IN THE HIGH COURT OF SOUTH AFRICA /ES

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED
DATE 6/5/16 SIGNATURE

CASE NO: A631/2015

DATE: 13/5/16

IN THE MATTER BETWEEN

JOSEPH MASEMOLA APPELLANT

AND

THE STATE RESPONDENT

JUDGMENT

PRINSLOO, J

[1] The appellant was tried in this court on the following eight counts:

1. murder;
2. attempted murder;
3. housebreaking with the intent to rob and robbery with aggravating circumstances as envisaged in section 1 of Act 51 of 1977;

4. contravening section 2 of Act 75 of 1969 (the previous Act on Firearms, known as the "Arms and Ammunition Act") – unlawful possession of a 9mm Parabellum Norinco pistol of which the serial number had been obliterated and without being the holder of a valid licence;
5. contravening of section 36 of the same Act (unlawful possession of an unknown quantity of 9mm ammunition without being in possession of a licence);
6. contravention of section 2 of the same Act (unlawful possession of a 9mm Parabellum Norinco pistol with serial number 46012527) without having a licence;
7. contravention of section 36 of the same Act (unlawful possession of 9mm Parabellum ammunition without being in possession of a licence);
8. robbery with aggravating circumstances, while using a firearm in the process.

[2] The trial commenced in this court on 8 November 2002 before the learned trial Judge, Els J.

The appellant was legally represented, and pleaded not guilty to all the charges. His plea-explanation amounted to the following: he knew nothing about the incidents on which the charges were based. He could not remember the dates alleged in the charges and could not say where he was on those dates.

[3] At the commencement of the trial, certain admissions were made in terms of section 220 of the Criminal Procedure Act, Act 51 of 1977 ("the CPA"):

1. a post mortem examination was conducted on the body of the deceased, mentioned in count 1, namely Rousseau Alexander Strydom on 26 November 2001;
2. the findings expressed in the post mortem report are correct;
3. the cause of death as mentioned in this report is correct namely "skietwond deur die regter bo-buik en borskas";
4. the post mortem report was handed in by agreement as exhibit "B";
5. the body of the deceased did not suffer any further wounds or injuries between the murder and the time when the post mortem was performed;
6. the contents of photo-albums and the sketch-plan depicting the scene of the crime and the body of the deceased and the injured complainant in respect of count 2 (exhibit "C") was admitted.

The same applied to exhibit "D", a further photo-album and ballistic report.

[4] The ballistic report illustrated that the weapon found in possession of one of the attackers shot and killed by the police on the scene fired the shots which killed the deceased.

[5] It is convenient, for illustrative purposes, to quote the contents of some of the charges:

"COUNT 1

In that upon or about 23 November 2001 and at or near Groenkloof in the district of Pretoria the accused did unlawfully and intentionally kill

ROUSSEAU ALEXANDER STRYDOM

a 2 year old boy.

COUNT 2

In that upon or about 23 November 2001 and at or near Groenkloof in the district of Pretoria the accused did unlawfully and intentionally assault

ROUSSEAU STRYDOM

by shooting at him with a firearm with intent to kill him.

COUNT 3

In that upon or about 23 November 2001 and at or near Groenkloof in the district of Pretoria the accused did unlawfully and intentionally break and enter the house of

ROUSSEAU STRYDOM

and/or

FREDRICA MARIA VAN NIEKERK

with intent to rob and did unlawfully assault and rob the said

ROUSSEAU STRYDOM

and/or

FREDRICA MARIA VAN NIEKERK

and did by force and violence take out of their possession a hat, fruit juice and other household ornaments, their property or in their lawful possession and did rob them of same, aggravating circumstances being present in that the accused made use of a firearm."

COUNT 4

This is the unlawful possession of the Parabellum Norinco pistol with the obliterated serial number, possessed on 23 November 2001 at or near Groenkloof.

COUNT 5

This is the unlawful possession at the same place on the same date of the unknown quantity of 9mm ammunition.

