THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case no: 538/06
REPORTABLE

In the matter between:

Siyabulela TANDWA	**First appellant**
Aubrey GODOLOZI	**Second appellant**
Nkqubela TEKULA	**Third appellant**
Khaya GASA	**Fourth appellant**
Tanduxolo ROZANI	**Fifth appellant**
Mzukiseni TSHEFU	**Sixth appellant**
Luyanda NGUBELANGA	**Seventh appellant**

and

The STATE	**Respondent**

Before: Cameron JA, Mlambo JA and Hancke AJA
Heard: Monday 19 and Tuesday 20 February 2007
Judgment: Wednesday 28 March 2007

Criminal law – Right to fair trial (s 35 of Bill of Rights) – accused accusing legal representative of misconduct leading to fair-trial violation – legal representative denying allegations – legal representative's account admissible in evidence – how appeal court should deal with unprobed counter-assertions – accused's allegations not raising real possibility that there was incompetence or that bad advice was given or that misconduct occurred
Right to silence (s 35(3)(h) of Bill of Rights) – state case based on inference – accused's silence pivotal to his conviction – silence not without consequences
Admission of unlawfully obtained evidence (s 35(5) of Bill of Rights) – evidence procured by assault and torture – admission violates fair trial guarantee and also detrimental to administration of justice
Dock identification of accused –sufficient in circumstance to sustain conviction

Neutral citation: This judgment may be cited as S v Tandwa [2007] SCA 34 (RSA)

CAMERON JA, MLAMBO JA and HANCKE AJA:

[1] During the early morning hours of Wednesday 18 November 1998, a robbery took place at the Standard Bank in Mthatha, Eastern Cape, in which the perpetrators looted R9.6 million from the branch's strongroom. The police arrived soon after the bank's usual daily round began. They found three bank employees locked inside the now-depleted strongroom. All three had spent the previous night under the robbers' guard. At dawn the robbers brought them to the bank and instructed them to de-activate the alarm and to open the strongroom safe. All three claimed to have done so under compulsion. But within hours, police suspicion focused intense scrutiny on two of the three, Mr Siyabulela Tandwa and Mr Aubrey Godolozi. By the day's end the two had been arrested on suspicion of complicity in the crime. They later stood trial in the Mthatha High Court as accused 1 and 2, with six further accused, on a charge of robbery in contravention of s 155(1) and (2) of the Transkei Penal Code, Act 9 of 1983.[1]

[1] Section 155(1) and (2) of the Transkei Penal Code, Act 9 of 1983:
'(1) Any person who steals anything and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, shall be guilty of robbery.
(2) Any person who commits robbery or attempted robbery with aggravating circumstances as defined in section 8 of this Code shall be liable on conviction to be sentenced to death, or to such lesser sentence as the court may deem fit.'
Section 8 defines 'aggravating circumstances' in relation to robbery or attempted robbery as –
'(i) the wielding of a firearm or any other dangerous weapon;
(ii) the infliction of grievous bodily harm; or
(iii) a threat to inflict grievous bodily harm, by the offender or an accomplice on the occasion when the offence is committed, whether before or during or after the commission of the offence.'

[2] At the trial's commencement the accused (who were all legally represented) pleaded not guilty and declined to offer any plea explanations, reserving their defence. Seven of the eight were convicted as charged. Accused 4, Ms Xoliswa Tekula, the wife of accused 3, was acquitted. Those convicted were sentenced to terms of imprisonment of between 17 and 20 years. With the leave of the trial judge (Van Zyl J) the seven appellants now appeal against their convictions only. We refer to them as they were arraigned in the trial court (where the other accused were Mr Nkqubela Tekula (3), Mr Khaya Gasa (5), Mr Tanduxolo Rozani (6), Mr Mzukiseni Tshefu (7) and Mr Luyanda Ngubelanga (8)).

[3] The robbers' plan and its execution were soon established, and were not disputed at the trial. In the course of the evening of 17 November 1998 – a drizzly night – the three bank employees were accosted at their homes by armed men and taken together with the members of their households to the residence of accused 2, where they were detained overnight. The three bank employees were taken to a separate room – that of accused 2. There they were questioned about the bank's security systems and alarm codes. Early the next morning the robbers proceeded to the bank with accused 1 and 2 and the third employee, Mr Mtutuzeli Sibindlana, where they disarmed the alarms and gained access to the bank and its vaults. The loot was taken, and the robbers scarpered after locking the three employees in the safe where the police later found them.

[4] The state case against the eight accused pivoted on three axes: direct evidence against five; inferential evidence arising from possession of part of the loot against one; and inferential evidence from lapses in bank procedures implicating the two employees. Direct evidence of the complicity of five of the accused came from an accomplice witness, Mr Eric Pakamani Dlamini, who in court identified accused 3, 5, 6, 7 and 8 as fellow robbers. In the case of each of these accused, the state also led corroborating evidence. This included a confession, admissions and other compromising statements and pointings out, as well as cash retrieved.

[5] Against accused 4 (spouse of accused 3), the state led evidence that she had safeguarded some of the loot, contending unavailingly that this – together with her associated conduct and statements – established her complicity.

[6] Against accused 1 and 2 the state's case rested largely on lapses in and deviations from bank procedures which it contended were compatible only with the inference that the two were complicit in the crime. During police questioning accused 1 denied his involvement (though he pointed the police to accused 2 as having possibly been involved). But accused 2, the police testified, soon admitted complicity, and it was he who led them to accused 3, 4 and 5. After the state closed its case, accused 2 testified in his own defence, and was vigorously cross-examined. By contrast, accused 1 did not testify at all. His advocate closed his case without calling him to the witness stand. After he was convicted, but before being

sentenced, he sacked his advocate (who had represented him for the preceding sixteen months), claiming that he had been prevented from testifying in his own defence. Our first task is to examine this claim and consider its consequences.

Accused 1's legal representation fair-trial complaint

[7] The Constitution guarantees every accused person the right to a fair trial (Bill of Rights s 35(3)). This includes the right 'to choose, and to be represented by, a legal practitioner' (s 35(3)(f)), as well as the right 'to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result' (s 35(3)(g)). The right to chosen or assigned legal representation is a right of substance, not form:

> 'The constitutional right to counsel must be real and not illusory and an accused has, in principle, the right to a proper, effective or competent defence.'[2]

Incompetent lawyering can wreck a trial, thus violating the accused's fair trial right. The right to legal representation therefore means a right to competent representation – representation of a quality and nature that ensures that the trial is indeed fair.[3] When an accused therefore complains about the quality of legal representation, the focus is no longer, as before the Constitution, only on the nature of the mandate the accused

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[2] *S v Halgryn* 2002 (2) SACR 211 (SCA) para 14, per Harms JA for the Court; *S v Mofokeng* 2004 (1) SACR 349 (W) para 18 (Louw AJ, Gudelsky AJ concurring).

[3] Compare *Strickland v Washington* 466 US 668 (1984) 685 ('An accused is entitled to be assisted by an

conferred on his legal representative,[4] or only on whether an irregularity occurred that vitiated the proceedings[5] – the inquiry is into the quality of the representation afforded.

[8] It need hardly be added that accused 1 enjoyed a constitutional right to testify in his own defence. The right of an accused person to 'adduce' evidence (Bill of Rights s 35(3)(i)) clearly encompasses the right to adduce his own evidence. It also follows clearly from the structure of s 35 that an accused person has the right to represent himself, without the interposition of counsel.[6] If the unwanted or inept advice of counsel improperly or unfairly thwarted his exercise of that right, his right to a fair trial would have been infringed.

[9] And this exactly is accused 1's complaint: that his counsel's incompetence, bad advice and obstructive conduct violated his fair trial guarantee. We must explain the circumstances under which his complaint arose. The trial was protracted – it started in November 1999, one year after the robbery, and the appellants were convicted thirty months later.

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attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair'), per O'Connor J for the Court.

[4] See *R v Matonsi* 1958 (2) SA 451 (A), which was decided on the basis that even if counsel had 'prevented' the accused from testifying, the nature of counsel's mandate in English and Roman-Dutch law was such that an accused in a criminal case could not, short of terminating counsel's mandate, question counsel's conduct of the trial and claim relief because of the conduct in question. In that case, the accused had taken no steps to withdraw counsel's mandate and had expressed no disagreement with the conduct of the case until after verdict. The trial was therefore judged regular (per Schreiner JA on behalf of the majority at 456A-457E). The minority judgment (per van Blerk AJA at 458D-F), though endorsing the outcome, expressed reservation about the far-reaching proposition the majority appeared to endorse that the accused forfeited control of counsel's conduct once counsel was mandated to conduct the trial. The approach differs from that to be taken under the Constitution.

[5] As Trollip JA envisaged in *S v Majola* 1982 (1) SA 125 (A) 133F, read in the light of *S v Zuma* 1995 (2) SA 642 (CC) para 16.

[6] Compare *Faretta v. California* 422 U.S. 806 (1975) (criminal defendant has an independent constitutional right of self-representation: he may therefore proceed to defend himself without counsel when he voluntarily and intelligently elects to do so).

Initially accused 1 was represented by Mr Rowan, later by Mr Noxaka, and from 1 March 2001 by Mr Fuyiziwe Shepherd Gagela, an advocate practising at the Bar in Mthatha, who appeared on Legal Aid Board instructions.

[10] The state closed its case against the accused on 10 September 2001, more than six months after Mr Gagela took over accused 1's defence. On the same day various of the accused, including accused 1 (but not accused 2), applied for their discharge. All the applications were refused. In dismissing accused 1's application, the trial judge found that 'there is evidence at this stage justifying an inference that he may have been involved in the commission of the offence'. Thereupon accused 1 and accused 4 closed their cases without testifying. Accused 4 was acquitted, but not accused 1.

[11] When the convictions were brought in on 23 May 2002, accused 1's bail was revoked, and he was taken into custody. Six weeks later, on 10 July, all the accused appeared in court when a postponement was granted. When court resumed on 23 July, the record reflects that Mr Gagela had been to see the judge in chambers. In court, he recorded cryptically that he was 'withdrawing as counsel of record for accused 1 because the communication has since waned'. The judge established from Mr Gagela, and confirmed from accused 1, that his withdrawal was at the request of accused 1. He then asked accused 1 whether there was 'any possibility' that he could 'resolve your difficulties' with Mr Gagela. To this accused

1's only response was 'I don't want to be represented, I want to talk on my own.' He offered no further elaboration.

[12] The state then led evidence in aggravation of sentence. The next day, 24 July, the accused were invited to lead evidence in mitigation. After the judge had explained his rights and opportunities to accused 1, he took the stand. He proceeded to relate his personal circumstances, including details about his employment with the bank, his family, his financial position and health. In the midst of these details, he stated (second-person appellations omitted):

> 'When this matter was proceeding I didn't elect to remain silent, I did want to speak but I was advised not to speak. I was advised by my attorney saying that he knows what he says because he is an attorney, because he knows the law. I did as he told me thinking that he knew what he was saying. I also have two photos showing my involvement in the sport as I have told the Court, I don't know whether the Court would also like to see them or whether the Court has got any interest in this sport.'

In response the judge merely indicated that since the evidence of his involvement in sport was unlikely to be disputed, it was not necessary to hand up the photographs.

[13] Although he was then cross-examined by other counsel and by the state, and although the judge inquired of accused 1 at the end of his evidence whether he wished to say anything else, nothing further emerged. Sentence was passed two days later, on 26 July, accused 1 being sentenced to 18 years.

