**IN THE HIGH COURT OF SOUTH AFRICA**

**(GAUTENG DIVISION. PRETORIA)**

CASE NO: A632/2015

DATE: 24/6/16

*Reportable: Yes*

*Of interest to other judges: Yes*

*Revised.*

IN THE MATTER BETWEEN:

ZACHARIA MASIAN PHETLA 1st APPELLANT

SIPHO MOEPYE 2nd APPELLANT

and

THE STATE RESPONDENT

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**JUDGMENT**

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**LEGODI J;**

**HEARD ON: 29 APRIL 2016**

**JUDGMENT HANDED DOWN ON: 24 June 2016**

[1] It is generally accepted that evidence of identification based upon witness' recollections of person's appearance is dangerously unreliable unless approached with due caution.[1] The average witness's ability to recognise faces is poor, although few

[1] S v Pretorius and Another 1991 (2) SACR 601 (A); S v Zitha 1993 (1) SACR 718 (A).

people are prepared to admit that they have made a mistake. On a question of identification, the confidence and sincerity of the witness is not enough.[2]

[2] The often patent honesty, sincerity and confidence of an identifying witness remain, however, a snare to a judicial officer who does not constantly remind himself of the necessity of disputing any danger of error in such evidence.[3] The witness should be asked by what features, marks or indications they identify the person whom they claim to recognise. Questions relating to height, build, complexion, what clothing he was wearing and so on should be put. A bald statement that the accused is the person who committed the crime is not enough. Such a statement unexplained, untested and un-investigated, leaves the door wide open for possibilities of mistake.[4]

[3] This appeal is about the identity of a person or persons who committed robbery with aggravating circumstances against Ms R D on 20 November 2002 at or near Groblersdal as well as murder, robbery with aggravating circumstances and other related charges, all committed on 28 November 2002 at a Standard Bank branch near Atok mine, district Sekhukhune, Limpopo Province.

[4] The appeal is against both conviction and sentence of life imprisonment on the murder charge, 15 years imprisonment on each of the two robbery charges with aggravating circumstances and 3 years on the unlawful possession of firearms and ammunitions both taken as one for the purpose of sentence.

[5] In the court a quo, there were five accused persons and all of them were convicted and sentenced as indicated above on the robbery charges and the murder charge committed on 28 November 2002. Accused 3 who is the appellant 1 in these proceedings was also convicted together with accused 4 on the robbery charge committed on 20 November 2002 and were sentenced as indicated above.

[6] However, in this appeal, there are only two appellants. Appellant 2 was accused 5 in the court a *quo.* The leave to appeal against their convictions and sentences was

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[2] South African Law of Evidence, 2nd edition by DT Zeffort and Praizer at 152 & 153.
[3] S v Miggel 2007 (1) SA 675 (C) at 678 E citing S v Mlati 1984 (4) SA 629 (A) at 632 H-I.
[4] R v Shekelede 1953 (1) SA 636 (T) at 638.

granted by Van Der Merwe DJP and Ledwaba J on 26 November 2012 and 29 October 2014 to appellants 1 and 2, respectively. For the purpose of this judgment, both appellants will be referred to as accused 3 and 5 respectively, as it was the case in the court a *quo.*

Events of 20 November 2002

[7] The events of 20 November 2002 formed the basis of count 6 in the court a quo and only the accused 3 and 4 were convicted and sentenced to 15 years imprisonment as indicated above, the trial court having found that there were no compelling and substantial circumstances justifying a departure from the minimum sentence of 15 years imprisonment prescribed in terms of the provisions of the Criminal Law Amendment Act 105 of 1997.

[8] The victim in count 6 was Ms R D (the complainant). She was the owner of Bevra Fruit Shop in Groblersdal, which was in the same premises where her home was situated. On Wednesday 20 November 2002, at about 07h00 and on her way to open the shop, she was accosted by three unknown male persons who approached from the corner of the house. They grabbed and forced her to switch off the alarm and then instructed her to go back into the house. They took the keys from her, opened the house and then proceeded straight to the bedroom. She was forced onto the floor and tied her up with wires. They then opened the safe, took the firearms from the safe including the hunting rifles, jewellery, a pistol and other belongings. They then exited the house, but left the hunting rifles behind. On the 28 November 2002, the complainants' pistol was recovered by the police at Jane Furse inside a motor vehicle registered in the names of accused 1, where accused 4 and 5 were arrested. On 14 January 2003 the complainant pointed out accused 3 and 4 at an identification parade held at Groblersdal Police station. Photo album concerning the identification parade was handed in by consent during trial. However, no evidence was led regarding the safety and reliability of the identification parade. On 5 April 2005 the complainant took the witness stand in the court a *quo* and testified about the events of 20 November 2002. She pointed out accused 3 and 4 in the dock as two of the three male persons who accosted her on 20 November 2002.

[9] The trial court in evaluating the complainants' evidence started off by expressing itself as follows:

> *"I was particularly impressed by the evidence of Ms D and the three ladies, Johanna Selema, Johanna Maselelane and Sina Molope. Also the police officers impressed me as honourable members of the South African Police Services.*
> *I keep in mind that regarding identification some of the witnesses are single witnesses. but I am satisfied that they ware reliable witnesses in all material respects.* (My emphasis).

[10] Then the trial court turned to deal with the evidence of accused 3 as follows:

> *"I considered the evidence of accused 3. His evidence-in-chief was that when he was stopped or when he was arrested or approached by the police, he told them that he knew nothing about the incident and he requested them to take him to church where they could confirm that he was at the church.*
> *This was the whole crux at his whole defence. Strangely enough, this crux of his defence was never put to these witnesses.*
> *Similarly his version as to how the police stopped them when they were arrested was never put to the witnesses, to the police witness. He failed to answer many questions put to him. I am satisfied the accused 3 version is not reasonably possibly true.*

[11] The court a quo then concluded its finding against accused 3 as follows:

> *"There remains to be considered count 6. This count was only sought against accused 3 and 4. The count is one of housebreaking with intent to rob and robbery. I am not satisfied that the evidence disclosed that in fact they had the intention to break into the house. In my view, the intention was clear to rob the complainant, Ms D of her possessions."*

[12] Having said this, the accused 3 was then convicted as charged regarding count 6. I have serious difficulties with the court a *quo's* findings. Firstly, the finding of guilt is not motivated. What is quoted above is all what the trial court said relevant to count 6. A

court has a duty to assess and evaluate the congency of the evidence of identification.[5] Many of the criteria for assessing what weight is to be attached to evidence of identification are to be found in a number of cases.[6] The trustworthiness of the witness's observation, recollection and narration of, are all three factors relevant to the assessment of evidence of identification and are affected by various factors.[7] *'Because of fallibility of human observation, evidence of identification is approached by the court with* some *caution. It is not enough for the identifying witness to be honest. The reliability of his observation must also be tested. This depends on various factors such* as *lighting, visibility and eyesight, the proximity of the witness, his opportunity for observation, both* as *to time and situation. the extent of his prior knowledge of the accused and mobility of the scene. Corroboration of the suggestibility, the accused's face, voice, build, gait and dress, the result of the identification parade, if any, and of course. the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them* as *are applicable in* a *particular* case, *are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence and the probabilities."[8]* (My emphasis).

