IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No: AR 336/17

In the matter between:

ZAMAKWAKHE ZAKWE	**1ST APPELLANT**
GADUMANE GANI ZAKWE	**2ND APPELLANT**
KHULENZOKUHLE ZAKWE	**3RD APPELLANT**
BUNYASO SOMANHLE ZAKWE	**4TH APPELLANT**

and

THE STATE	**RESPONDENT**

JUDGMENT

Delivered on: 10/12/2018

MNGADI, J

[1] The four appellants, with leave granted on petition, appeal against conviction. They were charged before the regional magistrate with one (1) count of murder. The appellants, who were legally represented, pleaded not guilty to the charge and the regional magistrate, having heard evidence, convicted the appellants as charged and sentenced each appellant to twelve (12) years imprisonment.

[2] In the trial the State led evidence of five (5) witnesses and each of the appellants testified. The charge against the appellants was that, upon or about 26 December 2011 and at or near KwaNomalala area in Tugela Ferry, they unlawfully and intentionally killed Siwakile Mzibomvu (the deceased), a 22 year old male person.

[3] The evidence, borrowing largely from the summary of the evidence by the trial court, was as follows. Zulisile Ndlovu (Zulisile) testified that, the appellants were brothers and they were part of the family of her in-laws and the deceased was her son. On 25 December 2011 late in the evening the first appellant and his parents came to her home looking for the deceased, she had last seen the deceased at home earlier in the day. They reported to her that the deceased earlier on that day had visited their home and they offered him a place to sleep in one of the houses. They later found that he had left without reporting that he was leaving, at the same time, it was discovered that an amount of R20 000 had been stolen.

[4] Zulisile testified that on the following day, she met the appellants and their father at Tugela Ferry as arranged in order to look for the deceased. The deceased had not slept at home. She and the appellants and their parents continued searching for the deceased. She received a call that the deceased was seen in Greytown. They proceeded to Greytown in two vehicles. She was in a double cab bakkie with the second and third appellants and their mother. She assumed that in the other sedan vehicle there was the first and fourth appellants and their father because she saw them in Greytown. She observed that there were sticks, sjamboks and knob sticks in the double cab vehicle.

[5] She testified that at Greytown they saw the deceased coming out of the bottle store and he was with Magwaza and Xulu. The vehicles were stopped and the appellants jumped out and grabbed the deceased. They searched him and found R2 000 cash on him. They put him in the boot of the sedan vehicle. Xulu produced R10 000 in cash and he said it was given to him by the deceased and he gave it to the

appellant's father. Magwaza told the appellants that R6 000 was given to him by the deceased and the money was at his home in Tugela Ferry. They then all drove back to Tugela Ferry with the deceased in the boot of the sedan vehicle which was driven by the first appellant.

[6] She testified that at his house Magwaza took out the R6 000 and he gave it to the appellant's father. The first appellant and his father told her that they will take the deceased away to hit him. She pleaded with them not to take the deceased away. They told her that they will not hit him in front of her as she will not feel good to witness the beating. She suggested that the deceased be handed over to the police, but the first appellant told her that they don't work with the police. The appellants than drove away with the deceased still in the boot, after dropping her near her home.

[7] Zulisile testified that the following morning she was visited by people sent to her by the appellants and she was taken to Tugela Ferry police station. She received a report to the effect that the deceased had died whilst he was being beaten up. She met the appellants at the police station but she did not speak to them. The evidence of Zulisile was confirmed by that of Xulu and Magwaza in all respects where Xulu and Magwaza were present.

[8] Dr Naidoo testified that he conducted the *post mortem* examination on the deceased's body on 29 December 2011. He observed extensive whiplash, abrasions and buises all over the body on the lower and upper limbs, the chest and posteriorially and laterally and over the neck. There were bilateral thoracic effusions which were straw coloured, which means that in the thoracic cavity there was fluid around the lung which was straw coloured , which was not blood. Both lungs at *post mortem* were collapsed. He found fat embolism as a result of damage to fatty issue releasing fluid which finds its way to the lungs and block the vessels causing the lung to collapse. He found the cause of death to be: (1) extensive whiplash bruises and abrasions and the fat embolisms. He concluded that the deceased died as a result of prolonged assault with a stick, rod, or sjambok. The pain was sufficient to cause death by shock.

