Cases Nos:
89/92
87/92
83/92

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between:

BRADLEY CECIL JASMIN	*1ST APPELLANT*
EBRAHIM NEIL WALLJEE	*2ND APPELLANT*
WESSLEY HERBERT	*3RD APPELLANT*

and

THE STATE	*RESPONDENT*

CORAM : *EKSTEEN, HOWIE et SCOTT JJA*

HEARD : *19 FEBRUARY 1998*

DELIVERED : *5 MARCH 1998*

JUDGMENT

SCOTT JA/...

SCOTT JA:

The three appellants were charged in the Durban and Coast Local Division with two counts of murder, three counts of robbery with aggravating circumstances, one count of theft and, in the case of the first appellant, the unlawful possession of a firearm and ammunition. All but the first count, which was one of theft of an Opel Monza motor car, related to events which occurred on 18 and 19 January 1990. In order to appreciate the nature of the various charges preferred against the appellants it is convenient to set out as briefly as the circumstances permit the events of those two days giving rise to the charges in question.

At about noon on Thursday, 18 January 1990, two men walked into an agency of the Permanent Building Society in Tongaat and announced to the teller that 'this was a hold-up'. The one was armed with a firearm and the other,

a knife. They were followed by a woman who stood between the door and the counter. At some stage she pointed to her wrist seemingly to indicate to the men that they were to hurry. All three were described by the witnesses as 'coloured'. They left with a relatively modest booty of R1 686,84. Shortly thereafter a white Opel Monza motor car with a CA registration number was seen to pull off from a parking bay close to the agency and drive away at speed. According to a bystander it had four 'coloured' occupants.

The following day, ie Friday 19 January 1990, at about 3.30 pm a woman walked into the banking hall at the Natal Building Society Agency in Port Shepstone and requested a teller to fill two paper bags which she produced with money. She was followed by two men; the one armed with a firearm, the other with a knife. Once again all three were described by the witnesses as 'coloured'. Before leaving with R11 650,63 in cash the man with the gun fired a shot into the

floor. Three people were seen by a passing motorist running from the direction of the agency to an awaiting white Opel Monza motor car with a CA registration number which pulled off at speed and so quickly as to indicate that there must have been a driver in the vehicle at the ready. The passing motorist, a Mr Duncan Shoesmith, realising that there was something amiss took the trouble, with commendable promptitude, to inform a provincial road traffic inspector, Mr Francois Harding, of what he had seen. The latter immediately radioed to all traffic patrol vehicles in the area to be on the look-out for the white Opel. Inspector Patheeben Pillay who was on patrol in a white Ford Sierra motor car together with Inspector Mfanukile Malangathi reported having seen a vehicle answering to the description given by Harding. He was instructed to give chase.

A motorist on the N2 travelling north from Port Shepstone just after 3.30 pm on 19 January 1990 testified that he was overtaken by a white Opel with

a CA registration number travelling at high speed. He observed the Opel turn off into a side road ahead of him and on account of its speed collide with the embankment on the side of the road. Shortly thereafter a provincial traffic-control vehicle, a white Ford Sierra, was seen to follow the Opel up the side road. A short way up this road, described as Link Road, there is a turn-off which is a *cul de sac* leading to a house.

At about 3.45 pm on the same day Warrant Officer Breedt in consequence of various radio reports drove to the *cul de sac* just mentioned. There he found a white Opel Monza motor car, registration number CA 70673, with its bonnet up. Lying on either side of the road were the bodies of Pillay and Malangathi. A subsequent post mortem examination revealed that each had been shot five times. Their revolvers had been removed from their holsters and there was no sign of their vehicle. It later transpired that the Opel had been stolen in

circumstances which I shall narrate in due course.

