

IN THE FREE STATE HIGH COURT, BLOEMFONTEIN

Case no: A246/2003

In the appeal between:

P MBELE

First appellant

K HLAHANE

Second appellant

and

THE STATE

Respondent

CORAM: RAMPAL J *et* MATHEBULA AJ

HEARD ON: 15 MAY 2006

JUDGMENT BY: THE COURT

DELIVERED ON: 17 AUGUST 2006

[1] The appellants were tried in the Sasolburg Regional Court in connection with multiple charges. The first appellant was convicted on eight out of the nine charges he was facing and sentenced to an effective jail term of thirty five years. The second appellant was convicted on three of the seven charges he was facing and sentenced to an effective imprisonment period of twenty years. They now come on appeal against all their convictions and all their sentences.

[2] The conviction of the first appellant related to the following eight charges:
The first charge, robbery with aggravating circumstances; the second

charge, robbery; the third charge, unlicensed possession of a fire-arm; the fourth charge, unlawful possession of ammunition; the fifth charge, attempted robbery; the sixth charge, murder; the eighth charge, robbery with aggravating circumstances and the ninth charge, attempted murder. He was acquitted in respect of the seventh charge of robbery with aggravating circumstances.

[3] The first appellant was sentenced to direct imprisonment as follows in terms of section 276(1)(d) of the Criminal Procedure Act No. 51/1977: twelve years in respect of the first charge; five years in respect of the second charge; four years in respect of the third charge; six months in respect of the fourth charge; twelve years in respect of the fifth charge; fifteen years in respect of the sixth charge; twelve years in respect of the eighth charge and three years imprisonment in respect of the ninth charge.

[4] In terms of section 280(2) Act No. 51/1977 the court below ordered that all the sentences should run so concurrently that the first appellant served an effective sentence of thirty five years imprisonment. In addition to this and in terms of section 12(2) Act No. 75/1969 the court declared the first appellant unfit to possess a fire-arm.

[5] The conviction of the second appellant related to the following three charges: the first charge, robbery with aggravating circumstances; the eighth charge, robbery with aggravating circumstances and the ninth charge, attempted murder. He was acquitted in respect of the following charges: two counts of robbery with aggravating circumstances, the seventh charge, and the tenth charge; as well as two counts of attempted murder, the eleventh and the tenth charges.

[6] The second appellant was sentenced as follows in terms of section 276(1) (b) Act No. 51/1977: twelve years imprisonment; twelve years imprisonment and five years imprisonment in connection with the first, the eighth and the ninth charges respectively.

[7] In terms of section 280(2) Act No. 51/1977 the court ordered that the three sentences should run concurrently and that they should concurrently run in such a manner that the second appellant served an effective sentence of twenty years imprisonment. In addition to this order the court declared the second appellant in terms of section 12(2) Act No. 75/1969 unfit to possess a fire-arm.

[8] Both appellants were aggrieved by all their convictions and all their sentences. Now they come on appeal against their respective convictions and sentences.

[9] We deem it expedient to group certain charges together according to their historical background. For the sake of practical expediency we divide the nine charges challenged on appeal into the following four categories: The first category consists of one charge, the first charge committed at Chris Hani, Sasolburg on 30 November 1997. The second category consists of two charges, eight and nine committed at Chris Hani, Sasolburg on 21 December 1997. The third category consists of three charges, two, three and four committed at Chris Hani, Sasolburg on 20 December 1997 and the fourth category consists of two charges, five and six committed at Chris Hani, Sasolburg on 4 January 1998.

[10] The version of the State in connection with the first category was narrated by three witnesses. It was alleged that the appellants attacked and robbed Matsidiso Barbra Motaung at Sasolburg on 30 November

1997 and robbed her of R1 000,00 cash at gunpoint.

[11] Matsidiso Barbra Motaung testified that she was busy working in the family shop called “Four-in-One” at Chris Hani on Sunday 30 November 1997. Her shop assistants were also in the shop. Among them were Thapelo Motaung and Sellwane Chabb. At or about 17h00 she was in the kiosk. She was doing the cashier’s work since the cashier was absent when she heard commotion in the shop. She looked up and saw three persons in the shop. The first person was dressed in dark green pants, green bottle-neck t-shirt and a black leather jacket. He was armed with a gun. He fired two shots inside the supermarket. He was a stranger. She had never seen him before. At one stage she was half a metre away from him. He was looking directly at her. She saw his face. He was right behind when the three entered her supermarket. She pointed the first appellant as the man she was describing.

[12] The second person was dressed in a grey poloneck jersey and a t-shirt. He was not a stranger. She had seen him before the incident. He was one of her customers. From time to time he bought things from her shop. He was the person who physically assaulted her by kicking her in the chest. He was sandwiched by his two companions when they entered the shop. She pointed out the second appellant as the man she was describing here.

[13] There was a third person with the appellants. She did not see how he was dressed. She did not recognise him. He was right in front when they walked in. He jumped over the counter into the kiosk. He demanded money from her. She resisted. He wrestled with her in an effort to rob her. He overpowered her in the end. He took money from the till in the kiosk. He also took some more money out of the till in the

service area of the supermarket. After they had removed the money the robbers fled from the scene on foot. It was during the wrestling that the first appellant fired a second shot and the second appellant kicked her. The robbers stole R1 000,00 cash. She called the police on her cellphone.

[14] Thapelo Motaung testified that he was on duty at “Four-in-One” supermarket at Chris Hani on Sunday 30 November 1997. A group of four boys arrived at the supermarket. Two of the boys walked into the fruit and vegetable section and two into the general section of the supermarket. He was standing at the door of the supermarket when the group arrived. One of the boys closed the door, produced a gun, aimed at him and grabbed him before he fired in the air. Thapelo managed to break loose and dashed out of the supermarket. He singled out the first appellant as the boy who perpetrated these criminal acts.

[15] Sellwane Chabb testified that she was on duty at “Four-in- One” supermarket at Chris Hani on Sunday 30 November 1997. She took an order from a certain customer apparently to the kitchen. On her way she looked back and saw the same customer jumping over the service counter of the kiosk. Then a commotion broke out in the shop. She and her fellow employees rushed to the main door in order to run out. In the vicinity of the door she noticed another robber pointing a gun at one of her fellow employees. She and some of her fellow employees turned away from the door and hid themselves behind the shelves in the shop.

