

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: SS 86/2014

- | | |
|-----|-------------------------------------|
| (1) | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3) | REVISED: YES/NO |

17/2/2023

DATE

SIGNATURE

In the matter between:

STATE

and

VUSUMUZI JOMO MAZIBUKO

Accused 1

XOLANI COMFORT MHWANAZI

Accused 2

SHAUN KHUMALO

Accused 3

VUSI DAVID SIBANYONI

Accused 4

STICKS NKUNA BHOVA

Accused 5

CALVIN CONGO MABUNDA

Accused 6

Neutral Citation: *STATE V VUSUMUZI JOMO MKHWANAZI AND 5 OTHERS*
(Case Number: SS 86/2014) [2023] ZAGPJHC 648 (17 February 2023)

JUDGMENT

MNCUBE, AJ:

Introduction

[1] The State has charged the six accused according to the section 144 of the Criminal Procedure Act 51 of 1977 indictment with sixty-eight counts of offences. The allegations are that the accused are guilty of the following charges—

- a. Contravention of section 2(1) (e) of the Prevention of Organised Crime Act 121 of 1998 (POCA);
- b. Contravention of section 2(1) (f) of POCA;
- c. Attempted robbery with aggravating circumstances;
- d. Murder read with the provisions of section 51(1) of the Law Amendment Act 105 of 1997;
- e. Contravention of section 18(2) (a) of the Riotous Assemblies Act 17 of 1956 as amended;
- f. Contravention of section 3(a) (i) of the Prevention and Combatting of Corrupt Activities Act 12 of 2004 (PCCA);
- g. Kidnapping;
- h. Robbery with aggravating circumstances;
- i. Contravention of section 3(1) of the Firearms Control Act 60 of 2000;
- j. Contravention of section 90 of the Firearms Control Act 60 of 2000;
- k. Theft;

- l. Contravention of section 4(1) (f) (vi) of the Firearms Control Act 60 of 2000;
- m. Contravention of section 120(10) (b) of the Firearms Control Act 60 of 2000;
- n. Contravention of section 2(1) of the Dangerous Weapons Act 71 of 1968 as amended; and
- o. Fraud

[2] The crux of the allegations against the six accused are that they formed an enterprise as defined in section 1 of POCA and participated in the conduct of the affairs of the enterprise through a pattern of racketeering activities. The sole purpose of the enterprise as alleged was to observe people withdrawing large amounts of cash in a bank and to follow them in order to rob them which occurred either in isolated areas or victims' homes. The state has decided to charge the various accused separately for various specific charges.

[3] All accused have pleaded not guilty to the charges. Save for accused six who has raised an alibi defence (as basis of defence), they have elected to remain silent. The State is represented by Adv. Wasserman assisted by Adv. Ehlers. The accused are represented by Adv. Xaba, Adv. Johnson, Adv. Crespi, Adv. Khunou, Adv. Soko and Adv. Mpanza respectively.

[4] The evidential materials consisted of oral evidence and documentary evidence in voluminous amounts of exhibits (as per attached annexure A). The trial which commenced on 22 August 2019 has been protracted by delays caused by various factors which are on record. The State called a number of witnesses who testified in the main trial and in several trials within trials. For the purposes of this judgment, the evidence of the various witnesses is summarized in the sequence as led by the state.

[5] The issues for determination in this matter are the following —

1. The identity of the assailants who committed the various offences; and

2. Whether or not the accused participated in the conduct of the affairs of the enterprise through a pattern of racketeering activities.

Summary of the evidence

- [6] On 3 May 2011 **Mrs Story Elizabeth Mosidi** was home watching television with her husband in the main bedroom. At 19H50 she was surprised by the entrance of an unknown male whose face was uncovered and who was armed with a firearm. The male ordered her husband to lie on the floor and demanded keys to Mabeskraal Post Office where she was employed. While this assailant was speaking to them, two other unknown males whose faces were covered entered the bedroom armed with knives and grabbing her son. Her husband and son were made to lie on the floor and tied up. The assailants proceeded to ransack the room and took two cell phones and seven hundred and forty rand in cash. The assailants drove with her using the family vehicle to Mabeskraal Post Office. En route to the post office the assailants were slapping her.
- [7] Upon arrival at the post office, she was forced to open the entrance door. The one assailant who was armed with a firearm stood guard outside while the two others who were armed with knives entered the post office with her. The two assailants were unable to gain access to the safe because there were no keys to the safe. The assailants ordered her to lie on the floor before they fled in her family's vehicle. After the assailants fled the scene she ran to the neighbours seeking help and she contacted her children. The police were also called who arrived and took statements. She was unable to identify any of the accused. She was shown Exhibit 'F' and explained that the members of public do not have access to the area depicted in photo 42. She indicated that members of public would not ordinarily have knowledge of the safe. She testified she was not present when the forensic people attended the scene at the post office.
- [8] **Mr Montshima Simon Mosidi** is Mrs Elizabeth Mosidi's husband. His testimony in the main corroborated his wife's evidence except for some differences. According to him they were accosted by three unknown males whose faces were not covered and who were armed with firearms. These assailants came with his son into the bedroom and he was instructed to keep

quiet. He and his son were ordered to lie on the floor and were both tied up. He could not see the suspects from the position where he was on the floor. The assailants left the scene taking his wife with them. His son first untied himself before freeing his (witness) own hands and feet. They were unable to leave the bedroom because the door was locked from outside. His son kicked the door until he made an opening which they used to get out of the bedroom. He noticed that the family bakkie was missing. He proceeded to check what was taken and he discovered that their rings, cell phones, cash were missing.

[9] When he and his son came out of the house he was surprised by the presence of the police who took down their statements. He was able to identify various photographs as depicted in Exhibit 'F'. He testified that after some time he was contacted by the police who reported that the bakkie had been recovered from a neighbouring village. He testified that accused 2 looked familiar to the suspect who was in possession of a firearm who had a lighter complexion at the time. It was put to him that according to his wife only two of the assailants' faces were covered. He conceded that he possibly did not see clearly because he was made to lie on the floor immediately when the suspects entered the bedroom. He maintained that he was certain that the one assailant who was in possession of a firearm did not cover his face. He conceded he could not recall whether the two others (assailants) if they were covered or not. He also conceded that his earlier testimony that the faces of all three assailants were uncovered was in fact incorrect. He conceded that he was not certain if accused 2 was the assailant who held a firearm, he merely looked similar. He stated that he did not attend an ID parade. He was unable to recall if he was present when the photographs of the scene were taken.

[10] **Mr Raymond Oageng Mosidi** is the son of Mr and Mrs Mosidi. On the day in question, he was home watching a television programme called 'Scandal'. Around 19h40 he heard the kitchen door opening. He was surprised by an unknown male who pointed him with a firearm and signalled him to stand up. He stood up and his cell phone which was in his hand fell to the corner of the couch. He was also signalled to lie on the floor which he did. A firearm was placed at the back of his neck and he was asked about the whereabouts of his

parents. He indicated that his parents were in their bedroom. He was manhandled and made to stand up. It was at that time that he noticed that there were two other assailants inside the house who were armed with knives and had balaclavas on. The assailants took him to his parents' bedroom. He noticed that his parents were shocked by the presence of the assailants. The three of them were made to lie down on the floor and tied with shoe laces. The assailants demanded the keys to the post office safe where his mother work and she informed them that the keys were kept by the manager. The assailants got hold of the keys to one of the family's vehicle, put a sock in his mother's mouth and left the house with his mother. After the assailants left the house, he found a knife which he used to cut the laces that had been used to tie him up. After first untying himself he proceeded to untie his father. The bedroom door was unlocked and he unsuccessfully tried to seek for help by open the window and screaming.

[11] He managed to open the bedroom door which had been locked by the assailants by making a hole on the door kicking it. He then remembered that he had another cell phone which the assailants did not discover. After opening the door, he used his cell phone to call his brother who is a police officer. He identified accused 2 by his height, body structure, eyes intensity, movements and complexion as the assailant who was armed with a firearm. It was put to him that his parents to mention that a sock was put in his mother's mouth; he remarked that maybe they have forgotten due to trauma It was further put to him that his mother failed to mention that she also lay on the floor, he remarked that his mother may have been mistaken. He estimated that the whole incident took thirty minutes. He testified that while the other two assailants who had their faces covered ransacked the house, accused 2 remained in the bedroom pointing them with a firearm. When asked why he did not mention in his statement that he was in a position to identify the assailants he stated that he was not asked about that. He conceded that he was in a state of shock during the incident. He denied that he was identifying accused 2 mistakenly.

