

SOUTH AFRICA / JUDGMENT

Mthembu v S (SS118/2008) [2010] ZAWCHC 391 (5 May 2010) [2010] ZAWCHC 391

COURT

Western Cape High Court, Cape Town

BEFORE

Motala

CASE / FILE NUMBER

SS118/2008

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IN

THE HIGH COURT OF SOUTH AFRICA (WESTERN
CAPE HIGH COURT, CAPE TOWN)

CASE

NUMBER: SS118/2008

DATE: 5

MAY 2010

In

the matter between:

THE
STATE
and
2.
LUCKY
MTHEMBU
3
MNINAWA
PHELA
PHUMELE
RINKIE VAAIBOOM
5.
CHUMANI
SIBANDA

JUDGMENT

MOTALA, J:

The four accused in this matter are each charged with six offences, two counts of murder, two counts of robbery with aggravating

circumstances and two counts in terms of the Firearms Control Act 60 of 2000, of being in unlawful possession of firearms and ammunition.

When the trial was first called there were five accused. The State withdrew the charges against one of them, Bulelani Joseph Vellem, who was accused no.1 and who subsequently gave evidence for the State. It is convenient to refer to the remaining accused as accused 2 to 5. All four accused pleaded not guilty to all the charges and except for making formal admissions, exercised their right to silence. The formal admissions are set out in Exhibit A.

The first witness called by the State was Inspector Treurnicht. He is an officer in the Technical Department of the South African Police Emergency Services. He explained that all calls made to 10111, the number one phones in emergencies, are recorded. He said that when a call is received at 10111, the person who receives the call registers the complaint on the computer and then transfers the complaint to a dispatcher, i.e. a radio operator, who then broadcasts the complaint to a vehicle patrolling in the area where the complaint originated. On receiving feedback from members of the South African Police who responded to the complaint, the complaint is taken off the system.

Inspector Treurnicht handed in, with the consent of the defence, three documents, being Exhibits G1 and G2, which are printouts from the system and Exhibit G3 which is a summary of the other two documents. On the basis of those exhibits, Inspector Treurnicht

testified as follows. On 12 July 2006 at 18:47, 10111 received a complaint from one Simphiwe, who was using cell phone number 0783510583. In what follows, I will refer to that number as the 078 number. The complainant alleged that his brother was drunk and

beating everyone in the house at 12 Sigcawu Street, Langa. The complaint was transmitted to Constable P Z M Golimpi, who reported

back a negative result, that is that no suspects were found. Accordingly no docket was opened. Inspector Treurnicht testified further that on 19 July 2006 at 19:51, 10111 received a complaint of an assault at 12 Sigcawu Street, Langa. The caller gave his name as Jack. He phoned from cell phone number 0736070274. In what follows I will refer to that number as the 274 number. Again Constable Golimpi was alerted. Again he reported a negative result.

Mr Cecil Mark Butsaka lives at 16 Merriman Street, at the corner of Sigcawu Street, Langa. He testified that he was watching television.

He heard a vehicle being revved excessively outside his house. He went out and saw a vehicle in his yard. Two police officers were

inside. He heard a sound like someone snoring. He ran to the nearby Langa Police Station. He was attended to by Captain P J Louwrens, who took him back to his house. Mr Butsaka testified that in the vicinity of his house, there is only one light and it is not, in his words, very strong.

Captain Louwrens testified that he went with Mr Butsaka to the corner of Merriman and Sigcawu Street. He found a police vehicle standing in the yard. The driver's door was slightly open. The windows were closed. He saw no bullet holes or any blood outside the vehicle. The driver of the vehicle made certain sounds. Although it was dark, he said the area was sufficiently lit by what he called a mast light.

Ms Noludi Dalindyebo was 15 years old at the time. She was in Grade 8 at school. She testified that between 7:30 and 8 p.m. that day she was standing outside her cousin's house in Rose-Innes Street near the corner of Sigcawu Street. She was with two friends, Nwabisa Mahlanya, who also testified and Ntombifutni Dlamini. The police asked for directions to number 14 Sigcawu Street and Ms Dalindyebo showed them that house. In fact she lived there at the time. The police then went to that house. In court she said that at no stage did the police get out of the van, although she said so in her statement, which is Exhibit H.

She said that one, Piwe her cousin, made a report to them. What Piwe told them was excluded as hearsay in a later ruling by me. About ten to 15 minutes later three persons passed them and entered the premises of her cousin's house and stood near or next to the garage. She did not see any firearms at that stage. She testified that those three persons then left and went to the police van, together with a fourth person. She did not know where the fourth person had come from. She was facing them. She said two of them then had guns. Then she heard several shots. She said that both doors of the police van were open and that the persons were leaning into the police van as if they were searching it or fiddling in the van, as she put it.

Ms Dalindyebo testified that two of the persons were on either side of the police van. The police van started moving, but went into

Humphrey's yard. Her reference to Humphrey's yard was clearly a reference to the yard of Mr Butsaka. She testified then that the four persons ran towards them. One of them swore at one of the others and fired a shot. She ran away and hid in a toilet. In chief, Ms Dalindyebo pointed out number 2 as one of the four persons. She said she had been told by Ms Mahlanya that his name was Rinkie. However, the next day when cross-examined by Advocate Andrews, who appeared for accused 2, she conceded that she had been wrong in pointing him out. She said also that the tall light in the area provided sufficient visibility.

Ms Nwabisa Mahlanya was 14 years old at the time. She testified through an intermediary, as she was afraid to testify in open court. In her evidence in chief she said that at about 8 p.m. that day, she and seven other girls, including Ms Dalindyebo, were at the corner of Rose-Innes and Sigcawu Street, outside a brown face brick house. The house has a garage. She said that two of the

girls were fighting with each other. She said that there was a tall light in Moshesh Street which provided sufficient light and there were other lights in Sigcawu Street which were, however, dim. She said that a police van then appeared and asked where number 12 Sigcawu Street was. The police asked if there had been a fight. They were told that the fight was over. The police then went to 12 Sigcawu Street.

A lady from that house came out and spoke to the police, who remained seated in the vehicle. She said that one Piwe then appeared and made a report to them. She said that a silver green Cressida arrived and stopped at the garage at the corner house. Four of the five persons in the Cressida got out of the car. She said that one of them was Rinkie, whom she had often seen for about a year. He is the cousin of one of her friends, Pumeza. She said he lives in Zone 8, Langa. The Cressida then drove off. She said that the four persons who got out of the car stood at, or near, the entrance of the garage of the face brick house, which was blocked by planks. Because of the report which Piwe had made, she and the others ran.

