IN THE HIGH COURT OF SOUTH AFRICA /ES

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED
DATE 25/4/16 SIGNATURE

CASE NO: A404/2014

DATE: 6/5/2016

IN THE MATTER BETWEEN

KHEHLA MAHLANGU 1ST APPELLANT

LUCAS SOVALA MASILELA 2ND APPELLANT

AND

THE STATE RESPONDENT

JUDGMENT

PRINSLOO, J

[1] The two appellants were the first two of six accused who were convicted in the Circuit Local Division of the Eastern Circuit District of this court on 5 October 2011 on six counts each.

The six counts are robbery with aggravating circumstances, murder, attempted murder, attempted murder, unlawful possession of firearms and unlawful possession of ammunition.

[2] It is not in dispute that the indictment, which is a comprehensive affair prepared by the Deputy Director of Public Prosecutions, was brought to the attention of all the accused. They were all legally represented.

[3] In respect of the charge of robbery, the indictment clearly states that there were aggravating circumstances as defined in section 1(1) of the Criminal Procedure Act no 51 of 1977 ("the CPA") read with the provisions of section 51(2) of Act 105 of 1997. This charge was originally crafted to refer to section 51(1) of the last-mentioned Act, but, at the commencement of the proceedings, the prosecutor applied for an appropriate amendment to replace a reference to section 51(1) with a reference to section 51(2).

There was no opposition to this amendment.

[4] In respect of the murder charge, count 2, the indictment also clearly states that it was in respect of murder read with the provisions of section 51(2) of Act 105 of 1997. Again, at the commencement of the proceedings, an amendment, unopposed, was granted replacing the reference to section 51(2), with a reference to section 51(1).

[5] The charges dealing with the unlawful possession of firearms and ammunition, counts 5 and 6, contain proper references to the applicable sections of the Firearms Control Act, Act 60 of 2000.

[6] For illustrative purposes, it is convenient to quote the contents of the charges.

"COUNT 1

In that upon or about 14 March 2009 and at or near Trichardt, in the district of Evander, the accused did unlawfully and intentionally assault

ABDULLA RASIHO AHMED DAYA AND/OR

EBRAHIM DAYA AND/OR

MOHSEEN DAYA

and take by force and violence from their possession two cell phones, their property or in their lawful possession aggravating circumstances being present in that firearms were used.

COUNT 2

In that upon or about 14 March 2009 and at or near Trichardt, in the district of Evander, the accused did unlawfully and intentionally shoot

ABDULLA RASIHO AHMED DAYA

an adult male person, as a result of which he passed away on 14 March 2009 at the High Veld Medical Clinic. The accused therefore unlawfully and intentionally killed the deceased Abdulla Rasiho Ahmed Daya.

COUNT 3

In that upon or about 14 March 2009 and at or near Trichardt, in the district of Evander, the accused did unlawfully and intentionally attempt to kill

EBRAHIM DAYA

a male person, by shooting him.

COUNT 4

In that upon or about 14 March 2009 and at or near Trichardt, in the district of Evander, the accused did unlawfully and intentionally attempt to kill

MOHSEEN DAYA

a male person, by shooting at him.

COUNT 5

In that upon or about 14 March 2009 and at or near Trichardt, in the district of Evander, the accused did unlawfully have in their possession firearms of unknown calibres and serial numbers, without being lawful holders of licenses issued in terms of the aforesaid Act to possess such firearms.

COUNT 6

In that upon or about 14 March 2009 and at or near Trichardt, in the district of Evander, the accused did unlawfully have in their possession an unknown quantity of ammunition, without being in possession of firearms capable of firing the aforesaid ammunition.

In the event of conviction the said Director of Public Prosecutions prays for sentence according to law."

[7] It is also convenient to quote the summary of the substantial facts in terms of section 144(3)(a) of the CPA, which summary accompanied the indictment:

"1. The deceased and the complainants in counts 3 and 4 were at their business premises on 14 March 2009. The accused arrived at these

premises. They fired shots at the deceased and the complainants in counts 3 and 4.

2. The deceased and the complainants in counts 3 and 4 were robbed of their cell phones.

3. The deceased was transported to hospital where he later died. The cause of death is given as:

'INTERNAL INJURIES – GUNSHOT LIVER'.

4. The accused at all relevant times acted with common purpose."

[8] The proceedings commenced before the learned trial Judge, Claassen J, in March 2011 when it was postponed, due to unavailability of counsel, to 4 October 2011.

