THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 444/08

In the matter between:

JOHANNES CHRISTIAAN LE ROUX	**FIRST APPELLANT**
TIMMY NANKERVIS	**SECOND APPELLANT**
ANTON PAUL LE ROUX	**THIRD APPELLANT**
WILLEM LE ROUX	**FOURTH APPELLANT**
GERHARDUS ROSSOUW	**FIFTH APPELLANT**
LOUIS ROSSOUW	**SIXTH APPELLANT**
DANNY SCHONE	**SEVENTH APPELLANT**
v	
THE STATE	**RESPONDENT**

Neutral citation:	*Le Roux v The State* (444/2008) [2010] ZASCA 7 (5 March 2010).
Coram:	Mpati P, Nugent, Mlambo JJA
Heard:	9 September 2009
Delivered:	5 March 2010

Summary: Criminal law – Public violence – what constitutes – group of perpetrators assaulting restaurant patrons at random and damaging restaurant utensils.

Public violence – no prior plan – common purpose developing at the scene – association with.

Fair trial rights – appeal delay – effect on sentence.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Seriti and Ledwaba JJ sitting as court of appeal).

1. The appeals against conviction succeed in respect of appellants 2, 3, 4 and 7. Their convictions and sentences are set aside.
2. The appeals of appellants 1, 5 and 6 are dismissed.

JUDGMENT

MLAMBO JA (Mpati P and Nugent JA concurring):

[1] The seven appellants were arraigned with seven others in the Brits Regional Court on a number of charges, but were convicted only on a charge of public violence. The first and second appellants were sentenced to six years' imprisonment, two years of which were suspended for five years on certain conditions. The other appellants were also sentenced to six years' imprisonment but in their case three years were suspended for five years on similar conditions. The appellants were unsuccessful in an appeal against their convictions and sentences to the North Gauteng High Court, Pretoria (Seriti and Ledwaba JJ). That court, however, granted them leave to appeal to this court against their convictions and sentences.

[2] As to the other seven persons originally charged with the appellants, one of them, Sydney Douglas Keyser, pleaded guilty to a charge of public violence at the commencement of the trial, and was consequently convicted on that charge and sentenced to six years' imprisonment, four of which were suspended also on

certain conditions. He then turned state witness. Two others had charges withdrawn against them and two more were discharged at the close of the state's case.[1] Of the remaining two one was acquitted on all charges at the conclusion of the trial and the other was successful in the appeal to the North Gauteng High Court.

[3] The incident giving rise to the matter took place some 13 years ago, on 17 June 1996 to be exact, at Hartebeespoort in Gauteng at a restaurant known as Tant Malie's. On that day, a public holiday, the restaurant was packed to the brim with patrons, including children, enjoying themselves and having a good time when a fight erupted. In the ensuing fight, which escalated into several other fights engulfing the whole restaurant, a number of patrons were assaulted and restaurant furniture and utensils were damaged. The appellants who were present at the scene and others, alleged to have been with them, were implicated as the perpetrators of these acts. The charges brought against them included attempted murder, assault with intent to do grievous bodily harm, malicious damage to property and theft.

[4] In this appeal the appellants have raised essentially two issues against their convictions. The first is that the incident on which their convictions are based was not of such a magnitude as to amount to public violence. The second is that the state had failed to adduce evidence linking them to any act of association in the commission of any transgression alleged to have been committed on the day in question. In relation to sentence it was contended that the trial court had misdirected itself when it turned down the appellants' application for a postponement which, they assert, was aimed at obtaining pre-sentence reports for purposes of bringing certain facts to the attention of that court for its consideration before imposing sentence.

[1] In terms of s 174 of the Criminal Procedure Act 51 of 1977 as amended.

[5] At the outset, and in view of the appellants' argument that the incident we are concerned with was not so serious as to amount to public violence, it is apposite to consider what constitutes that offence. Public violence is described by Snyman[2] as follows:

'Public violence consists in the unlawful and intentional commission, together with a number of people, of an act or acts which assume serious dimensions and which are intended forcibly to disturb public peace and tranquillity or to invade the rights of others.'

This description of the offence is no different in substance to that also proffered by Milton.[3] It is apparent from this definition that the salient features of the offence are that a group of persons, acting in concert must be shown to have committed an act or acts of sufficiently serious dimensions which invaded the rights of others and disturbed public peace.[4]

[6] The most recent case heard in this court featuring public violence is *S v Whitehead*.[5] In that matter a group of men assembled at a pre-arranged spot, and finalised a plan to attack workers and members of a union who were on strike. From their meeting these men then ran towards the strikers who had by that time assembled at a nearby park. What followed was an indiscriminate attack on the unsuspecting workers accompanied by the damage and destruction of property, notably motor vehicle windscreens. The conviction of public violence on these facts was not challenged on appeal.

