THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

JUDGMENT

Case No 121/09

In the matter between:

SIBUSISO ERICK KHOZA	**1st Appellant**
AUGUSTINUS KHOZA	**2nd Appellant**
DANIEL LUCKY MAKGAKA	**3rd Appellant**
EZEKIEL OMPHILE MAYELA	**4th Appellant**
AUBREY MOCHAKA	**5th Appellant**

and

THE STATE **Respondent**

Neutral citation: ***Khoza v The State*** (121/09) [2010] ZASCA 61 (1 April 2010)

Coram: Heher, Mhlantla and Bosielo JJA

Heard: **17 February 2010**

Delivered: **1 April 2010**

Summary: Criminal Procedure ─ fair trial ─ robbery with aggravating circumstances ─ unlawful possession of machine guns and ammunition ─ manner in which trial was conducted ─ presiding judge not biased against accused ─ no irregularity committed ─ no failure of justice occurred ─ appellants' alibi defence correctly rejected ─ guilt of appellants established beyond a reasonable doubt ─ convictions and sentences confirmed.

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Els J sitting as a court of first instance):

1. The appeal against the convictions and sentences is dismissed.

2. The legal representatives of the appellants are disallowed from recovering any costs relating to:

(a) the heads of argument in the appeal in so far as such exceeded 60 pages;

(b) the application to amend the heads of argument;

(c) the settling of the affidavits of the appellants (and any consultations related thereto) filed in support of the application referred to in (b); and

(d) the transcript of the argument before Sapire AJ.

JUDGMENT

MHLANTLA JA (HEHER JA and BOSIELO JA concurring):

[1] The appellants were convicted in the North Gauteng High Court, Pretoria on various charges. The first appellant was convicted of robbery with aggravating circumstances and unlawful possession of machine guns. He was sentenced to an effective term of 26 years' imprisonment. The other appellants were, in addition to the above offences, convicted of unlawful possession of ammunition and malicious injury to property. An effective term of 35 years' imprisonment was imposed on each of them.

The appellants appeal to this court with the leave of Sapire AJ (the trial judge having died) against their convictions and sentences. There is also an application for leave to appeal against the refusal by the trial judge to enter special entries in terms of s 317 of the Criminal Procedure Act 51 of 1977 (the Act).

[2] The issues to be determined on appeal are:

(a) Whether the trial court erred in refusing the application to note the special entries; and if so,

(b) whether the convictions and sentences ought to be set aside on the basis that the appellants' constitutional rights to a fair trial were compromised by the manner in which the learned judge conducted the proceedings; if not,

(c) whether the State established the guilt of the appellants, and in particular, the identity of the perpetrators of the offences beyond a reasonable doubt; and

(d) whether the judge committed any misdirection when he imposed the sentences.

[3] In order to understand the issues it is necessary to set out an exposition of the background facts. It is not in dispute that two cash-in-transit heists occurred. The first one, (the Mooinooi incident) took place at Majakaneng Bridge, Mooinooi, in the district of Brits on 11 November 2002 where members of the Fidelity Cash Management Services ('FCMS') were attacked by armed men. One of the employees was killed and a substantial amount of money was stolen. The second incident, (the Phokeng incident) occurred near Phokeng, Rustenburg on 18 November 2002 where an armoured vehicle was rammed from the rear by a BMW motor vehicle. The robbers fled with approximately R200 000 in the

direction of Luka village, a suburb in the district of Phokeng which is about seven kilometres from the scene of the robbery.

[4] The appellants and one Thabo David Nkosi were arrested as suspects a few hours after the Phokeng robbery at various scenes at Luka. According to the police, they were found in possession of many firearms and a substantial amount of money. They were eventually charged on 20 counts in connection with these incidents. The trial commenced on 6 October 2005. The appellants pleaded not guilty and raised alibi defences. In amplification thereof, they stated that the police had conspired against them; that the police had released the actual robbers and stolen some of the recovered money and then framed them by planting the firearms and money on them.

[5] The State tendered evidence in respect of the commission of the offences, the circumstances leading to the arrest of the accused and the discovery of the exhibits, that is, the firearms, money and stolen motor vehicles. The accused testified in their own defence. After conviction and sentence counsel for the third, fourth and fifth appellants lodged an application for special entries to be made on the record on the ground that the proceedings were irregular. This application was dismissed. I will deal with this aspect later.

[6] The evidence adduced on behalf of the State was as follows. Mr Sipho Hlope testified that on 11 November he was the driver of a cash van in the Mooinooi matter. He and his passengers were attacked by occupants in a white vehicle, a Honda, who shot at them. The bullets struck their motor vehicle causing it to overturn. He further testified that a

second vehicle which had accompanied them was also attacked and one of their colleagues was fatally injured.

[7] Captain Petrus Hara, of the Local Criminal Record Centre, Brits, ('LCRC'), who is employed as a draftsman, photographer and forensic investigator testified in respect of the Mooinooi matter. His evidence dealt with the collection of spent cartridges and their transfer to the ballistics section for comparison with a firearm found in the house at Luka, Phokeng. He took photographs of the scene and compiled a photo-album which was handed in as exhibit D.

[8] Mr Stoop testified that he was employed by the FCMS. He was on duty on 18 November and had been issued with a firearm, a .38. He and his colleague had been collecting money from their clients. They were travelling to Boshoek when a BMW vehicle collided with them from the rear. Shots were fired and the armoured vehicle overturned. He lost his firearm. He later saw a man with an AK firearm standing in front of a combi. The robbers stole money from the vehicle and drove away in the direction of Luka. He identified his firearm as exhibit 13.

[9] Inspector Malebogo Manere, an official draftsman and photographer attached to the LCRC, Rustenburg testified in respect of the Phokeng incident. He took photographs of the scene. He collected seven spent cartridges and sent these for ballistics testing. He also took photographs of the scene of the arrest at Luka and exhibits collected there.

[10] Inspector Petrus Myburgh of the LCRC, Rustenburg testified about the discovery of two motor vehicles, a Nissan van and a BMW as well as

the cash boxes found near these vehicles. These items were found immediately after the robbery in the vicinity of the Phokeng scene. His evidence prima facie indicated that the vehicles were stolen. Myburgh further testified that he collected exhibits including two firearms at Luka.

[11] Mr Michael Kruger who was employed by FCMS, testified that upon arrival at the Phokeng scene he recovered items belonging to his employer. His evidence related to amounts stolen and recovered, the firearm stolen during the Phokeng incident and to whom it had been issued. He identified the revolver, exhibit 13, as well as certain cash boxes and bags belonging to FCMS.

[12] Sergeant Petlele, who was attached to the Local Highway Patrol Unit, testified that he and his colleague, Inspector Ntoagae reacted to radio reports from a circling helicopter. They followed the direction of the helicopter and were first on the scene at Luka. He arrested the first, third, fourth and fifth appellants. He testified that the first appellant gave him the name of the third appellant when asked to identify himself. Petlele saw the fifth appellant rushing out of the main house at Luka to an outside corrugated iron shack. He and Inspector Mosegu arrested that appellant who was trying to kick his way out of the shack. They found cash in his back pocket. He denied the appellant's version that he had nothing to do with the charges and had been arrested for no apparent reason in the surrounding area during a police swoop.

