IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: 17574/2022P

In the matter between:

AARON MBUYISA	**FIRST APPELLANT**
NTHETHELELO ZULU.	**SECOND APPELLANT**
SAMKELISWE NDWANDWE	**THIRD APPELLANT**
MUZI KHUMALO	**FOURTH APPELLANT**

and

THE STATE	**RESPONDENT**

Coram: Davis AJ et Radebe J
Heard: 3 November 2023
Date of Judgment: 10 November 2023

ORDER

On appeal from: Pongola Regional Court (sitting as court of first instance):

1. The appeals of the first, second, third and fourth appellants' against their conviction on a charge of robbery with aggravating circumstances are dismissed.

2. This judgment is to be referred to the offices of the Director of Public Prosecutions in this division for their necessary oversight over the inordinate delay in this appeal.

JUDGEMENT

Davis AJ (Radebe J concurring)

Introduction

[1] The four appellants, who were legally represented during their trial, were convicted of robbery with aggravating circumstances, read with s 51(2) of the Criminal Law Amendment Act 105 of 1997 on 28 August 2015 in the Regional Court sitting at Pongola before the learned magistrate, Mr. Nhleko. The first appellant was also charged with and acquitted of possession of an unlicensed firearm.

[2] On 21 September 2015, the appellants were sentenced to 12 years' imprisonment, the trial court having found substantial and compelling circumstances being present that justified not imposing the prescribed minimum sentence of 15 years imprisonment. The trial court being no longer available, leave to appeal, was heard by another regional magistrate[1] on 10 November 2016 at which leave to appeal was granted to all the appellants against conviction only. It is this appeal which serves before us.

[3] The transcripts reflect that the learned magistrate made his ruling after placing on record that he had read the transcription of the record and found that leave to appeal should be granted.

[4] It subsequently came to light that the record was incomplete, there are no transcripts available for the appearances on 29 April 2015 and 11 June 2015. It was at this time that the State closed its case and the first appellant testified and was cross examined to finality. The form upon which the identification parade proceedings were

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[1] Mr M Nkosi.

recorded has also been mislaid. The magistrate granting leave to appeal did not mention the incomplete record.

[5] Requests to reconstruct the record were unsuccessful and the trial court is unable to reconstruct the record as his notes have been lost during a move of premises and neither the State nor the defence are in a position to assist. The trial court has deposed to an affidavit outlining why the record cannot be reconstructed.

[6] The first appellant's appeal is premised entirely on the basis that as his evidence in chief and cross examination is absent, and as such cannot be rectified. Therefore a failure of justice has occurred and his appeal should succeed. The remaining appellants appeal on different grounds.

Legal Position

[7] The full bench of this division in *S v Shangase*[2] eloquently set out the correct approach by a court hearing an appeal where part of the record is missing or incomplete. Henriques J, on behalf of the full court in *Shangase*, wrote:

'[8] There are a number of decisions which deal with the sufficiency of an appeal record. In *Phakane v S* [2017] *ZACC* 44; 2018 (1) SACR 300; 2018 (4) BCLR 438 (CC), the Constitutional Court emphasised the appellant's right to a fair appeal as entrenched in s 35(3) of the Constitution which provides for every accused person to have a fair trial which includes a right of appeal or review to a higher court. In *Phakane* when the matter first served before the court a *quo,* the Full Court had a complete appeal record save for the evidence of one of the State witnesses. The court took the view that the appeal could be determined fairly despite the incomplete record and confirmed the conviction but upheld the appeal on sentence. The appellant then sought leave to appeal this decision to the Constitutional Court. The Constitutional Court had to decide whether the State's failure to deliver a complete trial record where the missing evidence could not be reconstructed infringed on an appellant's right to a fair appeal entrenched in s 35(3) of the Constitution.

[9] Of crucial importance in the trial court was the evidence of a witness, a Mrs Manamela, whose evidence could not be transcribed or reconstructed. The Constitutional court, at paragraph 38 of the judgment, held the following:

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[2] *Shangase v S* [2023] ZAKZPHC 8 per Henriques J with Poyo-Dlwati JP and Ploos Van Amstel J concurring.

> "The failure of the State to furnish an adequate record of the trial proceedings or a record that reflects Ms Manamela's full evidence before the trial court in circumstances in which the missing evidence cannot be reconstructed has the effect of rendering the applicant's rights to a fair appeal nugatory or illusory."

[10] Reference was also made to the decision in *S v Joubert* [1990] ZASCA 113; 1991 (1) SA 119 (A) in which the Appellate Division held the following:

> "If during a trial anything happens which results in prejudice to an accused of such a nature that there has been a failure of justice, the conviction cannot stand. It seems to me that if something happens, affecting the appeal, as happened in this case, which makes a just hearing of the appeal impossible, through no fault on the part of the appellant, then likewise the appellant is prejudiced, and there may be a failure of justice. If this failure cannot be rectified, as in this case, it seems to me that the conviction cannot stand, because it cannot be said that there has not been a failure of justice."

[11] The importance and necessity of the record of the proceedings in a trial court being available on appeal was also succinctly dealt with by the Supreme Court of Appeal in the decision of *S v Chabedi* 2005 (1) SACR 415 (SCA) paras 5-6, where Brand JA held the following:

> "On appeal, the record of the proceedings in the trial court is of cardinal importance. After all, that record forms the whole basis of the rehearing by the Court of appeal. If the record is inadequate for a proper consideration of the appeal, it will, as a rule, lead to the conviction and sentence being set aside. However. the requirement is that the record must be adequate for proper consideration of the appeal; not that it must be a perfect recordal of everything that was said at the trial. As has been pointed out in previous cases, records of proceedings are often still kept by hand, in which event a verbatim record is impossible...
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> *The question whether defects in a record are so serious that a proper consideration of the appeal is not possible, cannot be answered in the abstract. It depends, inter a/ia, on the nature of the defects in the particular record and on the nature of the issues to be decided on appeal*."