[9] At the commencement of the proceedings on the aforesaid date, the amendments to the charge-sheet, which I have referred to, were applied for and granted.

[10] The learned Judge asked counsel whether it was necessary to put the charges to the accused or whether they had taken instructions on the plea that would be presented.

In respect of the two appellants (then accused 1 and 2) their counsel said:

"M'Lord, I have explained the charges to the accused ... and I have received instructions, M'Lord."

When counsel for the appellants was asked whether they were ready to plead, he indicated that number 1 pleads not guilty to all the charges and denies the allegations

against him. He conveyed the same message to the court in respect of the second appellant. He indicated that there was no plea-explanation.

I mention all these details, because of a point *in limine* which was argued by Mr Moeng, counsel for the second appellant, when the appeal came before us. Mr Mosopa appeared for the first appellant, and Mr Mashuga appeared for the state.

[11] Returning to the plea proceedings, I add that the interpreter stated to the court that both the appellants confirmed the plea-explanation, such as it was, offered on their behalf by their counsel.

[12] I add that the remaining four accused also, through their counsel, pleaded not guilty to all the charges, without giving plea-explanations, other than a bare denial of the allegations and in each case, the relevant accused confirmed the "plea-explanation".

[13] The remaining four accused did not feature in the appeal before us. I assume, although there was no official confirmation to that effect, that the remaining four accused did not proceed with efforts to appeal against their convictions and/or sentences.

[14] On 5 October 2011, all six the accused were convicted on all six the charges.

[15] On the same date, 5 October 2011, the first appellant was sentenced as follows:

on COUNT 1: twelve years imprisonment;

on COUNT 2: twelve years imprisonment;

on COUNTS 3 AND 4, the attempted murders, eight years imprisonment each;

on COUNT 5, possession of firearms, five years imprisonment;

on COUNT 6, possession of ammunition, two years imprisonment.

After pronouncing the sentences in respect of the first appellant, the learned Judge said the following:

> "The total amounts to 47 years. That obviously is far too much. I order that the sentences on COUNT 1, COUNT 3, COUNT 4, COUNT 5 AND COUNT 6, are to run concurrently. Eight years of COUNT 2 is also to run concurrently with the sentence on COUNT 1.
>
> That means that it is an effect (*sic*) imprisonment sentence of 20 years."

I, respectfully, have to observe that the arithmetic of the learned Judge clearly let him down: if eight years of the twelve years sentence in respect of count 2 run concurrently with the other sentences, only four years of the twelve years sentence remain, so that the concurrent sentences of twelve years, when added to the four years, produce an effective sentence of imprisonment of sixteen years and not twenty years. I debated this with counsel during the proceedings before us. I will revert to this issue.

[16] The second appellant was sentenced as follows:

COUNT 1, ten years imprisonment.

COUNT 2, twelve years imprisonment.

COUNTS 3 AND 4, six years imprisonment each.

COUNT 5, five years imprisonment.

COUNT 6, two years imprisonment.

Because of the cumulative effect of the total sentence of forty one years, the learned Judge ordered that all the sentences would be served concurrently with the twelve year sentence in respect of count 2, the murder charge. In the result, the effective sentence of imprisonment came to twelve years.

[17] For present purposes, I need not dwell on details of the sentences in respect of the remaining four accused, but it can be said that those sentences, by and large, corresponded with the sentences imposed in respect of the second appellant, namely twelve years effective imprisonment.

[18] Still on 5 October 2011, the learned Judge granted leave to appeal to this court to all the accused in respect of "conviction and sentence". The learned Judge did not give a judgment motivating his decision, but simply made the order.

[19] As I mentioned, it appears that the remaining accused, barring numbers 1 and 2, did not prosecute appeals.

[20] For the sake of brevity, I will refer to the first appellant as "no 1" and to the second appellant as "no 2", and to the other four accused as "no 3" to "no 6" respectively.

[21] I turn to the argument *in limine* presented by counsel for no 2.

ARGUMENT *IN LIMINE*

[22] The argument presented by Mr Moeng, can be summarised as follows:

- When the matter proceeded on 4 October 2011, "both appellants pleaded without any charges being put to them".
- This procedure flew in the face of the provisions of section 35(3)(a) of the Constitution, Act 108 of 1996 which reads as follows:

  > "Every accused person has a right to a fair trial which includes the right to be informed of the charge with sufficient detail to answer it."

