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IN THE HIGH COURT OF SOUTH AFRICA
(NORTH AND SOUTH GAUTENG HIGH COURT. PRETORIA)

DATE:06/08/2009

CASE NO.: A267/2008

In the matter between:

LUCAS MONARE
 YUNUS HESKE

1ST APPELLANT
 2ND APPELLANT

And

THE STATE

RESPONDENT

JUDGMENT

PRINSLOO. J

[1] This is an appeal to the full court of this division against the judgment by MOSHIDI, J, sitting with an assessor in the Vereeniging Circuit Court.

Before us Mr Tshabalala appeared for the first appellant, Mr Van Vuuren SC for the second appellant and Mr Roberts for the State.

Introduction

[2] It was a lengthy trial which ran over a number of days during different sessions. The record comprises ten volumes consisting of over

1000 pages.

[3] At the end of the trial, both appellants were convicted on three counts of murder, one count of robbery with aggravating circumstances and one count of kidnapping. In addition, the first appellant was convicted of contravening sections 3 and 90 of Act 60 of 2000 in that he unlawfully possessed a firearm and ammunition.

[4] On each of the three murder counts, both appellants were sentenced to life imprisonment. In respect of the robbery count, they were both sentenced to fifteen years imprisonment and in respect of the kidnapping they were both sentenced to five years imprisonment. In addition, the first appellant was sentenced to three years and one year imprisonment respectively in respect of the firearm and ammunition charges.

[5] For the sake of brevity, I shall refer to the first appellant as “number 1” and to the second appellant as “number 2”.

[6] The appeal came before us with the leave of the court *a quo* in respect of both convictions and sentences.

The three deceased persons

[7] The deceased were G.J.B., Q.G.B. and J.D.W.

[8] It is common cause that the charred bodies of all three the deceased were discovered by the police on 13 January 2004, a Tuesday, in the veldt at a deserted spot near Elandsfontein which is in the vicinity of Ennerdale and Lenasia in the Vereeniging district.

[9] The three bodies were lying next to and against each other with the hands tied behind the backs. The post-mortem evidence, which is not in dispute, indicates that all three died from a single gunshot wound to the head. They were first killed in this way, before they were doused with petrol and set alight.

[10] The first mentioned deceased, referred to by all the witnesses as “O.A.”, was the father of the second deceased (“Q.”) and the third deceased (“W.”) was the bodyguard of O.A. All three of them stayed in O.A.’s house in K [.....]. W [...] had also reached a relatively advanced age by the time of his death, and was no longer the classic powerful bodyguard that one might imagine. Q was a cousin of number 2, so that Q and O.A. were related to number 2 during their lifetime.

[11] On a general reading of the papers, it is clear that O.A. had been a

shrewd businessman and had been known to get involved in unlawful activities. He was also a feared individual, and not someone to be messed around with.

A brief sketch of the basic storyline and the *dramatis personae*

[12] The evidence in this case contains a mass of factual allegations relating to meetings, dates, times, relationships and the like. In my view, it is neither practicable nor required to revisit and scrutinise the testimony of each and every witness who gave evidence. A lengthy and detailed judgment was given by the learned judge *a quo*.

[13] Under this subheading, an attempt will simply be made to sketch, in broad terms, the basic storyline and the parameters within which the drama unfolded (or may have unfolded, depending on which version is to be preferred) which led to the death of the three deceased.

[14] The main state witness was one J.S. ("S."). He gave evidence as an accomplice in terms of section 204 of Act 51 of 1977, and he was repeatedly given the appropriate warning during the course of the trial by the learned judge.

[15] In very broad terms, S's version amounted to the following: he knew number 1 and number 2 and had on previous occasions been involved in criminal activities with them. In December 2003, the three of them started conspiring to rob O.A. of an amount of money by using a so-called "knock scheme". According to S., the essence of a "knock scheme" is that "you let people believe in one thing when you are actually doing another". A fourth participant in this conspiracy was another acquaintance, one Arrie, also known as Lala ("Lala").

The "knock scheme" would amount to the following: O.A. would be approached on the basis that Lala was a foreigner who had entered the country illegally. He required documentation to enable him to stay in the country. He was in possession of a large sum of American Dollars which he was prepared to exchange at a very favourable rate (something like to 3 to 1) as a *quid pro quo* for the papers. O.A., who was very fond of money, would find this proposition attractive. O.A. had many contacts who could produce the necessary papers. O.A. would then be enticed to bring the South African currency which was to be exchanged at the favourable rate for the dollars, to the home of number 2, who was in any event a distant relative, and during the visit S and number 1 would come from outside, overpower O.A. and whoever accompanied him and rob him of the money.