In the meantime, a radio report went out for all policemen and traffic inspectors on patrol to keep a look-out for the missing Ford Sierra. It was seen speeding on the N2 north of Link Road and travelling in the direction of Durban. Shortly thereafter and at a point about 4 km from where the Opel was discovered and just south of the Mhlangankulu river, it was found on the embankment on the eastern side of the N2. It was extensively damaged. From the tyre marks on the road and tracks on the embankment it was clear that the vehicle had veered across onto its incorrect side of the road and mounted the embankment where it had overturned. In it were discovered a 9 mm pistol (exhibit 1); a hunting knife (exhibit 3); a revolver which had been issued to the deceased traffic inspector Malangathi (exhibit 4) and a blue notebook containing telephone numbers and sundry information (exhibit 13). Subsequent ballistic tests established that the

shots that killed both deceased had been fired from the pistol, exhibit 1, as had the shot fired into the floor at the agency at Port Shepstone. The occupants of the motor car had fled.

Within minutes police from Port Shepstone as well as from the nearby Southport police station converged on the scene and began combing the area looking for suspects. A woman, described as 'coloured' was found at the water's edge on Southport beach. She was dressed in a bikini. Her clothes were in a bundle nearby. According to one of the policeman who approached her, Constable Rautenbach, she suddenly picked up her clothes while being questioned, walked into the sea and began shaking her clothing and in the process scattering bank notes into the surf. The woman, Miss Rochelle Koopman, who gave evidence for the State, denied that this is what happened. She testified that the money was concealed in her clothing which was carried into the sea by a wave

and that when she attempted to retrieve her clothing the money scattered into the surf. The dispute was however of little consequence. What is common cause is that a relatively large amount of cash found its way into the sea. An amount of R5 234 was recovered mainly, it would seem, due to the efforts of constable Rautenbach who plunged into the sea in pursuit of the bank notes. Indeed, his disregard for his own personal safety was such that he was washed out to sea by the spring tide and had to be rescued by the National Sea Rescue Institute. Koopman was arrested.

In the meantime, the first appellant was observed walking along the railway line parallel to and a short distance from Southport beach. By the time the police had crossed the Mhlangankulu river, which involved driving to the N2 and back again, the first appellant had left the railway line and was walking in a road close to the beach. He was described as 'coloured'. He had a naked torso and was

carrying his shirt. His trousers and shoes were observed to be wet. Tucked into his trousers was a revolver which proved to be the one which had been issued to the deceased traffic inspector, Pillay (exhibit 2). He was arrested. It was then shortly after 4 pm.

No further suspects were apprehended that afternoon. In the evening the first appellant and Koopman were being driven to Durban in separate motor cars when at about 8 pm the second and third appellants were observed hitch-hiking on the N2 in the vicinity of Umkomaas. The vehicle in front, in which Koopman was being conveyed, radioed to the vehicle following. The latter stopped and the second and third appellants were arrested. The vehicles then returned to Port Shepstone, there being apparently no longer any need to journey to Durban.

Against this background I return to the indictment. Count 1, as

previously indicated, was the charge of theft of the Opel Monza motor car. Count 2, being a charge of robbery with aggravating circumstances, related to the robbery at the Permanent Building Society at Tongaat on Thursday, 18 January 1990. Count 3, also a charge of robbery with aggravating circumstances, related to the robbery at Port Shepstone the following day, *viz* 19 January 1990. Count 4 related to the murder of Patheeben Pillay and count 5 to the murder of Mfanukile Malangathi. Count 6, a further charge of robbery with aggravating circumstances, related to the alleged robbery of Pillay and Malangathi of their vehicle and respective firearms. Count 7, which was directed at the first appellant only, related to the possession without a licence of Pillay's revolver and count 8, the possession without a licence of the rounds in that revolver.

The first appellant was acquitted on counts 1, 2 and 8, but convicted on counts 3, 4, 5 and 7. On count 6 he was convicted of the lesser crime of theft.

He was sentenced to 8 years imprisonment on count 3 and to 16 years imprisonment on counts 4 and 5 which were taken together for the purpose of sentence. The sentence of 8 years was ordered to run concurrently with the sentence of 16 years. On counts 6 and 7 he was sentenced to 2 years imprisonment on each count but the sentences were ordered to run concurrently. In the result he was sentenced to effective imprisonment for a total period of 18 years.

