

SOUTH AFRICA / JUDGMENT

Mbatha v S (AR339/15) [2016] ZAKZPHC 118 (19 August 2016)

[2016] ZAKZPHC 118

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Jappie JP, D Pillay, Poyo Dlwati

CASE / FILE NUMBER

AR339/15

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION, PIETERMARITZBURG

Case

No: AR 339/15

In

the matter between:

NQABENI

MICHAEL

MBATHA APPELLANT

and

THE

STATE RESPONDENT

Coram

: Jappie JP, D Pillay et Poyo Dlwati JJ

Heard

: 29 July 2016

Delivered

: 19 August 2016

ORDER

On

appeal from the KwaZulu-Natal High Court, Dukuza North Western

Circuit, Lopes J sitting as
a court of first instance:

Accordingly,

I propose the following order:

‘The appeal against conviction is upheld. The conviction of the appellant is set aside and the appellant is acquitted of the charge against him’.

JUDGMENT

POYO DLWATI J

- [1] The appellant together with two others, to whom I will refer to as accused 2 and 3 respectively, were convicted of murder by Lopes J sitting with two assessors in the High Court sitting in Dukuza North Western Circuit. He was sentenced to life imprisonment on 31 October 2012, whilst his co-accused were sentenced to twenty years imprisonment. The appellant’s application for leave to appeal was refused by the court a quo. This appeal comes before us after leave to appeal was granted by the Supreme Court of Appeal.
- [2] Two issues arise in this appeal. The first issue is whether the court a quo erred in relying on the evidence of two accomplice witnesses, Thulani Galaji Xulu (Xulu) and Bhékinkosi Theminkosi Zondi (Zondi) in convicting the appellant. The second issue is whether the court a quo erred in finding that the evidence of Zanele Kubheka (Kubheka) corroborated the evidence of both Xulu and Zondi so far as the appellant is concerned.
- [3] To fully appreciate the appellant’s contentions in this appeal, it is necessary to canvas the circumstances and evidence leading to the conviction of the appellant. Perhaps it is important at this stage to record that Xulu had been convicted of the same offence during 2008 and was serving a sentence of thirty years imprisonment at the time that he gave evidence. Zondi, on the other hand was warned by the court in terms of s 204 of the Criminal Procedure Act 51 of 1977 (the Act). It was the State’s allegation that the appellant was the mastermind behind the killing of Sabelo Andries Mkhize (the deceased) on 6 December 2006 in Ladysmith. He, according to the state, had hired the services of his two co-accused and Xulu to carry out the hit on the deceased. Zondi, at Xulu’s instance, became involved as a transport provider to the killers. To prove its case the state relied mainly on the evidence of Xulu, to prove the conspiracy and on the evidence of Zondi to prove the events that happened after the killing. It also sought to prove that the appellant had made various payments to his co-accused, as well as to Zondi and Xulu for the killing of the deceased.
- [4] Xulu testified that the appellant’s two co-accused, Zama Christopher Mthombeni (accused 2) and Mlungisi Muzi Mabhutana Mvelase (accused 3) were his friends. He knew the appellant as a principal at Siphimfundo High School (‘the school’). It was common cause that the deceased was the deputy principal at the same school. He testified that on 4 December 2006 he was on his way to Dundee Magistrate’s Court in the company of accused 2 and accused 3. Before they reached Dundee accused 2 received a call. After that call, accused 2 told Xulu that the appellant wanted to see them in Ladysmith.

[5] They proceeded to Ladysmith where they found the appellant waiting for them in Illing Street. They got into the appellant's

vehicle and went to a certain parking lot within Ladysmith. There the appellant told them that he had in fact discussed the issue for some time with accused 2 and 3. He wanted the deceased hit on his behalf. Xulu understood the appellant to mean that he wanted the deceased killed. After discussions amongst each other they agreed that they were ready to perform the task. It was agreed that it would be done within days. Xulu, accused 2 and 3 thereafter left the appellant.

