IN THE HIGH COURT OF SOUTH AFRICA
{EASTERN CAPE LOCAL DIVISION, BHISHO}

Case no. CA & R 25/2017

Date heard: 31 October 2018

Date delivered: 31 January 2019

In the matter between:

THOZAMILE GULE	First Appellant
ROSE NTUTHALO SOKOPO	Second Appellant
ORABA QELE	Third Appellant
ANELE YAWA	Fourth Appellant
UHURU QELE	Fifth Appellant

And

THE STATE	Respondent

JUDGMENT

TONI AJ

Introduction

[1] Serving before us is an appeal against the decision of my brother, Ndengezi AJ. Appellants were found guilty of one count of murder, two accounts of attempted murder, and unlawful possession of firearms and ammunition, respectively. The appeal is with the leave of the court *a quo*.

[2] The appellants were sentenced as follows: (a) count 1 (murder) – 25 years' imprisonment; (b) count 2 (attempted murder) – 15 years' imprisonment; (c) count 3 (attempted murder) – 15 years' imprisonment; (d) count 4 (unlawful possession of firearms) – 5 years' imprisonment; and (e) count 5 (unlawful possession of firearm) – 5 years' imprisonment. The sentences in count 1 and 2 and those in respect of counts 4 and 5, respectively, were ordered to run concurrently. The appellants were thus sentenced to an effective 45 years' imprisonment.

[3] In relation to count 1 the state alleged that on 10 September 2008 and at or near Norman's Wine and Dine, NU3, Mdantsane ("the tavern"), the accused shot and killed one Siyabonga Matiti ("the deceased"). In respect of count 2 the state alleged that on the same date and place as in count 1, the appellants attempted to kill one Sisanda Gole by shooting her with a firearm. In count 3 it was alleged that on the same date and place the appellants attempted to kill one Sisanda Febana. Alternative to counts 2 and 3 the appellants were charged with causing serious bodily injury to Sisanda Goje and Sisanda Febana by discharging firearms. In count 4 the appellants were charged with unlawful possession of firearms in that on the same date and at the same place they unlawfully possessed firearms without licences, permits or authorisation to possess such firearms. In count 5 it was alleged that on the same date and place the appellants unlawfully possessed live rounds of ammunition.

[4] The appellants were duly informed that a minimum sentence of life imprisonment would apply in the event of them being found guilty of murder, since the murder was allegedly planned or premeditated, or was committed by a group of persons acting in furtherance of common purpose.

[5] The first appellant appeals against his sentences only, whilst the rest of the appellants are appealing against both their convictions and sentences. The grounds

of appeal are (save for the first appellant) that the learned judge misdirected himself in convicting them and that (in respect of all appellants) the sentences imposed by the learned judge induce a sense of shock.

[6] In addition to relying on the evidence of an eye witness, in convicting the appellants the learned judge also relied on admissions made by some of the appellants. Apart from contending that the trial court erred in finding that the state had proved the guilt of the appellants beyond reasonable doubt, the second and fifth appellants also contend that the learned judge erred in admitting evidence of admissions allegedly made by them in the face of compelling evidence that they had been coerced into making the statements.

The Evidence

[7] The state called several police officers who attended the crime scene. Police officer Thobela Peter Phelisile said that he was alerted to a shooting at the tavern through a report from Radio Control. He said that he rushed to the scene and there met the owner of the business, Mthuthuzeli Ngqakayi, who informed him that three people had been shot, namely two women and one male. He noticed blood stains on the door, and had called an ambulance to attend to the injured. The two ladies were taken to Cecilia Makiwane and the male was slumped on a table and appeared to be dead. He then called one detective Mlumbi. Upon Mlumbi's arrival, he handed him 21 cartridges found on the scene.

[8] Nkululeko Mtuze, a police officer attached to the South African Police Fingerprints Section, also became aware of the incident through Radio Control, and upon arrival at the scene, he found Inspector Phelisile already there. He then took photos and collected exhibits, among which were cartridges and bullet heads. He also compiled a photo album which was submitted into evidence a Exhibit "A".

[9] Thamsanqa Jeffrey also testified that at about 17h00 on the day in question he received a telephone call from Radio Control that a shooting had occurred at the

tavern where "*15 Niggers*[1]" arrived and discharged shots. Upon arrival he found Phelisile and Mtutuzeli Ngqakayi there, and he took over the crime scene from the former. Mtuze arrived later, took photos and collected evidence.