- Although legally represented and having pleaded, it is not clear whether the appellants understood the charges levelled against them or not.
- The fact that counsel for no's 1 and 2 told the court that he had explained the charges to them, does not "necessarily mean that the appellants understood the charges they were pleading to".
- Section 105 of the CPA was also not complied with.

  This section provides:

  > "The charge shall be put to the accused by the prosecutor before the trial of the accused is commenced, and the accused shall, subject to the provisions of sections 77, 85 and 105A, be required by the court forthwith to plead thereto in accordance with section 106."

  (Sections 78, 85 and 105A do not apply for present purposes, and section 106 only prescribes the options open to an accused when pleading.)

- The provisions of section 105 are peremptory, and an accused person is entitled to know what case he has to meet.

- It is the duty of the prosecutor/state to put the charges to the accused and for the accused to plead thereto.
- Non-compliance with the provisions of sections 35(3)(a) of the Constitution and 105 of the CPA constitutes an irregular procedure entitling the appellants to have their convictions and sentences set aside.

[23] In opposing the argument *in limine*, Mr Mashuga, for the state, submitted that in section 1(1) of the CPA, "charge" is defined as including "an indictment and a summons".

[24] I have dealt with the proceedings which took place when the pleas were offered at the commencement of the case.

[25] It was not disputed that the indictment, which I have dealt with at some length, was presented to all the accused. After the amendments were moved in open court, and not opposed, there was also clear reference to the appropriate sections and subsections of Act 105 of 1997.

[26] Counsel for no's 1 and 2 told the court that he explained the charges to the accused. There is no basis whatsoever for finding that the appellants did not understand the charges.

After the pleas of not guilty on behalf of no 1 and no 2 were conveyed to the court, together with the "plea-explanation" to the effect that all allegations were denied, the

interpreter informed the court that "both accused 1 and 2 confirm the plea-explanation, M'Lord".

Counsel for all the other accused followed the same procedure. No objections were raised, at any stage during the trial, that the charges were not understood.

The indictments, comprehensively worded and amended, as well as the summary of the substantial facts in terms of section 144(3)(a) of the CPA, were in the possession of all the accused and their legal representatives.

[27] In all the circumstances, I have come to the conclusion, and I find, that there was, at the very least, substantial compliance with section 35(3)(a) of the Constitution as well as with section 105 of the CPA.

[28] Consequently, the argument *in limine* falls to be dismissed. Inasmuch as it may be necessary, I rule accordingly.

[29] I turn to a brief overview of the evidence. I will attempt to limit the summary to what is considered to be directly relevant to the case.

BRIEF OVERVIEW OF THE EVIDENCE

(i) Ebrahim Daya

[30] On 14 March 2009 at about 15:00, he was at his shop A&E Trichardt. It is a retail store or a "departmental store". He was having a meeting with his colleagues, his brother Mohseen and his cousin, the deceased, Abdulla. After the meeting they were

leaving the store via the back door. When he unlocked the door, and opened it, there was a man standing with a gun pointed at him, telling him to get down on his knees.

[31] He identified no 1 as the gunman.

[32] No 1 then hit him with the butt of the gun on the back of his head and he fell onto the floor.

[33] The gun was "a pistol" not a shotgun or a rifle or a revolver. A handgun.

[34] As he fell down, he was also kicked by no 1 and lost his consciousness.

[35] At the time of the attack, he noticed two other men behind the attacker. They appeared to be in the company of the attacker. They were watching the proceedings.

[36] The only other person who was supposed to be on site at the time was the security guard, which was accused no 5 ("no 5").

[37] When he regained consciousness, his brother and cousin were standing outside the shop. They probably had to step over him because he was lying at the door. As mentioned, the brother was Mohseen and the cousin was the deceased, Abdulla.

[38] The witness then saw no 1 firing a shot at the deceased who fell down. He then pointed the gun at the brother, Mohseen, and shot him as well. He took a third shot at the witness but he missed. The witness concluded that no 1 tried to kill him as well.

[39] It turned out later that the brother was shot in the leg or hip area and the cousin (deceased) in the abdomen.

[40] He therefore fired one shot at each of the three.

[41] When no 1 fired the shots, the other men, who were in his company, ran away. No 1 tried to call them back and even went after them on foot, but later came back alone.