[9] Constable Mbatha testified that on 27 December 2011 at 10am he attended a scene at Nomalala ward. The body of the deceased lying in the dry river bed was shown to him. On his return to the police station, he found the appellants who told her that the deceased had stolen their money and that having found him, they disciplined him but he managed to escape.

[10] The appellants in their evidence testified as follows: On 25 December 2011 at night, having discovered the theft of the money from their home, they together with their parents set out in third appellant's vehicle, a double cab bakkie to look for the deceased. They looked for him in their mother's relatives' homes, at taverns and at his (deceased's) home at Tugela Ferry but in vain. On the following morning they resumed the search, using two vehicles, a double cab bakkie and a sedan. In the bakkie it was the second appellant driving with the third appellant and their mother. In the sedan which driven by the first appellant was their father, the fourth appellant and a small boy.

[11] They stated that at Tugela Ferry they met with the deceased's mother. A report was received that the deceased was at Greytown. They, in both vehicles, proceeded to Greytown. They found the deceased being held by a group of men. They searched him and they found R2 000. Xulu gave them R10 000 and Magwaza said there was R6 000 with him at his home at Tugela Ferry. The aforesaid group of men placed the deceased in the boot of the sedan. They drove to Magwaza's home and they recovered R6 000. The deceased told them that R2 000 was with a certain boy at KwaNomalala and he offered to take them to that boy.

[12] After a short drive from Magwazas' house, they dropped off the deceased's mother. The first appellant took the deceased out of the boot and put him in the rear seat of the double cab bakkie. The fourth appellant got into the double cab bakkie. The deceased was placed between the third and fourth appellants in the back seat to ensure that he did not escape. The second appellant was the driver of the bakkie and the first appellant a front seat passenger. Their parents drove home in the sedan vehicle.

[13] They stated that at first after crossing the bridge at KwaNomalala, the deceased indicated that he was unable to point out the homestead where he left the R2 000 with a certain boy. He asked that the car be stopped so that he could look around. The vehicle was stopped and the deceased got off. He looked around and he suddenly ran away. The third appellant gave chase but he was called back by the others. It was at about 15H30 and there were homesteads in the area. The deceased, as far as they know, had relatives in the area. They then drove home.

[14] They testified that on the following morning they received a report over the telephone from their father that the naked body of an unknown boy had been found in a local river and he asked them what happened. They then decided to drive to the deceased's mother in order to find out whether the deceased came back home. They found that the family of the deceased had already received the news that it is the body of the deceased that had been found at KwaNomalala. They took the deceased's mother to the police station in order for her to identify the body.

[15] The appellants denied that they assaulted the deceased or that they were in any manner involved in his death. They denied that there were sticks and knob sticks or sjamboks in their vehicles. The first appellant denied that he and his father told the deceased's mother that they were going to beat up the deceased. They were not angry with the deceased and they had recovered the bulk of the money. It was the deceased's mother who suggested that the deceased be placed in the boot of the vehicle so that he would not run away. She was also against the taking of the deceased to the police station because the deceased had other cases.

[16] The regional magistrate found that the issues in dispute are whether the evidence proved beyond reasonable doubt that any of the appellants is liable for the beating of the deceased, and if so, whether such beating was unlawful and intentional.

[17] The regional magistrate noted that Zulisiwe was a middle aged rural woman with very little education. She is an unsophisticated person. The court found her to be an impressive witness. It found her evidence to accord with the probabilities. The trial court accepted her evidence that it was never her suggestion that the deceased be placed in the boot of the sedan vehicle. It also rejected that it was a group of unknown men who held and placed the deceased in the boot of the vehicle, but held that it was the appellants that had an interest in the deceased and it is the appellants who were in charge of the sedan vehicle. They took control of the deceased and they deprived him of his liberty. Further, Zulisiwe's evidence was corroborated by the evidence of Xulu and Magwaza. The court found the appellants to be mendacious witnesses and that part of their evidence did not make sense.