[16] She singled out the first appellant as the man with the gun. Although she did not know him before the incident, his face was familiar. He looked like a regular customer. She had been working at this supermarket for a period of six months immediately preceding the incident. From her

hiding place in the shop she heard two gunshots.

[17] On 9 January 1998 she attended an identification parade where she pointed the second appellant out.

[18] The version of the first appellant was that he was never involved in the armed robbery at the said supermarket. He testified that at or about 17h00 on Sunday 30 November 1997 he was at church where he was singing in the church choir. Among others Rev. Mkhwanazi and the second appellant were also present. Mirriam Mbele testified on behalf of the first appellant. She was apparently his sister. She stated that on Saturday 29 November 1997 the first appellant went to Rev. Mkhwanazi's church. He came back on Sunday 30 November 1997. He spent the rest of the day sleeping at his parental home at Holomisa. He was arrested on 8 January 1998.

[19] The second appellant's version was that on Saturday 29 November 1997 he went away from his parental home at Zamdela. He spent the night singing in the church choir. He arrived back home on Sunday 30 November 1997 at 10h30. He spent the rest of the day home. His mother was present. He denied he was involved in the armed robbery at "Four-in- One" supermarket.

[20] The trial court evaluated the state witnesses and concluded as follows in connection with the first category:

“As die Hof die kumulatiewe effek van hierdie getuie se uitkenningsgetuie in oorweging neem is die Hof tevrede dat die omstandighede tydens die rooftog gunstig was vir die maak van betroubare waarnemings. Die Hof is tevrede dat daar nie 'n redelike moontlikheid bestaan dat hierdie getuies eerlike maar versigtige getuies kan wees, wanneer hulle getuig dat die twee beskuldigdes twee van die aanvallers was wie daar op die winkel toegeslaan

het nie.”

[21] Mr. Pretorius contended, on behalf of the appellants, that the trial court erred in finding that the evidence of the three state witnesses was credible and reliable to establish the identities of the two appellants as members of the group of robbers involved in the armed robbery of the supermarket. But Ms Giorgi disagreed. She submitted, on behalf of the respondent, that the three state witnesses had ample opportunity to identify the two appellants and that the court *a quo* correctly found that the identification of the appellants by the witnesses was reliable.

[22] It was clear that identity was an issue in connection with the first charge. To determine whether the identity of the appellants had been proved beyond reasonable doubt, the court had to determine whether the observations made by the credible witnesses were also reliable:

“Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities;”

Per Holmes JA in **S v MTHETWA** [1972 \(3\) SA 766](#) (AD) at 768 A – C.

[23] The victim Matsidiso Barbra Motaung testified that the incident happened

broad daylight at 17h00; that the glass of the kiosk was such that she could see in the supermarket without herself been seen from the supermarket; that the first appellant was about 1,5 metres away from her when she saw him; that he was facing her directly; that she saw his face; that he was armed with a gun and that he was dressed in green pants, green shirt and black leather jacket. The trial court was aware of all these positive facets of the witness's observation.

[24] There were, however, certain negative aspects of the witness's observation which were apparently overlooked by the trial court because no word was said about them. Barbra Motaung did not say how long her observation of the robber with a gun endured. It seems to us her observation lasted for a relatively short time. The drama unfolded pretty fast. The man with the gun, according to Thapelo Motaung, walked in, closed the door, manhandled him and fired a shot. There was already commotion in the shop when Barbra Motaung looked up. The employees were screaming and running for cover. She was also probably shocked first by the commotion, then the sight of the man brandishing a fire-arm and then a shot. It seems unlikely in such a commotion that the gunman would have stared in one direction for long. The widespread mobility in the supermarket probably also detracted the witness attention somehow.

[25] Barbra Motaung made a weak attempt to describe the physical features of the gunman. The negative aspects raised in the foregoing paragraph probably explained the reason why. If she had adequate opportunity and favourable circumstances to make her observation, she probably would have said more about the facial features of the man with the gun. The police were on the scene within fifteen minutes after the incident. She described the gunman to them as a tall man with

a dark complexion. She also described how he was dressed. The description of the clothes did not help very much because the first appellant was not immediately arrested and found wearing the clothes which matched the description given by the witness. The description of a tall and dark man was also not very helpful even to the witness herself. Such common description fitted thousands of men at Sasolburg. There is no doubt about it. We know that the accused was arrested five weeks after the incident on 8 January 1998 and that an identification parade was held the next day on 9 January 1998. The witness, Barbra Motaung, attended the identification parade. There she pointed out a wrong person as the gunman. However, at the trial on 28 August 1999 she readily pointed the first appellant as the gunman.

[26] Now Barbra Motaung failed to identify the first appellant as one of the robbers within five weeks after the armed robbery. If she failed within such a relatively short period of five weeks, how could she have succeeded to make a correct identification after a comparatively long period of eighty one weeks? Bearing in mind the scientifically proven fact that human memory naturally fades away with the passage of time, we are of the view that the positive dock identification of the first appellant as the gunman made approximately two years later by Barbra Motaung, was highly unreliable. No satisfactory basis was laid for her belated identification in our view.

[27] Like Barbra Motaung, Thapelo Motaung also identified the first appellant from the dock eighty one weeks later. Whether this witness attended the identification parade or not, does not appear on the record. If he did he probably failed to identify the first appellant at that early stage. Otherwise, the State would have led such crucial evidence. If he did not attend the identification parade the question is why was he left out

since he was such an important witness. He was the only witness who came into physical contact with the gunman. Here too, no sound basis was laid to validate his identifying or pointing out of the first appellant. He hardly made any attempt to describe the physical features or the clothes the gunman was wearing. The only common factors between Thapelo Motaung and Barbra Motaung were that the robber at the door had a fire-arm and that he fired a shot on his arrival. Therefore Thapelo Motaung's evidence was, in my view, not reliable. It being unreliable, it follows without saying that it cannot logically serve as corroboration for the materially unsatisfactory evidence of Barbra Motaung.