She ran past the van which was moving backwards and forwards outside 12 Sigcawu Street. She ran towards the shebeen, Stinas in Merriman

Street. She said that she saw the four persons who had been standing at the garage, approach the police van, two on either side of the van. She heard three shots and saw the van being searched. That happened while the van was still outside number 12 Sigcawu Street. The driver of the van lost control of the vehicle as the shots were fired, went into a yard and got stuck in the sand. She ran into Stinas Shebeen. Ms Mahlanya made a statement to the police at about 3:20 a.m. the next morning. She said that she did not tell the police everything, as she had been beaten by them and had been threatened. She was brought into the court and she pointed out accused 4 as Rinkie.

Under cross-examination by Advocate Andrews, who appeared for number 2, the witness gave details of the assault upon her. She said she was taken away in a police vehicle. Her mother was not allowed to accompany her, although as I have said she was only 14 years old at the time. That is to be deplored.

In the vehicle she was struck with a firearm. At the police station she was threatened, slapped and prodded in her face. She said that Ms Dalindybo was also assaulted. The assailants were members of the South African Police stationed at Guguletu Police Station. Although she would have made the statement even if she had not been assaulted or threatened, she was crying while making the statement and could not say all she knew.

Under cross-examination by Advocate Marco, who appeared for accused 3, she stated that the four persons were standing at the garage before the police van arrived. She also said that she saw the shooting when she was standing at the corner of Merriman and Sigcawu Street. Under cross-examination by Advocate

Pitlele. who appears for accused 4 and 5, she testified that it was not very dark and that a tall light from Moshesh Street provided sufficient

light. She also repeated that she saw the shooting and not that she only heard the shots, as she had stated in her statement and earlier in court. She said also that she recognised Rinkie, because he wore a brown La Costa cap. When re-examined by Advocate Van Wyk, who appeared for the State, she said she had seen two guns at the garage, which appears to be inconsistent with her evidence in chief.

Ms Nobesuthu Mtlemeza lives at 12 Sigcawu Street. She testified that on 19 July, shortly before 8 p.m. there was a knock on the door. She opened the door. Two policemen asked who had called them and if there was a drunk man being aggressive at their home. She told them that there was no man living there. She and her sister thought it was a prank and laughed. Her sister reminded her of a visit by the police the previous week. She then remembered that one of the policemen had been there the previous week. The police asked her who were the girls and youths standing at the corner of Sigcawu and Rose-Innes Street. She saw people standing there, but could not recognise them as the corner is not well lit. The police then left. Shortly thereafter she heard a loud bang. She thought it was not the sound of gunshots, but of a vehicle crashing. She looked out of the window and saw the police van had crashed in Humphrey's house. She said also that the area in front of her house was well lit from a big light in Jungle Walk.

Bulelani Joseph Vellem was originally accused 1. He was warned in terms of section 204 of the Criminal Procedure Act. At that time he was employed as the driver of a Cressida taxi. He said that it was silver grey in colour. He testified that on 19 July 2006 he received a phone call from accused 5, whom he referred to as Chumani and whom he pointed out in court. He thought that number 5 had obtained his cell phone number from a mutual friend, Siyabulela Njani. He is known as Sabu. Sabu was on the list of State witnesses. He was not called by the State and was made available to the defence. The defence did not call him either.

Vellem testified that number 5 asked him to come to NY13A Guguletu, near the Rasta's. He went there and picked up accused 5 and his two friends, accused 2 and 3. It was the first time he had seen accused 3. He said he knew accused 2 by sight for a short time. He used to see him at or near a shop. Vellem testified that number 5 asked him to take number 5, number 2 and 3 to their friend Rinkie in Langa. It was approximately 7:05 p.m. He took them there. He was given directions by accused 3. All three of his passengers got out of the taxi and returned with number 4. It was the first time that he saw number 4. He said accused 2, 3, 4 and 5 got into his taxi.

He thought he was taking them back to Guguletu, but he was asked to stop after a short distance. He said his four passengers alighted. That was sometime between 8 and 9 p.m. He parked in a street in Langa for about an hour as he had been asked to wait for them. He said he received a call from number 5, who asked him to come to Rinkie's house. He picked up the four accused at Rinkie's place and dropped them off at a taxi rank in Langa. He then continued with his normal work.

He said that later that evening, accused 4 phoned him and asked him to come to NY69 Guguletu. He went there because he wanted to be paid the R100.00 fee that had been agreed upon. The four accused and others were there. He was not paid, but was told to return the next day. Whilst there

he saw them playing with firearms, small handguns. He asked generally, and then specifically of number 4 where the guns were obtained. Rinkie told him they had obtained the guns in Langa by shooting the police. The next morning he went back to NY69 for his money, but found no one at home. He was arrested on 26 July when a large contingent of police came to his home. A Vodacom SIM card was taken from him. He remembers that his number started with 079. He was shown Exhibit 1, a SIM card, and said he could not say if it is the same without putting it in a phone, but it looked the same as his.

The police asked for his cell phone. He told him that he had sold it to a woman in Samora. Vellem took them to her house, but that lady was not in. Vellem testified that the police obtained it later. He positively identified Exhibit 2, a Nokia 1100 as his phone, which he picked out from six cell phones in court. Vellem testified that he was taken by the police to a certain house. A young man from that house was put in another vehicle. They then went to the house of accused 2, who was arrested. Vellem testified that he and accused 2 were then taken to Bellville South Police Station. Two other young men were also there, but were later released. Vellem stated that he and accused 2 were continuously assaulted. Vellem testified also that Sabu had entered certain telephone numbers on his cell phone. The numbers were entered under the names, Mninawa, Rinkie and Carlos.

In terms of my ruling dealing with hearsay evidence, evidence as to what Njani i.e. Sabu said as to who those numbers belonged to, was excluded as hearsay. Vellem stated that accused 3's nickname was Mnish. He did not know if number 4 has a nickname. Under cross-examination by Advocate Andrews, Vellem gave details of repeated assaults on him and number 2 by the police and said he was not given anything to eat for two days.

However, he said that the assaults were not the reason for making the statement which he made on 27 July. Advocate Marco and Advocate Pitlele put to Vellem aspects of his evidence at a bail hearing, in which he contradicted his evidence in this court. For example, during the bail hearing he said that the first time he had seen the accused was when they appeared in court, that he did not see accused 5 on 19 July, that he cannot remember if he was in Langa on 19 July and that the numbers on his phone were inserted by his brother.

He admitted in effect that he had lied in several respects during his bail hearing. Vellem, however, was adamant that what he said in this court is the truth. He said that he had lied in the magistrate's court in order to save his life for he was incarcerated with the accused at Pollsmoor Prison, which was a rough place and that he had been threatened by the accused.

Mr Gary Voges is the deputy principal of the Spes Bona High School. He testified that accused 5 was a learner at the school from 2004 to

2006. In 2006 he was in Grade 11. His attendance was erratic and eventually he did not come to school. Mr Voges knew accused 5 well and interacted with him. He often acted as a referee or on the touch line at soccer matches in which number 5 played. Mr Voges testified that accused 5's fellow pupils sometimes referred to him as Carlos. Others call him Oscar.

