

HIGH COURT
(BISHO)

CASE NO. CC 5/97

THE STATE

versus

THEMBELA SYLVESTER ZWAYI

ACCUSED

J U D G M E N T

EBRAHIM AJ: In the indictment the accused, Thembele Sylvester Zwayi, has been arraigned on eleven counts, namely two counts of murder, four counts of kidnapping, four counts of robbery and one count of attempted robbery. At the commencement of the trial Counts 10 and 11, being that of murder and robbery respectively, were withdrawn by the State.

The accused pleaded not guilty to the remaining charges and elected in terms of s 115 of the Criminal Procedure Act 51 of 1977 not to disclose the basis of his defence and put the State to the proof of the allegations against him.

The State's Case

The State called five witnesses, four being the complainants in Counts 2, 3, 4, 5, 6, 8, and 9. In addition to those counts their testimony also relates to Counts 1 and 7. The following is a summary of their evidence.

Count 1: Three of the aforesaid witnesses, namely, Cyril Desmond Helfrich,

Madoda Mike Nkanti and Gideon Mali, testified that on 16 March 1994 and near Masingahta Junction they witnessed the accused shooting the driver of a kombi. At the time that the shooting occurred these witnesses, who had been kidnapped and were being kept prisoner by the accused, were seated on the rear seat of a Cressida motor vehicle driven by him. They say that when the accused shot the driver he said, *'Did you see that, it was a good shot - I shot him in the neck.'* The accused has not disputed that the victim was Leslie Mogridge and that he had died as a result of being shot but denies that he shot the deceased. Upon being shot the victim slumped over the steering wheel of the kombi which came to a halt in the middle of the road. The vehicle with the victim slumped over the steering wheel was left there and the accused then drove away from the scene with the witnesses still captive in the motorcar. When the shooting occurred the witness Donker was imprisoned in the boot of the Cressida.

Gregory Andrew Nel testified that on 16 March 1994 at approximately 2.00pm he was travelling from Dimbaza towards King William's Town when a red Cressida motorcar passed his vehicle. He noticed five people in the Cressida of whom one was a 'white' man who was sitting in the middle of the rear seat. Outside King William's Town, just before the brickfield, he noticed the same Cressida racing towards him. He also noticed a Husky vehicle standing in the middle of the road and thought that something must have happened. He approached the vehicle and saw a 'white' man slumped over the steering wheel. He stopped his own vehicle and went to the driver's side where he observed that the man was bleeding from a bullet wound in the neck. He applied his handkerchief to the wound to stop the

bleeding until the ambulance arrived. The person was then taken to hospital and he drove the Husky motor vehicle to the police station. He says further that he noticed that the driver of the Cressida appeared to be a tallish person.

Counts 2 and 3: The evidence of Madoda Mike Nkanti is that on 16 March 1994 and near Debenek he was driving a Ford Courier bakkie when he observed a red Cressida driving behind him and its headlights being switched on and off repeatedly. Thinking it was the police he pulled to one side and stopped. A man appeared on the left hand side of his vehicle and asked to borrow a jack. Another man appeared on the right hand side with a firearm in his hand and told the witness that he was borrowing his car. He pointed the firearm at the witness, took the keys of the car and forced the witness to alight from the vehicle. The witness was taken to the Cressida and had to get in and sit on the rear seat of the vehicle. The person with the firearm returned to the Cressida and drove off with them while one of the accomplices drove the Ford Courier bakkie. The witness says he had an opportunity to observe the man with the gun and was able to look at him properly. He was certain he would not forget this man and later identified the accused as being this person. He says further that he was with his captors from about 11h00 to 17h00 on the day of these events.

He also testified that after his captors had been driving around for quite some time they encountered a Canter truck with a GC registration. The accused indicated to the driver to stop and after the driver had complied the accused forced him to alight by pointing his firearm at him. This person was forced to get into the

Cressida and to sit on the rear seat. The accused then drove this truck and one of the other members of the gang drove the Cressida.

Under cross-examination he stated that he was seated behind the accused in the Cressida but had looked at his face properly when he was robbed of his vehicle and when he committed the other robberies. He observed that the face of the accused was longer than that of his accomplices. He was asked why he had made two statements to the police and whether, at the time that he made the second statement, he knew the names of the witness Helfrich and why the man with the gun was referred to in the statement as the accused Thembele Zwayi. He explained that he was asked by the police to make the second statement and they had provided Helfrich's name. Also he had heard the accused's name being mentioned by one of the accomplices on the day of the robbery.