[7] With this exposition of what constitutes the offence of public violence I turn to consider what happened in the case before us. The restaurant at which the

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[2] C R Snyman *Criminal Law* 5 ed p 321.
[3] J R L Milton *South African Criminal Law and Procedure* Vol II p 74:
'Public violence consists in the unlawful and intentional commission, by a number of people acting in concert, of acts of sufficiently serious dimensions which are intended violently to disturb the public peace or security or to invade the rights of others.'
[4] *R v Salie* 1938 TPD 136 at 138-139; *R v Cele* 1958 (1) SA 144 (N) at 152E-153C; *S v Mlotshwa* 1989 (4) SA 787 (W) at 795.
[5] 2008 (1) SACR 431 (SCA).

incident took place is made up in the first instance of a bar, a conventional shop as well as a gift shop where typically South African wares are on offer. Then there is an upper level catering for conventional restaurant services where meals are served. There is also an area in the outdoors of the premises divided into what is called the Bosveld, Luiperd and Laeveld lapas. These lapas are arranged into 41 specially constructed braai areas which cater for anything from five to 30 patrons at a time. There are also stables on the premises where horses were apparently kept. The restaurant appears, on the record before us, to be a favourite venue for family occasions such as birthday celebrations and is popular with locals and tourists alike.

[8] In what follows I set out an undisputed version of what transpired. According to this version a group of big and well built men, mostly with clean shaven heads, set upon and attacked restaurant patrons and committed a variety of other transgressions at the restaurant. This group is also said to have been identifiable by the dark windbreakers that they wore. There is no dispute that the spark that ignited the mayhem occurred at the horse stables. This was when appellant no 7 (Danny Schone) mounted or attempted to mount a horse backwards and was seen in the process fooling around with its tail. This conduct prompted a patron occupying one of the braai areas in that vicinity to make a remark about his antics. The nature of the remark was undisputedly innocuous and is alleged to have been along the following lines: ‘How can he do that’. The patron who made this remark was part of the Jamieson family which came to be known in the trial as the Jamiesons, who had come to the restaurant to celebrate Mr Shaun Jamieson’s birthday. The remark apparently emanated from Shaun Jamieson’s brother-in-law, Mr Hannes van Wyk, and it was apparently heard by Schone and some of his friends who then as a group proceeded to surround the Jamiesons. Some of the appellants were in that surrounding group and one of them uttered words to the effect of ‘come boys lets box’ where after one of them proceeded to assault Hannes van Wyk with fists despite the latter’s placatory efforts. Shaun Jamieson tried to come to his brother-in-law’s rescue but was

himself pulled from behind by his shirt and was then punched in his face which caused him to fall whereafter he was kicked several times.

[9] When the assault on Hannes van Wyk and Shaun Jamieson ceased, the group of attackers moved on and some of them were observed assaulting patrons they encountered along the way. Shaun Jamieson saw this group upending tables, breaking glasses and throwing chairs around. The group was then seen breaking up into smaller groups which continued assaulting any patron they encountered. This escalated into full scale chaos engulfing the whole restaurant with accompanying screaming, shouting and confusion. In the ensuing mayhem patrons, petrified of being assaulted, tried to keep away from the marauding attackers whilst others, who unfortunately found themselves in the vicinity of the conflict, were beaten up. The whole place by all accounts was virtually turned upside down. In the aftermath of the chaos there were patrons who were bleeding from the beating they had received, some of whom required medical attention.

[10] From the evidence presented by the state certain incidents which played themselves out amidst the chaos, stand out and it is necessary to refer to them. The first one is the Jamieson incident I have alluded to during which Hannes van Wyk and Shaun Jamieson were assaulted. Another incident is an incident where a big man was observed assaulting a much smaller man. This prompted one of the patrons, Mrs Diana McClelland, to throw a can at the big man, in an effort to stop the assault. It is common cause that the can hit someone who thereafter swore at McClelland. I will return to this incident later in this judgment when dealing with the issue whether the can hit the attacker or not.

[11] Another incident is the so-called Serfontein and Schutte incident. The evidence is that Dr Serfontein and Mr Schutte and their wives were also at the restaurant to celebrate a birthday. They heard some noises and Dr Serfontein and Mr Schutte then left to investigate what was happening after telling their

families to hide in a small room. They then found themselves surrounded by a group of men and one of them assaulted Dr Serfontein with a sjambok. They managed to leave the area and proceeded to their vehicles where Dr Serfontein took a jacket. On their way back Dr Serfontein was again attacked by approximately four men. When Schutte tried to assist Dr Serfontein he was also assaulted and lost consciousness. He regained consciousness when order had returned and required surgery for his wounds.