Constable Gungqisa testified that on 16 August 2006, he and

Sergeant Moses accompanied Inspector McLean to a house in Khayelitsha. He said McLean knocked on the door. They went in. The witness and McLean went to a bedroom where number 4 and another person were lying on a bed. Number 4 said it was his room. He asked permission to search the room. He lifted a mattress and found a Beretta pistol and two magazines, one of which was empty. He booked the firearm in the SAP 13 register. He said he explained his constitutional rights to accused 4 and arrested him for unlawful possession of the firearm.

Sergeant Phambela testified that on 2 August 2006, he, Inspector McLean, Inspector Louw and Sergeant Ndabimbi went to a house in NY3A, number

133. They were admitted by a young girl aged 12 to 14 years. He and McLean entered the house. In the dining-room there was a sofa with blankets on it. Some items of clothing were nearby. The sofa was still warm as if someone had been sleeping on it. Sergeant Phambela looked around in the yard of the house. He then returned to the front door. He saw accused 3 about to enter the yard. He testified that when number 3 saw him, number 3 ran. He gave chase and shouted at number 3 to stop and shouted that he was a police officer. He said that number 3 continued running along a passage between shacks. The passage is well lit by a tall floodlight. He fired a shot into the ground and number 3 stopped running.

Sergeant Phambela asked number 3 to raise his hands. He did not do so and took out a black 9 mm Parabellum, similar to his own. Sergeant Phambela testified that he took cover behind a shack and fired a shot towards number 3, but aimed at the ground not at number 3's body. He was about five and a half metres away. He said number 3 then disappeared. After checking that no innocent people had been injured, Sergeant Phambela and others, having seen a footprint on a sofa near a wall, jumped over the wall. They searched the house, but in vain. They then knocked on the door of a flat behind the house. It was opened by a man suffering from chickenpox. They did not enter the flat for fear of being infected.

However, a few hours later they returned to the flat and went inside. They found accused 3 lying on a bed in one of the rooms. He was in pain. He said he had been shot by the police. Number 3 was arrested after being informed of his constitutional rights. The police took number 3 back to the house at NY3A, number 133, where number 3 put on some of the clothes that were on or near the sofa. Number 3 said the clothing belonged to him. Under cross-examination, a different version was put to Sergeant Phambela as to what happened when the police first came to that house. He denied that version.

Dr Linda Liebenberg performed a post-mortem examination on one of the deceased. Her findings are set out on Exhibit B. She testified that the cause of death was a single gunshot wound to the left temporal region of the scalp. Tattooing was present, which indicates that the deceased was shot from a distance of 15 centimetres to about one metre. Dr Potelwa conducted a post-mortem examination on the other deceased. His findings are set out in Exhibit C. He found that the deceased had been shot twice, in the right arm and in the right temporal area of the head. There was soot within the wound, which indicates that the wound was a contact wound, that is

the barrel of the gun was in contact with the skin.

Inspector W K Louw went to the scene shortly after the incident. He was asked to assist with the preliminary investigation of the murders, initially to trace a Cressida vehicle. He thought he had been told that it was a light blue Cressida. On 26 July, as a result of information he received, he went to the shack of Vellem and arrested him. He searched a jacket in the shack and found a Vodacom SIM card in the jacket. He asked Vellem for his cell phone and as a result of information he received from Vellem, he eventually took possession of a cell phone from a woman in Philippi, where

Vellem had taken him. The SIM card and phone are Exhibits 1 and 2 respectively.

On the same morning that he arrested Vellem, he went with Vellem to an address in New Crossroads, where he found accused 2. He had been taken there by an informer, not by Vellem, who did not know number 2's address. Inspector Louw testified that Vellem identified number 2 as Lucky, the name Inspector Louw had been given. Inspector Louw testified that at number 2's home he found four cell phones, being Exhibits 3 to 6 and three boxes, which are in one forensic bag, being Exhibit 7. Number 2 admitted that all those items were his property.

Louw testified that he then went to NY55, number 12, Guguletu, an address given to him by Vellem as the address of accused 3. He went to a shack behind the main house. No one was there, but he found a cell phone, a Samsung E330, being Exhibit 8. Later he or Inspector McLean handed over all the items to Superintendent Viljoen. The handwriting on those forensic bags, is that of Viljoen. Later evidence on the contents of Exhibit 8, indicated Inspector Louw had confused Exhibits 3 and 8, for it is clear that Exhibit 8 was found in number 2's room and Exhibit 3 was found at NY55, 12 in Guguletu.

Under cross-examination by Advocate Andrews, Inspector Louw conceded that he may be mistaken in saying number 2 lived in Nontulo Road and that the name of the road is Makholwa

Street. He was, however, adamant that at number 2's shack he took possession of four phones and three boxes, not three phones and one box. It is clear that Inspector Louw does not remember matters very clearly, for example Exhibit 6 has the name Ayanda written on it. Surely number 2's name would have been written on it if it had been found at number 2's house. Under cross-examination by Advocate Marco, Inspector Louw was adamant that he took possession of number 3's phone, Exhibit 3, in an empty shack behind NY55, number 12 and not from the main house when number 3 and others were present.

Senior Superintendent Temmers was the investigating officer in this matter. He went to the scene while the police van and the deceased were still there. He established that the firearms of the deceased were missing. He described how he organised the investigation. As a result of a report he received, he initiated a search in Zone 8, Langa, for a person named Rinkie. At some stage he established that person's surname as Vaaiboom. He said that after receiving statements which were taken the next day, he personally went to that person's house in Zone 8, but received no co-operation from the family. Superintendent Temmers said that number 5 handed himself over at

the Bellville South Police Station on 18 September 2006, after negotiations with an attorney.

Evidence on the use of cell phones was given by Superintendent P J Viljoen, Ms Hilda du Plessis and Ms Petro Heneke.

Superintendent Viljoen has, since 1997, specialised in the downloading of cell phones and the analysis of detailed billings. He is self-taught and has trained others. It has been submitted that the evidence of the witnesses cannot be relied on in view of the possibility of manipulation of some of the data. In our view there is no merit in that submission.

Viljoen testified that on 19 July four calls were made to 10111 from the phone number 274. The calls were made at 18:32, 19:49, 19:49 and 19:51. Only two of the calls went through. It is to be noted that the call at 19:51 is the call referred to by Inspector Treurnicht. At the time when the four calls were made, the handset used was in the vicinity of the Langa High School, in the same sector in which the deceased were killed. Afterwards it moved to Nyanga, Guguletu and Philippi. Viljoen testified that the phone was in the same sector as the murders on 12 July also. Viljoen testified that on 12 July three calls were made from the 078 number to 10111. At 18:38, 18:47 and 19:35. The number was in the same sector as the killings, both on 12 and 19 July. It is to be noted that Inspector Treurnicht referred to the call at 18:47.

