THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 188/2020

In the matter between:

WILLIAM MZAMANI BILANKULU **FIRST APPELLANT**

JANSEN THAPELO MOKOENA **SECOND APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Bilankulu and Another v The State* (Case no 188/2020) [2020] ZASCA 114 (29 September 2020)

Coram: PETSE DP, MAKGOKA and NICHOLLS JJA and EKSTEEN and MABINDLA-BOQWANA AJJA

Heard: This appeal was disposed of without an oral hearing in terms of s 19*(a)* of the Superior Courts Act 10 of 2013.

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 29 September 2020.

Summary: Criminal Law and Procedure – murder – deceased shot by unidentified person in shootout with the authorities – accused had *dolus indeterminatus* to commit murder – unlawful hunting of rhinoceros in state reserve – s 31(3) of Limpopo Environmental Management Act 17 of 2003 –

s 252A of Criminal Procedure Act 51 of 1977 – entrapment not going further than providing opportunity to commit the offence – evidence of trap automatically admissible – s 35 of Constitution – evidence of cell phone records not disclosed before trial admitted in evidence – belated disclosure not causing trial prejudice.

Sentence – imposition of non-parole period – appellants not afforded an opportunity to address the trial court on the issue – not providing reasons for imposing non-parole period – misdirection – cumulative effect of sentence not considered – constitutes misdirection.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Spilg J sitting as court of first instance):

1 The appeal against the conviction is dismissed.

2 The appeal against the sentence is upheld.

3 The sentence imposed by the high court is set aside and substituted with the following:

'The accused are each sentenced:

(a) on count 1 to 20 years' imprisonment;

(b) on count 2 to 15 years' imprisonment;

(c) on counts 3 and 4, taken together for sentence, to 15 years' imprisonment.

(d) the sentence imposed in respect of count 2 and 10 years of the sentence imposed in respect of counts 3 and 4 will run concurrently with that imposed in respect of count 1.

(e) the accused will therefore each serve an effective sentence of 25 years' imprisonment.'

JUDGMENT

Eksteen AJA (Petse DP, Makgoka and Nicholls JJA and Mabindla-Boqwana AJA concurring)

[1] The appellants were convicted in the High Court of South Africa, Limpopo Local Division, Phalaborwa (the high court) of murder (count 1), unlawful hunting of rhinoceros (rhino)[1] (count 2), and unlawful possession of a firearm[2] (count 3) and ammunition[3] (count 4). They were each sentenced to a total of 50 years' imprisonment, of which five years were conditionally suspended, and a non-parole period of 25 years was imposed. They appeal, with leave of the high court, against their convictions and sentence.

[2] The appeal against the conviction raises three legal issues: firstly, the application of s 252A of the Criminal Procedure Act 51 of 1977 (the CPA); secondly, the admission of evidence of cell phone records in possession of the State which had not formed part of the docket provided to the appellants prior to the commencement of the trial; and thirdly, whether, on the facts, the State had proved '*dolus*' to the extent necessary to sustain a conviction of murder.

[3] Two issues were raised relating to the sentence imposed: firstly, the severity of the sentence, which results from the cumulative effect of the individual sentences imposed; and secondly, the imposition of a non-parole period without first affording the appellants an opportunity to address the court on the issue.

[4] The facts giving rise to the conviction are as follows: Mr Mateketo Justice Khosa (Khosa) was employed by African Field Ranger Training Service (African Ranger) as a field ranger. The Letaba Ranch (Letaba), a game

[1] A contravention of s 31(3) of the Limpopo Environmental Management Act 17 of 2003
[2] A contravention of s 3 of the Firearms Control Act 60 of 2000.
[3] A contravention of s 90 of the Firearms Control Act 60 of 2000.

reserve belonging to the Limpopo Development and Tourism Department (the Department) and situated in the district of Lulekani, Phalaborwa, had utilised the services of African Ranger from time to time to train field rangers employed by the Department. During the latter part of 2012 Khosa had been engaged to train field rangers at Letaba.

[5] In August 2012, he was approached by Mr Frans Ngwenya (Ngwenya) of Orange Farm in Gauteng, who expressed the wish to hunt rhino in the reserve. Before meeting Ngwenya, he had reported Ngwenya's plans to the senior field ranger in the employ of the Department at Letaba, Mr Selowa[4] (Selowa) and to Mr de Kock, a senior official in African Ranger, both of whom had suggested that he should cooperate with Ngwenya and keep them abreast. Once he had met with Ngwenya, Selowa introduced him to Colonel Fourie, who registered him as a police informer. Later Khosa was introduced to the second appellant, with whom he arranged, at the suggestion of the second appellant, for a hunt on 12 January 2013 to the exclusion of Ngwenya. The second appellant arrived with the first appellant and a man unknown to Khosa. On that day, two rhinos were shot and wounded, but managed to run away, and the poaching team fled the scene. At Khosa's suggestion, the same poaching team went back to the reserve on 14 January 2013 and Khosa arranged with Selowa to set up an ambush at a pre-arranged time and place to apprehend the poachers.