[28] Sellwane Chabb's evidence was rather confusing. She really became mixed up during her evidence in chief. She attributed to the gunman certain acts which were in fact done by the breadman. The converse also held true. She wrongly attributed to the breadman certain acts which were committed by the gunman. She corrected the cardinal mistakes she made in her evidence in chief during her cross-examination by Mr. Bernado, the second appellant's lawyer. Because the appellants were not labelled as accused number 1 and accused number 2 during the trial, the witness ended up confusing the one for the other. Her belated attempt to rectify the apparent contradictions in her testimony was not fully appreciated by the trial court. The misunderstanding was not limited to only the question of who was the possessor of the gun. The misunderstanding went further than that. Upon careful analysis and digestion of her testimony we realised that in many instances where she referred to the first appellant, she in fact meant the second appellant and *vice versa*. We note that even counsel for the respondent was also led astray by the numerical confusion pertaining to the dock sequence of the appellants as the accused in the court below. *Vide* paragraph 3.3 of the respondent's heads of

argument.

[29] The person or the robber who was earlier in the supermarket and enquired about the whereabouts of the proprietor of the supermarket was not the gunman, but the breadman. He was the customer who ordered “skambana” as a pretext to rob the supermarket. According to Sellwane Chabb the breadman was the robber who jumped over the service counter into the kiosk. Before the robbery she saw and spoke to the breadman on two occasions of two minutes each from a distance of one metre. She stated that as a result of the aggressive actions of the breadman, she and some of her fellow workers rushed to the door. There they saw another robber, a male person with a dark complexion who had a gun and was pointing it at one of the employees. We know now that Thapelo Motaung was held at gunpoint at the door. When Sellwane Chabb saw the perilous situation in which Thapelo Motaung was, she changed her direction. Afraid that she could be shot dead if she dared run out; she changed her mind and sought shelter behind the shelves in the supermarket.

[30] The following passage of the exchange between Sellwane Chabb and the prosecutor is important.

“Het u geleentheid gehad om die man met die vuurwapen mooi te identifiseer? --- Dit is korrek. Ek het na die persoon gekyk alhoewel ek nie duidelik na hierdie persoon gekyk het nie, maar ek kan hom aan sy gelaatstrekke herken.

Sou u hom weer kon herken as u hom gesien het? --- Edelaagbare ja as hy miskien hier te voorskyn kan kom sal ek in staat kan wees om hom te kan uitwys.

Is hy vandag in die hof of nie? --- Moet ek na al hierdie mense kyk wat hier in die hofsaal sit?

HOF Ja. --- Die getuie wys na no 1 beskuldigde in die beskuldigdebank.”

[31] She later said that she fleetingly observed accused number two. In actual fact she meant accused number one. This was another instance where Sellwane Chabb and the prosecutor were once again talking at cross-purpose. Although she said she recognised the first appellant by means of his physical features. This assertion was not explored any further. Despite this important intimation the prosecutor glossed over this vital aspect. The witness was never called upon to spell out such features. From the above passage one gets the impression that she was not aware at that stage that the gunman was present in court.

[32] The value of her dock pointing out was drastically diminished by the fact that no practical steps were taken to protect the first appellant. The trial court should have, at the request of the prosecutor, caused the accused to be removed from the dock before the identifying witness or witnesses were ushered in. In a case such as this justice demands that the accused should mingle with the members of the public, if not in the public gallery anywhere else in the court room, but they certainly should not remain in the dock. It is undesirable. Since she and the prosecutor were not on the same page; this adversely affected her identifying the first appellant. We also realised that Mr. Pretorius was also a victim of Sellwane Chabb's numerical confusion. The witness was practically and suggestively guided to the first appellant whose invidious position in the dock made him vulnerable to baseless and speculative guesswork identification. Virtually no basis was laid for her bold pointing out of the first appellant from the dock. How she could recognise him if he appeared after eighty one weeks when she failed to recognise him after just five weeks, is difficult to understand. To us it is clear that the highly suggestive questions as reflected in the passage quoted in paragraph [30] *supra* seriously had everything to do with her belated pointing out.

[33] It follows therefore that her evidence could not fairly be used as corroboration for Barbra Motaung's evidence. This is so because Sellwane Chabb's evidence was just as unreliable as Barbra Motaung's. Like Motaung she failed to identify the first appellant at an identification parade held five weeks after the robbery, but managed to point him out in court eighty one weeks after the incident. She gave no explanation at all as to what transformed and ameliorated her recollective mental powers. To her and to the other two witnesses the gunman was a total stranger. This then were the negative aspects of the observations made by the three state witnesses. In **S v MARADU 1994 (2) SACR 410** (WLD) at 413 g – i Blieden J eloquently articulated the danger of dock identification. He said:

“This passage affords a good illustration of the danger of accepting evidence of identification in the circumstances of this case. Once the witness, Pantelis, sees the persons in the dock he feels reassured that he is correct in his identification, even though this may not have been the position were they not there. To any member of the public, such as Pantelis, the fact that an accused is standing in the dock must naturally be suggestive of him being one of the parties involved in the crime, and no witness can be blamed for making such an assumption, even though it is incorrect.”

[34] As regards the second appellant, he was not at all implicated by Thapelo Motaung. The critique we previously levelled against Barbra Motaung in respect of the first appellant, applies equally well here. Moreover, she could not say when first or last she saw the second appellant in her supermarket although she alleged she recognised him as one of her regular customers. The alleged frequent visits, if there were recent visits, should have enabled her to give a more detailed and satisfactory description of his physical features. But that was not the case. The

unconvincing manner in which she testified about such visits created the impression that the last of those visits was probably in the far distant past and not recent. The supermarket started operating six years before the incident. It has to be mentioned that she could not point the second appellant out at the identification parade. The circumstances in which she pointed him out in court left much to be desired. In our view, all these negative aspects rendered the evidence of Barbra Motaung unreliable.

[35] As we have already mentioned, Thapelo Motaung's evidence was no corroboration for Barbra Motaung's assertion that the second appellant was one of the robbers and we proceed to examine the identification evidence of Sellwane Chabb in respect of the second appellant to determine whether it corroborates Barbra Motaung's. According to her shortly before the armed robbery a man walked into the supermarket, approached her and asked her where the owner of the supermarket was. Since the owner was not there the man went away. The conversation lasted for about two minutes.

