

SOUTH AFRICA / JUDGMENT

Semelane and Others v S (A17/2014) [2015] ZAFSHC 23 (29 January 2015)

[2015] ZAFSHC 23**COURT**

Free State High Court, Bloemfontein

BEFORE

Rampai, Tsatsi

CASE / FILE NUMBER

A17/2014

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IN THE HIGH COURT, BLOEMFONTEIN

FREE STATE DIVISION, BLOEMFONTEIN

Appeal No.: A17/2014

In the appeal between:

THAPELO LETHOA SEMELANEFirst Appellant

JACKSON TSHOLEDI MPHALESecond Appellant

MOJALEFA CUTHBERTH MOFOKENGThird Appellant

MELVIN NEELS LODEWYKFourth Appellant

and

THE STATERespondent

CORAM: RAMPAI, AJP et TSATSI, AJ

JUDGEMENT:

RAMPAI, AJP

HEARD ON: 18 AUGUST 2014

DELIVERED ON: 29 JANUARY 2015

- [1] These were appeal proceedings. The four appellants were tried in the regional court. They were convicted in respect of a wide range of charges. There was a great variety of sentences imposed on them. The severity of the custodial sentences varied from one appellant to the other. They ranged from five years imprisonment to eighteen years imprisonment. The appellants were aggrieved by the convictions as well as the sentences, they came before us on appeal with the leave of the trial court. The respondent opposed all the appeals.
- [2] The appellants were originally charged with two others. Their two co-accused Ms Dipuo Cecilia Mofokeng, accused number three and Mr Erastus Jonas Shiwenda, accused number six were not before us on these appeal proceedings. At the end of the prosecution case, accused number three was discharged in terms of Section 174, Act No 51/1977.
- [3] All in all the prosecution preferred 44 charges against the appellants and their co-accused. The list consisted of the

following charges:

- 3.1 Fraud x 5 counts;
- 3.2 Kidnapping x10 counts;
- 3.3 Impersonification x 6 counts;
- 3.4 Extortion x 9 counts;
- 3.5 Theft x 9 counts;
- 3.6 Armed robbery x 2 counts;
- 3.7 Intimidation x 2 counts;
- 3.8 Pattern of organized crime x 1 count.

The prosecution alleged that the appellants and their erstwhile co-accused committed those crimes at Bethlehem at various times during the period which commenced on 29th February 2008 and ended on 21st February 2009.

- [4] The appellants were tried in the Bethlehem Regional Court. Their trial began on 28th July 2010. They all pleaded not guilty to all the charges. They were all legally represented by a local attorney, Mr

Harrington. All of them exercised their right to remain silent. They did so by not disclosing the basis of their pleas.

- [5] The trial magistrate divided the charges into six groups since there were six reported incidents.

5.1 The first group consisted of six charges, numbered 1 – 6. The complainant was Mr KH Mahloko;

5.2 The second group consisted of six charges, numbered 7 – 12. The complainant was Mr AC Lombard;

5.3 The third group consisted of six charges, numbered 13 – 18. The complainant was Mr DP Stoltz;

5.4 The fourth group consisted of seven charges, numbered 19 – 25. The complainants were Mr E Swiegelaar and Mr A Koen;

5.5 The fifth group consisted of thirteen charges, numbered 26 –

38. The complainants were Mr J Oosthuizen and Ms B Oosthuizen;

5.6 The sixth group consisted of five charges numbered 39 – 43. The complainant was Mr SA Zuma and Mr V J Zuma.

[6] The last charge numbered 44 stood alone. It was levelled against all the accused. It concerned all the aforesaid

complainants. The prosecution alleged that the actions of the accused as fully set out in the first 43 charges established a pattern of organized criminal activity as envisaged in Section 9(2) Prevention of Organised Crime Act 121/1998 (POCA).

THE FIRST GROUP OF OFFENCES

[7] The accused were all discharged in terms of Section 174 Criminal Procedure Act 51/1977 (CPA), as regards the first group of charges. In the light of the discharges, I shall not say much about those charges, numbered 1 – 6. The first incident took place at Bethlehem on 29th February 2008.

THE SECOND GROUP OF OFFENCES

[8] As regards Lombard group, the incident took place at Bethlehem on Monday 14th April 2008. The second incident gave rise to charges 7 –

12. The third appellant Mr Mojalefa Cuthberth Mofokeng, accused number four was convicted on 3rd November 2010. On 3rd February 2011 he was then sentenced to a total of 9 years imprisonment in respect of the second group of offences. He was

aggrieved by the six convictions and their related sentences. He came to us on appeal with the leave to appeal granted by the court a quo.

[9] The version of the state was narrated by one witness namely Mr Antonie Christoffel Lombard, the following exhibits were handed in, in support of his testimony exhibit A, C & G. He testified that he lived on a farm at Harrismith. He owned a motor vehicle for sale, a Mercedes Benz. He privately advertised his motor vehicle as being for sale in a magazine called “Auto Trader”.

- [10] On Sunday, 13th April 2014 he received a call from someone who was interested in his motor vehicle. At the caller's request, he travelled to Bethlehem the very next day to negotiate a deal with the unknown prospective buyer. However, he used a van instead of the Mercedes Benz that was up for sale. He did so at the request of the purchaser or the caller. The two men met at Midas. Brevitas causa I shall refer to the prospective buyer as X. The character called X showed him diamonds, told him that he first had to sell the diamonds and that he would buy the motor vehicle with the proceeds of the diamond deal. Mr Lombard saw the diamonds and actually held them in his hands.
- [11] From Midas X took him to a certain back street behind Spur Restaurant in the vicinity of Fruit and Veg. They used his van to get there. There they met another character, Y. X told him that Y was a prospective buyer of the diamonds. X suggested that together they should sell the diamonds so that he could pay him cash for his motor vehicle. So the witness became involved.
- [12] From the second scene behind Spur Restaurant, the three men drove to Bohlokong. Again his van was used. Y took them to a certain house, the third scene. There he left him behind with X. He was made to understand that Y was going to fetch diamond buyers. Y was gone. He never came back.
- [13] About ten minutes went by. The next moment about three men, P, Q & R burst into the house. They said they were police officers, later on the house in question turned out to be a notorious drug den. They accused the witness of being involved in illegal activities. They alleged that he was there to sell drugs and diamonds. He denied the allegations. Their leader threatened to have him arrested and locked up. The first policeman (P) was a coloured who spoke Afrikaans and who introduced himself as Captain Clark. All of them P, Q and R ordered him to take out his cell phone. P then demanded R50 000.00 from him in order to let him off the hook. He had no money.
- [14] He called his friend Mr Christofel Johan du Plessis. One of the three policemen furnished Mr Du Plessis with certain banking details. The account holder was a certain Mofokeng, a customer of the First National Bank. His friend then undertook to deposit R10 000.00 into that account. He later did. On the instructions of P, the witness called two or so further people for more money, but none was able to help him out.
- [15] From the house in question they took him to the fourth scene ABSA Bank. Once again his van was used. The people demanded more money from him. He then called his wife. She went to ABSA Bank at Harrismith from where his identity document was faxed to ABSA Bank at Bethlehem. There he withdrew R50 000.00 and gave it to the police outside at the parking area near his van. He was then released. He was detained for approximately two and half hours.

- [16] His bank account number was 910500068. The withdrawal slip of R50 000.00 dated 14th April 2008 was handed up as exhibit A. He no longer had cellular details of the calls he received from the group, because he had deleted them. He was not able to identify any of the people who forced him to give them his money. He attended two identification parades, but failed to identify any of the suspects. He denied the suggestion that he paid R60 000.00 to the third appellant to supply cannabis.
- [17] The version of the third appellant Mr Mojalefa Cuthberth Mofokeng was narrated by him. He testified that he had known Mr Lombard since 2008. During that year he supplied the witness with cannabis at Bethlehem on two occasions. He was unaware that he had advertised his Mercedes Benz for sale. He never expressed to him any interest to buy his motor vehicle. He denied the following allegations: that he represented to Mr Lombard that he was a police officer; that he kidnapped him and held him in a certain house against his will; that he forced him to pay R60 000.00 or any other amount by false pretext.

THE THIRD GROUP OF OFFENCES

- [18] As regard the Stoltz group of charges, the third incident took place at Bethlehem on 25 June 2008. The incident gave rise to charges 13 – 18. The version of the prosecution was narrated by Mr Dale Peter Stoltz. On the strength of his evidence, accused 5 was convicted on 3 November 2010. On 3 February 2011 he was sentenced to a total of 10 years in respect of the third group of offences. He was aggrieved by the convictions and sentences. He came to us on appeal with the leave of the court a quo. Mr Melvin Neels Lodewyk, the fourth appellant in these proceedings, was accused 5 in the court a quo.
- [19] The version of the prosecution, in connection with the third group offences appealed against, was narrated by Mr Stoltz. He testified that he lived at Vryheid in Kwazulu-Natal. He owned a panel van, Ford Transnet. He wanted to sell it. He placed an advertisement in the Junk Mail on or about 26 May 2008. He advertised his vehicle for sale.

About a month or so later he received a call from a prospective buyer. The caller “A” was a coloured man. He said he called from Cape Town. He told the witness he was interested in his van. They arranged to meet at Cashbuild, Bethlehem in the Free State Province.