COUNT 6

This is the unlawful possession, six days later, on 29 November 2001 at or near Mamelodi of the 9mm Parabellum Norinco pistol with the mentioned serial number of 46012527.

COUNT 7

This is the unlawful possession of 9mm Parabellum ammunition (six rounds) at or near Mamelodi on 29 November 2001.

COUNT 8

This count was added to the other seven counts at the commencement of the trial by agreement between the parties. It reads as follows:

> "Deurdat op of omtrent 23 November 2001 en te of naby Buitekantstraat in die distrik van Pretoria die beskuldigde wederregtelik vir
>
> TAKALANI JAMES SADIKI
>
> aangerand en toe daar en deur middel van geweld 'n 9mm Parabellum Norinco pistool en 'n Ericson sellulêre telefoon, die eiendom of in die besit van
>
> TAKALANI JAMES SADIKI
>
> geneem en hom aldus daarvan beroof het."

[6] It is also convenient, for illustrative purposes, to quote the summary of substantial facts in terms of section 144(3)(a) of Act 51 of 1977 offered by the state:

"1. On the night of 23 November 2001 the deceased, a 2 year old boy was sleeping with his mother and father referred to in count 3 in their bed at their house in Groenkloof.

2. The accused together with two other persons broke into the house and entered the house through a window. They proceeded to the bedroom where the abovementioned persons were sleeping.

3. The accused and his companion(s) stood on either side of the bed. They threatened to shoot.

4. There was a scuffle between Mr Strydom and one of the assailants. The assailant shot at Mr Strydom twice. The assailant demanded firearms. Mr Strydom leaned over the deceased each time when a shot was fired. The deceased, who was sleeping between his parents was shot in the process.

5. The assailants then fled.

6. The helper had summoned the police in the meantime. The police arrived on the scene whilst the robbery was still in progress. The police shot dead one of the assailants on the scene and a 9mm Parabellum Norinco pistol was found in his possession. Its serial number had been obliterated.

7. The accused fled the scene.

8. The deceased was taken to hospital, but died shortly after arriving at the hospital.

9. The cause of death was:

'SKIETWOND DEUR DIE REGTER BO-BUIK EN BORSKAS'.

10. The accused was arrested on 29 November 2001 at Mamelodi hostel. An unlicensed 9mm pistol with serial number 46012527 was found in his possession."

BRIEF OVERVIEW OF THE EVIDENCE

[7] An attempt will be made to limit the overview to what is considered to be directly relevant to the case.

(i) Rousseau Strydom

[8] At about 03:15 in the morning of 23 November 2001 he was sleeping in the main bedroom of his house with the deceased, Alexander, between him and Driekie the mother of the deceased (this will be Fredrica Maria van Niekerk).

[9] Driekie woke up first and the witness immediately after her. Two black men were standing at the foot of the bed. One on his side and one on Driekie's side.

[10] The one on the side of the witness had a firearm which was aimed at the witness and he said "ek skiet jou, ek skiet jou". He kicked the assailant and thereafter the latter shot at him. The witness then propelled his body over Alexander and Driekie and he was shot a glancing blow against his chest and Alexander, who was in his arms, was also shot. The one man stormed towards him and the other man grabbed Driekie by the arm saying that they were looking for a firearm. He tried to pull her from the bed.

[11] At that stage the witness felt something wet against him and when he bent over he realised that Alexander was bleeding and that he had been shot. He shouted at the

assailants: "you shot my child, you shot my child". The two black men then fled out of the room.

[12] Shortly thereafter the witness heard shots outside. That must have been when the police shot at the assailants.

[13] The witness closed the door of the room, got hold of his firearm and shot a bullet into the floor through the carpet in the hope of scaring any other assailants which may still have been in the house.

[14] Driekie picked up Alexander, ran outside and with the aid of policemen on the scene he was taken to the Little Company of Mary hospital where he unfortunately passed away.

[15] The witness stayed behind to help the police with their investigation.

[16] It appeared that the attackers initially entered the house by breaking a window in the lounge but when they found a safety gate in the passage they went out again and re-entered through the study next to the bedroom. They removed the "louver (*sic*) venstertjies" in order to get into the study.