[36] Soon afterwards the same man came back. He entered the supermarket, approached her again and placed an order for "skambana" in other words bread. Like the first, the second encounter also lasted for about two minutes. She walked away from the breadman seemingly to take his order to the staff at the back. Although she did not know the breadman she recognised him as a frequent customer of the supermarket.

[37] On her way to the kitchen she heard some commotion in the supermarket. She looked back and saw the same customer, the breadman, jumping over the service counter into the kiosk where

Barbra Motaung was. At the identification parade on 9 January 1998 she pointed the second appellant out as the breadman, the customer who attacked Barbra Motaung in the kiosk. In court on 24 August 1999 she pointed the second appellant out as the breadman, the robber in the kiosk. This was the strongest evidence of identification in this category. However, the evidence of Barbra Motaung was that the robber who jumped into the kiosk was not before the trial court. He was the third force, the unknown third man. Yet according to Sellwane Chabb the robber in the kiosk was the second appellant. This alone is a material contradiction between the two witnesses. Their evidence as regards the identity of the second appellant is mutually exclusive. We deem it a futile exercise to dwell any further on the serious self-contradictions of Sellwane Chabb's testimony. From her evidence we cannot find any corroboration for Barbra Motaung. Instead the contradictions seriously watered down their respective assertions that the second appellant was a member of the criminal gang of the four robbers involved.

[38] For the reasons advanced above, we are seriously persuaded that the assertions of the three prosecution witnesses were baseless and therefore unreliable. It seems to us the witnesses were honestly mistaken.

“What is perhaps more important, though, is that there must be no reasonable doubt that the witness is not mistaken. In our view that will generally require something more than the mere assertion by the witness that he has correctly identified the culprit, if the inherent risk of error is to be guarded against. “

Per Nugent J and Schwartzman J in **S v SITHOLE AND OTHERS** [1999 \(1\) SACR 585](#) (WLD) at 591 (e). See also **S v MARADU**, *supra*.

The negative aspects of their individual and collective observations totally eclipsed the positive aspects thereof. The contention of the appellants that the trial court misdirected itself in finding that the testimonies of those witnesses were not only credible but also reliable has substance. We would therefore uphold the appeal in respect of both appellants in connection with the first charge.

[39] We turn now to the second category. This group consists of two charges, eight and nine. In this instance the version of the State was narrated by three witnesses namely Elizabeth Chakela, Johnny Chakela and Johannes Lebitsa. It was alleged that the appellants attacked Elizabeth Chakela and Johnny Chakela at Sasolburg on 21 December 1997 and robbed them of R1 700,00 cash at gunpoint. This was charge number eight. It was also alleged in charge number nine that the appellants attempted to kill Johnny Chakela at the same place and time by shooting him.

[40] Elizabeth Chakela, the complainant in respect of charge number eight, testified that she and her husband, Johnny Chakela, the complainant in charge number nine, were at their residence at Chris Hani at or about 21h00 on 21 December 1999. She was cleaning the house while he was relaxing in bed. The couple lived and conducted business on the same premises. At or about 21h00 two boys came into the shop under the pretext that they wanted to buy cigarettes. She took their money and walked towards the bedroom to get change for them. As she was about to enter the bedroom, she looked back and noticed that one of the two young customers was pointing a fire-arm at her. The boy without the fire-arm ordered the one with the fire-arm to shoot her. The boys demanded money from the couple.

[41] The fire-armless boy ordered her to escort him to the dining room where he tried to rape her. She began screaming in there. Her husband walked in and attacked the boy. At that moment the armed boy also entered the dining room and shot her husband twice. She ran out to seek help. She was not in a position to identify any of the two boys.

[42] The testimony of Johnny Chakela was that he was home with his wife on the night in question. He was relaxing in the bedroom when he heard some noise in the house. He jumped out of bed. Shortly afterwards his wife and two men entered the bedroom. The one man was armed with a knife, the other with a fire-arm. The man with the knife demanded money from the couple. They took money from the dressing table and from the wardrobe. The total was R1 700,00.

[43] The man with the knife took his wife to the dining room under the false pretext that he wanted her to disconnect the hifi-set, which they also wanted so steal. Once in there, he tried to rape her. She screamed and wrestled with him. He rushed in there and rescued his wife from the knife-man. As he turned to the gunman the latter shot him twice. Having wounded him and robbed her, the attackers fled from the scene. The incident endured for at least 45 minutes. The house was illuminated by means of electric lamps. He pointed the first appellant as the attacker with a knife and the second appellant as the attacker with a gun.

[44] Johannes Lebitsa testified that he was a sergeant in the employ of the SAPS. On 21 December 1997 he attended the scene of the crime at the residence of the Chakelas where he assembled two empty 9 mm shells.

[45] The version of the defence in connection with the second category was narrated by four witnesses, namely Philemon Mbele, Mirriam Mbele, Koos Hlahane and Elizabeth Hlahane.

[46] Philemon Mbele, the first appellant, testified that he was not involved in the armed robbery of Elizabeth Chakela and the attempted murder of Vusi Johnny Chakela at Chris Hani on 21 December 1997. The two charges were news to him on the day of his testimony. He was not on the scene at the time material to these two charges. On the day in question he was home until 15h00. He then left home for a choir practice session at church. He left the church later and returned home. By 17h30 he was already back home. He never went anywhere afterwards. He spent the rest of the day at his parental home with his mother and sister.

[47] Mirriam Mbele was the first appellant's witness. As regards the Chakela's episode, she was uncertain about the first appellant's whereabouts on 21 December 1997.

[48] Koos Hlahane, the second appellant's testimony was that he was not involved in the Chakela episode at Chris Hani on 21 December 1997. He stated that on the day in question he was not at Sasolburg. He was at Sharpeville in Vereeniging from 19 December 1997 until 6 January 1998 when he arrived back at Sasolburg. During that period he never returned to Sasolburg. At Sharpeville he was visiting his sister. He said he knew nothing about the particular incident.