[14] Only in an affidavit lodged with his application for leave to appeal on 31 July 2002 did accused 1 elaborate on his claims. For the first time he now stated that he and his advocate had actually agreed that he would testify – but that his advocate had not only thwarted this, but 'misled' him about the legal position.[7]

[15] When he granted the appellants leave to appeal against their convictions on 15 November 2002, the trial judge did not refer to these allegations. On appeal, however, counsel for accused 1 relied on these affidavit assertions, urging us to find that –

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[7] 'At the end of the state case I consulted and agreed with my counsel that he should apply for my discharge and if discharge is refused I should give evidence.
The application for discharge was refused.
Then there was further consultation between my defence counsel and myself where I insisted that I should testify, but my counsel stated that –
* I do not know the law and he is the one who knows the law, and I should not testify at all as there was no case against me.
* The judge would again look at the same evidence as he has and review his decision of refusing the discharge, when he deals with the whole of the evidence more especially that even the evidence of one Mr Eric Dlamini who gave evidence as an accomplice had told the court that I was the only person amongst all the accused who did not know of the conspiracy to rob the bank, and furthermore at no time that I was one of the accused who shared the spoils of the robbery.
As a layman, I truly believed the advice of the counsel, and I accordingly did not testify.
When the judge gave the judgment at the end of the case, I was so shocked when the judge said that, since I did not give evidence the court only remained with the evidence of the state and that even though I had the right not to testify, the court is compelled to accept the evidence of the state as correct and I was then convicted on all counts like the rest of the seven other accused.
I submit that, had my counsel told me that I was not compelled to testify [but] further that, if I do not testify, the court is entitled at the end of the case to draw an inference against me, I would have elected to testify. This was the most unfortunate situation that I had to fall onto.
The result of the conduct of my counsel led me to discharge him at the stage when mitigation of sentence had to be done; and I told the court that, because of the amount of suffering brought about by my being misled on aspects of law by my previous counsel, it would be in my interests that I should conduct carry on without legal representation. …
I submit that I have now been informed and verily believe that, when the court refuses an application for discharge at the end of the state's case, that means that there are some things that do not satisfy the court that a discharge would be a proper verdict at that stage; and the effect thereof is that the accused should in his own interest decide whether he should testify in order to place the court in light in respect of anything the court would like to know. I was in the dark as to such aspects and the same were not brought to my attention by my previous counsel.
I submit that by reason of the conduct of my own counsel I did not have a fair trial at all. I believe that I may apply for leave to appeal only on this ground that I had an incompetent counsel or I acted on wrong advice of a lawyer, resulting in an unfair trial.'

(a) the accused was not properly informed about the consequences of not testifying;

(b) the accused to his own prejudice followed his advocate's advice not to testify;

(c) the accused's right to a fair trial was accordingly breached and his appeal should on this ground be allowed.

[16] In response, the state appended to its written argument an affidavit from advocate Gagela disputing the claims of accused 1. Mr Gagela asserted that throughout the period he represented accused 1 'we had constant communication with regard to the case, especially during the defence case', and that he had fully and properly advised his client about the risk of not giving evidence.[8]

[8] 'After an application for a discharge was refused, I advised Mr Tandwa about the consequences of giving or not giving evidence in his defence. He readily accepted my advice and he elected not to testify after weighing up all the advice I had given him.
I refute that I stopped Mr Tandwa from testifying and giving evidence in his defence at any stage during the court case. …
The question of Mr Tandwa testifying if an application was refused was never discussed in detail at all during consultations prior to the discharge application being made, as I felt it was premature at that stage. Prior to the discharge application I had advised him of the procedures that would occur once the state closed its case. For that reason I flatly deny that there was an agreement that he would testify if the application was refused. …
Throughout my dealings with Mr Tandwa I understood him to be a man of independent thinking and reasoning. Certainly he is a man of such a calibre that he would have elected to testify if he wanted to. At no stage during the defence case did he indicate that he wanted to testify even when the other accused and their witnesses testified. Had he indicated that he wanted to testify I would have applied for the [re-]opening of his case in view of his change of heart.
I strenuously deny that I advised him that the judge would again look at the same evidence and would then review his decision not to grant a discharge because the test is different after all the evidence has been led. …
I dispute that I withdrew from representing Mr Tandwa as a result of my conduct. It was as a result of his election not to testify, which led to his conviction, that was devastating to him, and for this he apportioned the blame to me. …
I started representing Mr Tandwa on 5 March 2001. During the trial Mr Tandwa never expressed any doubt about my competence as his counsel. Even though his application for a discharge was refused, I continued to appear on his behalf and he never doubted my abilities as his counsel.
In the conduct of Mr Tandwa's case I discharged my duties to the best of my ability and I never gave Mr Tandwa any wrong legal advice.'

[17] The first question is how we must deal with the factual disputes the accused's claims present. How should an appellate court deal with conflicting testimony from an accused and his former legal advisor as to what transpired between them?[9] In particular, is his legal representative's affidavit admissible? The accused's entitlement to legal professional privilege protected the communications between him and his advocate from disclosure. What transpired in their discussions cannot be revealed unless the accused gave his consent or waived his privilege. The common law rule, though it embodies a substantive principle central to the functioning of the legal system, and not merely a rule of evidence or procedure,[10] is statutorily embedded in our law of criminal procedure.[11]

[18] Since accused 1 has nowhere expressly consented, the admissibility of his advocate's affidavit depends on whether he waived his right to legal professional privilege. In *Peacock v SA Eagle Insurance Co Ltd*[12] and

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[9] The question seems to be novel. In previous cases concerning an alleged failure of legal representation, the complaint could be adjudged from the record (*S v Bennett* 1994 (1) SACR 392 (C) and *S v Halgryn* 2002 (2) SACR 211 (SCA)) or from its attendant documents (*S v Mofokeng*.2004 (1) SACR 349 (W) (heads of argument)). In *R v Matonsi* 1958 (2) SA 451 (A) the complaint was decided without evidence from counsel as to what passed between him and the accused (457A-B and 458H). In *S v Majola* 1982 (1) SA 125 (A) there was no dispute because counsel admitted that he had not asked the accused whether he wished to testify: see 129E-F, 131H and 133E.

[10] See the discussion of this court's and other decisions in DT Zeffertt, AP Paizes and A St Q Skeen, *The South African Law of Evidence* (2003) 570-576.

[11] Criminal Procedure Act 51 of 1977 s 201:

'No legal practitioner qualified to practise in any court, whether within the Republic or elsewhere, shall be competent, without the consent of the person concerned, to give evidence at criminal proceedings against any person by whom he is professionally employed or consulted as to any fact, matter or thing with regard to which such practitioner would not on the 30th day of May 1961 by reason of such employment or consultation, have been competent to give evidence without such consent: Provided that such legal practitioner shall be competent and compellable to give evidence as to any fact, matter or thing which relates to or is connected with the commission of any offence with which the person by whom such legal practitioner is professionally employed or consulted, is charged, if such fact, matter or thing came to the knowledge of such legal practitioner before he was professionally employed or consulted with reference to the defence of the person concerned.'

[12] 1991 (1) SA 589 (C) 591-2 (Farlam AJ).

Harksen v Attorney-General Cape,[13] the courts drew a distinction between implied and imputed waiver of legal professional privilege. Implied waiver occurs (by analogy with contract law principles) when the holder of the privilege with full knowledge of it so behaves that it can objectively be concluded that the privilege was intentionally abandoned. Imputed waiver occurs where – regardless of the holder's intention – fairness requires that the court conclude that the privilege was abandoned. Implied waiver entails an objective inference that the privilege was actually abandoned; imputed waiver proceeds from fairness, regardless of actual abandonment.

[19] In propounding a doctrine of imputed waiver[14] (which may also be termed fictive or deemed waiver),[15] the judges in *Peacock* and *Harksen* drew on a passage from Wigmore, much-cited in our courts, that enjoins 'fairness and consistency' in inferring the extent of an implied waiver of attorney/client privilege. Wigmore in the same paragraph goes on to conclude that it is a 'fair canon of decision' that 'when a client alleges a breach of duty by the attorney, the privilege is waived as to all communications relevant to that issue'.[16]

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[13] 1999 (1) SA 718 (C) para 61 (Friedman JP and Brand J, following the analysis of Farlam AJ).
[14] Criticised by David Bilchitz in 1998 *Annual Survey of South African Law* pages 814-815 (see too 1999 *Annual Survey of South African Law* page 684), but endorsed by DT Zeffertt, AP Paizes and A St Q Skeen, *The South African Law of Evidence* (2003) 585.
[15] DT Zeffertt 1991 *Annual Survey of South African Law* page 544 accepts the distinction between implied and imputed waiver, but suggests that it would be more accurate to call the latter a 'fictive' or 'deemed' waiver.
[16] John Henry Wigmore, *Evidence in Trials at Common Law* (revised by JT McNaughton, 1961), vol 8 2328, cited amongst many other cases in *S v Boesman* 1990 (2) SACR 389 (E) 394g-h.

[20] The canon seems to us to be clearly right. Where an accused charges a legal representative with incompetence or neglect giving rise to a fair trial violation, it seems to us most sensible to talk of imputed waiver rather than to cast around to find an actual waiver.[17] Even without an express or implied waiver, fair evaluation of the allegations will always require that a waiver be imputed to the extent of obtaining the impugned legal representative's response to them. Rightly therefore, counsel on appeal accepted that the advocate's affidavit was admissible in assessing the accused's claims.

[21] The primary question is whether the failure of representation the accused alleges in fact occurred. The details of the accused's complaint are roundly denied by his legal representative. To some extent, of course, this is unsurprising, since his professional reputation is at stake, and there is a natural incentive to refute the claim. It will be a rare advocate indeed who admits either coercing the accused or not informing him of material consequences of trial-related decisions.[18]

[22] The assertion and counter-assertion are both on affidavit, and neither deponent has been tested by cross-examination. This need not however leave an appellate court helpless. The contest of two unprobed counter-assertions can, in an appropriate case, be properly explored to establish

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[17] We therefore cannot endorse the reservations about the utility of the distinction expressed in 1998 *Annual Survey of South African Law* pages 814-815. Nothing in *Kommissaris van Binnelandse Sake v van der Heever* 1999 (3) SA 1051 (A) paras 21-30 seems to us to impede this conclusion.

[18] But see *S v Majola* 1982 (1) SA 125 (A), where counsel admitted not asking the accused whether he wished to testify.

the truth. And this court has the inherent power[19] to develop if necessary a mechanism to establish which of the accused or his legal representative is telling the truth. This could be done in an appropriate case by a commission[20] or other suitable proceeding.[21]

[23] But this is not in our view an appropriate case. The question whether such a procedure need be developed will arise only where the accused's allegations raise a real possibility that there was incompetence or that bad advice was given or that misconduct occurred. In the present case the accused's allegations do not in our view pass the minimum threshold. They are so weak, contradictory and inherently improbable that we consider they must be rejected on affidavit without further inquiry. We say this for the following reasons.

(a) The accused was not an unsophisticated or illiterate person. On the contrary, he was a well-educated man who had completed his schooling at St John's College in Mthatha before starting employment with the bank in 1984. At the time of the robbery, he had had more than 14 years' service, and occupied a responsible position as the branch's senior

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[19] Constitution s 173:
'The Constitutional Court, the Supreme Court of Appeal and the High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice'.

[20] In *R v GDB* [2000] 1 SCR 520, [2000] 184 DLR (4th) 577 (SCC), the Alberta Court of Appeal faced issues of credibility and fact in a complaint about counsel's conduct of a criminal trial which it could not conveniently resolve itself. It therefore appointed a commissioner to conduct an inquiry into specific factual questions. The commissioner was appointed under a provision of the Canadian Criminal Code, but there seems to be no obvious reason why a comparable procedure could not be developed in the exercise of the constitutional power to protect and regulate the appellate process.