During the course of late 2003, early 2004, O.A. was approached and showed a keen interest in the transaction. A few dollars were shown to him as “samples” of the money which Lala had on offer. O.A. also offered to present Lala with a coffee shop that he owns as part payment for the foreign currency. Some of the meetings which had been arranged did not come to fruition, but, finally, it was arranged that O.A. would bring the money to the house of number 2 on Thursday 11 January 2004 where the transaction would be clinched. The plan was that S and number 1 would wait at nearby premises, and when they observed O.A.’s motor vehicle passing by on its way to the home of number 2, they would later follow them and perpetrate the robbery. Lala and number 2 would be waiting at the latter’s house to receive O.A. and his companions and, has a sham, S and number 1 would also hold up Lala and number 2 as perceived fellow victims of O.A. and his party.

On the appointed day, 11 January 2004, S and number 1 were waiting at the appointed premises and S saw a maroon Almeida vehicle, which he had spotted earlier in the garage of O.A., passing by, carrying who S considered at a distance to be O.A., Q and a third person. Before S and number 1 could pounce, they were notified by telephone that the deal was off, because O.A. had brought too little money.

[16] It was then arranged that the deal would be concluded the next day, 12 January. On the 12th, S and number 1 were again waiting for the victims to pass by on their way to number 2. This time O.A. and his party passed by in a white BMW ("the BMW").

After a while, S and number 1 departed to the house of number 2 to execute the robbery. S was armed with his 9mm Norinco firearm and number 1 had a "357" revolver.

They entered the premises of number 2, found Q and Williams outside, overpowered them, and took them inside where they found O.A., Lala and number 2 as planned. They were all held up with the firearms and their hands were tied behind their backs. They were blindfolded. Those that S tied up, he tied up with the wire from wire clothing hangers.

Afterwards Lala and number 2 were untied. Unfortunately, the operation took a turn for the worse when O.A.'s blindfold came off and he saw what was going on. With the sham having been exposed to the dangerous Uncle Allie, it was decided during a discussion between the

perpetrators that O.A. and his companions would have to be killed.

The BMW was driven off and parked near a nearby pharmacy. S himself took the BMW to the pharmacy, wiped off any fingerprints, activated the alarm and was picked up by number 1 in the latter's Microbus. In this vehicle they returned to number 2, Lala and the victims who were still tied up.

When it became dark, they loaded the victims into the kombi and number 1, accompanied by S and Lala, drove the victims to the deserted spot near Elandsfontein in the Vereeniging district where they were to be executed. On the way, they met number 2 who gave them two containers of petrol which was to be used as part of the execution process.

Number 2 then went back to "clean up the house" and S, Lala and number 1 proceeded to the deserted spot which was chosen by number 1. At this place, the three victims were taken from the Microbus, lined up, and number

1 shot them each in the back of the head. After they were killed, Lala and S dowsed the bodies with petrol and the bodies were set alight.

The three murderers left the scene.

Shortly after the killing, S, as earlier instructed by number 2, also used the cellphone of O.A. to send sms messages to number 2, to the effect that the deal had been successfully concluded. He sent a number of such messages. It was a small Nokia phone which S wanted for himself. About two days later, S destroyed this cellphone at his home in Ennerdale by throwing it against the wall. The other two cellphones were taken by number 1.

They went back to the house of number 2 who produced the money robbed from O.A.. It was a disappointingly small amount which was later divided between the four perpetrators.

The BMW was also removed from the pharmacy where it had earlier been parked and driven to The Glen shopping centre by number 1 who parked it there before he was picked up by S in the former's Microbus. Number 1 kept the key and said he had a buyer who may be interested in the BMW. Number 1 would wait a few days to make sure that the BMW was not fitted with a tracking device and thereafter remove the vehicle.

[17] Sometime later, S moved to the Cape with his family. In 2006, S was arrested in Plettenbergbay in connection with another serious crime which he had committed. By the time of his arrest, S had become a re-born Christian. His conscience was worrying him. He decided to disclose full details of all his criminal activities to the investigating officer at the time, one Captain Lourens of Kimberley. In the process he made a statement about the murder of the three deceased. The state decided to use him as a section 204 witness. The trial only commenced in November 2006, and was concluded in July 2007.

[18] It should be added that the police investigation into the murders, after the bodies were discovered on 13 January 2004, did not yield sufficient results to bring about a prosecution. The case was only reopened after S made his statement. Number 1 and number 2 were arrested but by then Lala had disappeared.

