



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

APPEAL CASE NO: **AR158 /17**

In the matter between:

THEMBELA ARNOLD NGUBANE

FIRST APPELLANT

MENZIWA AFRIKA MDAKANE

SECOND APPELLANT

SIFISO RICHARD MDAKANE

THIRD APPELLANT

SIFISO HANDSOME KHUBEKA

FOURTH APPELLANT

SIBONGENI SYDNEY MSIBI

FIFTH APPELLANT

SPHELELE LALELANI DUBAZANE

SIXTH APPELLANT

SIPHIWE MABIZELA

SEVENTH APPELLANT

MUTHIKABANI NASON BUTHELEZI

EIGHTH APPELLANT

MTHENJWA ERNEST BUTHELEZI

NINTH APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

(Delivered on 2 March 2018)

THE COURT:

[1] The Appellants were all convicted, in the Pietermaritzburg High Court, of the following offences:

1. Count 1 – Robbery with aggravating circumstances.
2. Count 2 – Contravening Section 27(1) read with Section 1 of the Explosives Act (26 of 1956) – causing an explosion.
3. Count 4 – Attempted Murder.
4. Count 5 – Robbery with aggravating circumstances.
5. Count 6 – Contravening Section 27(1) read with Section 1 of the Explosives Act (26 of 1956) – causing an explosion.
6. Count 8 – Attempted Murder.
7. Count 9 – Attempted Murder.
8. Count 10 – Attempted Murder.
9. Count 11 – Theft.
10. Count 12 – Contravening Section 27(1) read with Section 1 of the Explosives Act (26 of 1956) – causing an explosion.
11. Count 14 – Attempted Murder.
12. Count 15 – Attempted Murder.
13. Count 16 – Attempted Murder.
14. Count 17 – Murder.
15. Count 18 – Contravening Section 28(1) read with Section 1 of Act 26 of 1956 – unlawful possession of explosives.
16. Count 19 – Robbery with aggravating circumstances.
17. Count 20 – Contravening Section 27(1) read with Section 1 of the Explosives Act (26 of 1956) – causing an explosion.
18. Count 22 – Murder.
19. Count 23 – Murder.

- 20. Count 24 – Robbery with aggravating circumstances.
- 21. Count 25 – Causing an explosion.
- 22. Count 27 – Attempted Murder.

[2] In addition thereto, the Second to the Ninth Appellants were convicted of the following offences;

Count 28 – Unlawful possession of a machine rifle.

Count 29 – Unlawful possession of a prohibited firearm.

Count 30 – Unlawful possession of ammunition.

Count 31 – Contravening Section 28(1) read with Section 1 of Act 26 of 1956 – Unlawful possession of explosives.

[3] The following sentences were imposed:

Count 1 – Fifteen years' imprisonment.

Count 2 – Ten years' imprisonment.

Count 4 – Ten years' imprisonment.

Count 5 – Fifteen years' imprisonment.

Count 6 – Ten years' imprisonment.

Count 8 - Ten years' imprisonment.

Count 9 – Ten years' imprisonment.

Count 10 – Ten years' imprisonment.

Count 11 – Fifteen years' imprisonment.

Count 12 – Ten years' imprisonment.

Count 14 – Ten years' imprisonment.

Count 15 – Ten years' imprisonment.

Count 16 – Ten years' imprisonment.

- Count 17 – Life imprisonment.
- Count 18 – Five years' imprisonment.
- Count 19 – Fifteen years' imprisonment.
- Count 20 – Ten years' imprisonment.
- Count 22 – Life imprisonment.
- Count 23 – Life imprisonment.
- Count 24 – Fifteen years' imprisonment.
- Count 25 – Ten years' imprisonment.
- Count 27 – Ten years' imprisonment.
- Count 28 – Five years' imprisonment.
- Count 29 – Five years' imprisonment.
- Count 30 – Fifteen years' imprisonment.
- Count 31 – Ten years' imprisonment.