[18] It has been argued before us on behalf of the appellants that the trial court erred in accepting Zulisile's evidence. It was uncorroborated evidence and contradicted by other evidence,in particular, it is argued, Magwaza did not testify that he saw sticks in the bakkie when he was travelling in it from Greytown to Tugela Ferry and he did not testify that at Tugela Ferry the first appellant and his father said they were taking the deceased away to beat him up. Further, it is argued, at Greytown Xulu testified that he is the one who said the deceased must be taken to the police. In my view, it must be noted that Magwaza was not asked anything about sticks in the vehicle nor was he asked whether the first appellant and/or his father said anything about taking the deceased away to be beaten up. Xulu did not say that he is the only one who suggested that the deceased be taken to the police. It is not proper to decide the credibility of a witness in a piecemeal fashion. The decision relating to credibility must be based on the evidence of that witness as a whole and in the context of the entire evidence and the probabilities. In *Small v Smith* 1954 (3) SA 434(SWA) at 434E-G it was held that it is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved. In my view, it is incumbent to point out the part of the evidence that shall be contradicted and the evidence that will contradict it. Assertions in cross-examination by the legal representative of the accused are to be accepted as unequivocal admissions by the

accused of matters so asserted from the stage of the proceedings they are made and constitute material for consideration by the court unless and until they are withdrawn. See *S v Magubane* 1975 (3) SA 288 (N) at 291H).

[19] I agree with the regional magistrate that the claim by the appellants that they were never angry with the deceased for what he had done are false and falls to be rejected. Likewise, the regional magistrate, in my view, correctly accepted Zulisile's evidence, that after the recovery of R6 000 at Magwaza's place, the first appellant and his father declared openly to her that they were taking the deceased away to hit him. The fact that all along the appellants had looked for the deceased with a view to recover their money without reporting the case to the police, supports the evidence of Zulisile that the appellants refused to take the deceased to the police. The evidence of the appellants that although they were the persons who were anxious to recover the money and they had put a lot of effort in tracing the deceased, when the deceased was found they stood by and other unknown persons searched the deceased and placed him in the boot of their vehicle, not on their instructions, falls to be rejected and that of Zulisile, Magwaza and Xulu be preferred. Magwaza and Zulisile both testified that at Magwaza's place the appellants drove away with the deceased whilst he was in the boot of the vehicle. There is no evidence that prior to that the deceased had said anything about the whereabouts of the balance of the money. This is consistent with the first appellant driving away with the deceased in the boot in order to beat him up.

[20] The appellants testified that they (according to the fourth appellant it was the first appellant) took the deceased out of the boot because they had since grown to trust him because he was to cooperating. The regional magistrate, in my view, correctly held that there was nothing which indicated the deceased was cooperating and he could be trusted after the recovery of R6 000 from Magwaza. If it was so decided at Magwaza's home, why was he not taken out of the boot at that time?. Xulu and Magwaza produced the money given to them by the deceased on their own and the other money was found when the deceased was searched. Even after Magwaza had given the appellants R6 000, they still kept the deceased in the boot of the vehicle and even when Zulisile

pleaded that they take him to the police or deal with him in front of her, they refused and insisted on taking the deceased away. The appellants testified that even after transferring the deceased from the boot to the bakkie they kept the deceased in such a way as to ensure that he did not escape which confirms that at all times he was their captive. The trial court,correctly in my view, rejected that the deceased was at any stage treated differently because he was cooperating. The third appellant testified that the deceased was taken out of the boot when he had to show them the homestead where he left the money which was about two hours walk from Tugela Ferry which means it was at the area where the body was found at Nomalala. The deceased was only transferred from the boot because the sedan vehicle was to be driven away by the father of the appellants, not near Magwaza's home. When Xulu came across them the deceased was still in the boot because the two vehicles were following each other.