[13] The questions which should be asked to establish reliability on the evidence of identifying witnesses are set out in paragraph 2 of this judgment. In my view, the trial court did not deal with factors to be considered. The evidence of the complainant was concluded and accepted without probing into the reliability of her evidence on the identity of her assailants. The attempt to impute blame on accused 3 for not eliciting information on the reliability of her evidence, in my view, is misplaced. It was not accused 3's duty to establish relevant factors for reliable identification of the people who robbed the complainant. The prosecution had the duty to lead the complainant and elicit relevant factors to establish reliable identification. Its failure to do so, did not shift that duty to either accused 3 or 4.

Identification at home

[14] I now turn to deal with the evidence of the complainant as a whole starting with the

[5] R v Mputing 1960 (1) SA 785 (T) , see also S v Mehlape 1963 (2) SA 29 (A).
[6] S v Zitha 1993 (1) SACR 718 (A).
[7] See South African Law of Evidence, supra page 155.

events of 20 November 2002 at her home, how she was accosted and the alleged identification of accused 3 and 4. Her evidence in chief was captured in paragraph 8 of this judgment. As could be seen from the evidence, no details were given. For example, from which side of her did the three unknown persons approach? How far were the assailants from her when she saw them for the first time? Did she see all of them at the same time when they approached? What did she do or how did she react when the assailants were advancing towards her? How did they move with her back into the house? Was she walking in front of them or were they walking side by side? The questions are not exhaustive, but all would have been relevant in establishing the reliability of her evidence on identity.

[15] Her evidence in chief paraphrased in paragraph 8 above, unfolded in Afrikaans as follows:

> *"Ek was oppad na my winkel toe om te gaan oopsluit van die huis af, toe het daar drie mans vanuit 'n hoekie uitgekom en my so gegryp en my gedwing om die alarm af te sit."*

[16] This must have been a frightening encounter. A woman, alone at home, confronted by unknown persons with firearms displayed must have been a traumatic experience. One wonders how the opportunity to observe faces could have prevailed in those circumstances. But even more frightening was this:

> *"Het u enige iets in besit van hierdie mans gesien? - Hulle het vuurwapens gehad <u>wat hulle op my geriq het</u>."* (My emphasis).

[17] What did she do when that happened? Put differently, how did she react and how did she feel? Did she stare at the three assailants and the firearms pointed at her? On which of her side was each one of them? I think it would be safe to conclude that she could not in those circumstances have been able to identify any of her assailants by their faces. The trial court stayed off to deal with all of these.

[8] S v Mthetwa 1972 (3) SA 766 (A) at 768, per Holmes JA.

[18] Two things had happened before she actually got back into the house. She stated:

> *"Ek het die alarm afgesit en toe het hulle my terug gedwing na die huis toe."*
> *That is: "I switched the alarm off then they forced me into the house."*
> (My own translation).

[19] One wonders what would have gone through her mind now that she had been taken away from the possible view of other people. But, as if that was not enough, the security (the alarm) she had in the house to draw the attention of other people was deactivated, to ensure that she did not have the opportunity to alert other people bearing in mind that she was alone at home. As to what happened when inside the house, her evidence was as follows:

> *"Waama hulle my na my kamer toe gegaan het waar die kluis* was, *hulle het my op die vloer gedwing en met draadhangers vasgemaak, die kluis oopgesluit."*

[20] This is also paraphrased in English in paragraph 8 of above. The question around this statement could have been: How was she forced onto the floor? In what position was she on the floor? Who forced her on the ground? Who of the three people tied her up with wires? From what position or positions was she forced onto the ground and tied up with wires? How was she tied up with wires? How long did the process take place and in which direction or whom or what was she looking at when she was so tied up with wires?

[21] Of relevance, her evidence in chief concluded as follows:

> *"Hulle het die vuurwapens wat in die kluis was uitgehaal, asook die geld en <u>in die kamer rondgesnuffel vir ander besittings en uit geneem. (My emphasis)</u>.*

My translation in English: *"They took out the firearms from the safe, as well as money and ransacked the room for other possessions and took them."*

[22] Throughout the complainant's evidence, she was not specific as to who did what and in what position she was in relation to each of the three assailants or whether she

was looking at each one of them and for how long. There is another worrying factor which needed more clarity. She was taken back into the house. She was forced onto the floor, apparently in her bed room and she was then tied up. They took money *"en het in die kamer rondgesnuffel vir ander besittings ...*"

[23] If that was so, one would have expected the whole house to be ransacked and not just only her room. So, one would have expected most of the time the assailants spent inside the house was during the ransacking. The fact that she was accosted at 07h00 and that the assailants, left the house at about 07h30, must be seen in this context. Her evidence was not that she observed her assailants for 30 minutes that is from 07h00 to 07h30. Her evidence was elicited in cross examination by one of the defence attorneys as follows:

> ***"Mr Phahlane:** Can you tell us how long this incident took place when you were robbed?... Ek het sewe uur oopgesluit en dit was omtrent half agt min of meer, ek kan nie vir jou presies sê nie.*
> ***HOF:** Omtrent 'n half uur?* ... *Omtrent 'n half uur, ja."*

[24] The point is this: As part of the cautionary rule applicable to a single witness and identification being an issue, it was incumbent on the state to lead and investigate the complainants' evidence that accused 3 and 4 were the assailants and only then would it have been incumbent on the defence to test such evidence. Failure to do so left the door wide open for probabilities of mistake. (See, **Shekelele** quoted in paragraph 2 of this judgment). Furthermore, in cross-examination by Mr Phahlane the complainant's evidence proceeded:

> ***"Mr Phahlane:** You say you managed to identify the accused because of his face, not so? - His whole face, I see his whole face, his eyes, his nose, his mouth, everything.*
> *Yes, what about his eyes, his mouth, his face - It looks the same as it looks now.*
> *Madam, it is my client's instructions that he is not one of the people who robbed you on that day in question, any comment? - He is."*

[25] At the risk of repetition: 'A bald statement that the accused is the person who

committed the crime is not enough. Such a statement unexplained, untested and un-investigated, leaves the door wide open for probabilities of mistake." (See Shekelele in paragraph 2 of this judgment). This is exactly what had happened in the present case. Whilst one might say, it will usually be the task of the defence such a duty will only arise if sufficient evidence had been adduced for reliance on the evidence of identification. In the present case, that duty did not arise.

[26] Proper and reliable observation is found. The distinctiveness of the person's appearances is a factor to be taken into account. The court will be able to survey whether the accused has peculiar features, but some people look distinctive to one witness and not another. Thus to a person of one race, everyone belonging to another race, tends to look alike...[9] Assuming that this statement holds true, the present case should then be found to be falling squarely under such a factor for consideration. The complainant, a white woman was accosted by three unknown black persons as it would appear from the particulars of their names. If that was so, her evidence should have been approached with caution something which the trial court in my view, failed to do. I am therefore not satisfied that the evidence of the identity of the complainant's assailants at her home was sufficient to be relied upon.