- [20] The witness and his companion, Mr Takalane (Mr T R Ravele) travelled to Bethlehem to sell his vehicle. He met “A” at Cashbuild, the first scene. “A” suggested that they go somewhere to get the money. At the request of “A”, Mr Ravele remained behind. They used the witness van. On the second scene they met a Pakistan, “B”. The latter had diamonds but no money.
- [21] From the second scene, “A” took the witness to the third scene. They used the witness’ van. The Pakistani remained behind. On the third scene, an over-night sleepover place for truck drivers, they met “C”, a black chap. He also had diamonds in his possession. “C” enquired from the witness whether he had money to buy diamonds. The witness answered that he only had R100.00 for fuel. Using the witness’ cellular phone “A” called “B” and enquired about the money.

- [22] From the fourth scene “A” took the witness to a house at Bohlokong. On the way “A” put some diamonds in his pocket. They were still using the witness’ van. “A” made him believe that “B” would bring the money there. Instead, two strangers arrived. Let’s call them “D” and “E”. They said they were police officers. They showed him a wallet with a star badge. The impression of the witness was that the badge was not a real official badge of SAPS but a fake. The police officer ordered him to raise up his hands. They searched him. They found diamonds in his possession. They also ordered him to take off his shoes and socks. Again he obliged. They enquired from him whether he had drugs. He told them he did not do that stuff at all.
- [23] At that moment another police officer, “F”, entered the house. He said he was looking for “A”. The two walked out of the house together and vanished from the scene. Then “D” and “E” demanded money from him. They threatened to shoot him or to jail him unless he complied with their demands. There was a firearm. They advised him to phone around. They demanded lots of money for his release.
- [24] Among others, he called his cousin. The cousin agreed to pay R12000.00 to secure his release. He later received a sms from the bank notifying him about the deposits. The cousin made two deposits. The first was R5000.00 and the second R7000.00. Both deposits were made available on 24 June 2008.
- [25] From the fourth scene “D” and “E” took the witness to the FNB. Yet again his van was used. One of the two policemen was his passenger. The other followed them in a separate car. At or about 12:15 he withdrew about R11 700.00. One of the police was with him inside the bank. They then walked back to the parking where they took all the money from him. They gave him R300.00 back for fuel. The witness was then set free.
- [26] A document was shown to the witness. The witness identified it as his bank statement. The statement showed that two deposits were made on 26 June 2008. The document was received as exhibit B. The witness could not identify any of the men who claimed to be police officers. However, he identified as, Mr M N Lodewyk, appellant number four, as the coloured man.

THE FOURTH GROUP OF OFFENCES

- [27] The version of the prosecution was narrated by Mr E Swieggelaar. He testified that he lived in Bloemfontein. He owned a sedan, Ford Sierra. He decided to sell his car privately. He advertised his car for sale in the Auto Trader. Someone reacted to his advertisement. The caller expressed interest in his car. They made an appointment.
- [28] He travelled to Bethlehem on 11th August 2008. The purpose of the trip was to sell his car. His son, André Koen, aged 16 years of age, accompanied him. They travelled by his Ford Sierra. They met the caller, Mr “G”, at Midas. “G” got into the witness’s car to have a test drive. He no longer remembered “G”’s name. All he could still recall was that “G” had said he was a Nigerian.

- [29] After the testing of the car, they stopped and parked in the vicinity of a certain bank. "G" alighted and left. The witness and his son waited for his return. A little while later "G" returned. He was with "H". Both got into the witness's car. "H" opened his briefcase. The witness saw money in the briefcase. "G" told the witness there was a deal that he wanted to finalize first.
- [30] They all alighted from the car. They walked to a nearby park. "G" was very busy on the phone. At one stage "G" left. He later returned to the park and told the witness that he got the money. From the second scene near a bank, they drove to a guest house in the township pursuant to "G"'s suggestion.
- [31] They entered the house. Once again "G" became very busy on his phone. About 10 minutes or so later 3 men, "J", "K" and "L" burst into the house. "G" vanished from the scene. The three pretended that they were police officers. They flashed what looked like the official police badge. They immediately accused the witness and his son of being diamond smugglers. They were commanded to raise up their hands. They were searched. One of them falsely claimed he found diamonds in the witnesses's pockets. The accuser demanded that the witnesses washed their hands. He thereby meant that they should pay them something. He threatened to lock them up unless they complied.
- [32] The "police" demanded R20 000. Because the victims did not have that sort of money they were instructed to call friends or relatives. The witness's friend, Mr Tienie Bam of Bloemfontein agreed to help but only to the tune of R10 000. The "police" provided him with banking details of their own. Mr Bam caused the money to be electronically transferred into the account in question.
- [33] Although Mr Swiegelaar could not identify "G" and "H", he identified the 3 police officers, "J", "K", and "L" as accused number two, four and five. From the guest house accused number two and accused number four escorted them to a garage. There they gave R500 back to the complainant for petrol. However, they took their cellular phones. They set them free and ordered them to drive back to Bloemfontein.

THE FIFTH GROUP OF OFFENCES

- [34] The version of the prosecution was narrated by Mr JDC Oosthuizen. He lived at Reitz. He had a chicken enterprise. As a chicken vendor, he extensively marketed his stock in the township. His youngest son was born on 5th November 2007. He decided to buy him a present for his first birthday. For that purpose he and his wife travelled to

Bethlehem on 4th November 2008. With them was their little daughter.

- [35] The couple was having breakfast at Wimpy, when a customer by the name of James approached him. James had a business proposition.

James told him about a woman who was interested in the chicken business. James and the woman got into his car. The woman had a guest house in the township. They took him there for business negotiations. On their arrival they invited him and his wife into the guest house. He objected and insisted that his wife should remain in the car with the child. Once he was inside the house, the woman fetched a white bag from the deep-fridge. She opened it. The witness saw glass in the white bag.

[36] The next moment accused number two, four and five entered the house. They told him that they were members of the police drug unit; that he was a cannabis smoker, that he was also a diamond smuggler. They took his cellphone and wallet. They also took off his shoes. He pushed one of them off in a bid to leave the house. They warned him. One of them produced a gun and ordered him to raise his hands up.

[37] They fetched his wife from the car. They detained her in a certain room. They alleged he was a diamond smuggler.

They demanded “a bribe” in order to release him. They reminded him that there was a child involved. They took R1000 from his wallet. They demanded all in all R40 000. He told them he did not have any more money. They threatened to detain his wife and daughter.

[38] He agreed to give them an additional R35 000. One of them escorted him to the bank. He withdrew that amount of cash and gave it to them. They were released. The couple and their daughter travelled back to Reitz. However, accused number 5, who pretended to be Captain Jacob Booysen, kept on calling him afterwards. He demanded R17 000 more. He threatened that they would harm him unless he complied.

[39] The next day, on 5th November 2008 he gave them R17 000. He deposited the money into a bank account whose details he obtained from accused number 5 by way of an sms. They demanded more money. A few days later he deposited a further R10 000 into the same bank account. They kept on calling him and demanding more money.

[40] Eventually he turned to the police where he reported the incident. He gave the police the account numbers and the frequent caller’s cell number. One day he went to a certain shop to buy motor spares. There he spotted accused number

5. He called the police. On the strength of the information he provided accused number 5 was subsequently arrested.

THE SIXTH GROUP OF OFFENCES

[41] The version of the prosecution was narrated by Mr S A Zuma. He testified that he lived in Umgungundlovu, in other words

Pietermaritzburg. He was a business man. He had a trucking enterprise and apparently a supermarket. One day he

met a character called Malatsi at Cash & Carry in Qwa-Qwa. Malatsi hired him. They arranged that they would collect his goods on 21st February 2009.

- [42] On 21st February 2009, he travelled to Bethlehem. He was with his brother. They met Malatsi. He led them to a certain house in the township. Inside the house Malatsi enquired whether he knew gold. He answered the question in the negative. As Malatsi was trying to open a plastic bag, four men stormed into the house. They introduced themselves as police officers. One of them produced his police identification card. He pointed a gun at them while his companions searched them. They took his Nokia 1100 cellphone, wallet, money (R900 cash) and car keys. They took similar things from his brother. They then demanded R30 000.
- [43] Malatsi undertook to give them some money. Mr Zuma called his uncle who lived in Qwa-Qwa. The uncle agreed to lend the money to him but advised him to collect the money from his wife because he was out of town. He informed the “police officers” that he had to drive to Qwa-Qwa to collect the money. They agreed to let him go. An escort was assigned to him. However, they detained his brother. They undertook to release him provided he met their demands for money.
- [44] On the way to Qwa-Qwa he called his sister and asked her to report the incident to the police. He met his sister at a certain shopping centre in Qwa-Qwa. Then the police appeared on the scene and surprised his escort. He explained the whole story to them. They immediately arrested his escort and took him to the police station for questioning.
- [45] From there he drove back to Bethlehem with the police. He took them to the house in question. However, they found nobody in the house. He drove to town where he and his brother were re-united. He identified the first appellant and the second appellant as the escort and the gunman respectively. The character called Malatsi was not among the accused in the dock.