[6] Later Xulu, accused 2 and 3 discussed the issue further. They foresaw that they would require transport services to get them to the area where the deceased stayed. Xulu then phoned a friend of his who stayed in Johannesburg, this being Zondi. Xulu initially testified that he explained the details of the task at hand to Zondi and it was agreed that his services would be required on 6 December 2006. Indeed his friend, Zondi, arrived at his home at dawn on 6 December 2006. He briefed him of the details of the task to be performed. They were joined by accused 2 and 3 and attended to various errands. Later that day they needed something to eat and Zondi took them to Xulu's girlfriend's house who resided at Maqanda. Xulu, accused 2 and 3 went inside the house whilst Zondi remained outside eating peaches. After having had something to eat they proceeded to the Nazareth area, which is where accused 3's girlfriend's place is, as accused 3 needed to fetch ammunition for his .38 firearm.

[7] They thereafter went to Uitval to look for the deceased. According to Xulu they went to the deceased's home but it was dark, and this made them realise that he was not at home. Accused 2 then phoned the appellant and enquired where the deceased could be found as he was not at home. The appellant then directed accused 2 to the deceased's girlfriend's home as a place where he could be found. I must mention at this stage that there are a lot of contradictions on this issue between the evidence of Xulu, his statement in terms of s 112 that he made when he pleaded guilty and Zondi's evidence but I will return to this later. After the phone call to the appellant, Xulu, Zondi and accused 2 and 3 proceeded to the deceased's girlfriend's home who also resided in the area.

[8] When they arrived at that homestead, they realised that accused 2 and 3 were known in that homestead. It was therefore agreed that only Xulu would go into that homestead to check whether the deceased was there. He went to that homestead and pretended to be buying a beer. After buying the beer, and as he was leaving he saw that one of the male persons seated there was the deceased. As Xulu went back to where accused 2 and 3 were waiting, he observed the deceased standing up from where he was seated. The deceased then walked to back of that house. Xulu then went back towards the deceased whilst accused 3 jumped over the fence and approached the deceased. Accused 3 then shot the deceased as he was facing the other way. About three shots were fired at the deceased. Thereafter they got into Zondi's vehicle and drove away. It was decided that they must go to Johannesburg. On their way they phoned the appellant and told him that they had finished the job. They told him that they were going to Johannesburg for a few days, to which he replied, 'phone me the next day'. They proceeded to Johannesburg where they stayed at Zondi's home for a few days.

- [9] Various contradictions in Xulu's evidence were pointed out to him during cross-examination. For instance it transpired only during re-examination by the prosecutor that Xulu had previously pleaded not guilty to the charge he faced before Van Zyl J in Pietermaritzburg during October 2008. In those proceedings a statement in terms of s 115 of the Act had been submitted on his behalf where the basis of his defence was outlined. In that statement Xulu had stated that during the evening of the incident he had gone to buy beers at a shebeen and thereafter returned to his place of residence and did not go anywhere else during that evening. This obviously was in contradiction of his s 112(2) statement which he made when he pleaded guilty and later it contradicted with his testimony during the trial. Xulu maintained that his testimony in court was the truth.
- [10] It also transpired during his cross examination that during the October 2008 proceedings his then girlfriend Zanele Kubheka had testified that Xulu had told her that he (Xulu) had shot the deceased as accused 3 could not do it as he was known in the area. Instead accused 3 stood guard as Xulu shot the deceased. Obviously in those proceedings it was denied that he had told his girlfriend that. This further was contrary to his section 112(2) statement and his evidence during the trial. He maintained that accused 3 was the one that shot the deceased.
- [11] Furthermore, it was put to him that in his s 112(2) statement he had stated that the appellant had told them that he would pay them R60 000 yet in the trial he testified that they were going to be paid R100 000. There were a lot of contradictions also as to who was to share in this R100 000 and how much each person would receive. It became unclear as to whether it was ever discussed how much each person was to receive for the killing or whether it was a known factor between them. It also remained unclear whether Zondi was to receive any share in this R100 000 because according to Xulu he was going to receive R25 000 whilst Zondi denied that he was going to receive anything other than money for the use of his vehicle.
- [12] Furthermore, it was put to Xulu that in his s 112(2) statement he had stated that accused 3 had told him where the deceased's girlfriend resided after they had not found the deceased at his home. Yet, during his testimony Xulu testified that when they did not find the deceased at his home, accused 2 phoned the appellant and he directed them to where they could find the deceased. It was suggested to him that he made this up as he wanted to implicate the appellant. In this regard and in light of his s 112(2) statement and the evidence of Zondi (which I will deal with later) accused 2 could not have phoned the appellant in the presence of Xulu as according to Zondi accused 2 was always with him in the vehicle whilst accused 3 and Xulu went to look for the deceased. Xulu's evidence in this aspect cannot be reliable. This contravention was also highlighted by the trial judge when he asked Xulu (page 50 of

the record from line 5 – 13):

‘which version of how they got to the deceased's girlfriend's house is correct and he said I do not have a response’.