[10] Sisanda Goje ("Goje"), the complainant in respect of count 2, testified that she was at the tavern drinking beer when she saw about three people entering the door. She looked at them as they entered and could see that they were carrying firearms. She took cover under the table and thereafter heard several gunshots. She did not recognise the shooters. After the shooting had ceased she realised that she had been shot as she noticed blood on her jersey. There was another young man behind her who had also been shot. She was wounded in the arm and the owner, Mthutuzeli Ngqakayi, called an ambulance. She was first taken to Cecilia Makiwane Hospital and thereafter to Frere Hospital, together with the other complainant, Sisanda Febana. She spent three days in the hospital.

[11] She also said that she was shot at five times and that one bullet hit her in the chest but was fortunately deflected by her cellular phone. Her medical reports and a J88 form were handed in as Exhibits "B1 and "B2", respectively. Under cross-examination she testified that at the time the assailants entered she was drinking beer and Ngqakayi was behind the counter. When the shooting started he ran to the kitchen. The appellants' representative asked her if was possible that Ngqakayi did not witness the shooting. She replied that it "*could be that he did not see it*".

[12] The other complainant, Sisanda Febana, said that she had gone to the tavern after 17h00 to buy a fish. She was served by Ngqakayi who was behind the counter. She heard Ngqakayi exclaiming "yoh" and thereafter several gunshots were fired. She hid under a table, but could not avoid being hit. She only realised that she had been struck by a bullet when she felt a burning sensation on her waist and noticed that she was bleeding. The bullet is still lodged in her body. She does not know who fired the shots and according to her Ngqakayi disappeared after exclaiming "yoh". She did not know if he had seen the shooters.

[1] This was a reference to a local gang.

[13] Mthutuzeli Ngqakayi testified that he owns the tavern as well as a supermarket operated from the same premises. He runs the tavern whilst the supermarket is managed by his son, Siyabulela Ngqakayi ("Siyabulela"). Ngqakayi said that he knew all the appellants except for the fifth appellant. The appellants always drink at his tavern. He said he had known the first appellant since 2004 and was his neighbour. He knew the second appellant since his primary school days and their homes are close to each other. He further said that he knew the third appellant as a companion of Monwabisi and that they frequent the tavern together. The fourth appellant also usually accompanies them. Ngqakayi knew the first to the third appellants so well that he could even recite their nicknames, namely Thoko, Nkutalo and Oraba. He could, however, not remember the fourth appellant's first name or nickname.

[14] On the ill-fated day he was behind the counter at the tavern, selling fish to Febana. He had put the fish in the microwave when he saw one Monwabisi in the doorway, carrying two firearms. Monwabisi was behind Febana. Behind him was the first appellant who was also carrying a firearm, followed by the third appellant. Whilst he was still waiting to retrieve the fish from the microwave, Monwabisi exclaimed "*here is this faeces*", referring to the deceased. He was looking at the first appellant and firing shots at the same time. The first appellant followed suit, also referring to the deceased as "this *faeces*" and also fired shots at him. The third appellant thereafter did the same. Fearing for his own life, Ngqakayi drew his own firearm and went to stand closer to the kitchen. It was only then that he noticed that there were many assailants, some whom he did not know. He, however, did not see the fifth appellant.

[15] Ngqakayi pointed out the shooters as being the first, second and third appellants. He ran to stand near the door of the kitchen and could not see the others clearly because he was dizzy. The deceased was lying on a table, his body riddled by bullet holes from which blood was oozing. Under cross-examination Ngqakayi said that at the time of the shooting incident the entrance was well lit and there was also some illumination outside.

[16] His son Siyabulela testified that he knew all the appellants very well since they grew up together. He said that he and the first appellant are neighbours, that he

grew up together with the second appellant, was in police custody with the third appellant during 2004, and that the fourth appellant used to drink at his home and chat to his girlfriend. He also met the fifth appellant in prison.

[17] Whilst serving his customers at the supermarket he heard a volley of shots being fired at the tavern which is below the supermarket. He went outside to investigate and saw the first, second, third, and fourth appellants together with Monwabisi and one Tando. They were leaving the tavern while carrying firearms. Monwabisi was carrying two firearms. He heard Monwabisi commenting that he had killed "*that faeces*" that he had been looking for. He and the others also swore at Siyabulela and pointed him with firearms. He then ran into the supermarket where he locked himself and some of his customers in the kitchen. It was only after they had been told by other customers that the armed gang had left, that he went to see what had happened at the tavern. The deceased was still there and the floor was covered in blood. He also did not see the fifth appellant on the day in question.

