THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

High Court Case No: A213/12
Lower Court Case No: WRC114/08
DPP Ref No: 9/2/5/1 – 300/11

ASHLEY MANUKULA	**FIRST APPELLANT**
SAMORA MANISI	**SECOND APPELLANT**
ALLIE MPUMLO	**THIRD APPELLANT**

And

THE STATE	**RESPONDENT**

Coram: STEYN & ROGERS JJ

Heard: **30 OCTOBER 2015**

Delivered: **10 DECEMBER 2015**

JUDGMENT

ROGERS J (STEYN J concurring):

Introduction

[1] The appellants and one other stood trial in the court a quo on a number of charges in respect of crimes allegedly perpetrated during December 2007. For convenience I refer to them as they were in the court a quo, namely No 1 (first appellant), No 2 (second appellant), No 3 (no longer before the court) and No 4 (third appellant). I shall, after the first mention of the persons who feature in this judgment, refer to them by their surnames.

[2] The charges fell into three groups: (i) an alleged armed robbery perpetrated on 16 December 2007 against Mr and Mrs Shweni in Khayelitsha during which a licensed firearm and two cellphones were stolen (counts 1-4); (ii) an alleged armed robbery perpetrated on 28 December 2007 against Mr Mshudulu in Khayelitsha during which the latter's maroon Opel Astra CA 801 947 was stolen (counts 5-6); and (iii) an alleged armed robbery perpetrated on the night of 29 December 2007 at a pub in Rawsonville belonging to Mr Abel Camara during which Camara was shot dead (counts 7-18).

[3] At the end of the State's case the appellants were discharged on counts 5-6 and No 3 was discharged on counts 1-6. At the end of the trial No 3 was acquitted on the remaining counts. The appellants were convicted on counts 7 and 8 (the two main charges in respect of the Rawsonville incident, namely robbery with aggravating circumstances and murder) but acquitted on the ancillary counts relating to that incident. No 1, who was 17 years old in December 2007, was sentenced to 10 years' imprisonment on count 7 and 15 years' imprisonment on count 8, the first sentence to run concurrently with the second. No 2 and No 4 were sentenced to 15 years' imprisonment on count 7 and life imprisonment on count 8.

[4] No 1 sought and obtained leave to appeal against conviction only. No 2 applied for leave to appeal against conviction and sentence. Leave was granted in respect of sentence only but in terms of s 309(1)(a) of the Criminal Procedure Act he

has a right to appeal against the conviction which he pursues. No 4 sought and obtained leave to appeal in respect of conviction only.

[5] The trial in the court a quo was lengthy (the record runs to 4485 pages). The trial got under way on 13 October 2009. Judgment was delivered in mid-July 2012 and sentencing took place on 30 August 2012. No 1 and No 2 had separate legal representation. No 3 and No 4 were represented by the same attorney. On appeal Mr Klopper (who did not appear in the court a quo) represented the appellants and Ms Blows appeared for the State. We are grateful to both for the considerable assistance they provided to us in written and oral argument.

[6] The State adduced evidence of confessions allegedly made by all four accused and of an alleged pointing-out of a firearm by No 1. Following lengthy trial-within-a-trial proceedings the magistrate ruled the alleged confessions by No 1 and No 3 inadmissible. He held that the confessions by No 2 and No 4 were admissible. He deferred until the end of the trial a decision on the admissibility of the pointing-out. At the end of the trial he ruled the pointing-out inadmissible.

[7] It is not in dispute that on the night of 29 December 2007 four or five men robbed Camara's pub, that one or more firearms were involved, and that Camara was shot dead by one or more of the robbers. The issue on the merits is whether the appellants were among the perpetrators. On appeal Mr Klopper submitted (i) that there was insufficient evidence to find that No 1 was among the perpetrators; (ii) that the magistrate erred in finding the confessions of No 2 and No 4 admissible; (iii) and that without the confessions there was insufficient evidence to find that No 2 and No 4 were among the perpetrators.

Brief account of the incident

[8] As one entered the pub from the street there was a seating area referred to in the evidence as the alley (*'stegie'* in Afrikaans). At the end of the alley and to the left was the bar area. The robbery occurred shortly before midnight on 29 December 2007 as the bar was closing. Amelia Rosenkrantz, the bar lady, was behind the counter in the bar area. Camara had also arrived at the bar shortly before closing

time. The bar area and alley had been quite crowded but most of the patrons had left because the bar was closing. Some people were still milling around in the street.

[9] Two armed robbers entered the bar area. One or two other accomplices were guarding the alley. Camara, tragically in the event, was not compliant. He used a taser gun in an attempt to deter the robbers. Several shots were fired inside the bar. As he staggered out onto the street, several further shots were fired at him. The post-mortem report revealed five gunshot wounds: one to the left chest, two to the abdomen, one to the back (identified as the fatal wound) and one linear graze wound.

[10] The robbers, one of whom was seen exiting the pub with the till drawer, drove away at high speed in a maroon Opel Astra. Two quick-thinking witnesses memorised the first and second halves of the registration number respectively, namely CA 801 947, being the car stolen from Mshudulu the previous day. W/O Carstens of Rawsonville SAPS (who became the investigating officer) heard the gunshots while patrolling and hastened to the scene. He was pointed in the direction of the Opel and gave chase. The Opel was heading for Worcester via a back road. Carstens radioed Worcester SAPS for assistance. Not long afterwards he saw several SAPS vehicles trying to head off the Opel. The Opel managed to evade the police who followed the car into an informal settlement in Avian Park outside Worcester. Const Erasmus was at the front of the chase. The occupants of the Opel abandoned the car at a dead-end and fled in among the shacks. As he tumbled out of the car the Opel's driver fired two shots in Erasmus' general direction.

[11] Erasmus and his colleagues began searching the area. No 1 was found hiding under a mattress in an outside room of the home of a Ms Fransiya Dick. He was arrested. Three other men in the area, who struck the police as suspicious, were also arrested but subsequently released. No 2, No 3 and No 4 were arrested in Khayelitsha during the course of 30 December 2007.

[12] An empty till drawer, a Norinco pistol (being the licensed firearm stolen from Mr Shweni on 16 December 2007) and a Rossi revolver were found in the Opel.

The confessions

[13] As will appear hereunder, it is not strictly necessary to decide whether the confessions of No 2 and No 4 were correctly ruled admissible since the other evidence is sufficient to sustain the convictions. Nevertheless, and in case the matter should go further, I should explain why in my view the confessions should have been excluded.

[14] The onus rested on the State to prove beyond reasonable doubt that the confessions complied with s 217(1) of the Criminal Procedure Act, ie were made freely and voluntarily by the respective appellants in their sound and sober senses and without undue influence (*S v Zuma & Others* 1995 (2) SA 642 (CC) paras 29-33; *S v Kotze* 2010 (1) SACR 100 (SCA) para 20). If this was not proved, *cadit quaestio*; the confessions were inadmissible. A second question arises if the first is answered in favour of the State, namely whether the confessions should nevertheless have been excluded in terms of s 35(5) of the Constitution because to receive them would render the appellants' trial unfair or be detrimental to the administration of justice (see *S v Manuel & Andere* 1997 (2) SACR 505 (C) at 515i-516c).