[6] The first appellant carried the firearm and Khosa the bag containing the axe. The second appellant remained with the vehicle. As the poaching party

[4] Selowa died prior to the trial in undisclosed circumstances and his evidence was accordingly not available to the prosecution.

proceeded through the reserve Khosa spotted one of the rangers lying in wait with a rifle pointing in their direction. He fell to the ground and thereafter heard gun shots. It later turned out that one of the rangers Mr Mulalu Nemakhavhani (the deceased), had been shot dead. Hence the charge of murder.

[7] The evidence could not establish the calibre of the bullet which had killed the deceased. The high court was therefore unable to find that he was shot by either the first appellant or his accomplice. The evidence did, however, establish that he was killed in the shootout between the field rangers and the police, on the one hand, and the first appellant and his accomplice, on the other. Both appellants were subsequently arrested and charged.

[8] At the conclusion of the trial, the appellants were convicted on all counts and sentenced as recorded earlier. An application for leave to appeal followed and the trial judge ordered that:

'1. Leave to appeal conviction is granted in respect of the following grounds only:

(a) whether the cell phone records should have been admitted into evidence;

(b) whether the court should have admitted the evidence of Khosa having regard to the provisions of s252A of the CPA or weighed it differently;

(c) whether this court correctly found on the facts regarding the actual shooting incident on 14 January 2013 when the late Mr Mulalu Nemakhavhani was fatally shot inside the Letaba Ranch Nature Reserve;[5]

(d) whether the accused had the requisite legal intent, whether in the form of *dolus eventualis* or otherwise, to be convicted of murder.

2. Leave to appeal the sentences imposed is also granted.'

[5] This ground of appeal was not persisted in.

[9] It is convenient to consider first the question raised in para 1(b) of the order granting leave to appeal. Section 252A(6) provides:

'If at any stage of the proceedings the question is raised whether evidence should be excluded in terms of subsection (3) the burden of proof to show, on a balance of probabilities, that the evidence is admissible, shall rest on the prosecution: Provided that the accused shall furnish the grounds on which the admissibility of the evidence is challenged: Provided further that if the accused is not represented the court shall raise the question of admissibility of the evidence.'[6]

[10] At the trial both appellants were legally represented. Counsel for the appellants had been in possession of all the witness statements contained in the docket prior to the trial. Neither counsel raised any challenge to the admissibility of the evidence of Khosa nor was it raised *mero motu* by the trial judge. In consequence the admissibility of the evidence of Khosa was not adjudicated upon as contemplated in s 252A(7)[7] and the prosecution was not called upon to tender further evidence in respect of the planning of the operation. It is unfortunate that counsel for the appellants failed to raise their challenge at the trial as this could have served to focus the attention on the pertinent issues.

[11] In his heads of argument counsel for the State argued that s 252A found no application as there was no evidence that Fourie, a police officer, played any role in the operation.[8] This argument is factually insupportable and cannot

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[6] In *Kotzé v S* [2010] 1 All SA 220 (SCA); [2009] ZASCA 93; 2010 (1) SACR 100 (SCA); [2010] 1 All SA 220 (SCA) this court held that notwithstanding s 252A(6) the onus resting upon the State was to prove 'beyond reasonable doubt' the admissibility of the evidence. The distinction is immaterial on the facts of this case.

[7] Section 252A(7) of the CPA provides: 'The question whether evidence should be excluded in terms of subsection (3) may, on application by the accused or the prosecution, or by order of the court of its own accord be adjudicated as a separate issue in dispute.'

[8] Section 252A applies only to the State.

be sustained. As I have said, Khosa was introduced to Fourie by Selowa and registered as a police informer, with Fourie as his handler. During cross-examination Khosa was asked about the arrangement set up to apprehend the poachers. He stated:

'On that day of the 12th we had agreed with the field rangers that they were going to make an ambush there with the police officers, but when we go there they were not there and I showed the other people whom I was with where we should go.'

[12] In his statement to the police Khosa recorded, and he confirmed the correctness thereof in his evidence, that after the shooting on 14 January 2013, he immediately sought to contact both Fourie and Selowa to advise of his perception that the poachers had been arrested. Thus, although the issue had not been pertinently canvassed, probably in consequence of the failures in the trial proceedings to which I have referred earlier, there is good reason to conclude that Fourie was involved in the coordination of the operation. Due to the onus resting on the State to establish the admissibility of the evidence it was for the State to establish that Fourie was not part of the arrangement. In the circumstances the matter must be decided in terms of s 252A.

[13] It was contended on behalf of the appellants that the evidence of Khosa should not have been admitted. He argued that this was so as the commission of the offences was facilitated by the police and/or the game reserve authorities through the use of an undercover operation. Selowa had advised Khosa to encourage the suspects to come to the reserve to poach. The appellants, so the argument went, would not have been able to enter the reserve to hunt rhino without the assistance and encouragement of Khosa. For these reasons he urged us to hold that the conduct of the police and the reserve

management went beyond providing the opportunity to commit the offence and the evidence ought therefore to have been excluded in terms of s 252A.

[14] Notwithstanding the provisions of s 252A having been carefully considered and explained in *Kotzé,* they are still frequently misconstrued. Section 252A(1) provides for the authority to make use of traps and undercover operations and for the admissibility of evidence so obtained. The section states:

'Any law enforcement officer, official of the State or any other person authorised thereto for such purpose (hereinafter referred to in this section as an official or his or her agent) may make use of a trap or engage in an undercover operation in order to detect, investigate or uncover the commission of an offence, or to prevent the commission of any offence, and the evidence obtained shall be admissible if that conduct does not go beyond providing an opportunity to commit an offence: Provided that where the conduct goes beyond providing an opportunity to commit an offence the court may admit evidence so obtained subject to subsection (3).'