Identification parade

[27] An identifying witness should be asked to give detailed description of the alleged criminal at the earliest possible moment. In the present case, no evidence was placed before the court a quo that, when the complainant made a statement to the police, she which was probably on 20 November 2002 or soon thereafter, she was asked to give detailed description of her assailants.. The rationale is obvious. One, to state facts describing a perpetrator while things are still fresh in the witness's mind, is more reliable. Two, a description assists the police in the investigation of cases and tracing the culprit. Lastly, to ensure that when identification parade is arranged, the line up consists of people bearing more or less similar description. Such a line-up strengthens the reliability of a subsequent identification at a parade, if any. This information was lacking in the present case as it would appear from the record of the proceedings.

[9] See the South African Law of Evidence supra at 155

[28] Furthermore, regarding the identification parade, if there is a delay in giving the description of the culprit, the identifying witness is likely to forget, but may also have an opportunity to compare notes with other witnesses, which would diminished the value of his or her evidence.[10] For the same reasons, an identification parade should be held as soon as possible. Two things are worth mentioning. Firstly, the police officers who were involved in conducting the parade did not give evidence. It was placed on record that they could not be traced. Whilst the trial court should have satisfied itself that all efforts were taken to trace the witnesses, that did not happen. To have someone to collect witnesses from one point to the other before appearing in the line-up room or place is important because it ensures that no suggestions are made to a witness or witnesses either by the investigating officer or any police official and / or by other witnesses. This could be a police official who had fetched a witness from his or her home or a police official who took the witness from the witness room before appearing in the line-up room. The evidence of such police officials is intended to exclude tip off or suggestion as to whom to point out at the parade, even avoiding the witness having an opportunity to see the suspect or his or her picture before appearing at the line up room. The fact that in the present case, the complainant indicated that nothing untoward had happened before she was called to the line-up is not a guarantee that nothing had happened. The result is that the value of her evidence regarding subsequent pointing out at the parade was diminished. The trial court did not address itself on this issue at all.

[29] The identification parade was held on 4 January 2003. Almost two months after the arrest of accused 3 and other accused persons. No explanation was offered why the parade was only held on 4 January 2003 despite the fact that the complainant's firearm was recovered on 28 November 2002 in Jane Fence not far from Groblersdal. No evidence was led to exclude any suggestive evidence was made to the complainant between 28 November 2002 to 4 January 2003 when the identification parade was held.

[30] The procedure for the conduct of the parade is largely a matter of police practice.[11] But judges have laid down rules which should be observed if the accused is not to be

[10] R v Y and Another 1959 (2) SA 116 (W).
[11] See Christopher Williams Identification Parade (1955) Criminal Law Review 525; dealing with the practice in England.

prejudiced and the parade is to have maximum probative value. Whilst a breach of the rules is not *ipso facto* fatal and under our constitutional regime, the court must consider whether the accused's right to a fair trial has been violated, as envisaged in section 35 of the Constitution. Schreiner SA put it this way:

> *"An identification parade, though it ought to be* a *most important aid in the administration of justice, may become* a *grave source of danger if it created* impression which is false *as* to the capability of *a* witness to identify the accused." [12]

[31] In the present case the only people who could have testified on the complainant's capability to identify accused 3 at the identification parade would have been the police official who were involved in conducting the identification parade. The fact that a photo album of the line up at the parade and the pointing out of accused 3 was handed in by agreement, without more evidence, does not, for two reasons, have probative value: First, the photo album showing the complainant putting her hand on accused 3's shoulder, does not equate to the admission that the identification parade was properly conducted and that all safe guards have been adhered to. It must be understood to mean that accused 3 did not dispute the fact that the complainant pointed him out at the identification parade, nothing more and nothing less. Therefore, the prosecution was still obligated to lead evidence on the safe guards. Lastly, the trial court neglected or omitted to deal with factors, if any, relevant to the proper conduct of the identification parade. For the pointing out at the identification parade to be of material value, it was necessary to lead evidence satisfying the safe guard requirements. Therefore any attempt to suggest that accused 3 did not challenge the correctness of the identification parade, cannot be correct.

[32] Accused 3 and any other accused implicated by the complainant based on the result of the identification parade had the right to cross-examine and test the evidence of all those who participated in the identification parade. The fact that the police witnesses were not available, should not have been used to accused 3's disadvantage, as to do so would have rendered the trial unfair.

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[12] R v Kola 1949 (1) PH H100 (A); Sv Mlate 1984 (4) SA 629 (A) at 634 H-1.

[33] Scott JA dealing with the safe guards of an identification parade, put it this way:

> *appears from the identification form which was used on this occasion, it is a matter of police practice that the non-suspects be 'of about the same height, build, age and appearance' as the suspect and that they be similarly dressed. Where the parade included several suspects whose general appearance is markedly different, whether on account of height, build, and age or otherwise, care should be taken to ensure that there are sufficient non-suspects whose general appearance approximates that of each suspect. In such circumstances it may be advisable to hold more than one parade, particularly if the number of non-suspects that would be required would result in the parade being unduly large and cumbersome. If the number of non-suspects whose general appearance approximates that of each suspect s two few, or if there are other features of the parade which may be materially to influence an identifying witness, the probative value of the identification will generally be greatly reduced. The danger in such a case is of course, that, because the identification is made at a parade, it carries with it an assurance of reliability which is unjustified. "*[13]

[34] The difficulty in the present matter is that it falls short of what was articulated by Scott JA as quoted above. First, the complainant's evidence as to the identification parade was very scant and of relevance, it unfolded as follows:

> *'Mevrou, u het 'n uitkenningsparade bygewoon op 14 Januarie 2003, is dit korrek --- Dit is reg.*
> *En dit was Groblersdal Polisie Stasie is dit korrek?—Dit is reg.*
> *Goed. Kan u onthou deur wie u na die parade self geneem is?- Dit was deur 'n polisie person.*
> *Goed. Nou wat hat gebeur by die parade, as u net vir die hof kan sê wat gebeur het? - Ek hat in die kamer in gegaan waar die persona gestaan het en daar was 'n fotograaf en hulle hat vir my gevra om te kyk of ek die persone harken wat my geroof hat. Toe moes ek aan hulle raak met my hand op hulle skouer en dat*

[13] S v Mohlathe 2000(2) SACR 530 (SCA) at 541 A-D.

*hulle 'n foto daarvan neem en ek hat twee person uitgeken."*

[35] What is clear from the answers is that there was one parade held and both accused 3 and 4 were pointed out at that one parade. What is lacking, however, is whether it was not necessary to hold separate identification parades and if so the basis for opting to have one parade where there were two or more suspects. It is also not clear as to how many non-suspects were at the parade. Furthermore, the complainant was not led as to the appearance of the persons on the parade, whether they were similar to accused 3 and 4's appearances, height, build, complexion, age etc. These short comings in my view, was compounded by the fact that the trial court in its judgment elected or neglected to evaluate the evidence of identification. All that it said was quoted in paragraph 34 above. The result of all this is that, the probative value of the identification at the parade is diminished. Inow turn to deal with another aspect.