[13] Petlele thereafter arrested the third appellant in the flatlet adjacent to the main house under very suspicious circumstances. The appellant had concealed himself under a bed and was not only lying on top of money but some had been hidden in the front and in the legs of his trousers.

Assisted by Inspector Monageng and Inspector de Waal, he pulled the appellant out of the room. Petlele saw no-one planting money on the third appellant.

[14] Petlele arrested the fourth appellant after receiving information from members of the public. He and a colleague found the appellant on a neighbouring premises in a long drop pit toilet kneeling behind the door. A tracksuit top was immediately fished out of the toilet pit with 'a lot of money' wrapped in it. At the time of his arrest, the appellant wore a T-shirt and tracksuit trouser of the same colour and with the same distinctive white stripe as on the tracksuit. He denied the appellant's version that he was simply urinating and had no knowledge of the money or the top. Petlele testified that the firearms were removed from the house after the arrest of the appellants. He did not see anyone taking the firearms into the house.

[15] Inspector Mosegu testified that he was in the company of Insp More and Petlele when the fifth appellant was arrested in the shack. He also denied the appellant's version.

[16] Ms Moagi testified that she was inside the house when she saw an unknown man. She locked the door and closed the window. Shortly thereafter, she discovered that the door was open and noticed a takkie track leading into the house. She surmised that the person must have kicked the door open and entered. She could hear footsteps as if someone was walking inside the ceiling. She called the police. Mr Nkosi, accused 5 was arrested by the police in the roof.

[17] Inspector De Waal, who was attached to the SAPS Dog Unit, testified that on 18 November he and his partner Inspector Mogage reacted to a radio alert from the helicopter and went to the scene at Luka. They found several police officers including Petlele. Three suspects had already been arrested. He went with Petlele to a certain house where they found three persons, including the third appellant, hiding underneath a bed. He had money hidden under his clothes and in his trouser legs. When they took him outside to the other suspects and searched him, they found more cash on him.

[18] After the arrest of the third appellant, De Waal joined Captain Hechter and the team to search further. Bystanders pointed out a house to which another suspect had allegedly gone. There, he assisted Hechter to arrest the fifth accused who was hiding inside the ceiling in proximity to money concealed in a peg bag and a pair of gloves. During cross-examination De Waal denied an allegation that he had planted money on any of the appellants and that he ever carried weapons into the house and planted these on the appellants.

[19] Captain Hechter, who was with the Highway Patrol Unit, corroborated De Waal's evidence in respect of the arrest of the fifth accused. He was also present during the arrest of the fourth appellant, who was found hiding inside the toilet. He was adamant that the appellant never used the toilet. He corroborated Petlele's evidence in regard to the fourth appellant's arrest, the discovery of the jacket and money in the toilet pit and the fact that the jacket matched the pants worn by him. He denied the planting of firearms on the scene or on the appellants.

[20] Inspector Monageng, who was attached to the Rustenburg CIS, was in the company of Inspector Monamedi when they heard about the robbery through radio control. Acting on information from members of the public, he arrested the second appellant who was running in front of a nearby house. Immediately after the arrest, he received a report from Mrs Reetseng, the occupier of the house, that the suspect had in fact put a bag into a tub containing clothes that she had been washing. He left the second appellant with Monamedi to investigate. He retrieved the bag which was soaked with water. He opened the bag in the presence of Monamedi and the appellant and found that it contained cash.

[21] Monageng admitted making two statements on 2 December 2002 and 11 March 2004 respectively. These were admitted as exhibits S and T respectively. According to him, reservist constable Moyo remained in the car and was not involved in the arrest of the appellant. He and Monamedi had, before they heard about the robbery, by chance met Moyo and offered him a lift to the police station. Soon thereafter, they received the report about the robbery. He denied that Moyo had been involved or knew of the planting of money or firearms even before the robbery at Phokeng had happened.

[22] Inspector Monageng was also involved in the arrest of the third appellant. He corroborated the evidence of Petlele and De Waal.

[23] Inspector Monamedi corroborated the evidence of Monageng with regard to the arrest of the second appellant and the circumstances surrounding the discovery of the bag with money in the bath.

[24] Mrs Reetseng testified that she was at her home washing clothes in a tub of water. She saw a man carrying a black bag running through her yard. When she asked him why he was running, he replied that there was shooting taking place. He disappeared behind her house. He appeared later in the custody of the police but without the bag. She reported to the police that the man had a bag and must have thrown it in the tub. The police retrieved it. She was unable to identify the man. She corroborated the evidence of Monageng and Monamedi about the arrest and the discovery of the bag in a tub of water.

[25] Reservist constable Moyo testified that he was given a lift by Monageng. En route they received a report about a robbery and proceeded to the scene. He, however, remained in the vehicle throughout and was not involved in the arrest and search of the suspects. He denied the version of the third appellant. He knew nothing about the allegations against him and denied ever meeting the appellant.

[26] Inspector Ratseane, the investigating officer, testified to rebut the allegations of corruption and embezzlement of cash by him or the other officers. He denied being at the scene as he was on study leave.

[27] Inspector Blignaut, a ballistics expert made two statements: exhibits W1, being the Mooinooi ballistic report and W2, the Phokeng report. Blignaut identified exhibits 2, 8 and 10 fired at the Phokeng incident as machine guns or rifles which had been found at the premises at Luka. Exhibits 8 and 10 were also fired at the Mooinooi incident.

[28] I turn to deal with the evidence adduced on behalf of the accused. As stated earlier, all denied committing the offences and raised alibi defences.

[29] The first appellant testified that he was a taxi owner. On 18 November he was approached by a friend Ndlazi, to transport him to Rustenburg for a fee of R3000. He picked up Ndlazi and another unknown man. During the journey more people boarded and eventually the combi carried 15 passengers, all save for Ndlazi were unknown to him. He could not say whether his co-accused were in the combi or not. Nor did he pay attention to what they were carrying. At some stage Ndlazi directed him to go to a certain township. Ndlazi and the group alighted while he waited in the vehicle for Ndlazi. He was arrested by the police. During cross-examination he conceded that his mandate grew as they were travelling. He had never received his money from Ndlazi despite the fact that he was on bail throughout the trial. His explanation was that he could not trace Ndlazi. He further testified that he was not assaulted by the police.

[30] The second appellant testified that he had gone to Luka to look for a certain traditional healer's house. He enquired from one David about the direction. Whilst walking together, they saw a helicopter hovering overhead and the next moment David fled. He stood for a while under a tree to establish what was happening. Later he was approached by a motor vehicle. Two persons emerged and pointed firearms at him. They assaulted and arrested him. The police looked in vain for David. He heard them placing something in the boot. He was taken to a place where he met the other appellants for the first time that day. There he saw three white men carrying bags and big firearms into the house. One of the

police officers placed cash in the trousers of the third appellant. The police tortured him in the presence of Sergeant van der Merwe to sign a document stating that one of the bags with money belonged to him. He disputed the evidence of Mrs Reetseng.