[15] The legislature has explicitly permitted the use of a trap or engaging in undercover operations in order to detect, investigate or uncover the commission of an offence. This is not unlawful.[9] As explained in *Kotzé*:

'The section lays down two approaches to the admissibility of evidence obtained as a result of the use of a trap. Evidence is automatically admissible if the conduct of the person concerned goes no further than providing an opportunity to commit the offence. If the conduct goes beyond that the court must enquire into the methods by which the evidence was obtained and the impact that its admission would have on the fairness of the trial and the administration of justice in order to determine whether it should be admitted.

It must be stressed that the fact that the undercover operation or trap goes beyond providing the accused person with an opportunity to commit the crime does not render that conduct improper or imply that some taint attaches to the evidence obtained thereby. All that it does

[9] *Kotzé* para 21.

is create the necessity for the trial court to proceed to the enquiry mentioned in the previous paragraph.'[10]

[16] Whether the trap has gone beyond providing an opportunity to commit the crime is a factual enquiry.[11] The factual enquiry is carried out by weighing up the various factors set out in s 252A(2)(a)-(n). They must be weighed holistically and cumulatively. If, upon a consideration of these factors, and any other factor which has bearing on the question,[12] the court concludes that the trap did not go beyond providing the opportunity to commit the offence, the evidence is automatically admissible. If it did, then the enquiry proceeds to s 252A(3).[13]

[17] So, did the conduct of Khosa and the law enforcement authorities go beyond creating an opportunity to commit the offence? As I have said, the enquiry requires a consideration of the factors listed in subsec (2). Not all of the listed factors find application in every case and I shall confine myself to those which are relevant to the facts of this case. The material portions of s 252A(2) which find application to the facts of the present matter are as follows:

'(2) In considering the question whether the conduct goes beyond providing an opportunity to commit an offence, the court shall have regard to the following factors:
(a) Whether, prior to the setting of a trap or the use of an undercover operation, approval, if it was required, was obtained from the attorney-general to engage such investigation methods and the extent to which the instructions or guidelines issued by the attorney-general were adhered to;
(b) the nature of the offence under investigation, including-

[10] *Kotzé* paras 23 and 24.
[11] *Kotzé* paras 25 and 26.
[12] Subsection (2)*(n)* of s 252A.
[13] *Kotzé* para 31. Section 252A(3) provides for the admission of the evidence of entrapment in certain circumstances even when the entrapment did go beyond the mere provision of an opportunity for the commission of an offence.

(i) whether . . . the national economy is seriously threatened thereby;
(ii) the prevalence of the offence in the area concerned; and
(iii) the seriousness of such offence;

. . .

(d) whether an average person who was in the position of the accused, would have been induced into the commission of an offence by the kind of conduct employed by the official or his or her agent concerned;

(e) the degree of persistence and number of attempts made by the official or his or her agent before the accused succumbed and committed the offence;

(f) the type of inducement used, including the degree of deceit, trickery, misrepresentation or reward;

(g) the timing of the conduct, in particular whether the official or his or her agent instigated the commission of the offence or became involved in an existing unlawful activity;

. . .

(j) the proportionality between the involvement of the official or his or her agent as compared to that of the accused, including an assessment of the extent of the harm caused or risked by the official or his or her agent as compared to that of the accused, and the commission of any illegal acts by the official or his or her agent;

. . .

(m) whether the official or his or her agent acted in good or bad faith; or

. . . ’

[18] As for subsec (2)*(a)*, there was no evidence of whether or not consent of the Director Public Prosecutions (DPP) was obtained, perhaps because there had been no challenge to the admissibility of the evidence. However, the evidence of how the events unfolded strongly suggests that no prior consent was obtained. This factor militates in favour of the exclusion of the evidence. However, it cannot, of itself, be decisive of the issue. It is but one of the factors to be weighed.

[19] Rhino is a specially protected animal because it is an endangered species. The decimation of the rhino population in South Africa is a matter of national and international concern, which has enjoyed such media attention over the years as to thrust it into the public eye. The evidence in aggravation presented on behalf of the State established that, during the period 1 April

2014 to 8 October 2014, no fewer than 821 rhinos had been unlawfully killed in South Africa. There is no reason to believe that the extent of the onslaught was any less significant in January 2013. The evidence further established that the rhino population in South Africa is concentrated in Limpopo, which is suggestive of the prevalence of the offence in the area concerned. By virtue of the proximity of Limpopo to Mozambique and Zimbabwe, perpetrators of these offences often flee from the area making the policing of the offences difficult. Moreover, the harvest of the horn of a single adult rhino may have a market value of more than R5 million. The offence set out in count 2 is undoubtedly a serious one which is disturbingly prevalent in Limpopo.[14]

[20] The facts leading up to the offence are set out earlier. Ngwenya had initially engaged Khosa, of his own initiative, to hunt a rhino in Letaba. He enlisted the support of second appellant and introduced him to Khosa. The second appellant, in turn, invited the first appellant to become involved. When Ngwenya was unable to provide the rifle required for the hunt, the second appellant solicited the assistance of Khosa to facilitate the operation to the exclusion of Ngwenya. The initiative for the crime emanated from the second appellant.[15]

[21] A trap has been described as 'a person who, with a view of securing the conviction of another, proposes certain criminal conduct to him, and himself ostensibly takes part therein . . . [H]e creates an occasion for someone else to

[14] Section 252(A)(2)*(b)*.
[15] These considerations bear on subsecs (2)*(d), (e), (f)* and *(g)* of s 252A.

commit the offence'.[16] Entrapment is a 'proactive investigative technique'.[17] Per definition it involves a measure of deceit. In the present matter, after Khosa had agreed to assist Ngwenya, Ngwenya placed him under pressure to arrange an opportunity for the hunt. In consultation with the rangers at Letaba and the SAPS, Khosa represented to Ngwenya that the rangers were on strike and it was accordingly opportune to carry out the hunt in November 2012. The representation was false and therefore deceitful. Nothing came of the hunt because the plans were aborted and this deceit played no role in the offences which were later committed. No similar misrepresentation was made to either of the appellants in respect of the hunt on 12 January 2013. Khosa did no more than to provide the opportunity for the commission of the crime proposed to him by the second appellant. The vehicle utilised to travel to and flee from the scene was provided by the second appellant. The appellants provided the axe that was to be used to dehorn the rhino and the rifle and ammunition to shoot the animals. Khosa was merely the guide to show the route. He did nothing to induce either of the appellants to commit the offence nor did he show any persistence. The first invitation, which was extended in consequence of second appellant's initiative, was taken up with alacrity without any deceit, trickery or misrepresentation, save that Khosa did not reveal that an ambush was due to be set.[18]

[22] In *S v Lachman*[19] three different scenarios involving a trap were distinguished:

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[16] *S v Malinga and Others* 1963 (1) SA 692 (A) at 693F-G.
[17] S Bronitt and D Roche 'Between rhetoric and reality: sociolegal and republican perspectives on entrapment' (2000) *The International Journal of Evidence and Proof* 77.
[18] These considerations bear on paras (2)*(d), (e), (f), (g)* and *(j)* of s 252A(2).
[19] *Lachman v S* 2008 JDR 1558 (E); [2009] JOL 24343 (E), upheld on appeal in *Lachman v S* [2010] 3 All SA 483 (SCA) para 30.

'One is where the trap creates the opportunity to commit a crime for someone who, but for the trap, would not have committed a crime. A second occurs where the "trap" merely creates such an opportunity for someone who wanted to commit the particular offence – and would have done so in any event, even without the trap's influence. A third category is present … 'where the accused is himself or herself the initiator of the incriminating transaction and instigates the "trap" to conclude the transaction with him or her and the trap merely ostensibly participates therein, and in that sense creates the opportunity for the commission of the crime. *A fortiori* the accused in such a case commits the crime without any influence from the trap'.'[20]

In participating in the hunt on 12 January 2013 the appellants, in my view, fell squarely within the latter category. On an acceptance of Khosa's evidence he acted in good faith, revealing every intended operation to Selowa in advance. No controverting evidence was presented. The argument that Khosa 'encouraged' the appellants to commit the offence can therefore not be sustained.

[23] As I have said, the hunt on 12 January 2013 did not achieve its purpose. In consultation with the authorities Khosa again made contact with the appellants to return to Letaba to complete the operation. Whilst he deceitfully suggested to them that he had located one of the rhinos which was unable to move, his invitation on this occasion was again accepted with alacrity. There was no persistence on his part and no resistance from the appellants. There was no coercion or inducement. It bears repeating that the vehicle, the axe and the firearm and ammunition were all provided by the appellants without any involvement of Khosa.

[20] *Lachman* para 30.

[24] Considering all of these factors holistically and weighing them cumulatively, the inevitable conclusion is that, notwithstanding the failure to obtain the prior consent of the DPP, Khosa did no more than provide an opportunity for the commission of the offence which, after all, had been hatched by the appellants' erstwhile confederate Ngwenya.[21] In those circumstances the admission of the evidence is not detrimental to the administration of justice nor, in my view, did it render the trial unfair. Khosa's evidence was thus automatically admissible. It is therefore not necessary to consider s 252A(3).

[25] As a result of the argument presented on behalf of the appellants, the trial judge considered Khosa to be an accomplice. Whilst he may have been incorrect in this conclusion, he recognised the caution which he was required to exercise in weighing the evidence of Khosa. He was alive to the need to seek corroboration for critical aspects of his evidence and found such corroboration in the cell phone records. In the result the evidence of Khosa was correctly admitted and weighed.

[26] That brings me to the question whether the cell phone records should have been admitted in evidence. The admissibility of cell phone records and evidence relating thereto in criminal proceedings was not contested. Counsel for the appellants submitted that, on the facts of this matter, the admission of these records midway through the trial, in circumstances where they had not been provided prior to the trial, infringed their right to a fair trial guaranteed in s 35(3) of the Constitution of the Republic of South Africa, Act 108 of 1996.

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[21] Section 252A(2)(l).

[27] The appellants relied on ss 35(3)*(a)*, *(b)* and *(d)*, which provides:

'Every accused person has a right to a fair trial, which includes the right-

(a) to be informed of the charge with sufficient detail to answer it;

(b) to have adequate time and facility to prepare a defence;

. . .