[17] He testified about relatively insignificant articles that were removed from the house, lemon juice from the fridge and some crockery items.

[18] He identified the assailant who stood at his side of the bed, and whom he kicked, as the one who was lying dead outside the house after having been shot by the police.

[19] The assailant shot two shots at him and his family.

[20] In cross-examination Mr Strydom admitted that he could not identify the appellant as one of the assailants.

[21] After the incident, he made contact with the investigating officer, Mr Sithole.

[22] He was asked whether the latter then told him that when the appellant was arrested, another person by the name of Esau Kgaduke ("Esau") was also arrested. He confirmed this but could not remember the name of the other arrestee.

[23] It was put to him that the appellant would testify that the witness and the investigating officer asked Esau to make a statement. The answer of the witness was "dit is belaglik".

[24] It was further put to him that the appellant would testify that the appellant had heard that Esau was offered an amount of R10 000,00 to make the statement. The witness answered "dit is totaal belaglik". He denied that he made any promises to the investigating officer either. He did not know the appellant.

(ii) **<u>Esau Kgaduke ("Esau")</u>**

[25] He was 19 years old and stayed in the Mamelodi hostel in November 2001.

[26] He stayed there with the appellant and also two other men, one Oscar and one Alfred.

[27] On 22 November 2001 at about 18:30 he saw the aforementioned three persons at the hostel. They were busy walking away. He did not know where they were going. He did not see them again during that night.

[28] The next morning, 23 November, at about 07:00 the appellant came to him and asked him if he knew where Alfred was. He said that he did not.

[29] The appellant told him that they had gone to Sunnyside, that was the appellant, Alfred and Oscar. Alfred did not return from where they had been.

[30] The appellant told Esau that he had heard shots. This was at a house in Groenkloof.

[31] The appellant told Esau that Alfred and Oscar entered the house and the appellant waited outside. He heard a shot being fired.

At a stage, while standing outside, he saw the police and he called Alfred and Oscar. Oscar came out and they started running away and it was in that process that he heard a shot. After they heard the shots (plural) they ran all the way back to the hostel.

[32] Their sleeping quarters consist of eight "rooms" but they use only one door to enter. The "rooms" are divided by low walls and are described as "cubicles". Each slept in his own cubicle. There is one bed in each cubicle, including the cubicle of the

appellant. In the appellant's cubicle there were three steel cupboards. The witness had his own cupboard in his own cubicle.

[33] When the police came (presumably on 29 November) he heard that the police had confiscated a firearm in the possession of the appellant. The witness denied that he owned a firearm. He was arrested at the same time as the appellant.

[34] When asked whether Mr Strydom or the investigating officer offered him money to make a statement against the appellant, he answered in the affirmative. No amount was mentioned and he never received any money.

[35] It was the investigating officer ("speurder") who offered the money.

He was asked to mention in his statement that the appellant knew about this incident. He insisted that this was true (presumably because of the discussion between him and the appellant).

[36] At this point during Esau's evidence the learned Judge recorded that he observed the appellant making threatening signs at Esau, suggesting with his finger that he would be shot in the head.

[37] In cross-examination, Esau confirmed that after he made the statement he was released. It was put to him that the firearm which was found in the appellant's cubicle in fact belonged to Esau. This he denied. He said the weapon was found in the cubicle of the appellant.

[38] He denied that R10 000,00 was promised to him by the investigating officer and Mr Strydom to make a statement.

[39] Significantly, in re-examination, he insisted that his evidence about what the appellant had told him about the incident is based on his own knowledge (and presumably not what was told to him to say).

(iii) Francois Samuel Moller

[40] He was an inspector in the police.

[41] On 29 November 2001 at about 23:00 he went to room 28, Mamelodi hostel Block C.

[42] He confirmed that both the appellant and Esau were arrested on that day but he was only involved with the arrest of the appellant. About twelve to fifteen policemen took part in the operation.

[43] He entered the room of the appellant.