[19] In the process of summarising the outline of the evidence, and mentioning all the role players, I turn to the testimony of the rest of the witnesses.

[20] Constable Albertus Fivas Nel was a member of the SAPS Anti-

hijack Task Team during 2004. In May 2004 he proceeded to house number [.....], which was the house of number 1. They were looking for number 1 in connection with another matter concerning an armed robbery but number 1 was not at home. Nel and his colleagues found a stolen Mercedes Benz motor vehicle parked on the premises, and proceeded to search the house. In a drawer in the kitchen, and in the presence of number 1's wife, he found a BMW motor vehicle key. The key was hidden under some other loose articles in the drawer.

[21] He handed the BMW key to his commander, Captain Jacobus Oostermill Van Niekerk, who also later testified.

[22] I add that in heads of argument on behalf of the number 1, submissions were made to the effect that the search and seizure of the BMW key were conducted irregularly and not in accordance with the prescribed procedure. There was also an indication in the written submissions for the appeal hearing before us, that the wife of number 1, who did not testify at the trial, would be called to testify at the appeal hearing, if an application to do so were to be granted by us. This application was never proceeded with.

[23] Captain Van Niekerk testified that he, at the relevant time, was the operational commander of the anti-hijack team or task team of Vaalrand. On 19 May 2004 Constable Nel got in touch with him. He gave him the BMW key. These keys are fitted with a micro disk. He took the key to a BMW dealer for analysis. The analysis confirmed that the key belonged to the particular BMW driven by Q when he, O.A. and Williams went to conclude the transaction on the fateful day of the murder. The analysis also confirmed that the vehicle was registered in the name of Bernard B.J's . B.J's also testified, and it was common cause that he was the owner of the BMW and that Q had been using it with his permission. He arranged a meeting with B.J's , who confirmed that it was his vehicle and that the vehicle had been used by the deceased persons. He was also related to them. B.J's gave the name of the investigating officer in the case to Van Niekerk. Van Niekerk returned the key to Nel, who booked it into the SAP 13 register.

[24] K.A.M. was, in my view, a very important witness. He stayed with the deceased at the house of O.A. at [.....]. The witness and Q ran a business together known as "traffic fines solutions" in which they were equal partners. W., who also stayed there, worked for O.A.

[25] During November 2003, O.A. approached K.A.M. and informed him about a US Dollar deal involving an exchange with an Asian person. The amount mentioned was some 900 000 US Dollars. According to O.A. he was introduced to the deal by number 2. K.A.M. knew that several meetings were set up but proper contact and finality could not be achieved. O.A. told him that the Asian person, who had the foreign currency, at some stage stayed with number 2. He was informed about a meeting with O.A., attended by number 2 and his wife.

[26] Importantly, he told the court that in January 2004 he drove to the house of number 2 with Q and W. in the maroon A. They were supposed to exchange the South African Rand for Us Dollars. At the house of number 2, Q spoke with number 2. Thereafter Q said that they had to leave. Later they were informed that the deal had been called off. When they got home Uncle Allie told them that number 2 was not happy with the amount of money that they had on offer and that number 2 wanted to meet O.A. personally. The next day was Monday 11 January 2004. That morning he heard O.A. say to Q: "do not forget the 2 o'clock appointment".

[27] Before proceeding, I pause to mention that although S spoke about 11 and 12 of January as a Thursday and a Friday, this turned out to be

wrong because the 11th was a Sunday and the 12th was a Monday. K.A.M. also had the dates wrong. Generally, it was common cause that the second visit to number 2, when the BMW was used, took place on Monday 12 January when the murders were also committed. The bodies were discovered on Tuesday 13 January.

[28] Returning to the evidence of K.A.M., he said that he only got home from work that Monday the 12th at about 20:30 to be informed by Q's fiancée, Ms C.L, that O.A., Q and Williams, who had earlier left in the white BMW, had not yet returned. K.A.M. tried to make cellphone contact with all three, but was not successful in doing so. He went to sleep and was woken up at 05:00 by C.L. who told him that the three men had not returned home. They called various hospitals and police stations but could not find them.

[29] Because he knew that the three had gone to meet number 2 that Monday afternoon, he went to pick up a friend and drove to the house of number 2 but found nobody at home. He also made enquiries at the traffic department but could find no trace of the missing men.

[30] That Tuesday evening at about 18:30, M. picked up another friend, A.C., and three of his security staff and drove back to the house of

number 2. M. knew that the three men had been scheduled to meet number 2. M. was suspicious because Q had told him that some years earlier they also had a deal with number 2 involving one Rennie, and made a profit of some R500 000.00 but they did not give number 2 his share. According to Q, when number 2 was not paid from the deal, he reported the matter to the police with the result that both O.A. and Q were arrested. Because of that, Q had been reluctant to do the US Dollar deal, forming the subject of this case, with number 2.