[12] There was also the incident that occurred outdoors where a man was assaulted by a group of men. It appears that every time this man was assaulted he fell backwards against a tree which threw him back towards the attackers and this unleashed continuous beatings. Then there was an encounter between Mrs Alberts, the owner of the restaurant, and one of the men who shouted at her that his men would close down the place. Another encounter occured between the same man and Mr van der Watt, Mrs Albert's friend who was assisting her to run the restaurant on that day, where the same threats were made. Perhaps the most graphic, yet conclusive, evidence of the situation came from Van der Watt. I can do no better than quote his testimony to the effect that:

'Ons het gevoel soos gyselaars. Ons kon nêrens heen beweeg nie. Ons was te bang. Ons vryheid van beweging was ontneem want jy was te bang loop jy nie jou weer vas in een van die mense nie.'

And further:

'Nee, dit was vir my meer as aanranding. Dit was soos 'n aanval. Dit was nie vir my asof daar 'n bakleiery van weerskante was nie. Ek het dit nou genoem die term, bakleiery maar die aggressie, die aanval het definitief van hierdie groep gekom want die ander, die vrou het nog gepleit: "Moenie my man slaan nie".'

This evidence was uncontradicted. It is clear, in my view, that the drama that unfolded at the restaurant on that day was a rowdy, violent and bloody

confrontation in addition to which windows, shop wares and furniture were either upended and/or broken and that the public peace was seriously disturbed.

[13] The mayhem was so pronounced that the first law enforcement officers on the scene, Sergeant Olson and Inspector Madia, followed by Corporal du Bruyn, were unable to bring the situation under control and restore order until sometime later with the arrival of reinforcements. Perhaps one must also refer to an incident that occurred on the arrival of Olson. He was confronted by a big man who was part of the mayhem perpetrators. This man approached Olson menacingly with one of his hands behind his back. The significance of this confrontation is that the man's demeanour towards Olson was perceived to be one of aggression and was thought to have a weapon in his concealed hand. Needless to say but Olson became apprehensive when he was confronted in this fashion. Olson and Madia also observed small groups of men, from which the one who confronted Olson emerged, attacking individual patrons. They observed that a majority of patrons were barricaded inside the restaurant and that any patron who stumbled outside the restaurant was set upon by a group comprising anything from two to five men. With the arrival of reinforcements they were able to move in between the groups and rescue the patrons caught up in the fracas. Eventually the group of attackers left the scene and this resulted in a cessation of the chaos.

[14] All this evidence demonstrates conclusively, in my view, that the incident we are dealing with reached public violence dimensions and that the finding by the trial court that this offence was committed on that day is fully justified. A further useful indicator that public violence was committed is the number of incidents described by the witnesses.

[15] This leads me to the next and primary issue in the appeal and that is whether the appellants were correctly convicted of having committed any acts of public violence or associated themselves with the transgressions committed on

that day. The appellants do not dispute that at some stage there was trouble at the restaurant but they deny planning and/or being complicit in any criminal conduct committed there on that day. Their version which was accepted by the trial court was that they had planned beforehand to spend the afternoon at some other place in Buffelspoort to celebrate Sydney Keyser's birthday. This plan changed, however, when those travelling ahead in their motorbike convoy decided, as they went past Tant Malie's, that they would rather celebrate Keyser's birthday there. They then proceeded to redirect others in their convoy to the restaurant as well as recall those who had already gone past.

[16] In convicting the appellants the trial court accepted the appellants' version that they had no prior plan to be at the restaurant but reasoned that as they were present at the restaurant, they had acted in consent and their actions assumed serious dimensions which disturbed the public peace and order. On this basis the trial court concluded that they had committed the offence of public violence and convicted them accordingly. This conclusion was upheld by the North Gauteng High Court.

[17] In *S v Mgedezi* 1989 (1) SA 687 (A) this court dealt with a situation where there was no prior plan to commit the offence of public violence. It was stated there that a general and all embracing approach regarding all those charged is not permissible. It was stated further that the conduct of the individual accused should be individually considered with a view to determining whether there is a sufficient basis for holding that a particular accused person is liable on the ground of active participation in the achievement of a common purpose that developed at the scene. In that case the following was stated:[6]

'A view of the totality of the defence cases cannot legitimately be used as a brush with which to tar each accused individually, nor as a means of rejecting the defence versions *en masse*.'