The second and third appellants were convicted on counts 1, 2, 3, 4 and 5. On count 6 they were convicted of theft. The second appellant was sentenced to 3 years imprisonment on count 1; 9 years on count 2; 9 years on count 3 and 2 years on count 6 (theft). Sentence of death was imposed on count 4 and on count 5. The 9 years imposed in respect of count 2 was ordered to run concurrently with the 9 years imposed on count 3. In the result he was sentenced to two death sentences as well as an effective period of 14 years imprisonment.

The third appellant was sentenced to two years imprisonment on count 1; 8 years imprisonment on count 2; 8 years on count 3 and 2 years on count 6 (theft). Like the second appellant he was sentenced to death both on count 4 and count 5. The 8 years imposed in respect of count 2 was ordered to run concurrently with the 8 years imposed in respect of count 3. In the result the third appellant was sentenced to two death sentences as well as effective imprisonment for a period of 12 years. With the leave of the trial judge the appellants appeal against their convictions on all counts (save, in the case of the first appellant, count 7) as well as against the sentences of death imposed on counts 4 and 5.

All three appellants made statements to a magistrate and pointed out certain things to senior police officers. The admissibility of these statements and pointings-out was challenged and this resulted in a lengthy trial within a trial. Thirion J (who sat with assessors) ruled that the statements and pointings-out were

admissible. Nonetheless in delivering the judgment of the court at the end of the trial the learned judge referred to this evidence only in passing and based his conclusion on an analysis of the evidence of Koopman weighed against that of the appellants in the light of the probabilities and other evidence which tended to incriminate them. The statements made by the appellants and the pointings-out did not, in any event, assist the State in so far as the conviction on count 1 was concerned. In this Court counsel for the appellants attacked the finding that the statements and pointings-out were admissible. On the evidence I am inclined to think that the statements and pointings-out were correctly admitted. Nonetheless, I find it unnecessary to have to decide the issue, especially as the subject matter of the trial within a trial was irrelevant for the purpose of the conviction of appellants 2 and 3 on count 1.

Koopman testified at length. Before attempting to summarize her

evidence, it is necessary to refer briefly to certain other items of evidence implicating the appellants. I have previously referred to the fact that very shortly after the robbery and the killings on 19 January 1990 the first appellant was found in possession of exhibit 2 not far from the wrecked Ford Sierra motor car. Counsel for the appellant submitted initially, albeit somewhat tentatively, that the State had failed to prove that this was the weapon which had been in possession of one of the deceased traffic inspectors (Pillay), but did not persist in this submission. The policeman who arrested the first appellant testified that when exhibit 2 was found in his possession he reacted immediately by saying that it was not he who had killed 'the cops'. Although disputed by the first appellant, this evidence was accepted by the trial court, and in my view correctly so. It was common cause that the fingerprints of all three appellants were found on the Opel motor car which had been abandoned off Link Road. The notebook, exhibit 13,

found in the Ford Sierra motor car was acknowledged by the second appellant to be his property. On Saturday, 20 January 1990, when the three appellants were examined for injuries by Dr Khan, an assistant district surgeon, the first and third appellants explained that they had been involved in a motor car accident, while the second appellant explained that he had sustained the minor injuries observed by the doctor 'in an accident'. This was not in dispute.

Koopman, a former prostitute in her mid-twenties, testified that she was introduced to the second and third appellants at a flat in Joubert Park, Johannesburg, on Friday, 12 January 1990, by a friend whose name was Madenia. Koopman wanted a lift to Durban where she proposed staying for 4 or 5 days and Madenia told her that the two appellants would soon be going to Durban. According to Koopman she formed a relationship with the third appellant and for the next two days the four of them, ie the two appellants, Koopman and Madenia,

spent the time socializing and smoking mandrax. Although the second appellant was in possession of a minibus, which was described by the witnesses as a 'High Ace', the second appellant, according to Koopman, was for some reason unable to use that vehicle for the trip to Durban. Koopman testified that on the evening of Sunday, 14 January 1990, the second appellant announced that they would steal a motor car. A plan was made which was put into operation the next evening. A room was booked at an hotel called 'Diggers Inn'. The third appellant was left at the room where he was to hide in a cupboard. The other three then drove to another hotel which was a well known haunt of prostitutes. There Koopman, at the direction of the second appellant, solicited a black man driving a white Opel Monza motor car. Koopman was picked up by this man who turned out to be a Mr Zuma. They drove to the Diggers Inn but, unbeknown to Zuma, were followed by the second appellant and Madenia travelling in the High Ace. Once Koopman and