[31] The third appellant, who stays in Rustenburg, testified that he went to Luka on 18 November to visit his uncle Obed. They were in the outside rooms chatting when Ndlazi and his builders arrived. He had arranged with him to build a wall at his uncle's property. They had agreed on a price of R4000 of which he had already paid Ndlazi a deposit of R3000. They heard gun shots and ran inside the bedroom. They hid below the windows to avoid being struck by stray bullets. The police came in whilst they were lying down and arrested them. They were taken outside where the third appellant met the other accused for the first time. While lying on the ground, he saw three white policemen carrying firearms, boxes and bags into the house. One of the policemen placed some of the money in his trousers assisted by Petlele and an Indian policeman. He was assaulted and ordered to sign a form which stated that the money had been found on him. His cousin Itumeleng was also arrested.

[32] He testified that he met Moyo in the police cells and that Moyo had told him that he had been present at the scene with Monageng; that Moyo had seen two policemen placing money on him; that the police knew about the Phokeng incident and had apprehended the actual robbers earlier on the same day but released them and that the police had appropriated the money recovered for themselves. According to the appellant, Moyo refused to divulge the names of the policemen involved for fear of reprisal. He requested the appellant not to divulge this information to anyone as he, Moyo, would deny everything.

[33] During cross-examination the appellant changed his version. Confronted by the absence of building materials at the scene, he said that Ndlazi would not have commenced the building operations on that day as he was still busy working elsewhere. He was, however, unable to explain why Ndlazi had brought builders if no work was to be done. According to him, three police officers entered the house twice, carrying three boxes, a green box, a small green safe, 11 firearms and eight to ten bags. He admitted that his cousin, Itumeleng, refused to testify on his behalf.

[34] The fourth appellant testified that on 18 November he left Johannesburg for Rietspruit to meet a certain man known as Ramonso. The appellant was selling his motor vehicle and Ramonso had arranged a meeting with a prospective buyer. He did not find Ramonso but was advised that he had gone to Mutaung General Dealer at Luka and would wait for the appellant there. He proceeded to Luka. On his way to the store he needed to relieve himself and went into a certain house to use the toilet. He was still busy urinating when the police arrived and arrested him. He disputed the State's evidence of the finding of the jacket with money in the toilet pit. He was taken to a certain house where he met the other appellants for the first time. He was assaulted at the police station and forced to sign a document admitting that money had been found on him. He did not see any bags or firearms being carried into the house. Ramonso and the person that had granted him permission to use the toilet refused to testify on his behalf.

[35] Accused 5 did not lodge an appeal. He testified that he lived in Mamelodi, Pretoria and had gone to Luka to buy a vehicle from a certain Charles Molate. He was found by the police hiding in the ceiling of Ms

Moagi's house as he was afraid of being struck by stray bullets. He stated that Hechter falsely implicated him and denied being in possession of the peg bag.

[36] The fifth appellant testified that he operated a hair salon. On 18 November he left his home at Atteridgeville, Pretoria for Rustenburg by taxi. He was on his way to Phokeng to meet one Christene to negotiate the opening of a salon. Christene was, however, not home. He was advised that she had gone to Luka and was provided with the address. He was walking along the road looking for it when he was stopped by two men in a white vehicle. These people arrested him when he told them that he stayed in Atteridgeville. He was taken to a house, where he met some of his co-accused for the first time. He also saw the policemen carrying bags and big firearms into the house and plant money on the third appellant. He testified that he was taken to the police station with his co-accused and that he was not assaulted. The police found an amount of R60 in his possession which he acknowledged as his. They told him to sign a document to that effect. He complied. He denied the charges against him. During cross-examination he denied kicking his way out of the shack or trying to escape. Christene was not prepared to testify on his behalf.

[37] The trial judge found the appellants to be unsatisfactory witnesses. He rejected their version on the basis that it was so improbable and beyond belief that it could not reasonably be true when seen in the light of the totality of the evidence. The judge concluded that there was insufficient evidence to link the appellants to the Mooinooi incident and the theft of the motor vehicles. They were all acquitted on the Mooinooi charges. Regarding the Phokeng incident, the judge held that the

appellants had participated in the robbery and that they were in possession of firearms and machine guns at the time. Regarding the first appellant, whom the judge found to be the designated driver of the gang, the judge held that he was aware of the presence of the machine guns. He accordingly convicted the appellants in respect of the offences as described in para 1 above.

[38] I propose to deal with the application for the special entries first. In relation to each individual irregularity and the cumulative effect, the appellants complained that they were deprived of a fair trial of which protection both the common law and the constitution assured them.

[39] In deciding whether the appellants received a fair trial, each case must be considered on its own facts. In *Take and Save Trading CC & others v Standard Bank of SA Ltd*,[1] Harms JA said:

'Everyone is entitled to a fair trial and that includes the right to a hearing before an impartial adjudicator. This common-law right is now constitutionally entrenched. Present a reasonable apprehension of bias, the judicial officer is duty bound to recuse him or herself. The law in this regard is clear, having been the subject of recent judgments of both this Court and the Constitutional Court, and does not require any restatement. It is nevertheless convenient for present purposes to quote the following extracts from a Constitutional Court judgment for purposes of emphasis and because they are particularly germane to this case:

"The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and submissions of counsel.

At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or

[1] 2004 (4) SA 1 (SCA) paras 2 – 4.

himself if there are reasonable grounds on the part of the litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."
That is one side of the coin. The other is this:
"A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a Judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A Judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done." . . . .
Fairness of court proceedings requires of the trier to be actively involved in the management of the trial, to control the proceedings, to ensure that public and private resources are not wasted, to point out when evidence is irrelevant, and to refuse to listen to irrelevant evidence. A supine approach towards litigation by judicial officers is not justifiable either in terms of the fair trial requirement or in the context of resources. . . .
A balancing act by the judicial officer is required because there is a thin dividing line between managing a trial and getting involved in the fray. Should the line on occasion be overstepped, it does not mean that a recusal has to follow or the proceedings have to be set aside. If it is, the evidence can usually be reassessed on appeal, taking into account the degree of the trial court's aberration. In any event, an appeal *in medias res* in the event of a refusal to recuse, although legally permissible, is not available as a matter of right and it is usually not the route to follow because the balance of convenience more often than not requires that the case be brought to a conclusion at the first level and the whole case then be appealed.'

[40] I turn to consider the circumstances relating to the special entry in this matter. Counsel for the appellant has provided 75 quotations from the record which, he avers, support the contention that the trial judge behaved in a biased, irregular and unfair manner during the trial. As indicated above, the application for a special entry was launched after conviction and sentence on behalf of the third, fourth and fifth appellants. The terms of the entry were particularised as follows (I omit irrelevant material):

(a) The court did not permit the third appellant to give evidence of all the complaints which he had about the court's conduct of the trial. As a result of its ruling the fourth and fifth appellants also did not give such evidence;

(b) The court refused to allow full and/or reasonable cross-examination or unfairly interrupted or curtailed cross-examination;

(c) The court exceeded the limits of reasonable and fair questioning;

(d) The court demonstrated bias in favour of the State;

(e) The court unfairly harassed or adopted an unduly overbearing manner to counsel for the defence in the presentation of his case;

(f) The court unfairly and persistently allowed state counsel to put leading or material questions to state witnesses and also did so himself;

(g) The court failed to rule as inadmissible material documentary evidence unfairly produced by the State during the trial;

(h) The court unfairly prejudiced the case by describing the version which counsel proposed to put to certain state witnesses;

(i) The court did not permit proper re-examination of the accused.