[6] At p 703B.

And further:[7]

'The trial Court was obliged to consider, in relation to each individual accused whose evidence could properly be rejected as false, the facts found proved by the State evidence against that accused, in order to assess whether there was a sufficient basis for holding that accused liable on the ground of active participation in the achievement of a common purpose. The trial Court's failure to undertake this task again constituted a serious misdirection.'

[18] In argument before us it was submitted on behalf of all the appellants that the state had failed to prove any act of association by them with any transgression committed at the restaurant. The submission was that on this basis the appeals against the appellants' convictions had to succeed. It was further submitted that there was no reliable evidence linking the appellants to any of the transgressions perpetrated at the restaurant. In this regard it was submitted that in respect of J C le Roux in particular, he was uncontradicted in his assertion that he actively tried to stop the fracas and that he also tried to get his group out of the restaurant.

[19] It is clear in this matter that in convicting the appellants the trial court's premise was simply that as they were shown to have been present at the scene they were therefore complicit in the commission of transgressions by other members of the group. This, on *Mgedezi's* authority was a misdirection. In the absence of a prior agreement or plan to commit the transgressions mentioned the trial court was required to conduct an investigation of each appellant's conduct at the scene so as to determine whether that appellant associated himself with the acts of pubic violence. The trial court was also primarily reliant on Keyser's evidence in convicting the appellants. In this regard, the trial court reasoned that as Keyser had already been convicted and sentenced he stood to benefit nothing by falsely implicating the appellants. Keyser was an accomplice

[7] At 703I.

and his evidence against the appellants had to be treated with caution. That caution was called for in this instance is also due to Keyser's admitted animosity towards J C le Roux in particular. For this reason his evidence also required some corroboration before being accepted. Clearly therefore the trial court committed a misdirection in failing to treat Keyser's evidence with the necessary caution and in accepting it without the necessary corroboration. It is necessary therefore to consider all the evidence to determine the complicity, if any, of the appellants in the commission of any transgression committed at the restaurant.

[20] In so far as appellant no 1 (J C le Roux) is concerned, almost all the state witnesses testified and stated that he was visible as he appeared to play some leadership role regarding the group that was terrorising other patrons. This observation cannot be discounted in view of its corroboration by J C le Roux himself that some of the men in his group worked for him in his security business. He testified in this regard that seven of the men charged with him were in his employ at the time of the incident including appellants 3 (Anton Paul le Roux) and 4 (Willem le Roux) who were also his younger brothers. Keyser also attested to this. That J C le Roux also recognised his leadership role is found in his version that he was the one issuing instructions to his group to either desist from assaulting other patrons or to leave the restaurant. Clearly J C le Roux was a prominent and unmistakeable figure in the midst of the chaos.

[21] J C le Roux was implicated by Keyser to have been involved in the Jamieson incident I alluded to earlier. Keyser testified that when the fracas started around the Jamiesons J C le Roux was the one who said to them, 'come boys lets box' or words to that effect. Shaun Jamieson identified him and appellant 2 (Timmy Nankervis) as being present in the group that surrounded his family. He could, however, not say that he saw J C le Roux do anything or assault anyone. He testified that it was this appellant who was issuing instructions to the others. He could, however, in stark contrast to Keyser's evidence, not say if it was J C le Roux who uttered the words 'let's box'. In so far

as his wife, Juliana Jamieson is concerned, she identified the fourth accused[8] in the trial as the person who assaulted Van Wyk. It appears that in identifying that accused (Lawrence Pike) she was under the impression that she was identifying J C le Roux who had swopped positions with Pike just before she came in to testify. She conceded that she was mistaken in her identification when it was put to her in cross examination that it was suspect. Her evidence must, for this reason, be disregarded as being unreliable against J C le Roux. Clearly therefore we have no evidence of this appellant's complicity in the transgressions committed during the Jamieson incident.

[22] J C le Roux was also implicated by Van der Watt and Alberts. Van der Watt testified that when he encountered this appellant, he screamed abuse at him. He became very scared and requested this appellant and his group to leave but the latter demanded a refund of their money and threatened to burn the restaurant down. Van der Watt expressed the issued threat thus:

'Daardie groot persoon wat die bierblik gehad het. Wat ek as die leier aangesien het. Hulle het vir my geskree dat:
"Ons gaan julle toemaak. Ons gaan hierdie plek afbrand. Vannag gaan ons hierdie plek kool. Ons gaan hierdie plek afbreek tot die grond toe".'