[49] The second appellant's witness was Elizabeth Hlahane. She testified that the second appellant was her brother. She confirmed that he paid her a social visit from 19 December 1997 until 6 January 1998. During

that period he never went anywhere else.

[50] The trial court found that the Chakela couple were credible and trustworthy witnesses. Moreover, the trial court also found that Vusi Johnny Chakela's evidence, as it pertained to the identities of the robbers involved, was reliable. In the opinion of the trial court no reasonable possibility existed that these witness was honest but mistaken in his identification of the two robbers.

[51] On behalf of the appellants Mr. Pretorius contended again before us that the trial court misdirected itself by finding the evidence of Vusi Johnny Chakela as credible and reliable, particularly as regards the identity of the robbers. Once again Ms Giorgi, on behalf of the respondent, contended that there was no such misdirection on the part of the trial court.

[52] The trial court said the following about the reliable attributes of Vusi Johnny Chakela's evidence:

“Kyk die hof na die betroubaarheid van sy waarnemings, dan is dit so dat die voorval in die aand plaasgevind het en aan die ander kant is dit sy onbetwiste getuienis dat die woning elektries verlig was. Sy vrou was op daardie stadium nog besig om die huis skoon te maak. Dit blyk dat die twee aanvallers wie identifiseer as beskuldigde no 1 en 2 'n geruime tyd in die huis was, tussen 45 minute en 'n uur lank, waartydens hy sy waarnemings kon doen. Dit blyk uit sy getuienis dat die twee beskuldigdes ook deurgaans naby hom was. Hy het onder andere met hulle gesprekke gevoer, was ook in fisiese konfrontasie met een van die beskuldigdes. As die Hof die totaliteit van die feite en omstandighede wat soos verwoord in die getuienis van Johnny Chakela rondom die omstandighede wat geheers het ten tyde van die maak van sy waarnemings in oorweging neem, is die Hof tevrede dat daardie omstandighede uiteraard ook gunstig was vir die maak van

betroubare waarnemings. Daar bestaan ook nie 'n redelike moontlikheid dat hy 'n eerlike maar versigtige getuie kan wees, wanneer hy getuig dat die twee beskuldigdes die persone was wie vir hom en sy vrou daar in die huis aangeval het nie.”

[53] Those then were chiefly the favourable attributes of Vusi Johnny Chakela's observation. Unfortunately virtually nothing was said about a host of the unfavourable qualities of the witness's observation. In his chief evidence, the witness made bold assertions that the two appellants were the two robbers involved. He made no attempt to motivate his identificative assertion. No distinctive physical features or dresses were mentioned in respect of any of the appellants. The witness did not even claim to have recognised the appellants by means of their general facial appearance. In short, the witness did not lay down any sound basis for his identifying of the appellants as the robbers.

[54] Given the length of time that he claimed to have spent with them in the house, the witness should have been able to say something more about the robbers than he did. The law requires something more than the mere assertion by the witness that he has correctly identified the culprit – **S v SITHOLE & OTHERS**, *supra*.

[55] Judging by the criminal activities which occupied the robbers, it appears to us improbable that the episode could have endured for almost an hour. Therefore the witness probably did not have such ample opportunity to make his observation. The scene was not static but highly mobile. It shifted from the bedroom to the lounge as far as the identifying witness was concerned. All along a gun was pointed at him. He must have been in the grip of fear, not only for his life and that of his wife, but also the fear that she was in imminent danger of being raped.

[56] Eighteen days after the incident the first appellant was arrested. The identification parade was held on 9 January 1998. We take it that the second appellant was also arrested before the identification parade, because Sellwane Chabb pointed him out on that day. Whether Vusi Johnny Chakela participated in the police identification parade on that day does not seem to appear on the record. No police witness was called to testify about those investigative proceedings of the identification parade. It is a great pity. The investigating officer was not called.

Elizabeth Chakela was unable to identify the robbers. Her husband was therefore a single witness. Moreover, he was an identifying witness. It is trite that here the trial court had to be doubly cautious. We think it was not.

[57] How Vusi Johnny Chakela identified the appellant was captured on p.126. The passage which recorded the exchange between the prosecutor and the witness, reads as follows:

“Kan u enige van die mense uitwys? Kan u vir die Hof ‘n aanduiding gee, is enige van die twee persone vandag by die hof? --- Ja.

U kan maar voortgaan? --- Dit is hierdie twee (die getuie verwys na die beskuldigdes).”

[58] The witness made a dock identification. The two accused were sitting or perhaps even standing alone in the dock in court. They were seriously unprotected, dangerously exposed and helplessly vulnerable. Then a deadly suggestive question was put to the witness: “..... is enige van die twee persone vandag by die hof?” The answer was simple and straight forward. Neither the prosecutor nor the two defence lawyers

asked the trial court to put in place any practical protective measures to safeguard the interests of the accused before the identifying witness was called. It is incumbent upon the State to alert the role players especially the presiding officer, in advance of its intention to call an identifying witness so that appropriate arrangements can be made before the identifying witness is ushered in. We find it wise, advisable and meaningful to cause the accused to leave the dock and to let him take up a seat of his choice anywhere in the public gallery or anywhere else in the court room for that matter. It was not done in this case. The failure to do so severely jeopardised the interests of the appellants and diminished the value of the pointing out.

[59] When an accused person is identified as the appellants were identified in the instant case, the scale of justice is not fairly balanced. The playing field is uneven. In such circumstances considerations of fairness, equity and justice demand that reduced weight be attached to the evidential value of such dock identification if the inherent risk of erroneous pointing out or guesswork identification is to be guarded against – **R v SHEKELELE AND ANOTHER** [1953 \(1\) SA 636](#) (TPD) at 638 F – G. So treated, the diminished value of this identification evidence alone becomes insufficient to sustain a safe conviction. Worse still in this category is that the dock identification was made almost eighteen months after the incident. It was precisely on account of such inordinately long period that Elizabeth Chakela frankly and honestly told the court that she was unable to recall how the robbers looked like. As a result of that there was no corroboration for her husband.