[15] No 1 was arrested in Avian Park in the early hours of the morning of 30 December 2007. Although Carstens from Rawsonville SAPS was the investigating officer, officers from Organised Crime Bellville-South ('OCBS') were involved in the investigation by mid-morning. The case was clearly receiving priority attention. This may have been because Camara was a well-known, respected and popular member of the community and because his son starred in a popular television drama. W/O Engelbrecht, a profiler and intelligence officer with OCBS, travelled with W/O Maclean to Worcester SAPS where No 1 was being held. No 1 was questioned at Worcester and at Rawsonville. He testified that he was assaulted by black policemen at both locations. Thereafter No 1 and a police entourage travelled to Khayelitsha where No 2, No 3 and No 4 were arrested in the early afternoon. All four accused were taken to OCBS. Each of them claimed to have been placed in separate cells and assaulted by black policemen when they denied knowledge of the crime.

[16] SAPS was soon confident that the various accused would make confessions. At 16h30 Capt Jam-Jam of OCBS telephoned Col Mbulawa of Mitchells Plain SAPS to take No 4's confession. At 17h00 Jam-Jam phoned Sup Kwinana of OCBS to take No 1's confession. At 19h36 Maclean asked Capt Bailey of OCBS to take No 2's confession. No 3 must have held out the longest because it was only at 14h30 on the following day, 31 December 2007, that Jam-Jam phoned Col Benenengu of Cape Town SAPS to take No 3's confession.

[17] On the evening of 30 December 2007 Carstens took No 1 back to Worcester SAPS and then transferred him to Rawsonville SAPS for detention. (The disputed pointing-out in Avian Park seems to have occurred en route to Worcester SAPS.) The remaining accused were detained at Bellville SAPS in a building adjoining the OCBS offices. At 07h00 the next morning Carstens, so he testified, took No 1's warning statement[1] and then transported him from Rawsonville to OCBS. Between 08h00-08h20 Carstens, again as he testified, took warning statements at Bellville SAPS from No 2, No 3 and No 4.[2] The accused denied having signed warning statements on that date. They said their warning statements were signed on 1 January 2008. (There were separate warning statements for the three sets of charges, the warning statements in respect of the Rawsonville charges being dated 31 December 2007 and the warning statements in respect of the other charges being dated 1 January 2008.) The purported warning statement taken by Carstens from No 3 at 08h00 on 31 December 2007 (ie in respect of the Rawsonville charges) was unsigned, something which Carstens could not explain.

[18] Kwinana of OCBS started his confession interview with No 1 at about 08h00. He suspended the interview when it emerged that No 1 was a minor. No 1's mother, Cynthia, was summoned, and Kwinana resumed the confession interview later in the day. His mother co-signed the confession.

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[1] The warning statement is not in the record but he was questioned about it [record 1684; 1715-1720].
[2] Record 4272 (No 2), 4234 (No 3) and 4310 (No 4).

[19] Shortly after 08h00 Bailey started her confession interview with No 2 (this would have been minutes after he had supposedly signed his warning statement). The interview terminated at about 09h40.

[20] Later in the morning No 4 was taken to Mitchells Plain. His confession interview with Mbulawa took place between 12h30-14h25.

[21] As noted, by 14h30 Jam-Jam phoned Benenengu to take No 3's confession. Later that evening No 3 was transported to SAPS Cape Town. His confession interview with Benenengu started at 21h30.

[22] In the case of No 1, the magistrate rejected his evidence that he had been told by the police what to say to Kwinana. He found that the injuries on No 1's face (which were visible in the photograph taken shortly after his arrest) occurred during his arrest and were not inflicted during interrogation. He rejected the confession because he was not satisfied that No 1's rights as a minor had been sufficiently protected. His mother, Cynthia, who was called as a State witness, testified that she had fallen asleep during the confession interview and had, upon waking up, co-signed without reading it. Cynthia also testified that her son told her that he did not want to make a confession. Carstens asked her to persuade him to make a confession and said he would be released as there was nothing against him. Cynthia did so. The magistrate thought that this version could reasonably possibly be true and might amount to undue influence. I should add that Cynthia testified that when she saw her son, and before he made the confession, he told her that he had been assaulted by the police at Worcester, Rawsonville and Bellville-South.

[23] No 3, who was the last to make a confession, told Benenengu that he had been assaulted and that he had pain in his eyes and body. Benenengu wanted to terminate the confession interview but No 3 insisted on pressing ahead. Benenengu conceded in his evidence that this might have been because No 3 was scared. He formed the view that No 3 was apprehensive of being returned to custody. The magistrate considered it most unlikely that SAPS had fed No 3 the information he had to convey to Benenengu but was not satisfied that the confession had been freely and voluntarily made.

[24] In assessing the admissibility of the confessions made by No 2 and No 4 one cannot disregard the trajectory of the investigation as a whole. The police were clearly set on closing the case quickly. Within hours of their arrest, No 1, No 2 and No 4 had said enough to cause the police to arrange confessions and No 3 followed suit the next day. Little time was lost in bringing the accused before justices of the peace. All of the accused claimed to have been coerced by assaults and threats. No 1's mother testified that he told her this when she first saw him. No 3 told this to Benenengu. Kwinana noted certain wounds on No 1's head. The police photograph shows that his T-shirt was torn and had blood stains. Bailey noted an abrasion on No 2's left shoulder and a swollen right eye. Whatever the source of these injuries, they were not recorded in the SAPS10 incident books on the various occasions when the accused were booked in and out of detention, calling the integrity of these records into question. I should add that the evidence of Louw and Engelbrecht regarding the arrests of No 1 and No 2 respectively did not suggest that those accused would have sustained injuries during their arrest.

[25] If No 2 and No 4 were not coerced into making confessions, why did they do so? Of course it is not essential for the police to explain why a suspect made a confession. Nevertheless, if an accused testifies that he was coerced into making a confession, a court is entitled, in assessing whether such evidence could reasonably possibly be true, to consider the alternatives. A person may make a confession because he is plagued with guilt but on the State's case the accused were not men of refined conscience. And one is not talking about only one person who decided to 'come clean'. All four suspects did so, and fairly shortly after their arrest. On the State's case, they did so despite having been properly warned that they were entitled to remain silent and were entitled to legal representation at the State's expense. If these right were explained to them in a way they could understand and in a way which conveyed that the police respected their right to exercise them, what advantage was there to them in making confessions, at least without first talking to lawyers?

[26] It is here that the State's case runs into trouble. There was no evidence from any officer whose interviews with the accused led to their deciding to make confessions. Carstens, though he was the investigating officer, testified that he was

not involved in the interrogations. Indeed, he said that he had felt sidelined by the OCBS team. All he could say was that by the time he allegedly took the warning statements on the morning of 31 December 2007 he understood that the accused wished to make confessions. One knows that, in the case of No 1, No 2 and No 4, the arrangements for the taking of confessions were already underway the previous day.

[27] The warning statements, if they were indeed taken at Bellville-South on 31 December 2007, were clearly rushed jobs: certain selections which were meant to be marked on the forms were not made;[3] other selections, which should have been made during the warning interview, were pre-printed on the form by way of strike-out text;[4] No 2's interview for the warning statement was said to have both started and ended at 08h00; the place of No 2's interview was initially written as Rawsonville which was then scratched out and replaced with Bellville-South; No 3's warning statement was not signed by him but was signed by Carstens who by his signature purported to confirm that the statements and answers had been taken down by him; No 3's interview with Carstens was said to have started at 08h00 (the same time that No 2's interview supposedly started) and ended at 08h20; No 4's interview was recorded as having started at 08h20 and ended at 08h25. If No 2 in fact signed a warning statement at 08h00, it must have been just before his confession was taken, since Bailey said that her confession interview started shortly after 08h00.