He also testified that J C le Roux grabbed him by his throat and pinned him against the wall. J C le Roux did not deny the encounter with Van der Watt, though he denied assaulting him. He also did not deny the threat attributed to him stating that this was his attempt to obtain a refund of the money they had already paid and for which they had yet to be served. It is not disputed that his screams at Van der Watt were heard by other patrons and added to the general pandemonium taking place there. The other incident where J C le Roux was implicated was his confrontation with Mrs Alberts and where he again admittedly threatened to burn the place down unless they were refunded their monies.

[8] This is the person whose appeal was upheld by the North Gauteng High Court.

Alberts was unshaken in her identification of J C le Roux, saying that his face remained etched in her memory in view of her experience on the day of the incident. Van der Watt and Alberts were unshaken in their implication of J C le Roux and I have no reason to doubt their evidence. Clearly this appellant was identified by these witnesses committing transgressions that formed part and parcel of the criminality taking place at the restaurant.

[23] I now consider the can throwing incident. McClelland is the witness who threw a can at a big man she saw assaulting a smaller man. She testified that she had heard a commotion and as the noise grew and when she looked for the source of the noise she witnessed this assault. She also saw a child and a woman screaming next to the scene of the assault. She testified that she threw the can at the big man who was assaulting the smaller one basically to stop the assault. She could not, however, identify the big man involved in the assault and she further conceded that she was not sure if the can hit him. J C le Roux admitted that the can hit him but denied that he was involved in any assault at the time.

[24] Mr Carl Victor Jeppe also testified about the same incident and he gave the same evidence of a big man who was assaulting a smaller one and that his sister-in-law, McClelland threw a can at the attacker. He saw the can hit the attacker who then looked up and swore at McClelland. He also testified that this big man had a beer mug in his hand which he threw at McClelland but missed her. He further mentioned a child screaming next to the scene of the assault. He mentioned that a woman had tried to stop the assault by jumping on the back of the big man but was simply bundled away. Carl Jeppe identified J C le Roux as the man who was assaulting the smaller one and further testified that this appellant appeared to be the ring leader of the attackers. Whilst he maintained his identification of J C le Roux as the attacker, he conceded, however, that he could be mistaken between J C le Roux and appellant no 6 (Louis Rossouw) as to the man who perpetrated the assault. What is key however is that he (Carl

Jeppe) was unshaken in stating that the can hit the man who was assaulting another.

[25] It is necessary to place the can-throwing incident in proper context. This is in view of the suggestion in argument that it occurred during the Jamieson incident. Shaun Jamieson and his wife said nothing about the man who was assaulting Hannes van Wyk being hit with a can. Neither did they mention the presence of a screaming child or a woman who had jumped on the back of that man.

[26] We know that in the Jamieson incident it was not only Hannes van Wyk who was assaulted, but Shaun Jamieson too. From their vantage point, McClelland and Carl Jeppe would never have missed the assault on Shaun Jamieson. This analysis demonstrates, beyond any doubt, that when J C le Roux was hit with the can it was not during the Jamieson incident. In the final analysis J C le Roux's version does not, even remotely, suggest that the can hit him during the Jamieson incident. It could also not have been during J C le Roux's encounter with Van der Watt. Van der Watt did not observe what was observed by McClelland and Carl Jeppe, for instance, the woman who had jumped on the attacker's back. This incident must therefore be one of those that played out during the chaos at the restaurant. In my view, we cannot overlook McClelland's evidence that she was moved to throwing the can to stop an attack on another man. There was therefore a clearly identifiable aggressor at whom the can was aimed. That was J C le Roux.

[27] Then there is the incident involving Olson who testified that J C le Roux confronted him aggressively with his hand behind his back. He testified that as this appellant approached him in this manner he also challenged him (Olson) to shoot him. This, according to Olson, prompted him to hold his firearm in such a way that he was ready for anything as he thought this appellant had a firearm. He testified that when he asked the appellant what the problem was the latter

insulted him in return. He described this appellant's demeanour as very aggressive. Inspector Madia, who had arrived with Olson, corroborated Olson's account of the encounter with J C le Roux. In my view, if one takes account of the fact that Olson and Madia were the first law enforcement officers on the scene, followed by Du Bruyn and Traffic Inspector Niemandt, and that they were unable to bring normality to the situation mainly due to the conduct of J C le Roux's group, his conduct towards Olson was in line with what other members of his group were doing.