THE SECOND GROUP OF OFFENCES: ANALYSIS

- [46] As regards the Lombard group of charges, only accused number 3 was found guilty. The court a quo rejected his version. He admitted that the total sum of R60 000 was deposited into his bank account on 14th April 2008 but averred that the complainant was his customer; that he had previously supplied the complainant with goods on credit; that the credit transaction concerned cannabis and that the complainant made the two deposits, R10 000 and R50 000, in settlement of his indebtedness to him.
- [47] The evidence of Mr C du Plessis of Meyersgeluk Farm in the district of Harrismith gave substantial evidence to the version of Mr Lombard concerning the loan of R10 000. His evidence was that Mr Lombard had never borrowed money from him before. This was the first and unusual request. The second aspect of his evidence was that his friend was very nervous on the phone. Those two features of the witness's evidence strengthened the complainant's version that he was unduly pressured to borrow money.

[48] The Lombards also lived on a farm in the district of Harrismith. Their landed property was called Wesselhoek Farm. On 14th August 2008 Ms Anna Lombard, just like Mr C du Pleassis, received an unexpected and urgent call from her husband. As result of the urgent call, she hurriedly drove to Harrismith where she caused a copy of the complainant's identity document to be faxed from Absa Bank Harrismith to Absa Bank Bethlehem in accordance with his urgent instructions. A certain Willie instead of Issie helped her to fax the identity document. The evidence of the witness corroborated the complainant's version. Of particular significance was her evidence that her husband had gone to Bethlehem to negotiate a deal for the sale of his motor vehicle.

[49] According to Ms Lombard, the complainant's trip was not prompted by a decision to settle any creditor's account.

If that was indeed the underlying reason, the complainant would probably have arranged his affairs differently before he ventured out to Bethlehem from where the haphazardly made urgent calls to urgently pay a huge sum of money to a creditor. All these probabilities favoured the version of the complainant more than that of the third appellant.

[50] It was undisputed that Mr Lombard had advertised his Mercedes Benz sedan in the Auto Trader for sale. His evidence was that he received a call from a potential buyer. They arranged to meet at Bethlehem. The evidence of Mr Bouwer, the investigating officer, showed that on 14th April 2008 there was cellular contact between Mr Lombard's cell 082 855 2609 and unidentified caller's cell 073 053

6434. There were 7 calls exchanged. The latter also had contacts with accused number five, in other words the fourth

appellant, as accused number 6. There were 4 other unidentified callers who had contacts with Mr Lombard, accused number 5 and accused number 6 before, after or on 14th April 2008. One of those was probably accused number 3, in other words the third appellant, Mr M C Mofokeng.

[51] Although the complainant could not identify the third appellant at the police identification parade as one of the suspects involved in the criminal scam against him, documentary evidence against the third appellant was formidable – exhibits "c" and "g".

[52] Mr Lombaard did not use the sedan he wanted to sell during his trip from Harrismith to Bethlehem to meet the potential buyer.

Instead he used his van.

"Dit val 'n mens inderdaad vreemd op"

So commented the regional magistrate.

- [53] Indeed it appeared somewhat strange that a seller would go out to meet a stranger interested to buy his product but leave behind the very product a potential buyer would ordinarily wish to see. Mr Lombard's explanation that he left the sedan at the special instance and request of the caller was, at a first glance, also not very convincing. However, after examining the evidence relative to the second group in conjunction with the evidence in the case as a whole, the apparently strange version of Mr Lombard began to make sense.
- [54] The evidence as a whole clearly indicated that the third appellant and all those involved in the six groups of offences were not really interested in buying motor vehicles from any of the victims. They deceptively designed a criminal scheme whereby to make money from the victims by instilling fear on their minds. They then convinced the fearful victims to pay them in order to avoid certain harmful repercussions of refusal. At the heart of the criminal modus operandi was criminal intent to extort and not to defraud. Upon careful examination of the facts it became clear to me that the conduct of the third appellant was predominantly inspired by intention to commit the crime of extortion. The rest of what he did was designed to attain that primary criminal objective.
- [55] In my view the version of the third appellant was not only improbable, but it was also not reasonably true. Therefore, the court a quo was correct in rejecting it. I would also have rejected it had I sat as a court of first instance.
- [56] It does not follow from the above conclusion that the third appellant was, therefore, guilty as charged in respect of all the six charges.

I have earlier found that although Mr Lombaard was deceptively lured to travel from Harrismith to Bethlehem, the third appellant did not have the requisite fraudulent intent to defraud him of his motor vehicle. It has been held that false representation concerns the past or the present but not the future. *R v Myers* 1948 (1) SA 375 (A) on 382; *R v Deetleffs* 1953 (1) SA 418 on

421. The third accused did not, represent to the complainant currently existing state of affairs (present tense) or an

accomplished state of affairs (past tense).

- [57] The evidence showed that the third appellant falsely represented to the complainant that he or one of his cohorts might buy his motor vehicle in the future. Such representation about what the third appellant possibly contemplated to do sometime in the future was nothing less than a false promise about the future. The representation was false because, in truth and in fact, buying the complainant's motor vehicle was neither in the forefront or even at the back of the third appellant's mind. The third appellant's deceitful offer to purchase the sedan from the complainant was calculated to entice the complainant in order to ensnare him in the web of extortion.

- [58] I am persuaded by the submission of Mr P W Nel, counsel for the third appellant, that all the elements of the crime of fraud were not proven. The element of fraudulent intent was amiss. It follows, therefore, that the conviction of the third appellant in respect of charge number 7 could not be sustained. His conviction in respect of that charge was, with respect, a material misdirection on the question of law.
- [59] The evidence of the complainant was that he met one of his deceivers at Midas. It was highly probable that the third appellant was the extortionist whom the complainant first met on his arrival at Bethlehem. It is less probable that the third appellant was 1 of the 3 further extortionists who posed as police officers. We ascertained that the first extortionist ultimately lured the complainant to a drug den in the Bohlokong township. There, the first extortionist stealthily vanished from the scene.
- [60] When the complainant was surprised by his 3 fellow extortionists in the house, the first extortionist was nowhere to be seen, by the complainant at least. If that was factually the true position, then it could not be correctly found that the first extortionist held himself out as a police officer to the complainant. Accordingly the allegation that the third appellant had contravened sec 68(1) of the South African Police Service Act 68 of 1995 was not established beyond a doubt. The complainant was a single eye-witness.
- [61] It must be borne in mind that he could not identify any of the extortionists who stormed into the house and projected themselves as police officers whereas in truth and in reality some were probably not. Since there was some clear doubt as to the actual role the third appellant played in the entire drama which unfolded in the house, he was entitled to the benefit of such doubt. The verdict deprived him of the benefit of such doubt. The finding of the court a quo that the third appellant impersonated a police officer is one which, on appeal, I cannot uphold. In my view the conviction of the third appellant in respect of charge number 8 was a material misdirection. The complainant's evidence, though creditable, was very unreliable to secure the third appellant's conviction.
- [62] The complainant was lured from Midas to the scene of the crime. He was taken to the particular house under the false pretext that he was going to receive money for the sale of his sedan. The evidence showed that his van was used; that he drove the van at all times material to his complaint; that he was shown the way to the house; that he willingly drove to the house and that he freely walked into the house where he was later falsely accused, temporarily detained and extortively coerced to avoid arrest and incarceration.
- [63] Obviously Mr Lombaard was not taken to the house against his will. Although he was deceived to go there, he was not deprived of his freedom and forcibly shipped to the scene of extortion. He was not really detained for an exceedingly long and torturous period of time to break his human spirit of resistance. He was merely threatened that unless he complied with the extortionate cash demand, he would not be released. In the circumstances, the findings that he was kidnapped and robbed of this freedom were not supported by evidence. It follows, therefore, that the court a quo erred in convicting the third appellant of

kidnapping, charge number 9.

[64] I have earlier found that the third appellant did not squeeze any money out of Mr Lombaard but rather employed extortive compulsion to induce him to part with his money and to make those two extortionate deposits into the third appellant's bank account.

Extortion, in my view, was what the case was all about. The respondent proved beyond a doubt that the third appellant directly or indirectly committed the crime of extortion. The verdict pronounced against the third appellant in respect of charge number 10 is a finding which, on appeal, I cannot hold to be wrong.

[65] The third appellant was also found guilty of two counts of theft, to wit: R10 000 and R50 000 being charges 11 and 12 respectively. These two charges of theft were inextricably intertwined with the main charge of extortion. I think there should have been two separate counts of extortion in the second group of offences, viz one count in respect of R10 000 and another count in respect of R50 000. The former should have been part of charge number 10. It had to be so because there was a single criminal intent involved. It has to be kept in mind that the sinister motive and the entire criminal enterprise underlying charge number 10 was to get the complainant's money. The same facts relied upon to prove theft, say charge 11, were relied upon to prove extortion, charge 10. The two crimes were solidly connected by a single intent. The commission of that crime was accomplished when Mr C du Plessis deposited R10 000 into the bank account of the third appellant.[1]

[66] Immediately after the completion of the first crime of extortion, the third appellant, in collaboration with his co-perpetrators, revamped the wheel. They started a fresh series of criminally extortive actions. On the second occasion they extortively netted an extortionate price of R50 000 from the same victim. On the facts, a distinct and separate misdeed of extortion was committed. The third appellant can count himself lucky that he was not charged with a second count of extortion but theft. Since extortion is more serious than theft, the conviction of theft in respect of charge 12 has to stand. Theft was a competent verdict.