[4] The matter comes before us with leave to appeal having been granted by the Court *a quo* on conviction and sentence in respect of all counts. In his heads of argument, Mr Paver, for the State, conceded that there was insufficient evidence to sustain a conviction, against the various Appellants, in respect of the following counts:

<u>APPELLANT</u>	<u>CONVICTION</u>
1 st Appellant	Counts 11,12,14,15,16,17,18,19,20,22 & 23
2 nd Appellant	Counts 1,2,4,5,6,8,9 & 10
3 rd Appellant	Counts 1,2,4,11,12,14,15,16,17,18,19,20,22 & 23
4 th Appellant	Counts 1,2,4,5,6,8,9,10,11,12,14,15,16,17,18,19, 20,22 & 23
5 th Appellant	Counts 5,6,8,9,10,11,12,14,15,16,17,18,19,20,

	22, 23,24,25 and 27
6 th Appellant	Counts 11 & 12
7 th Appellant	Counts 5,6,8,9 & 10
8 th Appellant	Counts 1,2,4,5,6,8,9,10,11,12,14,15,16,17,18 24,25 & 27
9 th Appellant	Counts 1,2,4,5,6,8,9,10,11,12,14,15,16,17,18, 24,25 & 27

What is surprising is his statement that he did not seek the aforesaid convictions against the said Appellants in the Court *a quo*. Nevertheless, the Appellants were all convicted of the charges as set out in paragraphs [1] and [2] *supra*.

[5] In the preamble to the indictment, the State alleged that the Appellants and others conspired to form a syndicate “with the common purpose to target automatic teller machines (ATMs) of banks located in various locations in KwaZulu-Natal. Their aim was primarily to cause explosions of ATMs in order to steal the cash contained in them.” The State further alleged that the crimes “were all perpetrated or committed in furtherance of the execution of the aforesaid common enterprise decided and embarked upon by all the accused and their co-assailants”.

[6] It is immediately noted that none of the Appellants were charged with contravening the provisions of Section 2(1)(e) and (f) of Act 121 of 1998, that is the management of an enterprise through a pattern of racketeering; or while managing an enterprise through a pattern of racketeering activities, they knew or ought to have known that others in the same group were involved in activities which could be termed forming a pattern of “racketeering”. Perhaps this omission from the

indictment led the Court *a quo* to hold that “the question before the Court is whether it was the accused before Court who committed these offences”.

[7] In convicting the Appellants however, the Court *a quo* held as follows:

“This Court has also found that the accused before Court acted in furtherance of a common purpose. They all live or work in Johannesburg and the offences that they are indicted for were committed in KwaZulu-Natal. This on its own shows that they had planned their missions to commit these offences. The trend in all the scenes of the crime show that the same firearms were used in the commission of the crimes, the same type of explosives, the use of the stolen motor vehicles and commercial explosives, that all these indicate the preplanning in furtherance of a common purpose. It is clear to this Court that all the operations were committed by a group who only had a single objective, to get money from the ATMs and that if any people are found to be guilty or have participated in these offences, that they acted with a common intention to gain from these operations. This was not a kind of activity like people when they are rioting and other people just join in randomly, it is a planned operation.

This Court accepts that the State has proved its case beyond any reasonable doubt.”

[8] Despite it being a lengthy trial with 65 witnesses testifying, most of the evidence was not in dispute. It was not in dispute that:

- (a) That certain ATMs situated at the various scenes were in fact “bombed”.
- (b) That property was damaged in the process of the “bombings”.
- (c) That money was taken from the damaged or destroyed ATMs.
- (d) That passers-by were injured.
- (e) That various complainants were robbed of their belongings
- (f) That Mr Vidhur Jadu; Miss Bongakuhle Nkosi and Mr Sizwe Gule were killed in the process.

[9] All the Appellants denied any knowledge or involvement in any of the alleged offences. At the conclusion of the State's case, they all elected not to testify. None of the Appellants were directly implicated in any of the alleged offences. The Court *a quo* relied on circumstantial evidence and evidence of similar facts in order to convict all of the Appellants.

[10] It is accordingly necessary to examine the evidence led by the State and which was accepted by the Court *a quo* as linking the Appellants to the offences as alleged in the indictment.

[11] The evidence against the Appellants can be categorised into four main areas. These are:

- (a) The arrest of the Appellants and the subsequent recovery of firearms and explosives at the homestead of Mr Sibusiso Fakude;
- (b) The linkage of certain of the firearms referred to in (a) above to certain of the crime scenes in Counts 1 to 27;
- (c) Cellular telephone data and evidence;
- (d) The statements of the intended Section 204 witnesses, Zazi Duma and Wiseman Mahlobo, which were admitted in terms of Section 3(1)(c) of the Law of evidence Amendment Act, 45 of 1988.

(A) **THE ARREST OF AND RECOVERY OF FIREARMS AND EXPLOSIVES**

[12] On the 13th January 2013, Warrant Officer Graham, Constable Stock and certain members of the Tactical Response Team, acting on a

tip-off, stopped a kombi motor vehicle, with registration number PSB 762 GP, in the Mtubatuba area. The Appellants (save for the First Appellant) were passengers in this kombi which was at the time driven by Wiseman Mahlobo.

[13] Upon enquiring what they were doing in the Mtubatuba area, the Appellants responded that they were on their way to the funeral of the late Aaron Buthelezi. (This was subsequently confirmed by a letter, admitted into evidence by consent, from the relevant Ward Councillor, Mr M Q Mkhwanazi, who confirmed that the 8th and 9th Appellants were known to him and that the funeral of the late Aaron Buthelezi took place on the 13th January 2013).

[14] The Appellants were all searched and no firearms or explosives were found in their possession. The kombi was also searched, yielding the same result. The personal belongings of each Appellant, including the cellular phones, were placed into a “ziplock bag” allocated for each Appellant. The Appellants were all thereafter arrested. After questioning a few of the Appellants, the police, together with the Second, Eighth and Ninth Appellants, proceeded to the Jozini area where the Eighth Appellant pointed out the homestead of Mr Sibusiso Fakude. He told the police that all the occupants of the kombi had spent the previous night (12th January 2013) at the said homestead.

[15] The rooms at the Fakude homestead were searched and in one of them three AK47 rifles, a .45 Colt semi-automatic pistol and 119 rounds of ammunition were found wrapped in a sheet and concealed under a bed. (Other items – oil, crowbars, tape and flex cord were also found). There was a Ford Bantam bakkie parked in the yard. A hidden

compartment in the bin of the bakkie was found and in it the explosives referred to in Count 31 were discovered.

[16] There is conflicting and contradictory evidence relating to the discovery of the firearms and explosives. Colonel Botha, Warrant Officer de Wet and Warrant Officer Thaver all claim to have been the first to discover the firearms and explosives. Although this may cast some doubt relating to the entire search and recovery process, we are of the view that it does not take the matter any further as it was not challenged that the firearms and explosives were indeed found.

[17] The question which the Court *a quo* was faced with related to the possession of the said firearms and explosives. The firearms and explosives were not found in the physical possession of any of the Appellants. The State relied on the evidence of Mr Fakude and the statement of Mr Mahlobo (which will be discussed later in this judgment), to the effect that all the Appellants (save for the First Appellant) spent the night at Mr Fakude's homestead. However, scrutiny of Mr Fakude's evidence reveals that he did not know the Appellants, save for the Eighth and Ninth Appellants, and accordingly did not know who occupied the room in which the firearms and ammunition were found. He testified that he and the Eighth Appellant occupied one room and that some of the Appellants slept in the room where the firearms were found whilst others slept in the kombi. The Court *a quo* held that the Appellants jointly possessed the firearms and explosives and accordingly convicted them. This finding is based on the reasons of the Court *a quo* referred to earlier in this judgment (*Para [7]*).

[18] Where the Appellants were not in actual physical possession of the items and where joint possession by them was alleged, the legal

requirements for a conviction are clear. We do not propose outlining the development of the law on this subject. This has been clearly and concisely set out in the recent judgment of the Constitutional Court in **Makhubela v The State; Matjeke v The State 2017 (2) SACR 665 (CC)**. The Constitutional Court approved the test which was established in **State v Nkosi 1998 (1) SACR 284 (W) at 286 H-I**, namely:

“The issues which arise in dealing whether the group possessed the guns must be decided with reference to the answer to the question whether the State has established facts from which it can properly be inferred by a Court that:

- (a) The group had the intention (*animus*) to exercise possession of the guns through the actual detentor and
- (b) The actual detentors had the intention to hold the guns on behalf of the group.

Only if both requirements are fulfilled can there be joint possession involving the group as a whole and the detentors, or common purpose between the members of the group to possess all the guns.”

[19] It was noted by the Constitutional Court that this test has been cited with approval in numerous judgments of the High Court and Supreme Court of Appeal – see for example **State v Mbuli 2003 (1) SACR 97 (SCA)**; **State v Molimi and another 2006 (2) SACR 8 (SCA)** and **State v Kwanda 2013 (1) SACR 237 (SCA)**.

[20] When applying the test set out in **Nkosi** (*supra*) to the facts in the present case, there is no evidence from which it can be inferred that the Appellants had the intention to exercise possession of the firearms and explosives through the actual detentor or that the actual detentors had the intention to hold the firearms and explosives on behalf of all the Appellants. There is also no evidence of who the “actual detentors” are.

[21] We are accordingly of the view that the Court *a quo* erred in finding the Appellants (excluding the First Appellant) guilty of Counts 28, 29, 30 and 31. It follows that the convictions in respect of the unlawful possession of firearms, ammunition and explosives must be set aside.

(B) THE LINKAGE OF CERTAIN OF THE FIREARMS RECOVERED IN (A) SUPRA TO CERTAIN OF THE CRIME SCENES IN COUNTS 1 TO 27

[22] The Court *a quo* relied on the ballistic evidence relating to the firearms found at Mr Fakude's homestead to link the Appellants to the commission of all the offences in Counts 1 to 27¹. This despite the Court finding that the evidence showed that "the firearms found at Fakude's place were used in most of these robberies".

[23] The Court *a quo* failed to provide an analysis of the ballistic evidence to justify its findings as aforesaid. A careful analysis of the ballistic evidence reveals the following:

- (a) The firearms found at Fakude's homestead were Exhibits 22 – an AK47 rifle; Exhibit 23 – an AK47 rifle; Exhibit 24 – an AK47 rifle and Exhibit 25 – a Colt .45 pistol.
- (b) In respect of Counts 1 to 4, only Exhibit 25 – the Colt .45 pistol – was found to have fired shots at the scene.
- (c) In Counts 5 to 10 only Exhibits 24 – an AK47 rifle and Exhibit 25 a Colt .45 pistol were found to have fired shots on the scene.

¹ Excluding Counts 3, 7, 13, 21 and 26 which related to charges of malicious injury to property and of which all appellants were acquitted.

- (d) In Counts 11 to 13, none of the firearms recovered at the Fakude homestead were found to have fired shots at this crime scene.
- (e) In Counts 14 to 18 only Exhibit 24 – an AK47 rifle – was found to have fired shots at the scene.
- (f) In Counts 19 to 23 only Exhibit 23 – an AK47 rifle – was found to have fired shots at the scene.
- (g) In Counts 24 to 27, none of the firearms recovered at the Fakude homestead were found to have fired shots at the crime scene.

[24] In any event, we are of the view that given that the State has failed to prove who actually possessed the said firearms, the ballistic links to some of the crime scenes does not lead to the conclusion that all the Appellants were present at those crime scenes. The Court *a quo* erred in relying on this evidence in concluding that the only inference to be drawn was that the Appellants were part of a syndicate and therefore responsible for the commission of the various crimes.

(C) CELLULAR TELEPHONE DATA AND EVIDENCE

[25] In convicting the Appellants, the Court *a quo* relied on the cellular phone records alleged to relate to each of the Appellants. It is common cause that when the Appellants were arrested, they all had cellular phones in their possession. The State relied heavily on the cellular phone evidence presented by Ms Theresa Botha, an expert in analysing cellular phone data. Ms Botha analysed the calls made from the phones allegedly in the possession of each of the Appellants and cross-referenced their location and communication with each other at the time

when the various crimes, referred to in the indictment, took place. Her analysis was presented in Exhibit “NN” in the Court *a quo*. The Court *a quo* noted that the analysis revealed that the Appellants travelled from their “respective places of abode shortly before each crime scene in which they were involved and to the crime scene and then directly back to the original place of departure”. In summarising Ms Botha’s evidence, the Court *a quo* concluded:

“Her evidence, she informed the Court that it also showed that various members of the syndicate, all the accused before Court, having devices in their possession, were on various occasions not only in close proximity of each other but also in close proximity of the scenes of the crime mentioned in the indictments, and at times actually communicating at the respective scenes.”

[26] The Court *a quo* described the analysis in Exhibit “NN” as:

“... the existence of a complete web of information of numbers and/or names of all the accused, which confirms the notion that they were very well interconnected to communicate and even bared (sic) different names to assist the secretive nature of an organisation of this nature. The data indicates that at least half of the members of the gang of the accused were present at Utrecht on 5 December 2012 and more of the same members present at the next crime scene which was in Greytown on 5 January 2013.”

[27] In the light of Ms Botha’s analysis, the Court *a quo* concluded that all of the Appellants were guilty on all counts. The Court *a quo* however failed to properly analyse the cellular phone data evidence before it. A perusal of Exhibit “NN” reveals that not all of the Appellants’ cellular phones were present in the areas where the crimes were committed.

[28] An analysis of this evidence reveals that the undermentioned Appellants were not linked to the undermentioned crimes by virtue of the absence of their cellular phones in the particular area:

APPELLANT

COUNTS

1st Appellant

1,2,4,5,8,9,10,11,12,14,15,16,17,18,19,20,

	22 & 23
2 nd Appellant	1,2,4,5,6,8,9 & 10
3 rd Appellant	1,2,4,5,6,8,9,10,11,12,14,15,16,17,18,19,20,22, 23,24,25 & 27
4 th Appellant	1,2,4,5,6,8,9,10,11,12,14,15,16,17,18,19,20, 22 & 23
5 th Appellant	1,2,4,5,6,8,9,10,11,12,14,15,16,17,18,19,20, 22,23,24,25 & 27
6 th Appellant	11 & 12
7 th Appellant	5,6,8,9,10,19,20,22 & 23
8 th Appellant	1,2,4,5,6,8,9,10,11,12,14,15,16,17,18,24,25 & 27
9 th Appellant	1,2,4,11,12,14,15,16,17,18,24,25 & 27

Notwithstanding this, the Court *a quo* convicted all the Appellants of all the crimes.

[28] In respect of the remaining counts, the Court *a quo* relied on evidence that Exhibit “NN” showed that their cellular phones were used within the range of a particular cellular phone tower near the scenes of the various crimes. This was notwithstanding evidence that the reception of some of the cellular phone towers had a range of up to 34kms. Even if one were to accept that some of the Appellants’ cellular phones were found to have been used within the range of a particular cellular phone tower, the mere presence of their cellular phones within the area, cannot, without more, form the basis for drawing an inference that they were involved in the commission of the offences as set out in the indictment.

[29] The caution in solely relying on cellular phone evidence, without corroboration, was alluded to by Jappie DJP (as he then was) in **State v Green-Thompson & Others (unreported) Case No. 63/2011, (30th August 2013)** where the accused were charged with a number of robberies and where there was little direct evidence identifying each accused as being present at the various robberies. Whilst one of the accused was placed in the vicinity of a police station which had been robbed of certain firearms, and where the accused was later found in possession of one of the firearms stolen, coupled with an unsatisfactory explanation for his presence in the area, the Court was satisfied that there was sufficient evidence to convict him of robbery. On the other hand, the Court went on to say the following about the remaining counts:

“On Counts 4 and 5 the only evidence that implicates Accused 1 are the cellphone records which places him in the vicinity of the Pump House Pub on 28th January 2010 and at the Pit Stop Pub on 30th January 2010. Suspicious as this cellphone evidence may be and that it may well establish an association with the other accused, there is no physical evidence linking him directly to the robberies at these two pubs. In regard to these offences, we come to the conclusion that the evidence is insufficient to prove beyond reasonable doubt that Accused 1 was involved to the degree that the law requires with these robberies. We therefore find that the accused is not guilty on Counts 4 and 5.”

[30] Similar views were echoed by Cachalia AJA (as he then was) in **State v Molimi & Another 2006 (2) SACR 8 (SCA), at paragraph 16**, where the following is stated:

“...The only evidence against the Appellants were the abovementioned cellphone records that linked the three accused and, in the case of the Second Appellant, his own statement that had been found to be admissible against him.”

The Court concluded at paragraph 22 that:

“... While incriminating, creating a strong suspicion of his complicity in the events of the day, the (cellular phone) records would not, in my view, without any further evidence, have created a sufficient basis to convict him.”

[31] When the matter presented before the Constitutional Court – **State v Molimi & Another 2008 (2) SACR 76 (CC)**, it upheld the finding of the Supreme Court of Appeal, noting that:

“... The evidence contained in the cellphone records, while incriminating, would not, without further evidence, having created a sufficient basis upon which to convict the Applicant.”

[32] We are accordingly of the view that the Court *a quo* erred in accepting the cellular phone evidence as sufficient proof that the affected Appellants were at all the various scenes where the crimes were committed. On its own the evidence relating to the various cellphones suggests complicity where it links an Appellant to a significant area; but in our view the other available evidence does not create an evidential framework which, in combination with the cellphone evidence generates proof beyond a reasonable doubt.

(D) **THE STATEMENTS OF THE SECTION 204 WITNESSES**

[33] On the 29th December 2012, Mr Zazi Duma (“Duma”) signed a statement under oath concerning his activities in connection with the ATM bombings and robberies. He did so under the protection of Section 204 of the Criminal Procedure Act. On the 23rd January 2013, Mr Wiseman Mahlobo (“Mahlobo”) also signed a statement under oath concerning his involvement in the criminal activities, also under the protection of Section 204 of the Criminal Procedure Act. These statements described events which were included in the indictment. It was the intention of the prosecution to call both Duma and Mahlobo to testify in support of its case against the Appellants. However, sadly both Duma and Mahlobo died before the trial commenced.

[34] During the trial the prosecution made an application to admit the statements of Duma and Mahlobo into evidence. This application was made in terms of Section 3 of the Law of Evidence Amendment Act, 45 of 1988. Notwithstanding opposition from defence counsel, the learned Judge granted the application. The learned Judge was of the view that as the State had offered “to block the names of the accused or any other person that may be mentioned or stated in those statements,” this eliminated the element of prejudice to the Appellants. Despite this undertaking from the State to block or delete the names of persons mentioned in the statements of Duma and Mahlobo, the record reveals that this was not completely fulfilled. It is necessary, before dealing with the application and the role that the statements played in the trial, to briefly consider the extent of the said statements

[35] Duma’s statement comprises a confession to his involvement and participation in the events which gave rise to Counts 1 to 18. This involved three ATM bombings, three counts of attempted murder, one of murder and one of the possession of explosives. His description of the *modus operandi* of the gang of which he said he was a part, supports a conclusion that he participated in a continuous enterprise involving joint possession of firearms, ammunition and explosives, as alleged in respect of all the accused in the indictment on Counts 28 to 31. In furnishing an account of the events he described in his statement, Duma identified his alleged co-participants by name on numerous occasions. Those names were removed from the copy of the statement handed in. One assumes that the resultant blank spaces signify the presence of the names of persons who were the accused before the trial Court because the names of other people involved in Duma’s account of the events were not blanked out.

[36] Mahlobo's statement is in much the same vein as that of Duma. In his statement Mahlobo confessed his guilt with regard to Counts 1 to 4, 11 to 13, 19 to 23 and 24 to 27. He dealt extensively with his participation in the possession of firearms, ammunition and explosives which would support the basis upon which the State advanced its case in respect of Counts 28 to 31 – i.e. that there was common continuing joint possession of firearms and explosives by the gang.

[37] Mahlobo's statement also incorporated numerous references to the names of his co-perpetrators and save in one respect, these names were removed from the copy handed in. As with Duma's statement, the identities of other players in Mahlobo's account of events were not expunged. The exception in Mahlobo's statement lies in the fact that the names of persons who were the accused in the Court *a quo* appear in a list of persons who were arrested together with Mahlobo when the kombi in which they were travelling, driven by Mahlobo, was stopped by the police. That might have been considered unremarkable, given that it is not disputed that those persons were arrested on that occasion, but for the fact that the statement conveys that those arrested in the kombi slept the night before in the house in which the firearms and ammunition were later recovered and were associated with the other vehicle from which the explosives were extracted from behind a secret panel.

[38] In presenting his argument in the Court *a quo* for the admission of the statements under Section 3(1)(c) of the Law of Evidence Amendment Act, counsel for the prosecution acknowledged that the statements were confessions and that they fell within the provisions of Section 219 of the Criminal Procedure Act. Section 219 provides:

“No confession made by any person shall be admissible as evidence against another person”.

Counsel pointed out that the section draws no distinction between extra curial confessions made by co-accused and extra-curial confessions made by anyone else. He described the decisive points to be decided by the learned Judge as the issues as to whether the “device of removing the names which may point to persons who may or may not be in this Court” would answer an objection under Section 219 of the Criminal Procedure Act and negate any prejudice which would otherwise be caused to the accused through the admission of the statements.

[39] When furnishing her reasons for admitting the statements in the edited form, the learned trial Judge made no reference to Section 219 of the Criminal Procedure Act. The learned Judge noted that defence counsel had objected upon the basis that admitting the statements would prejudice the accused’s fair trial rights guaranteed in terms of Section 35 of the Constitution. She held that she had a wide and flexible discretion in terms of Section 3(1)(c) of the Law of Evidence Amendment Act when the admission of the evidence was in the interests of justice. This was contrary to the decision of **State v Ndlovu and Others 2002 (2) SACR 325 (SCA)** at paragraph 22 where it was held that a decision on the admissibility of hearsay is one of law and not discretion. The learned Judge then held that it was in the interests of justice to admit the statements in truncated form because the exclusion of the names of persons would eliminate any element of prejudice.

[40] The learned trial Judge revisited the issue in her judgment. Concerning the role of those statements in the decision as to whether the accused should be convicted, the learned Judge *a quo* recorded that the Court had decided “to accept the evidence of Zazi Duma and Mahlobo only in so far as it relates to executive statements and where such executive statements are confirmed by evidence aliunde. We have

steered completely off and did not rely on the versions that they have given in their statements in consideration of the evidence in this case”. The difficulty we experience in considering this approach to the statements is that both of them are entirely narrative in nature.

[41] The exception to the inadmissibility of hearsay evidence which is allowed by Section 31(c) of the Law of Evidence Amendment Act is qualified by the opening words of the Section which render its provisions subject to the provisions of any other law. The Criminal Procedure Act is such another law and Section 219 of that Act is a provision which forbids the admission of an extra-curial confession against any person except its maker. The exclusion of the names of the accused persons from the statements of Duma and Mahlobo did not make the statements anything other than the confessions they were in their unredacted condition.