[44] He went into the cubicle where the appellant was sleeping and found him in bed with a certain lady. He identified himself and told them to get up. The lady obliged and moved away. The appellant stayed on the bed after sitting up. He did not get up. He refused to comply with an order to get out of the bed. The witness called a colleague to come and assist him.

[45] The witness saw that the appellant had something in his left hand which looked like a key. He asked him to put the key on the bed but the appellant refused. The appellant put his hand behind the bed between the wall and the mattress and the witness heard something fall. He asked Inspector Colyn, who had joined him, to move the bed away and the result was that a bunch of keys was picked up by Inspector Colyn. The inspector then tested the keys of the three locks on the three steel cupboards in the cubicle and one of the keys opened one of the locks in which the firearm, Norinco 9mm pistol serial number 46012527 was found. It was hidden in the cupboard next to some clothing. There was also a magazine containing ammunition.

[46] In cross-examination, it was put to Inspector Moller that the accused would testify that the weapon was not found in one of the cupboards but it had been hidden between the cupboards. This the witness denied.

[47] The witness confirmed that the appellant would not give his co-operation, as described.

(iv) **<u>Riaan Colyn</u>**

[48] He was also an inspector in the police.

[49] He confirmed the evidence of Inspector Moller in every material respect. It is not necessary to summarise his evidence.

[50] Neither Inspector Moller nor Inspector Colyn was discredited in cross-examination. Colyn testified that the occupants of the hostel have their own cupboards and own keys.

(v) At this point Esau was re-called by agreement between the parties.

[51] He identified Alfred whose face, after he was shot dead, appears on exhibit "C44".

[52] This was Alfred who left the hostel on the evening of 22 November with the appellant and Oscar.

(vi) **Thakalani James Sadiki**

[53] On 23 November 2001 he worked as a security officer at Hello Sekuriteit.

[54] At about 23:50 that night he was on duty at Buitekant Street at Abie's Hyper World.

[55] He was busy writing entries into the occurrence book. He heard voices and when he looked up he saw three men in front of him.

[56] One of the men had a firearm which was aimed at the witness and he was told to keep still and not to move. He obliged. He was told to lift up his hands. The gunman approached him and the other two stood close by near a telephone. He was told to get up and he was searched. His cell phone and pistol were taken from him. He is the registered owner of the pistol, a Norinco 9mm Parabellum with serial number 46012527.

[57] The intruders also broke the wire connection attached to a two-way radio which the witness used in the course of his work.

[58] He identified his firearm when it was in the possession of the investigating officer, Captain Sithole.

[59] The incident happened on the night after the attack on Mr Strydom and his family.

[60] In cross-examination, the witness admitted that he could not identify any of the assailants. It was dark, and he did not know if the appellant was one of the attackers.

[61] After the last witness had testified, an admission was recorded that the person depicted on exhibit "C44" (Alfred) had been shot dead on the scene by one Inspector Braun of the police.

[62] Then followed a very short-lived attempt at making a section 174 application. Nothing came of this.

[63] At this point the case of the appellant was closed, without him testifying.

[64] During the closing address of counsel, and their debate with the learned Judge, counsel for the appellant conceded that convictions should follow in respect of counts 6 and 7, but not the other counts.

[65] Significantly, the learned Judge confronted counsel for the state with counts 4 and 5 (which he incorrectly referred to as counts 3 and 4). The following exchange took place between counsel for the state and the learned Judge:

> "HOF: Daar is geen getuienis [onduidelik] nie gelisensieerd was om daardie wapen te besit nie.
>
> MNR LUYT: Dit is korrek U Edele.
>
> HOF: Daar is nie getuienis dat indien hy dit besit het, onwettiglik nie. Dat die beskuldigde moes geweet het hy besit dit onwettig.
>
> MNR LUYT: Ja die staat is nie tot beskikking van sulke getuienis nie, dit is daarom aangebied nie U Edele."

THE JUDGMENT

[66] The learned Judge handed down his judgment on 21 November 2002.

[67] He convicted the appellant on counts 1, 2, 3, 6, 7 and 8 and acquitted him on counts 4 and 5.