[12] **Colonel Jacobus Botha** is a fingerprints expert in the employ of SAPS with thirty-three years' experience On 4 of May 2011 he attended the crime scene at

Mabeskraal Post Office as part of his duties where he dusted for fingerprints on the safety gate of the front door. He lifted fingerprints which were found on the front gate which were 103 cm high which were slanting down on the locking mechanism. He used black powder to dust for the prints and lifted the prints using a fingerprints tape. He compared those fingerprints to accused 2's fingerprints and found a match. He was able to mark twelve points of comparison in the two sets of fingerprints in Exhibit 'N'. He also found (in point 6 of the comparison chart) in accused 2's fingerprints a unique feature of a bifurcation that ended with another bifurcation. He prepared a court chart which was marked Exhibit 'M'. He concluded that the fingerprints he lifted from Mabeskraal Post Office security door were those of accused 2. He testified that he has never come across fingerprints which were similar. He explained that in courts the acceptable points of similarities for fingerprints is seven but in this matter he found twelve points. He indicated that he deals with fingerprints on a daily basis. When asked what method he used to compare the fingerprints found at the scene with those of accused 2, he indicated it was ACEV method which was verified by W/O Setshedi and Captain Marobe.

[13] He was asked whether he relied on the naked eye when comparing prints, he stated that he uses a magnifying glass. He conceded that fingerprints can be transferred from one surface to another. It was put to him that the prints were not clear, he responded by saying he would not have marked a point if he did not see it. He conceded that he was unable to make a positive match for the prints he lifted from the complainant's vehicle which was used as a getaway car. When questioned about the transferral of prints, he testified that it was possible to transfer prints from one area into another however transferring prints results in the loss of ridges which was not applicable in this matter.

[14] On 13 of March 2013 **Mrs Johanna Susana Meyer** with her husband Mr Joseph Meyer went to withdraw twelve thousand rand from Randfontein ABSA Bank. After getting the money, it was placed inside her husband's jacket. They left the bank and decided to go for lunch at Wimpy. While parking their vehicle on the emergency lane, she noticed a black golf which nearly collided with their car. She did not pay too much attention to it. After lunch they proceeded home.

Upon reaching home she opened the gate and proceeded to park the car in front of the garage door. She then heard her husband speaking to someone. When she looked in the rear mirror, she observed her husband making a blocking motion as though blocking a punch. A shot was fired and her husband fell to the ground. Initially she thought that he was playing. She closed the gate using the remote.

[15] One assailant identified as accused 3 forced open the gate and ran into a silver grey hatch that was outside the premises and the getaway car drove into Carney Street. She could not read the registration number of that car due to the distance. She ran to her husband in order to help him and pressed a panic button. She observed that he was shot on the right side of the temple with an exit wound to the back of the head. She testified that the money was still in the jacket. She identified the scene as depicted in the photographs marked Exhibit 'Q'. She conceded that she made two statements and explained that when she made the first statement she was still in shock. She conceded further that in both of her statements she did not indicate that she was able to identify the assailant, instead in her second statement it was indicated that she was not able to identify anyone. It was put to her that accused 3 will deny that he shot her husband; she remarked that though she was in shock, she was certain of his identity. She denied that she was making a mistake in identifying accused 3. She estimated the distance between the garage and where the shooting took place to be approximately eight to ten metres apart. She was unable to describe what the assailant was wearing. She was unable to recall the type of clothes accused 3 was wearing except to recall that he was neatly dressed. She further recalled that accused 3 had a grey face which she attributed to shock.

[16] The State intended to admit into evidence confessions allegedly made by accused 1 and accused 2 following this shooting incident. Following trials within trials their statements were ruled admissible.

[17] **Mr Marshall Momah** gave notice to ABSA Bank in Southdale as he intended to withdraw two hundred thousand rand. On Saturday 26 January 2013 he returned to Southdale ABSA Bank and had to wait in his car for approximately

forty minutes for electricity to be restored. After power was restored, he joined the queue to the tellers. The tellers wanted to give him the money he was withdrawing but he voiced his reluctance to receive the money publicly. He was taken to another room and the amount was given to him which he put inside his suit jacket before leaving the bank. He went into his car and placed the money inside the cubby hole before driving away. He intended to put fuel in his car but changed his mind after noticing that he was being followed by a BMW. As he was travelling he recalled seeing a VW Polo on the right side but he did not pay attention to it. When he was about five hundred metres from the robots on his route he was pulled over by two officials, one wearing metro police uniform and the other wearing police uniform.

[18] He was informed that they wanted to search his vehicle. The one official pulled out a firearm and ordered him out of the car. He was ordered to open the boot and to hand over the money which he had just withdrawn from the bank. Under threat of a firearm he was made to lie on the ground. He indicated that the money was inside the cubby hole. He was made to stand and was pushed towards the bushes. It was at that moment that he took his escape. While the assailant who was wearing metro police uniform went to look for the money inside the car he ran away. There were two cell phones valued at thirteen thousand two hundred rand, passport, Versace gold chain valued at seventy thousand rand in the car. The assailant who was wearing metro police uniform took his wallet containing one thousand rand and drove away in his (witness) BMW X3. He went to Booyens Police Station and opened a case and later went to ABSA to confront the tellers. Three police officials from Booyens Police Station came to the bank. After relating the incident to the police they took him back to the scene of the robbery. After visiting the scene of robbery he returned back to ABSA Bank where he had an interview with a lady called Maureen who was identified as the bank detective. After the interview he was then dropped off at his office. A month and two weeks later, he was called to go to Booyens Police Station where he met accused 3 who was working for ABSA Bank.

[19] During this encounter, accused 3 apologised to him and remarked that he was under pressure. He identified accused 1 from photographs as being present that day at the bank among the people who were waiting for power to be restored. It was put to him that accused 3 would deny that he was with a lady behind the counter that day; he insisted that accused 3 was indeed behind the counter. He testified that it was in fact accused 3 who counted the money. He conceded that when he went back to the bank after the robbery he was emotional. He further conceded that at the robbery scene he was not in a position to identify those assailants.

[20] On 29 of September 2015 **Ms Mamorebeli Lizbet Lethuo** went to Vereeniging Standard Bank to withdraw one thousand rand. After making the withdrawal she left the bank. As she was crossing the road someone smeared a substance on her left arm. An unknown male approached her and remarked that the same thing happened to him. This unknown male then suggested to her that they must approach a nearby police vehicle, this they did. She made a report to the police officers who turned out to be bogus officers that she was smeared with a substance. She further reported to the police officers that the male next to her (who was also a victim) was in a position to identify the suspect. They got into the police vehicle and proceeded towards the direction allegedly taken by the suspect. The unknown male pointed at someone as the suspect who smeared her with a substance. The bogus police officer questioned the suspect who confessed that he did smear a substance in order to take their money. The suspect was arrested and taken inside the police van.

[21] No sooner did the police officers burn the substance that was (previously) smeared on her then she lost consciousness. When she came to, the suspect was gone. The bogus police officers suggested to her that she must go to Standard Bank to withdraw all the money to prevent her from suffering from a stroke. They travelled to Everton Mall where she entered into the bank with one of the police officers and she withdrew twenty-five thousand rand. They went back to the police vehicle with the money which was in the possession of the police officer. The police officers requested her to say her account number which she did. They drove her back home with a promise that at 14h00 to take

her to the police station. Upon reaching home her bag which had contained money was handed back to her and the police vehicle drove off. When she opened her bag in place of money she found papers. Upon realising that she indicated her account number aloud to the bogus police officers, she took a taxi to Vereeniging Standard Bank in order to close her account. On arrival at the bank, one bank official seeing her distress took her to the police station where she was advised to go to Everton branch. The following day she went to Everton Police Station where she was referred to the Vereeniging Police Station this is where she eventually opened a case. After a while she was contacted by the police to attend an identification parade.

[22] During the identification parade the procedure was explained to her and after looking at the people in the line -up, she tapped on the shoulder of one person who went with her to the bank identified as accused 4. She also identified accused 4 in court. She conceded that she was not in a position to identify the suspect who smeared her with a substance. She conceded further that her eyesight was deteriorating however at the time of the incident she could see clearly. She testified that accused 4 is the one who entered with her into the bank. Following a demonstration on the height of accused 4, she conceded that accused 4 was not as tall as the assailant she met on the day of the incident. She testified that she was not shown any photographs during the ID parade. She denied that at the ID parade upon entering the room she went to accused 4 to point him out immediately.

[23] On 21 of November 2015 **Mr Jackie Jacob Phele** went with his wife to withdraw forty-five thousand rand from Southgate Nedbank after giving the bank the required notice. They were assisted by a male teller who wanted to know how much they were withdrawing and they responded by telling him. The teller indicated that five thousand rand of the amount they were seeking would be in twenty rand notes. He testified that his wife requested of him to inform the teller not to raise his voice. They were handed the cash which he put inside a bag and they left the bank. They decided to pretend to be shopping in order to check if they were not being followed. When all seemed fine, they left the centre, got into their car and drove off and he was driving the car. Using the

navigator system, they proceeded with their journey. While proceeding on R82 then R554 he noticed a blue Mercedes Benz which was following their car. After they joined the Vanderbijlpark route he noticed that the Mercedes Benz was no longer following them. As he continued driving in a secluded area approaching a garden shop (a nursery) he noticed the same Mercedes Benz was again following his car.