On 26 July, Exhibits 1 to 8 were handed over to Superintendent Viljoen by Inspectors McLean and Louw. He put them in forensic bags and his handwriting appears on them. Viljoen testified that Vellem's phone was a Nokia 1100. His number was 0792713274. On his SIM card he found that 26 numbers had been stored, including the 078 number under the name Carlos and the 274 number under the name Rinkie. Those were the two phones that phoned 10111 on 12 and 19 July respectively. The detailed billing of Vellem's number showed that it was in the same sector as the murders on 19 July, both before and after the murders. The detailed billing showed also that Vellem phoned the number recorded on his phone as that of Rinkie at 17:34 and 17:36. The duration of the calls, eight seconds and 11 seconds respectively, indicated the calls did not go through. At 8:02 Vellem phoned a number recorded in his phone as that of Carlos. The call lasted 19 seconds. He said that the number recorded as that of Rinkie, phoned Vellem four times, at 8:11 p.m., 8:17 p.m., 9:05 p.m. and 9:17 p.m.

Viljoen also examined the other cell phones handed in. He testified that the number on the phone of Exhibit 8 was 0736120166. He found that on that number, the 078 number, that is the number that phoned 10111 on 12 July, was stored under the name Cumza and that that number on Exhibit 3, 0730495195 was stored under the name Mnish. The detailed billing showed that the phone was in the vicinity of the murders on 19 July. Superintendent Viljoen testified also that the number was in contact with the number of one Rinkie four times that day - twice at 2:45 p.m. which did not get through, at 17:22, which lasted 19 seconds and indicated that they spoke, and at 19:53, which lasted 11 seconds and may or may not have got through, and that the 166 number is the number of accused 2.

Exhibit 3, a Samsung E330 belongs to accused 3. Superintendent Viljoen testified that the number on that SIM card was 0730495195. He found that the 078 number, the number that phone 10111 on 12 July was stored under the name Carlos and number 2's number was stored under the name Luciano. SMS's sent from that phone were from one Mniwa. The detailed billing showed that Exhibit 3 was in the vicinity of the murders on 12 and 19 July. Superintendent Viljoen testified that Exhibit 3 was used to phone 10111 on 12

July, but not the number found on its SIM card. In his evidence in chief he said number 2's SIM card was used, but when cross-examined by Advocate Andrews conceded it was the number recorded as that of Chumani Luke. That is the number recorded on Exhibit 3 as that of Carlos.

Ms Du Plessis is a forensic data analyst at MTN, a cell phone provider. She extracted the records of calls made to and from certain cell phones. These records are computer generated and are clearly admissible in terms of Act 25 of 2000. She handed in two documents,

Exhibits T1 and T2. I do not intend to set out all the evidence in detail, but the following must be emphasised. Exhibit T2 deals with the 078 number. Ms Du Plessis confirmed the evidence of Superintendent Viljoen that on 12 July that number called 10111 from

Exhibit 3. She stated also that on 13 July that number twice phoned the 274 number, the number that phoned 10111 on 19 July, and that on 19 July that number received four calls from the number ending in 274, and that on 18 July that number received four calls from the number on Exhibit 3, that is 0730495195. Three of the calls went to voicemail. One of them, at 16:24, lasted for ten seconds and originated from the Nyanga sports field.

She testified also that on 20 July that number called the number found on number 2's phone, that is the number ending in 166. The call lasted 19 seconds. Exhibit T1 is a record of calls made to and from the number found on number 2's phone, the number ending in 166. Ms Du Plessis testified that on 19 July that number received several calls from the number ending in 274, that is the number that called 10111 that day and that that number twice called the 274 number. She testified further that on 20 July that number received calls from the number on number 3's phone, and one call from the 078 number, the number that called 10111 on 12 July.

After the defence case was closed, I called Ms J P Heneke as a witness and recalled Vellem. I called Ms Heneke in order to deal with an objection raised by Advocate Pitlele. that Viljoen's evidence in relation to Vellem's cell phone was based on information from Vodacom and may have been hearsay. Ms Heneke is a forensic liaison officer at Vodacom. She handed in two documents. Those documents were wrongly marked Exhibits U and V respectively, but should have been marked Exhibits V and W, which I have now done. Exhibit V is an electronically generated document which sets out the calls made and received on Vellem's phone. Exhibit W is a simplified version of part of Exhibit V. Ms Heneke confirmed the evidence of Superintendent Viljoen as to calls made and received by Vellem.

I recalled Vellem in order to obtain clarity on two issues that concerned me and my learned assessor. The first was his evidence that he was telephoned by number 5 as the cell phone evidence did not show that Vellem received a call from the 078 number, assuming for this limited purposes that that number was number 5's. Vellem stated that when number 5 phoned, he gave his name, presumably Chumani, that the call was between 3 and 6 p.m. There are three incoming calls to Vellem that afternoon at 15:53, 16:53 and 17:54 from other numbers. Accordingly the call he received could have been made on a number other than the 078 number. The fact that the 078 number did not call Vellem that afternoon, must be regarded as a neutral factor.

A second issue that concerned us was that cell phone records indicate that on three occasions around 5 p.m. that day, Vellem phoned the 274 number, which was inserted on his phone as the number of Rinkie, whom he said he did not know. Vellem testified that he phoned that number as he wanted to contact Sabu, whose own phone number was off. That was a spontaneous response to my query and ties in with his earlier evidence that Sabu could be contacted at that number.

All four accused gave evidence. Accused 2 did not call any witnesses. He testified that he was born on 18 February 1982.

He left school in Grade 11 because of financial problems. He also attended a college sometime later. From the time he left school until he was arrested, he was a soccer player. Soccer did not provide him with a regular income, but he received money intermittently, up to R1 200,00 at a time. He also repaired cell phones. He said he cannot recall where he was on 12 July 2006 or 19 July 2006, but in cross-examination he said he was not in Langa on 19 July.

He said that normally on Mondays to Thursdays he attends soccer practice between 5 and 7 p.m. at the Nyanga East Stadium. He testified that when he was arrested, only three phones were taken from him, namely Exhibits 4, 5 and 8 and not Exhibit 6 as testified to by Inspector Louw. He said that after his arrest he was taken to NY55 where he saw accused 3. Two persons, Sabu and Punkie were arrested there. He denied being with the other accused or in Vellem's car on 19 July or any involvement with what occurred in Sigcawu Street. He said he did not know any of his co-accused or Vellem before that day and that in fact at the time of his arrest, Vellem said he did not know number 2.