[67] In view of the materially appealable misdirections already outlined, appellate interference was called for. I would therefore,

uphold the third appellant's appeal as regards the verdicts in respect of charges numbered 7, 8, 9 and 11. As regard the remaining two charges numbered 10 and 12, I am inclined to dismiss the third appellant's appeal and to confirm his conviction(s)

by the regional magistrate.

THE THIRD GROUP OF OFFENCES: ANALYSIS

[68] As regards the Stoltz group of offences, only accused number five was found guilty in respect of all the six charges numbered 13 –

18. He was the fourth appellant in these appeal proceedings. The court a quo rejected his version that he was not involved and that he was mistakenly identified. He denied the evidence of Mr Stoltz that he was the recipient of R11 800 which he, through extortive compulsion withdrew from his First National Bank at Bethlehem on 25th June 2008.

[69] The unchallenged averments contained in the witness statement, (exhibit “n”), by Mr T R Ravele corroborated the version of Mr Stoltz. He confirmed that he and the complainant lived at Vryheid; that they travelled to Bethlehem on 25th June 2008; that at Cashbuild they met a coloured man; and that he later saw the same coloured man with the complainant at the First

Bank.

[70] The evidence of Mr Bouwer showed that there were cellular contacts between the complainant and Mr E S Shiwenda, accused number six, on 25th June 2008. On the same day accused number six had 29 cellular contacts with “Z” an unidentified user of cell 078 966

6773. In turn “Z” had 2 cellular contacts with accused number five, the fourth appellant. Moreover, the fourth appellant had a minimum of 2 cellular contacts with 3 more unidentified suspects on the same day. Those suspects collectively had no less than 10 cellular contacts with accused number six who, as already indicated, had direct contacts with the complainant. Those objective facts, call them circumstantial evidence if you will, somehow corroboratively implicated the fourth appellant.

[71] On the strength of the extortive compulsion exerted on the complainant, the sum of R12 000 was deposited into his bank

account by way of two instalments of R5000 and R7000 (exhibit “j”). His evidence was that he was later coerced to go to the First Bank to get the money for the “police”. He was accompanied by a coloured chap who claimed to be Captain Jacob Booysen. There he withdrew R11 800 which he involuntarily handed over to the coloured gentleman. He did so to avoid the threatened arrest, detention and prosecution. At the police identification parade held on 21st January 2010 Mr Stoltz pointed out participant 5, Neels, as the coloured gentleman involved. The correctness of the pointing

out was admitted at the trial. The fourth appellant did not contend that he was not pointed out by the witness, Mr Stoltz.

[72] Although Mr Stoltz was a single witness and although the issue revolved around the identity of the suspect, the fourth appellant

was, in my view, correctly convicted of extortion, charge 16. The positive outcome of the police identification parade, the

observation by Mr Ravele, the cellular data evidence by Mr Bouwer and documentary evidence of bank statement - all corroborated the version of Mr Stoltz. The evidence of that single witness was reliable. He met the culprit during daytime. He spent some time with him. The prevailing circumstances were conducive. The fourth appellant was a passenger in his car.

[73] I deem it unnecessary to comment about the charges of fraud (13), impersonating a police officer (14), kidnapping (15), theft

(17) and theft (18). The reasoning, analysis, views, findings and conclusions are the same as those that apply to the Lombaard group of charges.

[74] In view of the material and appealable misdirections, appellate interference appeared to be justified. I would, therefore,

uphold the fourth appellant's appeal as regards conviction in respect of charges 13, 14, 15, 17 and 18. As regards the one remaining charge 16, I am inclined to dismiss the appeal of the fourth appellant and to confirm his conviction by the regional

magistrate.

THE FOURTH GROUP OF OFFENCES: ANALYSIS

[75] As regards the Swiegelaar group of charges, the second, third and fourth appellants were found guilty of all the 7 charges. The group consisted of charges numbered 19 – 25. The court a quo rejected the evidence of each of the appellants but accepted the evidence tendered against each of them.

[76] The schoolboy Hendrik Koen also known as André corroborated the testimony of his stepfather, Mr Swiegelaar. His evidence was that they lived in Bloemfontein. On 11th August 2008 they travelled to Bethlehem. The purpose of the trip was to sell the Ford Sierra belonging to his stepfather.

At Midas they met the caller who was interested to buy the car. They eventually ended up in a guest house at Bohlokong.

[77] Soon after they had taken their seats in the house, three men stormed into the house. They said they were police officers. They were falsely accused, searched, and robbed of their cellphones, among others. Then they were threatened with arrest, detention and prosecution because, as the "police officers" claimed, they were diamond smugglers. To let them off the hook, their accusers demanded money. He identified accused number five, in other words the fourth appellant, at the police identification parade through his general facial appearance and the spectacles. However, he could not recognise him in court. He attributed his failure to the long passage of time between the incident and his testimony.

[78] The evidence of the complainant's friend, Mr Marthinus Johannes Bam, materially corroborated the version of the complainant. He beefed up his evidence by means of documentary evidence, exhibit "i". The exhibit showed that the witness deposited R10 000

into a certain bank account on 11th August 2008. The deposit was made in favour of a certain S C Nhlapo account number 9141189146. The account was held at Absa Bank Bethlehem. The witness was an electrician in Bloemfontein. He knew Mr Eugene Swiegelaar who worked for Total Gas. He deposited the money in favour of Mr Nhlapo following a telephonic conversation he and Mr Swiegelaar had on 11th August 2008. The evidence of Mr Bam was never challenged by way of cross-examination.

- [79] The evidence of Mr Swiegelaar derived a great deal of corroboration from the testimony of a stranger, Mr Simphiwe Calvin Nhlapo. He testified that he lived at 6720 Naledi Bohlokong Bethlehem. He earned his livelihood as a casual vendor. The wares of his trade included, among others, cigarettes and soft drinks. He was a customer of Absa Bank. His account had been dormant for some time before 11th August 2008.
- [80] On 11th August 2008 accused number six, Mr Erastus Jonas Shiwenda, approached him. He knew accused number six very well. The witness explained that accused number six was his regular customer. Quite often he sold cigarettes to him on credit. However, it was not about cigarettes that accused number six approached him on that day. The witness heard from accused number six that someone was supposed to send him money; that he did not have a bank account; and that he needed the witness's banking details for that purpose.
- [81] The witness acceded to the request of accused number six. Together they went to the witness's parental home, then to Pick 'n Pay and finally to Absa Bank. There they made the necessary arrangements. The witness gave his bank card and his secret pin code to accused number six to enable him to keep on checking whether his account has been credited with the expected deposit. He then left accused number six at the bank.
- [82] A while later accused number six came to him. He confirmed to him that funds to the tune of R10 000 had been deposited.

He picked him up and together they once again drove back to Absa Bank. He withdrew R9000 plus and handed the cash to accused

number six. As a token of gratitude accused number six gave him R300 back. On that day accused number six was driving a sedan, an Audi. On previous occasion he had seen accused number five driving the same sedan. Therefore, he reckoned, that accused number five owned that car. Moreover he had previously seen accused number five and accused number six together in the very same car. He confirmed that exhibit "d" which was used to validate the huge cash withdrawal on 11th August 2008 from his account, was his identity document. A few weeks later accused number six approached him once again with a similar request but he could not help because he had lost his identity document in the meantime.

[83] The evidence of Mr Bouwer showed that there were 2 cellular contacts between accused number six and Mr Swiegelaar, the complainant, on 11th August 2008. On the same day there were 6 cellular contacts between accused number five, in other words the fourth appellant, and “Z” the unidentified user of cell 073 583 4118. The very same day “X” had 3 cellular contacts with accused number six. Still on 11th August 2008 there were 2 cellular contacts between “X”, an unidentified user of cell 083 771 0895, and the fourth

appellant. On the same day “X” had 3 cellular contacts with accused number six. Yet another unidentified

character “W” appeared on the scene. He used cell 079 848 6341. On 11th August 2008 he had one cellular contact with accused number six. The very next day he had one cellular contact with the fourth

appellant. A mysterious suspect known only as Limo had four cellular contacts with accused number six and 3 with the fourth

appellant on 11th August 2008 and further 2 on 12th August 2008.

[84] The cellular data strongly suggested that the fourth appellant and accused number 6 together had dealings with a few dubious characters such as “W”, “X”, “Y”, “Z”, Limo and others. The fourth appellant, through a common pool of questionable characters, indirectly associated himself with accused number 6. Moreover, a credible and reliable witness, Mr Nhlapo, gave evidence which strongly indicated that the fourth appellant had very close and friendly ties with accused number six, a gentleman who was highly implicated not only in this particular group of offences but virtually in all the groups.

[85] Through accused number six, the fourth appellant communicated with the complainant and the rest of the members of the syndicate. I am convinced that through those unidentified suspects the fourth appellant was in contact with accused number six, the initial

intermediary between the complainant and the syndicate.