[41] The trial judge did not deliver a considered judgment. According to the record he said:

'One of the aspects mentioned is that I did not allow accused no 3 to give his grievances. I put it to counsel more than once whether he wanted my recusal. Mr Paul Shapiro [counsel for the accused concerned] refused to apply for my recusal, so it therefore became irrelevant. Accordingly I find that this application is a misuse of legal processes. I refuse to note a special entry as set out in exhibit CCC.'

[42] There is no dispute that objection was made to many of the 'irregularities' during the trial. On most occasions the objections were not upheld. The record speaks for itself in this regard. Likewise the learned judge invited counsel to bring an application for his recusal if his clients were dissatisfied with his conduct of the trial. Counsel, however, declined to do so. In many cases such as the present an election might fairly be

treated by the trial court or a court of appeal as dispositive of a right to rely thereafter on irregularities. But in a long criminal trial for the commencement of which the accused may have waited years, I think that a court should be very slow to find that an election to pursue the trial to its conclusion in the face of harassment or other unfair conduct of the court, without applying for recusal, is consistent only with a waiver of the rights of the accused to raise such irregularities by means of special entry or in any other permissible form. Were it otherwise, the effect would be to allow the unfairness to prevail in the face of a clear constitutional right to the contrary. Moreover, if an irregularity of itself or cumulatively with other irregularities, is such as to render the trial unfair it would, in my view, be against public policy to uphold any election amounting to a waiver of an accused's right to rely on such unfairness.

[43] That being so, and the trial in question possessing the characteristics I have identified, I am of the view that the learned judge should have looked beyond the refusal to apply for his recusal as a ground to answer the application.

[44] The grounds open to a trial judge in refusing to note a special entry are restricted: that the application is not made bona fide or that it is frivolous or absurd or that the granting of the application would be an abuse of the process of the court. There is a further ground not expressly mentioned in s 317(1) but inherent in the section: when the irregularity appears from the record itself the special entry procedure, whilst convenient, may be unnecessary because of the wide powers of appeal enjoyed by the SCA in terms of s 316 of the Act.[2]

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[2] *S v Nkata & others* 1990 (4) SA 250 (A) at 256H.

[45] In an application for leave to appeal against the refusal to note a special entry, it is necessary for an applicant to show a reasonable prospect of success on appeal whether the irregularity appears ex facie the record or not.[3]

[46] Even if the court considers that the trial of the appellants was rendered unfair by the presence of an irregularity that is not enough to vitiate the proceedings unless the irregularity is per se such as to have that effect or there has been a failure of justice in that the evidence (and credibility findings, if any) unaffected by the irregularity was insufficient to prove the guilt beyond a reasonable doubt.[4] In the last mentioned regard, s 322(1) of the Act, it seems to me, provides a reasonable and justifiable limitation on the constitutional right to a fair trial. No argument was addressed to us on this matter but counsel did not submit otherwise. The Constitutional Court has held that the meaning of the concept 'failure of justice' in s 322(1), must be understood to raise the question whether the alleged irregularity stated in the special entry has led to an unfair trial.[5]

[47] I deal now with certain of the individual grounds of irregularity which were raised in the application. It will be necessary in certain instances to set out the relevant extract from the record:

(a) The refusal to allow accused 3 to give evidence about his complaints concerning the conduct of the trial judge.

The relevant passage appears towards the end of the evidence-in-chief of the third appellant. For convenience of understanding I set it out in full:

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[3] At 256I - 257C.
[4] At 257D-F.
[5] *S v Jaipal* 2005 (1) SACR 215 (CC) para 39.

'Examination by Mr Shapiro (continued): Right, now Mr Makgaba, there are certain observations which you made to me and which you said you wish to place on record. Can you do that now, please? ─ Well we heard here in court that the presiding officer, the judge, provided the transcripts of the trial, we then made a request that photocopies of the transcript be made available to our legal representative. We also requested the legal representatives to make such transcripts available to us. From the transcripts we observed that many issues came up, we realised that the judge who is presiding over our case is siding with the prosecution, he is against us.

Court: Mr Shapiro, where is this going to? Are you lodging [indistinct].

Mr Shapiro: That is what they say.

Court: Are you lodging an application for my recusal?

Mr Shapiro: No, M'Lord, I am [intervenes].

Court: Then I am not prepared to listen to this any further. An issue lodge [intervenes].

Mr Shapiro: M'Lord, these people have given me . . . , they give me notes, I cannot tell you, and they said they wanted to place it on record, I said to them there is a special procedure which we can add on, we can make an entry if you want afterwards, but they say they want to place it on record, it is this accused and there is another accused, and they said they want to place this; these are these observations. I do not know, M'Lord.

Court: I am just asking you, you are not making an application for my recusal?

Mr Shapiro: No, certainly not.

Court: Thank you. Yes, then you can go on ─ There are some numerous examples which I can quote to proof this point, but I will not be able to able to proof all of them. At the beginning of the trial the judge asked Mr Shapiro whether the defence case is . . . whether the police knew about the robbery and whether they took the money and the firearms and tried to dump them on the accused before court. Mr Shapiro responded by saying that yes, that is the defence case, the judge says that does not

make sense. That was an indication to us that the judge has already decided on this matter before it even started. We are not happy about that fact. In support of that fact, the judge told Mr Shapiro on many occasions that "you are wasting my time" and he mentioned or uttered those words on numerous occasions, and that happened each time Mr Shapiro was cross-examining a witness who found it difficult to can answer or respond to the question. The other reason was that the judge was also shouting and he was also harsh. Besides that there are numerous other [indistinct] and I cannot mention them all.

Is there anything else? – There are numerous other examples but I cannot mention them all. Yes there is something else. Mr Shapiro complained that Mr De Meillon is giving the statements to him, new statements as the case is proceeding and the judge said there was nothing he can do. At the stage when Mr De Meillon wanted to give Mr Shapiro new statements the judge interfered and said Mr De Meillon must first give those statements to the court. I do not know for what reason must statements be first given to the court before they are given to Mr Shapiro. Mr Shapiro must be the first to see the statements before the court sees the statements, so that if there is a mistake he can be in a position to can help the court. Another example in support of that fact, when Mr Shapiro was questioning Mr Monageng about the arrest of accused 2, the court of the judge appeared to be impatient, at certain times Mr Shapiro objected or complained about that.

[Court] Listen Mr Shapiro, if you are not going to apply for recusal [intervenes].

Mr Shapiro: I am not, M'Lord.

Court: I am going to stop this evidence at this point. If it is . . . . [intervenes].

Mr Shapiro: [indistinct] the accused, M'Lord.

Court: Well, then I am not going to listen to this any further.