(d) to have their trial begin and conclude without unreasonable delay.'

[28] Once the appellants had been indicted, they called for copies of the investigation docket to enable them to prepare for trial. The DPP obliged and provided them in good time with all the documents contained in the docket. The cell phone records were not in the docket and were held by the Technical Support Unit (TSU) of the SAPS. Neither counsel for the State nor the investigating officer had had sight of these records. After the trial had already started and two witnesses had completed their testimony, counsel for the State was advised that the TSU would make the records available. He therefore sought leave to introduce the records at the earliest opportunity and an adjournment of the trial in order to enable him, and the defence counsel, to examine the documentation, to take instructions in respect of their content, and to source witnesses to explain the implications thereof. Counsel for the appellants objected to both the introduction of the evidence and the postponement for the reasons set out earlier.

[29] It is not contentious that an accused person may, by virtue of the provisions of s 35 of the Constitution, be entitled to documentation in the investigation docket in order to prepare for trial. In *Shabalala and Others v Attorney-General of the Transvaal and Another* 1995 (2) SACR 761 (CC) at para 37 it was held:

'The accused may, however, be entitled to have access to the relevant parts of the police docket even in cases where the particularity furnished might be sufficient to enable the accused to understand the charge against him or her but, in the special circumstances of a particular case, it might not enable the defence to prepare its own case sufficiently, or to properly exercise its right "to adduce and challenge evidence"; or to identify witnesses able to contradict the assertions made by the State witnesses; or to obtain evidence which might sufficiently impact upon the credibility and motives of the State witnesses during cross-examination; or to properly instruct expert witnesses to adduce evidence which might similarly detract from the probability and the veracity of the version to be deposed to by the State witnesses; or to focus properly on significant matters omitted by the State witnesses in their depositions; or to properly deal with the significance of matters deposed to by such witnesses in one statement and not in another or deposed to in a statement and not repeated in evidence; or to hesitations, contradictions and uncertainties manifest in a police statement but overtaken by confidence and dogmatism in *viva voce* testimony.'

[30] In this instance the contentious documents did not form part of the docket. The reason for the failure by the TSU to have provided this documentation, which had been in their possession for almost a year, was not fully explained and the trial judge correctly criticised their conduct. However, that does not necessarily, of itself, render the trial unfair. The remarks of this court in *National Director of Public Prosecutions v King* 2010 (2) SACR 146 (SCA); [2010] ZASCA 8; 2010 (2) SACR 146 (SCA) para 4 are instructive:

'The right to a fair trial is, by virtue of the introductory words to s 35(3) of the Bill of Rights, broader than those rights specifically conferred by the fair trial guaranteed therein and embraces a concept of substantive fairness that is not to be equated with what might have passed muster in the past. This does not mean that all existing principles of law have to be jettisoned, nor does it mean that one can attach to the concept of a "fair trial" any meaning, whatever anyone wishes it to mean . . . Potential prejudice may be rectified during the course of the trial and the court may make preliminary rulings depending on how the

case unfolds and may revoke or amend them. Irregularities do not lead necessarily to a failure of justice.'

[31] The fair trial enquiry is, first and foremost, a fact-bound enquiry.[22] The appellants contended that their rights to a fair trial were infringed because the State had been in possession of the cell phone records for a substantial period prior to trial without discovering them. It was argued that the appellants were ambushed as they had already been obliged to cross-examine two State witnesses and to present their versions to them. The suggestion of an ambush presupposes that the prosecution had access to the documents before the commencement of trial and intentionally withheld them. That is not supported by the facts.

[32] Both appellants had pleaded not guilty and chose to exercise their right to silence. The first witness for the State was a police official who had been summoned to the scene of the shooting when the death of the deceased was reported. He testified as to what he found on arrival at the scene and did not implicate either of the appellants in any manner. Counsel for the first appellant did not cross-examine him at all. On behalf of the second appellant cross-examination was brief and his version of events was not suggested to him.

[22] See *Mashnini and Another v S* [2012] ZASCA 1; 2012 (1) SACR 604 para 51; and *Key v Attorney-General, Cape Provincial Division and Another* 1996 (2) SACR 113 (CC) para 13, in turn, referring to *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) para 153 (in relation to the fair trial provisions of the interim Constitution of the Republic of South Africa, Act 200 of 1993).

[33] Khosa testified thereafter. He was extensively cross-examined on behalf of both appellants. On behalf of first appellant, counsel put it to him that Bilankulu would deny that he was with him when the crime was committed. Nothing more was revealed of his defence. On behalf of second appellant, counsel revealed that he did meet Khosa at the Mahonisi Village in December 2012. However, he denied that their meeting or conversation had anything to do with rhino. He contended that Khosa had enquired about the purchase of a vehicle and that he had suggested that first appellant may have such a vehicle. He therefore introduced Khosa to first appellant at their next meeting. On behalf of second appellant, too, it was suggested that he would deny that he had been in Letaba with Khosa.

[34] There was nothing in the cell phone records which contradicted anything put to these witnesses and the conduct of the defence was not compromised by the versions put to Khosa. After they had had the benefit of an adjournment of approximately six weeks in order to study the records, to take instructions in respect thereof and to identify witnesses who may contradict the inferences drawn from the records counsel for the appellants did not challenge the correctness of any of the records or any of the evidence in relation thereto. The appellants have not identified any respect in which their defence might have been conducted differently, nor am I able to perceive any, had the records been available before the commencement of trial. There was no trial prejudice which might have arisen from the admission of the evidence and, in my view, the appellants' reaction to the indictment and to the evidence of the first two State witnesses would have been precisely the same. The argument in respect of trial prejudice can therefore not be sustained.

[35] The postponement followed after the ruling to permit the introduction of the records. Section 342A of the CPA was introduced into the Act in 1997[23] in order to give effect to s 35(3)*(d)* of the Constitution to which I have referred earlier. This section enjoins a court before which criminal proceedings are pending to investigate any delay in the completion of proceedings which appears to the court to be unreasonable and which could cause substantial prejudice to the prosecution, the accused or their legal representative, the State or a witness. Whether the delays are unreasonable depends on the circumstances of each individual case. In order to determine whether a particular lapse of time is unreasonable the court will perform 'a balancing act' in which, amongst other factors, the conduct of both the prosecution and the accused, the length of the delay, the reason which the State assigns to justify the delay and the prejudice to the accused are weighed. The most important factors bearing upon the enquiry relate to the nature of the offence, the duration of the delay, the reasons given therefor, and the prejudice, actual or potential, to the accused.[24] In the present case the length of the delay was relatively brief and was necessary to enable both the State and the defence to study and consider the documentation. I have already alluded to the seriousness of the offences and the fact that no prejudice at all to the accused has been demonstrated.

[36] In the event that it had been found that the delay would have been unreasonable, the high court could have refused a further postponement of proceedings, as the appellants contended ought to have been done.

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[23] See s 13 of the Criminal Procedure Amendment Act 56 of 1996, operative since 1 September 1997.
[24] See *Saunderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) paras 25 and 31-35 where the question of an unreasonable delay in the context of an application for a permanent stay of prosecution was considered. The factors are provided in s 342A(2)(a)-(f) of the CPA.

Section 342A(4)*(a)*, however, provides that where an accused person has already pleaded to a charge, a postponement of proceedings should not be refused unless exceptional circumstances exist and all other attempts to speed up the process have failed. None were alleged. In the result the granting of the postponement was not only justified but necessary in the interests of justice.

[37] I turn accordingly to the question of *dolus* in respect of the shooting of the deceased. The evidence did not establish who fired the shot which killed the deceased. It may have been fired by either first appellant, who was in possession of the firearm prior to the exchange of fire, or by his accomplice who had accompanied them in order to carry out the shooting of the rhino, or by one of the rangers in the confusion that is inherent in a shoot-out. Second appellant was not on the scene of the shooting. In order to secure a conviction for murder the State was required to prove beyond reasonable doubt that each of the appellants had the intention to kill the deceased. We are concerned here with the subjective mental state of the appellants.[25] By virtue of the inability to determine the origin of the bullet that killed the deceased, the facts demonstrate in the case of each of the appellants that the enquiry concerns *dolus eventualis*, ie whether in each case they knew that someone might be shot and killed.

[38] In the case of second appellant, the evidence established that he was the mastermind who solicited Khosa to facilitate the hunting of rhino. He also told Khosa that his friend would provide the firearm, obviously to execute their nefarious plan. First appellant provided the firearm. The prevalence of rhino

[25] See *R v Hercules* 1954 (3) SA 826 (A) at 830H *et seq*; *R v Horn* 1958 (3) SA 457 (A) at 464C-465E; and *S v Malinga and Others* 1963 (1) SA 692 (A) at 694F-685C.

poaching in Limpopo and the difficulties experienced in policing such crimes are set out earlier. The consequences of being caught in the act, as it were, were always predictable. Second appellant had sent his foot soldiers into the reserve to shoot rhino. Letaba was owned by the Limpopo Province and it must have been foreseen that the reserve would be patrolled by rangers. That, after all, was the reason for enlisting the support of Khosa to guide them. In the event of them being found in the reserve, armed with a rifle, a confrontation with rangers was an inevitable consequence. The likelihood of first appellant or the shooter in his company firing at rangers in order to ensure their escape and the possibility of return fire was self-evident. In my view, it is clear beyond a reasonable doubt that, in sending forth his armed posse, he must have foreseen the possibility of a shooting affray and a confused and desperate scene in which anyone could be hit. First appellant, as participant in the hunt, must have shared that foresight.

[39] On behalf of the appellants, it was submitted that they could not have foreseen the possibility of a confrontation with rangers because Khosa had advised that the rangers were on strike. This argument cannot be sustained. The evidence established no more than that Khosa had advised Ngwenya in November 2012, that the game rangers were on strike. No similar representation in January 2013 emerged from the evidence. In all the circumstances, whilst there is no direct evidence that the appellants knew that a confrontation with rangers was possible, on a conspectus of the evidence, I do not think that any person engaged in rhino poaching in a State reserve could not have foreseen the inherent possibility of a shoot-out with rangers in the event of confrontation. In the circumstances I consider that it was proved that

the appellants had '*dolus indeterminatus*'[26] in the sense that they in fact foresaw the possibility of a shoot-out with rangers and the concomitant possibility that anybody involved therein might be shot and killed.[27] In the circumstances the appeal against the conviction must fail.