[28] Engelbrecht testified that he was only involved in the initial profiling and intelligence work and played no role after the accused were brought to OCBS following their arrests. Jam-Jam and Maclean claimed no involvement in the questioning of the accused. Certain other officers who testified in the trial-within-a-trial said that their only role was to convey one or other of the accused to the senior officer who took their confessions.

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[3] All the warning statements were deficient in precisely the same respects. The selections not made on the form were: that the suspect did/did not understand the allegations against him; that he understood the provisions of the Constitution and elected/declined to make a statement and/or answer questions; that he was/was not at present under the influence of alcohol or narcotics.

[4] Again, all the warning statements had the identical pre-selections, including: that the suspect declined to exercise his right to remain silent; that he was not assaulted in any way; that he was satisfied that his statement had been correctly noted; and that he was satisfied with the interpreter. (The last of these selections was inapposite since no interpreter was used in taking the warning statements.)

[29] In the light of this gap in the State's evidence and the indications of improprieties concerning the confessions of No 1 and No 3, I do not think one can exclude as a reasonable possibility that No 2 and No 4 were coerced, as they claimed, by violence and threats into making confessions. The fact that they did not disclose the assaults and threats to Bailey and Mbulawa is not inconsistent with this possibility. On their version they feared further mistreatment by OCBS if they returned without having made confessions. They may not have trusted Bailey and Mbulawa to afford them adequate protection. No 2 and No 4 were taken to Bailey and Mbulawa by OCBS officers (Kotze and Ross respectively). While I do not find No 4's evidence plausible that Ross assaulted him at Mitchells Plain after he supposedly told Mbulawa that he did not wish to make a confession, each of the accused would have understood that an OCBS officer was waiting outside to take him back to OCBS as soon as the interview ended. In the case of No 2, his lack of confidence in the protection he would receive from Bailey may have been further eroded by the fact that she was attached to OCBS (though she was not part of the investigation). It has long been recognised as undesirable, even if not positively unlawful (cf *S v Mavela* 1990 (1) SACR 582 (A) at 589F), for a confession to be taken by a peace officer belonging to the police unit investigating the crime, even though such officer is not himself or herself part of the investigation (*S v Mdluli & Others* 1972 (2) SA 839 (A) at 841A-D; *S v Mbele* 1981 (2) SA 738 (A) at 743E).

[30] This is not to say that everything No 2 and No 4 alleged regarding their confessions was plausible, any more than that everything said by No 1 and No 3 regarding their confessions was true. In particular, I do not regard as plausible their claims that they were not the sources of the information recorded by Bailey and Mbulawa in their respective confessions or their allegations of impropriety directed at these two senior officers. However, the fact that an accused is untruthful in certain respects does not necessarily justify a conclusion that he was untruthful in other respects. I think that this is particularly so in this type of situation. A relatively unsophisticated person may feel that it is not enough to establish that he was coerced into making a confession. He may feel the need to go further and claim not to have been the source of the incriminating information at all, since otherwise, whatever the coercion, he will be revealed as guilty. Even if he understands that the law says otherwise, he may be apprehensive of the indirect or subconscious

influence which his failure to put distance between himself and the confession will have on the magistrate's mind.

[31] In *S v Gcam-Gcam* [2015] ZASCA 42, a case in which the court on appeal found that a confession should have been excluded, Cachalia JA made the following observations which resonate in the present case:

'[48] It is not necessary to deal with the evidence of the police in any detail. And I accept that the learned judge was correct in finding that much of the appellant's evidence was untrustworthy. But, I think he too readily accepted all the evidence of the police without properly analysing it, and did not properly consider those aspects of the appellant's evidence that were reasonably possibly true despite his mendacity… All that was required of the appellant was to present a version that was reasonably possibly true, even if it contained demonstrable falsehoods.

[49] When confronted with confessions made by suspects to police officers whilst in custody – even when those officers are said to be performing their duties independently of the investigating team – courts must be especially vigilant. For such people are subject to the authority of the police, are vulnerable to the abuse of such authority and are often not able to exercise their constitutional rights before implicating themselves in crimes. Experience of courts with police investigations of serious crimes has shown that police officers are sometimes known to succumb to the temptation to extract confessions from suspects through physical violence or threats of violence rather than engage in the painstaking task of thoroughly investigating a case. This is why the law provides safeguards against compelling an accused to make admissions and confessions that can be used against him in a trial.

[50] In addition, courts must be sceptical when the State seeks to use a confession against an accused where he repudiates it at the first opportunity he is given. Because ordinary human experience shows that it is counter-intuitive for a person facing serious charges to voluntarily be conscripted against himself. Often it is said that the accused confessed because he was overcome with remorse and penitence; 'a desire which vanishes as soon as he appears in a court of justice'. That is sometimes true, but is usually not.'[5]

[32] I am not impressed by Mr Klopper's submission that No 4's confession was rendered inadmissible by Mbulawa's failure to use an interpreter. His interview with

[5] See also *R v Ndoyana & Another* 1958 (2) SA 562 (E) at 564A-C per De Villiers JP; *S v Nzama & Another* [2009] ZAKZPHC 13 para 6 and cases there discussed.

No 4 was conducted in Xhosa, their first languages. Mbulawa, whose English was competent, recorded the confession in English. He testified that at the end of the interview he read the contents back to No 4, translating into Xhosa sentence by sentence, whereafter No 4 signed and placed his right thumbprint on each page. If the incriminating effect of the confession turned on nuance of language, the absence of an interpreter might affect its weight. That is not, however, the position in the case of No 4's confession. I do not think the State even necessarily regarded the confessions of No 2 and No 4 as full and candid. But the confessions unequivocally acknowledged their presence at and complicity in the armed robbery. In No 4's case, no infelicities of translation could have affected these fundamental acknowledgements.

[33] However, and for the reasons I have given, I do not think the State proved beyond reasonable doubt that the confessions were made freely and voluntarily. They should thus have been excluded.

The other evidence

[34] The accused denied all involvement in the robbery. No 2 admitted that he was at Camara's pub earlier in the evening but not at the time of the robbery. No 1, No 3 and No 4 denied having been in Rawsonville at all on 29/30 December 2007. Each accused denied knowing any of the others.

[35] I summarise the State's contrary evidence. No 1's girlfriend, Yona Ngayemfunda, testified that No 1 spent the night of 28/29 December 2007 with her. At about 05h30 the other accused and one Magou, none of whom she had previously met but who were introduced to her, arrived in a maroon car. Magou had a firearm concealed under his sweater. No 1 left with them.

[36] No 1's mother, Cynthia, testified that at about 06h00 on 29 December 2007 her son and one Khaya knocked on her door. Khaya wanted to borrow R100 from her. No 1 then left with Khaya and his friends in a maroon car. These friends included a mechanic Tamariza. Although she was a State witness, she denied that the other accused were among those present. When it was put to her under friendly

cross-examination that according to No 1 the car had been white, not maroon, she said she may have been mistaken. When the magistrate subsequently asked why she initially said the car was maroon, she said that the vehicle had looked to her to be maroon.

[37] The evidence of Agnes Nkonki is of some importance to the State's case. She is No 2's aunt. She used to spend weekends at No 2's grandmother's house in Goudini. That is where she was on 29 December 2007. No 2 came to the grandmother's house at about 06h30 and said that 'they' (presumably meaning he and friends of his) were going to town but that he would be back in the afternoon.