[24] He drew his wife's attention to the manner the Mercedes Benz was being driven. This Mercedes Benz forced their vehicle off the road and suspects alighted from the Mercedes Benz. One suspect who was in possession of a firearm (identified as accused 1) ordered him to open the window and he complied. He testified that accused 1 was wearing blue Levis jeans and a fawn hat. He then switched off the engine and raised his hands. Accused 1 proceeded to hit him with a firearm on the right cheek bone below his eye and he sustained an open wound which bled profusely. The laceration (open wound) required six to eight stitches. Accused 1 also hit him on his hip. One suspect had difficulty in opening the vehicle sliding until he was assisted to open the sliding door by his wife. Accused 1 demanded the money. On his request his wife handed over the money which was in a bag.

[25] Mr Phele testified that Accused 1 placed a firearm against his head presumably to shoot him but another suspects identified as accused 4 remonstrated that they should leave as they have the money. He recalled accused 4 as being less aggressive than the other assailants. In addition to taking the money, the assailant who stood in front of the mini bus took their cell phones, his wallet containing R1 050.00 (one thousand and fifty rand) cash and cards, his wife's hand bag and navigating system. Accused 1 took the keys of the mini bus. Accused 4 had the bag with money and started counting the cash. The suspects fled the scene. He sought assistance from a security person he found in one of the building within the vicinity.

[26] On 17 February 2016 Mr Phele testified that he attended an ID parade where he identified accused 1 and accused 4. He conceded that after withdrawing the cash from the bank he did not see anyone he regarded as suspicious. He explained that according to his observation, accused 1 looked handsome with a

unique face and was young. It was put to him that the J88 marked Exhibit 'X' noted the alleged injury to be on a thigh not the hip as testified, he stated that he was no expert and lacked knowledge of where a hip is situated. He refuted allegation that prior to attending the ID parade he was shown photos of the suspects. He reaffirmed and testified that during the ID parade he walked about before pointing out the suspects. He conceded that there was a possibility that the firearm was not loaded with bullets. He testified that according to him the firearm which accused 1 pointed at him was a real gun called a 'baby brown'.

[27] Mr Phele described that accused 4 was wearing a nice multi coloured golf t-shirt, formal pants and shoes but could not recall the exact colour of the shoes. He conceded that he paid more attention on the facial features of the assailants than clothing. He conceded that at the ID parade he was seeing accused 4 for the second time. He stated that three months after the incident he still managed to point out accused 1 and accused 4. He testified that the time as captured in his statement was incorrect.

[28] **Mrs Hessie Louise Phele** corroborated her husband on aspects relating to how the robbery incident unfolded. She became emotional when recalling the incident in court. She testified that she went with her husband to withdraw money. Where she differed with her husband's testimony is in regard to her position in the bank at the time the money was withdrawn. She testified that she only got up to approach the teller when she became concerned about the loud voice that the teller was using for security reasons. The teller raised concern about the large withdrawal and in her response she indicated that they are going to deposit it. The moment the money was handed over, they left the bank. They decided to pretend to be shopping as a security measure before they proceeded on their way. While on route she was vigilant and pretended to read a book. She testified that her husband alerted her to the presence of a Mercedes Benz which forced them off the road. They were accosted by armed men who were driving the Mercedes Benz, who alighted from it. She remembered the training she received and raised her hands and lowered her head so as not to alert the assailants that she was observing them.

[29] She noticed that the one suspect (whom she identified as accused 1) stood by the driver's side had unique features (a sharp nose) and was wearing a bunny style leather jacket which was not yet in season in South Africa. The one suspect who appeared older and immaculately dressed (whom she identified as accused 4) came to her side. Accused 4 demanded money from her and demanded her husband's wallet. Her husband was assaulted. She handed over the money. She observed that this suspect looked similar to a deceased young man she once knew. The handbag with its contents (five cell phones and cash) was taken by accused 1 and held it under his armpit. After taking the items the assailants fled the scene.

[30] They sought help from a security they found in a certain building that looks like a warehouse. On 17 February 2016 she attended an identification parade where she identified accused 4 first and thereafter accused 1. She denied that she was shown any photographs or told who to point out prior to the identification parade. It was put to her that according to her husband's testimony, they both approached the bank teller and she remarked that she testified as per her own recollection. It was further put to her that the alleged concern raised by the teller about where there were going to deposit the money was new evidence, she stated once more that her version was based on her own recollection. She conceded that during the pretence shopping she did not see anyone following them. She was unable to estimate how long the robbery incident took. It was put to her that her version that her husband was assaulted through an open door was inconsistent to his version that he was assaulted through an open window. She remarked that their experiences differed.

[31] On 5 February 2016 **Mr Vittoria Labuschagne** who is employed by Vusela Risk Services was on duty. On that day he was at Standard Bank in Vereeniging busy in the bank office with his work when he received a call from his colleague Mr Thabo More. Mr More made a report that he spotted suspicious people loitering in the bank. Upon receiving that report, he went out of the office to meet Mr More who pointed to a silver Polo which had two occupants. The Polo left the parking area of the bank and they decided to follow it. They also contacted police. When they reached Kliprivier highway off

ramp on the R59 police stopped the Polo and took over doing their police duties. He stated that after the Polo occupants alighted from the vehicle no one took picture with cell phones. The police took the two occupants to Kliprivier Police Station. He followed behind also heading to the police station. Upon arrival at the police station he informed the police that one of the suspects Mazibuko was known to him for his involvement in a Booyens socio robbery. The police contacted their provincial officials who were dealing with similar type of crime of socio robberies.

[32] He proceeded to explain the photographs shown to him which were taken from the footage of Standard Bank Vereeniging. He testified that the Booyens matter also involved socio robbery but was unable to recall all the details. It was put to him that in that Booyens matter accused 1 was in the bank in order to pay for his DSTV subscription, he remarked that he could not recall the details of that matter and conceded that he was unable to comment. He conceded that upon leaving the bank the Polo first drove to the taxi rank. It was put to Mr Labuschagne that accused 1 on 5 of February 2016 he was in company of accused 4 and they were at the bank in order to see accused 4's cousin, he had no comment. He denied that photographs of accused 1 and accused 4 were taken. He stated that he did not see any other person doing so. He conceded that no complaint was received following the presence of accused 1 and accused 4 in the bank. When asked why accused were taken to Kliprivier Police Station, he remarked that the police wanted to do more investigation relating to socio- robberies. He was unable to comment when it was put to him that accused 4 was going in and out of the bank because he was looking for his cousin.

[33] On 5 February 2016 **Mr Thabo More** who is also employed by Vusela Risk Services which company is contracted to Standard Bank was on duty at Vereeniging Standard Bank conducting surveillance. He then observed that accused 4 was acting suspiciously. Giving context to the suspicion, he testified that he noticed accused 4 following other customers in a queue before leaving the queue. There was a Caucasian gentleman who had withdrawn a large sum of money being followed by accused 4. He alerted his colleague Mr

Labuschagne about his suspicions and they decided to follow accused 4 who climbed into a car and it sped off. He testified that the said car was driven in a manner he described as reckless.

[34] Both he (witness) and Mr Labuschagne requested assistance from the police flying squad. He testified that the two occupants of the vehicle they were chasing must have been aware that they were being pursued. The police managed to stop the suspects' vehicle on R59 off-ramp. Accused 1 and accused 4 were the occupants in this car. He stated that no photographs of the accused were taken at the scene. A decision was taken to transport both accused to Kliprivier Police Station for further investigations. He identified accused 4 as depicted in photos per Exhibit 'AA'. He stated in cross examination that after he contacted Mr Labuschagne and reported to him that there were suspicious people and he requested Mr Labuschagne to follow the suspects. He explained that this was in order to check if the suspects were following the Caucasian man. It was put to him that his version differed from that of Mr Labuschagne in relation to the report given and the alleged reckless driving by the suspects, he maintained that to his recollection it was the truth. He had no knowledge of accused 1's version on the reasons he was together with accused 4.

[35] On 5 February 2016 **Captain Paul Machiel Harmse** who was a warrant officer at the time received a complaint over the police radio that there was pursuit taking place on R59. He organised a crew and booked one state vehicle and proceeded to the scene. En route he received information on the description of the vehicle that was being pursued as a blue Toyota Conquest which was pursued by private investigators from the bank. He testified that he waited for both vehicles on the off-ramp bridge. While waiting on the bridge, the two vehicles approached the off-ramp. Both vehicles were stopped. He indicated that at that stage he had no details why the Toyota was being pursued. The suspects identified as accused 1 and accused 4 alighted from their vehicle. The scene was then handed over to detective Sergeant Ntabeni. No photographs of the suspects were taken either at the scene or at the police station. Recalling that there was an identikit for one of the suspects which was on display at the

crime investigation office, it was decided to take both suspects to the police station for profiling.