The trial-within-a-trial

[18] During the trial proceedings a trial-within-a-trial was held with a view to determining the admissibility of certain statements made by the first, second, and fifth appellants to the investigating officer, Superintendent Andrew George Middleton ("Middleton") and Magistrate Dewald Van Lamp ("Van Lamp"). At the conclusion of the trial-within-a-trial the learned judge ruled that all those statements were admissible. The reasons for that ruling are regrettably not explained in his judgment. Suffice it to mention that the learned judge found that those statements did not amount to confessions since they did not constitute unequivocal admissions of guilt. Mr Els, who appeared for the state at the hearing of the appeal, correctly conceded that the learned judge had erred in admitting the statements. It was clear from the testimonies of both Middleton and Van Lamp that the appellants told them that they had been assaulted and exhibited injuries which were consistent with their claims. The appellants' versions regarding their alleged assaults and ill-treatment at the hands of the police were accordingly reasonably possibly true. The state has accordingly failed to establish beyond a reasonable doubt that those statements were made freely and voluntarily. Even though the learned judge correctly found that

the statements did not amount to unequivocal admissions of guilt, he respectfully erred in admitting the statements in the face of compelling evidence that the appellants had been assaulted and subjected to ill-treatment at the hands of the police.

[19] Middleton said that after asking the fifth appellant a series of questions, he asked him if he had been assaulted and whether he had any injuries. He replied that he had been assaulted, removed his shirt, and showed Middleton slight bruises on his left shoulder and back. He also told Middleton that he had been assaulted by the police with guns during his arrest. He nevertheless indicated that he still wanted to continue with his confession.

[20] It was put to Middleton during cross examination that the freshness of the injuries suggests that it was probable that the fifth appellant had been coerced into making the statement. It appears from the record that Middleton was unable to provide an acceptable reason why he nevertheless proceeded to record the fifth appellant's confession. It also became apparent during cross examination that Middleton was a senior officer in the same unit in which the police officials investigating the appellants were attached. After some obvious attempts to avoid dealing with this issue, contending that he had just been transferred to the unit and that he had no knowledge of any of these cases, Middleton eventually conceded that he was indeed attached to the same unit.

[21] Magistrate Van Lamp testified that the second appellant appeared before him at 14:09 on 15 September 2008, apparently in his sound and sober senses. Present in his office were the second appellant, the interpreter and himself. Having been warned by the magistrate, the second appellant indicated that he wanted to make a statement
and said that he expected to be advantaged since he did not have any knowledge of the allegations against him. When asked by the magistrate if he had been assaulted or threatened by any person to influence him to make a statement, he said he was not. But when he was asked if he had any fresh wounds, injuries or scars on his body, he said he was assaulted with gun butts on his head by police on 13 and 14

September 2008, and showed Van Lamp abrasions and contusions on his back. He said he was throttled and was suffocated with a tube while being exhorted to tell the truth.

[22] Van Lamp also testified in relation to a confession made by the first appellant. He said that having been warned in the appropriate fashion, an identical form with identical questions was also used in respect of the first appellant. He also said he was assaulted and gave a detailed and account of the assault. The same *modus operandi* that was used on the other appellants was also used on him. He also sustained visible injuries as a result of the assault. When he was asked whether he was assaulted to make a statement, he replied that he was assaulted to coerce him to admit the allegations.

[23] The first, second, and fifth appellants, in their testimonies during the trial within a trial, gave detailed accounts of the circumstances of their arrest and their ill-treatment at the hands of the police. In the light of the state's concession it is not necessary for to provide a detailed summary of their testimonies. Suffice it to say, however, that their versions were consistent with what they told Middleton and Van Lamp regarding their alleged assaults. In the circumstances I find that the learned judge in the court *a quo* erred in admitting the statements. I accordingly find that the statements made by the first, second, and fifth appellants to Van Lamp and Middleton, respectively, are inadmissible as evidence against those appellants.