It emerged further during cross-examination that he had identified the accused from a series of photographs which were mounted on a card that was hanging in an office of the Zwelitsha Murder and Robbery Unit. One of the policemen had possibly said that the person pointed out by the witness was Thembele Zwayi. Mrs Collett, who appears for the accused, showed him a chart with 25 photographs on it, (Exhibit 'B'), and he confirmed that it was similar to the one he had seen at the police station. The one on which the photograph of the accused appeared had fewer photographs on it though, possibly 8. He was also questioned on whether he had attended an identification parade and confirmed that he had done so and that he had pointed out the accused. It was put to him that on both occasions the

police had suggested who the person was, but he denied this.

Counts 4, 5 and 6: Cyril Desmond Helfrich and Gideon Mali both testified in respect of these counts. Their evidence is that on 16 March 1994 the witness Helfrich was driving a Mitsubishi LDV truck and that Gideon Mali was in the truck with him. They were driving back from Fort Beaufort to East London when a red Cressida motorcar passed their vehicle and slowed down in front of them. It appeared to the witness that the driver was signalling to them that something was wrong with the lights of their vehicle. Helfrich became suspicious and accelerated past the Cressida. A short distance further the Cressida passed his vehicle again and when it was in front the driver extended his arm out of the vehicle with a weapon in his hand. The witness thereupon slowed down and stopped. The Cressida reversed, came to a halt in front of his truck, and a number of people alighted from the Cressida. They surrounded his vehicle and one of them opened the door and pulled him out of the driver's seat. The person with the firearm pushed him between the two vehicles and took the money which he, Helfrich, had in his breast pocket. A pocket knife which was in his trouser pocket was taken by one of the other men. They found additional money in his trouser pocket and also took this. He was then forced to climb into the boot of the Cressida and all the while the person with the firearm was overseeing this. Thereafter the Cressida drove off with the witness imprisoned in the boot of the car.

After the Cressida had been driving around for a long time it stopped and Helfrich managed to open the boot from inside and jumped out. His kidnappers were

standing there and he told them that they could shoot him but he was not getting back into the boot of the car. His captors relented and allowed him to sit inside the car on the rear seat between the witness Mali and someone else, whom he later found out was not a member of the gang who had kidnapped him and the witness Mali.

He testified that his captors thereafter drove around for quite awhile until they came across a five ton truck which they forced to a halt. The driver of the truck was ordered into the boot of the Cressida and they drove off accompanied by the truck which was driven by one of the kidnappers. They again drove to various places and in the vicinity of Dimbaza and the King William's Town road they went to a village. On their return from there the truck became stuck in a pool of mud. He and the others were forced to push the truck out but did not succeed immediately. During the course of this he was pushed into the mud and man-handled. Eventually the person with the gun handed the gun over to an accomplice and went off in the Cressida to fetch stones which were then placed under the wheels of the truck. Eventually they managed to free the truck. They were made to get back into the Cressida and they then drove to King William's Town. There Helfrich, Mali and the witness Nkanti, were able to overpower the driver and escape. The witness Donker, who was in the boot of the car, managed to escape at the same time. They then reported to the King William's Town Police what had happened to them.

The witness Gideon Mali, in his evidence, corroborated that these events had

occurred and said that he was forced to get into the Cressida and had to sit on the rear seat. He confirms that one of the accomplices drove the truck belonging to the witness Helfrich at the time when they left the scene with both vehicles.

Both these witnesses state that they feared the individual with the firearm and that he continually pointed the firearm at them and ordered everyone around. They identified the accused as being the person with the firearm.

Count 7: The evidence of Madoda Mike Nkanti on this count is that after Mr Helfrich had been robbed of his vehicle and placed in the boot of the Cressida the robbers drove towards Dimbaza. Near to Makeke they encountered a Venture motor vehicle on the road. The driver of the Cressida, who is the person with the gun, tried to force the Venture off the road by pointing his firearm at its driver. However, the driver of the Venture produced a firearm from the cubbyhole in the dashboard of the Venture and was able to get away.

This incident is corroborated by the evidence of Gideon Mali. He also testified that when the driver of the Venture produced his own firearm that the accused immediately turned the Cressida around and drove in the direction of Dimbaza.