[12] In *S v Schoombee and Another* 2017 (2) SACR 1 (CC), the Constitutional Court had to consider whether the right of an accused person to participate in a reconstruction process was part and parcel of his rights to a fair appeal. In this matter, the appellants had not participated in the reconstruction process and the reconstruction was based solely on the trial judge's notes. At paragraph 19, the Constitutional Court once again emphasised that it was:

> "...long established in our criminal jurisprudence that an accused's right to a fair trial encompasses the right to appeal. An adequate record of trial court proceedings is a

> key component of this right. When a record "is inadequate for a proper consideration of an appeal, it will, as a rule, lead to the conviction and sentence being set aside".

At paragraph 20, the court held:

> "If a trial record goes missing, the presiding court may seek to reconstruct the record. The reconstruction itself is "part and parcel of the fair trial process".

Further, at paragraph 21, the court held:

> "The obligation to conduct a reconstruction does not fall entirely on the court. The convicted accused shares the duty. When a trial record is inadequate, 'both the State and the appellant have a duty to try and reconstruct the record'. While the trial court is required to furnish a copy of the record, the appellant or his/her legal representative 'carries the final responsibility to ensure that the appeal record is in order'. At the same time, a reviewing court is obliged to ensure that an accused is guaranteed the right to a fair trial, including an adequate record on appeal, particularly where an irregularity is apparent." (Footnotes omitted.)

[13] The Constitutional Court confirmed the principle that in *circumstances "where the adjudication of an appeal on an· imperfect record will not prejudice the appellants, their convictions need not be set aside solely on the basis of an error or omission in the record or an improper reconstruction process"*. It held that on the facts of the matter the record was detailed and specific and the appellant, by not challenging the reconstructed record when the matter first served before the Full Court, could not do so before it and rely on the imperfect record as a basis for their convictions and sentences to be set aside. It held that the record was adequate for a just consideration of the issues which the appellants had raised on appeal.' (my emphasis)

[8] On appeal, in this matter, we need to decide whether or not the record, as it presents before us, is adequate for a just consideration of the issues which the appellants, in particular the first appellant, have raised in this appeal.

Evaluation of the adequacy of the incomplete record

[9] Apart from the mislaid identification parade form, the evidence that is absent from the record is the evidence in chief and cross examination of the first appellant. It seems to be forgotten that the trial court in its judgment summarized, in detail, the evidence of the first appellant as follows:

'The first appellant testified that he did not know anything about the allegations against him. On the day of the incident he had come from Nongoma to Pongola with the third appellant to

view a house that was being sold. This house was being sold by the fourth appellant. They met at Pongola and proceeded to the WaterPas area where the house for situated.'

[10] After they viewed the house and discussed the price for the house the first appellant and third appellant left the second and fourth appellant behind at the house. When they arrived at a taxi stop three males (the fleeing group) ran past them being pursued by a group of another six people (the pursuing group) coming from the same direction.

[11] The pursuing group on arrival at the taxi stop, where the first appellant and third appellant were waiting. The pursuing group accused the first and third appellant of being part of the fleeing group. They then asked where they had come from, the first appellant told them he had come from Pongola to view a home that they wanted to buy.

[12] The pursuing group did not believe the first appellant and started to assault them. They fled. The first and third appellant were separated and after running about a kilometre another group of people found him at the bottom of the river when he was about to go up towards a school. They then made the first appellant walk to the shop, where the robbery occurred, where he found a group of people and a woman. He had not seen this shop when he had initially gone to Khumalo's homestead.

[13] On cross examination of the State witnesses it was put to them that the first appellant was assaulted at the shop again. Thereafter he was taken to the hospital where he saw the complainant, Yusuf Patel. According to the trial court's summary of the first appellant's evidence in the judgment, the first appellant when he testified told the court that he was not taken directly to the hospital, but he was, in fact, taken to the clinic where he was refused treatment. He was then transported to the station and kept in a certain room at the charge office and only received medical attention days later.

[14] It was only on Monday when the first appellant was taken to hospital. The robbery was committed on 20 June 2013, which was a Thursday. The significance of this is that the first appellant's version, as put to the State witnesses during the State

case, was that the first appellant was identified by the shop owner because he saw the first appellant at the hospital on the same day as the robbery.

[15] The first appellant claimed that he had never seen Ms Thembi Sikhosana the complainant's employee before, the first time he saw her was at court, and he conceded she pointed him out at the identification parade along with the complainant.

[16] In its analysis the trial court found it highly improbable that the complainant and Ms Sikhosana, the complainant's employee, identified the first appellant if he had not been present. The trial court found the identification of the first appellant as the person with the firearm both truthful and reliable. The trial court found it extremely coincidental that the first appellant would have come to the fourth appellant's homestead on that day and that both of them are subsequently identified as the perpetrators. That coincidence in light of all the evidence is impossible to accept as reasonably possibly true.

[17] The trial court noted in the judgment that the first appellant's evidence about his arrest, namely that he was standing at a taxi stop when three persons ran past him followed quickly by six other individuals who then accused him of robbing the store was never put to any of the State witnesses. The conclusion drawn by the presiding officer was that the first appellant fabricated this particular version of events at the time he gave evidence. That conclusion cannot be faulted. The reliable evidence on record is that the first appellant was arrested shortly after the robbery carrying a firearm in his hand that he only dropped to the ground after a warning shot was fired.

[18] Mr Mbokazi, of the legal aid board represented the first appellant, in his address to the trial court on the merits, says:

'the reason why I am not mentioning accused 1…, whether he should be found guilty or not, is that really one is in between taking into account the evidence that has been presented against the accused. Therefore it becomes difficult for me to stand up and say I am not convinced that the accused's guilt has not been proved beyond reasonable doubt or not'.

[19] Tellingly, during his address on the merits, unprompted by any intervention from the bench, Mr Mbokazi conceded that arguing against the finding that the first

appellant was correctly identified as one of the perpetrators is extremely difficult.[3] These concessions, with respect, are correctly made.

[20] The Supreme Court of Appeal (SCA) in *S v Chabedi*[4] held, regarding an incomplete appeal record, as quoted above, that the record need not 'be a perfect recordal of everything that was said at the trial'. The test is whether, and this is worth mentioning again is 'whether defects in a record are so serious that a proper consideration of the appeal is not possible'.[5] The answer to this must be clear. The nature of the defects and the issues to be decided are the determining factors in this regard.[6] This question can only be answered on a consideration of the facts on a case to case basis.