[21] In *S v Majola* 1982 (1) SA 125 (A), where the complaint occurred after conviction but before sentence was passed on the major count, this court envisaged that the trial judge himself could have heard the necessary evidence (see pages 131-2 and 133H).

treasury custodian. During his evidence in mitigation he appeared articulate and proficient. This does not mean that he could not have been bullied, misled or misadvised: but it does bear on how likely it was that this happened.

(b) The accused gave evidence and was cross-examined in a bail application not long after his arrest, which led to his being granted bail. He was thus aware of his right to testify, and indeed of the importance of exercising it. This does not mean that he may not have been incompetently persuaded not to give evidence at the criminal trial, or unjustly thwarted in a determination to do so, but again it bears on the likelihood of that happening.

(c) The accused's complaint against his advocate was serious. It was not only that his counsel had overridden his wish and a prior agreement that he would testify, but that counsel had failed to inform him that an inference could be drawn against him should he fail to testify and thus that counsel had 'misled' him about the law. Despite the magnitude of these infractions, and their momentous consequences, the accused made no mention of them on his first post-conviction court appearance on 10 July. It seems to us improbable that if these claims had been true he would not have raised them at this, the first available opportunity.

(d) Likewise, when he terminated the services of his counsel at the next court appearance, before testifying in mitigation, the accused did not

explain his reasons for wanting ‘to talk on my own’, despite having an opportunity to do so. This renders his grave claims implausible.

(e) What is more, the accused presented his complaint in conflicting terms: what he said in court and in his affidavit were materially different. During his evidence in mitigation, he claimed only that though he had wanted to testify, he was ‘advised not to speak’, and had followed this advice, trusting his lawyer. He made no mention of a prior agreement that he would testify, no mention of being prevented from speaking, and no mention of being misled by errant advice. The first time these latter claims arose was in the affidavit attached to his application for leave to appeal, after sentence was passed. The discrepancy casts further doubt on their veracity and points instead to their inauthenticity.

[24] In short, we find it inherently improbable that a well-educated accused with experience of testifying in previous proceedings would not either insist on giving effect to a previous agreement to testify, or complain immediately and in precise terms, at the first public opportunity, about having been unjustly thwarted in his wish to do so. There will no doubt be cases in which legal representatives mislead, misadvise, bully, obstruct or fail their clients; and courts will be astute to intervene when they occur. We are also alert to the fact that allegations of misconduct or incompetence by counsel may involve seemingly contradictory allegations, and that criminal accused may be in a vulnerable position in relation to their counsel. But in the particular circumstances we have set

out we find it impossible to attribute even the minimum plausibility to the accused's claims, and not to accept the exposition of his advocate. That account accords with the accused's first statement to the judge, which he advanced while testifying in mitigation, namely that he was advised not to give evidence, and that he accepted that advice.

[25] What his advocate's exposition adds to the accused's account is that the accused accepted this advice only *after* being properly advised about its possible consequences. Given the express conclusion the judge propounded in refusing to discharge the accused – that at the close of the state's case there was evidence 'justifying an inference that he may have been involved in the commission of the offence' – we find it improbable to a high degree that the accused's advocate did not take the elementary step of explaining to him the risk inherent in not testifying.

[26] As a matter of fact we therefore conclude from the circumstances surrounding the complaint, without the need for further inquiry, that it is unlikely that the accused was misadvised and misled as he claims. We conclude instead that his complaints against his counsel are to be attributed to chagrin at the fact that he was convicted.[22]

[27] This conclusion makes it unnecessary for us to weigh further what constitutes incompetence for fair-trial purposes, the extent to which the conduct here alleged indeed showed incompetence, the degree to which

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[22] Compare *S v Bennett* 1994 (1) SACR 392 (C) 398H:
'Regrettably one of the events which sometimes follows a conviction is recrimination from the convicted person who seeks to attribute his misfortune at having been convicted not to his own guilt, but to his

a court considering the conduct of the trial must be deferential in assessing counsel's decisions and conduct, and whether the conduct alleged resulted in a violation of the accused's fair trial rights.[23]

[28] But we think fairness requires us to add two observations. First, the record of Mr Gagela's conduct of the accused's case offers no basis for inferring any lack of proper competence, nor the want of basic integrity and skill that the accused's complaint imputes. Second, as will emerge from our discussion of the merits of the case against accused 1 and 2 that now follows, we cannot fault the advice he gave. That the trial resulted in the accused's conviction does not mean that the advice was wrong.

[29] To summarise: When an accused raises a fair-trial complaint involving allegedly incompetent legal representation that raises a dispute about what occurred between him and his lawyer, (a) the lawyer's response to the allegations is admissible in assessing the veracity of the complaint; (b) if the allegations raise a real possibility that there was incompetence or that bad advice was given or that misconduct occurred, it may be necessary for appropriate mechanisms to be developed to establish the facts; (c) in this case, the accused's complaint is inherently contradictory and implausible and must be rejected without further inquiry.

The case against accused 1 and 2 (Tandwa and Godolozi)

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counsel.'

[23] See *S v Halgryn* 2002 (2) SACR 211 (SCA) para 14.

[30] The circumstantial web in which the state sought to enmesh the two accused bank employees was spun by the evidence of a number of bank officials who explained the details of the branch's security system and its administrative protocols and procedures. The senior officer at the bank's main control room responsible for the functioning and monitoring of the computer-operated central 'Cosmos' alarm system, Mr Anthony Oosthuizen, sketched how the branch connections were monitored from Cape Town to check for alarms or after-hours activations. In this way, entries to the branch were monitored, while a microphone system for sound surveillance also existed. Three different types of alarm functioned: one activated on entry; one on the vault door; and a third inside the strong room or safe room. Distress alarms and wrong PIN (personal identification number) codes could also be monitored. The PINs were so configured that certain entries constituted a hold-up alarm. In other cases a key had to be turned in a certain direction to avoid activating the alarm.

[31] Oosthuizen testified that members of the branch carried panic buttons on their persons which on activation registered centrally as a panic alarm. The control panel or 'digi-pad' could be used on entry to send a distress code. Every entry and access was electronically recorded.

[32] The entries critical to the robbery were recorded in a printout to which Oosthuizen attested. This showed an exit sequence on 17 November 1998 at 19h14 next to the user number usually reserved for

the manager, indicating that the user activated the alarm on leaving. The record indicated further that at 05h03 the same user entered the branch and seven seconds later at 05:03:07 re-entered the pin code and deactivated the cash vault door. At 05:03:21 he activated the codes back into the digi-pad and deactivated the cash vault inside. At 07:26 a hold-up alarm was received and at 07:28:57 there was a manual isolation of the alarm which was reactivated at 07:29:16.

[33] The bank manager, Mr Mark du Plessis, testified that accused 1 was the officer in charge of custodianship. His job was to control and coordinate functions of the branch, cash security and supply, and to ensure cash holdings were maintained at low level, and to ensure regular clearance of surplus cash via SBV (the bk's dedicated security service). Du Plessis related from bank records that on Tuesday 17 November 1998 accused 1 took a lunch break between 13:00 and 14:00, and signed off at 17:45. The reason he gave for working late was 'treasury'.

[34] But this did not accord with what accused 1 told the police investigators in the tense hours of questioning after the robbery. According to Inspector Mxolisi Mqotyana of the Mthatha murder and robbery unit, accused 1 told him that on the day before the robbery he had left work after 14h00 to consult a doctor. When the police established that accused 1 had in fact only signed off work some four hours later, the discrepancy impelled the investigators to intense scrutiny of the three bank employees' versions.

[35] Du Plessis related that accused 2, the junior treasury custodian – who was accused 1's subordinate – signed off on the same day at 19:45 after taking a lunch hour between 13:00 and 14:00. His reason for working late was also recorded as 'treasury'. Du Plessis explained that a time lock on the strong room or safe door prevented access before effluxion of the period specified at the time of locking. The time lock operated independently of the alarm system. Both accused 1 and 2 were trained in its use. They were responsible on a daily basis for actually setting the lock to ensure that the strong room would be open at the required time the following day.

[36] It is evident from Du Plessis's evidence that branch policy was to keep as little cash as possible. The branch had a target of R4.5 million which was based on the average cash holdings for the month. The amount accumulated immediately before the robbery was more than double this. Du Plessis insisted that this was unusual: no cash had been cleared that week although it was the norm that cash would be cleared on a Monday or a Tuesday.

[37] Further significant testimony was that accused 1 and 2 had completed the strong room time lock register only until Monday 16 November 1998. The register had not been completed for the crucial day preceding the robbery, Tuesday 17 November. What is more, accused 1 and 2 did not sign the locking away register on that day. This was even though it was in existence when they left work on both days, and it was found in the

correct place on the morning after the robbery. The mystery of these two registers formed an intense focus of accused 2's cross-examination.

[38] Ms Veronica Groom joined the branch only days before the robbery, working with accused 1 and 2. She testified that on Tuesday 17 November 1998 she noticed that the cash had not been cleared. When she asked accused 1 why, he replied that they had been 'very busy' the previous day. Accused 1 and 2 asked her to be at work at 07h00 the next morning because there was still a lot of work to be done.

[39] Mr Mtutuzeli Sibindlana was the branch support officer in charge of treasury and the security system, and superior to accused 1 and 2. He testified that accused 1 and 2 decided when a money clearance was necessary: this was supposed to be done if the branch's cash holdings exceeded the daily limit of R4.5 million; though in cross-examination Sibindlana conceded that it was not uncommon for an amount of the order of R9 million to have accumulated in the bank.

[40] It was evident from Sibindlana's account of the robbers' conduct during the kidnapping that they had already been primed about procedures in the bank, who carried the keys, the details of the branch's security system, its link to Cape Town, and the panic buttons. It is therefore clear – and was not seriously disputed – that the robbers operated on inside information. The crucial question was its source. The finger of suspicion pointed unavoidably at the three bank employees entangled in the robbery. But it emerged that the robbers had treated Sibindlana more harshly than

accused 1 and 2, by threatening to place a hand-grenade inside his trousers, for detonation if he refused to cooperate. The impression formed by various state witnesses also was that Sibindlana appeared more traumatised after the robbery than accused 1 and 2, whom the same witnesses testified appeared relatively unscathed by the event.

[41] Less than a month before the robbery, the branch installed a new, highly sophisticated alarm system. The robbers knew its functioning as well as the alarm codes, even though the usual custodian was on leave. It is also unavoidably significant that the robbery occurred on a day the cash holding was at its highest and far above the average. In their positions respectively of senior and junior treasury custodian, the duties of accused 1 and 2 included ensuring that cash holdings were at a low level and that surplus cash was regularly cleared. Although cash was normally cleared either on a Monday or a Tuesday this did not happen that week. The R9.6 million the robbers managed to plunder was well above the branch target of R4.5 million.

[42] We must now consider the evidence of Dlamini, the accomplice witness. Dlamini testified that after one Jabulani Sando Nkobi approached him in Johannesburg to take part in the robbery, he travelled by kombi to Mthatha with Nkobi and one Oupa. They arrived in Mthatha in the early evening and went to a house in Northcrest. They were met outside by a person who introduced himself as ‘Khaya’ (the name of accused 5). In court, Dlamini identified that person as accused 5.

[43] Dlamini testified that on entering they found a man addressing a group of about 15 men, supplying information about the bank. Dlamini testified that accused 2 – whom he accurately described in his pre-trial police statement as short, stout, dark-complexioned and bespectacled – was that man. After about ten minutes, accused 2 left in a maroon Golf. This was later established to belong to accused 1's wife.

[44] Shortly thereafter Dlamini and all the other men left in different motor vehicles to a house in Ikhwezi Township, Mthatha. (The home of accused 2, where the hostages were in fact held, was in Ikhwezi.) At that house they took persons hostage and Dlamini again saw the maroon Golf. He also saw accused 1 and accused 2, as well as a light-complexioned man, whom he learnt 'was also working at the bank'. It is common cause that this person was Sibindlana.