The appellants' versions

[24] The appellants all testified in their defence. The upshot of their testimonies was that they all denied having committed the offences with which they had been charged. The first appellant testified that he knows Ngqakayi well since they are neighbours. He once had a quarrel with him long time ago, they fought and the quarrel remains unresolved. He also knows Siyabulela well since they grew up together. They do not have a cordial relationship ostensibly because of the quarrel he had with Siyabulela's father. He further said that he had also known the deceased during his life time. They resided together at NU3, Mdantsane. They often spoke to

each other but were not friends. But they were not enemies either. He knows the two ladies who were injured at the tavern, but he did not know their names.

[25] On the day of the shooting incident he was in the vicinity of the tavern drinking beer with the third and fifth appellants when they heard shots being fired from inside the tavern. They were about 60 metres away and whilst still in shock, they saw people running out of the tavern. He did not notice any of those people carrying a firearm. He did not see Siyabulela among the people. They left and went to another shebeen. He denied having been in the tavern on that day and said that Ngqakayi was lying when he said that he saw him, Monwabisi and others entering the tavern carrying firearms. He denied that he ever entered the tavern and said that he did not see Monwabisi on the day in question. He also said that Siyabulela was lying when he said he saw him, Monwabisi and others coming out of the tavern brandishing firearms. He denied any involvement in the killing of the deceased and shooting of the two women.

[26] Under cross-examination he said that the shooting incident occurred during the day and that the visibility was good. He also conceded that he was banned by Ngqakayi from entering the tavern after they had a quarrel and would sit outside. He denied that he is a member of a gang. He further said that what he told the magistrate in his confession was not true as he feared that he would be detained further and tortured by the police if he did not say what they expected him to say. The police assaulted him because they wanted him to incriminate himself.

[27] The second appellant testified that he grew up in NU3 and knows the tavern. He further testified that he knew the deceased but was not involved in his killing. He could not remember anything of particular significance on 10 September 2008, but he knew for a fact that he was not at the tavern. He said that the statement he made to the magistrate was not the truth and that he had been coerced into making it. Under cross-examination he conceded that he knows both Mtutuzeli and Siyabulela well and that they would not confuse him with somebody else.

[28] The third appellant testified that he resides at NU14, Mdantsane which is not far from the tavern. He said that he knows both Mtutuzeli and Siyabulela but only

recognised the latter when he saw him in court. They met in prison but were not friends. He denied knowing Monwabisi or being friends with him. He also said that he does not own a firearm. On the day in question he was telephonically contacted by the fifth appellant who was at his girlfriend's place at NU3, and had a taken a taxi to join him. On his arrival he was told by the fifth appellant's girlfriend that the fifth appellant was at the first appellant's place. He went to look for him but did not find him there. He subsequently found him sitting on a veranda facing the tavern.

[29] He further testified that Mtutuzeli did not know him, as he would speak to him only when he was buying something at the tavern. He did not go to the tavern on the day in question, but only went to a shop to buy tobacco. The only person who went there to buy beers was the fifth appellant. Mtutuzeli might be confusing him with someone else when he testified that he saw him at the tavern on the day in question. People often confuse him with the fifth appellant, who is his brother.

[30] Whilst they were still drinking beer they heard shots coming from the tavern. He stood up but whilst still trying to determine what was happening, he heard a commotion. He saw people coming out of the tavern and walking towards them. The first appellant then suggested that they should leave. The fifth appellant, however, refused to leave as he was already intoxicated. Both he and the first appellant held the fifth appellant and while supporting him, they walked past the crowd and went to another tavern called China's Place. He denied having been seen by Siyabulela carrying firearms or shooting at persons inside the tavern, as alleged by Mtutuzeli. Under cross-examination, he said that he was not informed of his rights and did not make any statements.

[31] The fourth appellant denied that he was in possession of an unlawful firearm or ammunition at the tavern on 10 September 2008. He further denied that he was at any stage at the tavern on the day in question. He also denied having shot the deceased or attempted to kill both Goje and Febana. He said that he had known Siyabulela from as far back as 2000. They were together in initiation school and would occasionally meet when they went to buy liquor at a tavern called Salinga's Place. He did not have good relations with Mtutuzeli flowing from their previous quarrels which resulted in the latter shooting at him in defence of Siyabulela. His

relations with the Ngqakayis were so strained that Mtutuzeli banned him from entering the tavern. He conceded knowing Thando Kondlo (mentioned by Siyabulela during his testimony) and also confirmed that he had since died. He said that on the day of the shooting incident at the tavern, he was painting his home. He could not dispute that Mtutuzeli had ample opportunity to observe the persons who shot and killed the deceased and injured Goje and Febana.

[32] Since the state has conceded that there was insufficient evidence against the fifth appellant to justify his conviction, it is not necessary for me to summarize his testimony. The fact that the statement he had made to Middleton had been ruled inadmissible, means that there is no evidence connecting him to the shooting, and his appeal against conviction must accordingly be upheld. This much was conceded by Mr Els.

Analysis and evaluation

[33] It is trite that in criminal proceedings the onus is on the state to prove beyond reasonable doubt that an accused is guilty of the crimes with which he had been charged. The accused does not have a corresponding obligation to prove his or her innocence.

[34] At this stage it is apposite to reflect on the proposition made by Brand AJA (as he then was) in *S v Shackell*[2], where he observed that:

"It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be

[2] 2001 (4) SA 1 (SCA) para 30

rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true. On my reading of the judgment of the Court *a quo* its reasoning lacks this final and crucial step."

[35] In assessing the evidence the court must consider it holistically in order to determine whether the guilt of the accused has been proved beyond reasonable doubt. It is only after a detailed and critical examination of each and every component in a body of evidence that a judge may be able "*to step back a pace and consider the mosaic as a whole"*[3]. In the words of Nugent J[4], the conclusion which is reached must account for all evidence. Illustrating the importance of an evaluation of all the evidence, Nugent J said:

"What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simple be ignored[5]".

[36] It is so that the statements made by the first, second, and fifth appellants having been found to be inadmissible, the state was entirely reliant on the evidence of Mtutuzeli Ngqakayi and, to the extent that his testimony corroborated that of the former, that of his son, Siyabulela. Mtutizeli's testimony was indeed compelling and beyond any criticism. It was common cause that he had known all the appellants well and had ample time to identify them. They admitted that they had been in the vicinity of the tavern, albeit that they claimed to have been on the veranda of a nearby property. If indeed he was dishonestly implicating the appellants, he would not have conceded that he did not see the fifth appellant. And since the possibility of mistaken identity can be excluded (since the assailants were well known to him), the only other basis on which his testimony can be rejected is that he was deliberately lying

[3] See S v Shilakwe 2012 (1) SACR 16 (SCA) at [11]; S v Hadebe and others 1998 (1) SACR 422 (SCA) at 426 f-h
[4] In S v Vander Meyden 1999 (1) SACR 447 (W) at 450 a-b; 1999 (2) SA 79 at 82D-E. This case is quoted with approval in the unreported judgment of Petse JA in Mulaudzi and others v The State, SCA case no. 768/2015 (SCA) and many other cases in that court.
[5] Emphasis added.

about the identities of the assailants. It must have been abundantly clear from the summary of the evidence that there is no basis for such a finding.

[37] More importantly, Mtutuzeli's testimony was corroborated by that of Siyabulela in a number of important aspects. It was also common cause that Siyabulela had known the appellants well. He also had ample time to observe them since they had spoken to him and threatened him with firearms as well. It is significant that Siyabulela also observed that Monwabisi was carrying two firearms and that he had bragged about having shot "*that faeces*" (facts mentioned also by Mtutuzeli). Since the first appellant has not appealed against his convictions (having admitted guilt during the sentencing stage), it must be assumed that Mtutuzeli's assertion that he was one of the shooters is unassailable. This fact renders it even more unlikely that he would have been mistaken about the identities of the other assailants. Where, as is the case here, an eye witness had known the accused previously, other issues such as identifying marks, facial characteristics and clothing are less important than in cases where there is no previous acquaintance with the accused. What is important is the opportunity for observation and degree of previous knowledge.[6] In this case the eye witness had more than adequate opportunity to observe the shooters, visibility was good, and they had been known to him for many years. The possibility of mistaken identity is accordingly negligible.

[38] Mr Giqwa, who appeared on behalf of the appellants, sought to criticise Mtutuzeli's testimony on the basis of a statement by Goje to the effect that the latter had run to the kitchen when the shooting started. He argued that there was accordingly a reasonable possibility that Mtutuzeli did in fact not witness the shooting. I am not convinced that it is reasonable to make such an inference from Goje's evidence. When Goje was asked about Mtutuzeli's whereabouts at the time the shooting had started, she was clearly speculating and could not possibly have known what he could observe from his vantage point.

[39] The evidence adduced by the state accordingly established a compelling *prima facie* case which required of the appellants to provide versions which were

[6] R v Dladla 1962 (1) SA (A) at 310.

reasonably possibly true. In my view the reasoning of Ndengezi AJ in finding that there was no reasonable possibility that their versions could be true (and rejecting them as false), cannot be faulted. It must have been evident from my summary of the evidence that their versions were contrived, improbable, and fell to be rejected as false.

[40] I am accordingly satisfied that the finding by the court a quo to the effect that the state has proved the charges against the second, third, and fourth appellants beyond a reasonable doubt, is justifiable. The appeal against their conviction accordingly fails.

The appeal against sentence

[41] Sentencing is pre-eminently within the discretion of the trial court, and the appeal court may interfere only if there is clear misdirection on the part of the trial court or the sentence is shockingly severe. The correct approach is to apply the triad of factors enunciated in *S v Zinn*[7], namely weighing: the personal circumstances of the accused; the interest of the society; and the nature and seriousness of the offence[8]. In *S v Pillay*[9] Trollip JA said the following:

"Now the word 'misdirection' in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence, it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence."

[7] 1969 (2) SA 537A
[8] See also S v SMM 2013 (2) SACR 292 (SCA) at 207, para (a)-(b)
[9] 1977 (4) SA 531 (A) at 553E=F

[42] As regard the circumstances in which a court on appeal may interfere with the sentence of the trial court, Mohamed CJ commented as follows in *S v Salzwedel and Others*[10]:

"A court of appeal was entitled to interfere with a sentence imposed by a trial Court in a case where the sentence was 'disturbingly inappropriate', or totally out of proportion to the gravity and magnitude of the offence, or sufficiently disparate, or vitiated by misdirection of a nature which showed emphasis of the personal circumstances of an accused and underestimation of the gravity of the offence constituted a misdirection which might result in the sentence being set aside."

[43] The court imposing sentence must ensure that it exercises its discretion not only correctly but also reasonably. The test being whether there was proper and reasonable exercise of the discretion bestowed upon the court imposing sentence. In *S v Kgosimore*[11] Scott JA said that '… *either the discretion was properly and reasonably exercised or it was not. If it was, a Court of appeal has no power to interfere; if it was not, it is free to do so...*'

[44] While the learned judge's finding regarding substantial and compelling circumstances cannot be faulted, the offences remain serious and deserving of long term imprisonment. In killing the deceased the appellants acted in a callous manner and without any regard for human life. They shot the deceased in cold blood and were completely unconcerned about the possibility of serious injury (or even death) to other by-standers.

[45] It is clear, however, that the learned judge did not give due consideration to the disproportionally severe impact of the accumulative effect of the sentences. The effective period of 45 years' imprisonment imposed by the learned judge is, with respect, so excessive in the circumstances that the inference is ineluctable that he did not properly exercise his sentencing discretion. This court is accordingly at large to interfere with the sentences. Mr Els conceded that it would be fair and appropriate to order all the sentences to run concurrently, resulting in an effective term of 25

[10] 1999 (2) SACR 586 (SCA)
[11] 1999 (2) SACR 238 (SCA) at 241, para 10

years' imprisonment. In my view such an approach will effectively ameliorate the unduly harsh consequences of the consecutive periods of imprisonment.

Order

[46] In the result, the following order issues:

1. The fifth appellant's appeal against his convictions is upheld and the convictions and the sentences imposed by the court a *quo* are set aside.

2. The appeal against the convictions of the second, third and fourth appellants is dismissed.

3. The appeal against the sentences in respect of the first, second, third and fourth appellants is upheld, and the sentence is amended to the extent that all sentences imposed by the court *a quo* are ordered to run concurrently, effectively resulting in 25 years' imprisonment for each appellant.

4. The sentences are antedated to 23 July 2010.

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H. S. TONI
JUDGE OF THE HIGH COURT (ACTING)

SMITH, J:

I agree.

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J. E. SMITH
JUDGE OF THE HIGH COURT

LOWE, J:

I agree.

_____

M. J. LOWE
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Appellants	:	Adv A. A. H. Giqwa
Instructed by	:	Legal Aid Board
	:	KING WILLIAM'S TOWN JUSTICE CENTRE
Counsel for the Respondent	:	Adv D. Els
Instructed by	:	The Director of Public Prosecutions
	:	BHISHO