Counts 8 and 9: The testimony of Stoney Nelson Donker is that on 16 March 1994 he was driving an Isuzu Canter truck with the registration GC 12179. He had passed Dimbaza and was proceeding to Debenek when he overtook a red Cressida. This vehicle followed him and near Debenek it overtook

his truck and stopped at the road leading to Debenek. When he passed the Cressida it followed him once again and flashed its head lights. He thought they wanted him to give a lift to someone but he did not stop. When the Cressida came alongside his truck he saw the driver pointing a firearm at him. He stopped and the accused then asked him why he had not stopped earlier. He said he had not done so as he was unaware that they were the police. The accused told him to alight and when the witness tried to remove the key of the truck and his belongings he was ordered to leave these alone. The accused was pointing the firearm at him and ordered him into the Cressida. Shortly afterwards the accused asked him to get out again and to show him how the gears of the truck worked. The witness returned to the Cressida and both vehicles moved off in the direction of Dimbaza, with the accused driving the truck. At Dimbaza they went to Madekeni village where the truck became stuck in the mud. The accused said they were being taken to the forest to be killed as they would provide the police with information. This witness corroborates that the witnesses, Helfrich and Mali, were forced to push the truck out of the mud and that they were ill-treated by the accused in the process. The witness says that Helfrich, in particular, was badly ill-treated. He confirmed that this person was the accused whom he had identified to the police from a series of photographs.

The witnesses Nkanti, Helfrich and Mali corroborate his version of events and state that after extricating the truck from the mud the vehicles proceeded to Dimbaza and there the accused stopped the vehicles and ordered the witness Donker to get out of the Cressida and into its boot. The witness had first refused but after the

accused threatened to crack his skull with the firearm he had no option but to get into the boot. The car moved off once more and he remained in the boot. After it had travelled for some time he heard a noise and he then managed to open the boot and jumped out and ran into a shop called Nick's Food where he found the witnesses, Helfrich and Mali. Someone telephoned the police who arrived and they were taken to the King William's Town Police Station.

The Defence Case

The defence has not denied that any of the offences were committed. The accused's defence, as it emerged during the course of the trial, is an alibi. The precise substance of the alibi, however, was only revealed when the accused testified in his own defence. In his testimony he stated that he could not say exactly where he was on 16 March 1994 except that during 1994 he was in the Transkei as he was living in Umtata during that year. He was arrested on 16 July 1994 at Ntshabeni in the Transkei and taken to the Zwelitsha Police Station.

In August 1994 he was charged with the offences set out in the indictment and remanded in custody until January 1995 when, so it appears, he was released on bail. While in custody he attended an identification parade and says that he was not advised of his right to have a lawyer present when the identification parade was being conducted. There were between 18 and 20 people in the line-up and, except for one person who was light in complexion but totally different to him, none of the others were of the same height as himself. Further, he had not given permission for his photograph to be placed on a cardboard chart with other

photographs for the purpose of identification. The photograph used by the police was an enlargement of the photograph in his identity document and was not a photograph which the police had taken of him. He denied that he was involved in the commission of any of the offences and that the witnesses who claimed that he was the driver of the Cressida had heard this from the police.

When the accused was cross-examined by Mr Sotenjwa in regard to his alibi the question arose why it was never disclosed that he was in Umtata - instead it had merely been put to the witnesses that he was not present when the offences were committed. Defence counsel objected to this line of questioning as she contended that an alibi defence did not necessarily require that an accused state exactly where he was and that it was sufficient to put to the witnesses that the accused denied being present. Counsel also contended that the accused's defence was not an alibi in the true sense of the word as the accused could not, as she says, prove that he was somewhere else.

I do not agree with these contentions. If the accused's defence is that he was not present when the offences were committed but somewhere else it is manifestly an alibi defence. But, the accused does not bear the burden of proving that his alibi is true. The Court is required to assess his alibi in the same way as any other defence, namely, whether it can be accepted as being reasonably possibly true or whether it should be rejected as it is obviously false. See *R v Biya* 1952 (4) SA 514 (A) at 512D-E and *R v Hlongwane* 1959 (3) SA 337 at 340H and 341A-B as well as *S v Mhlongo* 1991 (2) SACR 207 (A) at 210d-f.