[45] Later, during the long night preceding the robbery, Dlamini said it was accused 2 who was talkative, and 'who had the most answers'. Dlamini testified that he, accused 7 and accused 8 guarded the hostages through the night. The robbers were wearing balaclavas. In the morning a call came through to the cellphone of either accused 7 or 8, whereafter they all left in the maroon Golf for town, where they met up with accused 3, who was driving a white 'ambulance'. They abandoned the maroon Golf and the white ambulance took them to a homestead with a garage that had two doors. There he found Oupa and Nkobi, who gave him his share of the loot in a red and white bag: it was R435 000. At the trial, Dlamini

was shown photographs of accused 5's parents' homestead, which he identified as the place where he received his share of the loot. He testified that accused 7 and 8 were also given their share, after which they asked the Johannesburg robbers for a lift to Engcobo. They obliged before returning to Johannesburg.

[46] Dlamini's credibility was central to the state's case, and was the subject of vigorous attack both in the trial court and on appeal. The attack centred on the inherent plausibility of Dlamini's account, and on contradictions internal to his evidence, and between his court testimony and his prior statement to the police. The trial judge, who had the advantage of seeing Dlamini in person and at length, during a rigorous cross-examination at the hands of various defence counsel (which covers 287 pages of the record), concluded after applying a cautionary analysis that Dlamini had given credible and reliable evidence. We find his conclusion fully warranted. Prototypically for an accomplice, Dlamini tended to minimise his own involvement in the crime: he equated his role to that of accused 7 and 8, whom the judge rightly described as being only the 'foot soldiers' of the robbery. But he proved an intelligent, secure, confident, responsive and resourceful witness the credibility of whose account unrelenting cross-examination only tended to reinforce.[24] His

[24] One defending counsel imprudently asked Dlamini, 'Would you consider yourself to be an honest person?', to which he responded: 'My Lord I am not honest and that is why I am here today.'

account was largely coherent, and the contradictions relied on to criticise it were relatively insubstantial.

[47] Even though counsel pointed out that Dlamini was arrested in November 1999, after the trial had already started (creating the possibility that the police put him up to all he said), it is quite apparent that his account of the robbery was neither fabricated nor suggested to him; and counsel on appeal rightly conceded that he was present during the events he described and that he was an accomplice to the crime. The question therefore is not whether his evidence is wholly figmented, but whether and to what extent the details implicating accused 2, 3, 5, 6, 7 and 8 are reliable. Given the inherent quality of Dlamini's evidence, and the extent to which his exposition found corroboration in other evidence, our general conclusion is that they can safely be relied upon.

[48] Accused 1 elected not to testify or to call any witnesses in his defence. Accused 2 came to the stand. He denied any involvement. He was subjected to a sustained, meticulously prepared and tenacious cross-examination, during which prosecuting counsel took care to establish that he and accused 1 were jointly responsible for the monies in the safe, for clearing them and for setting the locks on the safe doors. It was also established that accused 1 and 2 could not act independently of each other since the junior treasury custodian (accused 2) could not depart from bank procedures without the knowledge and acquiescence of his senior (accused 1).

[49] In his evidence accused 2 was quite unable to explain satisfactorily why he and accused 1 had not completed the strongroom time lock delay register on the day preceding the robbery. He testified that the register went 'missing' on Monday 16 November 1998; yet it had been put to the state witness that it went missing only on the Tuesday. Although other means of filling in this essential administrative record were readily available – including a replacement register – the accused failed to use these. Instead, he claimed to have written down the crucial information on a piece of paper ('we filled in a blank paper', he said). Yet this was nowhere to be found after the robbery – while bank officials readily located the time lock delay register, uncompleted, and handed it to the police. Accused 2 testified that he enquired from Sibindlana about the allegedly missing register on 16 November 1998. This however contradicted the version put to the state witnesses. Groom testified that though she was working closely with accused 1 and 2, no complaint was made to her about the allegedly missing register. The accused's account was rankly implausible.

[50] And why had he and accused 1 set the strongroom time delay lock to open over an hour earlier than usual? Initially accused 2 testified that he had set the alarm in units of four hours, but changed this under cross-examination when it became apparent that this did not square with the actual time, or with when they left work (when he claimed they had set the device). Although accused 2 claimed to have set the time delay lock on

previous occasions to open an hour earlier than usual, the meticulously recorded history of the settings contradicted this. Here it is important to note that the time lock disengaged at 05:45 instead of the usual time of 07:30. This was the first time the lock had been set to open on a quarter-hour. That something most unusual had occurred was evident; yet accused 2 was unable to account for it with any plausibility.

[51] Accused 2's evidence was riven with other inconsistencies. Initially, he testified that the money was to be cleared on the Tuesday preceding the robbery, but under cross-examination he first said there was no need to have the cash collected – and then immediately changed this again. He testified that the robbers arrived at about five or ten minutes after he arrived home, having parted with accused 1. However, his evidence at the bail application indicated that he had been home for approximately two hours before the robbers arrived.

[52] The circumstantial evidence indicated overwhelmingly that when the robbery took place things were profoundly amiss at the branch, in ways that pointed to the guilty complicity of accused 1 and accused 2. There was an abundance of evidence calling for an answer. Accused 2 attempted an answer – but found his credibility flayed in a relentless and devastating cross-examination, by the end of which there was moral certainty that he had been party to the crime.

[53] Accused 1 chose to call no witnesses, and to shun the witness stand himself. That was his constitutional entitlement.[25] Yet his exercise of that right does not suspend the operation of ordinary rational processes.[26] The choice to remain silent in the face of evidence suggestive of complicity must in an appropriate case lead to an inference of guilt.[27] It is true that, in contrast to the other accused, there was no direct evidence implicating accused 1 in the robbery. The state's principal witness, Dlamini, though mentioning accused 1's presence among the hostages, suggested no complicity on accused 1's part. Nor – because, no doubt, they were arrested on the day of the robbery – were the first two accused discovered with any loot.

[54] Yet those accused were jointly responsible for the money in the safe, for clearing the cash, and for setting the locks. For the two days before the robbery, they did not complete the required documentation. They set the time lock to disengage over an hour earlier than normal, allowing the robbery to take place before branch officials arrived for work. The lock was also set, inexplicably, to a quarter-hour, signalling a striking deviation from the norm. The amount of money accumulated, together with the impression of various witnesses that accused 1 and 2 survived the apparent ordeal rather too blithely (though the trial court rightly did not

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[25] C Theophilopoulos provides a thought-provoking analysis of the 'right' in 'The So-Called "Right" to Silence and the "Privilege" against Self-Incrimination: A Constitutional Principle in Search of Cogent Reasons' (2002) 18 SAJHR 505.

[26] *Osman v Attorney-General, Transvaal* 1998 (4) SA 1224 (CC) para 22; *S v Boesak* 2000 (3) SA 381 (SCA) para 47; 2001 (1) SA 912 (CC) para 24.

consider either of these intrinsically decisive), add two further wafers of suspicion adding to the pattern pointing to complicity.

[55] It is further true that the state's inferential case rests entirely on circumstance, and that no direct physical evidence links accused 1 to the crime.[28] We have therefore given careful thought to the possibility that, despite the accumulation of suspicious circumstances, accused 1 might have been guilty only of carelessness in carrying out his duties. Yet it is here that his choice not to give evidence becomes pivotal, for while it is not inconceivable that the accumulated occurrences could have been explained as sloppiness, they were not so explained; and it is the absence of that explanation, plausibly advanced, that becomes decisive.

[56] In his testimony accused 2 tried to explain the lapses as oversights and remissnesses, but failed categorically. Since accused 1 chose not to testify, we have no reason to believe that he would have fared any better. While prosecuting counsel, Mr Carpenter, shredded the credibility of accused 2, he had even more material against accused 1. It was he who was in a position to explain the deviations from procedure and the failure to complete the registers, and it was he who could have told the court whether accused 2 had acted solo, without his own participative complicity. Accused 1's failure to supply answers on any of these aspects

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[27] 'The accused cannot be compelled to give evidence but he must risk the consequences if he does not do so': *Murray v DPP* [1994] 1 WLR 1 (HL) 11C, per Lord Slynn.

[28] Contrast *Murray v DPP* [1994] 1 WLR 1 (HL), where an adverse inference was drawn from failure to testify when physical evidence (inter alia fibre and mud particles) linked the accused to the crime; and *S v Boesak* 2000 (3) SA 381 (SCA); 2001 (1) SA 912 (CC), where a letter bearing the accused's signature was held to

inexorably strengthens the state's case, because in the absence of anything to gainsay it, the circumstantial web pointed overwhelmingly to his complicity:

'… if aspects of the evidence taken alone or in combination with other facts clearly call for an explanation which the accused ought to be in a position to give, if an explanation exists, then a failure to give any explanation may as a matter of common sense allow the drawing of an inference that there is no explanation and that the accused is guilty.'[29]

[57] The trial court correctly did not focus on the separate pieces of evidence as fragments, but considered their totality. In the face of the damning circumstantial evidence suggesting the involvement of accused 1, van Zyl J was in our view correct to conclude that the evidence established his guilt.

[58] Against accused 2 there was in addition the direct evidence of the accomplice Dlamini, who said that he addressed the robbers' pre-meeting. That constituted a 'dock identification', the nature of which we discuss later: for now we say only that we give his identification weight in the context of the other evidence against accused 2, particularly since Dlamini accurately described accused 2 in his police statement.

[59] Accused 2's statements to the police on the day of the robbery also implicate him. According to inspector Mqotyana, whose evidence the trial court rightly accepted, accused 2 gave the investigating team information

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constitute prima facie proof.

[29] *Murray v DPP* [1994] 1 WLR 1 (HL) 11G, per Lord Slynn, in whose judgment the other judges concurred.

implicating accused 3, and led them to the house of accused 3, eventually putting them on the track of the other accused. The trial court was not deterred in concluding that accused 2 was guilty by the fact that in May 1998, six months before the robbery, he submitted an 'explanation letter' to the then branch manager, Mr Adams, recounting an approach to him by a suspicious character who sought to involve him in preparations for a robbery. That accused 2 was so solicited, and that he rejected the advance, does not diminish the strength of the evidence proving that on a later fateful occasion he did indeed make himself party to robbing the bank.

[60] We therefore fully endorse the trial court's rejection of the evidence of accused 2 and its conclusion that his disclaimers were not reasonably possibly true.

The case against accused 3 (Tekula)

[61] The accomplice Dlamini testified that accused 3 was present at the pre-robbery meeting at 'Khaya's place' (the house of Khaya Gasa, accused 5, in Northcrest) on the night of Tuesday 17 November 1998. According to Dlamini, accused 3 was armed with a pistol. When Dlamini arrived at Northcrest at about 19h45 – having travelled with two other robbers from Johannesburg – accused 3 was already there. The host, accused 5, introduced them 'by names one by one'. Pressed in cross-examination about the identity of the accused, Dlamini stated that 'if you commit a

crime with a person you can never forget that person'. According to Dlamini accused 3 was driving a Red Cross vehicle, which Dlamini referred to as an 'ambulance'. Accused 3 testified that he was a house manager at the Red Cross, Transkei, in the primary school nutrition programme. For his employment he drove a white Kombi which bore the legend 'Red Cross Society Transkei', as well as red crosses on the front and on its passenger and driver doors. Indeed, accused 3 was arrested late on the evening of Wednesday 18 November while driving this Red Cross vehicle. Dlamini's evidence clearly hit the mark.