- [13] Furthermore, there was also a contradiction between Xulu's s 112(2) statement and his testimony about what happened after the killing of the deceased. In his s 112(2) statement Xulu had stated that the appellant had told accused 3 that they must go to Johannesburg and that he would phone them the following day. Yet during the trial Xulu testified that they decided, on their own accord, to go to Johannesburg and they phoned the appellant to advise him of same. There is also a contradiction between Xulu and Zondi about this part of the evidence but I will deal with it in greater detail when I deal with Zondi's evidence, suffice to mention that according to Xulu, after the killing of the deceased they only saw the appellant on 8 December 2006 and not on the night of the killing as testified to by Zondi. Ultimately it was denied that the appellant had made any payments to him or his mother for the killing of the deceased but Xulu disputed this.
- [14] On the other hand Zondi's evidence was that he indeed received a call from Xulu requiring them to meet. Xulu, however, did not tell him during the telephone call or on his arrival in Ladysmith as to why he required his services. They instead drank a lot of alcohol, ate and drove around Uitval in the company of accused 2 and 3. He confirmed that they went to Xulu's girlfriend's home but he did not go inside as he was eating peaches in his vehicle. Thereafter they continued to drive around and Xulu and accused 3 kept leaving the vehicle and coming back saying they could not find the person. He (Zondi) did not know who they were looking for and why. At all times during that evening Zondi remained in the vehicle with accused 2.
- [15] At some stage when accused 3 and Xulu had left the vehicle to go and look for this person again, Zondi heard about two gunshots. He enquired from accused 2 if he had heard that and what it could possibly be. Accused 2 told him that they had been hired to kill a person but they were afraid of telling Zondi this as he might not have agreed to help them with transport. After hearing this Zondi was shocked and was afraid of the accused 2 and 3 and Xulu. After sometime Xulu and accused 3 returned and told them that they had done the job. They told them that they must go and tell the appellant that they had done the job. The four of them then proceeded to KwaGodi where the appellant resided. At that stage Zondi told the other three that he was drunk and tired and was not able to continue to drive. Xulu then drove the vehicle. On arrival at the appellant's home, they did not find him there but after a telephone call was made they waited for him. Zondi did not know the appellant.
- [16] The appellant eventually arrived and after they introduced him (Zondi) to the appellant, thereafter a discussion was held. The appellant asked them as to who had done the job and Xulu told him it was accused 3. The appellant then served them food. A further discussion was held about the compensation for what they had done. The appellant was leading the discussion and expressed appreciation for the work that they had done. An amount of R60 000 was mentioned initially as the payment but the appellant told them he would make it R100 000 as they had done a good job. Zondi mentioned that at this stage he was no longer observing as to who was talking but was merely listening to the conversation as he was drunk, tired and shocked. The appellant told them that he would pay them in instalments of

20s but mentioned three twenties.