[86] The complainant pointed out the second, third and fourth appellants at the police identification parade. His reliable evidence of identification of the fourth appellant was directly corroborated by that of his son, Mr Koen. He was, to a certain extent, indirectly corroborated by the reliable evidence of Mr Nhlapo. On the day of the crime the car of the fourth appellant was actively driven around by accused number six in the furtherance of a criminal enterprise. His car was used as an instrumentality of crime. It has to be mentioned that the third appellant, previously accused number four, admitted that he knew the fourth appellant, previously accused number five, as well as accused number six. Moreover, he was correctly convicted for his involvement in respect of the Lombard group of offences where a pretty much the same modus operandi was used to commit acts of extortion.[2]

[87] In my view the court a quo was correct in finding that all of them, the second, third and fourth appellants were involved. Indeed the evidence conclusively proved that they were in it together. Mr J Nel, counsel for the second appellant, conceded that the evidence against the second appellant was reliable to prove his involvement. I am indebted to counsel for his responsible

concession.

[88] In view of the aforesaid findings, I would dismiss the appeals of the second, third, and fourth appellants as regards charge 23, extortion and confirm their convictions.

[89] It was common cause that the second appellant was indeed a police officer. He was, as such, officially issued with a police identification card and a firearm. It follows, as a matter of logic, therefore, that he could not impersonate a police officer because he was, in fact and in law, a police officer. That being the case, he could not contravene sec 68(1) of the South African Police Service Act 68 of 1995. I would uphold his appeal in respect of charge 20 and set aside his conviction.

[90] Both Mr Swiegelaar and Mr Koen identified the third and fourth appellants as two of the three men who introduced themselves as police officers. It was common cause that they, unlike the second appellant, were not officially genuine police officers.

By projecting themselves as such, they undoubtedly contravened sec 68(1) of the South African Police Service Act 68 of 1995. Therefore, their appeals fail and their convictions in respect of charge 20 are confirmed.

[91] As regards charge 19 - fraud, 2 counts of kidnapping and theft, charges 21, 22 and 25 respectively, I am of the view that those four convictions cannot be allowed to stand. The appeals of the second, third and fourth appellants in respect of those specified

charges are upheld. The convictions relative to charges 19, 21, 22 and 25 have to be set aside. Elsewhere in this judgment I gave reasons as to why similar convictions were, in my respectful view, incorrect. Those reasons are as valid here and now as they were there and then.

[92] I deem it necessary to comment about charge 25. It concerned the amount of R20 000. The misdeed of extortion, charge 23, was for all intents and purposes calculated to squeezing money out of the complainant by instilling fear in him. By the employment of extortive means, the second, third and fourth appellants, with the collaboration of accused number six, compelled

or coerced him to have money deposited into the account of their own choice. It follows, therefore, that there was a single criminal intent as regards those two charges. Since charge 23 can swallow charge 25, the latter cannot, on the facts, be allowed to stand alone.

[93] Finally, I turn to charge 24, robbery with aggravating circumstances. The two victims, father and son, were robbed of

their cellular handsets which were never recovered. It was not their evidence though, that the second appellant was pointing a firearm at them while the third and fourth appellants were busy unlawfully dispossessing them. As far as that charge was

concerned, the court a quo erred in convicting the second, third and fourth appellants of robbery with aggravating circumstances.

There was no evidence that any dangerous weapon was used during, before or after the robbery. It may well be that the second

appellant was armed with a firearm as the witnesses testified, but there was no evidence that he used such a firearm to unlawfully

threaten the victims. To that extent, the court a quo committed a material misdirection. The convictions of the appellants cannot be allowed to stand. Their appeals must be upheld.

[94] Consequently, appellate interference was justified. The conviction of each of the three appellants, the second appellant, the third appellant and the fourth appellant, for armed robbery needs to be set aside and substituted with the verdict that each of them is found guilty of robbery. It might well have been that the second appellant was armed with his official firearm as the witness testified. However, since robbery with aggravating circumstances is a statutory shade of robbery, legislatively

identified and specially scheduled as one of the most serious and prevalent crimes, possession of a dangerous weapon and the possessor's threat or actual use thereof has to be factually proven. It was not done in this instance. Instead, it was merely inferred or presumed. In the absence of credible evidence that any of the appellants, the second appellant in particular, used his firearm to threaten the victims, the conviction could not be sustained.

THE FIFTH GROUP OF OFFENCES: ANALYSIS

[95] As regards the Oosthuizen group of charges, there were 13 charges: 26 – 38. Mr Jan Daniel Cronje Oosthuizen identified the second, third and fourth appellants as the three men who posed as police officers.

[96] Ms Brenda Oosthuizen supported the evidence of the complainant. She added that while she was sitting outside and in the car, seven armed men walked pass the bakkie in which she was waiting for her husband. One of the men came to her shortly afterwards. He showed her a police identification card. He took her into the house. She was frightened. A woman put her in a separate room. "Inspector Booysen" accused her husband of being a diamond smuggler. He also accused her of being an accomplice. He threatened to detain her for 7 days before she could be released on bail.

[97] She identified accused number five, in other words the fourth appellant, as the man who introduced himself as Inspector Jacob

Booyesen. She answered that she recognised him by means of his general appearance. She denied the suggestion that she was mistaken. She stressed that he was on the scene. She pointed out the fourth appellant at the second police identification

parade. The only critique that could be levelled at her evidence was that she could not earlier recognise him at the first

police identification parade where she pointed out a person who was not a suspect.

[98] Notwithstanding its unreliable features, the evidence of the lady was significantly bolstered by that of her husband. He spotted the fourth appellant at TAB Bethlehem on 26th of March 2009. On the strength of his positive identification, the fourth appellant was arrested. On 10th June 2009 he positively identified the third and fourth appellants at the police identification parade. During the trial he identified the second, third and fourth appellants from the dock. Bearing all those facts in mind, one cannot seriously doubt the reliability of the identificative evidence given by the complainant. His evidence derived some compensatory value from the evidence of his wife.

[99] It must be pointed out that the third appellant was heavily implicated and correctly convicted in respect of two similar schemes

of extortion. (see the evidence relative to the Lombaard as well as the Swiegelaar incidents) I hasten to mention that the third appellant stayed with accused number six, a man whose name featured prominently in virtually all the six groups of offences.

I say no more about the involvement of the third appellant.

[100] As far as the second appellant was concerned, Mr J Nel candidly conceded, and in my view quite correctly, that the evidence as a whole strongly indicated that he was deeply involved.

[101] The evidence of Inspector Bouwer made very interesting reading. The cellular data evidence revealed:

101.1 that an unidentified caller “X” using cell 072 888 0084 had 50 cellular contacts with Mr Oosthuizen between 3rd November 2008 and 20th November 2008;

101.2 that an unidentified caller “S” using the same cell 072 888 0084 had 13 cellular contacts with the third appellant between 3rd November 2008 and 28th November 2008;

101.3 that an unidentified caller “T” using the same cell 072 888 0084 had 89 cellular contacts with the fourth appellant between 5th November 2008 and 30th November 2008;

101.4 that the same cellular simcard, cell 072 888 0084 was at one stage inserted and used in the cellular handset of the fourth

appellant;

101.5 that an unidentified caller “U” using the same cell 072 888 0084 also had 4 cellular contacts with accused number 6 between 27th November 2008 and 30th November 2008;

101.6 that there was no direct cellular contact whatsoever detected among or between any of the 4 appellants before us during the period 3rd November 2008 to the 31st November 2008.

[102] The evidence of the investigating officer further indicated that the complainant took him to the house where the incident occurred. The house was situated at 808 Extension 2 Bethlehem. An outstanding landmark on the premises was a red Cell C Network container. He also detected, through his investigation, that payments were made in favour of accused number three, Ms Dipuo Cecilia Mofokeng. The lady lived in the same house with accused number six as did the third appellant. Needless to say that the cellular simcard 072 888 0084 highly implicated the fourth appellant.

To sum up, I shall briefly comment about the charges, the verdicts, my findings, reasons and conclusions where necessary.

[103] I am persuaded that the following charges were not proven:

- (a) Charge 26, fraud;
- (b) Charge 27, impersonification in respect of accused number two only;
- (c) Charge 28, kidnapping Mr J D C Oosthuizen;
- (d) Charge 29, kidnapping Ms Brenda Oosthuizen;
- (e) Charge 30, kidnapping Nicolas Oosthuizen;
- (f) Charge 32, intimidation;
- (g) Charge 23, theft.

[104] I am inclined to set aside the convictions in respect of those charges. The Oosthuizens were extorted but not defrauded.

The second appellant was a police officer. Since he was, he could not contravene sec 68(1) of the South African Police Service Act 68 of 1995, as Mr Nel correctly contended. The Oosthuizens were lured to the scene of the crime. Although they were led to the house under the false pretext, they freely drove to the house. They were not taken there against their free will. The rest of what was done to them on the scene had nothing to do with kidnapping but everything to do with extortion. The conviction concerning the aforesaid charges could not be sustained by evidence. The court a quo erred, with respect.

[105] The evidence was overwhelming that the single criminal intent which informed the second, third and fourth appellants and dominated their minds was to threaten the complainant with all sorts of evils in order to extortively induce him to give them money. In my view the acts of intimidation as outlined in charge 32 did not constitute a separate charge. The charge of intimidation can comfortably be consumed by charge 10, extortion without doing any violence to the proven facts.

[106] As regards charge 33, the three gentlemen, the second, third and fourth appellants were convicted as charged. The evidence

clearly showed that the complainant was threatened and searched. During that process his wallet was removed from his pocket. An amount of R1000 cash was then taken by the appellants. Now that was plain robbery. It was neither theft or extortion. All the same it will do the appellants no harm to let the conviction of theft stand. However, the fact remains that the evidence showed that they robbed the complainant of his money.