[62] It is also not without significance that accused 2 pointed out accused 3, who took the police to look for accused 6 and to the house of accused 5, both of whom were implicated in the robbery. In addition, an amount of R60 000 was recovered at the home of accused 3 and at the home of the mother of his wife (who was accused 4). The money was de-clipped and in bundles with rubber bands, as money was stored in the bank's safe.

[63] In the face of this evidence, accused 3 advanced the version that he obtained the cash on 17 November 1998 from his friend Mr Lisa Noah (since deceased), whose life was being threatened, and that on the night of the robbery he had gone in his Red Cross vehicle to Mthatha Mouth, where he visited his uncle who performed a traditional ceremony for him. The trial judge rejected this version as false beyond reasonable doubt. His reasons are persuasive. During cross-examination, accused 3 varied his version, testifying that Noah gave him the money because Noah was

going to sleep at his girlfriend's house. Initially he testified that the money was found on him after he was tortured. He later testified that the money was found when his clothes were being removed at the commencement of the torture. He also testified that he had to move the money from his house to his wife's parental home because of the possibility of robbery.

[64] The only witness accused 3 called, his uncle Mr Milton Tekula, contradicted his evidence in material respects. The trial court described accused 3 and his uncle as unimpressive witnesses and in our view correctly rejected their evidence as false wherever it conflicted with that of the state, and concluded that it could not reasonably possibly be true.

[65] Dlamini also performed a 'dock identification' on accused 3, whom he met before the robbery, and with whom he travelled after the robbery to Tabase, where they received their share of the loot. In the context of Dlamini's other evidence relating to accused 3, particularly the 'ambulance', we afford his dock identification credence. Accused 3 was therefore correctly convicted.

The case against accused 5 (Gasa)

[66] Accused 5 was arrested in the early morning hours of Thursday 19 November 1998, the night after the robbery. By this stage accused 1 and 2 as well as accused 3 and his wife were under arrest. Acting on information from accused 2, Mqotyana and Detective Sergeant Loyiso Mdingi from the Mthatha murder and robbery unit went to his house in

Nyathi Crescent, Northcrest. On arriving they tried unsuccessfully to attract a response from within and were eventually driven to ask the public order policing unit to use teargas to gain entry ('to obviate a situation,' Mqotyana explained, 'where we would be shot by people from inside'). Mdingi testified that before searching he enquired from accused 5 (who was with his girlfriend) whether there was anything untoward within: accused 5 informed him that there was an amount of R37 550 in one of the wardrobes, which, he said, his mother had lent to him to start a pizza shop in a shopping complex. Throughout the trial accused 5 maintained this explanation.

[67] The police took accused 5 to his parental home in Tabase, and then arrested him. He told the police that he derived his income from running two taxis and that he occasionally sold second hand motor vehicles purchased from auctions.

[68] Acting on information supplied by accused 5's brother, Mdingi (who was the principal investigating officer in the case) proceeded on 31 December 1998 to accused 5's family home, where he retrieved fragments amongst ashes from a fire.

[69] Accused 5, when he testified, was also shown the photographs from which Dlamini identified the place where the loot was shared. Accused 5 confirmed that the homestead depicted was his mother's shop at Tabase. He denied Dlamini's incriminating allegations, claiming he knew nothing of the robbery and none of the accused before his arrest.

[70] Yet accused 5's account of his whereabouts during the robbery strained under implausibility. Accused 5 stated that in the early evening of the 17th November 1998 at about 19h00 his two taxi drivers arrived to check in the day's takings. When they left he watched television and went to sleep. On the morning of 18 November, his sister Zandile awoke him to tell him that she had received a call that their mother was ill. They then left for Tabase but found that his mother was not as ill as reported. As for the hubbub outside his house after the police arrived, he claimed to have been utterly unaware of it until he detected 'smoke' inside.

[71] Yet accused 5 was unable to explain why, if he knew his movements on the night of the 17th and the morning of the 18th, he gave no account of them either in his bail application or in his evidence in chief, and why no version at all was put in this regard to the state witnesses who implicated him, particularly Dlamini. Nor could he explain why until his own evidence there had been no mention at all of Zandile.

[72] Accused 5 called his mother, Mrs Agnes Kholeka Gasa, and his sister, Ms Zandile Gasa, as witnesses. His mother confirmed the loan to accused 5 but fared dismally under cross-examination, her account unravelling swiftly under implausibilities inherent to it and contradictions with accused 5's version. Several times she failed to answer entirely, exposing her evidence as born of family fealty. The sister, who was called only to verify the presence of accused 5 at his home on the night of the robbery, fared

similarly, contradicting her brother and making an altogether implausible showing.

[73] The critical elements of the state case against accused 5 were his possession of an unavoidably suspicious stash of cash (in declipped, rubber-banded bundles), his failure to respond to obtrusive police attempts to gain his attention on the night his house was surrounded, coupled with his lame explanation for his conduct, plus – most centrally – the incriminating evidence of Dlamini.

[74] Dlamini's evidence wove a taut web around accused 5. First, though he was unable to take the police to the precise site of the pre-robbery meeting in Northcrest (prosecuting counsel established that the house's intricate location would have made it hard for a stranger to re-locate after a single visit), he stated that the host introduced himself as 'Khaya'. What is more, he took the police to the scene where the loot was shared at Tabase – which corresponded tellingly with the location of accused 5's parental home. On the accused's own version, he was indeed there on the morning after the robbery, though Dlamini did not see him. In these circumstances we consider Dlamini's identification of accused 5 as the Khaya who hosted the pre-robbery meeting in Northcrest to be reliable, and conclude that the state proved his complicity in the robbery beyond reasonable doubt.

The case against accused 6 (Rozani)

[75] On Thursday 19 November, acting on information from accused 2, Mqotyana and Mdingi, with Inspector Ohlsson Nceba Miti, went to various localities in Mthatha looking for accused 6 but did not find him. He was eventually arrested on 8 December at a hotel in Melrose Arch, Johannesburg, by Detective Inspector Wayne Kukard and Superintendent Gerhardus Johannes Kruger of the Brixton murder and robbery unit. Accused 6 was arrested with one Skumbuzo Aphane. On their arrest the police confiscated a cell phone as well as a green Honda Civic and a false identity card (a BMW 328i was seized from Aphane). At the trial the state proved that the Honda was registered in the name of accused 6 on 2 December 1998, and that he had bought it just before for R56 000 cash.

[76] Kruger and Kukard thereafter questioned accused 6 and Aphane about the robbery. The admissibility of any statements accused 6 may have made to them was contested. Kukard and Kruger testified that during the questioning Kruger made detailed notes of accused 6's answers but that this record was destroyed when Kruger's office was sprayed with a fire extinguisher (the state led evidence establishing the destructive effects of this event).

[77] The state sought to rely on the statement given to Kruger as a confession which it contended was admissible in view of the fact that Kruger was a justice of the peace. The trial court in these circumstances decided after argument that oral evidence was admissible as to the contents of a written confession which had been destroyed. The court

ruled that Kruger was a commissioned officer capable of receiving a confession and that oral evidence of the contents of the destroyed confession was admissible. In view of the abundance of other evidence conclusively implicating accused 6, we refrain from addressing this question.[30] We therefore leave out of account Kruger's evidence regarding accused 6's oral confession.

[78] The morning after the arrest of accused 6, Senior Inspector Van Olst of the Brixton unit requested Captain Henning van Aswegen of the Pretoria murder and robbery unit to undertake a pointing out by accused 6 in what the witnesses referred to as the Transkei. The team accompanying Van Aswegen consisted of Superintendent Henry Beukes, organiser; Sergeant Bhuti Douglas Dlamini, interpreter; and Sergeant Zachareas Johannes de Lange, photographer. The same day, Van Aswegen and his team left Johannesburg with accused 6. They travelled to Mthatha via Pietermaritzburg (where they spent the night) and Kokstad. On the way accused 6 requested to call his girlfriend, Ms Nonzuzo Nontutuzelo Mngcotana, which he did on Van Aswegen's cellphone.

[79] Van Aswegen made detailed notes on the pointing out form. Accused 6 made hand-written insertions on the same document, appending his signature. These indicated that he understood everything on the form which had been translated to him in isiXhosa; that he agreed with the

[30] In *S v Tshabalala* 1980 (3) SA 99 (A) the state did not adequately prove that the original confession was in fact irretrievably destroyed or lost; secondary evidence was therefore not admissible, and the conviction was overturned.

contents; that the information written on it was the truth; that he understood his rights; and that the only person he wanted to contact was his girlfriend.

[80] The photo album depicts accused 6 at all stages of the trip and all points. According to the notes, on arrival in Mthatha accused 6 pointed out the Mthatha Standard Bank branch as the bank he and his accomplices had selected to rob, followed by the explanation that 'during the planning of the robbery it was decided on this bank as the finger man was employed there'. A photograph shows accused 6 outside the bank pointing to it (the trial court rightly rejected accused 6's preposterous suggestion that he was in fact pointing to his attorney's offices). Another note with accompanying photograph records that accused 6 pointed out a homestead in Libode, apparently belonging to a policeman called Ngcobo, said to have been implicated in the robbery, where the robbers met some four to five times to plan it.

[81] After the pointing out, on 10 December Van Aswegen's team handed accused 6 over to captain Khayalethu Gwayi of the Mthatha murder and robbery unit, who proceeded to question accused 6 about the robbery. Thereafter accused 6 was detained at the Idutywa police station. The next day, 11 December 1998, he was taken to the Mthatha Magistrate's Court for his first appearance, and thereafter detained first at the Mthatha central police station cells and then at the Wellington prison. The trial court, in our view correctly, found insufficiently plausible the accused's

claims that Gwayi and others assaulted him before his first court appearance.

[82] On 29 December accused 6 was booked out and taken to Mdantsane police station by inter alia Gwayi, Mdingi, Mqotyana, Mithi and sergeant Nongogo (who did not testify). These police officers took accused 6 to Corona in search of his younger brother, Mr Zingisa Rozani. Night had fallen by the time this trip was undertaken. After the younger brother was located, the police took the two to Zandukwana in the district of Libode. There accused 6 pointed out a spot from which the police dug out a bucket which contained money. Accused 6's sister Ms Nomhlophe Sigodi was present. Accused 6 was returned to Mthatha Central Police Station where he was detained at around 02h00 on 30 December 1998. The next day accused 6 was booked out and taken to the Standard bank where the money was counted: it amounted to R91 580.

[83] Thereafter accused 6 was taken to the Wellington prison where he was detained. In the evening, he was examined by Dr Lubanga as well as by Sister Mhlalase. They recorded a number of lacerations and multiple bruises over large parts of his body.

[84] A trial within a trial was held when the state sought to rely on statements by accused 6 to members of the Mthatha murder and robbery unit and the pointing out of the money at Zandukwana on 29/30 December 1998. The objection was that accused 6's rights to a fair trial had been violated and that any alleged statements were not made freely

and voluntarily. In this regard the defence alleged that accused had been tortured and assaulted into submission.

[85] The state called Mr Mvelisi Elias Arosi, the head of Wellington Prison. He testified that he was not on duty on the 30th of December 1998 when accused 6 was admitted at Wellington prison. He stated that his deputy, Siyla, who was on duty when accused 6 was admitted, would not have admitted him had he had any visible wounds: the prison's policy was that they would not accept or admit any awaiting trial prisoner if he had visible injuries. That accused 6 was admitted (the state argued) must therefore mean that he had no visible injuries on 30 December.

[86] The defence called Dr Lubanga to relate what he found when he examined accused 6 during the evening of 30 December 1998. Sister Mhlalase was also called to state her own findings when she examined the accused that evening.

[87] At the end of the trial within a trial, the trial court ruled provisionally that the pointing out on 29 December was admissible; but the trial judge reversed this ruling at the end of the trial on the basis that to the knowledge of the police officers in question, accused 6 had a lawyer at that stage, with the result that the pointing out in the absence of his legal representatives violated his right to a fair trial.