[42] Furthermore Section 3(2) of the Law of Evidence Amendment Act qualifies the provisions of sub-section 1, stating that those provisions “shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence”. The confessions of Duma and Mahlobo were inadmissible for reasons beside their hearsay nature. (See **State v Mhlongo, State v Nkosi 2015 (2) SACR 323 (CC) at paragraph 29**. To the extent that any passages in the statements might be regarded as admissions (with or without the deletion of the names of the alleged co-perpetrators), Mhlongo’s case (at paragraph 30) establishes that Section 3(1) of the Law of Evidence Amendment Act would be equally unavailable as a device to have the statements admitted in evidence against the Appellants. (See also **State v Litako 2014 (2) SACR 431 (SCA) at paragraphs 53 and 54**).

[43] The case sought to be presented against the Appellants was based exclusively on circumstantial evidence. Because of shortcomings in that evidence, something else was needed to bolster the case. The prosecution sought to achieve this by a process of comparing other circumstantial evidence (such as the cellphone evidence) with the descriptions of the events which appear in Mahlobo and Duma's statements, to conclude that the statements are consistent with the inferences sought to be drawn by the State from the circumstantial evidence before the Court. Such consistencies might arguably justify an inference of guilt which might not be the only reasonable one to be drawn from the other evidence on its own.

[44] It seems to us that whilst expungement of the names of the alleged co-perpetrators from the extra curial statements might avoid the error of relying upon such statements as identifying particular co-perpetrators, the usefulness of the statements depended upon the Court accepting the confessed guilt of Duma and Mahlobo as proved against the Appellants. (Indeed it is not possible to lend any weight at all to the description of the events in Duma and Mahlobo's statements without accepting that they were guilty as they confessed to be). The conclusion is inescapable that in seeking the admission of the statements, the prosecution invited the Court *a quo* to fall into the error of relying on the confessions of Duma and Mahlobo as admissible against the other Appellants. – See **Rex v Nkosi and Zulu 1959 PH H91 (AD)** and **R v Baartman and Others 1960 (3) SA 535 (A)**.

[45] Notwithstanding extensive references to the statements of Duma and Mahlobo in his heads of argument, counsel for the State conceded that he was unable to advance any argument in support of the proposition that the statements were properly admitted into evidence

against the Appellants. For the reasons stated above, we are of the view that this concession was properly made. The trial Court erred and the statements must be left out of account in considering the appeal against the convictions. Counsel for the State was unable to advance an argument that the other evidence presented was on its own sufficient to justify the convictions.

CONCLUSION

[46] In conclusion, there was no reliable evidence before the Court *a quo* to sustain a conviction on any of the counts and the Appellants ought to have been acquitted.

[47] Counsel for the State has confirmed that in the Court *a quo* he did not seek a conviction against the Appellants in respect of the counts set out in paragraph [4] *supra*. Notwithstanding this the learned Judge convicted the Appellants on those counts. No reasons were given why she disagreed with the submissions and concessions made by the State. In fact the judgment did not record the concessions made by the State at all. They were ignored. In our view a Court declining to act in accordance with such concessions made by the State is duty bound to explain where the State erred. In this case this was not done. As a consequence, the First, Third, Fourth and Fifth Appellants were sentenced to three life terms of imprisonment in circumstances where the State had conceded that there was insufficient evidence against them. It is indeed so that the evidence presented in the Court *a quo* raises strong suspicions against the Appellants. However, it is trite that suspicions do not amount to proof beyond reasonable doubt.

[48] We accordingly make the following order:

1. The appeal against the convictions and sentences of the Appellants is upheld.
2. The convictions and sentences imposed are set aside.

KRUGER J

OLSEN J

CHETTY J

DATE OF HEARING:	2 February 2018
DATE OF JUDGMENT:	2 March 2018
FOR THE 1 st , 5 th , 8 th & 9 th APPELLANTS:	Z Anastasiou
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INSTRUCTED BY:	Duma Attorneys
FOR THE 3 rd , 4 th , 6 th & 7 th APPELLANTS:	L Barnard
INSTRUCTED BY:	Duma Attorneys
FOR THE RESPONDENT:	D Paver
INSTRUCTED BY:	Deputy Director of Public Prosecutions