It should be apparent that if the Court is to properly assess whether there is a reasonable possibility of the alibi being true, the details thereof should be provided since in its absence the accused's defence is simply a bare denial. In my view, if these details are only disclosed, as in the present instance, at the late stage when the accused testifies the value to be accorded to the alibi may be adversely affected. I cannot see on what basis an accused can claim that he would be prejudiced in the presentation of his defence if he had to disclose the details of his alibi defence during the cross-examination of the State's witnesses. On the other hand, if he withholds same until he testifies there is prejudice to the State since the State will not have been provided with the opportunity of leading evidence which could expose the alibi as being false.

Evaluation of the evidence

Before proceeding to an evaluation of the evidence I would like to express my appreciation to both counsel for their assistance in drawing my attention to the relevant and numerous authorities in regard to the pertinent issues in this matter. It has greatly facilitated my task.

It has not been disputed by the defence that these crimes were committed save, of course, that it is denied that the accused is the perpetrator thereof. In her submissions, Mrs Collett who appears for the accused, has not suggested anything to the contrary but confined her argument to challenging the reliability and admissibility of the evidence regarding the identification of the accused, in particular, that of the identification parades.

I need to mention that when the witnesses testified the defence did not register any objection to the evidence in regard to both identification parades. The only objection raised was that the chart of photographs (Exhibit 'B') which was shown to the witness Donker was not the same one from which he had identified the accused at the photographic identification parade. I should mention further that in the case of the witness Nkanti his evidence that he had attended both the identification parades and identified the accused was elicited under cross-examination by defence counsel.

Defence counsel has contended that there has been a violation of the accused's right to legal representation both in respect of the photographic identification parade and the identification parade where the accused was personally present. As a consequence, so counsel contends, the evidence of the witnesses who have identified the accused at both these identification parades is not admissible against him. Mr Sotenjwa, who appears for the State, has submitted that the accused is not vested with a right to legal representation when a photographic identification parade is held.

I am not persuaded by Mrs Collett's argument that the accused has the right to legal representation at a photographic identification parade. Despite the fact that there is the very real possibility that this pre-trial procedure may result in evidence being obtained which could be detrimental to the accused it does not follow, in my view, that the accused can claim a constitutional right to legal representation when such a parade is held. By its very nature, since a series of photographs are utilised

at a photographic identification parade there is no question of the accused being present. Consequently, there is no substance in the argument that the accused could incriminate himself either verbally or by conduct.

Very often, too, it is necessary to hold this type of identification parade in order to ascertain who the suspect is so that the police may be able to effect an arrest. In such a situation, since the process entails the use of photographs, the argument that the person should have been afforded legal representation is not sustainable.

In *S v Hlalikaya and others* 1997 (1) SACR 613 (SECLD) Van Rensburg J concluded that an accused was not entitled to legal representation at a photographic identification parade. In his view: *'The right of an accused to be legally represented does not, however, extend to every investigative procedure upon which the State embarks. As I see the situation it only extends to pre-trial procedures where the accused is present and where the State seeks the co-operation of the accused in order to protect the accused against an infringement of his rights. In this regard I would refer to Melani's case [1996 (1) SACR 335 (E)] at 348i-349b where Froneman J explains the reason for the right to legal representation in the following terms: "The purpose of the right to counsel and its corollary to be informed of that right (embodied in s 25 (1)(c)) is thus to protect the right to remain silent, the right not to incriminate oneself and the right to be presumed innocent until proven guilty. Sections 25(2) and 25(3) of the Constitution make it abundantly clear that this protection exists from the inception of the criminal process, that is on arrest, until its culmination up to and during the trial itself. This protection has nothing to do with a need to ensure the reliability of evidence adduced at the trial. It has everything to do with the need to ensure that an accused is treated fairly in the entire criminal*

process: In the "gate houses" of the criminal justice system (that is the interrogation process), as well as in its "mansions", (the trial court) (See Beaudoin and Ratushny (eds) The Canadian Charter of Rights and Freedoms, 2nd ed at 462)."

I am in respectful agreement with the view that the right to legal representation which s 25(3)(c) of the Constitution of the Republic of South Africa Act 200 of 1993 conferred upon the accused does not extend to when a photographic identification parade takes place. It follows that, since the right in terms of s 25(3)(c) does not have any application in such a situation the submission that there has been a violation of this right cannot be upheld.