[21] The regional magistrate, in my view, correctly found it odd that the following morning when the accused heard from their father that a body had been found at the local river and being asked what did they do to the deceased, proceeded to drive to the deceased's mother, a long distance away, with a view to take her to the police station to identify the body found, without first ascertaining whose body it was. The inference is that they knew what they had done to the deceased. The appellants, in my view, are not telling the truth when they say they did not go to view the body found because they though they would not be able to identify the body. The fact is that they had been with the deceased for most part of the previous day. Why would they think the body is in state that they would not be able to identify it?. Despite the fact that the appellants had ample opportunity to report to their parents from 15H30 when the deceased allegedly escaped and it was close to their home and they were staying with their parents, they did not do, which indicates that there was no escape of the deceased. The appellant's mother was communicating telephonically with the deceased's mother, if the appellants reported the alleged escape of the deceased, it would have been reported to the mother of the deceased.

[22] It is not known what happened to the deceased, what is known is that the deceased was last in the company of the appellants as their captive, shortly thereafter, he was found dead, having been beaten to death. The appellants are not saying that any persons pursued the deceased when he ran away from them. They are not aware of any person who had any reason to harm the deceased. The deceased ran away in their area, he ran away about 500 meters from the spot where his body was found. Therefore, it is a fact that the deceased was last in the company of the appellants. The parents of the appellants having been involved themselves in the pursuit and capture of the deceased and the keeping of the deceased as captive, the father of the appellants declaring that the deceased will be beaten up, effectively disassociated themselves when the deceased was removed from the sedan vehicle and they drove away in the sedan vehicle leaving the deceased with the appellants.

[23] There was no direct evidence relating to the assault of the deceased. However, it was proved beyond reasonable doubt that the deceased was assaulted, and he sustained injuries from which he died. In the absence of any explanation, the assault was unlawful, and it was inflicted intentionally. The question is whether the from the objective facts established, the only reasonable inference is that the assault on the deceased was inflicted by the appellants or not. In *S v Jackson* 1998 (1) SACR 470 (SCA) at 476e-f it was held that the burden is on the State to prove the guilt of an accused beyond reasonable doubt, no more no less. n *S v Ntsele* 1998 (2) SACR 178 (SCA) at 182 it was held that what is required is to prove guilt beyond reasonable doubt not beyond a shadow of doubt, if only there is a remote possibility in favour of an accused, which can be dismissed with the sentence 'of course it is possible, but not in the least probable' the case is proved beyond reasonable doubt. In *R v Blom* 1939 AD 188 at page 202 to 203 Watermeyer JA said: 'In reasoning by inference there are two cardinal rules of logic which cannot be ignored: (1) the inference sought to be drawn must be consistent with all the proved facts, if it is not, the inference cannot be drawn; (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct'.

[24] The appellants' claim is that the deceased ran away and nothing happened to him. In *Shackell v S* [2001] 4 All SA 279 Brand AJA in 288e-f held' 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 rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonable possible be true. In *R v Mlambo* 1957 (4) SA 727 (A) at 738A it was held;' in my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to the accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must in other words be morally certain of the guilt of the accused. An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculationbut must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, proved facts of the case.' In my view, the claim is hollow and in the circumstances of the case is not reasonably possible true. In my view, the claim that the deceased whilst pursued by the appellants or some of them who had a reason to pursue him, he will, at the same time or soon thereafter, be set upon by other persons for their own reasons and be assaulted and killed, is in the circumstances of the case, so improbable that it cannot reasonably possible be true, it is so remotely possible that it can be dismissed with the sentence 'of course it is possible, but not in the least probable' . In my view, the claim as found by the trial court is false beyond any reasonable doubt and it falls to be rejected.

[25] The State has proved beyond reasonable doubt that the deceased sustained the injuries from which he succumbed at the hands of one or some or all the appellants. There was no evidence that all the appellants had planned or formed prior agreement that the deceased be assaulted. The injuries sustained by the deceased establish beyond reasonable doubt that the person or persons who inflicted them did foresee the possibility of the injuries causing death but nevertheless inflicted the injuries which

constitute *dolus eventualis.* In the absence of a prior agreement to assault the deceased, the next question is whether the assault was inflicted with common purpose on the part of all or some of the appellants. In *S v Mgedezi and others* 1989 (1) SA 687 (A), it must be shown in respect of each appellant:

(1) He must have been present at the scene where the violence was committed.
(2) He must have been aware of the assault on the deceased.
(3) He must have intended to make common cause with those who perpetrated the assault.
(4) He must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others.
(5) He must have had the requisite *mens rea*, he must have intended the deceased to be killed or he must have foreseen the possibility of the deceased being assaulted and performed his own act of association with recklessness as to whether or not the assault would ensue.