- [17] The appellant further told them that he would have finished the payment by April 2007. An amount of R500 or R600 was also produced by the appellant for petrol for Zondi's car. Accused 2 also requested for some money so that they can perform a cleansing ritual for themselves. At that stage the appellant took out a cheque book and made out a cheque for R1 000 or R1 500. Zondi could not remember the exact amount because he was drunk. A cheque was made into Zondi's name as it was established that neither Xulu nor accused 2 or 3 had bank accounts. Zondi testified that when the cheque had been written out, he took it. They left the appellant's home and they all proceeded to Johannesburg. On arrival in Johannesburg they proceeded to the bank and waited until it opened and he deposited the cheque. After receiving the money he gave it all to Xulu, accused 2 and 3.
- [18] At some other time accused 2 requested Zondi to give him his bank account details so that the appellant could deposit more money for accused 3 into Zondi's bank account. Zondi gave accused 2 the bank account number and the appellant deposited about R1 000 into the account although Zondi could not clearly recall the amount. Zondi did not dispute the fact that the amount that was deposited into his account by the appellant on 29 January 2007 was R2 500. Zondi testified that they came back from Johannesburg to Ladysmith on 8 December 2006 for accused 2's mother's funeral and also for his own relative's funeral. Zondi did not mention anything about a meeting with the appellant on 8 December 2006 and this contradicts Xulu's evidence.
- [19] Under cross examination he disputed that Xulu had told him on his arrival at Uitval the purpose for which they required his services. This is obviously in stark contrast with Xulu's testimony about Zondi's involvement in the whole incident, as Xulu painted a picture that Zondi knew on his arrival the reason why his services were required and he participated freely. Zondi always emphasised that he was drunk and tired throughout that evening. It was also brought to Zondi's attention that his evidence about what happened after the killing of the deceased was in contradiction to that of Xulu's evidence. He, however, was adamant that they went to the appellant's home that night to tell him that they had done the job and they sought payment.
- [20] Zondi also contradicted himself against the objective evidence of the cheque book and the bank statement that the appellant had given him a cheque for accused 2 and 3 and Xulu on the night of the killing, as he was the only one with a bank account. After contradicting himself on whether he deposited the cheque or he had cashed it, he was forced to concede that no cheque was given to him during that night and no cheque was deposited into his bank account on 7 December 2006. This was pointed out to him that the only deposit made by the appellant according to his bank statement was on 8 December 2006. This leaves a question as to whether there was in fact a meeting between them and the appellant on 6 December 2006 after the deceased's killing. Whilst he had initially testified in his evidence-in-chief that he had taken the cheque from the appellant on the evening in question, he later changed this under cross examination and testified that he was not sure as to who had taken

it. It was suggested to him that he was trying to distance himself from the commission of the offence and he disputed this.

- [21] It was put to him that the appellant did not dispute that he had made two payments into his account. What was in dispute was what those payments were for. It was put to him that the payments by the appellant to his bank account were on the instructions of accused 2 who had rendered services at the appellant's school and had wanted money whilst in Johannesburg but did not have a bank account, hence the deposits to him but he disputed this and was adamant that the payments were for the killing of the deceased. That in a nutshell was the evidence that linked the appellant to the killing of deceased.
- [22] The appellant on the other hand denied any involvement in the killing of the deceased. He denied that he had meetings with Xulu, Zondi, accused 2 and 3 where the killing of the deceased was discussed. He maintained his version as put to various witnesses especially about the payments to Zondi and one Nondaba. He testified that the payment to Nondaba was not a payment to Zondi as reflected in his diary but was a payment to one old man in his village who sold goats. One therefore has to take Zondi and Xulu's evidence and analyse it to check whether it was clear and satisfactory in all material respects. Thereafter that evidence must be weighed against the probabilities and improbabilities, and establish whether the appellant's

explanation is reasonably possibly true. However I will deal with this much later in the judgment.

- [23] I now consider the evidence linking the appellant to the plot or conspiracy to kill the deceased; thereafter I will look at the events of the evening of 6 December 2006 and to the events that happened thereafter and finally to the payments.
- [24] Firstly the evidence linking the appellant to the whole offence is taken from Xulu's and Zondi's evidence, albeit at different times. Xulu is a self-confessed killer who is currently serving 30 years imprisonment for the same offence. His evidence

therefore is tantamount to that of an accomplice and must be treated with caution. He is also a single witness in various aspects of his evidence where he implicates the appellant. The same applies to Zondi as he was warned in terms of s 204 of the Act. It is trite therefore that one of the safeguards in the exercise of caution is corroboration.[1] Zondi corroborated Xulu's evidence about certain events that occurred on 6 December 2006. I must therefore find corroboration for Xulu's evidence about the plot to kill and the killing of the deceased. Alternatively where no such corroboration is found, Xulu's evidence must be clear and satisfactory in all material respects in order to have the appellant convicted of the offence.[2]

- [25] There is no corroboration of Xulu's evidence about the meeting they held with the appellant on 4 December 2006. In this regard he initially testified that accused 2 had received a telephone call from the appellant advising him that he would like to see them in Ladysmith. Under cross examination he initially testified that the appellant had told accused 2 that he wants to see them for the Mkhize (deceased) matter. Quickly he changed this and said he did

not know what the meeting was going to be about. The trial judge had to intervene and asked him which was the correct version and only then did he say he knew that it was about the Mkhize's matter. He initially testified that accused 3 was not present on 4 December 2006 but later changed and said he was present. Both accused 2 and 3 denied that they had a meeting with the appellant on 4 December

2006. There was no other evidence to corroborate either the call by the appellant to accused 2 or the meeting between Xulu, the appellant, accused 2 and