[107] As regards charge 34, evidence established beyond reasonable doubt that the second, third and fourth appellants and other individuals committed the crime of extortion. They demanded R40 000 from the complainant. He gave them R3500

immediately because that was the amount which was readily available in his bank account. The conviction of each of them in respect of the charge of extortion was perfectly in order. I would, therefore, dismiss each one's appeal and confirm the convictions.

[108] As regards charge 35 intimidation, the threat which underscored the charge was "Ons sal jou kom haal as jy nie R17 000 betaal nie want ons weet presies waar jy woon", or words to that effect.

[109] The threat on which the prosecution relied upon in support of charge 32, also intimidation, was that the appellants and their cohorts had threatened to physically assault the complainant's little son, Nicolas Oosthuizen; that they had threatened to physically assault his wife, Mrs Brenda Oosthuizen and that they had also threatened to rape her unless he paid them R40 000. Those threats were made on 4th November 2008.

[110] The threat on which the prosecution relied in support of charge 34, extortion was crafted as follows:

‘... die beskuldigdes wederegtelik en met die opset om af te pers en uit hoofde van onbehoorlike dryfvere, vrees ingeboesem het by Jan Oosthuizen deur sy kind en vrou gevang te hou in ‘n voertuig...’

It was alleged that the threat was made on 4th November 2008.

[111] The threat on which the prosecution relied in support of charge 37, extortion, was crafted in the following manner:

‘ . . . die beskuldigdes wederegtelik en met die opset om af te pers en uit hoofde van onbehoorlike dryfvere, vrees ingeboesem het by Jan Oosthuizen deur aan hom voor te hou dat sy veiligheid en die veiligheid van sy gesin verseker sal word indien hy . . . ’

It was alleged that this treat was made on 7th November 2008 via telephone.

[112] As I see it, all those various threats which the prosecution in its wisdom, relied upon as different foundations of separate criminal charges, were not powered by distinct criminal intents. They were shades of one and the same ultimate purpose – extortion to exact undue advantage of R40 000 by instilling fear in Mr Oosthuizen. Such fear was packaged and presented to him in a great variety of evils. Those evils, whatever their number or form emanated from one and only one shade of mens rea.

[113] The various undue payments extortively exacted from the complainants clearly demonstrated that all roads led to Rome.

The first payment was R3500 4th November 2008

The second R17 000 5th November 2008

The third

R10 000 7th November 2008

The total advantage the appellants and their cohorts exacted was R30 500. Therefore, the complainant paid approximately 75 per cent of the amount originally demanded from him by way of three instalments. Of course he was bombarded with countless calls after the 4th November 2008. Although each subsequent instalment was accompanied by one or other sort of threat, I have some reservations

as to whether every subsequent payment constituted a separately new offence. In my view any further demands over and above the original R40 000, after the 7th November 2008 would have constituted a new and a separate crime of extortion.

[114] In the circumstances I have come to the conclusion that charges 32, 33, 35, 36, 37 and 38 could not be substantively sustained by the evidence as independent separate charges. They were all integral parts of but one criminal mosaic. The central

foundation of all that assortment of charges was extortion, charge 34.

[115] It is my considered view that the conviction of each of the appellants in respect of the aforesaid six charges cannot be allowed

to stand. Accordingly, I am inclined to uphold the appeals and to set aside each conviction as regards each appellant.

[116] The evidence indicated that after the 7th November 2008 the appellants and their cohorts continued to demand more money from the complainant. Such fresh demands and its corresponding threat were not totally divorced from the original demand of R40 000. The

threats continued after 7 November 2008 but no further payments were made by the complainant. The original extortion target of R40 000,00 was never reached. In my view, since there were no fresh and further demand, exceeding the original target. It could not be correctly argued that demands and threats made after 7 November 2008 constituted a new and separate charge of extortion. At any rate, no such charge was put to the appellants and their erstwhile co-accused. Moreover, even a separate charge of theft was not proven. In fact no such charge was formulated, as the charge sheet would show.

[117] The second appellant denied that he was involved. He also distanced himself from his co-accused. He claimed that he knew none of them. As already pointed out his counsel honourably conceded that he could not submit that the second appellant was wrongly identified. He was seriously implicated.

[118] The third appellant denied that he was involved. He could not give a reasonably true explanation of his frequent and numerous cellular contacts with the fourth appellant. He suggested that some other persons could possibly have used his cellular phone. His suggestion that nameless persons could have used his cellular phone to communicate with the fourth appellant was very improbable,

unsatisfactory and ridiculous. The fact that his cellular simcard was inserted in the cellular handset of the fourth appellant

highly implicated him. His false denial implicated him even more.

[119] The fourth appellant denied that he was involved. He denied that he ever held himself out as Captain Jacob Booysen to the complainant. There were three strange things about his denial. Firstly, he knew somebody by that name who lived in Welkom. Secondly, notwithstanding his co-operation, the investigating officer's efforts to trace such a person were fruitless. Thirdly, the complainant was victimised by a man who claimed to be Captain Booysen at Behtlehem, a person who apparently had close ties with the fourth appellant, a person who was also a resident of Bethlehem, just like the fourth appellant. The fourth appellant could not reasonably explain how the third appellant's cellular simcard landed in his cellular handset. The inference was that the two were birds of the same feather that flocked together.

[120] In my view the court a quo correctly rejected the version of each appellant. Their versions or denials were not reasonably true. They were not only improbable but beyond reasonable doubt false, as regards the three proven charges.

THE SIXTH GROUP OF OFFENCES: ANALYSIS

- [121] As regards the Zuma group of charges, all of the four appellants were found guilty in respect of all the five charges, numbered 39 - 43. Mr Siyaphi, Calvin Zuma identified the first, second and fourth appellants as 3 of the police officers who stormed in the house at Bethlehem on 21st February 2009 and demanded R30 000 from him. The second appellant was armed with a firearm and he showed his police identification card to the Zumas.
- [122] The evidence of Mr Vuyane Jeffrey Zuma materially corroborated that of his brother and the complainant, Mr S C Zuma. He remained behind with the second and fourth appellants, among others, when his brother drove to Phuthaditjhaba with the first appellant. At one stage a person knocked at the door. The stranger enquired as to who the owner of the green sedan was. The green sedan driver had parked it behind the stranger's car. The stranger wanted to drive out hence he wanted to have the green sedan shifted.
- [123] Later on he called his brother, Mr S C Zuma, seemingly commanded to do so. He was then instructed, by those who had held him captive, to switch on the loudspeaker of his cellular phone. The second appellant and his cohorts heard that the complainant was on his way back with the police. Upon hearing that message, the second appellant and his cohorts rushed out of the house and took to flight. He also left the room. He walked to the spot where, on their forward trip to the scene, they had dropped their cousins.
- [124] The evidence of Mr Diphapang Samuel Modise was that he was a resident guest at a place commonly known as Hamama Thepenyane, Bochabela Street, Bohlokong Bethlehem on 20th February 2009. At about midday he wanted to drive out but he could not because a car had blocked his way. He decided to knock at the door of the room next to his. There he found the second appellant whom he knew to be a police officer. The second appellant helped him out. He removed the car that was blocking his way. He then drove away.
- [125] A little while later he returned to the place. He parked his car at the same parking bay. Shortly after his return, someone came to his room with the police. The stranger pointed him out as being one of the police officer's companions. He denied the allegation. Notwithstanding that, he was arrested there and then.
- [126] The witness described the car behind his, which the second appellant moved out of his way, as a Golf GTi with a GP registration plate. He found three men in the room occupied by the second appellant. He corrected his earlier evidence by indicating that he met the second appellant at Hamama Thepenyane on 21st February 2009 and not on the 20th February 2009.
- [127] Inspector Bouwer gave some evidence concerning cellular data relevant to the sixth group of charges. His evidence showed:
- (a) that there was 1 cellular contact between the complainant Mr S A Zuma and an unidentified caller "M" using cell 073 441 4750 on 21st February 2009;

- (b) that there were 16 cellular contacts between “M” and the first appellant between 20th February and 22nd February 2009;
- (c) that there were 3 cellular contacts between an unidentified caller “N” using cell 076 102 6426 and Mr S C Zuma: 1 on 20th February 2008 and 2 on 21st February 2008;
- (d) that there were 10 cellular contacts between an unidentified caller, “O” using the same cell 076 102 6426 previously used by “N”, and the first appellant from 21st February to 22nd February 2008;
- (e) that there were 26 cellular contacts between an unidentified caller, “V” using the same cell 076 102 6426 previously used by “N” to contact Mr S C Zuma, and the fourth appellant from 20th February to 22nd February;
- (f) that there were 40 cellular contacts between an unidentified caller, “I” using cell 073 441 4750 utilized by “M” to communicate with Mr S A Zuma, and accused number six from 20th February to 22nd February;
- (g) that there were no cellular contacts detected between the second appellant and any of his co-appellants or even any of his co-accused during the relevant period.

[128] The first appellant denied that he was involved. He admitted however, that he was with Mr S C Zuma in his vehicle at the time of his arrest. However, he alleged that he was there to facilitate a diamond deal between Mr Zuma and Mr Malatsi. He added that Mr Zuma had asked him to accompany him on his trip to fetch money from his uncle. He averred that Mr Zuma used his cellphone during the trip because his cellphone’s battery was flat.