Zuma were in the room, the third appellant emerged from the cupboard and the second appellant came in through the door. Madenia had also come up to the room and according to Koopman the two women then fled. They were joined downstairs a few minutes later by the two appellants and they all drove off in the Opel. After collecting their belongings at the flat they left for Durban that very night, ie Monday 15 January 1990.

Koopman testified that en route to Durban the second appellant told the two women that they had given the black man (Zuma) a 'Colombian necktie'. (This is apparently a euphemism for a method of strangulation.) They arrived at Durban in the early hours of Tuesday morning and moved into an outbuilding on a property belonging to the third appellant's family in Randles road, Sydenham. Later that day they all went out visiting friends. Madenia did not return and they did not see her again. The following afternoon, ie Wednesday, 17 January 1990,

the two appellants and Koopman drove around Durban looking for suitable places to rob. In the evening, according to Koopman, they visited a friend of the second and third appellants who lived in Newlands East but she, Koopman, remained in the car.

On Thursday, 18 January 1990, Koopman said, they got up early and drove to Newlands East where they collected a man called 'Jazzie'. I interpose that although it was common cause that the first appellant's nickname is 'Jazzie' and that he lived at Newlands East, Koopman insisted that this person was not the first appellant. She said that the four of them drove to Durban where they attempted to rob an agency of the Permanent Building Society. The second appellant was at all times the driver of the Opel and the person who gave the instructions. He was clearly the leader of the gang. Koopman, the third appellant and Jazzie, who was armed with a firearm, went into the banking hall of the

agency but were thwarted by the tellers ducking behind bullet-proof screens. She testified that from there they drove to Tongaat where they again singled out an agency of the Permanent Building Society to rob. The third appellant and Jazzie, who was again armed with a firearm, went into the agency. Koopman and the second appellant remained in the car. The second appellant, however, grew impatient and sent Koopman to tell the others to hurry. She said she did so but did no more than put her foot into the banking hall of the agency and motion to the others to hurry. Her share of the takings was R200.

The next morning, Friday 19 January, the second appellant announced that they were to do another 'mission'. Koopman wanted to go to the beach and she put her bikini bathing costume on under her clothes as the second appellant indicated that she could go to the beach later in the day. She said they drove to Newlands East where they picked up Jazzie and from there they headed

south to Port Shepstone. After considering an agency of the Natal Building Society as a possible place for a robbery they drove to Harding. There they contemplated robbing a branch of the United Building Society but as a security official appeared to know one of the men they drove back to Port Shepstone, arriving there at about 3.30pm.

Koopman testified that Jazzie and the third appellant, who this time was the person with the firearm, went into the agency while she and the second appellant remained in the Opel. The latter noticed, however, that the other two had forgotten to take the bags in which the stolen money was to be placed. Koopman was accordingly instructed to follow them with the bags. Outside the agency the third appellant and Jazzie told her to go into the bank and ask the teller to fill the bags with money. This she did, followed by the two men. Before leaving with the money, the third appellant fired a shot into the floor. When the

three arrived back at the Opel, the second appellant drove off at great speed. After a short while they observed that they were being pursued. The second appellant turned off the N2 into a side road and in the process struck the embankment on the side of the road. He drove on, however, and then turned into another road which proved to be a *cul de sac*. They stopped and almost immediately a white Ford Sierra motor car pulled up behind them. She said that the second appellant leapt out and opened the bonnet of the Opel, at the same time shouting to the third appellant to shoot. She saw a black policeman in a khaki uniform climb out of the Ford. A number of shots were fired in quick succession. The black policeman collapsed and the third appellant turned the firearm on the other policeman who was still in the motor car. She said she remembered the third appellant saying 'take their guns'. The four of them climbed into the Ford with the second appellant behind the wheel and raced off. While driving north on the N2 the second

appellant lost control of the vehicle which veered onto the incorrect side of the road and overturned on the embankment.