He denied being at the house in NY69 later on the evening of 19 July. Under cross-examination by Advocate Van Wvk. number 2 said that occasionally he went to Langa to see his younger brother. He said he could not remember if his SIM card was in Exhibit 8 and could not remember the phone number or if any boxes were taken. Number 2 did not dispute that his phone was used as testified by Lieutenant Viljoen and Ms Du Plessis or that his phone was in Langa on 19 July. He said, however, that the phone was not used by him that day but by someone else, because his friends often used his phone when he was at soccer practice and even took it away. I asked accused 2 about the names Rinkie, Punkie and Mnish appearing on Exhibit R, which is a list of names and numbers recorded on his phone. He said he could not remember who they were as it was a long time ago.

Mninawa Phela, accused 3, testified and called one witness, Ayanda Jacobs. He is 24 years old. He gave his home address as NY94, number 15, but said that at that time he lived in NY3A at his uncle's home as it was in the same street as a stall where he and Ayanda Jacobs sold fruit and vegetables and other items. On 19 July he said he was as usual at work, which is usually from 7 a.m. to 9 p.m. He said he did not know Vellem or number 2. He knows number 4, they are related and they both often attended family occasions and traditional ceremonies. He also knows number 5 who lives in the same street. They are friends, but not close friends.

They used to take the same bus to and from school. Their girlfriends are friends. He testified that on 26 July he and Ayanda were having breakfast at NY55, number 12, Sabu was also there. There was a knock on the door, he asked who it was, the answer was it was Punkie. Punkie did not enter the house. Through a crack in the door he saw a long firearm. The police forced their way in and asked Sabu who he was. He told them. The police took him outside where someone identified Sabu. The police assaulted Sabu. Number 3 said that Vellem and number 2 were outside, although he did not know them at the time. He said the police took his and Sabu's phones which were on the table. He said at no stage did the police ask for him.

Number 3 testified that on 3 August he was at his uncle's home with Siyabonga, a girl who is about 18 years old and another person. He was in the bedroom preparing to bath. There was a knock on the door, the girl opened the door. Two armed men, casually dressed, entered and asked who lives there and who Mninawa was. He said that Siyabonga was asleep on the couch. The police thought he was Mninawa and woke him. As the police entered the bedroom, he jumped out of the front window and ran. He was chased, clearly by Inspector Phambela. He passed four houses and entered the yard of the fifth house and as he was about to jump over the wall, he was shot in the leg. There was no couch before the wall.

He said he fell on the other side of the wall, ran to a flat and jumped into an open window. He woke up the occupant, one Lamont, who was suffering from chickenpox. Lamont told him to go to another room and when the police got there, Lamont told them he had not seen or heard number 3. He confirmed Phambela's evidence that the police came back later and searched the house. He said they found him and assaulted him. He confirmed also that the police took him back to the house so that he could dress himself and he was taken to a clinic or hospital where he was treated. He was then taken to Bellville South Police Station where he was repeatedly assaulted. He was then taken to Langa Police Station where he was again assaulted. He said the investigating officer never assaulted him.

He denied ever being in Vellem's taxi or being involved in these matters. He was shown the two Samsung phones in court, Exhibits 3 and

8. He admitted he had a similar phone, but could not say whether Exhibit 3 was or was not his phone. Under cross-examination by Advocate Van Wvk. he said Inspector Phambela was not wearing a reflective jacket, indicating he was a police officer, but could not remember whether he had told that to his counsel. He said Inspector

Phambela was lying when he said that number 3 was outside the house and was entering the yard and ran when he saw Phambela. He denied ever having a gun. He denied telling Inspector Phambela, when he was arrested, that he had been shot by the police. He denied that Mnish was his nickname. He said that the acquired Exhibit 3 sometime between the middle and the end of July, but definitely he did not have that cell phone on 12 July nor did he ever lend it to anyone to use except his aunt. On 19 July, he said he was as usual at work. He was not sure if the phone was in his possession on the 19th or whether his aunt was using it. He was, however, certain that he was not in Langa on the 19th. He said that he did not tell his counsel that he did not have a phone on the 12th, because she did not ask him. Exhibit Q1 is a list of numbers stored on Exhibit 3. Accused said that the numbers stored, were

stored on the phone and not on his SIM card. He said he does know many of the people in his address book, those numbers must have been put on the phone before he acquired it or by his aunt. Exhibit Q2 is a list of SMS's found on number 3's phone. Number 3 denied any knowledge of some of the senders of the SMS's.

Ayanda Jacobs was called by accused 3. He confirmed that he and accused 3 worked together. He said he knows number 3 only as Mninawa. When asked if number 3 was at work on

19 July, he said that number 3 was always at work, but said he could not remember if number 3 left between 5 and 9 p.m. that day. In outline, he confirmed number 3's evidence as to what happened on 26 July at his home at NY55, number 12 - that Sabu was arrested and that his phone, Exhibit 6A, was taken by the police. Under cross-examination he could not give any details regarding 19 July, but repeated that number 3 was always at work. It appears he does not remember that day specifically and bases his evidence on number 3's normal routine.

Phumele Rinkie Vaaiboom, accused 4, is aged 23. He passed Grade 12 and did a course in IT. He testified that he did not own a cell phone on 12 June and has no knowledge of the call on that date to 10111. That evening he was at home and watched the TV programme, Generations. On 19 July he remembers arriving home from school about 5 p.m. His mother, his siblings and Nomavabo Vaaiboom were at home. After doing his homework, he watched Generations which starts at 8 p.m., then washed the dishes. Nomavabo Vaaiboom watched television with him. He said he did not own a cell phone on 19 July.

He said he knows number 3 and number 5, but not number 2 or Vellem. He denied the evidence of Vellem implicating him. He also denied that the witness, Ms Mahlanya knows him and denied her evidence that he was one of the four men in Sigcawu Street who attacked the two deceased. He denies ever owning a La Costa cap. He said he was arrested on 15 August. He too says he was assaulted. Under

cross-examination by Advocate Sebelebele, who appeared for the State, he said that he lived in Zone 8, Langa, number 38, but was arrested in Khayelitsha.

He had moved to Khayelitsha on 20 July, because Nomavabo Vaaiboom had told him that on the night of 19 July people with guns had come looking for him. Accused 4 confirmed that Pumeza, the friend of the State witness, Ms Mahlanya, was his cousin. He said he had a phone between 2000 and 2002. He said also that his mother had visited him in Khayelitsha and told him the police were looking for him. He said he told her to get an attorney before he could go to the police, but they did not have enough money. He said he cannot remember 12 July vividly, but set out his daily routine. He said he did not normally leave home after returning from school. He remembers 19 July being the night when people come looking for him. He did not return home after school on the 20th.