[88] The trial court made no finding on whether accused 6 was assaulted before the pointing out. Despite the evidence of Arosi about the prison's admissions procedures, we find it abundantly established that accused 6

was assaulted after the police booked him out of the prison. The weight to be attached to the procedures wanes in the face of the incontrovertible evidence of Dr Lubanga and Sister Mhlalase, who documented the injuries to the accused. That they were inflicted by the police – principally Mqotyana and Mdingi – in the course of their questioning of accused 6 is an unavoidable inference. We therefore find for this additional reason that the statements accused 6 made on 29-30 December to the police are inadmissible against him.

[89] It follows, in our view, for reasons we expand later in relation to accused 8, that accused 6's pointing out of the buried bucket of money, together with the discovery of the bucket itself, are inadmissible against him. This is 'real' evidence – in contradistinction to 'testimonial' evidence (such as a confession or admissions) – but it is inextricably tainted with the blemish of the police brutality that procured its discovery. It is not fit for receipt in a civilised legal proceeding.

[90] This finding makes it unnecessary for us to consider accused 6's explanation (which the trial judge rejected) for his possession of the money in the bucket and his reasons for hiding it.

[91] What remains of the state case against accused 6 are his suggestive access of affluence after the robbery (which he was unable to explain plausibly), but far more significantly his prejudicial admissions to van Aswegen and his team on 9/10 December during the pointing out trip to Mthatha. Accused 6 also made an incriminating statement to Gwayi in

Mthatha after being handed over to Gwayi's team. Those statements do not constitute a confession to the robbery, and were not tendered as such. Yet they tie the accused inextricably to its commission. His attempts to deny authorship of the incriminating statements, and to explain away what was said to van Aswegen and to impugn their voluntary nature were far-fetched and the trial judge rightly rejected them. There is no reasonable explanation for what the accused said to van Aswegen and Gwayi other than that he was deeply implicated in the robbery. With this corroboration, we also accept Dlamini's 'dock identification' of the accused. His guilt was established beyond reasonable doubt.

The case against accused 7 (Tshefu)

[92] Early on the morning on 11 December 1998 members of the Mthatha murder and robbery unit with members of the Mdantsane murder and robbery unit went to the home of accused 7's girlfriend, Ms Nombasa Primrose Ntaka, in Zone 5, Zwelitsha. She took them to a flat in King Williams Town where the police obtained information as to the whereabouts of accused 7. Gwayi and the members of his unit followed this lead while detective inspectors Kayalethu Sidwell Mbelu and Luvuyo Mapantsela, travelling in a separate motor vehicle, went with Ntaka the police station in Mdantsane's NU12 section. Ntaka later led the police to her parental home at Tolofiyeni. On arrival she entered the house and

emerged with a bag full of money, with which the party returned to the NU12 police station.

[93] There the police in effect confronted accused 7 with Ntaka and the retrieved money, for Gwayi and the other members of his unit had in the meanwhile found accused 7 at an address in Mdantsane and arrested him. They found him in possession of an unlicensed firearm with eight rounds of live ammunition. They then took him to the NU12 police station in Mdantsane where Gwayi questioned him. Mbelu and the Tolofiyeni party subsequently arrived at the station with Ntaka and the money. The police testified that the confrontation pitched accused 7 into a confessional and cooperative mode. The police then took accused 7 and Ntaka with the money to the East London branch of Standard Bank, where it was found to amount to R304 565.

[94] The state proved that on 20 November 1998 – two days after the robbery – Ntaka purchased a Jetta CLI motor vehicle for R46 000 in cash, and that on 25 November, driving the same Jetta, accused 7 arrived at a motor dealership to get a quote on a damaged Daewoo vehicle (which he said was for his girlfriend), laying down an R8 000 cash deposit for repairs. The state further proved that on 28 November the Jetta accused 7 had been driving was towed into a repair shop after being in an accident, and that on 30 November accused 7 paid R15 000 cash as a deposit for its repair. During the same transactions, accused 7 inquired

about purchasing a house for about R150 000, and was taken to view one.

[95] The state called Ntaka to give evidence, but she proved refractory, contradicting her police statement. After a contested application the court declared her a hostile witness whom the prosecutor was entitled to cross-examine. She testified that accused 7 was her boyfriend and that he handed her an amount of R350 000 for safekeeping, but that this was in October – before the robbery – and that the cash emanated from the taxi association to which accused 7 belonged. But her credibility was frayed and the trial court rightly regarded her as discredited.

[96] Gwayi testified that accused 7 did not cooperate initially – but that when during his interrogation Mbelu returned from Tolofiyeni with Ntaka and the money, accused 7, on seeing Ntaka, buckled, apparently defeated, and admitted his involvement, going on to implicate accused 8 and other persons. Defending counsel sought to cast doubt on the police account and pointed to a number of contradictions between the various policemen's exposition of the turn-around. The contradictions are in our view insignificant. That a traumatic confrontation occurred that led to a dramatic turnaround seems evident to us. The trial judge correctly found the essential elements of the police version, which in the case of accused 7 was not tainted by allegations of violence, to be true.

[97] The case against accused 7 pivoted on his munificent acquisitions (betokening an implausibly sudden access of affluence), the discovery a

huge stash of cash (again, de-clipped and rubber-banded into bundles), and his self-incriminating statements to Gwayi after Ntaka's arrival at his interrogation. We find those elements amply establish his guilt. Accused 7 insisted that the cash retrieved was given to him for safekeeping by Mr Mbuyiseli Robiyana, executive member of the taxi association for which the accused was a taxi rank manager. Although Robiyana came to testify in support of this version, cross-examination revealed it to be specious and unworthy of credence. The trial judge correctly rejected it.

[98] The state also invoked the evidence of Dlamini, who testified that he together with accused 7 and 8 guarded the kidnapped families through the long night preceding the robbery. The morning after, he and accused 7 and 8 were transported to a garage in a homestead in Tabase where they received their share of the loot. Accused 7 and 8 then requested a lift from Tabase to Engcobo. It is not without significance that Dlamini testified that during the robbery accused 7 was wearing 'a military type' lumber jacket; when accused 7 testified, it emerged that he was a soldier first in the Ciskei defence force and then South African National Defence Force from 1985 to 1997. Given the other incriminating evidence implicating accused 7, we consider that Dlamini's dock identification of accused 7 adds further weight to the state's case.

[99] We conclude that the guilt of accused 7 was effectually established.

The case against accused 8 (Ngubelanga)

[100] Accused 8 was apprehended on the morning of 24 December 1998 in section NU15, Mdantsane. He was arrested by, amongst others, detective inspectors Bonginkosi Kwinana and Lizo Elvis Mzimane of the Mdantsane murder and robbery unit, and Mdingi and Mapantsela from the Mthatha unit. A fracas ensued. Mapantsela's spectacles were broken, Mdingi was punched and the accused sustained injuries (particularly a bleeding wound on his forehead). The police said that the accused (whose right hand was encased in a plaster of paris cast) was belligerent from the outset, resisting arrest and assaulting the officers who had come to arrest him. The accused said the police assaulted him when he refused them permission to search his house.

[101] After he was subdued and the house searched (nothing being found), accused 8 was taken to the NU12 police station, where Gwayi and his team from Mthatha questioned him. It is not in dispute that the accused was not warned of his rights at his arrest, though the police evidence was that Mapantsela supplied the deficiency at the police station. The police witnesses claimed that there accused 8 became co-operative and admitted to involvement, even informing them where his share of the loot was – at Zinkomeni, Mdantsane. So the party proceeded to Zinkomeni. But nothing was found. The party returned to the police station, where there was further questioning.

[102] During the second round of interrogation the accused now apparently said his share of the loot was at his home in Seymour, near Queenstown.

The police put him in the back seat of a vehicle. Kwinana was driving, with Mdingi in the front passenger seat. Accused 8 was in leg irons. He had not been fully handcuffed because of the plaster cast on his right hand. The child lock was engaged to prevent him from opening the door.

[103] At Seymour accused 8 took the police to a house which they searched comprehensively – to the extent, on their own account, of demolishing a corrugated iron toilet to its very foundations. But again they found nothing. The next undisputed fact is that accused 8 was taken to the Seymour police station, where Kwinana laid a charge against him of attempting to escape from custody. Gwayi was summoned and hastened to the scene.

[104] Entry 747, which Gwayi made at 17h25 in the station's occurrence book, states that the accused 'has shown suicidal tendencies by trying to jump out of the police car'. The entry proceeds to state that 'fortunately', since the accused was partly handcuffed and wearing leg irons, 'he could not successfully escape', 'but however he did sustain some head and whole body bruises'. 'He has not', the entry proceeds, 'been seriously wounded'. Finally, the writer adds that the entry has been made 'solely to safeguard any malicious allegations that might be levelled against the whole Ministry of Safety and Security inclusive of the South African Police Services'.

[105] Accused 8 gave a disturbingly different account. He stated that at no stage did he co-operate with the police at NU12, but that they assaulted

him and tortured him using a rubber tube and bucket of water. He testified that when the police found nothing in Seymour they took him to a minor dirt road, where Mdingi took a nylon rope and tied him to the vehicle. He was then dragged for some distance. Because of this maltreatment, he informed the police that the money was at his cousin's house in section NU17, Mdantsane.

[106] The police, by contrast, claimed that a further interrogation followed at Seymour police station at which the accused cooperatively volunteered the further information. It is common cause that the party proceeded to NU17, Mdantsane, where after the accused instigated yet more diversion and wild goose pursuits, he eventually indicated a house from whose owner the police obtained telephonic permission to enter. This they did by breaking in. Inside, accused 8 pointed out a black suitcase with brown leather trim in the corner of a room. The police opened the suitcase and found what they had been seeking: money. They also found a red and white bag which contained an AK 47 rifle and an empty magazine. The money, when later counted at the bank, was found to amount to R176 000. Accused 8 was taken to Mthatha Police Station. He was never charged with possession of the AK 47 rifle. The police later confiscated a large number of items from his house, as well as an Isuzu bakkie.

[107] Mdingi stated that on 25 December 1998 he took accused 8 to Butterworth hospital for treatment. Accused 8 was also at some stage detained at the Wellington prison where a medical file was opened. That

contained detailed notes of his injuries. When he applied for bail on 13 January 1999 – nearly three weeks after the traumatic trip to Seymour – the magistrate noted 'for the record' that at a distance of 5 metres he could see 'extensive bruising on the abdomen, the chest, the left elbow', plus 'weal marks' over 'the whole of the back'.

[108] During the trial and on appeal the prosecution relied on the police version plus the evidence of Dlamini, who as previously related testified that he had met accused 8 in Northcrest and then spent the long night together guarding hostages at Ikhwezi. Dlamini testified that he, accused 7 and 8 stayed in the house the whole night (balaclavaed), and that they left in the morning after a telephone call; and that after accused 7 and 8 had taken their share of the loot at Tabase they were given a lift to Engcobo.

[109] Dlamini testified that accused 8 was wearing a black leather jacket at the time. He pointed out accused 8 in court, saying he was wearing the same leather jacket.

[110] During the trial the defence objected to the evidence of the pointing out on the basis that it was not freely and voluntarily obtained. This necessitated a trial within a trial. The accused testified that he took the police to the money under duress, after torture – but that in truth the cash did not come from the robbery, but belonged to his taxi association. This version Robiyana's testimony, invoked also by accused 7, was invoked to cement, but the trial judge resoundingly rejected it.

[111] Though the trial court found accused 8 an unimpressive witness, it concluded that his admissions during the pointing out procedure were not made freely and voluntarily. We have no doubt that this ruling was correct. The police account of the trip to Seymour and their dealings with accused 8 before and after would have been merely absurd if it did not provoke such disquiet about the brutality, indiscipline and absence of scruple it revealed. The contradiction at the heart of the police version was that even though the accused took them on repeated wild goose chases, in which no money was located, he was nevertheless voluntarily cooperating all along. The implausibility at its heart was that despite sustained preceding misinformation, the accused eventually took the police to the money without the supervention of improper means.

[112] In its details, too, the police evidence lacked any veneer of credibility. The police would have had the court believe that a semi-cuffed man with an arm in plaster, restrained by leg-irons, seated in the back of a child-locked car with two policemen in front, succeeded in opening the door at speed and tumbling out in an effort to escape – all this, it is to be remembered, while his disposition was and had been throughout one of full cooperation. And why, if he managed to exit from a car travelling (according to the police) at a high speed, was he not much more seriously injured? The injuries the magistrate and the medical personnel recorded give the lie to the version the police concocted about the accused's injuries.

[113] Despite ruling that the statements accompanying the pointing out were inadmissible, the trial court admitted the real evidence (the money and AK 47) the procedure yielded. The trial judge had regard to s 35(5) of the Constitution:

> 'Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.'

Accepting in favour of the accused that the evidence was obtained in a manner that infringed his rights under s 35(5), the judge concluded that its admission would not render the trial unfair or be otherwise detrimental to the administration of justice:

> 'The evidence is real evidence which existed independently from the pointing out made by accused no. 8. … it was common cause that the accused was in possession of the money and he provided an exculpatory explanation for his possession thereof. The inclusion of such evidence would not render the trial unfair within the meaning thereof and on any of the aspects as contained in Section 35(3) which aspects are not intended to be exhaustive. On the contrary, and especially in the light of the accused being in a position of providing an exculpatory explanation for his possession thereof it would in my view be detrimental to the administration of justice to exclude such evidence.'

[114] A further important factor, the judge considered, was 'the fact that the evidence in question was physical evidence that existed irrespective of the violation of the Constitution':

> '[A]s stated in case of *R v Collins* [(1987) 33 CCC (3rd) 1 (SCC)], a Canadian decision, such evidence will rarely operate unfairly for the reason alone that it was obtained in a manner that violated the Constitution. It existed irrespective of the violation of the Constitution and does not render the trial unfair.'

[115] On appeal accused 8 contends that the real evidence should be excluded because it was unconstitutionally obtained, and that admitting it rendered his trial unfair or was otherwise detrimental to the administration

of justice. We find these contentions compelling. As Scott JA recently pointed out (in a judgment delivered after the trial court's findings in the present case), improperly or illegally obtained evidence was generally considered admissible before 1994, so long as it was relevant to the matter in issue.[31] The interim Constitution did not contain an express provision directed in this area. However, after it came into effect, courts used their common law discretion to exclude evidence obtained in violation of the Constitution.[32]

[116] The notable feature of the Constitution's specific exclusionary provision is that it does not provide for automatic exclusion of unconstitutionally obtained evidence. Evidence must be excluded only if it (a) renders the trial unfair; or (b) is otherwise detrimental to the administration of justice. This entails that admitting impugned evidence could damage the administration of justice in ways that would leave the fairness of the trial intact: but where admitting the evidence renders the trial itself unfair, the administration of justice is always damaged. Differently put, evidence must be excluded in all cases where its admission is detrimental to the administration of justice, including the sub-set of cases where it renders the trial unfair. The provision plainly envisages cases where evidence

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[31] *S v Pillay* 2004 2 SACR 419 (SCA) at para 6 of his judgment (page 444). The majority judgment in that case, per Mpati DP and Motata AJA, excluded evidence obtained as a result of an illegal monitoring operation.

[32] *S v Motloutsi* 1996 (1) SACR 78 (C) (bank notes discovered during police search of the accused's premises without a warrant or permission, linking accused to crime, excluded on basis that deliberate and conscious violations of constitutional rights should generally lead to exclusion of evidence in the absence of exceptional circumstances); *S v Mayekiso* 1996 (2) SACR 298 (C); *S v Hammer* 1994 (2) SACR 496 (C).

should be excluded for broad public policy reasons beyond fairness to the individual accused.[33]

[117] In determining whether the trial is rendered unfair, Courts must take into account competing social interests.[34] The court's discretion must be exercised 'by weighing the competing concerns of society on the one hand to ensure that the guilty are brought to book against the protection of entrenched human rights accorded to […] accused persons.'[35] Relevant factors include the severity of the rights violation and the degree of prejudice, weighed against the public policy interest in bringing criminals to book. Rights violations are severe when they stem from the deliberate conduct of the police or are flagrant in nature.[36] There is a high degree of prejudice when there is a close causal connection between the rights violation and the subsequent self-incriminating acts of the accused.[37] Rights violations are not severe, and the resulting trial not unfair, if the

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[33] For an exploration of the considerations underlying these reasons, see Eric Colvin 'Fairness and Equality in the Criminal Process' (2006) 6 *Oxford University Commonwealth Law Journal* 1.

[34] *Key v Attorney-General, Cape Provincial Division* 1996 (4) SA 187 (CC) para 13 per Kriegler J for the court:

'In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale. To be sure, a prominent feature of that tension is the universal and unceasing endeavour by international human rights bodies, enlightened legislatures and courts to prevent or curtail excessive zeal by State agencies in the prevention, investigation or prosecution of crime. But none of that means sympathy for crime and its perpetrators. Nor does it mean a predilection for technical niceties and ingenious legal stratagems. What the Constitution demands is that the accused be given a fair trial. Ultimately, as was held in *Ferreira v Levin* [1996 (1) SA 984 (CC)], fairness is an issue which has to be decided upon the facts of each case, and the trial Judge is the person best placed to take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted.'

[35] *S v Lottering* 1999 (12) BCLR 1478 (N) 1483C-D per Levinsohn J, Combrinck J concurring.

[36] *S v Lottering* 1999 (12) BCLR 1478 (N); *S v Seseane* 2000 (2) SACR 225 (O) (the deliberate nature of police conduct in not explaining the accused's rights, part of an attempt to 'trap' the accused, justified exclusion of the incriminating statements) (Pretorius AJ, Malherbe J concurring).

[37] *S v Soci* 1998 (2) SACR 275 (E)

police conduct was objectively reasonable and neither deliberate nor flagrant.[38]

[118] As we have pointed out, though admitting evidence that renders the trial unfair will always be detrimental to the administration of justice, there may be cases when the trial will not be rendered unfair, but admitting the impugned evidence will nevertheless damage the administration of justice. Central in this inquiry is the public interest:

> 'So far as the administration of justice is concerned, there must be a balance between, on the one hand, respect (particularly by law enforcement agencies) for the Bill of Rights and, on the other, respect (particularly by the man in the street) for the judicial process. Over-emphasis of the former would lead to acquittals on what would be perceived by the public as technicalities whilst overemphasis of the latter would lead at best to a dilution of the Bill of Rights and at worst to its provisions being negated.'[39]

[119] Of course the public interest in combating crime is substantial. But in *S v Pillay*, Scott JA – who dissented on the facts of that case, which involved evidence uncovered as a result of an unauthorised search (the warrant having been obtained on the basis of erroneous statements)[40] – pointed out that the admission of derivative evidence obtained in circumstances involving some form of compulsion, or as a result of torture, 'however relevant and vital for ascertaining the truth, would be undeniably detrimental to the administration of justice'.[41]

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[38] *S v Lottering* 1999 (12) BCLR 1478 (N) (the accused's pointing out of evidence should be admitted even though he had not been warned of his rights: constitutional rights violations only render the trial unfair (and justify exclusion of evidence) if they are deliberate or flagrant).
[39] *S v Mphala* 1998 (1) SACR 654 (W) at 657g-h, per Cloete J.
[40] The majority, per Mpati DP and Motata AJA, considered that although the admission of the evidence in question, obtained through an unauthorised surveillance operation, would not render the trial unfair, it should be excluded as detrimental to the administration of justice: see *S v Pillay* 2004 (2) SACR 419 (SCA) at paras 90-98 of the joint judgment.
[41] *S v Pillay* 2004 (2) SACR 419 (SCA) at paras 9 and 11 of the judgment of Scott JA (pages 447d and 448d-e).

[120] This is such an undeniable case. Though 'hard and fast rules' should not be readily propounded,[42] admitting real evidence procured by torture, assault, beatings and other forms of coercion violates the accused's fair trial right at its core, and stains the administration of justice. It renders the accused's trial unfair because it introduces into the process of proof against him evidence obtained by means that violate basic civilized injunctions against assault and compulsion. And it impairs the administration of justice more widely because its admission brings the entire system into disrepute, by associating it with barbarous and unacceptable conduct. The cynical tenor of the lies the police advanced here to explain the injuries the accused sustained in their custody (his 'suicidal tendencies') is disturbingly reminiscent of an earlier era. We do well to underscore the renunciation of that era not merely in principle, but in police practice, and throughout the justice system.

[121] We accept that the public flinches when courts exclude evidence indicating guilt:

> 'At the best of times but particularly in the current state of endemic violent crime in all parts of our country it is unacceptable to the public that such evidence be excluded. Indeed the reaction is one of shock, fury and outrage when a criminal is freed because of the exclusion of such evidence.'[43]

But in this country's struggle to maintain law and order against the ferocious onslaught of violent crime and corruption, what differentiates

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[42] *S v Pillay* 2004 (2) SACR 419 (SCA) at para 8 of the judgment of Scott JA (pages 446f-g).

[43] *S v Ngcobo* 1998 (10) BCLR 1248 (N) at 1254G per Combrinck J (Hugo J and Niles-Duner J concurring) (evidence of multiple murder and robbery, which appellant dug up in field behind his parents' home in the presence of police admitted even though police had not warned him of his rights and the consequences of his pointing out).

those committed to the administration of justice from those who would subvert it is the commitment of the former to moral ends and moral means. We can win the struggle for a just order only through means that have moral authority. We forfeit that authority if we condone coercion and violence and other corrupt means in sustaining order. Section 35(5) is designed to protect individuals from police methods that offend basic principles of human rights. To admit the evidence of the recovered money and the AK 47 in the circumstances of this case would render that provision nugatory. The evidence should therefore have been excluded.