[26] It was common cause that the first and fourth appellants and their father were in his sedan motor vehicle whereas the second and third appellants with their mother were in the double cab bakkie. The first appellant was driving the sedan vehicle and the second appellant was driving the bakkie. They all drove to Greytown. The first appellant stated that seeing that it was a long matter and there was no evidence that deceased took their money he suggested that police be contacted which was not followed through. He stated that they did not get the police involved since their aim was to get the money, they did not want anybody to get arrested and they did not want anybody to die, their aim was first to get the money and that there was no need for them to get angry because if the money was not recovered, there would have been no one to pay the money. It seems to me to be a strange co-incidence that the deceased was placed in the boot of the motor vehicle owned by and driven by the first appellant. The deceased was still in the boot of the first appellant's vehicle driven by him when he was driven away after his mother had requested that he be punished in her presence and the first appellant and his father said they will not do so because they did not want the mother of the deceased to witness the beating. Even if that was said by the appellant's father, it matters not because it was said in the presence of the first appellant and the deceased was his captive. In my view, Zulisile is telling the truth that she was left at or

near Magwaza's homestead, not as claimed by the appellants that they drove away with her and she said they must take the deceased with them and place him between two appellants in the bakkie when they exchanged the vehicles. She had nothing to do with the exchange of the vehicles and how the deceased was taken away. It is likely that she wanted to see what was happening to the deceased as she had been involved in the search of the deceased and the recovery of the bulk of the money. In any case, third appellant admitted that her home was near Magwaza's home.

[27] The first appellant testified that he asked how they were going to receive the remaining R2 000. He suggested that they report the matter to the police, but he was persuaded that it was not necessary because the remaining money shall be recovered. In my view, this indicate, in contrast to the other appellants, the first appellant's commitment that the money be recovered. The deceased was assaulted in relation to the theft of the money. Again, in my view, it is no co-incidence that when the deceased was transferred from the boot of the sedan vehicle to the bakkie, the first appellant transferred with him. In fact, the evidence is that he removed the deceased from the sedan to the bakkie and he placed him between the third and fourth appellants at the back seat to ensure that he does not escape. The first appellant left his own vehicle to be with the deceased. The first appellant stated that he wanted the deceased to assist them to recover the remaining money. He sat in front in the bakkie and the second appellant drove the bakkie. He had to leave his own vehicle to be in the vehicle with the deceased. It was the first appellant on hearing of the death of the deceased who proceeded to the mother of the deceased and stated that they had no intention to kill the deceased and he suggested to her to go to the police station to identify the body. In my view, he knew that the body was that of the deceased and he knew what had happened to the deceased.

[28] The first appellant, the evidence shows, took upon himself that the money is or be recovered. His claim that when the deceased ran away, and the third appellant chased him, they immediately called back the third appellant because they were not concerned is inconsistent with their actions. They had looked for the deceased driving long

distances for two days from the part of the night the deceased disappeared with the money. They ensured that the deceased does not escape by placing him in the boot of the vehicle. They kept the deceased in the boot from 9H30 to about 14H00. It seems they were desperate to find the money and to do something to the deceased. The first appellant according to the evidence of Zulisile played the dominant role and he also happens to be the eldest brother amongst the three appellants who are his brothers. The first appellant stated that it was still in the morning when the deceased was apprehended and placed in the boot of the sedan vehicle and it was at about 15h30 when the deceased ran away. It was near the home of the appellants. The deceased ran away in broad day light in an area where he had relatives and the following morning he was found near the place where he allegedly had ran away having been beaten to death.