Mrs Collett has submitted further that the use of the accused's photograph without his permission in the photographic identification parade is an infringement of his right to privacy which s 13 of the Constitution of the Republic of South Africa Act 200 of 1993 has vested in him. I do not propose dealing with this submission in any great detail as I am not persuaded that the right to privacy is applicable here. But even if it should be, which I seriously doubt, then on the evidence before me the accused has not discharged the onus which rest on him to show that there has been an infringement thereof. He has stated that this was not the first time that he had been charged with an offence and it seems quite probable, therefore, that the police would have a photograph of him in their possession. His contention that the photograph is in fact an enlargement of the photograph which appears in his identity document is so far fetched as to be ludicrous.

On the basis of the evidence presented by him I am not persuaded that the use

of any photograph of his for the purposes of a criminal investigation is an infringement of his right to privacy. In the circumstances, this submission cannot be upheld.

The further question to be considered is whether the photographic identification parade was properly constituted and conducted. I find that the evidence does not reveal anything which brings into question either the constitution thereof or the manner in which it was held. There is no indication that the identification of the accused by the witnesses was tainted by irregularities nor has it been submitted by Mrs Collett that the parade was irregularly constituted or executed. She has confined her argument to the contention that the State should have presented evidence regarding the circumstances in which the identification parade took place. Mr Sotenjwa, on the other hand, submitted that the need for any further evidence fell away once the defence did not raise an objection to the evidence of the witnesses who identified the accused at the parade. Further, there was no indication from the defence that the identification parade was improperly constituted or tainted by irregularity in the conduct thereof.

I do not find Mrs Collet's argument persuasive. It was an easy matter for the admissibility of the evidence regarding identification to be challenged. Similarly, there was no reason for the defence not to indicate that it placed in dispute that the parade was properly carried out. In my view, the only inference to be drawn from the absence of any objections by the defence on such crucial issues, is that these were not being placed in dispute. I agree with Mr Sotenjwa that, in these

circumstances, there was no necessity for any further evidence as the witnesses had, in any event, testified on these issues.

The identifying witnesses have provided sufficient evidence to substantiate that there were no irregularities in the manner in which the photographic identification parade was conducted. The chart which was used consisted of between 8 to 25 photographs and the witnesses were left alone to peruse these photographs. They recognised the accused, of their own accord, on one of the photographs and were not prompted to do so nor was their attention directed to any specific photograph.

I have taken cognisance of the views expressed in various judgments regarding the circumstances to be taken into account when considering the reliability of an identification made from a photograph. These have been expressed in *R v Jackson 1955 (4) SA 85 (SR)*, *S v Shandu 1990 (1) SACR 80 (N)* and *S v Nkomo 1990 (1) SACR 682 (ZS)*. After considering these I find that the photographic identification parade was properly constituted and carried out. The evidence of the identifying witnesses, namely, Cyril Desmond Helfrich, Madoda Mike Nkanti, Gideon Mali and Stoney Nelson Donker is reliable beyond a reasonable doubt and, accordingly, admissible against the accused and it is so admitted.

I turn to consider the admissibility of the evidence in respect of the identification parade at which the accused was personally present as one of the persons in the line-up. In this regard the witnesses, Helfrich, Mali and Donker testified that they had identified the accused at this identification parade and were also cross-

examined on what had transpired there. But, at no stage during the course of either was an objection lodged by the defence that this evidence was inadmissible nor that the accused's constitutional right to legal representation had been violated. This only emerged when the accused testified in his own defence and stated that he had been denied the right to legal representation.

During the course of defence counsel's argument it was submitted that since the State had failed to lead evidence to prove that the identification parade had been properly conducted the evidence of the witnesses regarding their identification of the accused should not be considered by the Court. I am unable to uphold this argument. The admissibility of this evidence should have been challenged during the trial and not simply left to be raised at the stage of the presentation of argument. But, notwithstanding the failure on the part of the defence to raise this issue timeously I have decided to give consideration to whether the accused's allegation that he was not afforded an opportunity to consult a lawyer is probable or not.

The onus rests on the accused to show, on a balance of probabilities, that there has been a violation of his constitutional right to legal representation under s 25(c) of the Constitution of the Republic of South Africa, Act 200 of 1993. See *Qozoleni v Minister of Law and Order 1994 (3) SA 625 (ECD) at 640G-I*. The State has not disputed that the accused has such a right but contends that it has not been violated.

It transpired from the cross-examination of the witness, Helfrich, that he was required to attend a second identification parade at the premises of the Cambridge Murder and Robbery Squad. However, when he arrived there the police informed him that they were unable to proceed with the identification parade as the accused had demanded to have his lawyer present. It is clear, therefore, that at this stage the accused was aware of his right to be legally represented. It is equally clear that he would then also have known that the failure of the police to allow him to consult a lawyer, as he claims, on the occasion of the first identification parade was a matter of some concern. Armed with such knowledge I find it improbable that the accused would not have conveyed this to his counsel if he indeed had been denied legal representation on the occasion of the first identification parade. Moreover, if he did inform her of this prior to testifying in his own defence, I have no doubt that counsel would have lodged an objection timeously to the admissibility of the evidence in respect of such identification parade. It is most improbable that a crucial issue such as this would not have been presented as the focal point of his defence at the appropriate stage of the trial. Instead, it was only alluded to and, even then, only indirectly instead of it being presented as a direct challenge to the evidence relating to the identification parade. Although defence counsel, at one stage, asked of the witness, Helfrich, whether a lawyer was present when the photographic identification parade took place it was merely left at that and taken no further.

In the course of his testimony the accused stated that after his arrest he was taken to the premises of the Zwelitsha Murder and Robbery Unit for questioning and he

was then confronted with the charges. Certain questions were put to him by his counsel to which he replied, as follows:

Mrs Collett asked: *"Were you given an opportunity to have a legal representative present or advised of that right?"*

The accused replied: *"When another a policeman was telling me about that right concerning legal representation the other one said "Hey ssh, ssh, ssh" "*

Mrs Collett asked: *"So you were never given an opportunity to make contact with a lawyer at that stage?"*

The accused replied: *"No I was never given that opportunity. "*

Mrs Collett asked: *"Were you ever told any of your other rights at that stage?"*

The accused replied: *"I was not told about right (sic) "*

Mrs Collett asked: *"Did you make a statement to the police?"*

The accused replied: *"I am unable to say I did make a statement or I did not. The way I was being assaulted, my head was so hot inasmuch that I was just now agreeing to whatever they were saying. "*

Mrs Collett asked: *"Were you taken to a doctor?"*

The accused replied: *"There is a stage whereby I fainted, I was never taken to a doctor. "*

Mrs Collett asked: *"Now you ultimately appeared before the Magistrate's Court in connection with these charges, is that correct?"*

The accused replied: *"I appeared now, correctly, before the Magistrate's Court concerning now other charges, not the charges I am facing with now. "*

Mrs Collett asked: *"Now when did you appear in Court for the first time on these charges?"*

The accused replied: *"I just can't recall. I don't wish to mislead this Court that it was such and such a date, I am unable to recall the date as to on what date did I first appear before the Magistrate's Court."*

I find the accused's story regarding what transpired at the Zwelithsa Murder and Robbery Unit to be a fabrication. Even if his right to legal representation was only partially explained it would at the very least have aroused his suspicions, if not his interest, particularly if one policeman had indicated to another to keep quiet about it. Yet, there was no reaction at all on his part. Even when the police assaulted him he did not react. It is highly improbable that these events would not have evoked a response of one kind or another from the accused.

It is significant that the accused does not say that he actually wanted the services of a lawyer at this stage, nor that he asked for and was refused the opportunity of consulting with a lawyer. According to the accused it was not the first time that he had been charged with an offence nor the first time that he had been identified incorrectly by a witness. He claims that when the identification parade was held he was not advised of his right to have a lawyer present but once again he does not say that he actually wanted to consult one and was denied this right.

The accused has not elucidated on the circumstances surrounding the further identification parade which was to be held and in respect of which the witness,

Helfrich, testified that the police told him that they could not proceed as the accused had requested that his lawyer be present. The accused, rather conveniently, has chosen not to explain whether the police had informed him of this right or whether he had been aware of it and exercised it of his own accord. In the circumstances, the accused has failed to persuade me that his right to consult with a legal practitioner was violated.

Mrs Collett has contended further that should the Court find that the accused's constitutional rights have not been violated then the evidence of the witnesses identifying the accused should not be accepted as this is not reliable and trustworthy. She contends that the witnesses did not have sufficient or proper opportunity to observe the features of the person who was armed with a gun to enable them to subsequently identify him and they are mistaken, therefore, in identifying the accused as being the same person. Even though they may be truthful witnesses they are making an honest mistake in identifying the accused as being the perpetrator of these crimes.

In *S v Mehlahe 1963 (2) SA 29 (AD)* at 32A-B it was stated that, '*a Court should be satisfied not only that the identifying witness is honest, but also that his evidence is reliable in the sense that he had a proper opportunity in the circumstances of the case to carry out such observation as would be reasonably required to ensure a correct identification*', and further at 32C-D that '*(t)he nature of the opportunity of observation which may be required to confer on an identification in any particular case the stamp of reliability, depends upon a great*

variety of factors or combination of factors; for instance the period of observation, or the proximity of the persons, or the visibility, or the state of the light, or the angle of the observation, or prior observation or the absence or the presence of noticeable physical or facial features, marks or peculiarities, or the clothing or other articles such as glasses, crutches or bags, etc., connected with the person observed, and so on'.

It is not disputed that the witnesses Helfrich, Mali, Nkanti and Donker were kept captive by their abductors from about 11.00am to 5.00pm on 16 March 1994 - a period of at least six hours. Despite the efforts of defence counsel to cast doubt on the opportunity available to each witness to observe the features of the person armed with a gun I am satisfied that there was more than sufficient opportunity for the witnesses to do so. There is no question of the period of time being insufficient. Even though Helfrich was imprisoned in the boot of the car it was only for part of that period. For the rest of the time he still had more than sufficient opportunity to observe the person. The same applies to the witness Donker who was also imprisoned in the boot at some stage. Both of them, including the witnesses Mali and Nkanti, were involved with the efforts to extricate the truck from the mud and this clearly took quite a while. During that period the accused was in close proximity, ordering them around and supervising the entire operation to remove the truck from the mud.

The opportunities for observation available to the witnesses Mali and Nkanti were even far greater as they sat on the rear seat of the Cressida for the entire period.

These incidents occurred during the day and there is no evidence whatsoever to suggest that visibility was impaired in any way. On a number of occasions the accused was in very close proximity to them and in full view. Each of the witnesses noticed certain distinctive features of the accused such as, that he was tall, thin, young and had a longish face with a dark brown complexion.

Understandably there are slight differences in the versions of the witnesses in regard to their respective observations. This related to when the witness Donker was forced into the boot of the red Cressida and who drove his truck immediately after he was robbed thereof. Given the traumatic experiences they were subjected to such differences are understandable. It would have been most suspicious if their versions had been exactly the same. But, these discrepancies are not in regard to material aspects nor do they cast doubt on the honesty of the witnesses nor the reliability of their identification of the accused. There is no question of them lying nor has Counsel for the defence suggested that their honesty is in doubt. These are persuasive factors and I take these into account. I was impressed by the honesty of the State witnesses and find each one of them to be credible and their evidence reliable. See *S v Nango 1990 (2) SACR 450 (A) at 450g* where it was said that when the identification of an alleged offender is in issue everything turns on the honesty of the identificatory witnesses and the reliability of their observations. I conclude, therefore, that their identification of the accused as being the person who was armed with the gun and who perpetrated these crimes, is reliable and trustworthy beyond a reasonable doubt.

I turn now to consider the alibi of the accused. The accused, as I have stated previously, denies having committed these offences as he claims he was in the Transkei during 1994. He cannot recall where he was on 16 March 1994 but says he lived in Ntshabeni, a section of Ncische which is in Umtata in the Transkei. That was the extent of his alibi.

However, under cross-examination his memory improved somewhat remarkably although selectively. He was now able to remember that he was in Ntshabeni on 16 March 1994 though not what he was doing. Nor could he remember the name of the person to whom he paid rent, only that this person's clan name was Majola. He remembers further that from 1990 until 1991 he stayed in Pantu in St Johns. He then moved to Xorana in Umtata until 1993. When confronted with why he had said that he was in Umtata from 1990 until 1994 his reply was that he worked in Ntshabeni in Umtata during that period but stayed in St Johns. When asked why this was only emerging now he was forced to concede that he had not informed his counsel of any of this.