[21] On the facts of this matter the record in our view is detailed and specific enough. There is sufficient evidence on record of the first appellant evidence, imperfect as it might be. There are a number of recordals of the 1st appellant's version, firstly what was put to the state witnesses during cross-examination, secondly the detailed recordal of the first appellants evidence by the trial court, the discrepancies in the evidence compared to instructions put to witnesses by the legal representative of the first appellant. It is sufficient enough to decide the merits of the appeal in a way that accords with the first appellants fair trial rights as envisaged in section 35 of the Constitution.

[22] In conclusion, the record is sufficiently adequate for a just consideration of the issues which the first appellant has raised on appeal, including the incomplete record.

Adjudication of the appeal

[23] In *Sebidi v S* the court summarised the position as follows:[7]

'It is settled law that a court of appeal will not likely interfere with credibility and factual findings of the trial court. In the absence of an irregularity or misdirection, the court of appeal is bound

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[3] The transcript at 165.
[4] *S v Chabedi* 2005 (1) SACR 415 (SCA) paras 5 – 6, see *Shangase v S* [2023] ZAKZPHC 8 para 11.
[5] *S v Chabedi* 2005 (1) SACR 415 (SCA) para 6.
[6] *S v Chabedi* 2005 (1) SACR 415 (SCA) para 6.
[7] *Sebidi and others v S* [2023] ZANWHC 151 para 18, where the court referred to: *S v Francis* 1991 (1) SACR 198 (A) at 204c – e, *S v Mkohle* 1990 (1) SACR 95 (A) at 100e.

by such findings, unless it is convinced that the findings are clearly incorrect or unless an examination of the record reveals that those findings are patently wrong.'.

[24] The authors Schmidt and Rademeyer summarised how evidence is assessed on appeal as follows:[8]

'When an appeal is lodged against a trial court's findings of fact, the appeal court takes into account that the court a quo was in a more favourable position than itself to form a judgment because it was able to observe witnesses during their questioning and was absorbed in the atmosphere of the trial from start to finish. Initially, therefore, the appeal court assumes that the trial court's findings were correct, and it will normally accept those findings unless there is some indication that a mistake was made.' (footnote omitted)

[25] The SCA in *Hadebe* summarised the appeal courts approach to the trial courts findings as follows:[9]

'Before considering these submissions it would be as well to recall yet again that there are well-established principles governing the hearing of appeals against findings of fact. In short, in the absence of demonstrable and material misdirection by the trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. The reasons why this deference is shown by appellate Courts to factual findings of the trial court are so well known that restatement is unnecessary.'

[26] If the court of appeal is merely left in doubt as to the correctness of the factual conclusions arrived at by the trial court, it will uphold them. The SCA restated the principle as follows in *Naidoo*:[10]

'a Court of appeal does not overturn a trial Court's findings of fact unless they are shown to be vitiated by material misdirection or are shown by the record to be wrong.'

[27] *Van Heerden v S* pointed out that[11]

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[8] CWH Schmidt and H Rademeyer *Law of Evidence* (Services Issue 21, May 2023) at 3-40, and the cases cited.

[9] S v *Hadebe* 1997 (2) SACR 641 (SCA) at 645e – f.

[10] *S v Naidoo and others* 2003 (1) SACR 347 (SCA) at para 26; see also the following *dictum* of the SCA in *Beukes v Smith* [2019] ZASCA 48; 2020 (4) SA 51 (SCA) para 22:
'It is trite that the powers of an appeal court to overturn factual findings by a trial court are restricted. But where the findings of a trial court are based on false premises or where relevant facts have been ignored, or where the factual findings are clearly wrong, the appeal court is bound to reverse them.' (footnote omitted)

[11] *Van Heerden v S* [2021] ZAFSHC 275 para 16 where the court references *S v M* 2006 (1) SACR 135 (SCA) para 40.

'No judgment is perfect and the fact that certain issues were not referred to does not necessarily mean that these were overlooked. It is accepted that factual errors do appear from time to time, that reasons provided by a trial court are unsatisfactory or that certain facts or improbabilities are overlooked. As shown supra the court of appeal should be hesitant to search for reasons that are in conflict with or adverse to the trial court's conclusion. However, in order to prevent a convicted person's right of appeal to be illusionary, the court of appeal has a duty to investigate the trial court's factual findings in order to ascertain their correctness and if a mistake has been made to the extent that the conviction cannot be upheld, it must interfere.'

Factual matrix and the magistrate's findings

[28] The complainant's shop is situated in the semi-rural area of Pongola at a settlement known as Waterpas The shop's construction is a unfortunately a familiar one , the staff serve customers from behind burglar bars and hand items through gaps in the bars to the customers. Where items purchased are too large to pass through the burglar bars a door is opened to pass the goods to the customer. This is necessary due to safety concerns inherent in the nature of business in these areas. The complainant's shop sold food items, household items such as cleaning materials and airtime.

[29] On the day of the robbery the complainant was serving customers from this position and his employee Ms Sikhosana was preparing food in the back of the premises. The first and fourth appellants came in and asked to purchase mielie meal. When the complainant opened the gate in order to pass the mielie meal to the first and fourth appellant, the first appellant produced a firearm. He immediately grabbed the complainant. The gun was held against the complainant's face. The first appellant immediately removed the cell phone and some money from the complainant's pocket. The first appellant struck the complainant on the forehead with the firearm resulting in an open wound on the head. The complainant was severely assaulted. The first and fourth appellants punched and kicked him as they forced him into the back of the store-room. The fourth appellant was also armed with a knife. The fourth appellant tied the complainant up with a long cord.

[30] Ms Sikhosona was in the back of the store when she heard the commotion and came to the front of the store to see what was happening. She was immediately confronted by the first and the fourth appellants. She was grabbed by the first appellant and watched the complainant being tied up by the fourth appellant. On their demand she took them to where the money was usually kept, there she saw the second and third appellant who were using hand gestures to keep people from coming into the store.

[31] After being slapped by the first appellant Ms Sikhosona was also tied up and their assailants left the store with the items listed in the charge-sheet. They immediately untied themselves and ran into the street and raised an alarm. She saw the four appellants walking down the road together.

[32] She alerted two traffic cops, Mr Ndlangamandla and Mr Ntshangae and they along with the community gave chase. She did not participate in the chase, she waited along on the road near the store that had been robbed. After the capture of first to third appellants they were brought to her and she identified all three as those that had been involved in the robbery. Later she identified the four appellants at an identification parade.

[33] The third appellant was almost immediately apprehended by traffic officer Mr Ntshangase, who was assisted by the community. Derek Qwabe was one of the community members present at the time of the arrest of the third appellant. Pursuant to information from the community he ultimately apprehended the first appellant. The information led him onto a gravel road where he saw the first appellant walking with a Norinco pistol in his hand. Mr Qwabe shouted for the first appellant to put his firearm down, he refused, and Mr Qwabe fired a warning shot, the first appellant then put the firearm down and he was arrested.

[34] The second appellant was arrested shortly thereafter. On information from the community, the two traffic officers proceeded to a toilet situated at a nearby homestead in which a person was reported to be hiding. On arrival traffic officer Mr Ndlangamandla demanded that the person inside the toilet come out. The door was

opened, a bag was thrown out. Immediately thereafter the second appellant came out. A knife was recovered and inside the bag they also found airtime.

[35] The second appellant was crying and kept saying that 'a Khumalo had said they must leave Nongoma and come to Pongola to commit a robbery'. It was a voluntary spontaneous response. The second appellant was assaulted by the public and the traffic officers, who tried to protect him.

[36] Immediately on being taken into custody at the scene, the first to third appellants, the complainant's employee, Ms Sikhosana identified all three of them as being part of the gang that had robbed the store of the complainant. She identified the first appellant as the person who carried the firearm. The complainant's cell-phone was handed back to him after he identified it as his by activating the sim card and showing information on the phone that proved it was his. It is unclear from whom the phone was recovered.

[37] Constable Miya, the arresting officer from SAPS, took the first appellant to hospital on the same day because of the injuries he had sustained from the assaults of the public. The complainant was present at the hospital at the same time but Constable Miya maintained the complainant and the first appellant did not see each other at the hospital. This is confirmed by the complainant. The complainant later pointed out the first appellant at an identification parade.[12]

[38] Although the date of the arrest of the fourth appellant and the manner of his arrest was not led by the State, the fourth appellant when he gave evidence, testified that he was arrested on the Sunday after the robbery, which had occurred on a Thursday. He went to the police station to collect a missing identity book and was arrested while at the station. The date of his arrest is consistent with the record of his first appearance in the magistrates' court.

[12] The significance and probative value of the identification parade is doubtful on these facts. The complainant identified the first appellant at the scene, a short time after the robbery. Ms Sikhosana identified the first to third appellants at the scene shortly after the robbery. The fourth appellant maintains he had an intimate relationship with the witness, he does not argue that it is an honest but mistaken identification but one out of some sort of malice without any good reason for it. Thembi Sikhosana maintained that she does not know the fourth appellant and her identification of him was as a consequence of the robbery.

[39] The fourth appellant's version was that the second appellant introduced the first and third appellants to him as potential buyers for a house that he was selling. He went into town that day with the second appellant where they met the first and third appellants and discussed the sale. Thereafter they viewed the house.

[40] After the meeting concluded the first and third appellants left. The second appellant went to buy headache pills but never returned. He was called to an emergency concerning his cattle that had escaped onto the N2. He knows nothing about the robbery at the complainant's store, he never went to the store on the day of the robbery.

[41] The fourth appellant maintains he was in a serious relationship with the Ms Sikhosana, although he knew her as a Buthelezi. His wife disapproved of the relationship and this had caused conflict between his wife and Ms Sikhosana. This was fiercely denied by Ms Sikhosana. He was a regular at the complainant's store and the fourth appellant maintains that the complainant did not point him out at the parade and that Ms Sikhosana initially did not either until prompted to do so by the police. The fourth appellant is according to him well known to the witnesses. The fourth appellant called his elderly mother to corroborate the relationship, she failed to do so.

Appellant's submissions

[42] No submissions were made in respect of the first appellant at the trial pertaining to the merits of the matter. The first appellant's legal representative at the trial in fact conceded that the evidence against the first appellant was unanswerable. In respect of the first appellant, that concession is inevitable, the evidence implicating the first appellant is simply overwhelming. He is positively identified by both the complainant and his employee, Ms Sikhosana. Immediately after the robbery he is pursued by police and the community and arrested shortly afterwards openly in possession of a firearm. There can be little doubt that the court correctly found the first appellant guilty of robbery with aggravating circumstances.

[43] In respect of the submissions in respect of the second and third appellants, counsel for the second and third appellants maintains that the evidence led was

insufficient for the trial court to make a finding that they participated in the robbery. Although no finding was made by the trial court of it convicting on the basis of common purpose the submission is that there was insufficient evidence to link them to the crime.

[44] Counsel for the second and third appellants maintains that their decision not to give evidence in the matter was the correct decision as they had no case to answer at the closure of the State case. I am not sure that conclusion is correct.

[45] The fourth appellant was identified by Ms Sikhosana, but he testified that he was not on the scene. Counsel submits that the identification of the fourth appellant is unreliable, however the trial court found that the issue was more one of credibility than any question of the reliability of the identification and this issue needs to be resolved in this appeal.

[46] The trial court was, correctly so, alive to the need to evaluate all the evidence in totality, he warned against the compartmentalisation of different aspects of evidence. The analysis of evidence in isolation can lead to conclusions that are not sustainable on a careful conspectus of all the evidence. The court when evaluating evidence considers the totality of the evidence in order to decide whether or not the guilt of the accused has been proved beyond reasonable doubt. The approach is that the onus rests upon the State to prove the accused's guilt beyond a reasonable doubt and the corollary is that, if the accused's version in the *light of all the evidence on record* is reasonably possibly true and an innocent explanation, then he is entitled to an acquittal.[13]

[47] In *Sithole*[14] the SCA reiterated that

'A court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt nor does it look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true. The correct approach is set out in the following passage from *Mosephi and others v R* LAC (1980 – 1984) 57 at 59 F-H:

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[13] *S v Trainor* 2003 (1) SACR 35 (SCA) para 9, *Sithole v S* [2012] ZASCA 85 para 8, *S v Doorewaard and another* [2020] ZASCA 155; 2021 (1) SACR 235 (SCA) para 133.
[14] *Sithole v S* [2012] ZASCA 85 para 8. See also *S v Hadebe* 1998 (1) SACR 422 (SCA) at 426e-h.

> "The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful guide to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees."'

[48] I borrow from the trial court's reasoning as quoted in *Shepard*[15]

'In assessing the evidence, all of it must be considered, that is the state witnesses and the defence witnesses. Any witness taken in isolation may not meet the required standard of proof but when his or her evidence is considered collectively as part of the mosaic a different picture can and often emerge. That is what has transpired here. Assessed and judged individually it is unlikely that it can safely be stated that any state witnesses has established the guilt of the accused beyond reasonable doubt but collectively, together with that part of the accused's testimony which is not in conflict with the state case, a picture has emerged which fits like a hand into a glove enabling the court to find with the requisite degree of certainty whether the accused was involved in the final conduct.'

[49] When the evidence is approached on this basis it becomes clear that the trial court properly analysed the evidence before it and was free of any misdirection and correctly concluded that the onus had been discharged by the prosecution. The conviction of the first appellant is unassailable, the evidence is overwhelming against him and other than the incomplete record not a single submission has been made to suggest that his appeal had reasonable prospects of success. His appeal against conviction falls to be dismissed.

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[15] *Shepard v S* [2018] ZAKZPHC 70 para 56, where the court quoted from the magistrate's judgment. See also *S v Mavinini* 2009 (1) SACR 523 (SCA) para 26, quoted in para 55 in *Shepherd*.

The second and third appellants

[50] The submissions in respect of the second and third appellant that the State has failed to prove beyond reasonable doubt the case against them. As the trial court pointed out, it is not only the identification of them at the shop entrance waving people away from the scene and the vouchers recovered in the second appellants possession, that points to their guilt.

[51] The following facts were found and considered by the trial court:

(a) Ms Sikhosana identified the second and third appellants at the scene just outside and inside the shop.

(b) They were waving, keeping people away from the shop.

(c) The second appellant acknowledged the first appellant at this time.

(d) The four appellants left together.

(e) When Ms Sikhosana escaped and went outside, they were still together.

(f) Ms Sikhosana raised the alarm, all four of them ran away, splitting up.

(g) The third appellant was arrested almost immediately.

(h) Ms Sikhosana positively identified him at the scene.

(i) A short while later Mr Qwabe arrested the second appellant when he was found hiding in a toilet.

(j) The second appellant was found in possession of a knife and airtime vouchers in a bag.

(k) The second appellant was crying and kept repeating words to the effect that Khumalo made them come from Nongoma to commit robbery.

(l) Both the first and fourth appellants confirm that the four were together on the day and that the first and third appellants had come from Nongoma to meet them.

[52] There is therefore both direct and circumstantial evidence linking them to the commission of the robbery.

[53] Notwithstanding the direct and circumstantial evidence against them the second and third appellants elected to utilise their right to remain silent. That election has consequences, the trial court concluded that ‘their failure to testify and counter the evidence that was led against them was important in the consideration of the question

whether or not the state had discharged the onus'. The trial court then found that the State has proven beyond reasonable doubt that they are the perpetrators.

[54] The conclusion by the trial court is undoubtedly correct. The proper approach in situations like this has been defined by the SCA as follows:[16]

'It is trite law that a court is entitled to find that the State has proved a fact beyond reasonable doubt if a *prima facie* case has been established and the accused fails to gainsay it, not necessarily by his own evidence, but by any cogent evidence. We use the expression '*prima facie* evidence' here in the sense in which it was used by this Court in *Ex parte the Minister of Justice: In re R v Jacobson & Levy* 1931 AD 466, where Stratford JA said at 478:

> "'*Prima facie*'' evidence in its more usual sense, is used to mean *prima facie* proof of an issue the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, the *prima facie* proof becomes conclusive proof and the party giving it discharges his *onus*.'"

[55] In *S v Chabalala* ***[17]***the SCA confirmed that:

'The appellant was faced with direct and apparently credible evidence which made him the prime mover in the offence. He was also called on to answer evidence of a similar nature relating to the parade. Both attacks were those of a single witness and capable of being neutralised by an honest rebuttal. There can be no acceptable explanation for him not rising to the challenge. If he was innocent appellant must have ascertained his own whereabouts and activities on 29 May and been able to vouch for his non-participation. He was also readily able to confirm that the complainant indeed placed his hand on someone else's shoulder. To have remained silent in the face of the evidence was damning. He thereby left the *prima facie* case to speak for itself. One is bound to conclude that the totality of the evidence taken in conjunction with his silence excluded any reasonable doubt about his guilt.'

[56] When one considers the evidence in its totality, factoring into account each piece of the jigsaw of evidence, how each piece fits in with the other evidence on record then the only conclusion in this appeal is that the second and third appellants'' conviction as participants in the robbery is correct. At no time in his judgment did the trial court convict the second and third appellants for robbery other than on the basis that they were participants or co-perpetrators. The record shows that the trial court did

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[16] *S v Boesak* 2000 (3) SA 381 (SCA) para 46.
[17] *S v Chabalala* 2003 (1) SACR 134 SCA para 21.

not base the second and third appellants' conviction on the doctrine of common purpose at all. The trial court found that on all the evidence the four appellants were all undoubtedly participants.

[57] The first and fourth appellant entered the store while the second and third appellants ensured that no one interrupted the robbery. The second and third appellants prevented persons from entering into the store at this time. They left together. Shortly thereafter the first three appellants were arrested and identified by Ms Sikhosana. The third appellant on capture, immediately and spontaneously made a statement that the robbery was committed at the behest of the fourth appellant.

[58] Airtime vouchers were recovered from him, whereas it is correct that no evidence was tendered conclusively showing that the vouchers were taken from the store that inference is irresistible. The only evidence on record, because the third appellant declined to give evidence, is as follows:

(a) He was in the immediate vicinity of the shop, he is involved in ensuring the robbery is not interrupted by acting as an outside guard preventing people from entering or approaching the store.

(b) He leaves with the other three members of the 'gang' that removed the items from the shop.

(c) They walk away together,

(d) When the alarm is raised he flees along with the other three perpetrators.

(e) Shortly thereafter he is found hiding in a toilet with a knife and bag containing airtime vouchers.

(f) His spontaneous reaction to a question about why he is hiding in the toilet is to say to traffic officers Mr Ndlangamandla, Mr Ntshangase and other community members present, the fourth appellant[18] told them to leave Nongoma and come to Pongola to commit robbery.

[59] With there being no explanation why the second appellant was in possession of a knife and the airtime vouchers of the complainant, his spontaneous admission

[18] In context of the evidence in its totality the fourth appellant is the only person he could be referring to.

confirming a prior agreement to rob the complainant, his close proximity to the robbery both in time and place makes the inference of his participation in the robbery inescapable. The correct inference is arrived at almost inevitably when considering all the evidence holistically and not by focusing on evidence in isolation.

[60] Both the State and counsel for the appellants, in their heads of argument and submissions before this court, failed to heed the approach of the SCA in how to approach the evidence implicating the second and third appellants. On a consideration of all the evidence, the conclusion that on the the totality of the evidence the second and third appellants' guilt was proved.

[61] Despite the trial court convicting on the basis of participation or as co-perpetrators the State concedes the appeal on the basis that the appellants were not aware of the reliance on common purpose and therefore the matter has to be set aside. This would be so if the appellants were convicted on the basis of common purpose but as the judgment clearly states the trial court convicted, in my view correctly as perpetrators. It is necessary to briefly outline why the doctrine of common purpose played no role in the decision of the trial court.

Co-perpetrators and common purpose

[62] It would appear that the State and for that matter counsel for the appellants are of the belief that as the second and third appellant were not involved with the wielding of weapons and the removal of the items from the complainant's possession and this necessarily means that they could only be convicted in our law on the basis of the doctrine of common purpose. As they were not the 'main perpetrators' that the lesser role played by the second and third appellant meant that they could only be convicted on the basis of the doctrine of common purpose.

[63] The State in its heads of argument concedes the merits of the appeal on the basis that the doctrine of evidence cannot be applied unless the appellants were advised of the State's reliance on the doctrine before the trial commenced. There was no mention in the charge sheet of the State's reliance on the doctrine and therefore,

'as the charge-sheet is silent on any possible reliance on the doctrine of common purpose, and further that there was no application for amendment of the charge-sheet in terms of s 86 of the CPA, the conviction of the appellant . . . cannot stand.'[19]

[64] With respect to counsel on the facts of this matter the doctrine does not apply, the State during the trial did not seek to rely on the doctrine of common purpose and the trial court in its judgment made no mention of the doctrine. The magistrate convicted on the basis that all four appellants were perpetrators. A good illustration of the law on the facts of this matter is in *Hlongwane*[20] where the court had the following two issues to decide: the first was whether the appellant was a co-perpetrator or accomplice in respect of the robbery. The second was to determine if the appellant is a co-perpetrator or an accomplice where he did not wield or threaten the complainants with a knife, and where only his co-participants did.

[65] In *Hlongwane* the court said, with reference to the authors *Snyman* and *Hiemstra*, the following:[21]

'The starting point is that a person can commit an offence directly or vicariously through another and that where two or more persons agree to commit a specific crime, such as robbery, it is irrelevant what task each was assigned for its execution. Each is a co-perpetrator because he or she had agreed to commit the crime and either intended that force would be applied in order to rob or foresaw that possibility. Furthermore their agreement can be established through circumstantial evidence alone.'

[66] The requirements that must be present for an accused to be convicted as a perpetrator are well established. The fascination with who was primary perpetrator as opposed to a person merely performing other tasks to ensure the actus reus is completed is misplaced.[22] *Snyman* confirms:[23]

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[19] *S v Msimango* [2017] ZASCA 181; 2018 (1) SACR 276 (SCA) para 18.
[20] *S v Hlongwane* [2014] ZAGPPHC 332; 2014 (2) SACR 397 (GP). See SV Hoctor Snyman's Criminal Law 7ed (2020) at 224 – 227, A Kruger *Hiemstra's Criminal Procedure* (Service Issue 16 February 2023) at 22-29 onwards.
[21] *S v Hlongwane* [2014] ZAGPPHC 332; 2014 (2) SACR 397 (GP) para 41.
[22] SV Hoctor *Snyman's Criminal Law* 7ed (2020) at 222.
'If a number of persons commit a crime together, it is unnecessary to stipulate that only one of them can be the perpetrator, and that the others who help in its commission must necessarily fall into a different category.'
[23] SV Hoctor *Snyman's Criminal Law* 7ed (2020) at 222.

'It is not always practicable to identify one principal perpetrator or, as he is sometimes called, "principal offender" or "actual perpetrator". What criterion should be applied to determine which one of a number of participants qualifies as the principal perpetrator? One cannot allege that the principal perpetrator is the person who himself stabs the victim or, where theft is involved, removes the article, for a person may commit a crime through the instrumentality of another. If a number of people commit a crime and they all comply with the requirements for perpetrators set out above, they are all simply co-perpetrators. A co-perpetrator does not fall into any category other than that of a perpetrator.'

[67] *Snyman* uses the following example to explain the above quoted passage:[24]

'A enters a house and shoots and kills Y while B merely keeps guard outside the house. Both are nevertheless co-perpetrators in the commission of the murder, if the conduct of both can be described as the unlawful intentional causing of the death. That one is a perpetrator in no way detracts from the fact that the other is also a perpetrator.'

[68] Precedent confirms this. In *Parry*,[25] for example, on a charge of murder the actual person who was responsible for the delivery of the fatal blow was absent from the trial and never convicted yet Parry was convicted on the basis of his own acts and his own state of mind.

[69] In *Williams*,[26] similarly it was said,

'An accomplice's liability is accessorial in nature so that there can be no question of an accomplice without a perpetrator or accomplice committing the crime. *A perpetrator complies with all the requirements of the crime definition in question. Where co-principals commit the crime together, each co-defendant complies with all the requirements of the crime definition involved. On the other hand, an accomplice is not a perpetrator as the perpetrator's actus reus is missing from him*. An accomplice knowingly associates himself with the commission of the crime by the perpetrator or co-principals in that he is knowingly helpful in the commission of the crime or by knowingly providing the perpetrator or co-principals with the opportunity, the means or the information that promotes the commission of the crime.'

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[24] SV Hoctor *Snyman's Criminal Law* 7ed (2020) at 223.
[25] *R v Parry* 1924 AD 401.
[26] Joubert JA in *S v Williams* 1980 (1) SA 60 (A) at 63A-B as translated from Afrikaans to English by me.

[70] In *S v Khoza*,[27] the proper terminology in the participation doctrine was discussed. A participant may take the form of a perpetrator, co-perpetrator or an accomplice. This distinction between the forms of participants in an offence was restated in S *v Kimberley*[28] where the following was held:

'*Perpetrators and accomplices are all participants in a crime. A perpetrator is one who performs the act that constitutes the particular crime with the intention required by law for that crime. Where two or more persons together perpetrate a crime, they are termed co-perpetrators*. An accomplice is neither a perpetrator nor a co-perpetrator, in that the acts performed by him do not constitute a component of the *actus reus* of the particular crime. He is one that consciously associates himself with the commission of the crime by aiding or assisting the perpetrator, which generally involves affording him or her opportunity, means or information in respect of the commission of the crime. The criminal liability of the accomplice is therefore accessory in nature.'

[71] *Hiemstra*'s[29] explanation in his commentary logically sets out the correct approach, under the heading aptly named 'Unnecessary reliance on common purpose', and explains why the State's concession in their heads of argument is based on an incorrect premise:

'The doctrine of common purpose is often applied where it is unnecessary and inappropriate. This not only leads to muddling of the principles of participation but, more importantly, confuses the evaluation of the evidence by the person who has to decide on the facts. *The doctrine postulates as point of departure the absence of an agreement to commit the offence alleged*.'

[72] *Hiemstra* continues as follows:[30]

'Common purpose thinking is irrelevant where an agreement to commit the offence has been proved by means of direct or circumstantial evidence or both. Botha JA's discussion in *S v Mgedezi and Others* 1989 (1) SA 687 (A) at 705I of the prerequisites for liability based on the doctrine is expressly based on the premise: "In the absence of a prior agreement . . .". Holmes JA in *S v Ngobozi* takes as point of departure the absence of an agreement to murder. To invoke, as is sometimes done, common purpose in the case of a hired assassin is wrong in

[27] *S v Khoza* 1982 (3) SA 1019 (A) at 1031B-F.
[28] *S v Kimberley and another* 2004 (2) SACR 38 (E) para 10.
[29] A Kruger *Hiemstra's Criminal Procedure* (Service Issue 16 February 2023) at 22-29 – 22-30.
[30] A Kruger *Hiemstra's Criminal Procedure* (Service Issue 16 February 2023) at 22-29 – 22-30.

principle and calculated to confuse the *judex facti*.[31] In such cases the parties are simply co-perpetrators, with the person hired as direct actor, and the person who hires as vicarious actor.'

On the facts of this appeal there is both circumstantial and direct evidence of a prior agreement to rob the complainant.

[73] *Hiemstra* makes the point even clearer by using this example:[32]

'five robbers, all members of a gang, commit a bank robbery in the central business district in broad daylight. A sits waiting in the getaway car around the corner; B is the sentry across the road; C enters the bank with a suitcase in which to load the spoils; and D and E, both armed with AK47s, walk into the bank and open fire as they enter and fatally wound several bystanders. All five are guilty of murder, not as a result of a forced application of the doctrine but simply as co-perpetrators. Against each one the inference would be irresistible that he agreed that shots would be fired (by himself or one of the others), with the intent to kill bystanders or, at best for him, that he foresaw the real risk of such death and was indifferent thereto. Each of the members of the gang had the direct intent to apply deadly force in order to rob as to the murders there was thus, at the very least, intention by foresight of possibility (legal intention). Each fulfilled his agreed role in the execution of such intent. Each is thus a co-perpetrator in the commission of the murder, albeit vicariously in the case of those who did not directly participate in the shootings but nevertheless participated fully in the crime. *In such case invocation of the doctrine of common purpose is superfluous*. The correct result would be reached by a simple application of the principles of the law of participation on the given facts.'

[74] In casu, the second and third appellants did not testify, the unassailable facts correctly accepted by the trial court are that the second and third appellants' roles in the robbery at the complainant's store was the following:

(a) The four people involved met on the day and there was an agreement to rob the store.

(b) Two persons armed with a firearm and a knife went into the store to subdue the resistance of those at the shop.

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[31] This is Latin for the 'trier of facts'.

[32] A Kruger *Hiemstra's Criminal Procedure* (Service Issue 16 February 2023) at 22-30.

(c) The second and third appellants stood sentry guard outside to prevent assistance from entering to allow those inside to complete the act of robbery (i.e. *actus reus*).

(d) Immediately after the completion of the act they left together.

(e) They split up only after the alarm was raised.

(f) They were arrested shortly afterwards, the second appellant in possession of a knife and airtime vouchers.

(g) The second appellant makes a spontaneous declaration, crying or complaining that 'a certain Khumalo person who is the one that said they must leave Nongoma and come to Pongola to commit robbery.'

[75] The evidence shows that the second and third appellants entered into an agreement to rob the complainant's shop sometime prior to the robbery. They performed acts as described to assist in the completion of the robbery (i.e. *actus reus*) and to prevent and overcome any resistance to the robbery. They are all co-perpetrators, independent of any common purpose which has as its rationale the imputation of the *actus reus* to all the accused when the State cannot prove that all accused committed the *actus reus*.