[36] Captain Harmse admitted that the suspects' vehicle was erroneously described in his statement as a Polo. He indicated that the suspects were co-operative. He conceded that he was at the scene less than ten minutes and was not in a position to remark on what happened after he left the scene. He conceded that his evidence in chief was erroneous that the identikit was for one suspect rather there were identikits for both suspects. He was unable to say whether the suspects' vehicle was searched or not. He reaffirmed that both suspects were taken to the police station for profiling purposes. He conceded that he had no idea who created the identikit. He denied that accused 4 was made to lie on the ground at the scene and that was allegedly hit on the back with a firearm.

[37] On the day in question **Captain Lucas Joshua Malindi** was on duty at Kliprivier Police Station and as part of his duties he took photographs of the suspects using a camera which were saved on the police system. He recalled that one of the suspects he remembers is accused 1. He testified that once photographs are stored in the police computer system, one other person has access to the photographs except the investigating officer. He conceded under cross examination that he is the only person in charge to store the photographs unless he was not on duty in which case the station commander will delegate someone to assist with that duty. He remarked that he had no knowledge that there were police officers who took photographs of accused 1. He further conceded that he was seeing the identikit for the first time in court. He denied that other police officers took photographs of accused 4 using cell phones.

[38] On the same day of 5 February 2016 **Sergeant Boyboy Peter Noge** was on duty at Kliprivier Police Station when he heard over the police radio that there was a Silver Polo that was being pursued on R59. He requested Sgt Ntabeni to come along to give chase and they followed Captain Harmse who was using another police vehicle. They stopped at the top of the R59 Bridge and they spotted two vehicles approaching. A VW silver Polo was being pursued by a van. The Polo had two occupants. When it was stopped, Sgt Ntabeni interviewed the occupants thereafter they were taken to the police station. He

denied that any photographs were taken of the suspects. He confirmed that the identikit (marked Exhibit 'BB') was on display at the police station. He conceded in cross examination that no reason was mentioned for the pursuit of the Polo.

[39] He was unable to recall the period when the identikit was on display at the police station notice board. He conceded that he has no knowledge who compiled it. He denied again that photographs were taken of the suspects. He testified that the Polo occupants alighted from their vehicle and stood next to the car. He conceded that he was not in a position to dispute that the occupants were searched. He indicated that the reason the occupants were taken to the police station was that Sgt Ntabeni wanted to do investigations. He conceded that the Polo was searched but no weapons were found inside. He denied that photographs were taken of accused 4.

[40] **Sergeant Molatudi David Ntabeni** is the former investigation officer of the case. On 5 February 2016 he was on duty at Kliprivier Police Station. He corroborated the evidence of his colleague Sgt Noge. Where he differed from Sgt Noge was in respect of how they travelled. To his recollection, Sgt Noge travelled in the same police vehicle as Captain Harmse. He followed Sgt Noge using an unmarked police vehicle. The suspects were driving a Polo which was intercepted near Heidelberg off-ramp. There were investigators from the Standard Bank in Vereeniging who made a report about the reason why the suspects were pursued. The report prompted an interest as he had a similar case he was investigating on bank following involving Mr Phele. The suspects looked similar to the identikit of the suspects in Mr Phele's case. He decided to take the suspects to the police station and after verifying the resemblance of the suspects to the identikit, he placed them under arrest as he was certain they were the suspects in Mr Phele's case.

[41] He denied seeing anyone taking photographs of the suspects. He was unable to recall who compiled the identikit. He conceded that the appearance of accused 1 had changed from the time he was arrested and that accused did no longer resemble the identikit. He conceded that accused 1 and 4 appeared in the lower court and the matter was struck off the roll however he insisted that the docket contained all the statements. When asked why he was removed as

investigating officer, he stated the only reason given to him was that an expert had to take over the investigation. He denied that he informed accused 1 and accused 4 that he was removed because his seniors wanted to link them to the charges.

[42] On 17 February 2017 **Constable Tshepo Collin Ndlovu** was on duty at Kliprivier Police Station. On the day in question he was in charge of the identification parade which was conducted at Vereeniging Leeuhof Prison. He completed an identification parade form and explained the content of the form. He stated that the people in the line -up were the ones who chose the positions. He testified that the identifying witness Mr Phele upon entering the identification room he was informed about the procedure but was not instructed on whom to point out. Mr Phele pointed suspects who held positions 5 and 12 who were accused 1 and accused 4. The reaction of the suspects was one of calmness. The suspects reported in the presence of their attorney that their photos were taken and shown to the witness. He conceded in cross examination that the ID parade form had an incorrect date of the 16th and explained that he was unable to amend the incorrect date. He was unsure how many witnesses participated in the ID parade.

[43] He testified that immediately after the procedure was explained to Mr Phele, he turned and pointed out the suspects. It was put to him that at the time of his arrest, accused 1's photo was taken, he had no such knowledge. He conceded that there was a big age gap of the people who formed the line-up. He explained that it was the suspects themselves who chose the people to be in the line-up and denied that he was the one who chose the people in the line – up. He stated that he had no access to the prison where the ID parade was being held. He conceded that he omitted to insert the date and time of the ID parade, the charge.

[44] **Captain Magdalene Rajah** was stationed at Kliprivier Police Station during 2016 as a branch commander. She testified that she was unaware that she placed undue influence upon Sgt Ntabeni. She explained that as a branch commander, her duties included guiding the investigations and ensuring that the community was satisfied and dockets were ready for court. She explained

that she was not involved in the arrest of suspects. She stated that when dockets of bank followings are opened they are transferred to the specialised unit and Sgt Nyofane was part of that task team. She remarked that she had no knowledge about the allegations on what Sgt Ntabeni allegedly told accused 1 and accused 4. She reaffirmed that as soon as the accused were arrested the docket was handed over to the task team. She testified that she was aware of the existence of the identikit however it was the investigating officer who arranged for its compilation thereof. She conceded that her testimony was based on her memory. When she was confronted about the statement of Mr Phele which did not have the date and time, she conceded that it was shoddy work.

[45] **Sergeant Thabiso Humphrey Mokoena** assisted in an ID parade which was held at Leeuhof Prison. He testified that his role was to escort witnesses from the parade room to another room to wait for the whole ID parade to be completed. At no stage did he enter the parade room. He explained that he stood by the door and waited for the witness to come out of the parade room. He also indicated that he had no details of the matter. He conceded that he had no knowledge of what transpired before the witness entered the parade room. He conceded further that he was not in a position to know whether or not any witness was shown photographs of the suspects before the parade.

[46] **Dr Natasha Fakier** is a fully qualified medical practitioner. On 23 November 2012 she examined a patient Mr Phele and completed a medical report (J88) which was marked Exhibit 'X'. On this J88 she noted her clinical findings. She testified that there is a general confusion among people between a hip and a thigh. She did note a bruise on the patient but no laceration to the eye. She noted some swelling. The patient complained of blurred vision and was referred to an ophthalmologist.

[47] **Sergeant Thamsanqa Joseph Dhlomo** is a photographer and a draftsman for SAPS. On 16 March 2016 he was on duty and was requested to attend an ID parade at Leeuhof Prison in Vereeniging. He took the photographs per Exhibit 'Z'. He testified that he normally will work with the officer who is in charge of the parade and would take photos when instructed by the officer. He recalled that a

witness Mrs Phele entered the parade room in reverse and was given instructions by the officer in charge of the parade. He indicated that the identifying witness Mrs Phele was not shown any photos. He stated that the same procedure was followed in Exhibit 'W where the identifying witness was Mr Phele. He stated that Mr Phele was not shown any photos.

[48] On 6 July 2016 Sgt Dhlomo attended another ID parade as a photographer at Leeuhof Prison where the identifying witness was Mrs Lethuo. The same procedure was also followed during the ID parade that was held that day. He conceded that his role was confined to what transpired inside the parade room and was not able to comment about what took place outside the parade room. He denied that accused 1 and accused 4 informed him that their photographs were taken using cell phones on both occasions when the parades were held.

[49] On 17 February 2016 **Constable Mvula Nzapheza** was on duty and assisted during the ID parade which was held at Leeuhof Prison. His duty was to escort witnesses from the waiting room into the parade room. He indicated that he did not enter inside the parade room. He testified that he did not see anyone showing the identifying witness any photos and he also did not show any photos to any witness as he was not in possession of his cell phone. He had no comment regarding what transpired during the arrest of accused 1 and accused 4. He indicated that he had no knowledge about witnesses being shown accused's photos.