[68] The learned Judge paid due regard to the fact that Esau had testified that he had been offered money to make the statement. The learned Judge found that –

> "Dit blyk duidelik uit sy getuienis uit dat hy 'n bedrag geld aangebied is indien hy bereid is om teen die beskuldigde te getuig. Hy is baie seker van een feit en dit is dat wat hy getuig het wel die waarheid is en nie iets aan hom voorgesê is nie en nie vals getuienis is nie."

The learned Judge found Esau to have been an impressive and honest witness. There was no other way for Esau to know the facts about the attack in Groenkloof if it had not been conveyed to him by the appellant.

[69] The learned Judge said the following about the evidence of Esau:

> "Die vraag is wat se waarde kan ek heg aan Esau Kgaduke se getuienis, gesien die feit dat daar wel 'n bewering is en die erkenning is deur hom dat die ondersoekbeampte aan hom geld aangebied het om teen die beskuldigde te getuig. Ek moet eerlik sê, as dit alleenstaande was, dan sou mens moontlik kon gesê het dat daar 'n twyfel behoort te wees. Maar sy getuienis staan nie alleen nie. Die beskuldigde het nie getuig nie. Waar 'n persoon nie getuig nie, het dit dieselfde effek asof hy 'n leuenagtige getuie was. En dit kan gebruik word ter ondersteuning van die enkel-getuie se getuienis. Maar ek hoef dit nie eers so ver te neem nie. Die feit bly staan Esau Kgaduke is 'n enkel-getuie en ek moet versigtig wees. Maar sy getuienis staan vas en dit is nie weerspreek op geen manier nie. Daar is vir my derhalwe geen rede om sy getuienis te verwerp nie. Sy getuienis word aanvaar."

[70] I now turn to an aspect of the judgment which, in my respectful view, demonstrates a material misdirection on the part of the learned Judge which will entitle this Court of Appeal, with its limited powers when it comes to interfering with the findings of fact of the court below, to nevertheless set aside some of the findings.

[71] In making the remarks that follow, I remain alive to the trite authority that a Court of Appeal will be slow to interfere with the findings of fact of the court of first instance

and will only do so in the face of a material misdirection on the part of the trial Judge, which will justify such interference. I refer to the well-known line of cases starting with *R v Dhlumayo and Another* 1948 2 SA 677 (A) and followed by a number of judgments thereafter. See for example *S v Francis* 1991(1) SACR 198 (A) at 204c-f.

[72] Obviously referring to Esau's evidence about his discussion with the appellant, the learned Judge said the following:

> "Dit laat ons in die situasie dat beskuldigde op die toneel was as wag. Daar is 'n vuurwapen gewees. Toe mnr Strydom wakker word het Alfred daar gestaan met die wapen in sy hand. Beskuldigde hoor die skoot en hy bly staan tot hy die polisie sien, toe hy eers die ander twee waarsku."

In my view, this court should be slow to interfere with those observations, because the evidence of Esau on this particular point, although to an extent ambiguous, is the following:

> "Hy het vir my gesê dat Alfred en Oscar die huis binnegegaan het en dat hy buite gestaan het.
>
> Ja, en toe hulle nou binne is wat gebeur toe? --- Hy het 'n skoot gehoor klap daar binne.
>
> Wat vertel hy vir U, wat doen hy toe? --- Hy het hulle op 'n stadium, terwyl hy daar buite gestaan het, die polisie gesien en die twee wat in die huis was geroep.
>
> Goed, hy vertel u toe dat hy die twee in die huis geroep het en wat vertel hy vir u wat gebeur toe verder? --- Hy sê toe hy geroep het, het Oscar uitgekom.

> Hy sê Oscar het uitgekom, hulle het begin weghardloop en in daardie proses het hy 'n skoot gehoor klap.
>
> Het hy nog iets verder vir u vertel wat daar gebeur het? --- Hulle het toe gehardloop na hulle die skote gehoor klap het, gehardloop tot by die hostel en dit was toe hy my daar gekry het."

