justice."

[39] This is the corner-stone of Mr Van Wyngaard's argument. As I have illustrated, the admissibility of the hearsay evidence, in terms of section 3, only appears to have been finally ruled upon during the course of the judgment of the learned judge. It appears to have been raised for the first time during closing argument.

This is the mischief complained of in both *Ndhlovu* and *Molimi*.

[40] Barring the hearsay evidence, there is no other evidence on which no 2 could have been convicted. Selosa ultimately said he thought that the robber was wearing black. Initially he said he could not remember the colour of the clothing. Bystanders told Zozo that one of the four youngsters observed was wearing a black jacket. This is hearsay evidence. The bystanders did not link the youngsters they observed to the crime. Although Zozo observed no 2 wearing a black jacket and later identified him, this evidence does not, in my view, go far enough to link him to the crime. No 2 and his sister denied that no 2 owned a black "drimac". I have dealt with the evidence of Vilakasi when considering arguments on behalf of no 1. The evidence of Vilakasi was disputed by no 1. In any event, even if that evidence can be admitted on the basis that no 1 himself also testified, it appears that on Vilakasi's version, no 1 never directly implicated no 2 in the actual shooting. He appeared to rely on the involvement of Bomba rather on that of no 2.

I have dealt with the evidence of Kruger. This is also disputed by no 2 as I have illustrated. In any event, it does not, in my view, go far enough to justify a conviction of no 2 of the shooting. Even on Kruger's evidence, no 2 undertook to point out certain firearms, which he did in an unsatisfactory manner and which firearms could not be linked to the crime.

The unknown lady who allegedly told Lebese that she saw four black males running "across her shack" and that no 1 and no 2 were amongst them, did not give evidence. The evidence of Lebese in this regard is inadmissible hearsay evidence in the light of the authorities which I have quoted. To allow this evidence, would undermine the constitutionally guaranteed right to a fair trial of not only no 2 but also of no 1.

The evidence of Lebese that no 1 told him that no 2 did the shooting but exculpated himself, is inadmissible hearsay evidence as against no 2, and, in any event, disputed by no 1.

[41] No firearm was ever found in the possession of no 2. There is no direct evidence linking him to the crimes barring, perhaps, the inadmissible hearsay evidence.

[42] Both the appellants denied any involvement and also offered alibi evidence. This evidence was, perhaps justifiably, criticised by the learned judge, but I do not consider it necessary to revisit and analyse that evidence for present purposes.

[43] On the strength of the authorities quoted, I have to come to the conclusion that the admission of the inadmissible hearsay evidence in this case, compromised the constitutionally guaranteed rights to a fair trial, not only of no 2, but also of no 1. The appeal of no 2 must therefore also be upheld and the convictions set aside.

The order

[44] I make the following order: The appeals of both appellants against their convictions on all the charges are upheld. The convictions and sentences of both appellants are set aside.

W R C PRINSLOO
JUDGE OF THE NORTH GAUTENG HIGH COURT

A3-2013

I agree

W HUGHES
JUDGE OF THE NORTH GAUTENG HIGH COURT

I agree

C CAMBANIS
ACTING JUDGE OF THE NORTH GAUTENG HIGH COURT

HEARD ON: 18 SEPTEMBER 2013
FOR THE 1ST APPELLANT: Ms L A VAN WYK
FOR THE 2nd APPELLANT: M VAN WYNGAARD
FOR THE RESPONDENT: C PRUIS