[31] When M., C. and the latter's security staff got to number 2's house they found him and his family in a silver Toyota in his yard. M. approached number 2 and asked where the three men were. Number 2 said he had last seen the three men the previous evening and that the transaction had been successful. Number 2 showed M. an sms message on his cellphone, purportedly coming from O.A., indicating that the deal had gone well. M. could not recall how many sms messages there were. The sms was dated the Monday.

Number 2 told M. that after the deal the three gentlemen had gone to B.J's house. According to M., number 2 was not calm but nervous and

he was sweating. When he showed the sms to M. his hands were shaking.

[32] Number 2 told them where B.J's house was and they drove to that house but only found the wife at home. She gave them B.J's cellphone number. Before he could phone B.J's he got a call from C.L. who broke the news that three bodies had been found. The next morning he drove to Sebokeng to identify the bodies.

[33] I add that S also testified about the Rennie deal that had caused bad blood between number 2 and O.A..

[34] M. knew about the white BMW, that it belonged to B.J's and that the latter had given it to Q to use.

[35] M. was subjected to intensive cross-examination. I did not get the impression that he was discredited in any way. He stuck to his guns. He insisted that he knew about the Rennie deal, which was denied on behalf of number 2 during his cross-examination.

[36] Dr PJ Schutte conducted the post-mortem. The results were not

placed in dispute. Each of the deceased was killed by a single gunshot wound to the head. They were killed before the bodies were set alight. Although S had testified that number 1 shot the three deceased in the back of the head, it appeared according to the evidence of Dr Schutte that all the entry wounds were not necessarily in the back of the head. Dr Schutte also saw no traces of hanger wire with which the hands would have been tied. It was not disputed that the hands were tied. This is obvious from looking at the photos which were handed in as exhibits. The evidence that they were first killed by gunshot before they were set alight also lends corroboration to the evidence of S.

[37] Bernard Wolseley B.J's testified that he was in the motor trade and the owner of the BMW. He lent it to his cousin Q in December or November 2003. O.A. was his uncle (the brother of his father).

He knew M.. M. phoned him when the news broke of the bodies that had been discovered. He met M. at the Ennerdale police station and accompanied him when the bodies were identified.

On the Tuesday (perhaps Wednesday the 14th) the police informed him that the BMW had been found at The Glen. The shopping centre is known as Cumaro Crossing. He went to identify the car. The police told him that the security officials

mentioned that the car had been left there on the Monday evening. This also corresponds with the testimony of S. He was allowed to remove the car by using a spare key that he had. The car was not in a damaged condition. It was clean. It was fitted with a tracking device. The news about the car was broken to him by Captain Van Niekerk. He identified the car from photographs handed in as exhibits. The photographs were taken of the car which had been displayed at a garage in Lydenburg. B.J's had been involved in a collision with the car whereafter it was sold at an auction and taken to Lydenburg.

[38] He denied that he had any appointment to see O.A. on the Monday night as indicated by number 2 to M. This also corroborates the evidence of S.

[39] Inspector Jaco Horn was an inspector in the South African Police, stationed at the Ennerdale Detective Branch in the Vaalrand vicinity. He had ten years' experience. On 13 January he was informed about the murder scene at Elandsfontein and went to the deserted spot where he found the three burned out corpses. He identified them by reference to the photo album exhibit "C". The three bodies had bullet wounds in the

head. Their hands were tied with “cable ties”. He understood from some of his colleagues that a plastic can which may have contained petrol was found on the scene.

[40] Sanuse Ntelani was a security guard on duty at the relevant Cumaro Crossing shopping centre in January 2004. On Monday 12 January he reported for duty at 18:00. Before 19:00 he noticed the white BMW driving in and stopping in the parking area. A person alighted, locked the door and left. The person had a light complexion although he was not of “white origin”. It was a male. The vehicle was not removed during that night. The next day the police arrived. When he reported for duty the next day at 18:00 the BMW had been removed. He identified the car on the photograph exhibit. He said the person who parked the car, although light complexioned, was an African black. He described the general facial features of black Africans.

[41] Joseph Xaba was an inspector in the South African Police Force stationed at the Serious and Violent Crime Unit. He was the investigating officer and also went to the scene where the corpses were found. The name of number 2 was mentioned. Presumably by M.. Number 2 was questioned. He was not charged at the time. He knows about the BMW key that was found by Constable Nel. He took the key

to the garage in Lydenburg and managed to open the BMW and start it with the key.

He questioned number 1 (after his arrest) about the key. Number 1 said he did not know how the key had allegedly been found in his house. Number 1 said that he had only recently moved into the house.

[42] S was brought to him by the investigating officer from the Cape. Arrangements were made with Captain Fouche to accompany S to point out the place where the murders had taken place. He pointed out the correct place. He also pointed out the house of number 2.

[43] Before the state closed its case, admissions were also made in terms of section 220 of Act 51 of 1977 on behalf of number 1. This is exhibit "T". The identity of the three deceased persons was admitted and also the correctness of Dr Schutte's post-mortem findings. It was also admitted that the corpses sustained no further injuries between the shooting on 12 January and the post-mortem on 14 January 2004.

[44] Number 1 testified in his own defence. He denied any knowledge of the murders. He knew S although they were not friends. At one stage

there was a dispute between him and S about the latter having removed his laptop. He did own a kombi in 2003 and 2004. It appears that he took S's computer in retaliation for the laptop that had been removed. S confronted him and actually shot at him at a filling station.

[45] S also wanted to buy his kombi at one stage and when he refused, this caused further unpleasantness. He had known S since about 1997 or 1998. He describes S as a racist who was jealous of him.

[46] It appears that when they were driving together to the police station after the filling station incident, to report each other or to lay charges, they resolved their differences and did not proceed to lay charges.

[47] When he was cross-examined about the BMW key, he accused the police of conducting a conspiracy against him. This evidence I found unconvincing. He even denied that Nel found the key in his house. This denial was not put to Nel in cross-examination. He also denied that Xaba questioned him about the key. He said Xaba was telling lies.

[48] He did not raise the excuse, which he allegedly raised towards Xaba, that he had only recently moved into the house where the BMW key was found.

[49] He repeatedly accused S of being a racist and said that S would make up the story just because he (number 1) was black. On a general reading of his evidence, he appeared to offer this as a reason for S falsely implicating him, rather than the laptop/computer dispute, *supra*, which appeared to have been settled amicably on the way to the police station as I pointed out. This incident also happened years before S finally spilt the beans in 2006.

[50] As to the BMW key, number 1 testified that his wife never told him that the key had been discovered and removed by Nel. When Nel testified that he confiscated the key in the presence of the wife, and even asked her whether the family possessed a BMW, to which she replied in the negative, this evidence of Nel was not challenged in cross-examination. The wife of number 1 was also not called as a witness.

[51] Number 1 said he only met number 2 after they were arrested. Number 2 gave similar evidence.

[52] The only defence witness called by number 1 was Sonavhile Mayford Duda.

[53] According to Duda, he was a cellmate of S in the Leeuhof Prison for a while, and thereafter, by a great coincidence, also a cellmate of number 1.

[54] According to the witness, S told him that in order to get out of prison, he was going to implicate other people “so as to get bail”.

[55] After S left the cell, number 1, by a quirk of faith, was locked up with the witness in the same cell. When the name of S came up for discussion, because the latter had made certain drawings in the cell, it was discovered that number 1 had been one of the persons implicated by S.

[56] In cross-examination, this witness appeared to adapt his version from time to time. He had particular difficulty in demonstrating that S had mentioned that he would falsely implicate the other people rather than simply implicate them. In the context of this case, that would make a significant difference.

[57] It should be added, that, when he was cross-examined about this subject, S admitted that he had met Duda in prison. He denied having

said that he would implicate other people in order to get bail. It was put to S in cross-examination that there were two other inmates who would support the evidence of Duda and who would also be called to testify. They were not called.

[58] Counsel for number 2 called Johanna Petronella Heynecke as the first witness on behalf of number 2. She was employed at Vodacom Head Office in Midrand and regularly gave evidence when it came to the question of analysing cellphone records.

[59] She gave evidence about calls made and received on the cellphones of the three deceased during the relevant period in January 2004. There appears to be some discrepancies between the times when the cellphones were used according to the records, and the times when they may have been used according to the evidence of S.

As Mr Roberts pointed out, correctly in my view, such discrepancies were to be expected given the fact that S only made his statement and revelation of the incident some two years after the event.