[42] Before no 1 came back, the witness took out his cell phone to call for help. No 1 then took away the cell phone before he could call for help and also took the cell phone of the deceased. He therefore had three cell phones on him, namely that of the witness, the deceased and himself.

[43] After no 1 took the cell phones, he ran off again in the same direction on foot as he went to look for the other two men.

[44] The witness then carried the deceased and Mohseen back into the shop and phoned for help on the landline. Help arrived in the form of another brother and some friends. The deceased and brother were taken to hospital.

[45] Later that evening the deceased passed away because of the gunshot wound.

[46] The witness sustained an injury in the form of a bleeding wound on the back of his head. After-effects included "benign vertigo". He was treated at hospital but not hospitalised.

Mohseen was in and out of hospital for a long time after that.

[47] On 8 April 2009 the witness attended an identification parade.

[48] At the parade, he identified no 1 and asked him to step forward. He noticed that no 1 was wearing an earring, which was not the case at the time of the murder. It seems that he did not then identify him in the proper sense of the word, but subsequently told the police officer involved that no 1 was the attacker but he did not have an earring at the time.

He identified him by his features "his face, his nose, his clean-shaven head, I remember his complexion, there are a few good things about his features, about him, that I remember specifically, his built, his height".

[49] After asking no 1 to step forward, and noticing the earring, he assumed that the earring was part of the person's "everyday dress" and, for that reason, he did not point him out but told the police officer afterwards what had happened.

[50] At the time of the attack, no 1 was within two metres away from him. When he was ordered to get down to the floor, the attacker was no more than "his arm's length plus a few centimetres" away.

It was about 15:00 or 15:15. It was a clear day.

[51] When he regained consciousness after the attack, no 1 was 8 to 10 paces away. When no 1 did the shooting, the witness could see his face. No 1 also faced directly to him when he fired the third shot.

[52] When no 1 came back after having chased after the other two men, and took the cell phones (this is "the third identification") no 1 came straight to him to take the cell phone and he spent a slightly longer time because he also took the cell phone of the deceased. The witness then again identified no 1.

[53] The witness could also remember the clothing that no 1 had been wearing: it was a blue Sasol type overall top with the Sasol logo.

[54] The witness responded strongly to cross-examination on behalf of no 1. In my view, he was not in any way discredited.

[55] The witness was also cross-examined by counsel for no 5, the security guard. I consider it unnecessary to deal with that portion of the record, because no 5 did not feature in the appeal.

(ii) <u>Johanna Petronella Heyneke</u>

[56] She was employed as a forensic liaison manager at Vodacom head office in Midrand as a fraud examiner, particularly with regard to cell phone records.

[57] She testified about two cell phones, numbers 079[…] and 072[…] respectively.

[58] According to her evidence, number 0792[…] received an incoming call from number 072[…] at 15:48 on 14 March 2009.

These were "pre-paid" phones, and the witness could not indicate who the owners of the phones were at the time. According to the judgment handed down by the learned Judge, the one phone was in the possession of no 5 in February of 2009 and the other phone was retrieved from no 2 at the time of his arrest.

[59] Details of the use of these two numbers appear from exhibit "E" which is a lengthy print-out of the relevant data.

[60] The witness could not say much to advance the case of the state, and she did not receive a great deal of attention for purposes of cross-examination. The learned Judge did not directly take this evidence into account for purposes of his conclusions.

(iii) <u>Lucky Benedict Malaza</u>

[61] He was the original third accused of the original seven accused. Charges were then withdrawn against him, and he testified for the state, in terms of the provisions of section 205 of the CPA. Before he gave evidence, he was properly warned by the learned Judge in compliance with the requirements of that section.

[62] He knows all the accused.

[63] On 14 March 2009 he was at home when no 1 arrived. No 1 said he was looking for the witness from the previous day. He wanted him to assist with a job that had to be executed in Trichardt.

[64] No 1 asked him to accompany him to the home of no 2. There they found no 2 and no 4.

[65] No 2 told them that they had to wait for no 3.

[66] After a while, no 3 arrived in his Combi. They got into the Combi and no 2 introduced them to no 3.

[67] While in the Combi, no 1 received a call. He told the rest of them that no's 5 and 6 were waiting for them in Trichardt. No 3 was driving.