Mr Shapiro: I want the matter to be absolutely clear.

Court: Yes, Anything on the merits further, Mr Shapiro?'

[48] It appears that the learned judge properly allowed some leeway in order to ensure that he understood the nature and direction of the evidence. He was, in my view, right to rule against its continuation. The evidence which an accused person may give during a trial may be directed at the merits of the charge against him or her or towards mitigation of sentence. In either event a judge has a duty to take any evidence which bears on those issues and he or she will be wise to exercise a measure of leniency in determining the proper limits. But if the sole purpose is to draw attention to matters already apparent ex facie the record such evidence is superfluous and irrelevant. If, in addition, the merits of the defence are not implicated, then evidence is likewise, irrelevant to the question which the court is required to judge. But if it nevertheless needs to be said, the accused's evidence is neither the place nor the time to say it, nor is it the correct means of placing it before the court. If counsel deems a recusal application inappropriate, the procedure for a special entry is open to him. All these considerations apply to the first alleged irregularity. The refusal to allow the evidence of irregularity, did not impinge on the fairness of the trial and no failure of justice flowed from it.

(b) The refusal to allow full or reasonable cross-examination; the unfair interruption or curtailment of cross-examination.

[49] The principles underpinning the freedom of cross-examination of witnesses are well established.[6] Counsel for the appellant submitted that the learned judge:

(a) Persistently and unfairly interrupted counsel's cross-examination;

[6] See *R v Amod & another* 1958 (2) SA 658 (N) at 661.

(b) often the interruptions were made in what can only be described, with respect, as an 'extremely rude, confrontational and off-putting manner';

(c) 'answered questions' put to State witnesses in cross-examination by unfairly and irregularly interrupting cross-examination and by way of 'blatantly leading questions'.

[50] I readily accept that the record shows that the judge was on occasion impatient and abrupt. But it is even clearer that he was closely attentive to the questions put by counsel and determined to ensure that he clearly understood the purpose. To this end, the judge asked questions in clarification on frequent occasions. Many of the illustrations relied on by counsel arise from such occasions. A quotation from counsel's heads of argument will serve as an example of the pettiness and the irrelevance of many such complaints.

'The eighth quotation revolves around the following: the second appellant's defence was that he was standing under a tree alongside the road and the car in which the witness who he believes arrested him was travelling, almost ran him over. The following exchange in regard to this occurs:

Court – Is the tree in the gravel road?

Counsel – Yes.

Court – In the centre of the gravel road or where? Or next to the gravel road.

Counsel – It is alongside the gravel road, yes. He was standing under the tree.

Court – I understand that but I am asking you is your instructions that the tree is in the gravel road?

Viiib – Given the previous answer by counsel to the court's question, with respect this surely amounts to pure harassment.

lxa – The ninth quotation – counsel: Would you agree that there was a gravel road running past the house?

lxb – Once again the court with respect unfairly interrupts the cross-examination.

Court – Let us put it this way, forget the gravel. Is there a road next to this house.

Counsel: M'Lord, he was going to answer me. I wanted that answer.

lxc – The learned judge with respect is unfairly undermining the cross-examination and defeating its purpose.'

[51] In this context the learned judge was inclined to make comments to counsel such as 'You are really wasting my time' or similar expressions of impatience. For example, counsel introduced two statements by Inspector Monageng, exhibits S and T. He had initially stated that he had found three suspects at the premises and arrested them. In the second statement he changed the number to two. During the exchange the judge commented that counsel was wasting his time:

'Mr Shapiro: Now let me ask you the question. When did you amend this affidavit by changing three to two? ─ During the time whilst I was busy writing the statement.'

Mr Shapiro did not pursue this line of questioning but moved on to the next aspect, after having sought that these statements be admitted. The judge then said:

'Court: You have now handed up exhibits S and T.

Mr Shapiro: Yes.

Court: You did not ask the witness a single thing on exhibit T. You have asked him some questions in respect of aspects which he did not testify to in his evidence-in-chief as far as exhibit S is concerned. Why did you ask me to take these exhibits into the record?

Mr Shapiro: Because in exhibit T there was a statement there that the, a suspect was spotted by the helicopter and I was going to ask that and then I thought better of it.
Court: Please, Mr Shapiro, in future, do not overload the record with unnecessary documentation. If there is no reason for handing in a statement, I do not want statements handed in.'

The remark by the judge was, in my view, appropriate under the circumstances.

[52] Counsel described such remarks as 'rude, off-putting, disconcerting and blatantly unfair'. What must be borne in mind is that the counsel in question has behind him many years in practice, he is no shrinking violet, and the record provides no evidence that his cross-examination was adversely affected or curtailed by the attitude of the court. In fairness to the judge, he was also pushed to the limit by counsel's apparent lack of insight into relevance and his failure to understand the operation of the hearsay rule. The record indicates much jostling and repartee between the judge and counsel. Although the judge may have been hasty and was troubled by counsel's antics, he was very reasonable with him. The judge's approach was to ensure that essential issues remained succinct. Collateral or irrelevant issues were excluded and repetitive evidence was curtailed.

[53] A further example of counsel's seeming obtuseness may be seen in the following: in order to establish contradictions counsel made much in cross-examination of statements of witnesses furnished by the prosecution (often with little regard to materiality). The judge told him to hand the statements in without the necessity of reading each into the record (a common and acceptable practice) and he said he would read them himself. Later when counsel attempted to put in statements, the judge said:

'No, no. In my court I do not take cognisance of statements not put to the witness and which he has not had an opportunity to explain.'

Counsel's response was that the court had told him that he did not need to waste its time by reading it:

'You told me that specifically, you are going to take cognisance of what is in the statement. The judge then said In future I want an explanation from you when you want to put a statement to a witness on what basis you want to put the statement in.'

[54] Counsel described this ruling as 'blatantly unfair and irregular.' I consider it neither: it was a fair response to such obtuseness as counsel plainly did not appreciate the elementary difference between the unnecessary recitation of the full contents of a statement and the essential requirement of taking up with a witness in cross-examination those aspects of the statement upon which counsel would rely to criticise the witness. The record shows that the judge never informed counsel that the judge would himself seek out such contradictions.

[55] Counsel cited as a further example of unfairness in interrupting his cross-examination a question by the judge:

'Where are you going now?'

This was said to be 'restricting the latitude of cross-examination, securely muzzling counsel', 'creating an atmosphere of friction', 'harassing counsel and diverting counsel from the point he was pursuing'. This is all posturing. The point of counsel's questions (relating to the fact that the helicopter landed in a large open field) was entirely obscure. The question was reasonable. The reply (to the defence case) did not as the court remarked, 'make sense' but counsel was nevertheless permitted to pursue this line (without noticeable advantage to his clients) of questioning.

[56] A further example of an objection of a different kind is as follows:

'The witness Petlele says: "The men referred to that entered into the shack were at that stage uncontrollable."

Counsel: You see according to the police they had enough weapons there to start a small war and yet none of them seems to have fired any shots.'

At that stage the court interrupts the cross-examination to say

'Isn't that argument?'