[60] Mr Roberts also made the compelling submission that the evidence

of Heynecke corroborates that of S in the following important respect: according to the records, the cellphone of O.A. was used for the last time on the day of the murder (12 January 2004) and never again after that. This is in line with the evidence of S that he destroyed the cellphone, albeit two days later, by crushing it against the wall. By contrast, the cellphones of the two other deceased remained in use for a while after the murder. The one phone was fitted with a new sim card and was used until March 2004, and the other one was also fitted with a new sim card and was still in use by the time when the trial took place. These two phones, according to S, were not taken by him after the crime but by number 1.

[61] Number 2 gave evidence in his own defence. The basic storyline shows a remarkable resemblance with the evidence of S. Number 2 met a foreigner by the name of Arrie who wanted to exchange American Dollars for South African currency at a cheap rate in exchange for papers to validate his unlawful presence in the country. Number 2 took the deal to O.A. There was a great deal of negotiation. The possibility of the coffee shop changing hands was mentioned. On the Sunday before the murder Keith M., Q and Williams visited number 2 in the maroon Almeira. They brought some money but the deal fell through. On the Monday of the murder O.A., Q and Williams arrived in

a white BMW. They left with Arrie. Afterwards O.A. sent an sms to say that the deal had been successful. When they left they said they had an appointment with B.J's. Of course, B.J's denied this. Arrie disappeared and was never heard of again.

[62] The major differences between the version of number 2 and S, as can perhaps be expected, are the following: S had nothing to do with the transaction whatsoever although he was known to number 2 at that stage. Number 1 did not feature at all and was not known to number 2 until after they were arrested. The fake attack and robbery did not take place at the house of number 2 on the Monday afternoon or evening. When O.A., Q and W. left with Arrie, they were unharmed.

[63] Significantly, when he was cross-examined, number 2 could offer no explanation whatsoever for S's decision to falsely implicate him. He was cross-examined on this issue on two occasions.

[64] When he was asked whether S was at all aware of the transaction that he had had with Uncle Allie regarding the dollars he said that S could not have been aware of it. Later he said that after his first arrest in

February 2004, S came to enquire why he had been arrested and he mentioned the deal to him. The following then was asked: "All right. If you could just - did you go into details of the deal or just mentioned the deal to him? ... I just mentioned the deal to him, no details." In cross-examination this subject was taken up with him again. He was very vague when asked what he told S. On a general reading of his evidence, he maintained that S had nothing to do with the deal, and, on this version, S could not have known all the details which he disclosed to the police and the court when making the revelation.

[65] Number 2 also denied the "Rennie deal" where O.A. allegedly caused number 2's father to lose money.

[66] Number 2 admitted that he received a visit on the Tuesday evening from M. and some other men. He admitted that he was nervous, but denied that his hands were shaking and that he was as nervous as M. had made him out to be. In my view, he could not give an acceptable explanation for being as nervous as he said he was.

[67] Perhaps significantly, number 2 also did not go to the school where he taught on the Tuesday, the day after the murder. He took his wife to

a clinic for her ear ache and had his son circumcised. On all the evidence, including that of him and his father, the Tuesday would have been one of the busiest days of the school term, being the first day after the holiday.

[68] The father of number 2 also testified. He confirmed that his son helped him in his clothing shop where he sold school uniforms on the Monday until about 17:00 before he went home. He also denied the “Rennie deal”.

[69] This concluded the evidence.

S testifying as an accomplice and a single witness

[70] In his judgment, the learned judge *a quo* indicated from the outset that he was alive to the fact that the testimony of an accomplice must be treated with the utmost caution. He did so. He referred, *inter alia*, to *S v Masuku and Another* 1969

1 SA 375 (NPD) at 376-377, *S v Francis* 1991 (1) SACR 198 (A) and *S v Hlongwa* 1991 (1) SACR 583 (A).

In *Francis*, the learned judge of appeal says the following at

205e-g:

“It is not necessarily expected of an accomplice, before his evidence can be accepted, that he should be wholly consistent and wholly reliable, or even wholly truthful, in all that he says. The ultimate test is whether, after due consideration of the accomplice’s evidence with the caution which the law enjoins, the court is satisfied beyond all reasonable doubt that in its essential features the story that he tells is a true one (*R v Kristusamy* 1945 AD 549 at 556).”