[68] In Trichardt, they parked at a taxi-rank and no 1 made a call. It would have been to no 5 or no 6. Both no 5 and no 6 came to the Combi. They were introduced to no 5 as a security guard in Trichardt. No 5 explained to them the reason for the visit. They were there to "come and take money". He told them where the money was. The money was to be taken at "A&E".

[69] No 3 produced a firearm and gave it to no 4. No 1 also had a firearm.

The witness said "No, although it was not explained, but we already knew that when firearms are involved, we were going to go in there, use firearms and take the money in a correct manner."

[70] The firearms looked like "pistols, semi-automatics".

[71] No 5 told them that inside the shop there are two people, the owner and another one, and there was also a third person who was about to leave.

[72] No 2 said he could not go too close, because he had worked at the shop previously and is known there.

[73] No 1 said he would enter the place with no 4 because they both had firearms.

[74] No 6 would stand in front of the shop and, while standing there, would call no's 1 and 4 to tell them when the owners were leaving the shop. After a while no 5 called, informing "us" to go nearer to the shop. No 5 also called no 6.

[75] The Combi was driven closer, and no's 2 and 3 stayed in the Combi. They went to park at a certain place where "we" would find them after the job was done. Obviously it was intended to be the get-away vehicle.

[76] No 6 told the witness not to stand still at a place but to move up and down in front of the shop.

[77] No 1 and no 4 went behind the shop.

[78] When workers left the shop, no 6 called no 1 and no 4 informing them that they must be ready as the workers were leaving.

[79] After a while the witness heard gunshots. After he heard the second shot he decided to leave. He went to where no's 2 and 3 were supposed to have parked but they were not there. He stopped a taxi which was going to the township, got in and left. He went to his home in Embalenhle.

[80] At about 18:00 to 19:00 he went to go and listen to some disc jockeys in the township. While he was there no 1 arrived. No 1 asked him what happened to him, because the get-away vehicle was also missing. He told him that when he heard the gunshots he left and went home.

[81] They agreed to meet the next day. The next day he met no 4 at a shop in Embalenhle.

[82] No 4 told him that no 1 fired shots but no 4 did not fire any shots. On the same day the witness met no 1. No 1 did not say anything because he was scared. No 1 told the witness not to say anything about the incident.

[83] The witness said that he heard two shots.

[84] In cross-examination, it was put to the witness that he was arrested on 7 April 2009. He could not remember the date but confirmed that he was arrested. On that day he

was not charged, but he was arrested a second time and then he made a statement. The investigating officer told him that he was arrested with regard to a case involving a crime committed at A&E store and that he was in the company of no 1 at the time.

[85] There was an identity parade on 8 April 2009 whereafter the charges against him and no 1 were withdrawn.

[86] He was re-arrested on 29 October 2009 and thereafter appeared in the Kriel magistrates court. It was put to him that no 1 was arrested on the same day. It was put to him that him and no 1 were taken to the Kriel dam by the police but he said he was the only one taken to the Kriel dam because no 1 was supposed to appear in court on that day. Later it appeared that him and no 1 were taken to the Kriel dam and he admitted that, on that occasion, they were assaulted and "suffocated" by the police officers.

[87] On 1 November 2009 he made a statement admitting his involvement. It was put to him that he implicated his co-accused but he said that they were already implicated at the time.

[88] He was asked why he denied any involvement when he was first arrested but made the statement about his involvement after the second arrest. He said, although no 1 told him not to tell anybody what happened, the police told him to expose everything, and that he must not be afraid of telling the truth.

[89] He knew no 1 before the incident. They were friends. He also knew no 2. By then he had known no 2 for about a year.

[90] In further cross-examination, he did not deviate in any material way from his evidence in chief, which I have dealt with. I consider it unnecessary to deal with his evidence in cross-examination about the other four accused.

[91] He denied that he was falsely accusing no 1 and no 2. There were no problems between himself and no 1 so that there was no reason to falsely implicate no 1.

[92] If no 2 were to deny seeing him on 14 March 2009, it would be a lie.

[93] In further cross-examination on behalf of no 3, he said that the fact that the police told him not to be afraid and to tell the truth was not the only reason why he made the statement. "The other reason is that I felt ashamed when I heard that there was a person who was killed there, and the other thing is that we did not say ... it was not said that we were going to shoot there, they said we were just going to go and take the money there."