[38] At about 13h00 No 2 and four friends arrived back at the grandmother's house in a maroon car driven by No 2. Nkonki had not previously seen No 2 driving this car. She said that the car's colour was the same as that shown in the photograph of the abandoned getaway vehicle. The four friends included No 1, No 3 and No 4. No 2 and his friends spent the afternoon drinking and chatting on the lawn in front of the house.

[39] Another important witness for the State was Zodwa Mtindizi. She was a friend of Vanessa Manisi, No 2's cousin. In the late afternoon of 29 December 2007 No 2 and Vanessa collected Mtindizi to join the social occasion. On their way back to No 2's grandmother's house they stopped at Camara's pub and at another shebeen. A photograph taken at 18h57 at the Goudini Spa security gate, through which No 2 drove after picking up Mtindizi, shows him driving a maroon car with leopard-skin seat covers.[6] The same seat covers can be seen in the photograph of the abandoned getaway car.[7] Mtindizi, like Nkonki, testified that No 1, No 3 and No 4 were among No 2's friends whom she met at the grandmother's house. Later Nkonki served supper to No 2 and his friends.

[40] It was discussed between the men, Vanessa and Mtindizi that they would go to a club in Zweletemba, a suburb of Worcester. Vanessa and Mtindizi at some stage walked to Vanessa's house. When they returned to the grandmother's house

[6] Record 4101-4105.
[7] Record 4123-4124.

at about 21h15 they were told that the plan to go to Zweletemba had been abandoned because one of the men had to go to Paarl to close a pub belonging to his father. No 2, so it was understood, was returning the Khayelitsha. Nkonki gave him an Edgars shopping bag with clothes to take back to her house in Khayelitsha. This bag was found in the boot of the abandoned getaway car[8] and was subsequently collected from Worcester SAPS by Nkonki's brother. The men and Mtindizi left in the maroon car at about 22h00. No 2 was driving. He dropped Mtindizi off at her mother's place and drove off with the other men.

[41] At this stage the State's evidence shifts to the witnesses who were at Camara's pub. Since the incident was a dramatic one which played itself out over a period of time and was viewed by the witnesses from different perspectives there were, understandably, some differences in detail. In very broad summary, the bar lady, Amelia Rosenkrantz, testified that Camara had arrived at the pub to oversee closing-up. He was sitting with her in the bar area when two men with firearms entered and demanded money. When Camara said he did not have money, one of the men shot him. She could not say whether he was hit or how badly he was injured at that time but he managed to get out of the bar area. The men came behind the counter, removed the till drawer and ran out with it. She could not pick these men out during a photo ID parade. However, her description of the clothing of the man who shot at Camara accorded with the green and white striped T-shirt which No 2 was wearing in the photograph taken at the Goudini Spa security gate.

[42] Sylvia April and Miena van der Ross were among the last patrons sitting in the alley area. April said that two men were guarding the alley area at the time she heard the shot from the bar area. She identified these two men as No 1 and No 3. Miena recalled three men entering the pub. Two of them went to the bar area while the third guarded the alley area. She recognised one of the two men who went to the bar area as No 2. She had seen him at the pub on several occasions drinking with her uncle Jan Engelbrecht and had also seen him on the street and outside shops in Rawsonville. Her uncle had introduced him to her on one occasion at Camara's pub. She identified No 2 as the person who ran out with the till drawer.

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[8] See photo at 4125.

[43] Among the people in the road when the robbery occurred were Monrico Vermeulen and his cousin Llewelyn Pietersen. Vermeulen heard the sound of Camara's taser followed by a gunshot. A few minutes later Camara came staggering out followed by a black man wielding a firearm. The gunman shot at Pietersen who had been approaching the entrance and then fired a further shot at Camara. Vermeulen identified the gunman as No 2, being a person to whom he had been introduced several weeks previously at a bachelor's party followed by a wedding reception. Vermeulen testified that he had also seen No 2 at the pub at around 23h00 of the night of the robbery and they had greeted each other.

[44] Pietersen, though he was found by the magistrate to be an unreliable witness, confirmed that No 2 was the person who shot at him. He said the bullet struck him in the right thigh but he was able to remove it himself. He also identified No 4 as someone who had emerged from an adjacent shop carrying a till drawer.

[45] The two quick-thinking witnesses who memorised the registration number of the getaway car were Barend Cloete and Pieter Hermanus. Neither of them was standing close enough to the pub's entrance to identify the robbers. They did confirm, though, that a gunman fired shots at Pietersen who fell in the road. They testified that the shooter and three or four other men ran to the Opel Astra and sped away.

[46] As previously mentioned, the police followed the getaway car and it was eventually abandoned in Avian Park. No 1 was found not long afterwards hiding in an outside room of the house of Ms Fransiya Dick. I shall refer to her evidence presently.

[47] Although Mr Klopper submitted that there was no more than a 'strong suspicion' that the maroon car which Nkonki and Mtindizi saw No 2 driving was the same vehicle as the getaway car, I am satisfied that they were one and the same. It is not merely a matter of colour. There are the identical leopard skin seat covers and the presence in the getaway car of the Edgars bag which Nkonki entrusted to No 2. Furthermore, No 2's fingerprints were found on the getaway car.

The case against No 2

[48] It is convenient to start with an assessment of the case against No 2. He did not dispute that he was at his grandmother's house early on the morning of 29 December 2007 and again during the afternoon and evening. He also did not deny that he was the driver of the maroon Opel Astra on the various occasions identified by the State witnesses. He did deny, however, that the men who were in his company were the other accused. He also denied having been at Camara's pub when the robbery was perpetrated.

[49] The evidence identifying him as one of the robbers is strong. Van der Ross and Vermeulen both testified that he was one of the perpetrators. Although neither of them knew him well, they had been introduced to him and seen him on several previous occasions. Van der Ross quickly pointed out his photograph when Carstens on 8 January 2008 showed her a number of photographs. Although Pietersen was rightly regarded by the magistrate as a generally unreliable witness, his identification of No 2 as the person who shot at him is consistent with Vermeulen's and he too pointed out No 2's photograph from an album containing 42 photographs. Cloete and Hermanus corroborated Pietersen's evidence that a shot was fired at him. Although Rosenkrantz could not identify No 2 by his face, her description of the clothing of one of the gunmen who confronted her and Camara in the bar area is consistent with the clothing which No 2 is known to have been wearing earlier in the evening.

[50] The case against No 2 does not depend on whether the men who were with him during the afternoon of 29 December 2007 were the other accused. Nevertheless, if it was satisfactorily proved that those men included No 1, No 3 and No 4, his false denial of that fact would naturally justify the drawing of a highly adverse inference. The State witnesses who identified No 1, No 3 and No 4 as having been among the men in whose company No 2 arrived at his grandmother's house were Nkonki and Mtindizi. In assessing the reliability of their identification it is important to note that they saw No 2 and his friends in a relaxed social setting and over a period of some hours (cf *S v Mthetwa* 1972 (3) SA 766 (A) at 768A-C).

[51] Nkonki testified that on 1 January 2008, a couple of days after the incident, a policeman came to her house and asked if she was No 2's aunt. She confirmed this. She agreed to accompany the policeman to Rawsonville SAPS where she made a statement. After she had given her statement she had to wait for a policeman to take her home. The car arrived. As she put it, No 2 and two of his friends got out. They had hand and feet restraints. A detective then called her inside and asked her if she knew the two people who were with No 2. She confirmed that these were two of the four men who had been at her house on the afternoon and evening of 29 December 2007. These two men were No 3 and No 4.