Dock identification

[36] In my view, accused 3 was hit with two dock identifications. The complainants' evidence in chief unfolded as follows and I do this at risk of unnecessarily prolonging the judgment:

> *"Goed , hoe het u die twee persona uitgeken? - Ek het my hand op hulle skouers gesit, op die persona.*
> *U sê u het twee mans uitgeken? - Twee mans*
> *Is dit korrek? -Ja.*

[37] Now instead of inquiring whether the two men were in court, the complainant was led as follows:

> *"Ek wil u verwys op hierdie stadium na bewysstuk G, eerstens foto no 4. Bewysstuk G is 'n fotoalbum van die ID parade wat u bygewoon het op 4 Januarie 2003, as u net eerstens kan kyk na foto nommer 4, u staan in die foto, is dit korrek, en u hand is op die skouer van 'n sekere man,is dit korrek? - Dit is reg.*
> *Die man staan met 'n bord met nommer 8 op, is dit korrek? -Dit is reg.*

*Was dit een van die mans persona wie u uitgeken hat by die ID parade? - Dit is reg,ja.*
*Foto nommer 5, dit is 'n foto van die betrokke person met die nommer 8 wie u uitegeken hat, is dit korrek? -- Dit is reg.*
*Nou foto 6, u staan in daardie foto, en u hand is op die skouer van 'n ander man, is dit korrek? -Dit is reg ja.*
*Daardie man staan met 'n bard met die nommer 13, is dit korrek? - Dit is reg. Is dit die tweede man wat u uitgewys hat by die ID parade?.- Dit is reg.*
*Foto nommer 7 is 'n naby foto van die tweede verdagte wat u uitgeken hat, is dit korrek? - Dit is reg."*

[38] I think this line of leading was deliberate. Deliberate in that it was intended to prepare the complainant to be able to answer the question that followed bearing in mind that there were five accused persons in the dock. It was almost like preparing the complainant for an easy sailing to deal with the question in waiting. I say so, because the leading of the complainant by the prosecutor proceeded as follows:

*"Goed, Sien u die twee mans wat uitgeken het hier by die hof vandag? -Ja.*
*Goed, wie is hulle? - Dit is beskuldigde 3 en 4.*
*Hierdie twee beskuldigdes wat u uitgeken hat, was hulle in besit van vuurwapens gewees?-- Ja"*

[39] It must be concluded that the identification of the accused 3 and 4 in the dock on 5 April 2004, many months after the commission of the offences, did not mean that she had sufficient opportunity to reliably observe her assailants on 20 November 2002. She was deliberately led into pointing out accused 3 and 4 in the dock by first drawing her attention to accused 3 and 4's photos. That must have been found to have the rendered probative value of the dock identification in the present case more meaningless.

[40] The quotation in paragraph 37 brings another dimension to the reliability of the identification parade. Why should people on the line up of the identification parade be tagged? I say, tagged because both accused 3 and 4 carried boards marked 8 and 13 respectively. This must have left the door wide open for suggestions to be made to the complainant before she pitched up at the line-up. In the absence of the police's

assurance that no such suggestions were made to the complainant, the identification parade should have been found to be tainted. In so much as the police might have wanted to indicate the position number of each person on the line-up, that could easily have been done by counting from left to right or right to left and then state whether accused 3 and 4 were on positions 8 and 13, respectively. But in the presented case, photos were taken as the complainant was doing the pointing out, so, the pictures would have spoken for themselves in what positions were the people pointed out at the identification parade.

[41] Lastly, the court a *quo* had the benefit of the photo album and it could have dealt with the safe guards regarding the line-up, in particular, the appearance, complexion, height and build of the people on the parade. That did not happen as it appears from its judgment. This presents a difficulty to this court, because we did not have sight of the photo album, apparently the exhibits have since gone missing. That being so I have a difficulty in gauging the reliability of the line-up. Accused 3 should have been given the benefit of doubt on count 6. I must be worried whether accused 4 should not have been given the benefit of doubt as well. The trial court did not deal with the evidence implicating accused 4 differently from accused 3. Insofar as the trial court might have relied on the finding of the complainant's firearm in close proximity to where accused 4 was arrested, to find corroboration of identification, the principle of recent possession has to find application first to the facts of the present case. Whether or not it does, taking into account the lapse of time between 20 and 28 November 2002, is not for this court to decide. The difficulty I have however is that there is no indication that leave to appeal was granted or refused. For this, I would propose that counsel for accused 3 should endeavour to assist accused 4 in establishing whether leave to appeal was refused and if not to assist accused 4 to apply for leave to appeal.

Possession of firearm and ammunitions

[42] All five accused were convicted on counts 4 and 5. Before us it is only accused 3 and 5. The trial court in its judgment found as follows:

> *"Counts 4 and 5 are the illegal possession of firearms and ammunition. I am not sure whom of them was in possession of the firearms. It is clear that several*

*firearms were in their possession. It is unnecessary to find who was exactly in possession of the firearms. On the principle of common purpose they all had the intention of possessing the firearms.*

*Consequently I am satisfied that the state has proved its case beyond reasonable doubt on counts 4 and 5."*

[43] I have serious difficulties with this finding. First, the court made the finding without evaluating the evidence, more so that in the charge sheet three firearms to wit, automatic pistol C 41173 a 9mm, 2 semi-automatic firearms, pistol serial 9985 and a 357 magnum Astra revolver were alleged to have been found in possession of all the accused on 28 November 2003. One of these firearms was found at Hweleshaneng Village after it was allegedly dropped by accused 2 and the other two firearms were found in Jane Furse where accused 4 and 5 were arrested, one of which (pistol serial 9985) belonged to the complainant in count 6 and formed the subject of the robbery charge committed on 20 November 2002.

[44] Whilst the trial court found the existence of common purpose for possession, the common purpose was not alleged in the charge sheet. Starting with the accused 3, he was neither arrested at the scene nor at the place where the firearms were found. From Atok, that is where the murder offence was committed on 28 November 2002 to Jane Furse where the other two firearms were found is, according to Inspector Motlwa about 130 kilometres. In the charge sheet the offence of unlawful possession is said to have taken place at Atok on 28 November 2002. Of course this cannot be correct as according to the evidence, two of the firearms could not be linked to the commission of the offences at Atok.

[45] Accused 3 was not identified as one of the assailants at the Standard Bank Atok Branch. Three women who sought to implicate accused 2 said nothing about accused 3. Similarly, when the other two firearms were found in Jane Furse, other than to say accused 3 allegedly led the police thereto, no element of possession by whomever in Jane Furse can be imputed on accused 3 based on the principle of common purpose. For common purpose to apply, the accused 3 ought to have been connected to the commission of the offences at Atok on 28 November 2002 and *I* or his connection to the area and or vehicle where the two firearms were found in Jane Furse. He should have

been given the benefit and the trial court in my view, erred in finding that *"the state has proved its case beyond* a *reasonable doubt on counts 4 and 5."*

[46] Concerning accused 5 with regards to counts 4 and 5, the evidence of the police officials who were involved when accused 5 was arrested ought to be seen in context. Firstly, accused 5 did not deny that he was arrested where the grey BMW was found. He had gone to the home to ask for blessings from the pastor staying in that home. When he arrived there he was told that the pastor had gone to church and he waited for him. The home was not his, neither was the BMW vehicle which he found there when he arrived and he did not know who the owner was. He was outside seated on the chair which was offered to him before the police arrived. He was approached by Inspector Machete who arrested him. He had never been inside that vehicle. In fact, it was soon after he had arrived there that the police came and arrested him. No credible evidence was tendered to refute his version.