Nomavabo Chiny Vaaiboom was called by accused 4. She said, as he did, that she and accused 4 watched Generations together. She said that accused 4 then went to his room at the back of his house, a separate structure, four to six metres from the main house. Later she went to sleep. She said that some time later, several young men, more than five, in civilian clothes, kicked open the door and barged into the room. They pushed her around and enquired about number 4's whereabouts. They searched the house and then left. She then went to Rinkie's room and told him what had happened. The next day he did not return after school. About a week later the police came looking for number 4. She told number 4 that when he came home occasionally for a change of clothes. He said he would tell his mother about that.

Chumani Sibanda, accused 5 testified that he never owned a cell phone or a SIM card. He said he did not know Vellem and had never phoned him. On 19 July he went to school as usual and attended a soccer training session. The training was conducted by Mogamat Kamaldien, who picked him up at about 5 p.m. and dropped him again at home at about 7 p.m. He said that the coach called him Mani. He said he has never been called Carlos by anyone, not even at school. He denied being in Langa at all on 19 July. Advocate Marco, who appeared for accused 3, referred him to Exhibit Q2, to a SMS sent to number 3, asking number 3, to convey a message to him that his girlfriend was in the hospital. Accused 5 confirmed receiving that message.

Under cross-examination by Advocate Sebelebele. he stated that Mr Voges never attended any of his matches or training sessions and denied he was called Carlos as Voges had testified. He denied that Voges had either acted as a referee or on the touch line at school matters. Accused 5 said that he sometimes borrowed the cell phones of his parents or his sister and also gave his house's landline number to friends. He did not know the numbers of his family's cell phones. He never owned a cell phone, as it was a rule at home that one could not have one until completing matric. He said that he knew Sabu merely by sight and did not have his phone number. He gave details of his activity on 12 July, that he went to school, that he went to soccer practice until past 7 p.m. His father was not at home. He remembers the 12th, because he was questioned about it by the investigating officer. He denied phoning 10111 on 12 July or that he had phoned Vellem on 19 July.

Accused 5's father, Mr Sekilele Sibanda testified as to his son's normal routine. He cannot specifically remember 12 or 19 July, which were Wednesdays, but testified that he attends meetings on Mondays, Tuesdays and Wednesdays between 6:30 p.m. and 7:30 p.m. When he

returns home at about 7:45 p.m., accused would usually not have returned from soccer training. Usually he returns at about 8:30 p.m. Towards the end of July, the police came looking for number 5. The accused was at school at the time. The accused thereafter left school and slept elsewhere whilst funds were being raised to instruct an attorney.

Mogamat Kamaldien testified he was the coach of several soccer teams for which number 5 played. He usually fetched number 5 at home and dropped him off at home again. He usually finished at 8:30 p.m. and number 5 would get home at about 8:45 p.m. He could not remember specifically if number 5 was at the training session on 12 or 19 July. He said that number 4 was called Mani by the other members of the team. He said that around about 2004, number 5 was in possession of a cell phone during the training session. He also said that he has phoned number 5 on the landline at his home, or on a cell phone, that number 5 answered when he phoned those numbers.

That in broad outline is the evidence before us.

The State case rests principally on the evidence of Vellem. Although his evidence does not indicate any guilt on his part, his evidence clearly has to be treated as that of an accomplice. In fact, as I have said, he was warned in terms of section 204 of the Criminal Procedure Act. He is also a single witness in respect of some of his evidence. The correct approach in considering the evidence of an accomplice and of a single witness, is well established. The cautionary rule that is to be applied, requires that the evidence of such a witness must be carefully scrutinised, because of the well known dangers of reliance on such evidence.

A Court must ensure that there are factors which act as safeguards, factors which reduce the risks of relying on such evidence.

The evidence of Vellem has been criticised, correctly, by the 15 defence. The main criticism has focused on the conflict between his evidence here and his evidence at his bail hearing, during which he said, inter alia, that he had not seen the accused before they appeared in court, in other words that he had previously lied under oath. Vellem explained that he had lied at the bail hearing, in order to save his life. He said he had been threatened by the accused. Clearly he feared

reprisals at Pollsmoor if he implicated the accused.

It is in our view an acceptable explanation. Nevertheless the fact that he lied at the bail hearing, is an additional reason for treating his evidence with caution. In considering his evidence, one must bear in mind that people, including witnesses under oath, sometimes lie on one occasion and not on another and lie on one issue and not on another. What this Court has to determine is whether he was telling the truth in this court.

In our view there are several factors whose cumulative effect is to greatly reduce the danger of relying on Vellem's evidence. The first factor is his attitude towards the police and the State. One often finds that accomplices, especially accomplices seeking an indemnity, go out of their way to tailor their evidence to please the police or try to assist the State case. Vellem did not do so. He

confirmed in detail what was put to him by number 2's counsel as to assaults by the police on number 2 and thereby assisted number 2 to exclude a statement he made to the police. That is not the attitude of someone who is substituting an innocent person for a guilty one, the most obvious danger of relying on an accomplice. The second factor is the evidence of Ms Dalindyebo and Ms Mahlanya. Ms Mahlanya was the better witness of the two. The two young ladies' evidence corroborates Vellem's evidence in material respects. Their evidence has been criticised by the defence. Clearly there are inconsistencies between the evidence each gave in court and between their evidence and their statements. Some of those inconsistencies are clearly due to the fact that in our view they have been talking to each other. That explains why Ms Dalindyebo overnight corrected her evidence that number 2 was Rinkie and avoided my question in that regard. It also explains why Ms Dalindyebo said the police did not get out of the van, although she said so in her statement. She was clearly adjusting her evidence to that of Ms Mahlanya, who did not observe the police outside the van. Other inconsistencies are either not material or explicable as being a reconstruction, for example, Ms Mahlanya's evidence that she saw the shooting, where she had earlier said that she had heard the shots when she was about to enter a shebeen in Merriman Street. In considering their evidence, one must bear in mind that they were young school girls. They had witnessed an incident that clearly