[60] In our view, the favourable aspects of the said single witness observation were remarkably overshadowed by the unfavourable aspects. The

cumulative impact of all the evidential defects rendered the evidence of Vusi Johnny Chakela unreliable. The contrary finding of the trial court was, in our respectful view, a misdirection. This court sitting as it was in an appellate mode was entitled to intervene. We would therefore uphold the appeal in respect of both appellants. This then is our conclusion in connection with the second group of offences.

[61] We turn now to the third category which consists of the following three charges, two, three and four in other words, an armed robbery, possession of a fire-arm and possession of ammunition. The State alleged that the appellants committed these crimes at Chris Hani on 20 December 1997. The version of the State was narrated by six witnesses. They were Seromo Piet Mofokeng, Aaron Tshatsa, Samuel Hlomuka, Maria Zakay, Isaac Thulo and Modise Lucas Rampai.

[62] The evidence of Mofokeng was that he lived at Bethlehem. On Saturday 20 December 1997 he arrived at Sasolburg from Bloemfontein. He alighted from the train and walked on foot from the railway station to his brother's residence. Three men appeared from nowhere and confronted him. They attacked him at or about 04h30 and robbed him of his belongings. Among others they robbed him of his fire-arm and ammunition. He described his fire-arm as a 9 mm pistol with serial number 35206. He could not identify any of the robbers. The scene was not well lit although there were burning street lamps. Later on he received his fire-arm from the Sasolburg police.

[63] The witnesses Tshatsa, Hlamoka, Thulo and Zakay were at Zakay's drinking place on 4 January 1998. According to Hlamoka and Thulo, the first appellant, Phillemon Mbele, was also at Zakay's drinking place. Thulo testified that among his three companions there was the first

appellant. Thulo and Hlamoka testified that the first appellant had a gun in his possession. Tshatsa saw an unknown man with a gun. Zakay also saw an unknown man with a gun. The four witnesses heard gunshots. Tshatsa and Zakay saw a gunman and his companion pushing Zakay's husband around at gunpoint.

[64] Rampai's testimony may be restated briefly as follows: He knew the first appellant. On 7 January 1998 the first appellant handed a fire-arm to him. The first appellant said to him that he was quickly going to town; that he should please keep the fire-arm for him and that he would fetch the fire-arm on his return from town. The first appellant did not come back to fetch his gun. The next day he arrived home from school and received a message left by the police. He then took the first appellant's fire-arm to the police station and handed it to the police. The court also ruled the statement the first appellant made before the magistrate as admissible evidence. *Vide* exhibit G.

[65] The first appellant's version in connection with the third group of offences was that he was not involved in the robbery of Mofokeng near the railway station on 20 December 1997. He testified that on 4 January 1998 he was at Zakay's shebeen where he was attacked. His attacker used an assortment of objects such as a panga, beer bottle and a gun. He disarmed the aggressive villain while they were wrestling for the possession of the villain's gun. He overpowered the villain and fled from the scene taking with him the villain's gun. For two days after the assault he was not feeling well.

[66] He decided on a Wednesday following his assault to hand the villain's fire-arm to the police. On his way to the police station he met Rampai, showed him the gun and explained to him how he obtained possession

of the gun. Rampai advised him that he should first go to the hospital in view of the serious nature of his injuries. In addition Rampai also offered to keep the gun in the meantime for him. He followed Rampai's advice and went to the hospital first. From there he went back home to have a further recuperative rest. The next day, which was a Thursday, he was arrested. He then took the police to Rampai's residence to point out the gun.

[67] The trial court rejected the version of the first appellant and found that it was not reasonably and possibly true. It accepted the version of the State as proof beyond reasonable doubt that the first appellant was one of the robbers of Seromo Piet Mofokeng. Furthermore the trial court also found that from 20 December 1997 until his arrest on 8 January 1998 the first appellant was in an unlawful possession of Mofokeng's loaded 9 mm pistol and that he did not have a valid licence to possess such a fire-arm. Lastly the trial court further found that the first appellant was in an unlawful possession of ammunition in that fire-arm.

[68] The critical reasoning of the trial court is to be found in the paginated court record from p. 216 – 217. We associate ourselves with the views expressed in that passage. The proven objective facts coupled with the first appellant's confession as well as his patently false testimony justified the reasonable and legitimate inference drawn by the learned magistrate. The evidence given by Modise Lucas Rampai was particularly devastating to the first appellant's defence. Precisely fifteen days after Mofokeng was robbed by unidentified three robbers, the first appellant was seen at Zakay's shebeen with a gun. Three days later he delivered a gun to Rampai. No doubt it was the same gun that he had at Zakay's shebeen three days earlier. A day later Rampai delivered the gun to the local police community service centre. It turned out to be

Seramo Piet Mofokeng's fire-arm.

[69] The first appellant admitted possession of the aforesaid fire-arm; that he delivered it to Rampai for safe keeping; that he told the police about its whereabouts and that Rampai handed it to the police. When Mofokeng's fire-arm emerged after the robbery, it was in the hands of the first appellant. In **S v RAMA** 1966 (2) SA 395 (AD) at 400 C – E Rumpff JA, as he then was, said the following about the principle of recent possession:

“The third submission made on behalf of appellant is that the possession of the watches by the appellant was not so recent as to justify the inference that he stole them. The watch is an unusual and expensive watch and the learned trial Judge found that it would not pass readily from person to person. The theft from the boot of the car occurred on 29th May. According to Kaplan the watch was handed to him on 27th June. His evidence was not challenged. Mrs. Weertz told the Court - and her evidence was also not challenged - that two weeks after she had seen the watch exh. 1 in Johannesburg, it was brought to Pretoria by Marx. It follows from this that within 14 days after the theft, appellant was in possession of exh. 1. The learned trial Judge took into consideration the fact that appellant had denied possession of the watch, and his inference that the appellant was guilty of theft is one which, in my view, this Court cannot hold to be wrong.”

We are in respectful agreement. The principle of recent possession dictates that when a person is found in possession of recently stolen goods the law deems him to have acquired such possession through his participation in the crime of stealing unless he can give a reasonably satisfactory explanation to rebut the presumption.

[70] The argument of the first appellant that the trial court misdirected itself by accepting as credible and honest the collective evidence of the five

state witnesses saved the qualified evidence of Hlamoka concerning his involvement in the third group of offences consisting of charges two, three and four cannot be upheld. Here there was no misdirection. That being the case, we are not at liberty to interfere. We would therefore uphold the convictions in this third category.