[52] Mtindizi was asked to participate in a photo ID parade on 8 October 2008, supervised by Carstens. The album which she saw contained 42 photographs, including those of the four accused. She pointed out the four accused and another man.

[53] The magistrate was rightly critical of the investigative steps followed by the police in regard to identification. Physical ID parades with the usual safeguards, including supervision by an officer not involved in the investigation, were not held. Nkonki made her identification after seeing three men who were in police custody and obviously under arrest. While this was an unsatisfactory procedure for the police to have followed, Nkonki's evidence cannot simply be disregarded. The observations made by Majiedt JA in *S v Mohammed* [2011] ZASCA 98 paras 6-7 in analogous circumstances strike me as apposite.[9] Nkonki saw No 2 and his friends

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[9] '[6] The appellant's counsel laid heavy emphasis on the complainants' lack of any description of their assailants, particularly of the appellant, to the police after the robbery. He contended that this omission raises reasonable doubt about the reliability of their identification. It seems to me that the police, rather than the complainants, are to blame for this omission. The police were told by the complainants that they would be able to recognize the robbers in the event that the complainants see them again. But no descriptions of the robbers were sought from the complainants. In any event, even if it can be said that the omission is attributable to the complainants, it must be considered on the evidence as a whole. As stated above, the complainants had adequate opportunity for a reliable identification and the conditions were conducive to such reliability. As it turned out both complainants did, on their version, see one of their assailants, the appellant, again on more than one occasion and they took active steps to have the appellant arrested. The complainants' lack of any description of their assailants can therefore not detract from the reliability of their identification when all the facts and circumstances are considered.
[7] Criticism was also levelled against Botha's identification of the appellant at the police station after his arrest. The submission was made that it is tantamount to a 'dock identification' on which no reliance can be placed. In *S v Tandwa* 2008 (1) SACR 613 (SCA) para 129, this court reiterated that '. . .[d]ock identification . . . may be relevant evidence, but generally, unless it is shown to be sourced

over a period of some hours under relaxed circumstances. There could be no suggestion that she and Mtindizi conspired to make a false identification (they did not know each other).

[54] Recourse by the police to photo ID parades should not be encouraged where the holding of a physical ID parade is possible. Carstens' explanation for the absence of a physical ID parade (a supposed difficulty in arranging a date where all the witnesses and the accused could be present) was by no means satisfactory. However, a court must ultimately see to it that justice is done. Justice is concerned with the interests of accused persons and the community. The suggestion in *S v Moti* 1998 (2) SACR 237 (SCA) that it is irregular to hold a photo ID parade rather than a physical ID parade once a suspect is in custody was obiter.[10] In *S v Ndika & Others* 2002 (1) SACR 250 (SCA) Marais JA, after referring to *Moti* and the potential dangers associated with photo ID parades, said the following (para 23):

'What is clear however is that, if such a method [*ie a photo ID parade*] has been used, it is not axiomatic that the results are to be ignored. All will depend upon whether there is a reasonable possibility that improper conduct has tainted the reliability of the identification or that, even in the absence of any improper conduct, the objective circumstances attending the photographic identification were not conducive to accuracy and reliability.'

In *Ndika* the court on appeal confirmed a photo identification selected out of a sample of eight photographs. See also *S v Slinger* [2014] ZAGPPHC 581 where the court on appeal likewise accepted a photo identification. As in the present case, defence counsel in *Slinger* complained that the witness had not, prior to the photo ID, given a detailed description of the suspect. Bam J was not much troubled by this criticism, observing that it is 'a common phenomenon that a person can be identified without reference to any specific feature' (paras 6-10).

[55] In this case Mtindizi was shown a photo album containing 42 photographs, including those of the four accused and a fifth suspect. In cross-examination

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in an independent preceding identification . . . carries little weight'. The exception alluded to in this passage applies in this matter. Botha's identification at the police station therefore serves as a further factor enhancing the reliability of the identification, albeit to a very limited extent.

[10] See *S v Van Willing & Another* [2015] ZASCA 52 para 14 (and see my fuller discussion of the matter in paras 58-61 of my judgment in the court a quo: *S v Van Willing & Another* Case SS01/2013).

Carstens, who compiled the album, was criticised for having too few photographs. This was based upon a 'norm', which he apparently accepted, that there should be eight photographs plus that of the suspect. Because there were five suspects, there should, so the criticism went, have been 45 photographs. Apart from the fact that there is no fixed rule as to the number of photographs to be used in a photo ID parade, the logic of the criticism entirely escapes me (and was not, I should add, repeated by Mr Klopper). In respect of the 'first' suspect, the selection which the witness was required to make was to select (if able) a photograph out of 42 possibilities. With each selection made by the witness, the range would reduce by one (so that if the witness selected four suspects, the selection of the fifth would involve a range of 38 possibilities). There was thus a generous range of possibilities in the present case. Having examined the album, I am also satisfied that the faces were sufficiently similar to pose a true challenge to accurate identification.

[56] Furthermore, the results of the photo ID parades in their entirety indicate a lack of any improper influence by Carstens. In regard to counts 1-4 Mr Shweni was only able to point out No 2 and two other men (not the accused). Mrs Shweni was only able to point out No 4. In regard to counts 5-6, Mshudulu could only pick out one photograph and this turned out to be someone who could not have been related to the crime. In relation to the Rawsonville charges, Pietersen pointed out No 2 and No 3. Rosenkrantz was not able to make any identifications nor was Michael Manual, the cleaner employed at the pub.

[57] In assessing whether Mtindizi and Nkonki might have been mistaken, it is legitimate to examine the plausibility of No 2's version. He gave conflicting versions as to where he had been on 27 and 28 December 2007. He testified that he had been staying at Goudini but returned to Stellenbosch on Boxing Day for a couple of days to sort out his child's new year clothes. In his amended plea explanation he stated that he had spent the night of 28/29 December 2007 at a nightclub in Stellenbosch with his uncle James. His oral evidence, by contrast, placed the visit to the nightclub on the night of 27/28 December 2007.

[58] Be that as it may, he claimed to have arrived back at his grandmother's house in Goudini on the morning of 29 December 2007 in the company of his uncle.

His uncle then dropped him off at a pub in Worcester where he drank and bought alcohol to take back to Goudini. He had intended to take a taxi but by the time he wanted to leave for Goudini there were no taxis available. He approached a man standing next to a maroon car and asked him for a lift to Goudini, offering him R100 petrol money. The man agreed. No 2 loaded his liquor purchases into the boot. They (being the man and his four friends together with No 2) drove off. As they neared Goudini, No 2 suggested to the driver that he should allow No 2 to take over the wheel because the approach to his grandmother's house lay along a difficult road between vineyards and the car might be damaged if the driver was not familiar with the road. The driver agreed, and thus it was that No 2 was the driver of the maroon car when it arrived at the grandmother's house (as Nkonki testified).

[59] No 2 invited his new-found acquaintances to enjoy a drink with him. This is how they came to spend the afternoon and evening there. At some stage Nkonki suggested that the men might want female company. No 2 concurred and asked the owner of the car whether he could use it to fetch his cousin Vanessa and her friend Mtindizi, to which the owner was amenable. After fetching Mtindizi, and on their way back to his grandmother's house, they called at Camara's pub and at a shebeen called Mista. Nkonki served supper for No 2, the other men and Mtindizi.