traumatised them. Ms Mahlanya said she was crying when she made the statement. In court, many years later, she was afraid to testify and was allowed to do so through an intermediary. Furthermore, the two young women were awakened in the early hours of the morning. Ms Mahlanya's mother was not allowed to accompany her. They were both assaulted by the police. Immediately before the shooting, they were interacting with one another and not calmly observing what was going on. Nevertheless, their evidence is reliable in some respects. It is confirmed by other evidence, that of Ms Mtlemeza of 12 Sigcawu Street and by the evidence of the police officers who came to the scene. That there were no bullet holes in the police van, which confirms their evidence in a material respect that the two doors of the van were opened before the deceased were shot. That the van came to a standstill in the nearby yard of Mr Butsaka. That a Cressida was involved, for Inspector Van Wyk started to look for a Cressida that very evening. It is also noteworthy that Ms Mahlanya identified one of the assailants as Rinkie of Zone 8, Langa, in a statement to the police a few hours after the incident. Although the statement in that regard is a previous consistent statement, it may be referred to in terms of the rule that evidence of a previous identification is admissible. In our view the evidence of the two young women, and particularly the evidence of Ms Mahlanya, provide corroboration for the evidence of Vellem in certain material respects. Firstly, that a Cressida dropped off the assailants. The fact that Ms Mahlanya said it was green and Vellem said it was grey, is probably explicable as a reasonable error by Ms Mahlanya. Secondly, that four persons were involved. Thirdly, that one of them was number 4. In our view, Ms Mahlanya's identification of number 4 can be relied upon. She had often seen him. She knew that he lived in Zone 8, Langa and he confirmed that Pameza was his cousin. Fourthly, that the doors of the police van were opened before the deceased were shot. That they were shot whilst seated in the van. That the assailants were fiddling in the van. All of which is confirmed by the uncontested evidence that there were no bullet holes in the van,

that the bodies of the deceased were still in their seats and that their two firearms were stolen. Fifthly, that the police van went into Mr Butsaka's yard and came to a standstill, as confirmed by Mr Butsaka and the police who came on to the scene. A further safeguard is the cell phone evidence. That number 3's handset was used on 12 July to phone 10111. That on 19 July, number 2's handset received from and made calls to the 274 number, that is the number that phoned 10111 that day. And that both number 3's and number 2's handsets were in the vicinity of the murders on 12 and 19 July, as were the numbers that phoned number 10111. Another important factor is the conduct of accused 3 immediately before his arrest, and the conduct of number 4 when the police came to his house. I will deal with their conduct in more detail later. Finally, the dangers of relying on the evidence of an accomplice is reduced sometimes if the accused's evidence is not reasonably and possibly true. In our view, none of the accused were being truthful in court. Accused 2 in chief said he could not remember where he was on 12 and 19 July, but was adamant in cross-examination that he was not in Langa on 19 July, although he does visit his brother there. He did not dispute that on 19 July his phone was used in Langa, as stated by Superintendent Viljoen and Ms Du Plessis, but surmised that it must have been used by one of his friends. He was arrested only a week after the incident. One would expect him at least to provide some names of those who used his phone or tried to do so. Furthermore, when asked about the names and numbers recorded on his phone, especially the name Rinkie, Punkie and Mnish, he said he could not remember who they were as it was a long time ago. That simply cannot be accepted as truthful, especially if one recalls that as Ms Du Plessis testified on the basis of Exhibit T1, on 19 July number 2's number received several calls from number 274, which is the number that called 10111 that day, and that number 2's number twice called the 274 number. Furthermore, the evidence of Ms Du Plessis that on 20 July number 2's number received calls from the number on number 3's phone, that is 0730495195, and received a call from the 078 number, that is the number that called the 10111 on 12 July. Accused 3's explanation as to why he ran away when the police came to arrest him, cannot be true. The others in the house did not try to run away. Number 3 claims he did not know that Phambela was a policeman. However, when eventually arrested, he told Phambela he had been shot by the police. We accept Phambela's evidence in that regard. Accused 3's handset was used on 12 July to phone 10111. He claimed not to have had that phone on that day. That was crucial evidence, yet he did not give his counsel instructions to that effect. His explanation for not doing so, cannot be accepted. He stated that on 19 July he was as usual at work. He was not sure if the phone was in his possession or whether his aunt was using it. His evidence on Exhibit Q1 that he did not know many of the persons whose numbers are in his address book, and his evidence on Exhibit Q2 that he did not know who sent him SMS's, cannot be true. The evidence of his witness, Ayanda Jacobs, was not of much assistance. When asked if number 3 was at work on 19 July, he said that number 3 was always at work. It is clear he was describing number 3's normal routine. He said in any event that he could not remember if number 3 had absented himself between 5 and 9 p.m. that night. It is also noteworthy that according to Exhibit T2 on 18 July, the 078 number received four calls from the number on number 3's phone. Accused 4 was identified as being one of the four persons who attacked the deceased. As I have said, we find the evidence of Ms Mahlanya in that regard as

reliable. Accused 4 left home on 20 July and lived elsewhere as his witness, Nomavabo Vaaiboom had told him that men with guns were looking for him on that night. Her evidence that she tried to ask those men who they were and could not do so, as they were pushing her around, cannot be accepted. Although there is no direct evidence, those men must have been policemen, for only a few hours after the incident Ms Mahlanya had identified number 4 as one of the assailants. The evidence of Temmers in that regard is also relevant. Anyway about a week later it was clear to him that the police were looking for him. His mother told him, but first he wanted an attorney. There is no evidence that an attorney was ever consulted. Accused 5 told a blatant lie when he said he did not have a cell phone because of a family rule that one must first matriculate. His own witness, Mr Kamaldien, contradicted him in that regard. In any event it is clear that he had access to the cell phones of his parents and sister. Furthermore, we cannot accept that Mr Voges fabricated his evidence that number 5 was known as Carlos. We are satisfied that we can rely on the evidence of Vellem as corroborated by the factors I have mentioned. That he transported the four accused to Sigcawu Street and that the four accused, at least two of whom must have been armed, were the four persons who ran to the police van. All the evidence leave no doubt that the four accused had a common purpose to rob the deceased. Those of them who did not have a firearm, must have seen the firearms that were used and foreseen, as a strong possibility, that the deceased would be shot. We cannot find who possessed firearms before and at the time of the shooting or who shot the deceased. However, there is no doubt that their common purpose included the intention to exercise possession of the deceased's firearms through one or other of them and that the person or persons who took the deceased's firearms, had the intention to hold the firearms on behalf of all of them.

Accordingly, in terms of the decision in *S v Mbuli* 2003(1) SACR 97 (SCA), at 115d, all four are guilty on counts 5 and 6 also. All four accused are found GUILTY on all six counts as charged. MOTALA, J

In our view there are several factors whose cumulative effect is to greatly reduce the danger of relying on Vellem's evidence. The first factor is his attitude towards the police and the State. One often finds that accomplices, especially accomplices seeking an indemnity, go out of their way to tailor their evidence to please the police or try to assist the State case. Vellem did not do so. He confirmed in detail what was put to him by number 2's counsel as to assaults by the police on number 2 and thereby assisted number 2 to exclude a statement he made to the police. That is not the attitude of someone who is substituting an innocent person for a guilty one, the most obvious danger of relying on an accomplice.

The second factor is the evidence of Ms Dalindyebo and Ms Mahlanya. Ms Mahlanya was the better witness of the two. The two young ladies' evidence corroborates Vellem's evidence in material respects. Their evidence has been criticised by the defence. Clearly there are inconsistencies between the evidence each gave in court and between their evidence and their statements. Some of those inconsistencies are clearly due to the fact that in our view they have been talking to each other. That explains why Ms Dalindyebo overnight corrected her evidence that number 2 was Rinkie and avoided my question in that regard.