With respect, the observation made by the learned Judge up to this point is probably correct: it appears, on the weight of the evidence, that the appellant heard a single shot inside before he called Alfred and Oscar after seeing the police. The shot he heard when he and Oscar started running, was probably the shot fired by the police which killed Alfred. It is not clear what the other "shots" ("skote") would have been which the appellant allegedly (according to Esau) heard before they started running. Mr Strydom's evidence that two shots were fired at him and his family was undisputed. It is not in harmony with the appellant's version that he heard one shot inside.

[73] I turn to what I consider to be the material misdirection.

[74] After making the first-mentioned remark, the learned Judge said the following:

> "In afwesigheid van enige weerspreking kan ek net een afleiding maak en dit is dat die beskuldigde moes geweet het dat daar 'n vuurwapen is op die toneel."

I cannot, with respect, agree with this conclusion. There is no evidence whatsoever to support this finding. Assuming that the appellant heard a single shot before he went to call his two colleagues after seeing the police, it cannot, in the absence of evidence to

that effect, be inferred, as the only reasonable inference, that he knew that there was a firearm "op die toneel". He may have gathered that there was a firearm, but he would not have known who used it (the attackers or perhaps a victim) and it cannot be inferred that he knew in advance that the attackers had a weapon with them. There is no such evidence.

[75] Following this remark by the learned Judge he goes on to state:

> "Hy het saamgegaan om 'n huisbraak te pleeg met die opset om te roof of om te steel. En hier is die saak van *Staat v Malinga en Andere*, 1963 1 SA 692 Appèlhof ter sprake. Sy Edele, HOLMES, AR soos hy toe was, het in 'n soortgelyke geval waar daar ingebreek is en gegaan is om te breek, die volgende gesê:
>
> 'In the present case all the accused knew that they were going on a housebreaking expedition in the car, and that one of them was armed with a revolver which had been obtained and loaded for the occasion. It is clear that their common purpose embraced not only housebreaking with intent to steal and theft, but also what may be termed the get-away. And they must have foreseen, and therefore by inference did foresee, the possibility that the loaded fire-arm would be used against the contingency of resistance, pursuit or attempted capture. Hence, as far as individual *mens rea* is concerned, the shot fired by accused no 4 was, in effect, also the shot of each of the appellants. On the question of intention to kill, they must have foreseen, and therefore by inference did foresee, the possibility that the use of the loaded firearm would have fatal consequences. Violence, firearms, and death are ever an easy and sombre trinity, as I observed in *State v Masheane and Others*

(A.D., 16 November, 1959). And the appellants were clearly reckless whether death would in fact ensue or not. Hence the intention to kill must be imputed to each one of them." (Emphasis added.)

I add that the rest of the passage in the judgment dealt with by the learned Judge, at 695A-D, contains the following sentence:

"In the result all were rightly found guilty of the crime of murder."

[76] Before turning to count 3, that of robbery, the learned Judge then says the following about the murder charge after quoting the passage from *Malinga*:

"Dit is duidelik dat beskuldigde gegaan het saam met ander om in te breek en te steel of te roof, dat hy 'n gemeenskaplike opset gehad het saam met die ander twee, dat hy geweet het daar is 'n wapen, ten minste een, dat hy moes voorsien het daadwerklik voorsien dat dit kan gebruik word in die oorkoming van verset of ontsnapping en waar daar derhalwe iemand gedood is of verwond is, hy die opset gehad het soos die persoon wat daadwerklik die skote afgevuur het." (Emphasis added.)

There is absolutely no evidence that the appellant knew about the weapon. Such knowledge is the main thrust behind the conclusions arrived at by Holmes JA. This is not a similar case ("soortgelyke geval") as found by the learned Judge.

[77] In *S v Mgedezi and Others* 1989 1 SA 687 (AD), the following is said by the learned Judge of Appeal at 705I-706B:

"In the absence of proof of a prior agreement, accused number 6, who was not shown to have contributed causally to the killing or wounding of the occupants of room 12, can be held liable for those events, and the basis of the decision in *State v Safatsa and Others* 1988 1 SA 868 (A), only if certain prerequisites are satisfied. In the first case, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he must have intented to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite *mens rea*; so, in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue ... In order to secure a conviction against accused number 6, in respect of the counts on which he was charged, the State had to prove all of these prerequisites beyond reasonable doubt. It failed so to prove a single one of them."