[60] No 2 testified that he asked Vanessa and Mtindizi to join him at a club in Zweletemba. He had arranged for the owner to drop them off there. However the girls declined, saying they were already drunk. No 2 and the men took Mtindizi home. No 2 again took the wheel to ensure that there were no mishaps along the difficult road. After Mtindizi had been taken home, the owner resumed his position behind the wheel. No 2 fell asleep as they drove toward Zweletemba, waking up when they arrived there. The men dropped him off near the police station. He walked to his aunt's house where he drank with his cousins and then fell asleep. The following morning he took the train from Worcester to his mother's house in Khayelitsha.

[61] It need hardly be observed that this is a rather unlikely tale. If the road to his grandmother's house was so treacherous, how did No 2 imagine that a taxi was going to get him there? Why would the owner of the car allow a complete stranger to

drive it (coincidently on the three different occasions when the State witnesses observed him behind the wheel)? Is it likely that four men who had never before met No 2 would not only have agreed to take him to his grandmother's house but then have abandoned whatever other plans they might have had in favour of spending a number of hours with a stranger? And why did No 2 leave with the men that night? It was at his grandmother's house that he was staying during the holidays. He had bought the alcohol to take back to his grandmother's house and claims to have intended to get there by taxi. Why then not sleep there the night? Why instead ask to be driven to Zweletemba and sleep at a place he was not expected? Finally there is the Edgars bag which was found in the boot of the getaway car. Why did No 2 not take it when the men dropped him off in Zweletemba? The presence of the bag in the boot is more consistent with No 2 and the other occupants having fled from the car.

[62] The magistrate described No 2's demeanour as self-assured but said that his account, as summarised above, was very unconvincing. I agree. Indeed it is wholly implausible. As against this, the magistrate formed a favourable opinion of Mtindizi and Nkonki. Regarding the former, he said that she came across as intelligent and alert. Her observations, he said, were thoroughly tested under cross-examination. As to Nkonki, the magistrate said that he never gained the impression that she wished to mislead the court or that she was uncertain of herself. My own reading of their evidence has not created a different impression in my mind.

[63] As I have said, No 2 was identified as one of the robbers by Van der Ross and by Vermeulen. Although the magistrate did not comment specifically on their demeanour, he recorded, specifically with regard to identification evidence, that all the State witnesses apart from Pietersen made a favourable impression on him. Vermeulen's evidence reads well. Van der Ross also comes across from the transcript as a sincere and honest witness. She was subjected to a very lengthy and at times unfair cross-examination, exacerbated by the fact that she was recalled after No 2 decided to change his lawyer. Her exasperation and exhaustion is apparent on several occasions towards the end of the cross-examination.

[64] In my view, and leaving out of account the confession, the other evidence which the magistrate accepted was sufficient, particularly in the light of No 2's implausible testimony, to establish his guilt beyond reasonable doubt.

The case against No 1

[65] Ngayemfunda, who was No 1's girlfriend at the time, testified that the other accused arrived at her house early that morning in a maroon car and went off with No 1. No 1's mother likewise stated that No 1 was in the company of other men that morning and drove off from her place in a maroon car. Although under cross-examination from her son's attorney she conceded that the car might have been white, it does not seem very plausible that one could mistake the two colours. She testified that the men in the car were not the accused. The fact that she was a State witness does not mean that her evidence to this effect must be believed. The prosecutor was not in a position to cross-examine her.

[66] I have already referred to the evidence of Nkonki and Mtindizi and the favourable impression they made on the magistrate. Mtindizi made a confident photo ID of No 1 on 8 October 2008. Nkonki made a dock identification. (No 1 was not one of the persons she saw and identified at the Rawsonville police station on 1 January 2008.) When it was put to Nkonki by No 1's attorney that he had never been at her house, she replied that he knew very well he had been there. Given the favourable circumstances under which Nkonki observed the people who were with No 2 and the good impression she made on the magistrate, her dock identification is not without some evidential value.[11]

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[11] See, eg, *S v Mdlongwa* 2010 (2) SACR 419 (SCA) para 10 where Saldulker AJA (as she then was) said the following:'Additionally, merely because Mbatha made a dock identification of the appellant and accused five, does not make his evidence less credible. Generally, a dock identification carries little weight, unless it is shown to be sourced in an independent preceding identification. But there is no rule of law that a dock identification must be discounted altogether, especially where it does not stand alone. Mbatha had ample opportunity at least to observe two of the robbers who participated in the robbery as is visible from the video footage and who were later identified as the appellant and accused five in the facial comparison made by inspector Naude, an aspect to which I shall return to later, thus supporting his dock identification of them.' (In the second sentence of this passage she made a footnote reference to *S v Tandwa* 2008 (1) SACR 613 (SCA) at 617b-d. See also *S v Ramabokela & Another* 2011 (1) SACR 122 (GNP) paras 21-22.)

[67] Of the witnesses at Camara's pub, only April was able to identify No 1 as one of the robbers. When Carstens showed her a photo album on 7 January 2008 she was not able to point out any suspects. She thought the skin colours in the photos seemed too light. She testified, however, that on 12 August 2009, while she was waiting at court to testify, she saw the accused and immediately recognised No 1 and No 3 as the two persons who had been keeping guard in the alley.

[68] While April's evidence does not read badly (and she too was subjected to an unduly lengthy cross-examination), the magistrate stated that she came across as uncertain and he thought that her evidence did not really advance the State's case. To this I may add that April's description of the clothes worn by the man she identified as No 1 cannot confidently be said to accord with what No 1 was wearing that night. She said this person was wearing a cream/beige T-shirt and beige knee-length pants. In the police photo taken shortly after No 1's arrest he is shown wearing a white T-shirt with thin pink stripes. He testified at the trial-within-a-trial (this was after April testified) that when arrested he was wearing black jeans. This was not challenged or further explored.

[69] I thus consider that there is insufficient reliable eyewitness testimony to place No 1 on the scene at the time of the robbery. However, there is the reliable evidence of Mtindizi and Nkonki that he was in No 2's company during the afternoon and evening.

[70] There is also evidence that after the car chase No 1 was found hiding near to the abandoned Opel. It is common cause that he was concealed under a mattress in an outside room belonging to Fransiya Dick (the room did not have a door or roof). Erasmus testified that two shots were fired in his general direction by one of the men who fled from the car. He did not say that he returned fire. On his evidence, there were thus only two shots fired within seconds of each other. The police then began a search. Erasmus said that No 1 was only found about 30 minutes later. According to Louw, who found and arrested him, the outside room was about 30 to 40 metres from where the car was abandoned. No 1 did not offer an explanation for hiding in the outside room.

[71] Dick testified that the gunshots woke her up. She turned on the light and opened the door. A man wearing a white and pink T-shirt approached her and pleaded to be allowed inside (*'Mamma asseblief help my dat ek die huis binnegaan'*). He even offered to pay her. She refused and closed the door. She went to her window, attracted the attention of a policeman and told him about the man.