[76] On the requirements as succinctly set out by *Hiemstra* above, the second and third appellants are co-perpetrators, the trial court did not convict the second and third appellants by invoking the doctrine of common purpose, but because they fully participated in the crime, including the completion of the act (i.e. *actus reus*). The appeal in respect of the second and third appellants against their conviction on a charge of robbery with aggravating circumstances consequently falls to be dismissed.

The fourth appellant

[77] The State conceded the issue of identification raised in the heads of argument of the fourth appellant, State counsel submitted that the dock identification of the fourth appellant carried little weight. The SCA has held that:

'Dock identification may be irrelevant evidence generally, unless it is shown to be sourced in an independent preceding identification, it carries little weight: "taken on its own it is suspect".'[33] (footnotes omitted)

[78] In *Tandwa*[34] the SCA said,

'In ordinary circumstances, a witness should be interrogated to ensure that the identification is not in error. Questions include –

> "what features, marks or indications they identify the person whom they claim to recognise. Questions relating to his height, build, complexion, what clothing he was wearing and so on should be put. A bald statement that the accused is the person who committed the crime is not enough. Such a statement unexplored, untested and uninvestigated, leaves the door wide open for the possibility of mistake."' (footnote omitted)

[79] The factual basis of the concession in the heads of argument is incorrect. It is submitted on behalf of the fourth appellant that the single evidence of Ms Sikhosana who identified the fourth appellant as the person who tied the complainant and her up and was armed with a knife is unreliable. According to the State's heads of argument, this is especially so as it was a dock identification. Whereas Ms Sikhosana did not testify about attending an identification parade, indeed the prosecution surprisingly did not lead her on that aspect, however the fourth appellant did testify about the identification parade.[35]

[80] Unfortunately counsel for the State clearly placed their heads of argument before this appeal court without acquainting itself with the record in a way consonant with their duties to the court and indeed the victims of crime. A detailed reading of the record would have revealed that she attended the identification parade.

[81] The record of the fourth appellant's evidence reveals that the four appellants stood on an identification parade with over 20 other people standing. The complainant pointed out the first appellant and a 'wrong' person, then Ms Sikhosana attended at the parade and pointed out the first, second and third appellants. She then conferred

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[33] *S v Tandwa and others* 2008 (1) SACR 613 (SCA) para 129.
[34] *S v Tandwa and others* 2008 (1) SACR 613 (SCA) para 130, see also from para 131 onwards.
[35] Transcribed record at 127-130.

with a police officer and pointed the fourth appellant out thereafter. The identification of the fourth appellant was done at an identification parade.

[82] At the identification parade two attorneys represented the four appellants. During the leading of the fourth appellant in his evidence in chief his attorney asked him , to comment, on the fact that the form recorded that Ms Sikhosana took three minutes to correctly point out all four appellants, and no-one else. The fourth appellant's identification patently was not a dock identification.

[83] The fourth appellant's version in respect of Ms Sikhosana, the identifying witness, was that they were involved in a relationship and there was a dispute between the Ms Sikhosana and the fourth appellant's wife. As the trial court stated the issue was one of credibility not identification. There was no cross examination on how she identified him, the fourth appellant's version was that Ms Sikhosana identified him due to her conflict with his wife. He maintained he was being falsely accused by her out of malice, there was no honest mistake.

[84] Despite the indication when cross examining the witnesses for the state that numerous witnesses were to be called to verify the relationship, only the fourth appellants elderly mother was called and, with respect, the trial court's rejection of her evidence and that of the fourth appellant cannot be faulted. They were poor witnesses and their evidence replete with contradictions and improbabilities. There is nothing in this record to suggest that the trial court misdirected or erred in its evaluation of the evidence in this regard or its final rejection of the fourth appellant's evidence.

[85] Prior to the acceptance of Ms Sikhosana's evidence, the trial court analysed and approached the evidence with caution and found to be reliable. The fourth appellant's version was correctly rejected as on the totality of the evidence as not being reasonably possibly true. There is no misdirection, there was ample evidence to support that conclusion both direct and circumstantial.

[86] There is ample supporting evidence both direct and circumstantial to support the findings of the trial court that it is the four appellants who were the four co-perpetrators of the robbery at the premises of the complainant. It is common cause

that they were together on the day of the robbery, the second appellant's spontaneous response when he exited the toilet is a strong indicator that the fourth appellant had summoned the three others to Pongola from the Nongoma area to commit this robbery. They were together for a period before the robbery was committed. The fourth appellant's evidence was correctly found to be mendacious.

[87] Malan JA in *Mlambo*[36] stated:

'In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused.

An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case.

Moreover, if an accused deliberately takes the risk of giving false evidence in the hope of being convicted of a less serious crime or even, perchance, escaping conviction altogether and his evidence is declared to be false and irreconcilable with the proved facts a court will, in suitable cases, be fully justified in rejecting an argument that, notwithstanding that the accused did not avail himself of the opportunity to mitigate the gravity of the offence, he should nevertheless receive the same benefits as if he had done so.'

[88] In my view the trial the trial court correctly weighed and assessed all the evidence and correctly convicted all four of the appellants.

[89] The appellants first appeared before the magistrate in Pongola on 24 June 2013, they were sentenced on 21 September 2015. Leave to appeal was granted on 10 November 2016. Whereas some of the delay is caused by the difficulties occasioned by the reconstruction of the incomplete report, almost seven years has lapsed since leave to appeal was granted. There was every prospect that the appellants fair trial rights would have been rendered illusory by the delay simply by the

[36] *R v Mlambo* 1957 (4) SA 727 (A) at 737A-D.

effluxion of time. This is not acceptable and requires attention by the role-players in the criminal justice system. For this reason this judgment on appeal is to be referred to the offices of the Director of Public Prosecutions in this division for their oversight.

Order

[90] Accordingly, I make the following order:

1. The appeals of the first, second, third and fourth appellants' appeals against their conviction on a charge of robbery with aggravating circumstances are dismissed.

2. This judgment is to be referred to the offices of the Director of Public Prosecutions in this division for their necessary oversight over the inordinate delay in this appeal.

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DAVIS AJ

I agree, and it is so ordered.

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RADEBE J

APPEARANCES

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