[40] I turn to the sentence. As stated already, the appeal against sentence is based on two grounds. The first is the imposition of a non-parole period by the high court. The second is that the cumulative effect of the sentence is startlingly inappropriate. I deal with these, in turn. The power to impose non-parole conditions are circumscribed in s 276B of the CPA. Section 276B provides:

'**Fixing of non-parole period**

(1) *(a)* If a court sentences a person convicted of an offence to imprisonment for a period of two years or longer, the court may as part of the sentence, fix a period during which the person shall not be placed on parole.

(b) Such period shall be referred to as the non-parole-period, and may not exceed two thirds of the term of imprisonment imposed or 25 years, whichever is the shorter.

(2) If a person who is convicted of two or more offences is sentenced to imprisonment and the court directs that the sentences of imprisonment shall run concurrently, the court shall, subject to subsection (1)*(b)*, fix the non-parole-period in respect of the effective period of imprisonment.'

[41] The high court provided no reasons for the conclusion that such an order was appropriate and imposed the non-parole period *mero motu*, without any prior warning that it was being contemplated or affording counsel for the appellants an opportunity to address it on the issue. In *S v Stander* [2011]

[26] See *S v Nkombani and Another* 1963 (4) SA 877 (A) at 892A-B.
[27] See also *S v Lungile* 1999 (2) SACR 597 (SCA); [2000] 1 All SA 179 (A) para 18.

ZASCA 211; 2012 (1) SACR 537 (SCA) three issues arose: First, whether the presiding officer had been obliged to give reasons in his judgment on sentence for imposing the non-parole order. Second, the circumstances under which a court would be entitled to impose a non-parole order as part of the sentence. Third, whether the magistrate had been obliged to invite or allow argument before the imposition of a non-parole order.

[42] In respect of the second issue raised in *Stander* this court held:

'An order in terms of s276B should . . . only be made in exceptional circumstances, when there are facts before the sentencing court that would continue, after sentence, to result in a negative outcome for the future decision about parole.'[28]

[43] It went on to hold that 'a court, before making a non-parole order, should carefully consider whether exceptional circumstances exist'.[29] Exceptional circumstances, it held, 'should be circumstances that are relevant to parole and not only aggravating factors of the crime committed, and a proper evidential basis should be laid for a finding that such circumstances exist'.[30] In this instance there was no evidential basis laid for the conclusion arrived at.

[44] In addressing the first issue raised in *Stander* this court referred to *S v Immelman* 1978 (3) SA 726 (A) at 729A-C where Corbett JA said (at 729A-C):

'It has been decided in this court, with reference to the verdict of the court, that, although there is no provision in the Criminal Procedure Code for the delivery of a judgment when

[28] See *Stander* para 16.
[29] *Stander* (ibid) para 20.
[30] See also *Strydom v S* [2015] ZASCA 29 para 15.

a judge sits alone or with assessors (when these decisions were given the alternative system of trial by jury still obtained), in practice such a judgment is invariably given and that it is clearly in the interest of justice that it should be given (see *R v Majerero and Others* 1948 (3) SA 1032 (A); *R v Van der Walt* 1952 (4) SA 382 (A)). It seems to me that, with regard to the sentence of the court in cases where the trial judge enjoys a discretion, a statement of the reasons which move him to impose the sentence which he does also serves the interest of justice. The absence of such reasons may operate unfairly, as against both the accused person and the State.'

In this respect, too, the high court failed.

[45] The third issue which arose in *Stander* relates to the opportunity for the parties to address the court on the issue. The court postulated that at least two questions arise when such an order is considered:

'First, whether to impose such an order and, second, what period to attach to the order.'

It ruled that the parties were entitled to address the sentencing court on each of these issues and the failure to permit them to do so constituted a misdirection.[31] The high court failed in each of these respects. For these reasons the imposition of a non-parole period cannot be sustained.

[46] What remains is the severity of the punishment imposed. I turn first to consider the periods of imprisonment imposed in respect of the individual offences. The power of the court of appeal to interfere with the sentence imposed by the trial court is a limited one. The principles which govern this power have been reiterated on numerous occasions. The language employed in framing the test has sometimes varied, but the effect has in essence been the same. It was set out in *S v Berliner* 1967 (2) SA 193 (A) at 200G-H:

[31] See also *Strydom* para [16] *Mthimkhulu v S* [2013] ZASCA 53; 2013 92) SACR 89 (SCA) para 21; *Mhlongo v S* [2016] ZASCA 152; 2016 (2) SACR 611 (SCA) paras 6, 12, 13 and 26; and *Jimmale and Another v S* 2016 (11) BCLR 1389 (CC); 2016 (2) SACR 691 (CC) paras 13, 20 and 24.