Koopman testified that when she regained her senses the second and third appellants were no longer there. She and Jazzie climbed out of the car and swam across a nearby river (the Mhlangankulu) heading for the beach. She was still in possession of the stolen money which the second appellant had earlier told her to look after. On arriving at the beach she said she was so out of breath that she could not continue. Jazzie went on without her and she took off her clothes and sat down at the water's edge in her bikini. After a short while she was approached by two policemen. While talking to them a wave came in and carried her clothing into the sea. She retrieved her 'top' in which the money was concealed but in the process the bank notes fell into the sea. She was then arrested. She also testified that she later undertook to take the police to the

Randles road property where she had stayed with appellants 2 and 3. That evening while travelling back to Durban with the police she saw the second and third appellants hitch-hiking on the side of the road. She pointed them out to the police and they were arrested. The trip to Durban was abandoned and they all returned to Port Shepstone.

In the light of the evidence which is common cause or otherwise uncontroverted it is apparent from Koopman's detailed account of the events of 18 and 19 January that she must have been present when the robberies were committed and the traffic inspectors shot. This much was conceded by counsel for the appellants. The same is true with regard to the theft of the Opel. It was established by independent witnesses that the body of Mr Zuma had been found in a bedroom at the Diggers Inn. He had been strangled in a manner which was described by the policeman who examined his body at the hotel as a Colombian

necktie. Before his death Mr Zuma was the night auditor at the City Lodge hotel in Durban. The Opel had been hired by a guest at the hotel and left there to be collected by the motor car hiring company in question. However, the vehicle could not be found and Mr Zuma did not return to work. He was last seen by his girl friend at about midday on Monday, 15 January, 1990 in Soweto. He was then in possession of a white Opel Monza motor car. An important question which faced the trial court, therefore, was whether reliance could be placed on the evidence of Koopman to the extent that she implicated the appellants in the commission of the crimes with which they were charged.

It is convenient to begin with the second appellant when setting out shortly the evidence of the appellants in answer to the case against them. The second appellant testified that he was employed by a clothing manufacturer in Durban as a driver and had driven up to Johannesburg in his employer's High Ace

with the object of collecting a consignment of mandrax for sale in Durban. On 8 or 9 January 1990 (not 12 January as alleged by Koopman) he and the third appellant were introduced to Koopman by Madenia. Koopman spent the night with them in the flat in which they were staying and from then on she and Madenia were constantly in and out of the flat. On Saturday 13 January 1990 he discovered, when using his employer's petrol card to fill the High Ace with petrol, that the vehicle had been reported as stolen. He considered it unwise to drive the vehicle back to Durban with a consignment of Mandrax and on Sunday, 14 January, told the third appellant in the presence of Koopman that they would have to hire a taxi for the return trip. The second appellant testified that Koopman's response was that there was no need to do so as she could borrow one of her boy friend's many motor cars. The following day, Monday 15 January, she arrived at the flat with the white Opel Monza in which they left for Durban at about 11.30

pm that night. He said Koopman and the third appellant stayed on property belonging to the latter's family in Randles road, Sydenham, while he, the second appellant, spent the nights at his girl friend's house. Nonetheless, he, Koopman and the third appellant spent much time in each other's company for the next few days. Madenia who had travelled down to Durban with them disappeared on Tuesday night. On Wednesday all three of them went to the beach together. In the evening they visited the first appellant at Newlands East. The Opel was always driven by the second appellant. On the Wednesday evening, however, according to the second appellant, Koopman announced that she required the Opel the following day as she had to see a client. On Thursday she was away the whole day returning at 6.30 pm. He testified further that on her return she informed them that she required the vehicle again on Friday, 19 January, as she had to see another client at Port Shepstone. The next morning, as Koopman only had to be at Port

Shepstone at 11am, they all went together as far as the first appellant's house. There, after smoking some mandrax, the three men decided to go the beach. They travelled south with Koopman in the Opel and on reaching Umkomaas, the third appellant decided that he wanted to be alone with the second appellant in order to discuss matters which were confidential. The second and third appellants accordingly went to the beach alone leaving the first appellant in the car with Koopman who continued on her way to Port Shepstone. He testified that in the evening when Koopman did not return as arranged, he and the third appellant walked to the N2 in order to hitch-hike back to Durban. On the way they were set upon by three men and in the process of defending themselves sustained certain minor injuries. While later hitch-hiking on the N2 they were arrested. The second appellant admitted that the notebook, exhibit 13, was his. He said he had left it in the Opel. He was unable to explain how it had found its way into the Ford

Sierra.

The third appellant confirmed in evidence the version of the second appellant, as did the first appellant to the extent that it related to him. The first appellant testified that on Thursday, 18 January, he went to work and had nothing to do with the other appellants or Koopman on that day. On Friday, 19 January 1990, he did not go to work as he was not feeling well. Nonetheless, after chatting that morning to the other appellants and Koopman who had come to visit him, he felt better and decided to go to the beach with them. He said that the other appellants got out at Umkomaas and that Koopman thereafter dropped him off at Southport, promising to pick him up on her way back to Durban. He testified that he spent the day on the beach and shortly after 3.30pm saw Koopman there. She wanted to go for a swim and handed him the firearm, exhibit 2, to look after while she swam. She explained that she had acquired it by a stroke of luck. While in

possession of the firearm he was arrested. He denied ever saying that he had not killed the cops or words to that effect.

The trial court was fully aware of the dangers associated with the evidence of Koopman, and the need for caution. This witness was not only an accomplice but had clearly lied in relation to the identity of the first appellant. This was apparent from various statements she had made in the course of the investigation and also from the evidence of the first appellant himself. There were also other shortcomings in her evidence of lesser import. Nonetheless, and subject to these criticisms the court *a quo* found her to have given her evidence in a calm and dignified manner and to have weathered a lengthy cross-examination well. There is nothing in the record which is inconsistent with such a finding. The evidence of Koopman with all its defects must, of course, not be viewed in isolation but in the light of all the evidence. When this approach is adopted it is

clear that there are a number of factors which strongly support her version as opposed to that of the second and third appellants.

A comparison between the evidence of Koopman with that of the second and third appellants reveals what Thirion J described as 'a decisive balance in favour of the conclusion that Koopman's version is the truth'. As far as counts 2 to 6 are concerned it strikes me as most improbable that Koopman, who was constantly in the company of the appellants from even before they left Johannesburg, should have other accomplices who teamed up with her at Tongaat and then again the next day at Port Shepstone without the second and third appellants having any inkling of what she was up to. And yet this is implicit in the version they would have had the court accept as reasonably possibly true. That version explains the fingerprints on the Opel and also, possibly, the presence of the second appellant's notebook in the Ford Sierra (assuming the unlikely conduct

on the part of one of the real perpetrators of transferring the notebook from the one car to the other). What neither appellant attempted to explain or deny in the course of the main trial was the statement made by each to Dr Khan on 20 January that he had been involved in 'an accident' or 'a motor accident'. In this Court counsel were agreed that the failure of the appellants in the main trial to answer Dr Khan's evidence was probably an error and that in the circumstances fairness to the appellants demanded that regard be had to the explanations proffered by them when giving evidence in the trial within a trial. However, those explanations do not assist them. Both the second and third appellants admit having told Dr Kahn that they had been involved in 'an accident' or 'motor accident'. Both said that this was untrue and that they had given a false explanation for their minor injuries merely to please the policeman who were present when they were examined. They said that in truth they had sustained the

injuries observed by the doctor when they were involved in a fight with three men who attacked them while they were walking to the N2 the previous evening. The explanation advanced for their alleged false statement to Dr Kahn is clearly untenable. On their own evidence at the stage they were examined by the doctor they were still holding out against the efforts of the police to get them to talk. It was only later that they said they 'cracked' and agreed to talk to a magistrate. There was in any event absolutely no reason why, if they did suffer the injuries in the course of an assault by strangers, they should not have said so to the doctor.