[50] **Sergeant Desolomo Moko** was on duty on 17 February 2016 and assisted during the ID parade which was held at Leeuhof Prison. His duty was to guard the two witnesses who were in the waiting room before they were escorted into the parade room. The identifying witnesses were brought to the waiting room by the prison officials. While the witnesses were in the waiting room no one spoke to them and there were also not shown any photos. He stated that he did not show any photos to the witnesses as he was not in possession of his cell phone. He indicated that he bore no knowledge about what might have transpired before the day of the ID parade. He also had no knowledge on how the witnesses arrived at the prison. He testified that he did not see Sgt Nyofane

on the day of the parade. He explained that he was requested by Sgt Ndlovu to assist during the ID parade.

[51] **Captain Thabiso Samuel Tsibulane** also assisted during the same ID parade which was held on 16 March 2016 at Leeuhof Prison. His duty was to guard the two witnesses in the waiting room before they were escorted into the parade room. The waiting room was situated at the reception area of the prison. While the witnesses were in the waiting room no one showed them any photos and he also did not show them any photos as he was not in possession of his cell phone. He testified that no one spoke to the identifying witnesses. He indicated that it was W/O Sigo who requested him to assist during the ID parade without providing the details of the matter. He stated that he had no knowledge of how the witnesses arrived at the prison. It was put to him that the witnesses were shown photos of the suspects before their arrival at the ID parade, he had no comment.

[52] **Constable Regan Makhubela** was on duty on 16 March 2016 and also assisted during the ID parade which was held at Leeuhof Prison. His duty was to guard the two witnesses after they were finished in the parade room. He testified that he had no details about the matter. He did not see anyone showing the witnesses photos from a cell phone. He also did not show the witnesses any photos as he did not have his cell phone with him. He conceded that he had no knowledge of what transpired before the witnesses got inside the parade room. He indicated that he was unaware that anyone (i.e. any suspect) was pointed out by the witnesses.

[53] **Ms Maureen Coetzee** is employed by ABSA Bank as an information specialist whose duties included investigating serious and violent crimes and the gathering of data on syndicates. She started her testimony by giving an overview of her work including her involvement in cases dealing with associated robberies¹. She testified that since 2003 she noticed an increase in this type of robberies. After checking the video footages which were obtained from the four major banks they were able to identify common denominators.

¹ Associated robberies are robberies where bank clients are followed after withdrawing money and en route to their destination they would be robbed.

Information was gathered about the suspects. She was also a part of the task team which was started in order to deal with these robberies. She testified that the modus operandi used by the suspects in associated robberies was that they formed two groups- the first group is known as 'spotter' and the second group is known as 'the gun men'. These two groups usually travel in different cars. The 'spotter' group will travel in a borrowed car belonging to a member of the syndicate while 'the gun' group usually travel in either a hijacked car or a stolen car. The 'gun' group will use a second car. The second car for the 'gun' group can be legal but with fake number plates.

[54] She testified that the 'spotter' will enter the bank and do couple of things (conduct business) while observing clients who are withdrawing money. The 'spotter' may join a queue going to the tellers or sit inside the bank until a potential victim has been identified. The 'spotter' group will follow the victim upon leaving the bank and also call the 'gun' group. The 'spotter' has the responsibility to check the direction that is taken by the potential victim and the type of car the victim drives (the mode of transport). Both 'the spotter' and 'the gun' groups will then follow the potential victim until either the destination or until a stop street when the robbery will be committed. The 'spotter' group vehicle will be within the vicinity of the robbery but not necessarily at the (actual) robbery scene. She explained that this is done for two reasons- (i) to check if the robbery actually takes place, which is more of a trust issue and (ii) to be around should something wrong occurs. The victim will not see the 'spotter' at the robbery scene making it difficult to connect the two groups. After the robbery the two groups will meet up to share the spoils.

[55] The information that she has gathered reveals that the 'spotter' gets a bigger cut due to the high risk involved. She further explained that the 'spotter' plays a vital role in identifying a potential victim. In respect of this matter she testified starting with the incident involving Mr Johannes Meyer (of the Randfontein Cas) that she received the case and viewed the footage. She then approached ABSA Bank for more downloaded footage which she did an analysis on. She gave context in each still photo here in court². At the time when she received and analysed the ABSA footage, she had no information about a person of

² Still photographs handed on record as exhibits.

interest who can be seen in still photo 6 entering the bank with another male. The same person of interest is seen in photo 27 leaving the bank. That person was later identified as accused 1. The other male who can be seen in the footage in company of accused 1 was never identified. Accused 1 was only identified with the help of a colleague Tony Els who gave her the photos and the name of the suspect as Vusi Mazibuko. She then notified detective Karel Nel from Randfontein Police Station immediately.

[56] She was able to compare the photo she obtained from Tony Els with the footage and she concluded that it was the same suspect. She also analysed the footage from Southdale bank involving Mr Momah (Booyesen Cas) and concluded that the same suspect was involved in both Randfontein and Booyesen matters. She informed the investigating officer in the Booyesen case Sgt Nefuranyeke that she knew the identity of the suspect and that the suspect was appearing in court.

[57] As the suspect Mazibuko was appearing in another matter in Palm Ridge High Court she accompanied Sgt Nefuranyeke to Palm Ridge High Court where she pointed out the suspect who was then arrested. Sgt Nefuranyeke brought Mazibuko to Booyesen Police Station for questioning. After speaking with the suspect Mazibuko, Sgt Nefuranyeke reported that he was going to look for other suspects who were involved. The interview revealed the involvement of the Southdale (bank) employee and she followed up the information as it was apparent that an employee gave the information.

[58] She called her line manager and reported to him about the allegations. The next day they (she and line manager) proceeded to Southdale branch before opening time for two reasons- firstly which was to avoid conducting the interview as it can get hectic in the branch and secondly accused 3 was responsible for giving monies to tellers and they did not want to interrupt that. They found accused 3 who was then interviewed. Accused 3 admitted that he gave information to his brother in law that Momah will be coming on Saturday to withdraw money. The interview was conducted without any pressure or assault or threats. Accused 3 admitted he gave information to his brother in law and provided the name of the brother in law as Bongani Mnikazi. She testified that

as soon as accused 3 disclosed the information of giving information to a brother in law he appeared relaxed. The interview revealed accused 3 he got ten thousand rand for the information.

[59] Accused 3 was arrested by the investigating officer and taken to Booyens Police Station. She remained at the branch to sort out issues. She was extensively cross examined. It was put to her that her testimony that a spotter receives a higher salary was speculative; she remarked that she was basing that evidence on the many years of experience as well as her interviews with the suspects. She testified that her analysis of the conduct of accused 1 inside the bank was that of a spotter as he left the bank shortly after the bank client left. She stated that in her interview with accused 3 she may have advised him that he did not have to say anything. She had no comment when it was put to her that accused 3's version was to deny making any admission. She indicated the distance between the clients, the Meyers and accused 1 was four to six metres.

[60] Following on the court's question regarding the criteria used to identify a spotter, she testified that it would be people who leave the (teller) queue when they are almost to the front and people who appear nervous and also certain body language. She stated that she looks at the way people behave and leave. She testified that her experience has taught her to look at client behaviour. In both the Booyens and Randfontein footage the behaviour (profiling a spotter) she observed fitted that of a spotter. She conceded that in the Randfontein footage, the behaviour of accused 1 did not present as that of a spotter however the gentleman in whose company he was did. She conceded that she was not in a position to dispute that the other male in the same footage was in a hurry.

[61] **Warrant Officer Mzwandile Abednego Sigo** was in charge of the identification parade which took place on 22 February 2016 at Vereeniging Leeuhof (prison). Afterwards he completed the ID parade form. In that form it was noted that the witness Mrs Lethuo took three minutes to identify the suspect Sibanyoni whose reaction was to make a report that on the day of his arrest photos of him were taken. W/O Sigo testified that the witness was not told who to point and there

was no one who had a cell phone during the ID parade. On 16 March 2016 he was also in charge of another ID parade where Mrs Phele was the witness who took two minutes to point accused 1 and accused 4. The suspects repeated the allegations that their photos were taken. It was put to him that the accused informed him before the ID parade was held about the allegations; he remarked that they had an attorney who would have stopped the ID parade before it proceeded.

[62] **Ms Mathemba Pretty Nyembe** was on duty on 23 January 2015 as a teller at ABSA Bank when Mr Momah came to withdraw money. At that time there was no money at the branch. As she was going on leave, she gave or delegated the duty of treasury to accused 3. She informed accused 3 that Mr Momah was requesting four hundred thousand rand. The next day which was a Saturday accused 3 reported to her that the money was available so Mr Momah must be informed. In reaction to the report she indicated that Saturday was a short day and proposed that Mr Momah be notified on Monday. Indeed, Mr Momah was notified and arrived at the branch. While she was processing the transaction electricity went off. All the people left the bank and only returned when the electricity was back including Mr Momah. Instead of taking the requested amount of four hundred he only took two hundred thousand rand.