[47] As indicated in paragraph 42 of this judgment, the trial court did not indicate the basis on which it rejected accused 5's version. Two things can be inferred from his version. That is, he could not have been inside the grey BMW and therefore the firearm found inside the vehicle could not be linked to him. Secondly, the firearm which was found in another old vehicle within the yard, could not have been placed therein by him or with his knowledge neither could accused 5 have possessed it in common purpose with whoever was responsible for placing the firearm therein because he knew no one there.

[48] I must immediately say, I am unable to find that accused's 5 version was not reasonably possibly true. Insofar, as the trial court appears to have had issues with the reasons for accused 5 to be at Jane Furse one needs to alleviate those concerns raised by the trial court. Accused 5's version was briefly as follows: He was staying in Springs, Gauteng Province. He was running a business, a tavern in Springs. The business was not doing well. His neighbour was also running a tavern, although he did not explain where. He went to his neighbour to enquire what he was doing right for his tavern to operate successfully. The neighbour told him that he was helped by a pastor in Jane Furse, who did some rituals for the neighbour and as a result the neighbour's business was successful. The neighbour gave him the direction to this Pastor's home. It was

common cause during the trial that such a person by the name of Letlapeng existed and it did not appear to be in dispute that the home in question did belong to Letlapeng who was apparently a well-known Pastor.

[49] The trial court and the prosecutor did not seem to appreciate the importance of accused S's version regarding Pastor Letlapeng. For example, the prosecutor spent a lot of time questioning the accused 5 as to why he did not just go to any pastor around Springs area. Similarly the trial court expressed the same sentiment, in particular in regard to what sort of help the pastor could have been to accused 5 in enhancing his business. In the cause of cross-examination by the prosecution, the trial court intervened and asked the following questions:

> *“Court: I am not sure, what sort of help or ass stance would this pastor have been able to give you? -If you can check most people attending this church are rich.*
> *No, no I am just asking you, please answer my question. I am warning you it is in your best interest to answer questions, I am telling you now if you do not answer the questions the prosecutor when he address me, will say you were not prepared to answer the questions. So it is in your interest, answer the questions? -I understand.*
> *Now I have a problem with your evidence that you now went to this pastor to assist or to help you. What sort of assistance was he going to give you?- I would have gone to him, I would have spoken to him, the pastor in question, explaining my problem and he would have told me what to do thereafter."*

[50] At the risk of prolonging the judgment, after the prosecutor concluded his cross-examination of accused 5, the court a *quo* took over again and asked questions as follows:

> *"Court: I still have problems and I do not understand what sort of assistance were you going to seek from the pastor. What did your neighbour tell you, what assistance did he get?- Well, my neighbour told me that he went to that pastor, the pastor gave him sort of muti that he used on his premises, on himself, that is on his body. Those were specifically coffees, fish oil, milk, there is a mixture and*

*he prayed for those things before he gave it to him and those are the things that he used on his premises as well as on his body. And he has got to drink some of those things to vomit for people to like you.*

*So this pastor, was he a "towenaar?" -No, this person is a ZCC member and he uses those things that I have just mentioned.*

*Yes.- He further said that this pastor would assist me in stopping smoking because I was a heavy smoker and that damaged my body.*

*But now he is a man from the church, why did he give you muti, to do what? To drive the devils out or what?-- Well, as I said those are the things that the pastor gives you as I said, he prays for those to chase away the devil.*

*But any pastor can pray for you, why go to this one?- Yes, as I said I first went to different traditional doctors, I was tired of going to them.*

*You never told me about that. - They did not assist me in any way and that man's business was prospering. That is why I went to him, to ask for advice and he referred me to this specific pastor.*

*Are you saying that you previously went to others to assist? - Yes, as I said during questioning by the state advocate I told him that I was tired of going to traditional doctors because I used to pay a lot of money, 3000, 4000, and I would not have spent much with this pastor because I were to buy coffee, milk and fish oil, salt, gruff salt.*

*To do what? - That is the mixture that he was supposed to use. And then? -He would pray for that and give it to me to use.*

*And then you use this mixture and then what does it do? It makes you wealthy?- Yes, it will make me stop smoking, it means I will be healthy and my business will also prosper.*

*Now how does this make your business prosper, that is what I do not understand? Your big problem was going there to get your business back on track, how does this mixture get your business on track?- Yes, I did not see the pastor after that stage, those things that I have mentioned are things explained to me by someone that is the person who referred me to the pastor, that those are things that the pastor uses but, maybe, maybe he would have added something else or other things to those when I explain my problem to him, the business problem.·*

[51] If you come from a different background, cultural belief and religion, one is likely to make the same mistake as the trial court and the prosecution in dealing with accused 5. Coming from the background that may not vastly be different from that of accused 5, I see nothing strange in his version.

[52] I think accused 5 tried as far as he could to educate the prosecutor and the trial court about his own belief and the reason to go to Jane Furse to consult with pastor Letlapeng. For example, in cross-examination by the prosecutor, the information *inter alia,* was elicited as follows:

> *"Tell* me, *what made you decide to go to Jane Furse* -- *Yes, I have already explained that the reason why I went to Jane Furse it is because of the explanation given to by my neighbour as to why he succeeded in his business. I was tired of paying traditionally doctors money, my business did not succeed. I was trusting God, that is why I went to pastor.*
> *There was no pastor you could go to in Gauteng or the Springs area?- <u>If you need help you go anywhere, if somebody comes to you and tell you that you can get help in Mozambique, never mind the distance, you go there for</u>* <u>a</u> *<u>distance.”</u>* <u>(My emphasis).</u>

[53] I find nothing wrong with what accused 5 said. Accused 5's version was therefore in my view, wrongly found not to be reasonably possibly true. As I said, it was not suggested that the home where accused 5 arrested did not belong to pastor Letlapeng.

[54] Insofar as the trial court might have found accused 5 to have been in possession of the two firearms within the area where accused 5 was arrested, evidence presented ought to be seen in context, accepting for a moment state's version in some respects. Three police officials testified about what had happened when they arrived at the home of Letlapeng in Jane Furse. The impression the police officials wanted to give was that accused 5 ran away or attempted to run, upon arrival of the police. If that was so, it would mean that the accused 5 was running away due to the firearm in the grey BMW or because he was involved in the commission of the offences at Standard Bank in Atok. But this suggestion must be seen in context.

[55] The context was this: In his evidence in chief, Inspector Motlwa indicated: "As we arrived at that scene or at that homestead, some police officials gave chase to those people who ran away but I did not see those people."

[56] This version appears to coincide with accused S's version when he said:

> "... *I stood up, looked around, saw people running around and I saw these many people also entering these premises, there were many vehicles outside ..."*

[57] Inspector Motlwa was the one who found the firearms in Jane Furse. Now, the next question is, why did people run away from the premises? Who and how many were 'those people' who were being chased by the police officials. But of importance is the fact that it was not Inspector Mothwa's evidence that accused 5 was one of those people who were chased by the police.