[122] In view of the trial court's reliance on *S v Collins*, it may be useful to underscore the comments of Scott JA in *Pillay*[44] about the Canadian decisions. Under s 24 of the Canadian Charter –

> '(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."[45]

[123] In *R v Collins*, a police officer violated the accused's rights by grabbing him by the throat. The accused had a bag of heroin in his hand, which the state sought to admit. The Supreme Court of Canada held that a trial is rendered unfair if the evidence is self-incriminating, such as a confession:

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[44] *S v Pillay* 2004 (2) SACR 419 (SCA) at paras 6-9 of his judgment (pages 444h-447h).
[45] *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11

> 'The use of such evidence would render the trial unfair, for it did not exist prior to the violation and it strikes at one of the fundamental tenets of a fair trial, the right against self-incrimination.'[46]

But the *Collins* court drew a distinction between real and testimonial evidence. While it viewed testimonial evidence (such as a confession) as undermining trial fairness, it expressed doubt that real evidence, discovered derivatively as a result of unconstitutional conscription, could render a trial unfair:

> 'Real evidence that was obtained in a manner that violated the Charter will rarely operate unfairly for that reason alone. The real evidence existed irrespective of the violation of the Charter and its use does not render the trial unfair.'[47]

[124] It was this doctrine the trial judge invoked in the present case. Since the heroin in *Collins* was 'real evidence', the Court held that its admission would not render the trial unfair. (The heroin was however excluded on a balancing of the other factors.) Yet in later decisions, Canadian jurisprudence has rejected a strict distinction between real and testimonial evidence. In *R v Burlingham*,[48] the Canadian Supreme Court excluded a murder weapon found as a result of a confession obtained in violation of the right to counsel. The court held that the *Collins* distinction was unfounded and that admitting the real evidence would operate unfairly. It noted that after *Collins*, it had 'consistently shied away from the differential treatment of real evidence', and concluded that 'the use of any evidence that could not have been obtained but for the participation of the accused

[46] *R v Collins* (1987) 33 CCC (3rd) 1 (SCC) at 45, 38 DLR (4th) 508 (SCC) at 526.
[47] *R v Collins* (1987) 33 CCC (3rd) 1 (SCC) at 45, 38 DLR (4th) 508 (SCC) at 526.
[48] *R. v. Burlingham,* [1995] 2 SCR. 206, 124 DLR. (4th) 7 at 25.

in the construction of the evidence for the purposes of the trial would tend to render the trial process unfair'.[49]

[125] Furthermore, focusing, as the High Court did, on the classification of the evidence (distinguishing between the nature of the evidence – testimonial or real) is misleading, since the question should be whether the accused was compelled to provide the evidence. As the Supreme Court of Canada noted in *R v Stillman*:

> 'What has come to be referred to as "real" evidence will not necessarily fall into the "non-conscriptive" category. There is on occasion a misconception that "real" evidence, referring to anything which is tangible and exists as an independent entity, is always admissible…the concept of "real" evidence without any further description is misleading. It will be seen that, in certain circumstances, evidence such as the gun in *R. v. Burlingham*, [1995] 2 SCR 206, 97 CCC (3d) 385, 124 DLR (4th) 7, may come into the state's possession as a result of the accused's compelled participation or "conscription" against himself. Thus, while the evidence is "real" it is nevertheless conscriptive evidence.'[50]

[126] Though the US Supreme Court has not dealt specifically with physical evidence obtained from a coerced confession, a number of its decisions clearly assume that the exclusionary rule extends to physical evidence.[51] The American Law Institute has observed that the rationale for the

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[49] *R. v. Burlingham,* [1995] 2 SCR. 206, 124 DLR. (4th) 7 at 25.
[50] *R v Stillman* (1997) 113 CCC. (3d) 321 (SCC) at 353, 144 DLR (4th) 193 (SCC) at 224.
[51] The probable reason is that until 1991, a coerced confession mandated an automatic reversal of sentence. There was thus no need to consider whether the additional 'real' evidence should also be excluded. A number of cases, however, support the proposition that the Court assumed that real, as well as testimonial evidence, falls within the exclusionary rule. See, *e.g., Kastigar v. United States*, 406 U.S. 441, 453 (1972) ('We hold that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege. While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader. Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege. The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being "forced to give testimony leading to the infliction of 'penalties affixed to . . . criminal acts.'" Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness.').

exclusionary rule naturally extends it to preventing the introduction of physical evidence derivatively obtained. The ALI Model Code observes:

> 'In recent years ... the Supreme Court has made it clear that coerced confessions must be excluded not only because of their unreliability, but also because the methods used to obtain such confessions are intolerable and involve compulsion prohibited by the Constitution... In view of this expanded basis for excluding confessions, the justification for the automatic admission of all "fruits" becomes greatly attenuated. If the use of an illegally obtained confession constitutes compelled self-incrimination, so may the use of evidence derived from the confession. And, if the purpose of the exclusionary rule is to deter unacceptable police behavior, then the exclusion of fruits may also be necessary to achieve this deterrence. There would seem to be no rational basis for distinguishing between products of an illegal search as opposed to products of an illegally obtained statement in terms of applicability of the fruits doctrine.'[52]

[127] In this case, the police conduct violated a number of rights, including the accused's right to freedom and security of the person. This guarantees the accused the right '(c) to be free from all forms of violence from…public…sources' and '(e) not to be treated or punished in a cruel, inhuman or degrading way' (Bill of Rights s 12). And as a detained person, the accused specifically had the right 'not to be compelled to make any confession or admission that could be used in evidence' against him (Bill of Rights 35(1)(c)).

[128] The rights violations here were severe since they stemmed from the deliberate conduct of the police and were flagrant. There was a high degree of prejudice because of the close causal connection between the violation and the subsequent discovery of the money and the AK 47. It did not therefore constitute admissible evidence.

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[52] Model Code of Pre-Arraignment Procedure 150.4, comment at 410-11 (American Law Institute, Proposed Official Draft, 1975), cited in, Yale Kamisar,'Response: On the "Fruits" of Miranda Violations, Coerced Confessions, and Compelled Testimony', 93 *Michigan Law Review* 929 (March, 1995) at 940-941. The California Supreme Court has similarly held that derivative real evidence is excluded under the United States Constitution: *People v. Ditson* 369 P 2d 714, 727 (Cal. 1962), vacated as moot, *Ditson v California* 371 U.S.

[129] This brings us to the question whether the accused's conviction can stand in the light of the exclusion of the real evidence against him. The principal remaining evidence against him is Dlamini's dock identification, which – in contrast to the same witness's identification of accused 2 – was not reinforced by any preceding description of traits specific to the accused. Dock identification, as our previous allusions to it in this judgment indicate, may be relevant evidence, but generally, unless it is shown to be sourced in an independent preceding identification,[53] it carries little weight:[54] 'taken on its own it is suspect'.[55] The reason is apparent:

> '[T]here is clearly a danger that a person might make an identification in court because simply by seeing the offender in the dock, he had become convinced that he was the offender.' [56]

[130] In ordinary circumstances, a witness should be interrogated to ensure that the identification is not in error. Questions include –

> 'what features, marks or indications they identify the person whom they claim to recognise. Questions relating to his height, build, complexion, what clothing he was wearing and so on should be put. A bald statement that the accused is the person who committed the crime is not enough. Such a statement unexplored, untested and uninvestigated, leaves the door wide open for the possibility of mistake.'[57]

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541 (1963).

[53] Dock identification was thus approached by the full bench in *S v Bailey*, unreported judgment of the Cape High Court (case 215/2000) dated 31 August 2000 paras 24-28, quoting SE van der Merwe 'Parade-uitkennings, Hofuitkennings en die Reg op Regsverteenwoordiging: enkele grondwetlike perspektiewe' (1998) 9 *Stellenbosch Law Review* 129 at 141 (if the state can convince the court that the dock identification is based on observations that are independent of the observations from an inadmissible identification parade, it can be admitted).

[54] *R v Masemang* 1950 (2) SA 488 (A) 493, per van den Heever JA, Centlivres and Schreiner JJA concurring.

[55] *S v Moti* 1998 (2) SACR 245 (SCA) 257h ('is op sigself genome verdag'), per Nienaber JA (Schutz and Plewman JJA concurring).

[56] Paragraph 52 of the official report *Identification Procedure under Scottish Criminal Law, Cmnd 7096* (1978), cited in PJ Schwikkard and SE Van Der Merwe, *Principles of Evidence* (2nd ed, 2002) page 515.

[57] *R v Shekelele* 1953 (1) SA 636 (T) at 638, per Dowling J, Price J concurring.

[131] Where the state relies solely on a dock identification, however, these questions carry little weight. This is because the witness can look at the accused in the court – as happened in the present case, to the indignant objection of the accused and their counsel. Under these circumstances, dock identification is similar to a leading question. As a result, in certain circumstances it could carry no weight at all.[58]

[132] The question is whether Dlamini's dock identification, standing alone, is sufficient to establish beyond reasonable doubt that accused 8 was one of the robbers. After careful consideration, we have come to the conclusion that in the circumstances of this case, Dlamini's identification of accused 8 is reliable. We say this for the following reasons:

(a) Given the overall quality and cogency of Dlamini's evidence, the possibility that he was maliciously figmenting the presence of any of the accused can safely be excluded. The sole question in relation to accused 8 is thus whether he may have been mistaken in insisting that he was one of the robbers.

(b) Previous cases where dock identifications have been rejected have generally involved fleeting preceding encounters. This case is different. Dlamini's exposure in particular to accused 7 and accused 8, more than to any of the other robbers, was far more than merely fleeting. He had extensive contact with the two over more than twelve hours. He met them

[58] *S v Maradu* 1994 (2) SACR 410 (W) 413j-414a, followed in *S v Daba* 1996 (1) SACR 243 (E) at 248, later explained in *Ebrahim v Minister of Justice* 2000 (2) SACR 173 (W).

at the pre-robbery planning meeting in Northcrest. Then he spent the long night guarding the hostages in the same room with them. Although the robbers were wearing balaclavas overnight, the intimacy and intensity of the engagement would have exposed to Dlamini details of the two men's gait, gestures and physical stature. Indeed, as Dlamini pointed out in his testimony, it was important for the robbers to know each other, and to be able to distinguish their own from non-robbers. This accounts for his insistence that he could never mistake a person with whom he had performed a criminal assignment. What is more, the three travelled together the next morning, without balaclavas, first to town, then to Tabase and thence to Engcobo. Dlamini's opportunity for identification was therefore extensive and protracted.

(c) Further, we find it significant that accused 7 and 8 were the only two accused who came from Mdantsane, that they were close associates (accused 8 testified that they were friends and had known each other since 1983), and that both were involved in the taxi industry (accused 7 was a rank manager at Mdantsane, while accused 8 ran taxis, and was a founder member, with Robiyana – the witness accused 7 called – of a taxi association). The other accused all came from Mthatha. Yet it was precisely these two whom Dlamini paired. They were he said assigned together with him as 'foot soldiers' to guard the hostages while the money was seized at the bank. It was these two who, after the loot was shared, asked the Johannesburg robbers for a lift to Engcobo – from where,

presumably, they had made or planned to make joint arrangements for further transport. These connections of location, occupation and association sharply reduce the risk that Dlamini made an erroneous pairing. Conversely they enhance the assurance that he correctly identified accused 8, and correctly linked him to accused 7 (whom other evidence conclusively establishes was involved in the robbery).

(d) Dlamini identified the leather jacket accused 8 was wearing in court as that he wore during the robbery, but this in our view adds insubstantial safeguard against the risk of error were the dock identification standing alone.

(e) A more telling strand of evidence – we put it no higher than that – is the sudden access of affluence that accused 8 exhibited immediately after the robbery. He went on an extensive spending spree, the fruits of which the police confiscated after his arrest. This he was unable to account for with any plausibility in his evidence. In cross-examination he tried implausibly to increase his sources of income to explain the sudden increase in his resources. His evidence about an invoice for furniture he bought is implausible bearing in mind that the document was given to him only just before his evidence – and it was generated only on 23 October 2001, shortly before he testified at the trial. Even more telling in this regard is that the document was not produced during accused 8's bail application. Cross-examined about it, the accused became evasive. Initially he testified that his wife bought the items except for four items the

police took. He contradicted this in his later evidence. He testified that certain of the goods belonged to his girlfriend's mother although this evidence contradicts what was put to the state witnesses. That evidence in turn is contradicted by his evidence in his bail application where he testified that he bought the clothes.

(f) Accused 8 ran an alibi defence. There was no onus on him to prove it. But notable was a total lack of detail about his whereabouts on 17 and 18 December 1998. He created an unfavourable impression on the trial judge, who rejected his evidence as false beyond reasonable doubt. We consider that assessment sound.

[133] In these circumstances, we consider that Dlamini's identification of accused 8 as one of the robbers establishes his involvement beyond reasonable doubt.[59]

[134] In the result, the appeals of all the appellants are dismissed.

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JUDGES AND ACTING JUDGE OF APPEAL

[59] Compare the approach in *S v Bailey*, unreported judgment of the full court of the Cape High Court (case 215/2000) dated 31 August 2000 paras 24-28 and in *S v May* 2005 (2) SACR 331 (SCA) paras 51 and following.