It also explains why Ms Dalindyebo said the police did not get out of the van, although she said so in her statement. She was clearly adjusting her evidence to that of Ms Mahlanya, who did not observe the police outside the van. Other inconsistencies are either not material or explicable as being a reconstruction, for example, Ms Mahlanya's evidence that she saw the shooting, where she had earlier said that she had heard the shots when she was about to enter a shebeen in Merriman Street.

In considering their evidence, one must bear in mind that they were young school girls. They had witnessed an incident that clearly

traumatised them. Ms Mahlanya said she was crying when she made the statement. In court, many years later, she was afraid to testify and was allowed to do so through an intermediary. Furthermore, the two young women were awakened in the early hours of the morning. Ms Mahlanya's mother was not allowed to accompany her. They were both assaulted by the police. Immediately before the shooting, they were interacting with one another and not calmly observing what was going on. Nevertheless, their evidence is reliable in some respects.

It is confirmed by other evidence, that of Ms Mtlemeza of 12 Sigcawu Street and by the evidence of the police officers who came to the scene. That there were no bullet holes in the police van, which confirms their evidence in a material respect that the two doors of the van were opened before the deceased were shot. That the van came to a standstill in the nearby yard of Mr Butsaka. That a Cressida was involved, for Inspector Van Wyk started to look for a Cressida that very evening. It is also noteworthy that Ms Mahlanya identified one of the assailants as Rinkie of Zone 8, Langa, in a statement to the police a few hours after the incident. Although the statement in that regard is a previous consistent statement, it may be referred to in terms of the rule that evidence of a previous identification is admissible.

In our view the evidence of the two young women, and particularly the evidence of Ms Mahlanya, provide corroboration for the evidence of Vellem in certain material respects. Firstly, that a Cressida dropped off the assailants. The fact that Ms Mahlanya said it was green and Vellem said it was grey, is probably explicable as a reasonable error by Ms Mahlanya. Secondly, that four persons were involved. Thirdly, that one of them was number 4. In our view, Ms Mahlanya's identification of number 4 can be relied upon. She had often seen him. She knew that he lived in Zone 8, Langa and he confirmed that Pameza was his cousin. Fourthly, that the doors of the police van were opened before the deceased were shot. That they were shot whilst seated in the van. That the assailants were fiddling in the van. All of which is confirmed by the uncontested evidence that there were no bullet holes in the van, that the bodies of the deceased were still in their seats and that their two firearms were stolen. Fifthly, that the police van went into Mr Butsaka's yard and came to a standstill, as confirmed by Mr Butsaka and the police who came on to the scene.

A further safeguard is the cell phone evidence. That number 3's handset was used on 12 July to phone 10111. That on 19 July, number

2's handset received from and made calls to the 274 number, that is the number that phoned 10111 that day. And that both number 3's and number 2's handsets were in the vicinity of the murders on 12 and 19 July, as were the numbers that phoned number 10111. Another important factor is the conduct of accused 3 immediately before his arrest, and the conduct of number 4 when the police came to his house. I will deal with their conduct in more detail later.

Finally, the dangers of relying on the evidence of an accomplice is reduced sometimes if the accused's evidence is not reasonably and possibly true.

In our view, none of the accused were being truthful in court. Accused 2 in chief said he could not remember where he was on 12 and 19 July, but was adamant in cross-examination that he was not in Langa on 19 July, although he does visit his brother there. He did not dispute that on 19 July his phone was used in Langa, as stated by Superintendent Viljoen and Ms Du Plessis, but surmised that it must have been used by one of his friends. He was arrested only a week after the incident. One would expect him at least to provide some names of those who used his phone or tried to do so. Furthermore, when asked about the names and numbers recorded on his phone, especially the name Rinkie, Punkie and Mnish, he said he could not remember who they were as it was a long time ago.

That simply cannot be accepted as truthful, especially if one recalls that as Ms Du Plessis testified on the basis of Exhibit T1, on 19 July number 2's number received several calls from number 274, which is the number that called 10111 that day, and that number 2's number twice called the 274 number. Furthermore, the evidence of Ms Du Plessis that on 20 July number 2's number received calls from the number on number 3's phone, that is 0730495195, and received a call from the 078 number, that is the number that called the 10111 on 12 July.

Accused 3's explanation as to why he ran away when the police came to arrest him, cannot be true. The others in the house did not try to run away. Number 3 claims he did not know that Phambela was a policeman. However, when eventually arrested, he told Phambela he had been shot by the police. We accept Phambela's evidence in that regard. Accused 3's handset was used on 12 July to phone 10111. He claimed not to have had that phone on that day. That was crucial evidence, yet he did not give his counsel instructions to that effect. His explanation for not doing so, cannot be accepted. He stated that on 19 July he was as usual at work. He was not sure if the phone was in his possession or whether his aunt was using it. His evidence on Exhibit Q1 that he did not know many of the persons whose numbers are in his address book, and his evidence on Exhibit Q2 that he did not know who sent him SMS's, cannot be true.

The evidence of his witness, Ayanda Jacobs, was not of much assistance. When asked if number 3 was at work on 19 July, he said that number 3 was always at work. It is clear he was describing number 3's normal routine. He said in any event that he could not remember if number 3 had absented himself between 5 and 9 p.m. that night. It is also noteworthy that according to Exhibit T2 on 18 July, the 078 number received four calls from the number on number 3's phone.

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Accused 5 told a blatant lie when he said he did not have a cell phone because of a family rule that one must first matriculate. His own witness, Mr Kamaldien, contradicted him in that regard. In any event it is clear that he had access to the cell phones of his parents and sister. Furthermore, we cannot accept that Mr Voges fabricated his evidence that number 5 was known as Carlos.

We are satisfied that we can rely on the evidence of Vellem as corroborated by the factors I have mentioned. That he transported

the four accused to Sigcawu Street and that the four accused, at least two of whom must have been armed, were the four persons who ran to the police van. All the evidence leave no doubt that the four accused had a common purpose to rob the deceased. Those of them who did not have a firearm, must have seen the firearms that were used and foreseen, as a strong possibility, that the deceased would be shot.

We cannot find who possessed firearms before and at the time of the shooting or who shot the deceased. However, there is no doubt that their common purpose included the intention to exercise possession of the deceased's firearms through one or other of them and that the person or persons who took the deceased's firearms, had the intention to hold the firearms on behalf of all of them.

Accordingly, in terms of the decision in *S v Mbuli* 2003(1) SACR 97 (SCA), at 115d, all four are guilty on counts 5 and 6 also. All four accused are found GUILTY on all six counts as charged.

MOTALA, J

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