[94] In his judgment, the learned Judge paid a considerable amount of attention to the evidence of this witness. After summarising the evidence of the witness, he said:

> "In the evidence Mr Malaza gave a very clear story, he explained it well, in sequence, he never deviated from his story, there was an instance where he apparently had a slip of the tongue where he talked about Bethal instead of Trichardt, and he admitted that he made that mistake, but on the whole he

made a favourable impression on the court. He never contradicted himself in any specific way, and I can find no reason purely on the demeanour and the way he gave evidence to criticise him."

The learned Judge also dealt with the criticism levelled against the witness because he first denied involvement and then, after the alleged assault by the police, he spilt the proverbial beans. In this regard the learned Judge said the following:

"The question is whether this other criticism, mainly about the previous assaults, detracts from his evidence as such. Nothing prevents a person from whatever cause or reason, to change his views and change his mind, even if he was assaulted. That does not prevent him from deciding eventually, freely and voluntarily, to make a statement, and then to back it up by giving evidence basically to the same effect in court. There is no real deviation from his evidence in court from the statement made on 1 November 2009.

As far as I am concerned he was a reliable witness and I have no doubt in accepting his evidence *in toto*. The fact however still remains that he is a single witness in respect of most of the accused, the only one that is really attached by other evidence is accused 1.

His evidence must be clear and satisfactory in all material respects. As I say, he is already ..., I have already said he gave clear evidence, his story was cohesive and coherent, and there were no contradictions whatsoever. I can find no reason not to accept his evidence, even on the basis of a single witness, which was given in clear and satisfactory terms."

(iv) Johannes Bhuthi Dludlu

[95] He was employed as a security guard at A&E store at the relevant time. He was on duty on 14 March 2009 between 06:00 and 18:00.

[96] At 15:00 he heard gunshots and saw two men running. He asked his colleague, no 5, to call the police which no 5 never did. He ran after the perpetrators but lost them, and called the police.

[97] Cross-examination on behalf of no 5 need not be dealt with for the reasons I have mentioned.

(v) Petrus Daniel Zeeman

[98] He was a warrant officer in the South African Police with 34 years service. Since 2007 he was attached to the Organised Crime Unit in Middelburg.

[99] He conducted the identification parade at Hendrina on 8 April 2009.

[100] At the parade, Mr Ebrahim Daya asked that no 8 on the parade (which later turned out to be appellant no 1) had to step forward. He did not point him out. He also pointed out someone else, Dludlu, who was not directly involved, as I have pointed out.

[101] After the parade, Daya told him that person no 8 (no 1 as I have explained) was recognised by him but was wearing an earring. The witness also noticed the earring before the parade. He noticed the person putting on an earring before the parade.

He explained to Daya that suspects having to appear at a parade were entitled to change their clothing "sodat hulle met gemak op die parade kan verskyn".

[102] This evidence served to corroborate the evidence of Daya on this particular subject.

[103] Then followed a trial within a trial in respect of statements and pointings out made by no 5. For reasons mentioned, I need not deal with this aspect.

(vi) <u>Jonathan Gerhardus Botha</u>

[104] He was a warrant officer with 12 years service in the Secunda Crime Intelligence Unit.

[105] He testified about the cell phones to which I have referred.

[106] Cell phone with number 072[…] was confiscated from no 2 at the time of his arrest.

(vii) <u>Mosiwa Thlalele</u>

[107] He was a warrant officer in the Police with 19 years service.

[108] After the incident, some time in 2010, he arrested no 5 in Ermelo. No 5 was in possession of a cell phone with number 073[…].

[109] After the evidence of this witness, certain admissions were recorded in terms of section 220 of the CPA. The correctness of a photo plan and key compiled by one Johan Hendrik Frederik Ras, exhibit "D", was admitted. The same applied to a

photograph of the Combi and the correctness of a ballistic report, exhibit "F". The medical evidence with regard to Mohseen Daya, exhibit "G", was also admitted.

I add that Mohseen also testified. He merely confirmed that he was shot in the leg and also broke "my finger-bone" as a result of the attack which was perpetrated upon him during the robbery of 14 March 2009. He spent about ten nights in hospital. He could not identify any of the perpetrators and he was not cross-examined.

[110] After the state case was closed, an application for the discharge of no's 1 and 2 in terms of section 174 of the CPA was refused.

[111] Thereafter, all six the accused closed their cases without giving evidence.