[63] The money was taken to bulk section where accused 3 used to work. Accused 3 went out of the bulk section to allow the transaction to be processed. While she was busy counting the money accused 3 kept on coming in to check if they were finished. She noticed that he had his phone with him instead of leaving it with the supervisor as a norm. Mr Momah even made a remark about the fact that accused 3 kept coming inside the bulk section. Eventually the transaction was completed and Mr Momah was given the money. Two hours later Mr Momah returned to the bank and reported that he had been robbed and the assailants knew that he had money because they demanded four hundred thousand. Mr Momah suspected accused 3 to be behind the robbery but she defended him to Mr Momah. She testified that it was only accused 3 and her who knew that Mr Momah withdrew the money. She described accused 3 as a person who liked expensive things.

[64] **Mr Buti Stephen Kgomo** works with Ms Coetzee at ABSA Bank as her line manager. He received a report from Ms Coetzee about a certain arrest which implicated an employee and she requested him to accompany her to Southdale to conduct an interview. Ms Coetzee, an investigator called Sammy Methi and he proceeded to the branch in Southdale. They conducted an interview with accused 3 who disclosed that her sister's boyfriend approached him seeking information and he was paid ten thousand rand for the information. Accused 3 reported that he used the money for entertainment and to buy groceries. The investigating officer was called to the branch and arrested accused 3. It was put to him that accused 3 would deny that he was present during the interview and of his involvement. He indicated that at the time of the interview he had dreadlocks and possibly he was mistaken. It was put to him that accused 3 would deny that he gave information to his sister's boyfriend and in exchange received ten thousand rand. He remarked that he would be lying if he denied that.

[65] **Colonel Gerhardus Johannes Kruger** was on duty on 25 January 2014 at Randfontein Police Station. On the day in question he interviewed accused 1 after introducing himself and explaining legal rights to him. Accused 1 indicated that he understood his rights and elected to proceed with the interview without an attorney. During the interview, accused 1 was not assaulted and provided certain information which he noted down. This prompted a trial within a trial and after the ruling was made the admissions were admissible. Col Kruger testified that he conducted the interview in English and there was no communication breakdown between them. He wanted to find out from accused 1 what was the purpose for his presence at the bank. Accused 1 indicated that he had been in the company of his girlfriend and had gone to the bank in order to get coins for his home business. Accused 1 was confronted with the photos obtained from the bank footage, and then gave the name of Malanga as the person he was with

[66] Col Kruger enquired from accused 1 if he was willing to tell him what happened and warned him again of his legal rights. Accused 1 expressed a willingness to provide more information. He disclosed his names, address, the type of job he

was doing and with whom he was when visiting ABSA bank. The information was written down and accused 1 signed the document. The information was followed up and it was discovered that the suspect he was looking for was arrested and was appearing in Germiston Court. He proceeded to Germiston Court where accused 2 was arrested with one Linda Mkhize. Accused 2's rights were explained and he provided names and some of the names were similar to the ones accused 1 had indicated.

[67] He testified that accused 2 expressed a willingness to make a statement of his involvement. Efforts to get a magistrate to take down accused 2's statement were unsuccessful and he made arrangement with Captain Muller to take accused 2's statement. Efforts were also made to trace the other suspects during the night with the assistance of accused 2 but they could not be found. It was put to him that no rights were explained to accused 1, he remarked that he did explain rights. He conceded that Exhibit 'LL' does not reflect the date on which the information was taken. He further conceded that he did not ask accused 1 about the standard of his education. He denied that accused 1 did not understand English. He further denied that accused 1 asked for a lawyer.

[68] **Captain Corne Brits** is a face identification expert with sixteen years' experience who is attached to the Krugersdorp Face Recognition Unit. He received footage from the investigating officer which contained images from the close circuit television as well as control images. He was requested to do a comparison. He assessed the face for unique marks for comparison and compiled a court chart. He found and marked eleven similarities in both images and reached the conclusion that the person depicted in the images was accused 1. He conceded under cross examination that the CCTV footage was not of good quality while the control image was of a better quality. It was then put to him that the conclusion he reached could not be correct because the images were not good quality, he remarked that quality did not affect the anatomical features. He explained that it was the unique features which enable the comparison. He explained further that if he did not find any similarities he would not be in a position to make a court chart. Once again it was put to him and argued that the comparison was questionable due to the poor quality of the

images, he reaffirmed that his findings were confirmed by two other experts who agreed with the marked points. He conceded that he used a computer in the process which cannot be manipulated.

[69] When it was pointed out that in the CCTV footage of the person depicted had a bushy moustache, he remarked that he worked with shape and according to his finding it was the same person. He concluded that the images were that of accused 1. After making a comparison he compiled a court chart. He found similarities in both images on the shape of the cranial, the forehead, thick eyebrow shape, nasal body, nasal tip, upper lip, lower lip and earlobe. He reaffirmed that the quality of the images did not affect the anatomical features which are used to compare.

[70] **Warrant Officer Miranda Michelle Modau** is stationed at Krugersdorp Local Criminal Record Centre (LCRC) with fourteen years of experience received exhibits from the investigating officer in a sealed bag. The investigating officer requested an analysis from CCTV image and control photos. She marked points of similarities and prepared the court chart. Her findings were that the images were of the same person.

[71] **Sergeant Kenneth Nefuranele** was the investigating officer of Booyesen Cas 450/1/2015 who was working in collaboration with Ms Maureen Coetzee. On 16 February 2016 he was on duty and met Ms Coetzee who played a video footage that depicted the occurrence of crime in Booyesen. He travelled to Braamfischerville with Ms Coetzee who pointed the house of accused 1. Accused who was home was arrested and informed of his legal rights which he understood. The premises were searched and a red Adidas bag was found containing clothes allegedly worn by accused 1. He testified that Ms Coetzee was also instrumental in the arrest of accused 3 whom he arrested. During the arrest of accused 3 his rights were explained. Investigation revealed that accused 3 was a brother in law of one Bongani Mnikazi. He conceded that accused 1 was arrested because of Ms Coetzee. It was put to him that he did not explain any rights to accused 3, this was refuted. He indicated that rights were explained and he was given a copy of the notice of rights which he signed.

[72] **Captain Sam Makwakwa** received a call on 12 February 2015 from Sgt Nefuranyele requesting him to take down a statement from a suspect. He then asked Sgt Nefuranyele to bring the suspect to his office who brought the suspect identified as accused 3. Accused 3 had no visible signs that he had been assaulted and not under influence of any intoxicating substance. Captain Makwakwa introduced himself to accused 3 by showing him the appointment certificate and explained the purpose of the interview as well as the allegations against him. They were alone in the office. He informed accused 3 of his legal representation rights who indicated that he understood them. Accused 3 elected to make a statement in the absence of a lawyer without any undue influence and did not make any report that he had been threatened. They communicated in IsiZulu and English without any communication breakdown. They read the pro forma together and accused 3 only signed it once he understood the contents. Accused 3 then made the statement freely and voluntarily. The statement was marked Exhibit 'UU'.

[73] Captain Makwakwa could not to explain how Sgt Makua's signature was appended on the pro forma as he was not present when that was done. He conceded in cross examination that the time reflected on the pro forma was 15h45 while the time reflected on notice of rights document was 17h30. He explained that accused 3 was detained before the reflected time of 17h30 and he stated that the report he received was that accused 3 wanted to come to confess. It was put to him that accused 3 did not remember the name and physical appearance of the officer he was brought to, he remarked that such a contention was possible due to passage of time.

[74] It was also put to him that Sgt Nefuranyele who brought accused 3 into the office did not leave, this was refuted. He also refuted that there were other police officers in the office. Captain Makwakwa denied that accused 3 was presented with a document which had parts that were completed and some parts which were blank and told to sign. He was unaware that Maureen Coetzee had an interview with accused 3 prior to his interview. He denied that only Sgt Nefuranyele produced his appointment card. It was put to him that accused denied that rights were explained to him and that he elected to make a

statement, this was refuted. He stated that he only saw accused 3 once and yet he was able to identify him in court years later. Based on the questions by the court, he testified that the atmosphere during the interview was free.

[75] **Warrant Officer Karel Nel** received two memory sticks from Ms Maureen Coetzee which were contained in an evidence bag with serial number PA 5001297561 which he took to Pretoria Forensics for purposes of analysis. The memory sticks were given to one Lebogang. He identified two sets of documents- the first document was a section 212 statement made by Lebogang and the second document was a photo album which was compiled after analysis. He explained that the change in evidence bag was caused by opening the first evidence bag to access the memory sticks for analysis and thereafter the exhibits would be sealed in a new evidence bag. He received an evidence bag with serial number PA 5001365003 from Warrant Officer Maimane.

[76] He further received a working copy of a compact disc contained in an evidence bag with serial number PA 5001365005 which was given to Captain Brits at Krugersdorp LCRC who indicated that he required photographs of the suspect in different angles in order to do comparison. The requested photos were taken by Warrant Officer Niemand and stored in a compact disc inside a forensic bag with serial number PA 6002399549. The memory sticks were taken back to the SAP 13. His involvement in the Booyesen docket was to assist the investigating officer to do facial comparison and his involvement in the Randfontein docket was to verify accused 1's address for bail application. He indicated that at accused 1's address certain clothes were confiscated and placed in the SAP 13.