'. . . [In] the absence of any irregularity or misdirection, this Court will, on a question of severity, only interfere if it considers that there is a striking disparity between the sentence passed and that which the Court of Appeal would have passed …'

This is because the trial court has a judicial discretion, and the appeal is not to the discretion of the court of appeal: on the contrary, in the latter court the enquiry is whether it can be said that the trial court exercised its discretion improperly.[32]

[47] In respect of count 1, murder, Counsel for the appellants submitted that the discretionary minimum sentence set out in s 51(2) of the Criminal Law Amendment Act (Criminal Law Amendment Act) 105 of 1997 (CLAA), was 15 years. The submission cannot be sustained. On the proven facts, which are not subject to the appeal, the game ranger was shot in circumstances where the appellants acted in the furtherance of a common purpose to poach rhino. By virtue of the provisions of s 51(1) of the CLAA, read with Part 1 of Schedule 2 para (d), the discretionary minimum sentence is one of life imprisonment. The high court correctly approached the sentence of murder on this basis. It found substantial and compelling circumstances to deviate from the discretionary minimum sentence and imposed a sentence of 20 years' imprisonment. I am unable to find that there is a striking disparity between the sentence which this court would have imposed and that which was imposed by the high court.

[48] In respect of count 2, s 117 of the Limpopo Environmental Management Act provides for a fine not exceeding R250 000 or imprisonment for a period not exceeding 15 years, or both such fine and such imprisonment and a fine

[32] *S v Ivanisevic* [1967] 4 All SA 422 (A).

not exceeding four times the commercial value of the fauna in respect of which the offence was committed. The penalty on count 2 represents the maximum period of imprisonment prescribed under the said Act. As I have noted, the high court heard evidence relating to the prevalence of rhino poaching and the consequences thereof in South Africa and in Limpopo. The danger posed to the rhino population generally weighed heavily with it. It was submitted that the sentence imposed was unduly harsh as neither of the appellants benefited from the criminal deed by virtue of the swift action of the game reserve management and the evidence did not establish that either of the rhinos died. On a conspectus of all the evidence, I do not consider that these considerations can redound to their benefit. It was not of their doing. I am unable to find that the sentence imposed is startlingly inappropriate.

[49] Counts 3 and 4 were taken together for purposes of sentence and a sentence of 15 years' imprisonment was imposed. The sentence is permissible under the Firearms Control Act and, in the circumstances of the present matter, I am unable to find that it is so harsh as to induce a sense of shock.

[50] However, when imposing sentence on multiple counts a court must be aware of the cumulative effect of the individual sentences on the accused. The cumulative effect of the sentences imposed amounts, as I have said, to a sentence of 45 years' imprisonment. Such sentences are extraordinary in the legal history of this country. In *S v Tuhadeleni and Others* 1969 (1) SA 153 (A) Rumpff JA at 189H stated:

'In the Republic of South Africa sentences of 50 or 60 or 70 years' imprisonment, or more, are not imposed, as is done in some other countries, the maximum sentence imposed in the

Republic being, in practice, not more than 25 years, and that only in very exceptional cases.'

[51] These remarks were referred to in *S v Whitehead* 1970 (4) SA 424 (A), in this court in considering the cumulative effect of sentences on multiple counts, where Ogilvie-Thompson JA stated (at 438F-H):

'Notwithstanding all the aforegoing, however, the cardinal . . . fact remains that [the] appellant was sentenced to a total period of 22 years' imprisonment…. In the minority judgment in *S v Tuhadeleni and Others* . . . RUMPFF, J.A. (with whom VAN BLERK and POTGIETER, JJA concurred) expressed the view that in practice a maximum sentence is 25 years, "and that only in very exceptional circumstances". Without necessarily concurring in the existence of a maximum as thus suggested, I certainly share the view that a sentence of 25 years will only be appropriate in very exceptional circumstances.'[33]

In my opinion, save where the law prescribes a sentence of life imprisonment, this salutary guideline to the upper limits of prison sentences ought to be respected.

[52] I have already rejected the criticism of the individual sentences imposed. However, I am unable to find that the circumstances of the current matter constitute such exceptional circumstances as to justify an overall effective sentence of 45 years. The trial judge appears to have overlooked the impact of the cumulative effect of the various sentences. This is a misdirection which has resulted in a striking disparity between the sentence which he imposed and that which I consider appropriate. For the reasons set out above, I consider that the effective sentence imposed should be ameliorated to yield an effective sentence of twenty five years. This may be achieved by ordering

[33] See also *R v Mzwakala* 1957 (4) SA 273 (A) at 278 where a sentence of 25 years was described as 'exceptionally long according to our practice'.

that the sentences imposed in respect of counts 1 and 2 and ten years of the sentence imposed in respect of counts 3 and 4 run concurrently.

[53] In the result:

1 The appeal against the conviction is dismissed.

2 The appeal against the sentence is upheld.

3 The sentence imposed by the high court is set aside and substituted with the following:

'The accused are each sentenced:

(a) on count 1 to 20 years' imprisonment.

(b) on count 2 to 15 years' imprisonment.

(c) on counts 3 and 4, taken together for sentence, to 15 years' imprisonment.

(d) the sentence imposed in respect of count 2 and 10 years of the sentence imposed in respect of counts 3 and 4 will run concurrently with that imposed in respect of count 1.

(e) the accused will therefore each serve an effective sentence of 25 years' imprisonment.'

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J W EKSTEEN

ACTING JUDGE OF APPEAL

Appearances

For appellants:	L M Manzini
Instructed by:	Pretoria Justice Centre, Pretoria
	Bloemfontein Justice Centre, Bloemfontein
For respondent:	N G Munyai
Instructed by:	Director of Public Prosecutions, Pretoria
	Director of Public Prosecutions, Bloemfontein