[78] In the present case, and for the reasons mentioned, the requirements for a conviction on the ground of common purpose on the part of the appellant, were not present in respect of counts 1 and 2 and he was entitled to an acquittal on those charges.

[79] I turn to count 3, the robbery of the family. The learned Judge said the following:

"Wat die aanklag van roof aanbetref, is daar slegs getuienis dat daar vrugtesap geneem is en dat daar 'n peper- en soutpotjie in 'n bak buite gevind is wat verwyder is uit die huis uit. Dit is duidelik dat hierdie rooftog van hulle onderbreek is deur die aankoms van die polisie en hulle nie meer kon geneem het nie. Nogtans is hierdie karige items verwyder."

On the evidence, it is unlikely that the theft of these items was interrupted by the police. It is clear from the evidence of Strydom, which is undisputed, that the assailants fled as soon as he shouted at them that the child had been shot. It is more likely, and one must always be slow to speculate, that these items were removed earlier on when the attackers broke into the lounge, as I have mentioned.

[80] Nevertheless, it is clear, on the evidence of Esau, and fortified by the fact that the appellant elected not to give evidence to rebut the *prima facie* case against him - see for example *S v Boesak* 2001 1 SA 912 (CC) - that the appellant had the required intention, and common purpose with his two colleagues, at least to break in at the Groenkloof property and steal what was available.

[81] In view of the provisions of section 260 and section 262(1) of the CPA, a conviction of the offence of housebreaking with the intention to steal, and theft, will be a competent verdict under these circumstances.

[82] I need not deal with counts 4 and 5, in respect of which there was an acquittal, for the reasons mentioned.

[83] As far as counts 6 and 7 are concerned, the identified weapon of the witness Sadiki was found in the possession of the appellant hidden in his locked metal cupboard of which he held the key, some six days after the robbery of Sadiki. The appellant did not give evidence to rebut the case against him. He was clearly properly convicted on these two counts.

[84] I turn to count 8. After dealing with the evidence in this regard, and recognising that Sadiki was not able to identify his attackers, the learned Judge nevertheless came to the following conclusion:

> "Die besit van hierdie vuurwapen toegesluit in sy kas laat my net een afleiding maak en dit is hy was betrokke by die roof op die 23ste van Sadiki."

I can find no material misdirection in this regard on the part of the learned Judge which would entitle this Court of Appeal to interfere with his finding, given the trite principles laid down in cases like *Dhlumayo* and *Francis*.

In my view, the finding of the learned Judge is also fortified by the fact that the appellant chose not to testify to rebut the case against him. In *Boesak, supra*, the following is said at 923E-G:

> "The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused."

[85] In the result I find no basis for interfering with the conviction in respect of count 8.

[86] In all the circumstances, I have come to the conclusion, and I find, that the appeal against the convictions ought to be upheld in respect of counts 1 and 2, which convictions fall to be set aside, and in respect of count 3 there ought to be a conviction on the lesser, competent, verdict of housebreaking with the intention to steal, and theft. The convictions in respect of counts 6, 7 and 8 ought to be confirmed.

[87] I turn to the appeal against the sentences.

THE SENTENCES

[88] There was an argument by Mr Moeng for the appellant, that where the provisions of the Criminal Law Amendment Act, no 105 of 1997, dealing with prescribed minimum sentences, were, as one reads the record, not dealt with by the learned Judge before the sentencing stage, this omission ought to be taken into account for sentence purposes – see *S v Ndlovu* 2003(1) SACR 331 (SCA).

It has in any event been recognised that "judicial opinion is divided on the issue of whether it is necessary for a presiding officer to draw the attention of an accused person – who is represented – to the applicability of the minimum – sentencing provisions where they are not contained in the indictment". See *S v Xaba* 2011(2) SACR 1 (KZP) at 3a-c and cases there mentioned.