[77] **Captain Susana Johanna Muller** took down a statement made by accused 2. Following the ruling made by the court that such statement was admissible, she testified that she had an interview with accused 2 which led to him making a statement. She had a blank pro forma with her during the interview. She gave accused 2 a clean blank piece of paper who wrote on it in his own hand writing. She testified that the information contained in annexure 'A' came from accused 2 and also wrote the names of his friends on the left side of the document. On

the right column was information given by accused on the cars used at the scene. There was a drawing she made which accused 2 found to be wrong. Accused 2 took it upon himself to draw a correct one that they both signed. In cross examination she conceded that 90% of the information in the document was related in isiZulu and was then translated. She conceded further that she had a challenge in pronouncing certain words and that it was accused 2 who wrote the names on the document for her. Accused 2 read the document and understood the content.

[78] It was put to her that Sgt Msindeli had testified that the document was translated for the accused and she remarked that it was correct. It was then put to her that this was contradictory, she explained that the translation took place during the process. When confronted with information on paragraph 14.1 she conceded that the information was due to human error.

[79] On 6 January 2018 **Warrant Officer Desmond Mukhari** was on stand-by duty. He proceeded to a crime scene at Giyani Spar in company of Sgt K.R. Shabalala. On their arrival, they were shown a video footage of the robbery incident. He reconstructed the scene based on the viewed footage by marking the scene using cones. Cone 1 marked the place where the robbery victim alighted from a vehicle on arrival at the premises. Cone 2 marked the place where the victim was walking. Cone 3 marked the exact spot where the victim was accosted and robbed. He testified that on 7 January 2018 he attended another scene outside Giyani at Xikukwani Village. On arrival at this scene he found two vehicles- a Toyota Run X and a police vehicle with bullet holes. The scene was photographed from different angles. He stated that he did not find cartridges at the scene. He conceded that he did not measure the distances between the two vehicles depicted in photo 3 of Exhibit 'CCC'. It was put to him that according to accused 5, the Run X also had bullet holes and his response was he had no such knowledge

[80] On 6 January 2018 **Ms Priscilis Maluleke** an employee at Mopane Super Spar in Giyani was on duty. She gave an amount of twenty thousand rand to Mr Ngobeni in order to get cash of tens and twenty denominations from Nedbank which was going to be used for change. The money was placed in a school

bag. A short while later she heard a commotion. She got a report that Mr Ngobeni had been robbed of the money and was in the camera room. She proceeded to the camera room and found Mr Ngobeni inside who was no longer in possession of the money. She indicated in cross examination that the twenty thousand was in two hundred rand denominations. She stated that the money was placed inside a blue school bag.

[81] **Mr Phuthuma Zulu** is another employee of Mopane Super Spar in Giyani who was also on duty on the day of the robbery. He transported Mr Ngobeni to Nedbank to get cash in small denominations which was going to be used for change. He remained in the vehicle while Mr Ngobeni went inside the bank. A short while Mr Ngobeni returned and they drove back to work. He parked the vehicle by the receiving area within the premises of the shop. Mr Ngobeni alighted while he remained seated in the vehicle. He then heard people making noise and he decided to step out of the vehicle. He noticed a white car reversing out of the gate. A shot was fired. He got a report that Mr Ngobeni was robbed. He testified under cross examination that the incident happened swiftly. He conceded that he did not have a clear view of the incident. He further conceded that he did not see when the money was taken. He indicated that he did not see the money.

[82] **Mr Robert Magezi Maswanganyi** an employee at Mopane Super Spar who was posted at close circuit control room was on duty on the day of the robbery. After he got a report of the robbery he decided to check the video footage. On the footage he observed a blue vehicle stopping by the entrance which was followed by a white vehicle which entered inside the premises. The occupants of the white vehicle accosted Mr Ngobeni, robbed him and went back into their vehicle and it sped off. During the robbery the people who were around the receiving area tried to hide when a shot was fired. He confirmed that Exhibit 'EEE' photos were produced from the video footage. He testified that he was requested by Sgt Shabalala to download the footage from the close circuit television in the shop. After getting permission from the business owner to download the footage, he bought a universal serial bus (USB) on which he downloaded the footage. He was unable to recall the exact date he

downloaded the footage. He indicated that the road around the premises was not a busy road. He testified that from the footage he observed that it was the blue car that followed the bakkie which was used by Mr Ngobeni.

[83] **Mr John Ngobeni** was on duty at Mopani Super Spar in Giyani on 6 January 2018. Ms Priscilla Maluleke gave him R 20 000.00 (twenty thousand rand) cash in R 200. 00 (two hundred rand) denomination notes and requested him to get change from Nedbank. He placed the money inside a green Spar bag. He was transported to Nedbank by Mr Zulu. Upon arrival inside the bank he joined the queue to the tellers. When he reached the teller he requested an exchange of the two hundred rand notes for ten and twenty rand notes. This was done. The money was counted and he placed it inside the Spar bag and left the bank. They travelled back to work. Upon reaching the store premises, he alighted from the vehicle carrying the bag over his shoulder. While walking behind a truck that was parked in the premises as he was proceeding towards the entrance he was accosted by an armed assailant who demanded the money.

[84] They struggle over the bag. Another assailant arrived to assist the first assailant. He was eventually dispossessed of the bag. A gun shot was fired. All the assailants got into a white vehicle and it drove off. He sustained pain on the left shoulder as a result of the struggle. He confirmed that Exhibit 'EEE' depicted the photos of the robbery incident as it unfolded. He confirmed that Exhibit 'GGG' photos depicted him inside the bank. On 8 February 2018 he was contacted by Sgt Shabalala and requested to identify a green Spar bag. He positively identified the bag as the same one taken from him. He was able to identify the said bag positively on the basis that the bag had one handle. He was unable to identify any of the assailants. It was put to him that the evidence by Ms Maluleke was that he carried a blue bag, this he denied and remarked that she made a mistake. He reaffirmed that it was a green bag which was only used by Spar cash office staff.

[85] **Mr Meke Mkosi** was on duty on day of the incident at Spar Giyani posted as a security guard at the gate. A car driven by Mr Zulu drove into the premises. He testified that Mr Ngobeni alighted from the said vehicle. He approached Mr Zulu in order to request him to shift the car. While speaking to Mr Zulu a commotion

ensued. He went towards the gate. It was at that time when shot was fired causing him to run. He hid behind the truck. In that position he could not see any assailant. He confirmed that it was him as depicted on Exhibit 'EEE' photo 5. He indicated under cross examination that at the time he was the only security guard at the gate. He maintained that Mr Maswanganyi was not there. Emanating from the court's questions, he explained that the gate was not closed because there was a delivery truck which was the reason he wanted Mr Zulu to move his car to make way for the delivery truck.

[86] **Mr Resenga Teacher Ngobeni** was on duty also at Mopani Super Spar posted at the receiving section waiting for a bananas delivery truck which was by the gate of the premises. A vehicle driven by Mr Zulu drove into the premises. Mr John Ngobeni alighted from the said vehicle carrying a school bag over his shoulder. When Mr Ngobeni walked around another truck that was parked within the premises, a white car drove in. An armed male alighted from that white car and ran towards Mr Ngobeni. The assailant grabbed the bag which was carried over Mr Ngobeni's shoulder. He testified that there was a struggle over the bag. Another assailant came over to assist the assailant who was tussling with Mr Ngobeni for the possession of the bag. The commotion drew the attention of other people who shouted at the assailants (to stop what they were doing). A shot was fired in the air. The assailants ran back to the white car which reversed out of the premises and drove off. He testified that he was not in a position to identify the type of firearm. He confirmed that Exhibit 'EEE' photo 1 depicted the truck which was parked inside the premises. He proceeded to identify some of the people who were standing on a platform including himself in a red t-shirt with Spar logo. He conceded that he was not in a position to identify any of the assailants.

[87] **Mr Matome William Ramalepe** an employee also at Mopani Super Spar was on duty on the day in question. He testified that he was posted at the receiving area of the premises waiting for the delivery of bananas. He corroborated Mr Ngobeni. He expounded that when the third assailant appeared intending to help in dispossessing the bag, the second assailant had managed to take possession of the bag. The first assailant fired a shot in the air before all the

assailants got into their car and it drove off. He was unable to identify the type of firearm which was in possession of the first assailant. He conceded that he was not in a position to identify any of the assailants.