[71] Now we proceed to do an assessment of the fourth and final category. It consists of two charges, namely charge five and six. The State alleged in charge five that the first appellant armed with a gun attempted to rob Mlindelwa Mazinyo at Chris Hani on 4 January 1998. The State also alleged in charge six that at the same place and time the first appellant killed the said Mlindelwa Mazinyo.

[72] The version of the State in connection with the fourth group of offences was narrated by five witnesses, namely Aaron Tshatsa, Maria Zakay, Isaac Thulo, Samuel Hlamoka and Modise Lucas Rampai. The summary of their collective testimonies was that Tshatsa was at the victim's place to ask for some money change. He sat down in the dining room. Two men entered the dining room, walked straight to Mazinyo and shot him. Apparently Mazinyo was also in the dining room. The victim stood up and walked towards the bedroom. The one robber followed the victim and demanded money from him. He heard a second gunshot later. He saw the victim collapsing. The robbers vanished. He could not identify the robbers. The victim was not armed. The victim did not attack his unidentified villains.

[73] Zakay's evidence was substantially the same as that of Tshatsa. She added that she was in her bedroom when she heard the first gunshot in the dining room. Shortly after the first gunshot her husband entered the bedroom followed by a person with a gun. The victim and the gunman again walked out of the bedroom. The next moment she heard a

second gunshot. The victim was not armed and in fact had no fire-arm. The second shot was fatal.

[74] The composite testimonies of the remaining witnesses were as summed up in paragraph [63]. We deem it unnecessary to repeat it here.

[75] The version of the first appellant was that Mazinyo, the victim, attacked him, struck him with a panga, hit him with a bottle and tried to shoot him at Zakay's shebeen on 4 January 1998. He and the victim wrestled for the possession of the victim's fire-arm which had fallen down to the ground. He managed to dispossess the victim. Having done so he ran away taking with him the victim's fire-arm. He was so assaulted by the victim that he felt weak for two days. He nursed himself at his friend's during those two days. Three days after his assault by the victim he met Modise Lucas Rampai on 7 January 1998. He was on his way to hand the fire-arm to the police. He told the latter about the circumstances in which he obtained possession of the gun. Upon noticing his injuries Rampai suggested that in stead of going to the police station, he should rather go to the hospital first. Besides the suggestion Rampai also volunteered to keep the fire-arm on his behalf until his return from the hospital.

[76] From the hospital he went back home for further recuperative rest. The next day, on Thursday 8 January 1998 he was arrested in connection with the aforesaid incident at Zakay's shebeen. He led the police to Rampai's home where the fire-arm was kept. He denied the charges that he attempted to rob Mazinyo and that he killed him in the process.

[77] The court *a quo* evaluated the two versions. Having done so, it rejected the version of the first appellant as false beyond reasonable doubt. The

court specifically rejected as false the first appellant's version as to how he acquired possession of the fire-arm in question. The court accepted the first appellant's admission that he was in possession of the fire-arm. But it found that the first appellant did not get the fire-arm by dispossessing Mazinyo on 4 January 1998 but that in truth and in reality he got the fire-arm by robbing Mofokeng on 20 December 1997.

[78] The court *a quo* found that Maria Zakay's testimony corroborated Aaron Tshatsa's testimony. The significance of their collective evidence lies in the following credible facts: That the victim, Mazinyo, was surprised and attacked in his house where he was peacefully minding his own business; that the victim did not have the fire-arm in his possession and that the victim did not assault any of his attackers; that the motive for the attack was robbery and that the victim was cold bloodedly shot dead because he did not hand any money to the attackers as they wanted.

[79] Thulo and Rampai were also credible and honest witnesses. The former did not witness the alleged assault of the first appellant by the victim. But the only person with a fire-arm that he saw was the first appellant. Hlamoka's testimony was heavily, but correctly criticised by the trial court. His testimony was accepted provided it was not in conflict with that of a credible witness, Tshatsa.

[80] On the facts the contention of the first appellant that the trial court misdirected itself by accepting the evidence of the aforesaid witnesses concerning his involvement in the fourth category charges, cannot be upheld. The findings of the court *a quo* that two persons burst into the house of Mazinyo; that the first appellant was one of the two men; that he was armed and dangerous; that he pointed a fire-arm at the victim;

that he demanded money from the victim and that he cold bloodedly shot the victim dead, because the victim would not surrender his money to him, were correct. It is our considered opinion that the facts justified such findings. Therefore we are inclined to confirm the two convictions of serious assault and murder as pronounced by the magistrate.

[81] Before we proceed to deal with the second leg of the appeal, in other words the sentence, we would like to make a few general comments. Seromo Piet Mofokeng was robbed of his 9 mm pistol loaded with 9 mm ammunition on 20 December 1997. The next day, 21 December 1997, Sergeant Lebitsa assembled two 9 mm shells on the crime scene in respect of the Chakela's incident. Fourteen days after Mofokeng's robbery on 4 January 1998, Mazinyo was gunned down. Twenty one days after Mofokeng's robbery, on 7 January 1998, Rampai received a 9 mm pistol from the first appellant. Twenty two days after Mofokeng's robbery the police received a 9 mm pistol from Rampai. Was there no criminal link running from Mofokeng's episode *via* Chakela's episode to Mazinyo's episode? These facts strongly suggest that the first appellant was involved in the Chakela's episode as well a day after Mofokeng was robbed. Yet the first appellant has now escaped. It seems to us that no forensic material, assembled from the scenes at Chakela's, at Mazinyo's and at Rampai's, was ever sent to the forensic science laboratory in Pretoria for comparative ballistic analysis. The chances are that had the important microscopic examination and analysis been done, the first appellant would probably have been properly convicted on the strength of possible ballistic evidence. Ballistic evidence and identification parade evidence were disturbingly lacking in this case. As a result of such neglect there was probable miscarriage of justice. We are not certain whether the case was poorly investigated or poorly

presented to the court or both.