[129] The second appellant denied the allegations that he was involved. He testified that he was totally mistaken and wrongly identified as the coloured police officer who was the actual culprit involved. Notwithstanding his denials he could proffer no reasonable explanation which could be said to be possibly true as to why the Zuma brothers particularly identified him. It must be borne in mind that the evidence of Mr Modise, an independent witness who knew the second appellant as a police officer, put the second appellant under the spotlight. His evidence objectively fortified the evidence of the two brothers in material respects.[3]

[130] The crux of Mr Modise’s creditable and reliable evidence was that he found three men in the room. When his evidence is considered together with the evidence of the two brothers, it can be readily deduced that the men in the room were the second and fourth appellants and Mr V J Zuma. Besides the evidence of the brothers who identified the fourth appellant as one of the suspects who claimed to be the police officers on the scene, the cellular data evidence depicted him as one of the individuals who, through dubious and unidentified characters, indirectly communicated with Mr Zuma. Moreover, his co-accused and now the first appellant, directly communicated with the complainant. It is significant to keep in mind that the first appellant somehow corroborated the version of complainants that Malatsi was the intermediary and that he met the two brothers at Hamama Thepenyene when they arrived there with Malatsi.

- [131] The fact that the first appellant, who had many dealings with the fourth appellant, was found on the scene seriously implicated the fourth appellant. It is probable that the fourth appellant was also on the scene at the time the two brothers arrived. That fortifies their identification of the fourth appellant as one of the suspects.
- [132] In my view the court a quo correctly dismissed the versions of the first, second and fourth appellants. Their individual versions were not reasonably true. They were all very improbable. Above all these, their versions were proved to be beyond reasonable doubt false. I would, therefore, dismiss each of their versions in respect of some of the proven charges.
- [133] As regards charge 39, in other words contravention of sec 68(1) of the South African Police Service Act 68 of 1995 the first and fourth appellants were correctly convicted. They impersonated police officers well knowing that they were not. The evidence showed that they too claimed to be police officers. The appeal of the second appellant however succeeds as regards charge 39.
- [134] As regards charge 40, the evidence established that the complainant, Mr S C Zuma was robbed of his belongings, among others, his wallet and R900 cash. The evidence further showed that the second appellant was armed with a dangerous weapon, to wit, a firearm during, before and after the commission of the robbery.
- [135] As regards charge 41, the evidence proved that Mr S C Zuma was lured to the scene of the crime. A cunning scheme was hatched to get him there. He drove there on his free accord. He was not deprived or robbed of his freedom in any way whatsoever. He was never held as a captive either in the house or in the motor vehicle.
- [136] Since there was no evidence to sustain the kidnapping conviction of any of the appellants, the convictions cannot be allowed to stand. I would, therefore, set them aside, in respect of charge 41.
- [137] As regards charge 42, the evidence proved that Mr V J Zuma was detained at Hamama Thepenyane for two and a half hours or so.

He was held as a captive. However, as in the case of his brother, he also freely went there. He was not unwillingly

forced to go there. The threat to detain him was calculated to pressure his brother to meet their demand for R30 000.

There is no evidence that he tried to break loose and that his attempt was foiled by some actual restrictive means. He was not physically handcuffed or leg-chained. It would seem that the door of the room was not locked. Besides, there was no evidence that he was detained or held at gun-point. Besides, it appeared that the door of the room was not locked. When Mr Modise arrived there, he made no effort to seek help or to simply yell. The threat was to have him arrested and locked up unless his brother paid the money. It was doubtful as to whether kidnapping has been

proven in this instance given those facts. It is always better to err in favour of an individual than the State in such situation.

[138] As regards charge 43, there was sufficient evidence that the respondent proved beyond reasonable doubt that the appellants and their cohorts committed the crime of extortion at Bethlehem on 21st February 2009. It stands to reason, therefore, that the appeal of each of the three appellants cannot succeed. The conviction of the first, second and fourth appellants cannot, in the absence of any material misdirection be interfered with. The court a quo was correct in delivering the verdict that each one of them was guilty of extortion.

[139] Now the outcome of the appeal as regards the merits may be summarised. In my view the outcome of the appeal in respect of each of the appellants should be as stated below:

139.1 The first appellant's appeal:

- a) should succeed in respect of charges 41 and 42 but should fail in respect of charges 39 and 43.
- b) as regards charge 40. It should partially succeed and partially fail.

139.2 The second appellant's appeal:

- a) should succeed in respect of the following charges:
19, 20, 21, 22, 24, 26, 27, 28, 29, 30, 32, 35, 36, 37, 38, 39, 41 and 42; but
- b) should fail in respect of charges 23, 31, 33, 34 and 43
- c) however, it should partially succeed and partially fail as regards charge 40

139.3 The third appellant's appeal:

- a) should succeed in respect of charges
7, 8, 9, 11, 26, 28, 29, 30, 32, 36, 37 and 38; but
- b) should fail in respect of
10, 12, 27, 31, 33, 34 and 35

139.4 The fourth appellant's appeal:

- a) should succeed in respect of charges
13, 14, 15, 17, 18, 19, 20, 21, 24, 25, 26, 28, 29, 30, 32, 35, 36, 37 and 38; but
- b) should fail in respect of charges
16, 20, 23, 27, 31, 33, 34, 39 and 43
- c) it should partially succeed and partially fail as regards charge 40.

This concludes the first leg of the appeal.

[140] Now I turn to the second leg of the appeal. The first appellant was sentenced to an effective correctional term of 5 years' imprisonment. The punishment meted out included, amongst other, the following still relevant sentences:

140.1 charge 39, pretention

1 year imprisonment

140.2 charge 40, robbery with

aggravating circumstances 5 years' imprisonment

140.3 charge 43, extortion 2 years' imprisonment

I hasten to point out that I was persuaded that the competent verdict in respect of charge 40 should, on the facts, have been robbery and not robbery with aggravating circumstances.

[141] The second appellant's remaining sentences out of the original 25 are as follows:

141.1 Charge 23, extortion – 2 years imprisonment;

141.2 Charge 24, armed robbery – 5 years imprisonment;

141.3 Charge 31, extortion – 1 year imprisonment;

141.4 Charge 33, theft – 1 year imprisonment;

141.5 Charge 34, extortion – 1 year imprisonment;

141.6 Charge 43, extortion – 2 years imprisonment;

141.7 Charge 40, armed robbery – 5 years imprisonment.

The effective sentences imposed on him was 15 years imprisonment.

[142] The second appellant was originally convicted and sentenced to 5 years imprisonment in respect of armed robbery, charge 24.

Again he was convicted and similarly sentenced in respect of charge

40. Both convictions now relate to less severe offences of robbery since no circumstances were shown to have exacerbated common law or non-statutory form of robbery. Such appellate

interference notwithstanding, I am not persuaded that sentence of 5 year imprisonment for robbery was disturbingly shocking regard being had to the circumstances of the criminal enterprises we are here dealing with.

[143] The second appellant was arrested on 17 March 2009. He was never released on bail. He was sentenced on 3 February 2011. He was, therefore, incarcerated for almost 2 years before his trial was finalised. He was occupied as a police officer at all times material to the case.

[144] There were 27 sentences originally imposed on the third appellant. The effective sentence was 15 year imprisonment. He was aggrieved by the punishment. Of those original sentences 8 remain relevant to this appeal. The remaining 8 are:

144.1 Charge 10, extortion, 1 year imprisonment;

144.2 Charge 12, theft, 1 year imprisonment;

144.3 Charge 24, armed robbery, 5 years imprisonment;

144.4 Charge 25, theft, 2 years imprisonment;

144.5 Charge 27, statutory contravention, 1 year imprisonment;

144.6 Charge 31, extortion, 2 years imprisonment;

144.7 Charge 33, theft, 2 years imprisonment;

144.8 Charge 34, extortion, 2 years imprisonment.

[145] The comments I made at par 142 in connection with armed robbery vis-à-vis robbery are also applicable to the third appellant in respect of charge 24.

[146] There were 31 sentences originally imposed on the fourth appellant. In this instance the effective sentence was 18 years imprisonment. He was aggrieved. Of those 31 original sentences, 20 are on the verge of falling away and 11 will remain relevant to the appeal. The 11 are:

146.01 Charge 16, extortion, 2 years imprisonment;

146.02 Charge 20, statutory contravention, 1 year imprisonment;

146.03 Charge 23, extortion, 2 years' imprisonment;

146.04 Charge 24, armed robbery, 5 years imprisonment;

146.05 Charge 27, contravention of section 68(1), Act No 68/95, 1 year imprisonment;

146.06 Charge 31, extortion, 2 years imprisonment;

146.07 Charge 33, theft, 2 years imprisonment;

146.08 Charge 34, extortion, 2 years imprisonment;

146.09 Charge 39, statutory contravention, 1 year imprisonment;

146.10 Charge 40, robbery with aggravating circumstances, 5 years imprisonment;

146.11 Charge 43, extortion, 2 years imprisonment.

[147] As regards robbery with aggravating circumstances, charges 24 and 40, the views I previously expressed at par 142 apply equally well to the fourth applicant.