[71] In his argument, Mr Van Vuuren also referred to the following passage from *R v Ncanana* 1948 4 SA 399 (AD) 405:

“The cautious Court or jury will often properly acquit in the absence of other evidence connecting the accused with the crime, but no rule of law or practice requires it to do so. What is required is that the trier of facts should warn himself, or, if the trier is a jury, that it should be warned, of the special danger of convicting on the evidence of an accomplice; for an accomplice is not merely a witness with

a possible motive to tell lies about an innocent accused but is such a witness peculiarly equipped, by reason of his inside knowledge of the crime, to convince the unwary that his lies are truthful. This special danger is not met by corroboration of the accomplice in material respects not implicating the accused, or by proof *aliunde* that the crime charged was committed by someone.” (Emphasis added)

[72] Mr Van Vuuren also referred to the provisions of section 208 of Act 51 of 1977 which simply provides that an accused may be convicted of any offence on the single evidence of any competent witness. Mr Van Vuuren argued that the testimony of S was not satisfactory in every respect. He referred to, *inter alia*, the fact that S had said that he tied the people up with wire hangers whereas the post-mortem evidence and other evidence suggested that they were tied up with other material. He also referred to the testimony of S about the time when the attack took place. It is correct that S initially indicated that the attack and the fake robbery took place earlier in the afternoon, but in cross-examination he appeared to exhibit a measure of uncertainty about exactly what time in the afternoon it happened. It should also be borne in mind that S made his statement

some two years after the event.

I have already referred to the apparent discrepancy with regard to the cellphone records. When dealing with the question of whether or not there should be corroboration of the testimony of an accomplice, Mr Van Vuuren referred to Commentary on the Criminal Procedure Act by Du Toit at all at 24-4. The following is stated by the learned authors:

“And in *S v Hlapezula* [the reference is 1965 4 SA 439 (A) at 440E-F] at 440F HOLMES JA, after listing the dangers inherent in relying on accomplice evidence, added:

‘Accordingly ... there has grown up a cautionary rule of practice requiring (a) recognition by the trial court of the foregoing dangers, and (b) the safeguard of some factor reducing the risk of a wrong conviction.’

What safeguards may the courts consider in order to reduce such risk? Corroboration is the most obvious safeguard, but there is no rule of law or practice requiring corroboration of the accomplice (see *R v Ncanana* ...).”

I have already referred to the passage from *Ncanana* and underlined

the particular remark that there is no rule of law or practice requiring a court to insist on other evidence connecting the accused with the crime.

In this regard Mr Van Vuuren also referred to the following passage from *Meyer v Director of Public Prosecutions KZN* [2006] 4 All SA 598 (N) 606c-d:

“The greatest caution must be exercised in evaluating the evidence of Steytler. He is a single witness and an accomplice, and for reliance to be placed upon his evidence it has to be clear and satisfactory in every material respect. In addition corroboration implicating the appellant in the commission of the offence must be sought in order to reduce the risk of a wrong conviction.”

[73] Mr Roberts, correctly, argued that one must consider the evidence in totality. He submitted that it is highly improbable that S would have implicated the appellants falsely. If that were so, it would mean that he either fabricated the whole story or, having been part of the commission of the crimes, he falsely involved the appellants rather than the true perpetrators. There would appear to be no rational reason for him to do this. Moreover, it would mean that he implicated two people (number 1

and number 2) who did not know each other from a bar of soap, according to their evidence.

[74] Mr Roberts also, whilst legitimately criticising the quality of the evidence of Duda, pointed out that even if S had told Duda that he was going to implicate other people, that would still be distinguishable from an utterance that he was going to falsely implicate them. I have already referred to this aspect.

[75] Mr Roberts also, correctly in my view, emphasised the remarkable resemblance between the version of number 2 and the version of S. The corresponding aspects have been listed. He also illustrated the contradictory nature of number 2's evidence when he was confronted with the question as to whether or not he discussed the matter with S in February 2004. To this I have already referred.

[76] It seems to me that, if number 2's evidence that S had nothing to do with the whole affair were to be believed, it is almost inexplicable how S could have known about the following:

- That the BMW was parked at the shopping centre on the night of the murder.

- That number 1 took the key (corroborated by the evidence of Nel and others).
- That sms messages were sent to number 2 from the phone of O.A. on the night of the murder.
- That number 2 was visited on the Sunday afternoon by the three individuals in the maroon Almeira.
- That number 2 was visited on the day of the murder by the three individuals in the white BMW.

[77] Another mystery which arises on the version of the appellants, and particularly number 2, is the following:

If the deceased were not murdered as described by S, then who were the perpetrators? There was no suggestion by any witness as to any other possible perpetrators. On the version of number 2, the deceased must have been attacked shortly after leaving his home by unknown individuals. It appears to be unthinkable that Arrie could have executed the attack by himself. No other individuals were involved in the negotiations leading up to the

deal.