[57] Counsel described his approach as 'perfectly legitimate cross-examination' and the defence was muzzled by the interruption. I have no doubt the judge was right. There was no dispute that many firearms were found at the scene but that none was fired. It was not appropriate for this witness to speculate as to why that was so, but for counsel to raise at the end of the trial if the evidence merited the drawing of an inference. Counsel did not explain to this court what advantage he could have obtained had the question been pursued. In fact counsel did not even debate the validity of the judge's question to him. Els J did not however leave the matter there but asked the witness pertinently:

'Did they have any arms at that stage? Weapons?'

The reply was:

'No, they did not.'

This highlights the lack of substance in allowing the line of cross-examination; the reply was also not in conflict with the evidence of any of the accused.

(c) Mr Shapiro was threatened by the judge

[58] Counsel for the defence put the proposition that State counsel was involved in illegally paying witnesses to testify against the accused. This

was in terms of his instructions, albeit no evidence was tendered to support such a proposition. The judge then said:

'You must not make insinuations unless you have a basis therefor, regardless what your instructions are. Are you suggesting that Mr De Meillon is involved in this conspiracy? Are you making that suggestion? I want that specifically put on record. Are you suggesting Mr De Meillon is instigating witnesses to give false evidence so that he could implicate the accused? Is that what you are saying?

Mr Shapiro: I am not going that far but I say I am . . . (intervenes)

Court: But that is what you insinuated Mr Shapiro, you insinuated by your questions and it is a dangerous insinuation to make and I would suggest that Mr De Meillon takes this matter further.'

[59] Counsel for the defence contended that the judge's conduct was improper when he threatened him. This submission cannot in my view prevail. Counsel for the appellant did not have a basis to put that allegation. He did not have the facts from Itumeleng, said to be the source, who refused to testify. The defence thus had no factual basis for implicating and accusing counsel for the State of conspiracy. In the result, the judge was justified to be upset with Mr Shapiro.

(d) The court failed to rule as inadmissible material documentary evidence unfairly produced by the State during the trial.

[60] The State produced statements of witnesses during the course of the trial which had not previously been made available to the defence. These included one by Petlele and two by a ballistics expert. Counsel objected, for obvious and acceptable reasons his clients did not want to delay the trial by further postponements. It is clear from the record that the judge was not averse to accommodating counsel to a lesser extent. He was however not prepared to exclude reliance on the evidence. The

interests of justice required a balance to be struck. Counsel, however, made no attempt to compromise but simply applied for special entries to be noted against reliance on the evidence. But the irregularity did not reside in that ruling but rather in the failure to afford the defence adequate chance to prepare (if such was the effect), an opportunity which the defence did not itself seek.

[61] I do not feel it necessary to multiply examples of the passages said to evidence irregularities. I have read and considered every passage in the context in which it appears together with counsel's submissions. In many instances the last-mentioned are backed up by affidavits of the appellants who voice their shock, surprise, disgust, disillusionment and despair at what they describe as rude, unfair, biased, aggressive and interventionist behaviour of the trial judge. As is apparent from the few representative examples to which I have referred, many of the 'irregularities' were not such as to sustain the pejorative colour that counsel and the appellants seek to attach to them. I am satisfied that the learned judge was not biased against the accused nor was his conduct of the proceedings such as to provoke a suspicion of bias. The record seen in its totality contains many instances where counsel was given his head without interruption; when he was interrupted or stopped, there were acceptable grounds for doing so.

[62] To the extent the judge expressed incredulity at the substance of the defence, the comment was probably unnecessary but it was entirely provisional in context, not unjustified and it was as well that counsel be aware of the problem. When it came to the final assessment of the probabilities the judge demonstrated an ability to conduct an objective analysis which depended on the facts. That he applied his mind to the real issues is borne out by the fact that in the end he acquitted the appellants

on the majority of the charges. He treated the first appellant differently from the others. In my view, this is the hallmark of an open mind. It is evident that the judge weighed and evaluated all the evidence. His judgment, despite the problems alluded to, reflects a fair balance.
Nor do I find reason to uphold counsel's contention that he was deterred from pursuing relevant lines of cross-examination by any intervention from the court. The judge's brusqueness with counsel may have exceeded what was strictly necessary on a few occasions, but I find nothing on the record to suggest that his impatience reflected on the accused themselves or the merits of their defence.

[63] I will however assume, hypothetically, that the judge had not interrupted counsel or cut short his cross-examination in any respect, and that the witnesses had been left to their own devices rather than assisted by leading questions. Would the outcome of the trial still have been the same, ie, a finding beyond a reasonable doubt?

[64] I have no doubt it would. The grossly improbable substance of the overall defence would have been no wit altered or enhanced. The individual lack of credibility attaching to each accused would have remained. Nothing that counsel could or would have put to the witnesses could have changed certain controlling realities: the presence of each in the same place without an acceptable explanation for their association; their close proximity to money and arms which three hours previously were taken from or used in the Phokeng robbery; and the circumstances of the arrest of each of the appellants. Unless there was a reasonable possibility at the end of the case that the police had deliberately and collusively framed the accused, a conviction inevitably had to follow. No amount of unimpeded cross-examination of state witnesses, or indeed of

calling witnesses which the State left out of its selection would realistically have conduced to that end.

[65] That being so, even allowing the existence of the irregularities (other than bias which can be ruled out), no failure of justice occurred and the reliance on the irregularities cannot succeed. It cannot be that the appellants' contention is that the acquittals were unfair or resulted in a failure of justice or were not according to law. The appeal based on the alleged irregularities set forth in the special entry must fail. There is accordingly no basis to set the proceedings of the court below aside.

[66] The next leg of the enquiry relates to the appeal against conviction based on the merits. Counsel inter alia, submitted that the court a quo misdirected itself when it failed to draw an adverse inference against the State for not calling certain witnesses and for admitting hearsay evidence. He also contended that the court had misdirected itself when evaluating the evidence.

[67] In regard to the first ground, he submitted that Insp Ngquko should have testified to rebut the allegations of conspiracy, despite the fact that Itumeleng, the alleged source of such information, had refused to testify. In my view, this contention is ill-founded. The questions that have to be asked is what worth did this allegation carry if the source did not testify? How does the evidence become admissible if Itumeleng does not testify? The answer is obvious – no weight can be attached to such an allegation. It is trite that the State or defence cannot be expected to rebut allegations which have no basis. There was no need for Insp Ngquko to testify if there was no evidence to rebut. Absent the evidence of Itumeleng, the veracity of the allegations cannot be determined.

[68] Counsel submitted that More who had arrested the fifth appellant, Supt Diale who took charge of the scene where the appellants were arrested and Insp Mailate who had received the bag with money should have testified to either rebut the allegations of conspiracy or corroborate the evidence of other State witnesses.

[69] More did not feature on the list of witnesses and therefore the defence could have called him if they wanted to. More was assisted by Petlele and Mosengu and these witnesses testified about the fifth appellant's arrest. It was therefore not necessary to call More to repeat the evidence relating to the arrest of the appellant. It has to be borne in mind that the State is entitled to decide which witnesses are necessary to be called. An adverse inference can only be drawn if there is some reason to believe that the witness who has not been called could contradict the State's case in that regard. In this case the calling of additional witnesses is undermined by the defence version. There is no possibility that the witnesses who were not called would sustain the defence version.