[29] The first appellant testified that the body of the deceased was found about a kilometer from where he escaped from them. The appellant did not see any person pursuing the deceased. It is highly unlikely that at the same time as the deceased was escaping from the appellants he will be set upon and be fatally assaulted by other people, in particularly in a sparsely populated rural area. The circumstances establish that it is the appellant, one or some of them who assaulted the deceased to death.

[30] The nature of the injuries sustained by the deceased does not indicate whether one or more instruments were used to inflict the injuries. The money stolen belonged to the third appellant and the theft caused concern to the entire family of the appellants. Some appellants had interest in the matter as much as their parents and it may not be concluded that all of them were involved in the assault to of the deceased. All the appellants know what happened to the deceased, but they have no duty to explain to the court what happened, therefore, no adverse inference may be drawn against them. The question is whether the evidence acceptable to the court proves the guilt of each appellant beyond reasonable doubt. The fact that they have given a version which is inherently improbable does not strengthen the State case against each appellant.

[31] Zulisile was not able to make a clear distinction amongst the second, third and fourth appellants, but she was certain regarding the first appellant. She was certain that it was the first that appellant that came to her residence with his parents late in the evening on the date the deceased stole the money, and that the first appellant drove the vehicle in which the deceased was placed in the boot, and that it was the first appellant and his father who told her that they were taking the deceased away to hit him. She testified that it was the first appellant who said they will not take the deceased to the police because they do not work with the police and that it was the first appellant who was too vocal.

[32] The circumstantial evidence established a strong *prima facie* case against the first appellant and a strong suspicion against the other appellants. The other appellants gave improbable versions but this is not enough to constitute guilt beyond reasonable doubt and it remains a strong suspicion against them. In my view, the trial court erred in finding that the case against the other three appellants was proved beyond reasonable doubt. In applying the *Mgedezi* principles to them there may be those who were there to see what was happening and may be to assist, if so, requested. They are entitled to the benefit of the doubt.

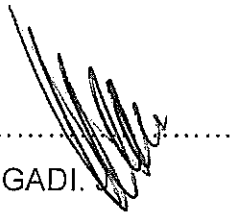
[33] On the evidence, the first appellant clearly manifested an intention to retrieve the money by means of an assault ifnecessary. The evidence indicates that he played the major role in kidnapping the deceased, placing him in the boot of the vehicle, openly stating that the deceased was being taken away to be beaten up. The evidence show that the deceased was beaten up in the same evening he was with the appellants and it is the same afternoon he was last seen alive. The nature of the assault indicates that the person inflicting the injuries must have foreseen and there did foresee that death would result which constitute dolus eventualis. The first appellant has not given any explanation consistent with innocence. The trial court was correct in rejecting his version as false beyond reasonable doubt In my view. the trial court correctly convicted the first appellant on the charged of murder. It was argued before us that at least the appellants could be guilty of culpable homicide or assault with intent to do griouvous

bodily harm. I cannot agree, the severity of the injuries sustained by the deceased show that it was a brutal assault over a period of time and the deceased was left to die.

[34] I propose the following order:

(1) The first appellant's appeal against the conviction on the charge of murder is dismissed. The conviction and sentence are confirmed.

(2) The second, third and fourth appellants' appeal against convictions is upheld. Their convictions and sentences are set aside.



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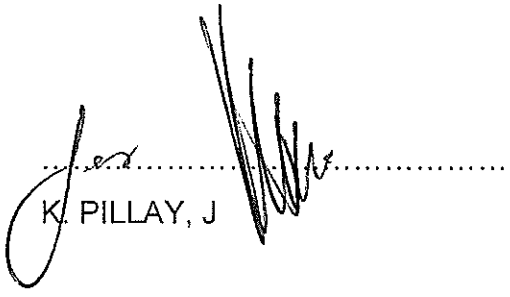
MNGADI. J

I agree, and it is so ordered.



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K. PILLAY, J

APPEARANCES

Case Number	:	AR 336/17
For the Appellants	:	L BARNARD
Instructed by	:	Messrs. Nel and Stevens Attorneys GREYTOWN
For the respondent	:	PWR MANCIYA
Instructed by	:	DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS
Matter argued on	:	26 October 2018
Judgement delivered on	:	