3. As Xulu's evidence is riddled with contradictions in this regard it falls to be rejected as no one knows where the truth lies

[26] I turn now to consider the evidence about the events of 6 December 2006. Xulu testified that he told Zondi on his arrival at Uitval as to why his services were required on that day. Zondi flatly denied this. Either Zondi is distancing himself from the offence or Xulu is lying but this does not take the matter any further for the appellant but affects Xulu and Zondi's credibility. Xulu further testified that after they did not find the deceased at his home, accused 2 phoned the appellant to enquire where they could find the deceased. However, this is contradicted by his own s 112(2) statement where he stated that accused 3 knew where they would find the deceased after they did not find him at his home. In any event Zondi had testified that accused 2 was always with him in his car when Xulu and accused 3 went to look for the deceased. Accused 2 therefore could not have phoned the appellant in the presence of Xulu. Furthermore there is no corroboration for the call having taken place. This evidence purporting to link the appellant to those events ought to be rejected.

[27] The further contradiction is about the actual person who shot the deceased. Whilst this does not take the appellant's case any further, it, however, has an impact on Xulu's credibility and reliability. Xulu denied that he was the one who pulled the trigger and stated that it was accused 3 who shot the deceased. Kubheka, whose evidence was accepted as reliable by the trial court, and I have no criticisms levelled at her evidence, she testified that Xulu had told her that it was him (Xulu) who had shot the deceased. The explanation about why Xulu was the one who pulled the trigger was more probable and is consistent with his earlier evidence that it was agreed that he would go inside the homestead where the deceased was as accused 2 and 3 were known in that homestead.

[28] Furthermore the description he gave to his ex-girlfriend about how the deceased was shot was consistent with the deceased's injuries as detailed in the post mortem report admitted into evidence as exhibit 'J'. Furthermore, accused 3 denied any involvement or whatsoever of the killing of the deceased and again there is no corroboration of Xulu's evidence in this regard. I am therefore of the view that Xulu again lied about this aspect of his evidence and Kubheka's evidence must be accepted as the truth.

[29] I now turn to consider the events that took place after the killing of the deceased. It was Xulu's evidence that after the killing they drove to Johannesburg and telephoned the appellant and advised him that the job had been done. Yet according to Zondi, after the

killing they went to the appellant's home in KwaGodi where they had a meeting with him. The appellant on the other hand denied that he had received a call from Xulu advising him that the job had been done. He also denied that he had a meeting with Zondi, Xulu and the two other accused at his home during the evening of 6 December 2006. On the State's own version there are contradictions in this regard. There is no objective or reliable evidence that indeed the meeting did take place. In my view the appellant must get the benefit of the doubt in this regard.

- [30] On the other hand, the appellant's version on this aspect is that he could not have met with them because there were local elections in the area and as a councillor he had to attend to those proceedings. Zondi, it should be remembered, kept emphasising that on the night in question he was drunk, shocked and tired. His evidence on its own cannot be reliable. Again the State's evidence in this regard has not been proven beyond a reasonable doubt that there in fact was a meeting. In any event Xulu testified that there was no meeting on the 6 December 2006. Even his evidence that he merely had called the appellant to advise him that they had done the job and that they were going to Johannesburg was not corroborated. There is therefore no reliable evidence that the appellant met with the accused, Xulu and Zondi on 6 December 2006.
- [31] The final issue is the payment that the appellant allegedly made as compensation to various people for the killing of the deceased. Mr Khathi, on behalf of the state conceded during the trial that he did not have evidence with regard to various entries in exhibit 'K' save for item 4. That entry was a payment allegedly made to Nondaba in the sum of R500.00. A note to this effect was made in the appellant's diary which was handed in during the trial and was marked exhibit 'K'. Zondi testified that this was cash handed to him by the appellant during the evening of 6 December 2006.
- [32] The appellant on the other hand testified that he had bought a goat from an old man in his area who they usually referred to as Nondaba. In this regard the evidence of Elphus Mpini Zondi corroborated the evidence of the appellant that indeed the appellant had bought a goat from him at some stage. He confirmed that at times he sold goats even though that was not an on-going business so to say. He also confirmed that his clan name is Nondaba and other people refer to him as Mancinza. On this aspect the court a quo erred in finding that Mr Zondi had conceded under cross-examination that his clan's name was not Nondaba. The record on page 415 from line 3 bears me out in this regard. He was asked the following question by Mr Khathi:

'You are who the people referred to as Mancinza?'