[70] It was further submitted that the police officer depicted in exhibit H at photo 49 should have testified to explain what he was doing when the photograph was taken. In my view the failure of this officer to testify is not fatal to the State case. It is obvious that he was merely illustrating the presence of money in the pocket. The cash had been slightly pulled out of the pocket to enable the photographer to take a photo thereof. That is not uncommon conduct nor is it irregular. The failure to call the police officer concerned does not warrant a finding of an adverse inference against the State.

[71] Counsel further contended that the police had no information about the whereabouts of the suspects save for the existence of a white combi. He argued that the evidence of the officials in the helicopter was crucial as any information recorded by the police on the ground from the helicopter was hearsay. This submission is without substance. Petlele testified that the helicopter led them to the white combi and that they followed the direction of the helicopter. He never said that these officials told him anything. He made his personal observations and effected the arrests. Monageng also testified that the helicopter led them to the accused. That in my view is not hearsay evidence. It is a fact and does not prove the truth of whatever Monageng or Petlele was told from the air.

[72] In regard to the second ground, counsel submitted that the judge misdirected himself when he readily accepted the evidence of the State witnesses and in particular, the evidence of Moyo, Petlele, Monageng, Mrs Reetseng and Blignaut and that he erred when he rejected the appellants' version. The correct approach is to consider the evidence holistically, weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about an accused's guilt.[7] The court must look at the reliability and credibility of the witnesses and consider if any of them had a motive to falsely implicate the appellants.

[7] *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15.

[73] Counsel submitted that the judge should have been critical of Moyo's motives when he attended court on numerous days when he was not required to do so. There is nothing strange in Moyo's conduct. He had not made a witness statement and was called without prior consultation by the State to rebut the allegations. He denied any knowledge under oath of the allegation of conspiracy. In the absence of a previous statement, it is far-fetched to suggest that Moyo changed his version when he testified.

[74] In regard to Petlele it was contended that he supplemented his statement and only mentioned the fact that some money was found in the jacket pocket in the second statement. In *S v Bruinders & 'n ander*[8] the court held:

'In order to discredit a State witness on the basis of his affidavit, it was still necessary that there had to be a material deviation by the witness from his affidavit, before any negative inference could be drawn. The purpose of an affidavit was to obtain the details of an offence, so that it could be decided whether a prosecution should be instituted against the accused. It was not the purpose of such an affidavit to anticipate the witness's evidence in court, and it was absurd to expect of a witness to furnish precisely the same account in his statement as he would in his evidence in open court.'

[75] There is no material discrepancy between the two statements. These are just statements made at different times. The court must consider Petlele's independent observation. What matters is what he saw at the scene and his reliability as a witness. Hechter corroborated Petlele's evidence in regard to the discovery of the jacket. In my view no improper motive can be attributed to Petlele for failing to mention this aspect in his first statement. In regard to Monageng, counsel for the appellant argued that Monageng never mentioned in his statement that the second appellant was running. It later transpired that counsel was in fact misleading the

[8] 1998 (2) SACR 432 (E) at 434i-j. See also *S v Mafaladiso & andere* 2003 (1) SACR 583 (SCA).

court as the reading of the statement revealed that Monageng had in fact mentioned this aspect.

[76] Counsel submitted that no reliance could be placed on Mrs Reetseng's testimony because she never saw the second appellant dropping the bag in the water. I do not agree with this submission. Mrs Reetseng was an independent witness who had seen the appellant proceeding towards the bath carrying a bag. She later saw him in the custody of the police without the bag. This was subsequently retrieved by the police from the bath. Mrs Reetseng was washing the clothes and never had a bag in her possession. The question to be asked is how the bag ended up in the bath? What other inference could be drawn from the facts but that it was put there by the second appellant when he realised that the police were chasing him and that he did so to get rid of the incriminating evidence.

[77] Counsel further argued that the evidence of Blignaut should have been rejected as the seal in regard to the exhibits found at Luka and Phokeng was unreadable. This argument has no merit and is rejected. It has to be borne in mind that the purpose of the seal is to provide clear evidence that the exhibits were not tampered with. The case reference number (CAS) of the police station, on the other hand, identifies the place where the exhibits came from and this was legible. The evidence of Blignaut was that the bullets came from the guns used at the scene. In any event the defence version was that they had no knowledge of the source of the firearms as they had been planted on them.

[78] In the result there is nothing exaggerated in the evidence of these witnesses. No valid criticism can be levelled at them. The trial court did

not commit any misdirection when it accepted the evidence of the State witnesses. There is accordingly no basis to reject same.

[79] Turning to the defence version, I am of the view that the alibi defences were flawed and were correctly rejected. The first appellant had not proffered an exculpatory explanation to the police at the time of his arrest at Luka. It was submitted that the judge erred in drawing an adverse inference against the first appellant for his failure to disclose an alibi prior to the trial. The right to remain silent is a right that is constitutionally protected. In *S v Thebus & another*,[9] Goldstone J et O'Regan J:

'An accused person needs to understand the consequences of remaining silent. If the warning does not inform the accused that remaining silent may have adverse consequences for the accused, the right to silence as understood in our Constitution will be breached.

Moreover, in many cases, the fact of the warning itself will render the silence by the accused ambiguous. It will not be clear whether the accused remained silent because he or she is relying on the right to remain silent, or for another reason, whether legitimate or not. To the extent that the silence is ambiguous, of course, it will have little value in the process of inferential reasoning, especially where the guilt must be proved beyond a reasonable doubt.'

[80] The argument does not take the appellant's case any further because his alibi is patently false and highly improbable. He wishes the court to believe that he went to Luka from Tsakane, Brakpan on business, yet never received his fee of R3000 even after his release on bail. It is highly unlikely and improbable that a taxi owner would not ensure payment for the trip and allow himself to be led around collecting unplanned for passengers. He pretended not to know his co-accused, yet provided a false name to Petlele upon his arrest, which turned out to be the third

[9] 2003 (2) SACR 319 (CC) paras 87 - 88.

appellant's name. It is significant that he would have known the third appellant's name when he had never met him before their arrest. The only inference that can be drawn is that the first appellant was part of the planning of the Phokeng robbery.

[81] The third appellant's version about the building of the wall did not make sense. Initially, these people had arrived to commence the building operations. When confronted about the absence of building material, he changed his version and stated that Ndlazi who co-incidentally had been brought there by the first appellant, had come to discuss certain issues with him. If he had come to discuss some issues, why would he bring ten builders along? Furthermore he had paid Ndlazi who had 10 or more builders a sum of R4000 from which Ndlazi would have to pay the first appellant R3000. This would have left Ndlazi with a paltry R1000 for his profit and to pay his workers.