[28] What is significant about his behaviour is that it was in the open and in full view of members of his group and patrons alike. Both Olson and Madia testified that members of J C le Roux's group brazenly continued to assault other patrons despite being aware of their presence as law enforcement officers. The continuation of assaults in full view of the police deals, in my view, a decisive blow to J C le Roux's version that he tried to diffuse the situation. Surely, one wonders why, if this is true, that the assaults continued unabated from the inside and spilled out into the open. In my view, J C le Roux's version should be rejected as false. I accept as correct the evidence that he was prominent during the whole incident due to the leadership role he played in his group of attackers. In this regard Schutte, amongst others, testified that this appellant was the apparent leader of the group of attackers and that he (Schutte) also witnessed him shouting at the police. It is important to take into account that it was his group that was assaulting the other patrons and for him to behave as described is in my view clear evidence of association with the transgressions committed by members of his group. He was as complicit as his other members in disturbing the peace and invading the rights of others. On this basis I conclude that his complicity in the criminality of that day was proven beyond reasonable doubt and that his conviction for public violence must stand.

[29] In so far as Nankervis is concerned, Shaun Jamieson testified that he was the one who had abused the horse and thereafter confronted his brother-in-law.

As we know it was not Nankervis but Schone who was involved in the incident with the horse. Furthermore, it is clear that Shaun Jamieson was mistaken that Nankervis was the one who assaulted his brother-in-law, as I will show when dealing with Louis Rossouw who it was shown is the person who perpetrated that assault during that incident. Shaun Jamieson did not implicate Nankervis in any other transgression. Furthermore, no other witness implicated him save for some oblique reference to him by Serfontein allegedly engaged in an argument with a patron. Nankervis' version regarding his clothing on the day (short pants) and his denial of complicity in any of the transgressions was not contradicted. After considering all the evidence it has not been shown beyond reasonable doubt that he associated himself with the transgressions committed on the day. For this reason the appeal against his conviction should succeed.

[30] Anton Paul le Roux was implicated by Keyser regarding an assault on a patron but no witness corroborated Keyser in this regard. This appellant was also identified by Dr Serfontein as the person who assaulted him with a sjambok. In this regard, however, I must also consider the evidence of Mr Schutte who was involved in the same incident and who identified Schone as the person who had assaulted Dr Serfontein with the sjambok. It is correct that the assault of Dr Serfontein with a sjambok is undisputed but two perpetrators were identified whilst we know that only one person committed the offence. Clearly, there is doubt as to the identity of the sjambok assailant between Anton Paul le Roux and Schone and for that reason both must be given the benefit of the doubt. Schone is the person who fooled around with the horse. That is the incident that led to the mayhem on the day in question. His conduct on the horse, whilst probably morally reprehensible, does not make him guilty of public violence. He was not implicated in any other transgression save for the Serfontein sjambok incident, for which, as already found, he profits from the benefit of the doubt. The appeal against his conviction must also be upheld.

[31] Appellant no 4 (Willem le Roux) was convicted on evidence that he took biltong from the shop when the mayhem started, without paying for it. He was not identified by any witnesses as having taken part in or associated himself with the criminal conduct that followed. Other mention of his participation in the criminal conduct of that day came from Keyser, which he disputed, but we have no corroboration of Keyser's testimony in this regard. His appeal against his conviction must also succeed.

[32] Appellant no 5 (Gerhardus Rossouw) was identified first by Keyser and then by Shaun Jamieson as one of the attackers that surrounded his family. Shaun Jamieson testified that this appellant was not involved in the assaults on him and Van Wyk but stated that he saw him throw some punches at a patron as the group moved away. Furthermore, J C le Roux also mentioned in his evidence that Gerhardus Rossouw assaulted a patron at the door of the restaurant. This corroborated Keyser's evidence that he and this appellant assaulted a patron at that door. Carl Jeppe also identified Gerhardus and Louis Rossouw assaulting patrons respectively. It is clear from the evidence regarding the Jamieson incident that Louis Rossouw is the person who assaulted Shaun Jamieson's brother-in-law which is also apparent from J C le Roux's evidence.

[33] In view of the fact that Gerhardus and Louis Rossouw elected not to testify during the trial, the evidence against them was not contradicted. The evidence against these appellants shows direct association by both in the transgressions committed there. In *S v De Kock* (244/2004) [2005] ZASCA 9 (18 March 2005) this court was concerned with an accused's failure to give evidence and the inferences that may legitimately be drawn from such failure and said:

'[17] The essential question before this court is whether the state had established a prima facie case against the appellant that necessitated an explanation. While an accused has the right to remain silent, a right now also entrenched in the Constitution, where the evidence for the state is such that it calls for an answer, and none is forthcoming, the state's case will be found proved beyond a reasonable doubt. The

classic statement of this principle is to be found in *S v Mthetwa* 1972 (3) SA 766 (A) at 769D-F, per Holmes JA:

"Where . . . there is direct *prima facie* evidence implicating the accused in the commission of the offence, his failure to give evidence, *whatever his reason may be* for such failure, in general *ipso facto* tends to strengthen the State's case, because there is then nothing to gainsay it, and therefore less reason for doubting its credibility or reliability; . . .."'[9]

To sum up therefore my view is that the guilt of Gerhardus and Louis Rossouw was proved beyond reasonable doubt and the appeals against their convictions must also fail.

[34] The argument advanced in support of the appeals against sentence is that the trial court committed a misdirection when it refused a postponement application by the appellants. The basis advanced for the application was to provide the appellants with an opportunity to source pre-sentence reports more particularly correctional supervision reports before the imposition of sentence. It was argued that the reason pre-sentence reports were necessary was due to the fact that six years had elapsed since the commission of the offence with the consequence that the appellants' predispositions had changed in that period and that they had become more mature individuals. The criticism levelled at the trial court is that it refused the postponement application simply because it had formed the view that only direct imprisonment was appropriate in this case. It was further submitted that the issue of sentence should be remitted back to the trial court for reconsideration in view of the delay of five years from the time when the appellants were sentenced to when their appeals were heard by the court a quo. It was submitted in this regard that a period of some 13 years had elapsed since

[9] See also *Osman v Attorney-General, Transvaal* 1998 (2) SACR 493 (CC) at para 22 where Madala J stated: 'Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a *prima facie* case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence.'

the commission of the offence to the hearing of the appeal before us and that a lot has happened in the lives of the appellants in the intervening period. This, it was submitted, called for the sentences to be considered afresh taking account of the appellants' current circumstances.

[35] It is correct that pre-sentence reports and other reports of that nature do in the normal course assist trial courts with regards to sentence. In the main pre-sentence reports are used to bring the personal circumstances of accused persons to the fore. The role of pre-sentence reports must, however, not be confused with the obligation of a trial court to impose an appropriate sentence in the first place. As stated in many cases which it is not necessary to cite, sentence is a matter for the discretion of the trial court and a court of appeal must focus on whether that discretion was exercised judicially. As an appeal court we should be slow to interfere in sentences imposed by trial courts where the exercise of their discretion is beyond reproach. See *S v Pieters* 1987 (3) SA 717 (A) at 727F-H where the following is stated:

'Met betrekking tot appèlle teen vonnis in die algemeen is daar herhaaldelik in talle uitsprake van hierdie Hof beklemtoon dat vonnis-oplegging berus by die diskresie van die Verhoorregter. Juis omdat dit so is, kan en sal hierdie Hof nie ingryp en die vonnis van 'n Verhoorregter verander nie, tensy dit blyk dat hy die diskresie wat aan hom toevertrou is nie op 'n behoorlike of redelike wyse uitgeoefen het nie. Om dit andersom te stel: daar is ruimte vir hierdie Hof om 'n Verhoorregter se vonnis te verander alleenlik as dit blyk dat hy sy diskresie op 'n onbehoorlike of onredelike wyse uitgeoefen het. Dit is die grondbeginsel wat alle appèlle teen vonnis beheers.'

The issue, in my view, is whether the sentence imposed by the trial court in this case is appropriate. In itself the refusal to allow a postponement for purposes of a pre- sentence report is not a misdirection. It is clear, in this case, that all the appellants' personal circumstances were considered by the trial court before it imposed sentence. The trial court was also clearly conscious of the six year time lapse from when the offence was committed up to the conclusion of the trial. We

were not informed during argument what facts were left out of account by the trial court before it imposed sentence. The facts in casu are clearly distinguishable to those in *S v Van Rooyen* 2002 (1) SACR 608 (C) where a pre-sentence report was found to be essential more so as a juvenile was involved.

[36] There is clearly no basis in this matter to find that the trial court committed a misdirection when it refused the postponement application. I am further of the view that the evidence we have in this matter shows that an incident of magnified proportions occurred at Tant Malie's restaurant on that fateful day in June 1996. The most recent exposition of the approach to the sentencing of people convicted of public violence is found in the matter of *S v Whitehead & others* (supra) where a sentence of five years' imprisonment, two of which were suspended, was upheld by this court. In that matter the offence was committed in August 1995 and the appeal in this court was heard in November 2008 ie a period of 13 years as we have in this case. In dismissing the appeal against sentence this court expressed itself thus:

'The sentences were not startlingly inappropriate, nor do they induce a sense of shock. The appellants and their cohorts brazenly, in broad daylight, in the face of a substantial police presence, set upon a group of peaceful workers and severely assaulted them with lethal weapons. They indiscriminately smashed cars of innocent bystanders and pursued and assaulted other black persons who had nothing to do with the striking workers. Amongst those assaulted were women and elderly persons. It was demeaning and humiliating to them in the extreme. A substantial jail sentence was, in my view, warranted, particularly where as a consequence of their actions a life was lost.'[10]

In this case, which is not dissimilar to *Whitehead*, families were out on an afternoon to have fun and minding their own business when they were wantonly and violently subjected to senseless assaults. All the factors, especially this one, show that the conduct to which the appellants were parties on that day was

[10] At para [12].

sufficiently serious as to warrant severe punishment. Based on all the above I have no hesitation in finding that the trial court's sentence was fully justified.

[37] With regard to the submission concerning the delay in the appeal, generally an appeal court is not at liberty, when dealing with an appeal against sentence, to take into account facts that were not before the trial court when it imposed sentence.[11] Where however there are exceptional facts and circumstances that come to light after sentence but before an appeal is finalised an appeal court can have regard to these facts.[12] This is done in most instances where the appeal court has found some misdirection on the part of the sentencing court. In this regard the appeal court could either remit the matter to the trial court for a fresh consideration of sentence taking account of the new facts or it could itself deal with the matter in the process of arriving at an appropriate sentence.[13]

[38] It is so that in the case before us a total of 13 years has elapsed since the commission of the offence. The appellants endured six years during which they attended the trial until they were convicted and sentenced. I have already stated that the refusal of a postponement for purposes of sourcing pre-sentence reports did not prejudice the appellants as all relevant facts were placed before the trial court. Another period of seven years has now elapsed from the time the appellants applied for leave to appeal from the trial court to the court a quo and eventually to this court. The appeal from the trial court to the court a quo took five years to be heard but remarkably there is nothing in the record before us to account for this delay. This was also not dealt with in argument before us. I mention this because we have no idea if there are any new facts, exceptional or otherwise, that could require consideration in deciding whether the matter should be referred back for a fresh consideration of sentence. It is not the appellants' case that the six year duration of the trial infringed their right to a fair trial. As

[11] *S v Verster* 1952 (2) SA 231 (A) at 235; *R v Hobson* 1953 (4) SA 464 (A) at 466.
[12] *S v Karolia* 2006 (2) SACR 75 (SCA).
[13] *S v Barnard* 2004 (1) SACR 191 (SCA).

regards the period of the delay in finalising the appeal that also, in my view, cannot found a basis to refer the matter back unless we can conclude that the right to a fair trial was infringed. In *S v Pennington* 1992 (2) SACR 329 (CC) the issue of appeal delays was considered by the Constitutional Court in the context whether this infringed the fair trial rights of the applicants in that matter. There the Constitutional Court expressed itself as follows:

'[39] Both the interim Constitution and the 1996 Constitution deal with the rights of accused persons to a fair trial. Section 25(3)*(a)* of the interim Constitution includes within this right the right to a trial "within a reasonable time after having been charged", and s 35(3)*(d)* of the 1996 Constitution to the right "to have their trial begin and conclude without unreasonable delay". Although delays in the hearing of an appeal might extend the period of anxiety which the appellants undergo before finality is reached, appellate delays are materially different to trial delays. To begin with there can be no question of prejudice, for the appeal is decided on the trial record, and the outcome of the appeal cannot be affected in any way by the delay. Moreover, where the appeal fails, as it did in the present case, the appellant's guilt, established at the trial, has been confirmed.'

And further

'[41] Undue delay in the hearing of criminal appeals is obviously undesirable, particularly when the appellants are in custody. It does not follow, however, that such delay constitutes an infringement of the constitutional right to a fair trial. That question can be left open, for even if it were to be regarded as an infringement of that or some other constitutional right, I am satisfied that it would not entitle the appellants to have their convictions set aside or their sentences reduced on appeal.'

[39] On the authority of *S v Pennington* the delay in finalising the appeal by itself did not infringe the appellants' fair trial rights. In the absence of any exceptional circumstances impacting on the sentences that were imposed we are not at large to set aside the sentences. There is also no basis to refer the matter back. I conclude therefore that there is no basis upon which we can set aside the

sentences imposed in this matter and to refer the matter back to the trial court for the reconsideration of the sentence. The appeals against the sentences must also consequently fail.

[40] In the circumstances the following order is granted:

1. The appeals against conviction succeed in respect of appellants 2, 3, 4 and 7. Their convictions and sentences are set aside.
2. The appeals of appellants 1, 5 and 6 are dismissed.

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D MLAMBO

JUDGE OF APPEAL

APPEARANCES:

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