[78] Inasmuch as there may be a requirement that, when one deals with the evidence of an accomplice, there must be other evidence linking the accused to the crime, (which does not appear to be the case from the authorities quoted) it seems to me that number 1 was linked to the crime by the discovery of the BMW key in his house and his unsatisfactory and varied explanations as to how that may have come about as well as his failure to call his wife to testify. As to number 2, I am of the view that he is linked to the crime by the various areas of similarity between his version and that of S.

[79] The learned judge *a quo*, steeped in the atmosphere of the trial, was highly critical about the demeanour of number 1 in the witness box. He motivated this approach in explicit detail. See pages 761 to 765 of the record. Similarly, the learned judge was not impressed with the evidence of number 2 and his demeanour in the witness box. Again, he fully motivated this approach. See pages 771 to 776 of the record.

[80] As opposed to this, the learned judge was impressed with S. He considered him to be a satisfactory witness.

[81] It appears to me that, in a case like this, it can never do any harm to remember the well-known principles laid down in *R v Dhlumayo and Another* 1948 2 SA 677 (AD). In that case it is stated that the trial judge has advantages - which the appellate court cannot have - in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanour, but also their appearance and whole personality. This should not be overlooked. Consequently the appellate court is very reluctant to upset the factual findings of the trial judge. Even in drawing inferences the trial judge may be in a better position than the appellate court, in that he may be more able to estimate what is probable or improbable in relation to the particular people whom he has observed at the trial. Where there has been no misdirection on fact by the trial judge, the presumption is that his conclusion is correct; the appellate court will only reverse it where it is convinced that it is wrong. In such a case, if the appellate court is merely left in doubt as to the correctness of the conclusion, then it will uphold it.

I can find no material misdirection of the nature intended by *Dhlumayo*, that ought to lead this court of appeal to set aside the conclusions of the trial judge.

In *Francis, supra*, the learned judge says the following, at 204c-f, when dealing with the principles in *Dhlumayo*:

"This Court's powers to interfere on appeal with the findings of fact of a trial court are limited [*R v Dhlumayo and Another* 1948 2 SA 677 (A)]. ... In the absence of any misdirection the trial court's conclusion, including its acceptance of D's evidence, is presumed to be correct. In order to succeed on appeal accused number 5 must therefore convince us on adequate grounds that the trial court was wrong in accepting D's evidence - a reasonable doubt will not suffice to justify interference with its findings [*R v Dhlumayo supra; Taljaard v Sentrale Raad vir Kooperatiewe Assuransie Beperk* 1974 2 SA 450 (A) at 452A-B]. Bearing in mind the advantage which a trial Court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this Court will be entitled to interfere with the trial Court's evaluation of oral testimony [*S v Robinson and Others* 1968 1 SA 666 (A) 675G-H]."

[82] For all these reasons, I have come to the conclusion that the appeals against the convictions ought to fail.

[83] As to the appeals against sentence, it is fair to say, without doing an injustice to counsel for the appellants, that they did not strongly argue that the sentences were inappropriate. The crimes committed were of the most horrific nature. There is clearly no evidence of remorse on the part of the appellants. There is no question of compelling circumstances, as intended by the provisions of Act 105 of 1997, having been established. The compulsory minimum sentences cannot be interfered with. There is nothing shocking or inappropriate about the sentences in respect of the lesser charges.

[84] Inasmuch as the learned judge did not specify that all the sentences would run concurrently, he did not have to do so. See SS Terblanche *Guide to Sentencing in South Africa* 2nd ed at 233-234 where the following is stated:

“Such sentences, when they consist of any other form of imprisonment, automatically run concurrently with the sentence of life imprisonment. As a result, the cumulative effect of any other sentences is of no consequence, and there is no need to order such sentences to run concurrently. It has also been decided that life imprisonment cannot be extended by any additional term of

imprisonment.”

See also the reference, in footnote 226 on page 234, to section 39(2)(b) of Act 111 of 1998.

[85] In my view the appeals against the sentences ought also not to be upheld.

The order

[86] I make the following order:

The appeals of both appellants are dismissed and the convictions and sentences are confirmed.

W R C PRINSLOO

JUDGE OF THE NORTH GAUTENG HIGH COURT

I agree

E M MAKGOBA

JUDGE OF THE NORTH GAUTENG HIGH COURT

I agree

A M L PHATIDU

JUDGE OF THE NORTH GAUTENG HIGH COURT

Heard on: 27 May 2009

For the 1st Appellant: Adv L M Tshabalala

Instructed by: Pretoria Justice Centre

For the 2nd Appellant: Adv J L C J Van Vuuren SC

Instructed by: Nardus Grove Attorneys, Pretoria

For the State: Adv F C Roberts

Instructed by: The Director of Public Prosecutions

Date of Judgment: