NOT REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

APPEAL NO. AR 383/2009

In the matter between:

VIVAPHI SIBIYA **Appellant**

and

THE STATE **Respondent**

JUDGMENT

GORVEN J

[1]The appellant in this matter was charged with:

a) One count of murder read with the relevant provisions of section 51 and Schedule 2 of the Criminal Law Amendment Act, No. 105 of 1997 (the amendment Act);
b) One count of robbery with aggravating circumstances read with the provisions of s 1 of the Criminal Procedure Act, No. 51 of 1977, further read with the relevant provisions of s 51 and Schedule 2 of the amendment Act;
c) One count of unlawful possession of a firearm;
d) One count of unlawful possession of ammunition.

He pleaded not guilty and was convicted as charged. He was sentenced to life imprisonment on count 1, 15 years' imprisonment on count 2 and 3 years' imprisonment on counts 3 & 4 which were taken together for the purpose of sentence.

[2]The appellant was accused No. 1 at the trial where he was charged along with two other persons. Accused No.2 was also convicted on count 1. Accused No. 3 was convicted on all four counts (albeit relating to a different firearm and ammunition). Accused 2 and 3 were refused leave to appeal but the appellant was given leave against both the convictions and the sentences.

[3]The only direct evidence linking the appellant, and accused 3, to the first two charges was that of accused 2. He did so in a statement to the police, his statement in terms of s115 of the Criminal Procedure Act, No. 51 of 1977, and his testimony in court. His evidence was to the effect that the appellant had indicated to him that he wanted the deceased dead. The appellant and accused 3 thereafter approached accused 2 to assist in killing the deceased. Accused 2 had demurred but had accompanied the others to await the deceased. The appellant and accused 3 had proceeded around a corner and down a hill, leaving accused 2 to wait for the deceased, who would walk along that path, whereupon accused 2 would fire the first shots at him as he descended the hill towards the other two. When the deceased walked past, accused 2 did nothing. After the deceased went down the hill, accused 2 heard gunshots and went home, discharging a number of shots from his firearm when

he neared his home. The body of the deceased was found at the place from which the gunshots emanated.

[4]This means that the only direct evidence was that of an accomplice. This triggers the cautionary rule which has been stated by Holmes JA in *S v Hlapezula & Others*[1] in the following terms:

> It is well settled that the testimony of an accomplice requires particular scrutiny because of the cumulative effect of the following factors. First, he is a self-confessed criminal. Second, various considerations may lead him falsely to implicate the accused, for example, a desire to shield a culprit or, particularly when he has not been sentenced, the hope of clemency. Third, by reason of his inside knowledge, he has a deceptive facility for convincing description-his only fiction being the substitution of the accused for the culprit. Accordingly…. there has grown up a cautionary rule of practice requiring (a) recognition by the trial Court of the foregoing dangers, and (b) the safeguard of some factor reducing the risk of a wrong conviction, such as corroboration implicating the accused in the commission of the offence, or the absence of gainsaying evidence from him, or his mendacity as a witness, or the implication by the accomplice of someone near and dear to him; see in particular *R v Ncanana* 1948 (4) SA 399 (A) at 405-406; *R v Gumede* 1949 (3) SA 749 (A) at 758; *R v Nqamtweni and another* 1959 (1) SA 894 (A) at 897G-898D. Satisfaction of the cautionary rule does not necessarily warrant a conviction, for the ultimate requirement is proof beyond reasonable doubt, and this depends upon an appraisal of all the evidence and the degree of the safeguard aforementioned.

[1] 1965 (4) SA 439 (A) at 440 D-H

[5]The appeal therefore turns on whether or not the trial court properly relied on this testimony. It is clear from the judgment of the trial court that it was alive to this rule. That satisfies the first test. As regards the second test, a number of features are relevant of which I will list a few. The clear mendacity of the appellant is a factor to take into account. This emerged in relation to whether a firearm was surrendered by him at the meeting of the community held by the induna. In addition, he was also clearly not truthful as to the events at the liquor store of his cousin where he said that he sought mealie meal when none was sold there and denied that he said he was going to visit accused 2. There are aspects of accused 2's testimony which are corroborated by and consistent with, the other evidence in the case. For example, the firearm surrendered by him at the meeting was described by the induna to have had an extended magazine. Accused 2 described the firearm which the appellant carried as having had a long magazine in his statement to the police made on the day of his arrest. Further, accused 2's testimony as to the visit to him by the appellant was corroborated by Khulekani Mseleku's evidence that the appellant went to his liquor store and said he was going to visit accused 2. The evidence of accused 2 implicating accused 3 was corroborated in many material respects which I shall not detail. No cogent reason could be suggested as to why accused 2 would fabricate evidence against the appellant. If accused 2 had wanted to do so, one would expect his evidence against the appellant to have been more damning and direct.

[6]Mr Zaca, who appeared for the appellant, submitted that there were improbabilities and inconsistencies in the evidence of accused 2. That is indeed so and was

conceded by Mr Radyn, who appeared for the State. His evidence as to why he discharged his firearm near his home is improbable. It could never have deceived the appellant into believing that accused 2 fired shots at the deceased. The deceased was out of sight of accused 2 during the attack so he could not have fired at him then and, had he fired at him before the attack, the appellant would have heard the shots. Mr Zaca pointed to one inconsistency, that in his police statement accused 2 claimed to have seen accused 3 fire the fatal shots at the deceased whereas in his S115 statement and in his evidence he sought to correct this and claimed only to have heard the shots. The ballistic evidence linked the firearm found in the possession of accused 3 to the shots fired at the deceased. Had accused 2 wanted to avoid cross-examination on his police statement, which is consistent with the ballistic evidence, he would have continued to claim that he saw the shots being fired since he knew that both the appellant and accused 3 claimed to know nothing of the matter. The fact that he changed his version did not in any way advantage him – he was clearly setting the record straight after his initial incorrect statement. If anything, this supports the truthfulness of accused 2's testimony.

[7]In dealing with these criticisms, Mr Radyn relied on the approach in *R v Kristusamy* [2] where the court said the following:

> After all one cannot expect a witness of that class to be wholly consistent and wholly reliable, or even wholly truthful, in all that he says. If one had to wait for an accomplice who turned out to be a witness of that kind - or indeed anything like it - one would, I think, have to wait for a very long time; members of the criminal classes do not usually come nearly up to so high a standard. That fact was fully recognised

[2] 1945 AD 549

> in *Rex v Levy* (1943 AD at p. 561) and in *Rex v Kubuse and Others* (1945 AD 189). But it is, of course, necessary that the Court should be satisfied beyond reasonable doubt that in its essential features the story which he tells is a true one. If more than that were required, the administration of justice would in many cases be rendered impossible.

[8]In my opinion, the story which accused 2 told is true in its essential features. It is consistent with all the other known facts in the case. I can find no fault with the reasoning of the court *a quo* in relying on his evidence. That being so, the appeal against conviction on counts 1 and 2 must be dismissed.

[9]As regards the appeal on counts 3 and 4, the trial court rightly found that the appellant's evidence as to the events of the community meeting could not be accepted at all. That of the induna and other witnesses was correct. The appeal must also fail on these two counts.

[10]Where an accused has been convicted of murder and of robbery with aggravating circumstances, a court is obliged to impose a mandatory sentence in accordance with s 51 of the amendment Act, unless it is satisfied that substantial and compelling circumstances exist that justify the imposition of a lesser sentence. The sentences for the offences in question are life imprisonment and 15 years' imprisonment respectively for the first such offence.

[11]An appeal court can only interfere if, in imposing sentence, the lower court misdirected itself or imposed a sentence which, in the view of the appeal court, is so startlingly inappropriate as to warrant interference. On the first two counts in the present matter, since the provisions of the amendment Act apply, the latter consideration does not, at least initially, apply. This is because the legislature has specified minimum sentences which, if imposed, would render it unlikely for an appeal court to arrive at a finding that such sentence was startlingly inappropriate. The former is, however, of great importance at the stage of the consideration of whether substantial and compelling circumstances exist. If relevant considerations have been overlooked or irrelevant factors have been taken into account, for example, this would warrant the finding that a misdirection has taken place. Such a finding would result in the appeal court being at large to approach sentencing afresh, if there is sufficient material before it to do so.

[12]It is therefore necessary to assess whether the learned judge misdirected himself in finding that no substantial and compelling circumstances existed which warranted lesser sentences than those prescribed. In *S v Malgas*[3] the Supreme Court of Appeal set out how a court should conduct an enquiry as to whether substantial and compelling circumstances are present. The following was said to be the general approach to be adopted:[4]

> In doing so, they are required to regard the prescribed sentences as being generally appropriate for crimes of the kind specified and enjoined not to depart from them unless they are satisfied that there is weighty justification for doing so. A

[3] 2001 (1) SACR 469 (SCA)
[4] At para [18]

> departure must be justified by reference to circumstances which can be seen to be substantial and compelling as contrasted with circumstances of little significance or of debatable validity or which reflect a purely personal preference unlikely to be shared by many.

[13]Dealing with the vexed point of when a finding may be made when no specific criteria were set out in the legislation, Marais JA continued as follows:[5]

> [22] What that something more must be it is not possible to express in precise, accurate and all-embracing language. The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease has hardened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust or, as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If that is the result of a consideration of the circumstances the court is entitled to characterise them as substantial and compelling and such as to justify the imposition of a lesser sentence.

[14]The court *a quo* mentioned the argument on this aspect in its judgment. It took into account the submissions made and found that no substantial and compelling circumstances had been shown to exist. Taking into account the tests set out in the cases, even considering the relative youthfulness of the appellant, his social and educational background and the fact that he was a first offender, I cannot find that the trial court misdirected itself. Even if there was a misdirection I would not, myself, have found the existence of such circumstances. In particular I am of the view that the

[5] At para [22]

nature of the offence, which amounted to a pre-planned, cold-blooded, contract killing where the appellant was the initiator and procured others to do his dirty work, clearly outweighed the personal circumstances of the appellant. It is my view that the legislature intended the minimum prescribed sentences precisely for situations such as this. I can find no basis for unease, hardening into a conviction that an injustice was done, by the trial court having imposed the minimum sentences on counts 1 and 2.

[15]Counsel representing the appellant did not advance any argument against the sentences imposed in respect of counts 3 and 4 and neither can I find any basis to interfere.

[16]In the result, the appeal against the convictions and sentences is dismissed.

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GORVEN J

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GOVINDASAMY AJ

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LUTHULI AJ

Date of appeal:	29 January 2010
Date of judgment:	4 February 2010
For the appellant:	EB Zaca, instructed by Pietermaritzburg Justice Centre.
For the respondent:	K Radyn