[148] As regards the profiles of the appellants as individual offenders the trial magistrate commented:

“Wat u persoonlike omstandighede aanbetref het mnr Harrington dit volledig op rekord geplaas ten opsigte van elkeen van u, met betrekking tot u familie verpligtinge, u huwelikstaat, en so meer. Die hof neem ook kennis van die vorige veroordelings wat daar wel bewys is teen sommige van u. Ek sal dit ook in gedagte hou en vêrder die feit dat u vir ‘n geruime tyd verhoorafwagtend in hegtenis verkeer het.”

[149] As regards the crimes the trial magistrate commented:

“Wat die aard en die erns van hierdie misdrywe aanbetref, kan die hof onomwonde sê dat dit in ‘n uifers ernstige lig beskou word. Die gemeenskapsbelang kom by hierdie tipe van optrede soos wat u gepleeg het, sterk na vore. Al die klaers wat hier ter sprake was, is deur u geterroriseer, van hulle vryheid ontnem, hulle is bedrieg, geïntimideer en afgepers.”

[150] As regards the societal interest the trial magistrate commented:

“Die gewone wetsgehoorsame lede van die gemeenskap, is duidelik keelvol vir misdaad. Die hof beklemtoon weer dat wanneer die vonnisse in hierdie saak opgelê word, die gemeenskapsbelang sterk op die voorgrond geplaas word.”

[151] In sentencing the appellants the court a quo took into account the following aggravating factors:

151.1 that the crimes were thoroughly planned;

151.2 that lawlessness in our country was spreading like a wave of an acid;

151.3 that the society was deeply concerned about the alarming increase of serious crimes;

151.4 that the unwary victims were cunningly targeted and deceptively lured by means of false representations;

151.5 that the second appellant, third appellant and fourth appellant were deeply involved in the entire criminal enterprise;

151.6 that the second appellant, a police officer, betrayed the trust society had in him.

[152] The following were strongly aggravating factors:

152.1 The appellants clearly acted together as a criminal syndicate or gang;

152.2 The victims travelled long distances at great expense to Bethlehem from various places such as Harrismith, Reitz, Bloemfontein, Vryheid and Pietermaritzburg or Phuthaditjhaba to be exploited;

152.3 The majority of the victims suffered huge financial losses. The Oosthuizens were so financially ruined that their chicken enterprise went under. The fourth appellant so bombarded them with endless calls that they decided to relocate because they feared that their lives were in danger at Reitz.

[153] It is clear and obvious that the aggravating factors eclipsed the mitigating factors by far. In my view the individual sentences imposed on any of the appellants were very lenient regard being had to the gravity of the main crimes of extortion and the seriousness of the related crimes. It is my firm view that the court a quo committed no material misdirection as regards the sentences relative to the charges in respect of which the appeals failed.

[154] Obviously the effective sentences imposed in respect of each of the 4 appellants require reconsideration in view of the fact that their appeals were substantially successful. I am inclined to reduce the effective sentences as follows:

154.1 In respect of first appellant – from 5 to 4 years imprisonment;

154.2 In respect of second appellant – from 15 to 11 years imprisonment;

In respect of third appellant – from 15 to 11 years imprisonment;

154.3 In respect of third appellant – from 15 to 11 years imprisonment.

154.4 In respect of the fourth appellant – from 18 to 14 years imprisonment.

[155] Accordingly, I make the following order in connection with the first applicant as regards conviction:

155.1 The appeal succeeds in respect of charges 41 and 42;

155.2 The conviction is set aside in respect of each of those charges;

155.3 The appeal partially succeeds as regards charge 40. The conviction for robbery with aggravating circumstances is set aside and substituted with the following verdict: Guilty of robbery;

155.4 The appeal fails as regards charges 39, 40 and 43. The conviction in respect of each charge is confirmed.

[156] As regards sentence, I make the following order in connection with first appellant:

156.1 The appeal fails as against the sentences in respect of charges 39 and 43;

156.2 The related sentences of 1 year imprisonment and 2 year imprisonment are confirmed;

156.3 The appeal succeeds as against the sentence imposed in respect of charge 40. The sentence of 5 years' imprisonment is set aside and substituted with one of 4 years imprisonment;

156.4 I direct that the sentences must run concurrently;

156.5 The effective sentence is, therefore, 4 years imprisonment;

156.6 The order made in terms of section 103, Act No 60 of 2000 stands.

[157] Accordingly, I make the following order in connection with the second appellant as regards the merits.

157.1 The appeal succeeds in respect of charges 19, 20, 21, 22, 25, 26, 27, 28, 29, 30, 32, 35, 36, 37, 38, 39, 41 and 42;

157.2 The conviction in respect of each of those charges is set aside;

157.3 The appeal fails as against the sentences imposed in respect of charges 23, 24, 31, 33, 34, 40 and 43;

157.4 The related sentences of 2 years, 5 years, 1 year, 1 year, 1 year, 2 years and 4 years imprisonment are confirmed;

157.5 The sentences must consecutively run in such a way that the second appellant serves an effective sentence of 11 years imprisonment;

157.6 The order made in terms of section 103, Act No 60 of 2000 stands.

[158] I make the following order in connection with the second appellant as regards the sentences:

158.1 The appeal against the sentences imposed in respect of charges 23, 24, 31, 33, 34, 40 and 43 fails;

158.2 The related sentences of 2 years and 5 years, 1 year, 1 year, 1 year, 2 years and 5 years imprisonment are confirmed;

158.3 The sentences must consecutively run in such a way that the second appellant serves an effective sentence of 11 years imprisonment.

158.4 The order in terms of section 103 Act No 60 of 2000 stands.

[159] Accordingly, I make the following order in connection with the third appellant as regards the merits:

159.1 The appeal succeeds in respect of charges, 7, 8, 9, 11, 19, 21, 22, 25, 26, 28, 29, 30, 32, 35, 36, 37 and 38;

159.2 The conviction in respect of those charges is set aside;

159.3 The appeal partially succeeds in respect of charge 24. The conviction for robbery with aggravating circumstances is set aside and substituted with the verdict: Guilty of robbery.

159.4 The appeal fails in respect of charges 10, 12, 20, 23, 24, 27, 31, 33, and 34. The conviction in respect of each charge is confirmed subject to the qualification concerning charge 24.

[160] I make the following further order in connection with the third appellant as regards the sentence:

160.1 The appeal fails as against the sentences imposed in respect of charges 10, 12, 20, 23, 24, 27, 31, 33 and 34;

160.2 The corresponding sentences of 1 year, 1 year, 2 years, 2 years 5 years, 2 years, 2 years, 2 years and 2 years imprisonment are confirmed;

160.3 The sentences must consecutively run in such a way that the third appellant serves an effective sentence of 11 years imprisonment;

160.4 The order made in terms of section 103, Act No 60 of 2000 stands.

[161] Accordingly, I make the following order in connection with the fourth appellant as regards the merits:

161.1 The appeal succeeds in respect of charges 13, 14, 15, 17, 18, 19, 21, 22, 25, 26, 28, 29, 30, 32, 35, 36, 37, 38, 41 and 42;

161.2 The conviction in respect of each of those charges is set aside;

161.3 The appeal partially succeeds and partially fails in respect of charges 24 and

40. The conviction for robbery with aggravating circumstances is set aside and substituted with the verdict: Guilty of robbery;

161.3 The appeal fails in respect of charges 16, 20, 23, 24, 27, 31, 33, 34, 39, 40 and 43. The conviction in respect of charges 24 and 40 each charge is confirmed subject to the said qualification.

[162] I make the following further order in connection with the fourth appellant as regards the sentences:

162.1 The appeal fails as against the sentences imposed in respect of charges 16, 20, 23, 24, 27, 31, 33, 34, 39, 40 and 43;

162.2 The corresponding sentences of 2 years, 1 year, 2 years, 5 years, 1 year, 2 years, 1 year, 2 years, 2 years, 2 years, 1 year, 5 years and 2 years are confirmed;

162.3 The sentences must consecutively run in such a way that the fourth appellant serves an effective sentence of 14 years' imprisonment;

162.4 The order made by the court a quo in terms of section 103, Act No 60 of 2000 stands.

[163] The sentences imposed on the appellants must be deemed to have been imposed on 3 November 2011.

M. H. RAMPAL, AJP

I concur.

E. K. TSATSI, AJ

On behalf of the first, third
and fourth appellants: Adv P. W. Nel

Instructed by:

Justice Centre

BLOEMFONTEIN

On behalf of the second
respondent: Adv J. Nel

Kramer Weihman & Joubert

- [1] In the light of this finding, the separate conviction in respect of theft, charge 11, cannot be allowed to stand. I am inclined to set it aside.
- [2] Similarly the fourth appellant also knew the third appellant as well as accused number six. All those facts and more were telling against the third and fourth appellants. They fortified the cellular data evidence given by Mr Bouwer. They suggested that there was something suspicious about the apparent lack of cellular communication between them. As Inspector Bouwer testified, nowadays criminals are aware that cellular contacts among members of the same criminal syndicate can be regarded as incriminating evidence, hence, they do all they can not to communicate with each other by means of cellular phones.
- [3] The fourth appellant, like his co-appellants, also denied the allegations that he was involved.

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Prepared on 10 October 2026 · Esheria