[58] Inspector Matloga, however, gave a different version as to what happened when they arrived at the place where they found the grey BMW. He was in the same vehicle as Inspector Motlwa. They were about 30 meters from the premises when they saw a grey BMW parked on the premises. He then said:

> *"And I* saw *two people leaning or standing against that vehicle at that stage- Before* we *climbed out of our vehicles, I* saw *the people that I have mentioned at the vehicle* were *starting to run away."*

[59] He then said those people were accused 4 and 5. Clearly his evidence brought accused 4 and 5 closer to the vehicle. That coupled with the alleged running away by accused 5, made him suspect and responsible for anything found inside the vehicle, in particular the firearm. His alleged running would have meant that he must have been aware of the firearm in the vehicle and *I* or a suspect to the Atok offences. Matloga's version did not tally with that of Inspector Mothlwa, but most importantly it did not tally with the version of inspector Machete who actually arrested accused 5. lnpector Machate's evidence unfolded as follows:

> *"Upon our arrival* as *I was about to open the gate, I saw two people standing up,*

*the people in question* were *earlier seated outside next to this vehicle."*

[60] This version is in direct contrast with that of Inspector Motlhwa and Matloga. No leaning or standing against the vehicle was mentioned by Inspector Machete. Furthermore, there is no mention of running away by the accused 5 as it was suggested by Matloga. Therefore, any suggestion accused 5 did not conduct himself like an innocent person should be seen in context and no adverse inference could have been made against him. The rejection of his denial of any knowledge of the firearms should be found to have been wrong. He should have been given the benefit of doubt with regards to both counts 4 and 5.

[61] Just before I conclude on counts 3 and 4, I am somehow worried by the convictions of accused 3 on both counts 4 and 5. I might be repeating myself in this regards and perhaps it is necessary to do so as an attempt to clarify my concerns. Accused 3 was not placed at the scene by any direct evidence. He was not seen at the Atok scene of crime where the murder offence was committed nor at Hweleshaneng Village where the firearm allegedly dropped by accused 2 was found. Hweleshaneng Village is a distance away from Atok. The only evidence that was presented during trial which was common cause was that accused 3 was arrested at Lebowakgomo in a vehicle which was allegedly seen at the scene or a distance away from the scene.

[62] No firearm was found in his possession or inside the vehicle in which he was a passenger. Whilst the police suggested that he led them to the place where accused 4 and 5 were arrested and two firearms found at on the premises, no evidence justifying the imputation of common purpose principle regarding possession of such firearms. He too should have been given the benefit of doubt. This then brings me to another consideration regarding other charges.

Evidence on counts 2 and 3

[63] Count 1 was the murder charge and count 2 was the robbery with aggravating circumstances. The allegations having been that on 28 November 2003 accused 3 and 5 together with three other accused persons by force took a Mazda vehicle DWM 479 W from the deceased in count 1after the deceased was fatally shot. Starting with the

robbery charge, count 2, none of the accused persons could ever have been found guilty of robbery of the motor vehicle aforesaid. What was committed with regard to the motor vehicle was theft and not robbery. The proven facts were these: The deceased who was the bank manager, parked the aforesaid car and then moved towards the main entrance of the bank. The first door was opened for her and as she approached the second door, she was accosted by an unknown person, who was said to have been accused 4. Accused 4 demanded the safe keys and when she indicated that she did not have them, she was then shot and killed. The assailant entered the back and tried to access the safe but with no success. Thereafter the deceased vehicle was taken. Very clear, the intention was to rob the bank. When the vehicle was taken, no force or threat was used. Therefore, the taking of the deceased's motor vehicle was clearly theft and not robbery with aggravating circumstances.

[64] Identity became an issue throughout the trial. For the purpose of these proceedings, the issue is whether the trial court was correct in finding that the identity of the accused 3 and 5 was proved beyond reasonable doubt and ***I*** or whether whoever committed the offence at Atok did so with common purpose with accused 3 and ***I*** or 5 regarding counts 1 and 2. I have earlier on in this judgment dealt with the principle applicable to the question of identification and I do not find it necessary to repeat myself.

[65] As I said, the trial court in convicting accused 3 and 5 did not deal specifically with the evidence putting each of the accused at the scene or bringing each of the accused within the principle of common purpose. Briefly, the requirements for principle of common purpose as articulated in S v **Mgedezi** are:[14]

- The accused must have been present at the scene where violence was being committed;
- The accused must have been aware of the assault or commission of the offence against somebody;
- The accused must have intended to make common cause with the person or persons committing the offence;

[14] 1989 (1) SA 687 (A) at 705 I- 706 C.

- The accused must have manifested his sharing of a common purpose by himself performing some act of association with the conduct of others; and
- The accused must have intended to commit the offence.

I am of the view that the trial court erred in finding that the facts of the present case met the requirements aforesaid to have found accused 3 and 5, guilty on charges 1 and 2, based on common purpose.

[66] The only evidence implicating accused 3, or seeking to place him at the scene of the crime at the Bank in Atok, was that he was a passenger inside the vehicle allegedly seen at the scene of crime. The assumption must have been, because the motor vehicle in question appeared suspicious at the scene of the crime, that is, because it dropped off near the bank the people who ultimately robbed the bank, he must have been one of those people or he must have had common purpose with them. I am making this assumption unassisted by the finding of the trial court as it did not specifically deal with the state's evidence. It moved from this premises as articulated in its judgment:

> *"On accepting the evidence or the state's version the question then arises on what does the evidence prove against the accused? I have already indicated there were six charges preferred against the accused. The first count was that of murder. In my view, I should indicate at this stage that in this matter the state relies on common purpose. Itis alleged by the state that the accused acted in furtherance of a common purpose in doing what they did. As far as the murder is concerned, although it is so that only one of the accused killed the deceased, on the principles of the common purpose all the accused are held liable if the court is satisfied that in fact they acted in common purpose. The evidence of the state which I have accepted indicates clearly in my view that all the accused acted with a common purpose. The common purpose as far as count 1is concerned were that they intended robbing the bank, that one or more of them armed themselves with firearms, that they knew if there was any resistance against their attack, they would kill and consequently the mere fact that only one killed, they are all liable for the deed of accused 4. The same goes for count 2, for the robbery. They*

*have a common purpose of robbing, whether they were in the bank or outside or in the car, they had a common purpose of all robbing the bank. According to the principles of common purpose they are all liable."*

[67] The trial court seems to have further moved from the premise that because it rejected the version of accused 3 as to why he was a passenger in the motor vehicle driven by accused 1, that in itself should be found to establish common purpose. This appears from its judgment wherein it stated:

*"I consider the evidence of accused 3. His evidence-in-chief was that when he was stopped or when he was arrested or approached by the police, he told them that he knew nothing about the incident and he requested them to take him to the church where they could confirm that he was at the church. This was the whole crux of his evidence. Strangely enough, the crux of his evidence was never put to these witnesses. Similarly his version* as *to how the police stopped them when they were arrested was never put to the witnesses, to the police witnesses. He failed to answer many questions put to him. I* am *satisfied that the accused's version is not reasonably possibly true."*

[68] The fact that accused 3's version was rejected did not mean that he had common purpose with those who had committed the crimes in counts 1 and 2. Assuming that accused 3 was inside the car when a firearm was allegedly dropped by accused 3 at Hweleshaneng Village, that did not mean that he was involved in the commission of the crimes or that he had common purpose with those who committed the crimes. So, even if accused 3 had lied about the fact that he got a lift from accused 1 at Pudingwane when he was allegedly from the ZCC church, that did not prove beyond reasonable doubt that he was at the scene of crime or that he had common purpose with the three who were dropped off at the scene or near the scene.

[69] It was the two security officers working at Atok mine next to Standard Bank who testified about what had happened before and when the deceased at the bank was killed. They were together at a distance of about 30 away meters from the bank. The deceased was killed by one of three people who were dropped off with a maroon BMW with a black top. Mr Matlou's evidence in chief *inter alia,* proceeded:

*"Where exactly where they dropped off in relation to the bank?- Far from the bank,* a *distance from the bank."* (My emphasis).

Now, the question is how do you impute the principle of common purpose on and connect the occupants of the vehicle which had dropped the assailants "far from the bank" to the commission of the of the offences at the bank 30 minutes later, as it will appear hereunder?

[70] The other worrying factor in Matlou's evidence was that he took down the maroon BMW's registration numbers. This was before the commission of the offences at the bank. Why would he have had an interest in the vehicle to the extent of taking registration numbers? I pose this question because at that time, there was no basis to suspect that an offence was going to be committed. Furthermore, Matlou was asked if he had seen the driver and if he could identify him. He answered in the affirmative and said it was accused 1. I do not have to deal with the reliability of his evidence regarding the identity of the accused 1. But it is worth noting that his evidence as it unfolded suggested that the shooting occurred about 30 minutes after the three men were dropped off. Accepting that this was so, as the trial court found, neither common purpose nor the only inference based on evaluation of the evidence as a whole could be deduced to impute liability or responsibility for the commission of the offences on accused 3. All that was proved against him was that he was a passenger in the accused 1's vehicle when the two were arrested several kilometres away from the scene of crime.

[71] His lies, if any, regarding his presence in the accused 1's vehicle did not prove anything. Put differently, it did not prove his participation in the commission of the offences. Counsel for the state ***I*** respondent did not ask for the dismissal of the appeal during oral argument, in my view, correctly so. Remember, the fact that an accused person lied, does not mean that he or she is guilty of the offence or offences charged. The court is not entitled to say that because he has been proved to be a liar, he is therefore likely to be a criminal.[15] It is possible that an innocent person may put up a

[15] Tumahole Bereng v The King (1949] A.C. 253 P.C.

false story because he thinks that the truth is unlikely to be sufficiently plausible.[16] The true fact is, you cannot apply the principle of common purpose in a vacuum. Some factors as articulated in paragraph 65 above have to be present before the principle can be invoked.

[72] In any event, I do not think that accused 3's version was correctly rejected, and that it was proved to be false beyond reasonable doubt. It was a version that remained to be on the balance and to have rejected it as false beyond reasonable doubt, in my view, was not based on proper evaluation of the evidence as a whole. He should therefore have been given the benefit of doubt with regards to counts 1 and 2.

[73] I now turn to deal with the evidence against accused 5. He was implicated by Mr Mohlala one of the security officers at Atok mine. In chief he stated that he saw three men seated under the tree near the corner of their offices, and did not know how they arrived there. Then, the prosecutor was allowed to put a leading question as follows:

> "Right. You say you saw them at that stage seated under a tree, is that near to Standard Bank?-- That is so."

[74] Then Mohlala, who sought to place accused 5 at the scene started to explain how one of the three men shot the deceased and a question was put to him as follows:

> *"When this man who was armed shot the deceased, what were the other two men doing?-- I last saw them still there at that spot that I have mentioned and* as *I said* as *the one was shooting this lady, I ran into the office."*

[75] Mohlala suggested that he had about twenty minutes, approximately, to observe the people who were seated underneath a tree before the deceased was shot. He then said the three men were accused 2, 4 and 5. Accused 5 was wearing a blue two-piece overall with an Eskom mark on the chest. He was seeing the three men for the first time. In cross-examination by counsel for accused 5 the evidence unfolded as follows;

[16] S v Rama 1966 (2) SA 395 (A).

*"You are sure that the man you identified* as *accused 5 had the clothes you explained, the two-piece Eskom overall? - That is* so. *Sir, my instructions* are *that accused 5 did not wear* a *two piece Eskom uniform on that day.*
*He was wearing it. He was wearing white bike trousers and* a *white shirt? -*
*That is* a *lie.*
*He will deny having been on any scene of crime -He was there."*

[76] One must question the reliability and creditability of Mohlala's evidence. First, he was with Matlou, but he did not see the three people been dropped-off a distance away from the bank as testified by Matlou. Secondly, what made him to observe these people for twenty minutes remained to be a mystery. There was a bank there, there was also an ATM machine there and one would have expected people to come there and wait for the bank to open. For example, Mr Niewoudt one of the state witnesses was at the bank, waiting for the bank to open when the bank manager (the deceased) arrived. He was actually at the bank and closer to the assailants, I want to believe. But, still he could only be able to identify one person, allegedly accused 5. Both Mohlala and Matlou did not see the deceased's vehicle been taken, questioning therefore their attention been directed at the bank.

[77] Mohlala was also not a creditworthy witness. In chief, he started by stating:

*"I saw three men on the morning in question; <u>one of the three was standing at, Standard Bank at the first ATM machine</u>, whilst the other two were standing at a distance from there, still on the premises of Standard Bank."* (My emphasis).

Then he was questioned:

*Did you see where these men came from? -- Yes.*
*Where did they come from? -- <u>They were seated under</u>* <u>a</u> *<u>tree near the comer of our offices</u>.* (My emphasis).

[78] Firstly, he did not directly answer the question which was very clear. When he was asked as to whether he saw where the people came from, he said "yes", but when he was further asked where they came from his answer was as quoted above. But most

importantly, his evidence differed with what he had said earlier on. That is, that the three men were standing when he saw them. His alleged identification of accused 5 is linked to the contradiction above.

[79] Mohlala's evidence with regard to the identification of accused 5 was scanty as was the case with other witnesses in the whole of the proceedings in the court a *quo.* He was not asked the details of what make a reliable identification.

For example, in chief his evidence proceeded:

> "And the other two men that you saw, who were they? - Number 5"

[80] He was then asked about accused 5's clothing and he said he had "a *blue two-piece Eskom mark on the chest."* The prosecution asked him nothing about the features of accused 5. In cross-examination by counsel for accused 4, the issue of identification was raised with regard to accused 4 and this unfolded:

> *"Besides his clothes, what else could you identify him on? -His face.*
> *What about his face? - His complexion.*
> *Your complexion, (inaudible), complexion, his complexion and accused 5's complexion same? - No."*

[81] So, Mohlala's only evidence on record was that he managed to identify accused 5 by his clothes and his face without the details. Accused 5's alleged clothes were never produced or spoken about during evidence of the many witnesses who testified, particularly that of the police, despite the fact that accused 5 was arrested on the same day and no identification parade was held. Therefore, his evidence putting accused 5 at the scene could never have been reliable. This brings me to other worrying factors in the prosecution case.

Worrying factors

[82] I deal with the worrying factors in . this case because successful prosecution is dictated by thorough, meticulous and successful investigation. Many cases are lost

during prosecution because the police acted on an impulse without being more concerned about collection of information meticulously, carefully and not in a rush. Proper presentation of evidence in court by the prosecution is also very important and it has to be meticulous as well. The deceased's motor vehicle was recovered on the same day about 21 km from the crime scene, as it would appear from the record. This was a very critical source of investigation from the police bearing in mind that the assailants at the scene of the crime escaped in the deceased's vehicle. Investigation of fingerprints and DNA evidence on the vehicle should have become priority in tracking down and linking those who had abandoned the deceased's vehicle. However, the prosecution contended itself with the admissions which was recorded as follows:

> "*--M' Lord, the crime scene 21 kilometres away from Standard Bank is the scene where the deceased's vehicle was recovered, that is point F according to photos 21 to 24. And-"*

[83] One can safely assume that the police did not collect the required information or evidence regarding possible fingerprints on the deceased's vehicle and other DNA evidence. Similarly, about 27 kilometres from the crime scene a firearm which was allegedly thrown away by accused 2 was found. How this firearm was handled at the scene to preserve evidence of fingerprints and or DNA was not disclosed. Again, one can assume that the police were shady in their investigation. Assuming that any of the accused alighted from the deceased's vehicle and entered into accused 1's vehicle further investigation could have been made: Foot and or shoe tracks and or tyre tracks, say, of the accused 1's vehicle could have been investigated and lifted to bring it closer to the deceased's abandoned vehicle.

[84] In Lebowakgomo accused 1 and 3 were arrested in a vehicle suspected to have been connected to the three men who were involved in the crime at Standard bank, Atok Mine branch. What efforts were made to ensure that evidence of possible fingerprints and or DNA was preserved, more so that more than two persons were involved? The court a *quo* heard nothing about this. Instead, it looks like the police were all over the place trying to trace other suspects by eliciting information from the arrested suspects including accused 1 and 3. For example, an allegation of assault was made by accused 3 although the allegation was summarily dismissed as it would appear from the

record of the proceedings. This of course raises another concern.

[85] The police proceeded to Jane Furse allegedly on the report which was made to them by accused 3. The report appeared to have amounted to either an admission or confession. Now, insofar as the trial court might have relied on this information, that would have constituted unfair trial because the admissibility thereof was not proved after accused 3 made allegations of force, threat or an assault on him. The trial court had a duty to investigate the allegations and decide whether to hold a trial within a trial to establish the admissibility of the admission and or pointing out. Therefore, any reliance on the information elicited from accused 3, if admitted and considered by the trial court, would have amounted to an unfair trial. The difficulty is that it is not clear from the trial court's judgment which evidence it relied on to find that the state had proved its case beyond reasonable doubt against accused 3 and 5.

[86] At Jane Furse two firearms were found. One of them belonged to the complainant in count 2. Inspector Motlwa in his evidence in chief stated:

> *"What happened to the two pistols?- A member of the fingerprint experts* was *summoned who then* came *to take photos of these firearms and also to take the firearms in question and sent them for ballistic tests."*

[87] Inspector Motlwa said this after he had indicated that he found the firearm 'underneath a passenger seat on the left hand side, on the left front side of the grey BMW found in Jane Furse'. He also indicated that, whilst searching the premises, he found another firearm in a cubbyhole of an unused vehicle. The answer given as included above is worrying. It gives the impression that despite fingerprint expert been called, he was called to take photos of the firearms and not lift possible fingerprints on the firearms. Perhaps that explains why there was no evidence regarding fingerprints on the firearms or thereof. If the investigation for fingerprints was done on the firearms, the result, negative or positive should have been disclosed. If accused 5 had anything to do with the motor vehicle in question, he could easily have been linked by investigation of his fingerprints on the vehicle and or the firearms. Another worrying question is why the occupants of the premises where the grey BMW vehicle and the two firearms were
BMW found in Jane Furse'. He also indicated that, whilst searching the premises, he

found another firearm in a cabby-hole of an unused vehicle. The answer given as included above is worrying. It gives the impression that despite fingerprint expert been called, he was called to take photos of the firearms and not lift possible fingerprints on the firearms. Perhaps that explains why there was no evidence regarding fingerprints on the firearms or thereof. If the investigation for fingerprints was done on the firearms, the result, negative or positive should have been disclosed. If the accused 5 had anything to do with the motor vehicle in question, he could easily have been linked by investigation of his finger prints on the vehicle and or the firearms. Another worrying fact is why the occupants of the premises where the grey BMW vehicle and the two firearms were not charged or made state witnesses? If made state witnesses, they could easily have refuted the evidence of the accused 5.

Conclusion

[88] In concluding, whilst the trial court relied on common purpose, of necessity in the circumstances of the present case concerning the accused 3 and 5, it also relied on circumstantial evidence. The fact that the accused 3 was found several kilometres from the scene of crime at Atok mine in the suspected vehicle, and the fact that the accused 5 was found next to the vehicle inside which a firearm linked to the commission of the crime was found, does not mean that the requirements for reliance on circumstantial evidence, have been met. Put simply, the inference sought to be drawn did not exclude every reasonable inference save the one sought to be drawn and the inference sought to be drawn was not consistent with all proven facts.[17] Consequently the appeal on convictions ought to succeed.

[88] Had it not have been for the finding on convictions, I would have had difficulties in finding that the trial court erred in finding the absence of compelling and substantial circumstances on Counts 1 and 6. However, as far as count 2, I would have found that conviction on the competent charge of theft was appropriate and this could have had bearing on sentence. Furthermore, I would have found nothing wrong with the sentence of 3 years on counts 4 and 5 both of which were taken together as one for the purpose of sentence.

[17] T v Blom 1939 188 AD at 202-203

[90] I should be concerned about the accused 1, 2 and 4 who are not before us in these proceedings. In the light of my finding above, as I said earlier, it is not clear whether they did previously apply for leave to appeal. Both counsel for the state and accused 3 and 5 would have to investigate and if no application for leave to appeal was never brought, Mr HL Alberts who appeared for accused 3 and 5 should assist in ensuring that their application for leave to appeal is brought on an expedited basis and that thereafter the appeal should be placed on the roll expeditiously and on preferential basis.

Order

[91] Consequently an order is hereby made as follows:

91.1. The appellant's1 appeal against conviction and sentence on count 6 is hereby upheld and the conviction and sentence thereof are set aside.

91.2. The appeal against convictions and sentences imposed against appellants 1 and 2 (accused 3 and 5) respectively in respect of counts 1, 2, 4 and 5 is hereby upheld.

91.3. Both convictions and sentences imposed against appellants 1 and 2 (accused 3 and 5) respectively, in respect of counts 1, 2, 4 and 5 are hereby set aside.

91.4. It is hereby directed that the appellants 1 and 2, that is, Mr Zacharia Masian Phelia and Mr Sipho Moepye be released from prison with immediate effect unless held in connection with other cases.

91.5. It is hereby directed that both counsel for the appellants and the Respondent (the State), should investigate whether the accused 1, 2 and 4 (Messrs Themba Mkhoza, Elija Mashinini and Thomas Moretsele) had previously applied for leave to appeal against both their convictions and sentences in this matter and if not, counsel for appellants 1 and 2 is hereby directed to assist accused 1, 2 and 4 to apply for leave to appeal on an expedited basis and if granted to ensure that their appeal is heard on preferential basis and counsel for the state to assist in this regard.

M F LEGODI
JUDGE OF THE HIGH COURT

I AGREE,

C P RABIE
JUDGE OF THE HIGH COURT

I AGREE,

P M MABUSE
JUDGE OF THE HIGH COURT.