THE JUDGMENT

[112] In his well-reasoned judgment, the learned Judge summarised the evidence.

[113] He dealt comprehensively with the evidence of Mr Ebrahim Daya. He also dealt with the identification parade. He found that not much emerged from the cross-examination.

[114] He found that, on the evidence, particularly that of Daya and Malaza, there was clear *prima facie* evidence of the involvement of no's 1 and 2. He strongly relied on the evidence of Malaza for the convictions, in particular, of no's 2, 3, 4, 5 and 6, as well as that of no 1, where the evidence of Daya served as corroboration.

[115] In my view, the evidence of Daya was convincing as he had three opportunities to identify no 1.

[116] I have dealt with the learned Judge's careful analysis of the evidence of Malaza. It appears from his judgment that he took the relevant cautionary rules into account.

[117] He dealt with the question of common purpose, on which basis the accused were charged, as appears from the documentation from the Director of Public Prosecutions, and also with the mutual possession of the firearms and ammunition in this regard.

[118] In deciding whether or not there is room for this Court of Appeal to interfere with the judgment and the convictions, the following principles have to be taken into consideration:

- Not one of the accused chose to give evidence to rebut the version presented by the state witnesses.

In *S v Boesak* 2001 1 SA 912 (CC) the following is said at 923D-F:

> "The right to remain silent has application at different stages of a criminal prosecution. An arrested person is entitled to remain silent and may not be compelled to make any confession or admission that could be used in evidence against that person. It arises again at the trial stage when an accused has the right to be presumed innocent, to remain silent, and not to testify during the proceedings. The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent

during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence."

In my view, the learned Judge was correct in finding that a proper case was made out against no 1 and no 2 which called for an answer. His decision to convict them, is, in my view, fortified by the principles reaffirmed in *Boesak*, and other cases.

I need not express a view about the conviction of the other accused, and will refrain from doing so.

- It is trite that a Court of Appeal must be slow to interfere with the findings of fact of the trial court. This well-known principle is confirmed in the line of cases following upon the decision in *R v Dhlumayo and Another* 1948 2 SA 677 (A). See also *S v Francis* 1991(1) SACR 198 (A) at 204c-f.

  I could find no material misdirection on the part of the learned Judge which would allow this Court of Appeal to interfere with his findings of fact as required in the cases I have mentioned.

[119] In the result I have come to the conclusion, and I find, that the appeal against the convictions of no's 1 and 2 must fail.

[120] I turn to the sentence.

[121] I have mentioned full details of the sentences imposed in respect of no's 1 and 2.

[122] I find no basis upon which this Court of Appeal, with its limited powers when it comes to considering the sentence imposed by the trial court, can interfere with these sentences.

[123] Consequently, the appeal against the sentences ought to fail, subject to the following remark: I have mentioned the arithmetical miscalculation of the learned Judge when he stated that the sentences he imposed in respect of no 1 resulted in an effective period of imprisonment of twenty years. Where he ordered that eight years of the count 2 sentence was to run concurrently with the sentence on count 1, only four years remained to be served in addition to the total concurrent sentence of twelve years. Consequently, the remark by the learned Judge about twenty years should be corrected to read sixteen years, in order to avoid confusion, particularly in the ranks of the prison authorities.

THE ORDER

[124] I make the following order:

1. The appeal of the first and second appellants in respect of their convictions is dismissed.
2. The appeal of the first appellant against the sentences imposed is dismissed, except that the statement made by the learned Judge that he is to serve an

effective imprisonment period of twenty years is set aside and corrected to read sixteen years.

3. The appeal of the second appellant against his sentences is dismissed.

W R C PRINSLOO
JUDGE OF THE GAUTENG DIVISION, PRETORIA

A404/2014

I agree

N RANCHOD
JUDGE OF THE GAUTENG DIVISION, PRETORIA

I agree

H J FABRICIUS
JUDGE OF THE GAUTENG DIVISION, PRETORIA

HEARD ON: 12 FEBRUARY 2016
FOR THE 1ST APPELLANT: M J MOSOPA
INSTRUCTED BY: HOFFMAN LESHILO ATTORNEYS
FOR THE 2ND APPELLANT: ADV MOENG
INSTRUCTED BY: PRETORIA JUSTICE CENTRE
FOR THE RESPONDENT: M M MASHUGA
INSTRUCTED BY: THE DIRECTOR OF PUBLIC PROSECUTIONS