[89] Moreover, given the conclusions I have arrived at with regard to the appeal against the convictions, the minimum sentence provisions were not applied by the learned Judge with regard to the sentences in respect of the remaining counts.

[90] With regard to count 3, the sentence imposed was eighteen years imprisonment, but it has to be reduced, in view of the proposed conviction of the lesser competent charge of housebreaking with the intention to steal, and theft. In my view, an appropriate sentence would be one of eight years imprisonment.

[91] With regard to counts 6, 7 and 8, the following sentences were imposed:

Count 6: three years imprisonment.

Count 7: one year imprisonment.

Count 8: eighteen years imprisonment.

In my view, there is no basis for interfering with these sentences, given the limited powers of a Court of Appeal to do so, and recognising that the imposition of sentence strictly falls inside the province of the trial court. However, it seems to me that it would be appropriate to order that those three sentences, which have a bearing on the same underlying incident, ought to be served concurrently.

LEAVE TO APPEAL PROCEEDINGS

[92] For the sake of detail, I add that, on 26 January 2005, the learned Judge refused an application for leave to appeal against both the convictions and sentences.

On 21 October 2012 the Supreme Court of Appeal granted leave to appeal against the convictions and sentences to the Full Court of this Division. These are the proceedings which came before us on 22 April 2016.

THE ORDER

[93] I make the following order:

1. The appeal against the convictions in respect of counts 1 and 2 is upheld and those convictions are set aside.
2. The appeal against the conviction in respect of count 3 succeeds in part. That conviction is set aside, and replaced with a conviction of housebreaking with the intention to steal, and theft.
3. The appeal against the convictions in respect of counts 6, 7 and 8 is dismissed and those convictions are confirmed.
4. The appeal against the sentences in respect of counts 3, 6, 7 and 8 succeeds in part and they are replaced with the following:

   In respect of count 3: eight years imprisonment.

   In respect of count 6: three years imprisonment.

   In respect of count 7: one year imprisonment.

   In respect of count 8: eighteen years imprisonment.

   It is directed that the sentences in respect of counts 6, 7 and 8 are to be served concurrently.
5. The orders of the learned Judge *a quo* in respect of convictions and sentences are set aside, in part, and replaced with the following:

   "(i) Ten opsigte van klagtes 1 en 2, word die beskuldigde onskuldig bevind en ontslaan.

(ii) Ten opsigte van klag 3, word die beskuldigde skuldig bevind aan die mindere oortreding van huisbraak met die opset om te steel, en diefstal.

(iii) Ten opsigte van klagtes 4 en 5 word die beskuldigde onskuldig bevind en ontslaan.

(iv) Ten opsigte van klagtes 6, 7 en 8 word die beskuldigde skuldig bevind.

(v) Ten opsigte van klag 3, word die beskuldigde gevonnis tot agt jaar gevangenisstraf.

(vi) Ten opsigte van klagtes 6 en 7, word die beskuldigde gevonnis tot drie jaar gevangenisstraf en een jaar gevangenisstraf onderskeidelik.

(vii) Ten opsigte van klag 8, word die beskuldigde gevonnis tot agtien jaar gevangenisstraf.

(viii) Dit word gelas dat die vonnisse ten opsigte van klagtes 6, 7 en 8 gelyklopend uitgedien sal word."

6. The sentences now imposed are antedated to 21 November 2002.

W R C PRINSLOO
JUDGE OF THE GAUTENG DIVISION, PRETORIA

A631/2015

I agree

P A MEYER
JUDGE OF THE GAUTENG DIVISION, PRETORIA

I agree

J W LOUW
JUDGE OF THE GAUTENG DIVISION, PRETORIA

HEARD ON: 22 APRIL 2016
FOR THE APPELLANT: S MOENG
INSTRUCTED BY: THE PRETORIA JUSTICE CENTRE
FOR THE RESPONDENT: Ms PHYLLIS VORSTER
INSTRUCTED BY: THE DIRECTOR OF PUBLIC PROSECUTIONS