[82] The other appellants went to Luka to meet certain persons. The second appellant went to Luka to meet a traditional healer. The fourth appellant also travelled from Johannesburg to meet Ramonso about a possible sale of his vehicle. Ramonso decided not to wait for him but went to Luka. The fifth appellant travelled from Pretoria to meet Christene. She too did not to wait for him but went to Luka. Accused 5 also went to Luka to meet Charles to buy a vehicle. The meetings never materialised. All the appellants, for some strange reasons went to Luka on the day of the incident. The question to be asked is was it a mere co-incidence that the appellants happened to be there? In my view, it would be a remarkable co-incidence if they were not involved in the robbery. The linking of the second appellant to the wet bag with money is conclusive evidence that he participated in the Phokeng robbery.

[83] All the defence witnesses refused to testify and no explanation was given therefor. One does not know what they would have told the court. Would they have corroborated the appellants' version or given a totally different version? One can only assume, in the absence of any other explanation that they would not have supported the appellants.

[84] The defence version, in my view, does not make sense and is highly improbable. There was no need for the police to seek other persons to falsely accuse them of the robbery. They could have appropriated the money and charged the real robbers. To plan and execute the framing of innocent persons with cash and exhibits in broad daylight within three hours of the robbery in Phokeng is if not impossible, at least unlikely in a high degree. Not only would all the police participants, who came from different units, have to agree, they would have had to plan and prepare for a future uncertain event and be at the right place simultaneously when the robbery and the arrests were carried out. Members of the public and independent witnesses like Mrs Reetseng and Ms Moagi would have had to be removed or convinced that what they witnessed was something else. It is equally strange that the police who were, according to the appellants, hell-bent on falsely implicating the appellants, treated the first and fifth appellants differently from the others. They did not assault them nor did they plant any money on them.

[85] In my view, there was overwhelming evidence against the appellants in regard to the commission of the offences at Phokeng. Their version is not supported by any objective facts and is highly improbable. The proven facts lead to only one reasonable inference that the appellants were involved in the armed robbery at Phokeng. They were

thus correctly convicted. It follows that the appeal against the convictions must fail.

[86] It therefore remains for me to consider the appeal against sentence. The imposition of sentence is a matter falling pre-eminently within the judicial discretion of the trial court. The test for interference by an appeal court is whether the sentence imposed by the trial court is vitiated by irregularity or misdirection or is disturbingly inappropriate.[10] The trial court imposed the following sentence in respect of the first appellant:

(a) 21 years' imprisonment for robbery; and

(b) 15 years' imprisonment for the unlawful possession of machine guns.

The court took into account the cumulative effect of such sentences and accordingly ordered a period of ten years to run concurrently with the sentence in respect of the robbery charge. The effective sentence is thus 26 years' imprisonment.

[87] The other appellants were sentenced as follows:

(a) The court treated the charges of robbery and malicious injury to property as one and imposed a period of 23 years' imprisonment.

(b) 15 years' imprisonment in regard to the unlawful possession of machine guns; and

(c) 5 years' imprisonment for unlawful possession of ammunition.

The court ordered a period of eight years in respect of the conviction for unlawful possession of machine guns to run concurrently with the sentence imposed for robbery. They were thus sentenced to an effective term of 35 years' imprisonment.

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[10] *Director of Public Prosecutions, KwaZulu-Natal v P* 2006 (1) SACR 243 (SCA) para 10.

[88] Part II of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 prescribes in the case of first offenders, a minimum sentence of 15 years' imprisonment for certain offences, inter alia, robbery with aggravating circumstances and unlawful possession of machine guns or rifles. A court may impose a lesser sentence if there are substantial and compelling circumstances. The court a quo correctly found such circumstances did not exist in this case. It further held that the minimum sentence was, in view of the seriousness and aggravating nature of the offences, too lenient and accordingly imposed the sentences referred to in paras 86 and 87 above.

[89] Counsel submitted that the court a quo had misdirected itself and that it did not pay due regard to the element of mercy and the rehabilitative effect of the sentence and in the end imposed a sentence that was excessive. This submission cannot prevail. This was an armed robbery which was extremely dangerous. It involved a gang of robbers using two automatic rifles and machine guns. They struck the armoured vehicle from the rear and shots were fired causing the vehicle to overturn. Their purpose was to bring the vehicle to a stop at all costs and they did not care about the safety of the occupants. They cut the vehicle open and fled with the money. These are aggravating factors which the trial court took into account when considering the appropriate sentence.

[90] In the result I can find no misdirection by the trial court. The sentences imposed are commensurate with the seriousness of the offences, the circumstances of the appellants as well as the interests of society. The court further took into account the cumulative effect of the sentences and in the result ordered part of the sentence to run concurrently with the sentence imposed in respect of the robbery count.

There is accordingly no basis for this court to interfere. In the result the appeal against sentence also fails.

[91] It is necessary to refer to an aspect arising from the record on appeal and in particular the heads of argument. There is a disturbing trend concerning the heads of argument in this court. The provisions of rule 10(3) of this court provide:

'(a) The heads of argument shall be clear, succinct and without unnecessary elaboration;

(b) The heads of argument shall not contain lengthy quotations from the record or authorities.

(c) References to authorities and the record shall not be general but to specific pages and paragraphs.

(d)(i) The heads of argument of the appellant shall, if appropriate to the appeal, be accompanied by a chronology table, duly cross-referenced, without argument.'

[92] In *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd*[11] Harms JA said:

'There also appears to be a misconception about the function and form of heads of argument. The Rules of this Court require the filing of main heads of argument. The operative words are "main", "heads" and "argument". "Main" refers to the most important part of the argument. "Heads" means "points", not a dissertation. Lastly, "argument" involves a process of reasoning which must be set out in the heads. A recital of the facts and quotations from authorities do not amount to argument.'

There is no reason why the practice in criminal appeals should be treated any differently.

[93] It has become an undesirable practice for the parties not to give due consideration to the rule relating to the composition of the record on appeal. The rule has been ignored in this case as voluminous heads of

[11] 1998 (3) SA 938 (SCA) para 37.

argument were filed. The appellants' heads of argument consist of three volumes of 281 pages. We were also burdened with the notice of motion and heads of argument in respect of the application for leave to appeal before Sapire AJ, three volumes of supplementary heads of argument as well as an application for an amendment of the heads of argument, all of them unnecessary. The documents exceeded 900 pages. This court has repeatedly admonished parties against the inclusion of unnecessary documents in appeal records.

[94] Counsel for the appellant protested his ignorance when we raised the issue and referred him to the relevant rule. That was an insufficient response. In the circumstances, I intend making an appropriate costs order to show our disapproval with this conduct.

[95] In the result the following order is made:

1. The appeal against the convictions and sentences is dismissed.

2. The legal representatives of the appellants are disallowed from recovering any costs relating to:

(a) the heads of argument in the appeal in so far as such exceeded 60 pages;

(b) the application to amend the heads of argument;

(c) the settling of the affidavits of the appellants (and any consultations related thereto) filed in support of the application referred to in (b); and

(d) the transcript of the argument before Sapire AJ.

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N Z MHLANTLA
JUDGE OF APPEAL

Appearances:

For Appellant:	P I Shapiro
	P I Shapiro, Pretoria
	Giorgi & Gerber Attorneys, Bloemfontein
For Respondent:	A R de Meillon
	Director of Public Prosecutions,
	Bloemfontein