[72] No 1 denied having spent the night of 28/29 December 2007 with his girlfriend Ngayemfunda. Friends picked him up from his mother's house in the morning. One of these friends was a person called Tamarisa, and it was in his car that they travelled. He said these friends were from his neighbourhood in Delft but he did not know their addresses. They went to Avian Park where a 'street bash' was to take place. They did some things along the way, arriving at Avian Park at about noon. He himself did not know anyone in Avian Park but he had been there before with Tamarisa. They drank in the street. There was music coming from a house. The street in question was the road dividing the formal part of Avian Park from the informal settlement. At some stage he went between the shacks to urinate. This was when he heard shots. He ran deeper into the informal settlement and hid. He denied having spoken to Dick. He admitted that he did not offer an explanation when Louw asked him why he was hiding there.

[73] No 1's denial that he spoke with Dick is inconsistent with her evidence. Dick made a favourable impression on the magistrate. Furthermore, No 1's attorney did not, during Dick's cross-examination, challenge her version that No 1 asked to be allowed inside and offered to pay her. No 1, by contrast, made a poor impression on the magistrate.

[74] No 1 did not foreshadow an alibi until Nkonki was cross-examined. His version overall is highly implausible. It is unlikely that he would have been picked up in Delft as early as 06h30 with a view to attending a street party in Avian Park. He did not explain what he and his friends did between 06h30 and noon. His version was inconsistent with what was put on his behalf to Mtindizi, namely that he had left Delft for Avian Park at about 11h00. When cross-examined about this, he said he did not know where his lawyer got this from.

[75] Since the car chase ended after midnight on 29 December 2007, No 1 on his version must have been at the street party for more than 12 hours, apparently standing in the road the whole time. His evidence about the street party (which he gave in March 2012) was at odds with his testimony at the trial-within-a-trial (given in September 2011). On the earlier occasion he claimed to have been drinking in Avian Park at a shebeen called Plank Hok. He was not able to explain the discrepancy.

[76] He claimed not to have been with his friends when the gunshots were fired and did not know what became of them. His supposed reaction to the gunshots was very peculiar. He ran deeper into the informal settlement, ie in the direction from which the shots came, rather than back to the road where the street party was taking place. Only two shots were fired over the space of a few seconds. On No 1's version, he must have still been looking for a hiding place sometime after the brief outburst of gunshots had come to an end. Why did he still feel the need to hide? Even if he wished to get off the street, why did he find it necessary to conceal himself under a mattress rather than simply taking shelter in the room? And why would he remain hidden there for half an hour or so? Given his proximity to the place where the car chase ended, it is difficult to believe that he could not have been aware of the police's presence. They had arrived there with flashing blue lights and sirens. Erasmus testified that there were upward of 20 officials on the scene. The reaction of an innocent person would have been to approach the police rather than hide from them.

[77] On No 1's version, his three friends could have vouched for his alibi. The case was twice postponed for the possible calling by No 1 of an unidentified witness. On the third occasion No 1's attorney informed the court that the witness was 'still not available' and that his client had decided to close his case without further evidence.

[78] The magistrate was thus fully justified in rejecting No 1's version as false. Reliable State evidence placed him in the company of No 2 (who was definitely one of the perpetrators) during the afternoon and evening of 29 December 2007 and justified the further inference that he and No 2 were among the persons who fled from the abandoned Opel. Although the evidence is circumstantial, and although

there is no direct evidence of the role played by No 1 in the robbery, the court a quo was thus correct in finding that the State had proved his complicity beyond reasonable doubt.

The case against No 4

[79] Ngayemfunda testified that No 4 was one of the men that came to her house early on the morning of 29 December 2007 to collect No 1. They were inside the house for about five to ten minutes while No 1 got dressed. She did not really look closely at them (except for Magou, who attracted her attention because of the concealed firearm). However she picked up their names from the discussion. One of them was called Allie.

[80] She said she went to the police to make a statement after hearing from No 1's mother that the police wanted to talk to her because No 1 had told them that he had been with her earlier on 29 December 2007. Her first and main statement was not put to her in cross-examination, from which it is safe to infer that her statement mentioned the names about which she subsequently testified.[12] In fact, the proposition put to her in cross-examination was that she heard the names from No 1 when visiting him at Bellville-South, which she denied.

[81] Ngayemfunda also testified that when she and Cynthia visited No 1 at Bellville-South on 31 December 2007, she saw No 2, No 3 and No 4 together in a cell . She recognised one of these men as Allie (ie No 4). This was just two days after she had seen the men at her house. She was not asked to participate in a photo ID parade, perhaps because she knew No 1 well and had seen the other accused in custody and recognised them a couple of days later.

[82] Mtindizi identified No 4 as one of the persons who was with No 2 on the afternoon and evening of 29 September 2007. She did so during a photo ID parade on 8 October 2008. She testified that his was the only identification with which she had struggled because there were two photos which looked very alike but she was ultimately confident of her identification.

[12] The statement of 2 January 2008 at record 4179-4180 is clearly a supplementary statement.

[83] When Nkonki saw No 2 and two others (No 3 and No 4) under arrest in Rawsonville on 1 January 2008, she immediately identified the two others as having been among the men present at the house on 29 December 2007. I have already observed that the circumstances in which this identification was made call for caution. However Nkonki in general made a favourable impression on the magistrate. We cannot interfere with his conclusion that Nkonki made an honest identification. In assessing whether the identification was reliable, one must counter-balance the irregular circumstances in which it was made against the fact that Nkonki had opportunity to observe the men in relaxed circumstances over a period of some hours. She served them supper. It was three days later that she saw the three men under arrest. The faces of No 2's acquaintances would still have been fresh in her mind. Furthermore, her identification of No 4 does not stand alone. It is corroborated by Mtindizi's testimony.

[84] No 4 can derive no benefit from the evidence of No 2 and No 1 to the effect that none of them knew each other and that none of them (apart from No 2) were at Nkonki's place on the afternoon and evening of 29 December 2007, because the evidence to that effect by No 2 and No 1 was correctly rejected as false.

[85] I have already observed that the various accused denied knowing each other. Engelbrecht testified that No 2 and No 4 were together when the police arrived to arrest them on the afternoon of 30 December 2007. Had this been clearly established, it would have undermined No 4's claim. However, both No 2 and No 4 testified at the trial-within-a trial and again in the main case that they were alone and at different addresses when arrested. Each gave the address at which he was allegedly arrested. This aspect was not taken up with them in cross-examination.

[86] No 4 testified that on 29 December 2007 he had been painting his house in Khayelitsha. He finished at about 14h00, washed and went to fetch his girlfriend, Babalo Njedo. They returned to his house at about 19h00 and spent the rest of the night there. The magistrate did not comment adversely on his demeanour. His version, unlike those of No 1 and No 2, is not inherently implausible. He did not, however, call his girlfriend to corroborate his alibi.

[87] It is clear from the magistrate's judgment that he regarded the decisive factor in No 4's case as being his confession. It was this which distinguished his case from that of No 3 who was acquitted.

[88] We are not bound, however, to uphold No 4's appeal merely because it appears that but for his confession the magistrate would probably have acquitted him. It is apparent that the magistrate formed a favourable opinion of Ngayemfunda, Mtindizi and Nkonki. If their identification was accepted as reliable in respect of No 1 and No 2, why should we not accept it in respect of No 4? If No 4 was in truth in the company of No 1 and No 2 during the afternoon and evening of 29 December 2007 and left Goudini with them in the maroon Opel at about 22h00, the inference would be irresistible – in the absence of evidence to the contrary which could reasonably possibly be true – that No 4 remained with them and participated in the robbery. No 4 did not offer a version that he had parted company with the other accused at some stage after 22h00. Instead he put up a false version that he had never been with them at all.