His response was:

'that is also correct. The Zondi's, the other clan name is also Mancinza'.

- [33] There is therefore no reason why the appellant's version, corroborated by Mr Zondi could not be accepted by the trial court in this regard. In my view his version in this regard is reasonably possibly true. The other payments were those for the sum of R1 500 and R2 500 into Zondi's account on 8 December 2006 and on 29 January 2007 respectively. According to Zondi these were payments for the killing of the deceased received on behalf of accused 2, 3 and Xulu from the appellant. However the appellant's version in this regard was that indeed the payments were for accused 3. During May to November 2006 accused 3 had been working at the school as a security guard but had not been paid for that. It was then agreed between the appellant and Mr Thamsanqa Ivo Ngubane, who was the chairperson of the school governing body at the time, that accused 3 be given some money as a token of appreciation for his services. It was for this reason that the sum of R2 500 was paid to him.
- [34] With regards to the amount of R1 500 the appellant testified that Accused 3, who is also his brother-in-law, had called him whilst he (accused 3) was in Johannesburg. He requested the appellant to lend him some money as he wanted to return to KwaZulu-Natal. Because he did not have a bank account, he gave him Zondi's banking details and that is how the money ended up in Zondi's account. Accused 3 corroborated the appellant's version in this regard. In weighing this evidence against Zondi's, it cannot be said that the appellant's explanation is not reasonably possibly true. In my view therefor, the appellant ought to have received the benefit of the doubt and be acquitted.
- [35] Having taken all the evidence that implicates the appellant in the commission of the offence, weighing it against the probabilities and the improbabilities; I am of the view that the learned trial judge erred in relying on the evidence of Xulu and Zondi in convicting the appellant. Xulu's evidence was of such poor quality that it can never be held to have been clear and satisfactory in all material respects. Where it ought to have been corroborated by Zondi, there were material and irreconcilable contradictions in their evidence. Xulu's evidence was not corroborated at all where it implicated the appellant. In this regard the learned judge erred in finding that Khubeka's evidence corroborated Xulu's evidence. This was not in relation to the involvement of the appellant but related to accused 2 and 3's involvement.
- [36] The same applies to Zondi. He mentioned on various occasions that during that evening he was drunk and tired as if to say 'do not rely much on what I'm saying'. As alluded to earlier, his evidence contradicted Xulu's evidence in all material respects. He tried to distance himself from being involved in the commission of the crime, yet Xulu testified that he informed Zondi about it in the beginning, on his arrival at Uitval, i.e. the purpose for which his services were required. He was a poor witness who contradicted his evidence-in-chief during cross-examination. Zondi is also not a reliable witness.

- [37] What is left is whether the appellant's version with regards to the payments is reasonably possibly true. In this regard the learned trial judge misdirected himself when he found that the appellant's defence was not credible. All that was required was for him to give an explanation which is reasonably possibly true. As held in *S v Shackell* 2001
- (2) SACR 185 SCA at para 30 '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'. In my view the appellant's explanation cannot be held to be false and he ought to have received the benefit of doubt and be acquitted.

Order

[38] Accordingly I propose the following:

'The appeal against conviction and sentence is upheld. The conviction of the appellant is set aside and the appellant is acquitted of the charge against him'.

I agree

JAPPIE JP

D PILLAY J

Date of Hearing

: 29 July 2016

Date of Judgment : 19 July 2016

Counsel for Appellant : Ms D Barnard

Instructed by

: Christopher, Wilton & Tathan Attorneys

Counsel for Respondent : Mr D Naidoo

Instructed by

: The Director of Public Prosecutions, PMB

[1] See *R v J* 1966 (1) SA 88 (SR); *S v Eyssen* 2009 (1) SACR 406 (SCA) para 12; *S v Dos Santos and another* 2010 (2) SACR 382 (SCA); *S v Ndawonde* 2013 (2) SACR 192 (KZD) para 8; *S v Prinsloo and others* 2016 (2) SACR 25 (SCA) para 169.

- [2] See s 208 of the Criminal Procedure Act 51 of 1977; see also *S v Sauls and others* 1981 (3) SA 172 (A); *S v Ndawonde* supra para 4; and *S v Prinsloo* supra para 169.
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