Admittedly this relates only to the crimes committed on the Friday when they were involved in the accident. But once it is clear that they were present on the Friday there can be no basis for interfering with the decision of the trial court to accept the evidence of Koopman regarding the participation of the second and third appellants in the robbery at Tongaat. This is particularly so if

regard is had to the improbabilities implicit in their evidence previously referred to and the description given by the witnesses to the two robberies as to the vehicle used and of the robbers who were described as 'coloured'. In my view, therefore, the second and third appellants were correctly convicted on counts 2, 3, 4, 5 and 6. As far as count 6 is concerned, the trial court, correctly, I think, was of the view that the necessary intent to rob had not been established and that on this count the appellants had to be convicted of theft.

Although Koopman did not implicate the first appellant, there can be no basis for interfering with his conviction on counts 3, 4, 5 and 6, ie the counts relating to 19 January 1990. The explanation given by first appellant for his possession of exhibit 2 was improbable to say the least. If his version were true it is difficult to imagine why Koopman should have given the firearm to him to look after and not also the money. His version is also not supported by Koopman.

She clearly had no motive to falsely implicate him. On the contrary, the probabilities are that she was lying to protect him. Indeed, it is common cause that the first appellant's fingerprints were found on the Opel. I have previously referred to the trial court's acceptance of the evidence as to what the first appellant had to say when exhibit 2 was found in his possession. Finally, the first appellant, like his fellow appellants, told Dr Khan that he had been in 'a car accident'. His explanation for having said this was the same as that given by the other appellants and had to be rejected for the same reasons. It follows that the first appellant was, in my view, correctly convicted on counts 3, 4, 5 and 6. There was no appeal on count 7 and he was acquitted on count 8 as it had not been shown that he was aware that there was ammunition in exhibit 2. He was similarly acquitted on count 2 because although the probabilities strongly favoured the conclusion that he was one of the robbers at Tongaat, Koopman had failed to implicate him.

There remains count 1 - the theft of the Opel. Although the evidence of Koopman regarding the date (ie a date not prior to Monday, 15 January) and the manner of the theft was confirmed by other witnesses whose evidence was not disputed, the only evidence directly implicating the second and third appellants was that of Koopman. The court *a quo* nonetheless came to the conclusion that it was safe to convict the two appellants on count 1. The evidence implicating them must, of course, be viewed in the light of the evidence as a whole, including the evidence of the appellants themselves and their false denial of having participated in the robberies. Zuma was last seen at midday on Monday, 15 January. He was then in possession of the white Opel. It is common cause that on that very night, ie the night of 15 January, the two appellants and Koopman left for Durban in the Opel. If the version of the second and third appellant were true it would mean that on this occasion, too, Koopman, unbeknown to the appellants,

had acquired the services of an accomplice, or more than one, to rob and kill Zuma in order to get hold of the Opel for a joy ride to Durban. As pointed out by the court *a quo*, it is extremely unlikely that a person or persons would go to the length of committing murder to obtain a motor vehicle simply to hand it over to Koopman so that she and her newly acquired friends could spend a few days at the coast. I agree. It is also somewhat unlikely that Koopman would have offered on Sunday, 14 January, to provide a vehicle if it had not yet been stolen. In all the circumstances I am unpersuaded that there is any justification for interfering with the conviction of the second and third appellants on count 1.

It follows that the appeal of all three appellants against their convictions must fail.

The appeal against sentence was confined to the sentences of death imposed on the second and third appellants in respect of counts 4 and 5.

Subsequent to the trial the death sentence was declared by the Constitutional Court to be inconsistent with the Constitution and accordingly invalid. This being so, other sentences must be substituted. In accordance with what has become the practice in such circumstances the matter must therefore be remitted for the imposition of competent sentences.

The following order is made:

(a) The appeal of each of the appellants against his convictions is dismissed.

(b) The appeal against the sentences of death imposed on the second and third appellants in respect of count 4 and count 5 is upheld and the sentences of death are set aside.

(c) The matter is remitted to the court *a quo* for the imposition of a competent sentence on the second and third appellants in respect of count 4 and count 5.

EKSTEEN JA

- Concur

HOWIE JA

D G SCOTT