Common purpose

[89] Mr Klopper argued that there was insufficient evidence to establish on a balance of probability that the accused had a common purpose to rob and kill Camara. The requirements for criminal liability on the basis of common purpose are trite (*S v Mgedezi & Others* 1998 (3) SA 687 (A) at 705I-706C; *S v Thebus & Another* 2003 (6) SA 505 (CC) paras 49-50). In the present case the accused went together by car to Camara's pub. The eyewitnesses attributed active roles to four perpetrators. No 2, who I am satisfied was one of the men that confronted Camara in the bar area, had a firearm, as did at least one man in the alley. A pistol was found in the abandoned car behind the front passenger seat, with one round in the chamber and another in the magazine. A Rossi revolver was found in the boot. The occupants must have had at least one further firearm, because the person who shot at Erasmus fled with his firearm.

[90] This evidence, coupled with the adverse inference to be drawn from the accused's false denial of being present at the scene, justifies the conclusion beyond

reasonable doubt that the perpetrators intended to rob Camara's pub and to use firearms to achieve their purpose. Intent to kill, at least in the form of dolus eventualis, must have been present.

[91] In my view, therefore, the appellants' convictions should be upheld.

Sentence (No 2 only)

[92] In the absence of substantial and compelling circumstances, Camara's murder attracted a life sentence because it was committed in the course of the perpetration of robbery with aggravating circumstances and because it was committed by a group of persons acting in the execution or furtherance of a common purpose.

[93] The approach to the question whether substantial and compelling circumstances exist is the one laid down in *S v Malgas* 2001 (1) SACR 469 (SCA), which has been consistently followed. In terms of that case the factors to be considered in determining whether substantial and compelling circumstances exist are all the factors traditionally taken into account in assessing an appropriate sentence, bearing in mind, however, that it is no longer 'business as usual' and that the emphasis has shifted to the objective gravity of the crime and the need for effective sanctions. If, after considering all relevant sentencing factors, the court has not merely a sense of unease but a conviction that injustice will be done if the prescribed sentence is imposed or (to put it differently) that the prescribed sentence would be disproportionate to the crime, the criminal and the legitimate needs of society, there will be substantial and compelling circumstances requiring the court to depart from the prescribed sentence.

[94] The Supreme Court of Appeal has emphasised, however, that a trial court should not base a finding of substantial and compelling circumstances on flimsy or speculative grounds or hypotheses (see, eg *S v PB* 2011 (1) SACR 448 (SCA) paras 9-10 and the passages there quoted). In *Malgas* it was said that the lawmaker has ordained that 'ordinarily and in the absence of weighty justification' the prescribed sentence should be imposed. Unless there are 'truly convincing reasons

for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts' (para 25).

[95] In determining whether an injustice would arise from the imposition of the prescribed life sentence, the customary sentencing considerations which come into play are the well-known triad comprising the offender, the offence and the interests of society. These three factors in turn require a court to bear in mind the varying purposes served by criminal punishment, namely deterrence, prevention, retribution and rehabilitation. Nevertheless, and in respect of crimes dealt with in the Act, the type of sentence to which these considerations point should not be assessed as if the Act had not been enacted. As was observed by Cameron JA in *S v Abrahams* 2002 (1) SACR 116 (SCA) at para 25 the Act 'creates a legislative standard that weighs upon the exercise of the sentencing court's discretion', so that even where there are substantial and compelling circumstances one should expect discretionary sentences to be more severe than before.

[96] No 2 was 22 at the time the crimes were committed and was thus relatively young. The State proved no previous convictions. He was in custody for about three years and eight months awaiting trial (30 December 2007-30 August 2011). In addition to these factors, which the magistrate mentioned, it may also be recorded that he had a four-year-old son currently residing with the child's mother.

[97] As against these considerations, there is the gravity of the crime and the circumstances in which it was committed. No 2 played a leading role. Camara's son testified as to the grief and trauma which his father's death had caused the family and the way the murder had shattered the town of Rawsonville. No 2 did not express genuine remorse, stating no more than that he felt partly responsible because he had brought the four unknown men into the area – a completely false attempt to distance himself from the crimes.

[98] In *Director of Public Prosecutions KZN v Ngcobo & Others* [2009] 4 All SA 295 (SCA) the fact that the appellants were aged between 20 and 22 at the time of the premeditated murder was not regarded, on its own or with other factors, as constituting substantial and compelling circumstances. The court said that none of

them demonstrated immaturity and that there was no evidence of peer pressure. In *S v Matyityi* 2011 (1) SACR 40 (SCA) Ponnan JA was critical of the trial judge's use of the phrase 'relative youthfulness' without any attempt at defining what exactly that meant in respect of the particular individual. The learned Judge of Appeal said that while someone under the age of 18 years could be regarded as naturally immature the same does not hold true for an adult and that a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor.

[99] In regard to time spent in custody (as to which, see *S v Radebe & Another* 2013 (2) SACR 165 (SCA), holding that there is no mechanical rule of thumb), the magistrate observed that the defence had contributed to the delay. There is merit in this observation though even if No 2 had conducted his defence with greater efficiency and economy his awaiting-trial period would have been lengthy on account of other factors. In *Director of Public Prosecutions, KwaZulu-Natal v Ngcobo & Others* 2009 (2) SACR 361 (SCA) the three accused, two of whom were 20 at the time of the murder and the third 22, argued that a two and a half year period awaiting trial should count in their favour. On appeal by the State, the Supreme Court of Appeal set aside an 18-year sentence for murder and replaced it with the prescribed life sentence. With reference to the awaiting-trial period, Navsa JA observed that the accused had maintained their innocence throughout the trial and sentencing proceedings, which necessitated the leading of extensive evidence. In *Director of Public and North Gauteng Pretoria v Gcwala & Others* 2014 (2) SACR 337 (SCA) the State conceded that the four-year period which the accused had spent awaiting trial constituted substantial and compelling circumstances to depart from the prescribed life sentence but successfully appealed against the trial court's approach of giving the accused credit for double the amount of time in custody.

[100] Each case must depend on its own particular circumstances. When all the circumstances are weighed in the present case, I do not think the magistrate erred in his conclusion that there were not substantial and compelling circumstances to deviate from the prescribed life sentence. In the language of *Malgas*, the case has not created in me a conviction that injustice would be done if the prescribed

sentence were imposed or that the prescribed sentence would be disproportionate to the crime, the criminal and the legitimate needs of society.

Conclusion

[101] It would not be right to end this judgment without commenting on the way the trial was conducted. Defence counsel cross-examined at inordinate length, tediously returning to ground already traversed, exploring in absurd detail matters which no witness could be expected to recall, posing ‘questions’ which at times ran to a page or more, unfairly suggesting to witnesses that if their version differed from that of another witness one of them must be lying, being aggressive and so forth. On neither side was there a serious endeavour to ensure that the evidence unfolded in a coherent fashion. The task of a reader could have been facilitated by early agreement on basic matters of geography and layout. The magistrate, who otherwise conducted in exemplary fashion a difficult trial which ran before him in fits and starts and delivered thorough and helpful judgments, should have intervened to keep cross-examination within proper bounds. This was necessary in fairness to witnesses and to prevent the inefficient wasting of judicial resources. Had this been done, the length of proceedings might have been reduced by half.

[102] The appeals against the convictions and the second appellant’s appeal against sentence are dismissed.

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ROGERS J

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STEYN J (conc)

APPEARANCES

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