There were numerous other contradictions and improbabilities in his evidence. I do not propose to enumerate all of these save for the most glaring examples. He said he visited his mother in Ginsberg near King William's Town in December of 1990, 1991 and 1992 and travelled there with borrowed vehicles. In 1993 he owned a vehicle but because of its condition he could not travel to Ginsberg with it. On other occasions he travelled by taxi. However, at no stage did his mother see the vehicles which he had used as she never left the house. In 1993 he telephoned

her from Bloemfontein to ascertain the address of his aunt (his mother's sister), in Kimberley. When questioned about his identity book he said that the police took it either in 1989 or 1990. He never lodged a complaint about this nor did he obtain a replacement. When travelling between the Ciskei and South Africa he had to bribe the border officials, but he never did this personally as he gave the money to the taxi driver. The photograph used in the photographic identity parade was an enlargement of the photograph from his identity document. He admitted he had also not informed his counsel of this.

His mother, Joyce Nomvuselelo Zwayi, testified in support of his alibi. She did her utmost to provide substantiation for the alibi of the accused, but failed dismally in this respect. What she did succeed in doing though was to expose the untruths in the accused's story. She differed with him about his mode of travel to Ginsberg, saying that he had told her that he travelled by public transport. He had also never telephoned her concerning her sister in Kimberley who had visited her at some stage during this period. And, the occasions that he had visited her did not coincide with the dates he claimed to have done so and she was quite sure that it was not in March 1994.

When Counsel for the State sought to test her memory in respect of certain events, her reply more often than not was that she could not remember. While she may be a caring mother she did not impress as a witness. Her evidence contradicts that of the accused in material respects and consequently I do not find that her evidence substantiates his alibi.

The accused was a very poor witness. His evidence, as I have indicated, was riddled with contradictions, improbabilities and untruths. Certain aspects of his evidence and his replies under cross-examination, I would venture to say, caught even his Counsel by surprise since he had clearly not informed her thereof beforehand. In my view, there is no reasonable possibility of his alibi being true. On the contrary, it is manifestly false and a fabrication. I have no hesitation, therefore, in rejecting same.

In my view, the State has discharged the onus which rests upon it and proved beyond a reasonable doubt that the accused is guilty of Counts 1, 2, 3, 4, 5, 6, 8 and 9 as set out in the indictment. In so far as Count 7 is concerned the evidence does not go far enough to prove that the accused had attempted to rob the driver of the Toyota Venture of this vehicle. What is beyond a reasonable doubt though is that the evidence does prove that the accused pointed a firearm at the driver of this vehicle. In terms of s 260 of the Criminal Procedure Act 51 of 1977 if the evidence on a charge of robbery or attempted robbery, as the case may be, does not prove such offence but the offence of pointing a firearm, the accused may be found guilty of the offence so proved.

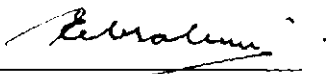
I, accordingly, find the accused guilty of the following crimes:

- (a) On Count 1 of the murder of LESLIE MOGRIDGE;
- (b) On Count 2 of the robbery of MADODA MIKE NKANTI of his Ford Courier

Bakkie and I find that aggravating circumstances as defined in section 1 of Act 51 of 1977 are present as the accused used a firearm in the commission of the offence;

- (c) On Count 3 of the kidnapping of MADODA MIKE NKANTI;
- (d) On Count 4 of the robbery of CYRIL DESMOND HELFRICH of his Mitsubishi vehicle and I find that aggravating circumstances as defined in section 1 of Act 51 of 1977 are present as the accused used a firearm in the commission of the offence;
- (e) On Count 5 of the kidnapping of CYRIL DESMOND HELFRICH;
- (f) On Count 6 of the kidnapping of GIDEON MALI;
- (g) On Count 7 of pointing a firearm at the driver of the Toyota Venture motor vehicle, whose identity is unknown;
- (h) On Count 8 of the robbery of STONEY DONKER of his truck, registration number GC 12179, and I find that aggravating circumstances as defined in section 1 of Act 51 of 1977 are present as the accused used a firearm in the commission of the offence;

(i) On Count 9 of the kidnapping of STONEY DONKER.


Y EBRAHIM
ACTING JUDGE OF THE HIGH COURT (BISHO)

Heard on the : 10/3/97, 11/3/97, 24/3/97, 25/3/97, 26/3/97,
21/4/97, 22/4/97, 12/5/97, 13/5/97, 14/5/97,
15/5/97, 16/5/97, 19/5/97, 9/6/97, 13/6/97,
6/8/97 and 25/8/97.

Judgment delivered on : 2 September 1997

Counsel for the State : Mr M P Z Sotenjwa

Counsel for the Accused : Mrs S A Collett