[82] We turn now to the sentences. As regards the first appellant the relevant sentences relate to the following remaining convictions: two, three, four, five and six. It will be recalled that the first appellant was sentenced to imprisonment for five years, four years, six months, twelve years and fifteen years for these charges respectively.

[83] It is a serious offence to take another person's life. In such circumstances the personal circumstances of the appellant should yield to the seriousness of the offence. See **S v WEARNE** [1979 \(1\) SA 820](#) (A) at 823 C – E. Furthermore in **RAMOKO v DIRECTOR OF PUBLIC PROSECUTIONS** [2003 \(1\) SACR 200](#) (SCA) at 204 – 205 the court emphasised that the objective gravity of the offence plays an important role. In **S v MOHASE** [1998 \(1\) SACR 185](#) (O) at 193 the court said, *inter alia*, that the sentence imposed must sent a clear message to potential offenders as well.

[84] In sentencing the first appellant the court *a quo* took into account the following mitigating factors: The first appellant was twenty years of age at the time he committed the crimes. He passed standard five at school. He stayed with his parents on whom he was largely dependent for his basic needs of subsistence. He had no fixed gainful employment, but he occasionally did some casual jobs here and there. He was still unmarried. He had no dependent minor children. He was a first offender. It is also important to bear in mind that the first appellant remained incarcerated for three years before he was sentenced.

[85] The other side of the coin shows that the court *a quo* also took into account the following aggravating factors: The nature and the

seriousness of the crimes such as robbery and murder; the prevalence of the crimes; the thorough planning of the crimes; the cold bloodedness of Mazinyo's shooting; the widespread culture of violence in the jurisdiction of the trial court; the rampant trivialising of human life; the constant criminal violation of the general interest of society.

[86] On behalf of the first appellant it was contended that the cumulative effect of the sentences was shockingly severe and therefore inappropriate, given the first appellant's mitigating factors. On behalf of the respondent, however, it was contended that in imposing the various sentences on the first appellant, the court *a quo* carefully took the cumulative effect thereof into account.

[87] In the course of passing sentence the trial magistrate commented:

“Dit is so dat die Hof ook nie sy oë kan sluit vir die werklikheid nie – dat misdrywe van geweld, moord, roof met verswarende omstandighede en ook misdrywe waarby vuurwapens 'n prominente rol speel, dikwels met lewensverlies soos maar ook weer in die onderhawige saak misdrywe is wat op 'n baie groot skaal voorkom in jurisdiksie-gebied van hierdie Hof in besonder.”

Vide p. 226: 14 – 24.

The remarks were justified to a great extent. Where crime is rife, stiff sentences are called for. All these crimes were prompted by the sinister and criminal objective to rob. These criminal enterprises have become ravaging social evils. What is particularly aggravating here is that the first appellant did not perpetrate these crimes alone. He was a member of a criminal gang which tormented the small community of Chris Hani especially the small emerging vendors. The other members of his gang

are still at large.

[88] We have painstakingly considered the individual sentences. We are satisfied that three out of the five sentences imposed on the appellant are in order, namely five years imprisonment in respect of count two, robbery, six months imprisonment in respect of count four, possession of unlawful ammunition and fifteen years imprisonment in respect of count six, murder.

“As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence;”

Vide **S v PILLAY** [1977 \(4\) SA 531](#) (AD) at 535 E – F per Trollip JA.

[89] The first appellant was acquitted in respect of the charge of attempted robbery in other words count five, but was convicted for assault with intent, which is a competent verdict. He was then sentenced to twelve years imprisonment. In my view, the sentence is not within the generally acceptable limits of reasonableness. It is shockingly severe and therefore inappropriate. The disparity between the crime and the sentence is of such a wide degree of seriousness that it suggests that the court *a quo* did not exercise its discretion at all or that it exercised its discretion improperly or unreasonably to the detriment of the first appellant. The misdirection is one which vitiates the decision of the court on sentence. *Vide* **S v PILLAY**, *supra* at 535 F – G.

[90] The misdirection therefore calls for our interference. It appears to me that reducing the sentence by seven years would be commensurate to the crime for which the first appellant was found guilty in the end.

Lastly, the law forbids a sentence longer than three years imprisonment for the crime of unlawful possession of a fire-arm in contravention of section 2 Arms and Ammunition Act No. 75/1969. It follows therefore that the sentence imposed on the first appellant in respect of count three was excessive. The misdirection compels us to reduce the sentence in order to bring it within the appropriate statutory parameters of sentencing. We are of the opinion that a reduction of one year will do. The five crimes boil down to two criminal transactions. We would therefore find a way of tempering with the cumulative impact of these multiple sentences to avoid undue hardship. It must be borne in mind that an important mitigating factor in this case is the fact that the appellant was incarcerated for three years before he was sentenced. As regards this the appellant is entitled to full credit for this period. *Vide S v NKOMONDE* [1993 \(2\) SACR 597](#) (WLD).

[91] As regards the second appellant, his appeal on the merits was successful against all the three convictions. Obviously all the corresponding sentences have to be set aside.

[92] Accordingly we make the following order as regards the first appellant:

92.1 In respect of charges one, eight and nine the appeal succeeds.

The conviction and the sentences are set aside.

2. In respect of charges two, three, four, five and six the appeal on the merits fails. The convictions are confirmed.

2. In respect of charges two, four and six the appeal against the sentences fails. The sentences are confirmed.

2. In respect of charges three and five the appeal against the

sentences succeeds. These sentences are set aside and it is substituted therefore: three years imprisonment and five years imprisonment respectively.

2. We direct in terms of section 280(2) Act No. 51/1977 that the sentences of five years, three years, six months, five years and fifteen years imprisonment in respect of the charges two, three, four, five and six shall all run concurrently so that the first appellant serves an effective sentence of twenty two years imprisonment.

2. The foregoing sentences shall be deemed to have been imposed on the first appellant on 21 November 2000.

[93] The appeal of the second appellant succeeds *in toto*. The convictions and the sentences are set aside in respect of charges one, eight and nine.

M.H. RAMPAL, J

M.A. MATHEBULA, AJ

On behalf of the appellants: Attorney K. Pretorius
Instructed by:
The Justice Centre
BLOEMFONTEIN

On behalf of the respondent: Adv. S Giorgi
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN