IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED

_____ _____

DATE SIGNATURE

CASE NUMBER: A36/15

DATE: 17 June 2016

BONGANI SIBEKO Appellant

V

THE STATE Respondent

JUDGMENT

MABUSE J:

[1] This is an appeal against both conviction and sentence.

[2] The appellant, Mr. Bongani Sibeko, accused 1 in the court *a quo*, appeared with accused 2 and accused 3, before the regional court magistrate in Benoni where they were charged with armed robbery with aggravating circumstances as envisaged in s 1 of the Criminal Procedure Act 51 of 1977 ("the CPA'). The said charge was read subject to the provisions of s 51(2) of the Criminal Law Amendment Act No. 105 of 1997 ("the Minimum Sentence Act").

[3] The appellant, who enjoyed legal representation by a certain Mr. Kathrada throughout the entire trial, pleaded not guilty to the said charge and made a plea-explanation in terms of the provisions of s 115 of the CPA. In such plea-explanation, he denied all the allegations against him.

[4] The charges against the appellant arose from an incident that took place on 7 August 2011 at house no. […] Dumashi Street in Daveyton. The complainant in the matter was one Reuben Vusimuzi Sibeko, the appellant's uncle. The incident took place at night in a shack in which the complainant was sleeping. Earlier, the complainant had been watching television, in particular movies, on a dvd. Present with him, at the same time, were the appellant, one Lesuku Mfecane ("Mfecane") and Mpho Ngabisa ("Ngabisa"). Mfecane did not live far from the house where the incident took place. Mfecane and Ngabisa were friends. The complainant referred to Mfecane and Ngabisa as the appellant's friends whom he, the complainant, knew only by sight.

THE COMPLAINANT

[5] This is now the complainant's testimony. While they were watching television, the appellant told him that he would be going to a night service at his church. The appellant left for church. He left his two friends, that is Mfecane and Ngabisa, behind. Around

02h00 and whilst he was asleep some people, four in number, arrived where he was sleeping. Two of those four people were Mfecane and Ngabisa and the others, accused 2 and accused 3. While either of accused 2 or accused 3 pointed him with a knife, the other of the two pointed him with a firearm. Both of them demanded money from him. By the use of the knife and the firearm, they took away from him a sum of R110.00 and his Vodaphone cell phone. During this incident accused 3 kicked him on his chest.

[6] He recovered his cell phone after the police had arrived and after the police had threatened and assaulted his assailants. The cell phone was recovered from the one that had a knife and who was the last one to be arrested. When the cell phone was recovered, he could not see who it was recovered from because he was inside the police van.

MPHO ALFRED MAGWALU ("MAGWALU")

[7] Magwalu, a member of the South African Police Service with three years' experience in the Police Service, was the State's second witness. On 7 August 2011 he was on duty and was the investigating officer of the complainant's complaint. In the execution of his official duties, he arrested the appellant, accused 2 and accused 3 for robbery. He arrested them following the information he had received from the witnesses who saw them commit the offence. These witnesses were the complainant and another one who was at court during his testimony.

[8] Following the report that he had received from the *"guys*" who were watching television and who were present when the robbery was committed, he went to accused 3's residential place. On their arrival they were directed to accused 3's bedroom by his mother. They found accused 3 sleeping in the said bedroom. In this bedroom he recovered the weapon that was used in the commission of the offence and the

complainant's cell phone. After finding the complainant's cell phone he asked accused 3 about it and accused 3 told him that he had received the cell phone from the appellant and accused 2. Accused 3 was the last one of the three accused to be arrested. At the time he arrested accused 3, the appellant and accused 2 were in the police van.

[9] The complainant was present when he arrested accused 3. After recovering the cell phone, he showed it to the complainant who identified it as his. The complainant also recognised the knife as the weapon which was used during the robbery.

[10] During cross-examination he told the court that he arrested the appellant, accused 2 and accused 3 following the reports that he had received from two witnesses. By the two witnesses he referred to the two witnesses who were watching television. These two witnesses were Mfecane and Ngabisa. He told the court that the complainant had told him that his nephew, the appellant, was among the people who robbed him and that three people robbed him.

[11] At the conclusion of the evidence of the second state witness, the state informed the court that it had no more witnesses to call. The state indicated immediately thereafter to the court that it intended calling another witness to testify and for that purpose it would have to make a formal application for the re-opening of its case. Despite the objection by Mr. Kathrada against the postponement of the matter, the court duly granted the application for postponement.

KWENA FIDAS MAROKANE ("MAROKANE")

[12] When the matter resumed on 3 May 2012, the state applied for the re-opening of its case to enable it to lead the evidence of another witness. As the application was not opposed, Mr. Kathrada had no objection against it, the court granted it. Thereupon the

state led the evidence of Marokane, an English speaking member of the South African Police Service stationed at Daveyton Police Station. In his testimony Marokane told the court that on 7 August 2013 he was on duty with Magwalu. He confirmed in his testimony the arrest of the appellant and his co-accused in the court *a quo* and the offence for which the three of them were arrested. He also confirmed the evidence of Magwalu in respect of the cell phone and knife. He told the court that these objects were found where accused 3 was sleeping. This cell phone was found in the presence of the complainant. Over and above, he told the court that the complainant identified not only the cell phone as his but also the knife but also found in the room in which accused 3 was sleeping alone as the knife that was used during the robbery. Accused 3 did not tell him anything about the cell phone and the knife.

[13] He was unwavering in his evidence during cross-examination that the cell phone and the knife were found in the room in which accused 3 was sleeping alone. He described the shack as consisting of one room with only one entrance. There was no separate room. That room was pointed to them by a certain woman whom she presumed to be accused 3's mother as accused 3's bedroom.

[14] The state closed its case at the conclusion of this witness's testimony. Mr. Kathrada then applied in terms of s 174 of the CPA for the discharge of the appellant, accused 2 and accused 3. The said application was *"brought on identity, on the version put or given by the accused that at the time of the incident being the nephew, he was not at home."* That is how Mr. Kathrada put it. It was furthermore brought on the basis that *"it was the, I think confirmed by the complainant that indeed his nephew has no motive, whatsoever, in fact, robbing him; and furthermore that the complainant was uncertain about the people who robbed him."* It was specifically argued that there was no case for

the appellant to answer. The State opposed the application. In opposing the application the state made a concession. It stated that: *"it is true what Mr. Kathrada says, but part thereof is not true."* It pointed out that the complainant identified accused 2 and accused 3 as some of the perpetrators of the offence. It also submitted that the appellant and accused 2 were implicated by accused 3.

[15] The court *a quo*, having considered the evidence before it at that stage and the submissions made both by the state and the defence, refused the application in terms of s 174, the court stated that:

"It is so, that there is some evidence by the police officials, referring to accused one. It is, from what I see, eminent that accused three might testify against accused one or implicate accused one. It is not really correct to say that the court cannot take cognisance of evidence of one accused against the other. It is just a matter of cautionary rules being applicable to the evidence of co-perpetrators. In the interest of justice then the application is denied."

[16] Although the refusal of the court *a quo* to grant the application in terms of s 174 of the CPA was not an issue raised in the application for leave to appeal, I am satisfied that the court *a quo* exercised its discretion properly in doing so.

APPELLANT

[17] Upon the court refusing to grant the application for the discharge in terms of s 174 of the CPA, Mr. Kathrada then called the appellant into the witness box to testify in his defence. The appellant told the court that on 7 August 2011 he was at home in the company of the complainant who was visiting and two other boys, Mfecane and Ngabisa. These two were not his friends but were people who had merely asked to

come and watch a movie at his place. He knew them by sight, one was a neighbour and the other one was a neighbour's friend. He was cooking and when he wanted to dish for the complainant he told him that he did not want food. He told his uncle that he would be going to church. Before leaving he told the complainant that he would be leaving and asked him to chase Mfecane and Ngabisa away. He had himself asked them to leave but they refused saying that they were still watching a movie. He left. He went to the church where he spent the whole night. It was a church gathering. At the church gathering he spent time with a certain Sibusiso Simelane (Simelane) who used to stay in Daveyton but who, due to the passing of his family, had moved to Mfecane in Brakpan. He pointed Simelane out as the only person he spent the entire night with because he was the one who came to fetch him. The church gathering started at 23h00 and ended at 06h00 the following day. He did know accused 2 and accused 3 by sight. Initially the police had also arrested Mfecane but was released later and made a state witness.

[18] Under cross-examination he told the court that that evening they were attending a night prayer at church. He raised an alibi defence. He conceded that if Mfecane was one of the people who had accosted his uncle, his uncle would have been able to identify him. The complainant told him that when the robbery took place it was dark in the shack.

MILTON SIBEKO ("MILTON")

[19] In support of his case the appellant called two witnesses, one Milton Sibeko and a certain Nombula Sibongile Sibeko (Nombula). Milton was the pastor's assistant of the Apostolic Church. The pastor of the church was William Sibeko. He told the court that on 7 August 2011, from 23h00 to 07h00 on 8 August 2011 he was with the appellant at church at Extension 3. He saw the appellant. He described the event he was attending with the appellant as a cleansing ceremony which was held at the house of the woman

who had passed away. That woman who had initially stayed at a section of Daveyton called Vergenoeg had later relocated to Extension 3 of the same township. The ceremony was held at a house and not in Church. He told the court furthermore that he saw the appellant at some stage because at some point he had to sit with another man. The appellant never went anywhere.

[20] During cross-examination he was adamant that it was a cleansing ceremony and not a night prayer meeting and that it was held at a house and not in a church. It was not a night prayer. Simelane was no ordinary member of the church. He held an important position in the church. He was a pastor's assistant with responsibilities. Therefore the appellant could not simply refer to him as another "guy".

[21] **Nombula Sibongile Sibeko ("Nombula"),**

Nombula, the complainant's sister described the premises where the incident took place as follows. There are two structures in those premises. There is a main house which she occupied. There is in the same premises also a one room shack which was used by the complainant and someone else. At the time of the robbery at 23h00 she was in the main house. She knew who robbed the complainant and she went on to describe how she came to know the perpetrators.

[22] She saw Mfecane at the shack. She saw four people come into the yard. As the four people got into the yard she walked into the dining room. As these four people were talking to each other, next to her window, she thought that the appellant had come back. But when she looked properly she noticed that it was not the appellant. She saw Mfecane. He had a jacket with its hood pulled over his head. She went to her bedroom from where she observed the event unfolding outside.

[23] Whilst she was looking outside through her bedroom window she saw the four of them get into the shack. One of them was heavily built and the other one was light in complexion. The third one was short and the fourth one resided in the same street as one Mike. These latter two were chasing each other with a knife in the premises. The police did not take her statement of the event.

ACCUSED 2

[24] Accused 2 said that knew nothing about the robbery. He was not present where and when it was committed or on the evening of the robbery. He was at his home. Present with him at home at the relevant time was his sister. The only reason he was able to remember that he was at home on 7 August 2011 was that he was arrested the following day at home. Mfecane and Ngabisa pointed him out to the police because they knew him by his nickname. He knew nothing about the cell phone and the knife that were found in the possession of accused 3. His defence was therefore an alibi.

ACCUSED 3

[25] Accused 3 told the court in his testimony that he knew accused 1 by sight and accused 2 from their days at school where they both participated in school events. He knew accused 2 by his other name as Scarro too. On the day of his arrest, he continued with his testimony, at 12h00 he was found at his home in the main house and not in his bedroom. As he stepped into the house the police found him in the kitchen as he stepped into the house. They asked him who Abraham Nel was and if he knew Bongani and Scarro. He told them that he knew Bongani Kunene, his cousin. The complainant's cell phone and knife were found in the house. He only saw them when they were discovered by the police. The police retrieved these items not from his bedroom but

inside the house. This was in a room that was utilised by Bongani whenever he paid them a visit. Later he told the court that the police found him eating inside the kitchen. He denied that he brought the items to the house and insinuated that they were brought by Bongani. His mother was not present on the day the police were at his home but his aunt was. He denied that he took part in robbing the complainant. He denied furthermore that he told the police that he received the complainant's cell phone and a knife from the appellant and accused 2. He called no witnesses in support of his case.

[26] At the close of the defence case, the court, in the exercise of its powers conferred by s 186 of the CPA, called two witnesses, one Lesuku Mfecane and a certain Mpho Ngabisa to testify about the events of 7 August 2011.

LESUKU MFECANE ("MFECANE")

[27] Mfecane told the court that he knew the complainant because he lived near his (the complainant's) home. He and the complainant were not friends but he would go to the complainant's home from time to time. He would go there for diverse purposes, either to watch dvd's on the television or to smoke or for both.

[28] He knew about the incident that took place in the complainant's shack on 7 August 2011 because he was present when it took place. He saw it. According to him, they were in Bongani (the appellant's) shack, watching movies with the complainant. The appellant left the shack but later returned in the company of some friends of his. He then ordered them, that is Mfecane and Ngabisa, to leave or to give them space as they had something to do. They left and when he was at the gate he heard the appellant's uncle scream. He then saw the appellant and his friends run away. He identified the friends who ran away as the appellant, accused 2 and accused 3. He never went back to

investigate in the shack as the appellant had ordered them out of the place. The event took place around 24h00.

[29] During cross-examination by the State he told the court that he was with Ngabisa. He disputed the appellant's version that when the incident took place he was at church. He told the court that the version that the appellant had gone to church was untrue.

[30] Mfecane was put under intense cross-examination by Mr. Kathrada. During such cross-examination, he was unwavering in his testimony that he was present when the incident of 7 August 2011 took place in the complainant's shack. Furthermore he told the court that before the appellant and his co-accused were arrested, he and Ngabisa were questioned by the police. He denied that he and Ngabisa participated in the event that took place in the shack. He was resolute in his evidence that on his return, the appellant had told him that: *"I want you to leave. I want to do something."*

MPHO NGABISA ("NGABISA")

[31] Ngabisa confirmed Mfecane's testimony that both of them were in the complainant's shack on 7 August 2011 and in particular when the complainant was robbed. He was present when part of the incident took place in the shack. He set out that part of the incident that he saw as follows. They were seated in the shack watching movies. The appellant said he would be going to church where there was going to be a night vigil. The appellant left Mfecane and Ngabisa with the complainant. Before he left the appellant he asked them, Mfecane and Ngabisa, to close the door when they left.

[32] The appellant came back. He found them still in the house and still watching movies. He asked them when they would be leaving but they told him that they were still

watching movies. He asked them how long they were still going to be and they told him that they would be done any time soon. The appellant went out again telling them that he was going to a night vigil.

[33] Around 23h00, the appellant came back. This time he was in the company of two of his friends. They sat down. One of them asked for a smoke from him. As he was smoking they stood up. At this stage the complainant was already asleep on the other side of a curtain that divided the shack into two sections. The side of the shack on the other side of the curtain, where the complainant was sleeping, had no light.

[34] The appellant stood by the door while two of his friends grabbed the complainant. He heard one of them say *"where is the money"?* At this stage Mfecane had risen from where he had been sitting. He picked up their stuff and left. When he left the shack the appellant's two friends were still wrestling with the complainant on the other side of the curtain. He went out and stood at the gate with Mfecane. While still at the gate he heard the door of the shack banging and thereafter saw the trio, i.e. the appellant, accused 2 and accused 3, coming out running.

[35] He knew accused 2 because he attended school with him and accused 3 only by sight. Between him and Mfecane, Mfecane was the first to stand up where he had been sitting and to walk towards the door. When Mfecane left he was still gathering the tools that they used to smoke. Mfecane stopped in the alcove of the door and shouted at him to hurry up so that they could leave.

[36] During cross-examination by the State he told the court that the complainant did not scream but spoke normally. Nombula was the last witness to testify after his evidence and Kathrada told the court that he no longer had any witnesses to call.

[37] The court *a quo* analysed the entire evidence and concluded that the State had proved beyond reasonable doubt that the appellant was involved in the robbery that was committed on 7 August 2011. It rejected the appellant's version on the basis that it was not reasonably possibly true and convicted him accordingly. Upon conviction it sentenced him to ten (10) years imprisonment after finding substantial and compelling circumstances in his favour. It is accordingly this conviction and the subsequent sentence of ten years' imprisonment imposed on him by the court *a quo* that he is dissatisfied with. He has in his application for leave to appeal set out numerous grounds of appeal against the conviction and sentence afore mentioned.

[38] The crucial questions that the court a quo had to determine were firstly, whether the appellant had been reliably identified as one of the people who were present in or at the shack when the complainant was robbed and secondly, whether the appellant was party to a common purpose to rob the complainant. The onus was on the state to prove these. The duty of the state to prove its case beyond reasonable doubt includes the duty to prove the identity of the perpetrators. The court a quo correctly pointed out that the question that needed to be answered was who the robbers were. In **S v Van der Meyden 1999(2) SA 79 (WLD) at page 81 A-B** the court set out the manner in which evidence should be assessed when it stated that:

"In which ever form the test is expressed, it must be satisfied upon the consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so

too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true."

The incident in question took place in a one room shack divided into two sections by a curtain. At all material times it took place it was dark, according to the complainant, so dark that if he looked at himself in the mirror, he would not have been able to see himself in it. Notwithstanding the darkness in the room, there is evidence though that the television was on at the time and its light illuminated the shack to a certain degree. The complainant was, it is his evidence, only able to see in the dark four people among whom he identified accused 2 and accused 3. Again in the dark he was able to see that accused 2 had a firearm and accused 3 had a knife. He was able to describe accused 2 by his built and his weight. He was able to identify accused 2 and accused 3 but was unable to identify the other two assailants, in particular the appellant. According to him light came into his side of the shack through a big window of the shack. One cannot fault him for failing to mention the light from the television. The television was not on his side of the curtain. The television light was therefore prevented from reaching his side of the curtain.

[39] The court a quo was dissatisfied with the evidence of the complainant with regard to the identification of his assailant. On this important aspect it stated quite clearly that the complainant was not the best of witnesses. Thereafter it made an adverse inference about him as a witness. Based on his evidence the court remarked that the complainant was bent on trying to protect the appellant. It is a mystery that in the same circumstances the complainant was able to identify accused 2 and accused 3 but unable to identify the other two assailants, in particular the appellant. Considering that, on the complainant's version, it was dark in the shack and that the only source of illumination in the shade was through the window light, the court *a quo* was correct in finding that the

complainant did not have a clear opportunity to identify his assailants and on that basis to reject the complainant's evidence.

[40] Not all of the complainant's evidence was rejected by the court *a quo* though. For good reasons, the court *a quo* accepted the complainant's evidence that he had been robbed of his cell phone and money. This evidence stood uncontested. It was furthermore not in dispute that the cell phone found in accused 3's bedroom belonged to the complainant.

[41] There are other portions of the complainant's evidence which were not contested. His evidence that he had watched television earlier with both Mfecane and Ngabisa while the appellant was present and working was not contested. This evidence enjoyed the support of both Mfecane and Ngabisa. Finally, it was never disputed that the incident took place in the complainant's shack, which consisted of one room.

[42] The court *a quo* was satisfied with the evidence of Magwalu and Marokane. It made no adverse remarks about them or their evidence. The evidence of Marokane corroborated the evidence of Magwalu in all material respects, in particular, with regard to the aspect that the complainant's cell phone and a knife were found in the room in which accused 3 was found sleeping. The court *a quo* remarked that the two police officers were independent witnesses who had nothing to gain by testifying that they found the cell phone and the knife in a certain room. It found their evidence reliable and credible.

[43] The court *a quo* accepted the evidence of the two court witnesses that they were present when the robbery took place. In fact their evidence on the afore going aspect was never challenged and never assailed. It was never suggested to them that they did not properly see the incident take place. In fact their whole evidence relating to the

incident itself was never contested. There is not a suggestion that they had schemed to give false evidence against the appellant. It was never in dispute that they both knew the appellant. The appellant himself testified Mfecane and Ngabisa were people who used to come to his house to watch movies. Apart from that he testified that Mfecane was his neighbour. The evidence of Nombula is even clearer. She told the court that Mfecane was their opposite neighbour. In the circumstances it is highly unlikely that they might have made a mistake with regard to the identity of the appellant. The fact that they knew the appellant enhanced the value of their identification. See in this regard **R v Dladla 1962 (1) SA 307 (A)** where the court had this to say about prior knowledge by a witness of the identity of a perpetrator:

" *One of the factors which is of great importance in the case of identification is the witness' prior knowledge of the person sought to be identified. If the witness knows the person well or has seen him frequently before, the probability that his identification will be accurate is substantially increased."*

They were present in the shack when the robbery took place. They were sitting on the side of the curtain where there was television light. They were therefore favourably placed to see clearly what happened at the time. The court *a quo* was satisfied that their evidence established beyond reasonable doubt the identity of the appellant at the scene. Their evidence therefore answered the first question that the court a quo had to determine, whether the appellant was reliably identified as one of the people who were in the shack when the complainant was robbed.

[44] It is indeed so that there were contradictions in the evidence of these two court witnesses. The one notable contradiction that the appellant relied on is whether or not the complainant screamed. It was pointed out by Mr. van As, counsel for the appellant, that while the complainant and Ngabisa never testified that the complainant screamed

during the robbery, Mfecane told the court that the complainant screamed. If anything this contradiction shows that the court witnesses did not plan to mislead the court and furthermore that they had not been coached as to what they should tell the court. More importantly this contradiction is immaterial.

[45] Contradictions only show that witnesses are capable of making erroneous statements. Once the witnesses give two different versions about the same thing, it only proves that one of them is wrong but does not prove who of the two is wrong. *"It follows that the mere fact of contradiction does not support any conclusion as to the credibility of either person. It acquires probative value only if the contradicting witness is believed in preference to the first witness, that is, if the error of the first witness is established."* See in this regard **S v Oosthuizen 1982(3) 571 TPD at 576 B-C**.

[46] The fact that Mfecane told the court that he went home from the complainant's place and later contradicted himself under cross-examination when he told the court that he went to Siphiwe's place after leaving the appellant's shack constitutes an immaterial contradiction that did not eviscerate the core of his evidence. The fact that constable Magwalu told the court that the complainant told him that his nephew was present when the robbery took place cannot be regarded as a contradiction *vis-a-vis* what the complainant told the court. It is indeed so that the complainant never told the court that the appellant was present at the robbery. Absence of evidence is not evidence of absence. In his heads of argument Mr. Kgagara had referred the court to the authority of **S v Oosthuizen** *supra* to demonstrate that contradictions per se do not lead to rejection of a witness's evidence.

[47] The court *a quo* was aware that the evidence of both court witnesses was in some respects deficient and inconsistent. However, the court *a quo* was satisfied that, despite all the deficiencies and inconsistencies, the truth had been told. The principle of our law with regard to inconsistencies and contradictions was clearly explained in **S v Mkohle 1990(1) SACR 95(A) at page 98**. The court in that authority had this to say:

"Contradictions per se do not lead to the rejection of the witness' evidence. As Nicholas J, as he then was, observed in S v Oosthuizen 1982(3) SA 571 T at 576 B-C, they may simply be indicative of an error … Not every error made by the witness affect his credibility: In each case the trier of facts has to make an evaluation, taking into account such matters as the nature of the contradictions, their number and importance and their bearing on other parts of the witness' evidence." From the above passage it is abundantly clear that the fact that, in his testimony a witness was shown to be inconsistent, does not mean that the court should reject his evidence. There may be a reason for such inconsistency and it is for the court to establish the reasons for the witness' inconsistency. Once the court has established that the testimony of a witness is contradictory it must go further and establish whether such inconsistencies are material and what the effect of such inconsistencies are on the entire evidence of a witness. If the court is satisfied that, despite the inconsistencies the core of a witness' evidence contains the truth and that such inconsistencies do not eviscerate the credibility of the witness, the court is entitled to make its finding on such parts of the witness' testimony as containing the truth. In my view, the contradictions that have been pointed out by the appellant in the application for leave to appeal and also in his counsel's submissions do not affect the credibility of the two court witnesses. Accordingly, I find that the court *a quo* was correct in finding the two court witnesses to be convincing witnesses; ultimately in accepting their version and furthermore in finding

that their credibility could not be challenged. Their evidence, in my view, was beyond reproach.

[48] It was submitted by counsel for the appellant that the court should have treated the evidence of the two court witnesses with caution. It is so because both of them had testified that they were smoking dagga. Counsel for the appellant submitted that the only reasonable inference that could be drawn was that they were smoking while they were in the appellant's room and that even after leaving the appellant's room they still wanted to smoke. There is no iota of evidence before the court that these two court witnesses were rendered truculent or dazed by the dagga they had smoked. There is no suggestion, as already had been pointed out, that they did not see well. In my view, this submission is fallacious. Finally, there was no duty imposed on them to report what they had witnessed in the shack. The fact that they did not report the incident not even to the police does not detract from their evidence as witnesses who had seen it happen.

[49] I now turn to the evidence of the appellant and of the witnesses who testified in support of his case. It is quite clear that, apart from denying all the allegations of the offence against him, the appellant had another defence. That defence was an alibi, in other words, he was not at house number […] Dumashi Street, Daveyton, when and where the complainant was robbed. According to his evidence, during the material time in which the robbery on the complainant would have been committed, he was at a church gathering until he came back home at 07h00 the following day. His alibi evidence was supported by Milton and Nombula.

[50] The court *a quo* rejected, on grounds that it pointed out, the appellant's alibi. It rejected that alibi on the grounds that Milton and the appellant differed materially with regard to

the venue where the event of 7 August 2011 was held and the nature of the event that they attended. Each one of them testified about a different event that was held on the evening of 7 August 2011 until the following day. The appellant testified that he attended a night vigil at a church at Extension 3 whereas Milton himself was adamant that it was a cleansing ceremony, and not a night prayer, that he attended at a house of a certain member of church at Extension 3. Two people who attend the same event at the same place are unlikely to describe it wrongly and to say that it was held at two different places.

[51] The court *a quo* was also not prepared to rely on the evidence of Nombula which tended to support the appellant's alibi. While she had not accompanied the appellant to where he testified he had gone, she told the court that the appellant had attended a night vigil at a school, which contradicted not only the appellant's version but also Milton's version. Overall Nombula was not a good witness. Her evidence did not tally at all with the evidence of the other defence witness, including the complainant's evidence.

[52] The court quite correctly remarked that a possibility existed that the appellant might have gone to where Milton was, shown his face and thereafter returned. There are other problems though with the appellant's evidence. According to his evidence, he was with Sibusiso Similane the whole night at a church prayer. He does not mention other people who were present, for instance, Milton. It is difficult to imagine how he could have missed Milton at the ceremony that they both attended and this is despite the fact that Milton himself told the court that he was with the appellant at the ceremony that he attended. Quite conveniently he mentioned Sibusiso and thereafter told the court that he was not available to testify on his behalf. No reasons have been furnished why he was not able to see Milton at the event.

[53] During his testimony, even before he was asked, Milton told the court that on 7 August 2011 he was with the appellant. This response shows quite clearly that he had been coached what to say. Milton himself did not mention Simelane. Surely if he saw the appellant at the ceremony then he should have seen Simelane who was at all material times with the appellant. Finally, they could not have seen each other because they were at different places where they each attended different events. Milton himself prevaricated with regard to the nature of the event he attended that evening. Initially he testified that the event he attended was a prayer service. Later he changed and told the court that it was a cleansing ceremony. In his evidence-in-chief he testified that the event they both attended with the appellant was held at a church. Later under cross-examination they did not have a church.

[54] In his heads of argument Mr. Kgagara had referred to the authority of **R (and not S) v Hlongwane 1959(3) SA 337 A** and stated that the legal position with regards to an alibi was that there is no onus on the accused to establish it and if it might be reasonably possibly true he must be acquitted. This was indeed the test that the said authority set out. But in the same matter the Court had this to say about an alibi at pages 340 B to 341 A:

"But it is important to point out that in applying this test, the alibi does not have to be considered in isolation … The correct approach is to consider the alibi in the light of the totality of the evidence in this case, and the court's impression of the witnesses." Again on this point the words of the court in S v Van der Meyden supra in paragraph 38 become even more important.

[55] Upon a consideration of the whole of the evidence, the court *a quo* concluded that the appellant's evidence regarding his alibi was not reasonably possibly true. It found, still upon a consideration of the entire evidence, that the evidence of Mfecane and Ngabisa convincingly established that the appellant was part of the group of people that included accused 3 and accused 4 that on 7 August 2011 robbed the complainant.

[56] The following evidence is relevant to the second question, that is, whether the appellant was a party to a common purpose to rob the complainant:

56.1 the appellant came together with accused 2 and accused 3 to the shack;

56.2 it is clear from the following circumstances that what was about to happen had been planned. On their arrival the appellant chased Mfecane and Ngabisa and told them that they had something to do. Clearly he did not want them to witness what they were about to do;

56.3 it is equally clear that a knife and firearm were intended to be used in the commission of the robbery. It is highly unlikely that the appellant did not know that his companions were armed. Certainly that they were armed.

56.4 the evidence indicates that while accused 2 and accused 3 robbed the complainant, the appellant stood in the alcove of the door or in the doorway;

56.5 the appellant did not assist the complainant to fight off accused 2 and 3. He did nothing to disassociate himself from the actions of accused 2 and 3;

56.6 even after the robbery he was seen fleeing with accused 2 and 3.

The conclusion is therefore inevitable that the appellant was a party to a common purpose to rob the complainant. All this evidence, in my view, satisfied the requirements of guilt to be proved on the basis of common purpose as set out in **S v Mgedezi and Others 1989(1) SA 687(A) at 688B-E**:

"In the absence of proof of a prior agreement, an accused who was not shown to have contributed causally to the killing or wounding of the victims……can be held liable for those events on the basis of the decision of S v Safatsa and Others 1988 (1) SA 868(A) only if certain prerequisites are satisfied. In the first place, he must have been present at the scene where the offence was being committed. Secondly, he must have been aware of the assault on the victims. Thirdly, he must have intended making 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, 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.

Inherent in the concept of imputing to an accused the act of another on the basis of common purpose is the indispensable notion of an acting in concert. From the point of the accused, the common purpose must be one that he shares consciously with the other person. A 'common' purpose which is merely coincidentally and independently the same in the case of the perpetrator of the deed and the accused is not sufficient to render the latter for act of the former."

The principle set out above applies in equal measures in the case, like the instant one, where robbery of whatever class, is applicable. The court *a quo* was, in my view, correct in its finding that the State had proved beyond reasonable doubt that the appellant had committed the offence he has been charged with.

APPEAL AGAINST SENTENCE

[57] The appellant has also noted an appeal against sentence imposed on him by the court *a quo*. This is clear from the application for leave to appeal in which he has set out his grounds of appeal against the sentence as follows:

"10 years convicted, however I feel that I was wrongfully arrested and convicted. On this particular day I attended a night vigil church service and I only returned the next morning to my uncle's house. None of the said stolen goods was found in or on my possession. No fingerprint of mine was found at the place of robbery and no firearm was found in my possession. I do feel that I was wrongfully arrested and sentenced."

Quite frankly no grounds of appeal against the sentence have been set out in the afore going paragraph. That, however, does not exempt this appeal tribunal from enquiring into the appropriateness of the sentence. This appeal tribunal is still under an obligation to carefully scrutinize the judgment of the court *a quo* on sentence and to carefully consider the correctness of its conclusions or reasoning.

[58] Firstly, in his heads of argument, Mr. Kgagara had pointed out that the charge in the court *a quo* did not indicate that the State would rely on s 51(2) of the Criminal Law Amendment Act 10 of 1997. This is incorrect because in the court a quo the appellant was charged with:

"Robbery with aggravating circumstances as he tendered in section 1 of Act 51 of 1977.

That the accused is/are guilty of the crime of robbery with aggravating circumstances (read with the provisions of section 51(2)(a) of the Criminal Law Amendment Act of 1997) and further with section 1 of Act 51 of 1977 (CPA).

It is therefore clear from the charge sheet that served before the court *a quo* that the State had given ample indication to the appellant that it would rely on the provisions of s 51(2) of Act 105 1997. In **S v Mthembu 2012(1) SACR 517 SCA at page 523 paragraph 15** the court stated that:

"At present an accused person is warned at the time of the charge or the indictment that section 51 of Act 105 of 1997 will be applicable in the event of a conviction. A reference to the Act in the charge forewarns the accused not just that he or she is on the risk for the minimum sentence ordained by the legislature unless substantial and compelling circumstances are found to exist, but also that the sentencing jurisdiction of the regional court (should that be the forum) has been enhanced to give practical efficacy to the legislature. At the commencement of the trial therefore an accused person can hardly be under any illusion as the risk that he or she faces. Thus, the warning to an accused person where the minimum sentence applies is far more comprehensive than would be the case if it does not apply."

[59] In **S v Malgas 2001(1) SACR 469 (SCA)** the court concluded that:

"This court can of course only interfere with the sentence imposed by the trial court where it is vitiated by a material misdirection, or where the disparity between the sentence of a trial court and the sentence which the appellate court would have imposed, have it been the trial court, is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate". See Malgas at paragraph 478 E-H. In the above matter the court set out the circumstances that must exist before an appeal court can interfere with the sentence imposed by the trial court. Absent such circumstances an appeal court is not justified to interfere with the sentence imposed by the trial court.

[60] In assessing the sentence it contemplated imposing on the appellant, the court *a quo* considered the personal circumstances of the appellant as placed before it in Exhibit 'A' and as contained in a pre-sentencing report that had been prepared for it and for that purpose. It took into account the fact that the complainant had suffered no injuries

despite having been kicked in the chest by accused 3 and the fact that the complainant's cell phone was recovered. It considered the fact that the amount of R110.00 was not recovered and that it was not a lot of money. It considered the seriousness of the offence the appellant had been convicted of. On the seriousness of the offence, the court *a quo* took into account the fact that the crime that the appellant had been charged with and convicted of was rife in its area. The court in **R v Mapumulo and Others, 1920 AD 56 at page 57** had the following to say:

"The infliction of punishment is pre-eminently a matter for the discretion of the trial court. It can better appreciate the atmosphere of the case and can better estimate the circumstances of the locality and the need for a heavy or light sentence than an appellate tribunal and we should be slow to interfere with its discretion."

Accordingly, in assessing the appropriate sentence to be imposed on the appellant the court *a quo* was entitled to take into account the prevalence of the offence in its area of jurisdiction as enjoined by the authority **of R v Mapumulo and Another supra**. The purpose of taking into account the prevalence of a certain offence in its area was accordingly to determine the purpose for which the sentence should be imposed. That purpose is to discourage like-minded offenders from committing a similar offence.

[61] The court *a quo* also took into account that such offences are committed by people of the appellant's age group.

[62] It analysed all the relevant factors necessary in the determination of an appropriate sentence, paying very careful attention to the personal circumstances of the appellant even at the expense of the interests of the society and the seriousness of the offence, weighed all the factors and distilled from such factors what it considered to be an appropriate sentence. It concluded that there were substantial and compelling

circumstances. Once it found the existence of such circumstances it decided to deviate from imposing the ordained sentence.

[63] In his heads of argument Mr. Mashile, on whose behalf Mr. Luyters appeared at the hearing of this appeal, had referred this court to the case of **S v Chowe 2010(1) SACR 141 GNP**, in which the court *a quo* had found substantial and compelling circumstances. The appellant was 26 years of age; the value of the cell phone that the appellant had robbed the complainant of was R600.00 and the complainant in that matter was unharmed. The appeal court found substantial and compelling circumstances. The sentence of 15 years imprisonment that had been imposed on the appellant by the court *a quo* was on appeal set aside and in its place was substituted with a sentence of 10 years imprisonment.

[64] In the circumstances I am satisfied that the trial court took into account all the relevant factors in its determination of an appropriate sentence and furthermore that in the process it imposed a just and appropriate sentence on the appellant. The sentence so imposed, considering the facts before the court, was neither harsh nor shocking, nor disproportionate to the offence of which the appellant had been convicted. I have found no misdirection committed by the court *a quo* in the assessment of the conviction of the appellant nor in the sentence imposed.

[65] Accordingly I propose the following order:

1. That the appeal against both the conviction and sentence be dismissed;

2. That the conviction of the appellant by the court *a quo* and the subsequent sentence imposed on him be confirmed.

_____

P.M. MABUSE
JUDGE OF THE HIGH COURT

I agree and it is so ordered

_____

C.P.RABIE
JUDGE OF THE HIGH COURT

LEGODI J; (DISSENTING)

[66] I have had the opportunity of reading the judgment by my bother Mabuse J, and unfortunately I am unable to agree that the trial court correctly found that the guilty of the appellant (accused 1) was proved beyond reasonable doubt through the evidence of the two witnesses called by the court.

[67] The appellant Mr Bongani Sibeko will be referred to in the proceedings as accused 1 as he was the case in court *a quo*. He appeared in the Regional Court sitting in Benoni on one count of robbery with aggravating circumstances, the complainant being his uncle and they were staying together. He was charged together with two other accused persons, Mr Mtsolisis Buthelezi (accused 2) and Mr Abraham Nel (accused 3).

[68] The three of them were convicted as charged and sentenced to 10 years imprisonment, the trial court having found that there were compelling and substantial circumstances, justifying lesser sentence than the prescribed minimum sentence. The appeal is with the leave of the court *a quo*.

[69] The trial court in convicting accused, inter alia, expressed itself as follows:

"I find that I can rely on the evidence presented to court by the state in order to come to a finding. Accused, expected, or wanted the court to believe that he has got alibi… As far as accused's alibi is concerned, I find that there are so many contradictions between himself and these alibis and witnesses that I cannot find it to be reasonably possibly true."

[70] In a nutshell, the evidence presented by the state was to this effect: On the evening of 7 August 2011 complainant was robbed of his cellular phone and money at his place of residence in Daveyton. His evidence regarding the reliability of his evidence on identity was rejected by the trial court and in my view, correctly so. He was also found not to be a credible witness for not implicating accused 1. There were four people who robbed him including accused 2 and 3 the other two could not be recognised.

[71] In convicting accused 1 and his co-accused the trial court relied heavily on the evidence of the two witnesses called by it, namely Mr Lesuku Mfecane. ("Mfecane") and or Mpho Ngabisa (Ngabisa) who testified after the three accused had testified, but before two witnesses called by accused 1 had testified.

[72] Mfecane and Ngabisa were together with the complainant and accused 1 at the latter's home that evening. Accused 1, later that evening left for church or a night vigil. Mfecane, and Ngabisa remained behind with the complainant. They were busy smoking, apparently dagga or some form of substance and also watching movies. Later that evening after the accused 1 had left the complainant went to sleep in the same room but, separated apparently by a curtain.

[73] What had happened thereafter became the subject of a dispute before the court, accused 1 having indicated that he was at church or a prayer meeting the whole night until the following day. On the other hand, Mfelane and Ngabisa suggested that accused

1 returned that evening together with two other persons and that the three of them assaulted the complainant and robbed him. The trial court accepted their evidence and found the accused 1 guilty as charged It is this finding that I am having difficulties with and the rejection of accused1's evidence as having been shown to be false beyond reasonable doubt, in particular that he was at church.

[74] Mabuse J in his judgment also moved from the premise that an identity was an issue as the trial court did and that the trial court correctly found that accused 1 was placed at the scene of the crime and that he shared common purpose in the commission of the offence against his uncle. I do not think that an identity was an issue regarding accused 1 seen in the light of the fact the court's witnesses and accused 1 knew each other very well. The real issue was whether the witnesses did not falsely implicate accused 1.

[75] Firstly, Mfecane and Ngabisa's evidence should have been approached with caution. In the course of cross-examination, Mfecane's evidence unfolded as follows:

"Now, you will agree that, before the accused were arrested, yourself and Mpho were the first people that the police had apprehended or in fact, questioned? --- Yes, they did question us.

It is not that you went to the Police. The police came to you? --- Yes.

Similarly, the evidence of Ngabisa was even much revealing at it in cross-examination it *inter alia*, unfolded:

"You know that the complainant was being robbed, ---Yes---yes."

You knew exactly who robbed him---Yes.

But you did nothing around it?---Yes.

You did nothing about it? You did not tell anybody. You did not get the police. You did absolutely nothing, until the police came to you. They put you, they put you in a van?---I was not in the van. I was in the vehicle.

Sorry, I apologise, in the police vehicle? --- Yes.

And then you made a statement, saying that: I know the people who robbed him? --- Before we made a statement, the police did assault the three accused. Then the police thought that we were involved in this incident. They put Lesuku in a separate room. I was put in the other room". (My emphasis).

[76] What else one was to expect from Mfecane and Ngabisa. They were the first people to be arrested. That alone would have put them on the defensive, and unfortunately a lead was given to them at whom to point finger to. Accused 1, 2 and 3 were there and were being assaulted and thereafter Mbelane and Ngabisa were questioned. Any suggestion that they had no motive to implicate accused 1 or any of accused for that matter, on my view, flew in the face of what was before the trial court.

[77] Another important consideration, which in my view, the trial court overlooked was their unwillingness to come to the rescue of the complainant if one was to go by their version. As quoted above, absolutely nothing was done to help the complainant. They told no one what had happened to the complainant and made no efforts to notify the police. Mfecane indicated that he was staying about 10 meters, 15 metres from the complainant's place and he used to go to the complainant's home. His evidence under cross-examination by prosecutor unfolded:

"You said the uncle was screaming, was he, what was said, did he say anything that you could tell us about, or he was just shouting?--- He was crying, like someone was screaming, [indistinct].

Did you not go to find out what was happening with the uncle? --- As he had chased us away, we had no interest of returning to find out what was happening."

[78] Then the defence attorney took it further:

"---Mr Mbelane, the way I understand it, the complainant in his matter, you in fact, might not be friends, but you will spend time together, you will smoke together?--- Yes. He was not our friend, but we used to go to his place or residence and smoke there."

"… So, it is not someone that, if something has happened to him, be it that he is mugged, he is robbed, in your presence you would help him. You will not turn you back and walk away, obviously not? --- We could not help them, because he chased us away.

Who had chased you? --- The chased us away, He said there is something that he wanted to do and to [indistinct]. (My emphasis).

… Fair enough, you were outside. The fact of the matter is, you heard him screaming, as if someone was throttling him. You were there, you heard it? --- Yes. That happened.

And obviously, you heard what was going on. You were just smoking with him a few minutes ago. But you continued to go home? --- Because we were not scared (sic), as these guys had chased us away. I said to my other friend that it is best we go home."

[79] Mfecane was clearly in trouble with the questioning and started being evasive and contradictory. Who had chased him away? Was it the complainant? If not why they did not help him? But of course it could not have been the complainant because on Ngabisa's version, the complainant had gone to sleep when the other people arrived and when Mfecane and Ngabisa left.

[80] Clearly if they were as innocent as they alleged, they would have come or should have come to the assistance of the complainant. They did not act in accordance with human

experience. You spent the night with someone, you have together been smoking whatever they were smoking, you used to visit and smoke with that person and when that person was in trouble you become indifferent to his plight. Instead of going to the police or scream for help for him, you decide to go and look for another smoke.

[81] In my view, the trial court considered its witnesses' evidence in isolation and did not evaluate their evidence with other evidence placed before it. For example, it should have been difficult to reject the evidence of the complainant's sister that the two witnesses called by the court were part of the people who had robbed the complainant or at least her evidence should have left some doubt in the case against accused 1.

[82] Dealing with credibility, in my view, the trial court did not consider other aspects of the evidence of Mfecane and Ngabisa. Their evidence in chief as led by the court left much to be desired. Mbfecane's evidence in chief unfolded as follows:

"We were inside Bongani's shack. As we were in the shack, whilst working he made us to watch movies. We were in the company of his uncle. Bongani was working. He needs to come and left there. He came back in the company of his other friends and then he asked that we should give him space and that we should leave. That is when leaving, at the gate, we heard his uncle screaming and the friends ran-away".

[83] This evidence in my view, was materially in contrast to the version of Ngabisa which in chief led by the court emerged as follows and I quote at the risk of prolonging this judgment:

"We were smoking and we were seated. What made us to leave, Your Worship, is that accused 1 came with his friends and they robbed his uncle. That is what made us leave.

Were you present when the robbery took place? --- I was present when part thereof was in the process, not the rest of it, Your Worship.

Can you tell us then, what you know? --- We were seated watching movies, smoking. Accused 1 said he is going to church. There is a night vigil. Then he left us with his uncle. We were still watching. Then, he said, when we were about to leave, we should close the door and that is when he left us with his uncle. He came back. That was the first time and he still found us there. Then, he asked us as to when we will be done. We said we will be done any time soon. Then, he went out again. He said he is going back to the night vigil. Around 11, he came back with two of his friends. They sat down. Then the third one said he asked a smoke from me. As they were, as he was smoking, the [indistinct] stood up. It is a two roomed house, it has been partitioned. The uncle stays on the other side and there is no light. The uncle was already asleep and he left us, because we were watching movies and he said he was going to sleep. Bongani stood by the door and the other two and then these other two grabbed the uncle and I heard the voice of one then saying: "Where is the money?" The other one, the other one, had already left. I was busy picking up some of my stuff. Then we left them, once (whilst?) they were still wrestling with him. They reside in, along the same [indistinct], we stood by the gate and as I heard the door, a door that was being slammed or banged. Then they came out running. They went, or rather, into Mabasa and, then that is how it ended up. From there, I went to, I went home and the police came in the morning."

[84] The contradictions are obvious. These are very material contradictions, which in my view, should have watered down the credibility of the court's witnesses. I cannot agree that the contradictions were not material. For example, Mfecane said nothing about accused 1 having stood and watched at the door whilst the other two people were robbing the complainant. This is very material non-corroborative evidence which one would have been expected to be corroborated by Mfecane if it did happen as testified by Ngabisa. The principle of common purpose could not have been invoked on the facts of the case.

[85] The evidence about the participation of accused 1 in the commission of the offence was as quoted above. The difficulty with this evidence was of a single witness. A single witness who in my view could not have been a neutral, seen in the light of how the police dealt with accused 1, 2 and 3 in the presence of the witnesses. The police arrested the two witnesses. In their presence questioned and assaulted accused 1, 2 and 3 and only thereafter were the court's witnesses questioned.

[86] It was almost like: ''*If you do not talk this is what will happen to you*". The credibility of these witnesses was in my view, at stake right at the outset. If they are such reliable witnesses who had seen the commission of the offences, as they testified, why did the prosecution elect not to call them as state witnesses? The state first closed its case and later applied for the reopening, but still elected no to call them. Instead, he called the arresting police officer, whose evidence was on the report made to him. Still the prosecution elected not to call any of the alleged eye witnesses. This gives the impression that the prosecution knew that it could not rely on their evidence.

[87] For Ngabisa to say that accused 1 left for church, and then came back and enquired as to when the court's witness were going to leave and then thereafter left again and later returned with accused 2 and 3, in my view, without the corroboration of Mfecane should have been found fatal to any reliance on their evidence. What made Ngabisa to see what he said he saw and Mfecane did not see? Was it because it never happened or was it because they were under the influence of whatever they were smoking?

[88] Ngabisa said accused 1 when he returned for the last time with accused 2 and 3, sat down and accused 3 then asked for a smoke. As accused 3 was smoking, he stood up. That Mfecane must have seen if it happened. Accused 1 stood by the door and accused 2 and 3 robbed the complainant and either accused 2 or 3 then said to the complainant "*Where is the money?*" These are details which Mfecane would not have missed if

accused 1 returned twice to the house that evening. To suggest that, the fact that their evidence did not tally, was a reflection of their honesty and credibility, in my view, goes far beyond acceptable differences in their evidence.

[89] Alleged evidence of standing at the door by accused 1, sitting down together with accused 2 and 3, asking for the smoke and grabbing the complainant by accused 2 and 3 were so material that Mfecane should have volunteered for the information without been asked. The fact that Mfecane left room, the evidence did not suggest that, that was before accused 1 allegedly stood at the door and before the three accused sat down when accused 3 allegedly asked for a smoke. In fact according to Mfecane what happened was that accused 1 '*came back in the company of his other friends',* and then he asked that, they *'should give him space'* and they *'should leave'*. They then left and at the gate, they heard 'the uncle screaming and the friends ran away'.

[90] So, on Mfecane's evidence, he left the room together with Ngabisa, except to say he was not consistent with this version. Therefore if what Ngabisa said had happened, did happen, Mfecane should have seen. The suggestion that Mfecane left first and that he could not have seen everything ought to be seen in context. The context is that most of the critical things would have happened in his presence if they were to be believed.

[91] I am also not satisfied that the trial court correctly rejected accused 1's evidence and that of his witnesses as being proved to be false beyond reasonable doubt. For example, in its judgment the trial court stated:

"I find that I can rely on the evidence presented to court by the state, in order to come to a finding. Accused 1 expected, or wants the court to believe that he has got an alibi. It called two witnesses to corroborate that. It is however, a problem that Mr Milton Sibeko testified that he saw accused at this night vigil.

The accused before court, accused 1, does not indicate the same locality, as to where this vigil would have taken place. Accused 1 stated it was at the church at Extension 3. Initially, Mr Milton also referred to a church in Extension 3, but eventually ended up saying that, in fact, it was in the tent at this Emily person's family's house. Both cannot be true". (My emphasis).

[92] This finding is also echoed by Mabuse J in his judgment to which as I said, I am unable to agree. I can do no better than quoting the relevant portion of accused 1's evidence. But before that, it is important to state how Mabuse J deals with the issue in his judgment:

"[50] The court a quo rejected, on grounds that it pointed out, the appellant's alibi. It rejected that alibi on the grounds that Milton and the appellant differed materially with regard to the venue where the event of 7 August 2011 was held and the nature of the event that they attended. Each one of them testified about a different event that was held on the evening of 7 August 2011 until the following day. The appellant testified that he attended a night vigil at a church at Extension 3 whereas Milton himself was adamant that it was a cleansing ceremony, and not a night prayer, that he attended at a house of a certain member of church at Extension 3. Two people who attend the same event at the same place are unlikely to describe it wrongly and to say that it was held at two different places."

[93] Whether a terminology is given to the church event as "*night vigil*", "*cleansing ceremony*" or *"night prayer*", in my view, is not material and I do not think that the evidence suggested that the '*event was held at two different places*'. Of relevance, accused 1's evidence was as follows:

"Where were you going? --- I was going to church.

Where is this church that you are attending? --- It was at Extension 3.

Was there anyone in specific that you can recall that you spent time with or can confirm that you were at the church gathering that evening? --- Yes. There is someone, this guy, he used to stay at Daveyton. Due to the passing away of his family he lives now and moved, he relocated to Tsakane.

He was present that evening. He spent the entire night there with you up until the gathering had ended?--- Yes.

What time did you, did this gathering end…it was seven in the morning that it ended or started? --- The gathering started around 11 and ended around six o'clock in the morning". (My emphasis).

[94] Then in cross-examination, of relevance, his evidence proceeded:

"Sir, what church ceremony were you attending that evening? --- It was a night prayer.

An overnight prayer? --- That is an all night prayer,

All night prayer and the pastor was there? It is correct?—Yes." (My emphasis).

[95] This evidence must be seen in the context of the remarks Mabuse J makes in paragraph 53 of his judgment:

"[53] During his testimony, even before he was asked, Milton told the court that on 7 August 2011 he was with the appellant. This response shows quite clearly that he had been couched what to say. Milton himself did not mention Simelane. Surely if he saw the appellant at the ceremony then he should have seen Simelane who was at all material times with the appellant. Finally, they could not have seen each other because they were at different places where they each attended different events. Milton himself prevaricated with regard to the nature of the event he attended that evening. Initially he testified that the event he attended was a prayer service. Later he changed and told the

court that it was a cleansing ceremony. In this evidence- in –chief he testified that the event they both attended with the appellant was held at a church. Later under cross-examination they did not have a church." (My emphasis).

[96] "*…They could not have seen each other because they were at different places, where they each attended different events…,*" with respect, cannot be correct. Clearly, that there was a church gathering was not in dispute. The evidence of accused 1 quoted earlier lays emphasis on a '*church gathering*'. Nowhere did he mention that the gathering was inside a church building. '*Church gathering*', does not have to be inside a church building in order to qualify as a "*church gathering*". Members of a particular church who come together and pray can in my view, constitute a "*church gathering*". Reference to the "*night prayer*", "*night vigil*" or "*cleansing ceremony*", without details from the user of the words cannot be concluded to constitute a contradiction, particularly used in a language that is not one's mother tongue.

[97] Both accused 1 and his witness Mr Milton Sibeko indicated that the event was at Extension 3. Accused 1 was never asked exactly where in Extension 3 was the event, neither was he asked what was the nature of the "*church gathering*". Details only emerged during the evidence of his witness and in my view, Mr Hilton Sibeko was a good witness.

[98] Perhaps examination and evaluation of his evidence is important. On the evening in question he attended a church service. His evidence in chief unfolded *inter alia,* as follows:

"… Now, so obviously, you know the reason why you are here Mr Sibeko, accused 1 is charged with a certain robbery. The incident, according, it would have happened on the 7th August last year, August? --- Now, before the Lord, I was with this boy in church. You're Worship, on the 7th August 2011, in Extension 3". (My emphasis).

[99] I see no contradiction about the area where the ceremony was held. "*In church*", must be seen in the context of what is stated later hereunder. It suffices to mention that '*in church*', cannot be confined to its literal meaning, say, of being inside a church building. In any event, the witness's evidence was later clarified and I am unable to see any contradiction.

[100] His evidence furthermore proceeded in chief as follows:

"Is it said time that this thing, this ritual, or wherefore you go there. Was like a specific prayer or just a normal routine prayer? --- In fact, Your Worship, this was specifically a ceremony, or a ritual, Your Worship, after a certain lady had passed on. So, this was a cleansing, one of the cleansing ceremony". (My emphasis).

[101] It is important, to note that until the defence counsel came with words like *"this ritual*", *"this thing*" *"specific prayer*" or just *"a normal routine prayer*", the witness had only referred to the event of having been at a church or gathering *"for prayer purpose*". So, the mentioning of several words like, it was "*specifically for a ceremony*" or "*a ritual*" and *"a cleansing, one of the cleansing ceremony*", should be seen in context, also bearing in mind that an interpreter was used during the witness's evidence. To see usage of these various words, as a contradiction in my view, would not be justified.

[102] Again his evidence further in chief, proceeded:

"And, lastly, Mr Sibeko, tell me, at who, was this held in the church or where was this ceremony held? --- Okay, the church was being used by, the church building was being used at the time, your worship. Other people had, I think they hired the church building. So, we got a tent and we conducted the ceremony at the residence, Your Worship, or that the particular family."

[103] The trial court saw this as a contradiction, the witness contradicting himself and accused 1. Mabuse J also seems to agree in this regard with the trial court's finding. I do not. I see this as a clarification. It was a clarification which appears to confirm my sentiments earlier. In all probabilities, if accused 1 was asked the same question the answer would have been the same as clarified by Mr Milton Sibeko. That is, being at church or going to church does not necessarily mean inside a church building. You can attend church or prayer meeting anywhere, whether being inside tent and at another person's home, as was the case here. For this, accused 1 in his evidence as quoted above, never mentioned that he was at a church inside a church building. '*I was with this boy in church*' as indicated by Mr Milton Sibeko, in my view, was satisfactory clarified. The evidence as clarified by the witness that there was a tent erected at this particular home and "*I was with this boy in church*", should have been understood in proper context and not as a contradiction.

[104] Similarly, I do not think the evidence of Mrs Sibeko should have been rejected as completely unreliable. She must have been the one who led to the arrest of the two court's witnesses, if not the complainant or accused 1. As I said earlier, the conduct of the two witnesses in being indifferent to what had happened or was happening to the complainant on their own version , did not portray them as innocent people, otherwise, they would have come to the assistance of the complainant.

[105] There is another factor which concerns me. The complainant is an uncle to accused 1. The court's witnesses were well known to him although they were not friends. The three of them were staying in the same vicinity. On Ngabisa's version, accused 1 returned with accused 2 and 3, sat down and then accused 1 stood up and moved to the doorway almost like blocking the way out or watching who was coming whilst at the same time accused 2 and 3 were robbing and assaulting his uncle. That does not make sense. Why would accused 1 do that to his uncle? But, most importantly, why would accused 1

participate in the robbery of his uncle in full view of the two people who knew him so well? If accused 1 was there and wanted to rob or have his uncle robbed, he could have done so after he had ensured that the two court's witnesses had gone. But according to Ngabisa, the robbery started whilst he was still inside the house and accused 1 stood at the doorway.

[106] The trial court did not have to accept accused 1's version in order to have found him not guilty. Even if the trial court had rejected accused 1's version, it still had to be satisfied that the guilt of accused 1 was proved beyond reasonable doubt. Reliance on the evidence of the court's witnesses for proof of the guilt of accused 1 beyond reasonable, in my view, was not in line with the evidence presented.

[107] Had it not have been for my finding above, I would have difficulties in finding that the trial court erred in finding that there were compelling and substantial circumstances justifying a lesser sentence than the prescribed minimum sentence of 15 years imprisonment. Having found that there were compelling and substantial circumstances justifying a lesser sentence, the trial court in the exercise of its discretion imposed a sentence of ten years imprisonment. I am unable to find any misdirection in this regard.

[108] Consequently I would make an order as follows:

108.1 The appeal of the appellant (accused 1) on both conviction and sentence is hereby upheld.

108.2 The conviction and sentence are hereby set aside and substituted as follows:

"Accused 1 is hereby found not guilty and discharged."

M F LEGODI

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Appellant:	*Adv. F van As*
Instructed by:	*Pretoria Justice Centre (Legal Aid Board)*
Counsel for the Respondent:	*Adv. PCB Luyt*
Instructed by:	*Director of Public Prosecutions*
Date Heard:	*29 April 2016*
Date of Judgment:	*June 2016*