[88] **Constable Olga Khoza** was on duty on 6 January 2018 posted as crew to Sgt Matukana (who at the time held the rank of a constable). Around 10h00 they reacted to a back-up request from a K9 unit at block B Homu Village. They proceeded to the section and upon arrival at Homu section 14B members of community pointed to the direction of the pursuit. They followed the route and spotted the K9 police vehicle which was pursuing the suspects. She told the court that Constable Makhubele was pursuing the suspects on foot. One of the suspects threw a green bag (described to be like a school bag) with a Spar logo on the ground. As they got closer to the suspects, she noticed that they were in possession of firearms. The two armed suspects ran into a certain homestead and jumped over the fence into other homesteads. Sgt Matukana drove into the last homestead that the suspects entered into. She heard Sgt Matukana pleading with the suspects not to shoot at them.

[89] The suspects placed the firearms on the ground and were taken back to the police vehicle. Those suspects were identified as accused 2 and accused 6. The suspects were searched by Warrant Officer Mthombeni, Sgt Matukana and Constable Makhubele. From both suspects' pockets R 320.00 (three hundred and twenty rand) in R 20. 00 (twenty rand) denomination notes were found. Later the recovered firearms were registered into SAP 13. She confirmed that Exhibit 'DDD' photo depicted the recovered firearms. She explained that one of the firearms depicted Exhibit 'DDD' photo 2 did not have a serial number.

[90] On 7 January 2018 Constable Khoza was on duty in company of Sgt Matukana. They were proceeding to Ben's store when they noticed a blue Run X driven in the opposite direction. Sgt Matukana commented that the said vehicle was involved in the Spar robbery based on the information given by an informer. They made a U-turn, put on the blue lights and siren and pursued the Run X. Despite signalling to the driver to stop by flicking lights, he failed to do so. They requested police assistance to block the road. Upon realising that the road was blocked, the Run X was driven at a high speed towards a different

section A in Giyani. They requested for more back-up. They pursued this Run X vehicle past several villages before it changed direction and drove towards the direction of Ben's store. They were behind the Run X when the driver noticed other police vehicles that was blocking the route, took out a firearm through the window shot randomly. This resulted into a shootout. They eventually managed to catch up to the driver identified as accused 5 after he was apprehended at the point depicted in Exhibit 'CCC' photo 3.

[91] She confirmed that Exhibit 'CCC' photo 3 depicted the police vehicle she travelled in. She explained that the police vehicle did not have any bullet holes when it was assigned to them that day contrary to photos 7 and 8 which depicted bullet holes afterwards. She reaffirmed that the chase that took place the previous day on 6 January 2018 was partly by foot and partly by vehicle. She explained and clarified in cross examination that she saw Congo (accused 6) throwing the green bag to the ground. This bag was recovered by Sgt Makhubela a member of the K9 unit. She described that green bag as similar to a school bag that can hang over a shoulder.

[92] She identified accused 2 as the suspect who was in possession of the firearm with no serial number. She explained that she was able to notice this due to the fact that the said firearm was shiny. Sgt Matukana seized the two firearms from the ground. She conceded that she did not see when the money was found in the pockets of the two accused but rather she was given the report by Sgt Matukana. She disputed accused 2's version that he was arrested while smoking cigarette. She remarked that accused 2's version that he knew nothing about any firearm or about the green bag was a lie. She reaffirmed that accused 2 did scale over a wall on 6 January 2018. She further reaffirmed that the incident on 7 January 2018 after the blue lights and siren were put on, the Run X driver did not stop instead increased speed. She testified that from the time they encountered the police blockage until accused 5 was apprehended they did not encounter any civilian vehicles. She denied that they fired back at accused 5.

[93] She testified that there were other police vehicle also gave pursuit. She conceded that she did notice that accused 5's vehicle sustained bullet holes but

did not know who fired at it. She did not notice any injury on accused 5 as she did not check on him. She indicated that she did not interview accused 5 because she was scared after seeing him wielding a firearm. It was put to her that according to Desmond Mukhari's evidence the blue car had no bullet holes, this was denied as untrue. Remarking on accused 5's version that he was driving along Risinga Road at normal speed when his vehicle was suddenly shot at by the police, she said it was incorrect. She reaffirmed that the police sirens were on. She denied that she approached accused 5 and had noticed that he was bleeding. She denied the version that the police vehicle did not put on blue lights and siren as untrue. She clarified that on 6 January 2018 when they arrived at Homu Village block 14B, the suspects were running on foot being pursued by the police. She identified accused called Congo (accused 6) as the suspect who threw a bag with a Spar logo from the vehicle. She testified that while giving chase to the two suspects on 6 January 2018 she never lost sight of the suspects and she noticed that the suspects were armed.

[94] The suspects were instructed to drop the firearms and they complied. She confirmed that accused's rights were explained twice- at time of arrest and at the police station. She remarked as untrue the accused 2's version that he was arrested while visiting accused 6's home during a party. It was put to her that she was not in a position to see who threw the bag with Spar logo, on the basis that the police vehicle was driving fast and her concerns for her safety. She remarked that concerns for her safety did not affect her ability to see and she saw accused 6 throwing the bag. She refuted accused 6's version as untrue.

[95] On 20 February 2017. **Mr Johannes Malema** went to Giyani Standard bank in company of Tumelo Monama to withdraw R 25 000.00 (twenty-five thousand rand). A bank official asked him to wait. After a while they were assisted by a teller who asked them three times where they reside and he indicated that they reside at Bellevue. The teller then counted the requested money and handed it over to him which he put inside a red school bag. They left the bank and boarded a taxi home. Upon arrival at home he proceeded into the bedroom (second bedroom as described) where he intended to place the money when suddenly he was accosted by an armed man in the passage. He retreated into

the bedroom. The assailant hit him on the left side of the forehead with a firearm and he sustained an open wound. A second assailant appeared and dispossessed him of the bag with money.

[96] The two assailants ran out of the house. He decided to give chase and it was at that stage that he noticed that there was a third assailant who stood by the door. The three assailants got into a white i20 Hyundai and it drove off. He was thereafter requested three times to attend an ID parade. The first two ID parades never materialised however the third ID parade was a photo parade. He gave details on how the photo ID parade transpired including the fact that he was not told who to point out. On his own he pointed three suspects.

[97] He proceeded to explain what each photo in Exhibit 'HHH' depicted. In court he pointed at accused 2 as the third assailant who was by the door. He pointed accused 5 as the assailant who hit him with a firearm, and accused 6 as the assailant who dispossessed him of the bag full of money. He conceded during cross examination that he was unable to see the registration number of the white Hyundai. He was confronted with the content of the first statement in which he stated there were two assailants; he explained that at the time he made the statement he was frightened and a bit dizzy after the assault. He was also confronted with the second statement which reflected same information (that there were two assailants); he stated that he was still mentally affected by the incident of the robbery.

[98] He denied that he was misleading the court on the number of assailants who were at his home. He was unable to recall what the assailants were wearing. He conceded that there were no identifiable features of accused 2 which assisted him to identify him. He conceded further that he did not take any notice of accused 2's height and built. He had no comment when it was put to him that accused 2 denied being at his house. He reaffirmed that the people he pointed out (at the photo ID parade) were the suspects who were in his house. He reemphasised that he was not mistaken in identifying accused 2. He conceded that his observation was limited however he was adamant that accused 5 was one of the assailants in his house as recognised him by his face. He conceded that in his statements he did not furnish any description of the assailants

however remarked that in his statement he did say that he was in a position to identify them. He further conceded that he was in a shocked state. He was unable to give clothing description of the assailant who allegedly dispossessed him of the money. He reaffirmed that during the photo ID parade he was not told that the people who robbed him could not be part of the photos.

[99] **Mr Tumelo Monama** is Mr Malema's nephew. He corroborated Mr Malema and expounded that while he was in the sitting room, his uncle was in the bedroom when four assailants accosted them. Only three assailants entered inside the house and demanded money. One assailant pointed him with a firearm while the other two approached his uncle. Of the two assailants who went to his uncle only one was armed with a firearm and they managed to get the bag which contained the money. The assailants ran out of the house boarded a white Hyundai i20. He noticed that his uncle was bleeding from his forehead.

[100] He explained that he did not attend any identification parades due to tertiary commitments. In court he pointed at accused 2 as the assailant who pointed him with a firearm. He pointed accused 6 as the assailant who demanded the money. He remarked under cross examination that while they were in the bank they did not notice any suspicious person or anyone following them. He indicated that the assailants entered the house using the front door. When asked what accused 2 did during the incident, he explained that he demanded the money. He explained further that he did not react to the demand made by the assailant due to the trauma he was experiencing. He stated that accused 6 was the first assailant who entered the house and confronted his uncle. He testified that accused 6 was not armed. He reaffirmed that accused 2 remained with him. He was unable to give time estimate on how long the robbery incident took. He said that it happened fast. He stated that when the assailants entered the house his uncle's child Tebogo aged twelve years was in the sitting room watching television. When confronted about the inconsistency on which assailant between accused 2 and 6 demanded the money, he explained that accused 2 also demanded the money.

[101] He remarked that accused 2's version that he was at a clinic in Daveyton in SOWETO on the day of the robbery was a lie. He recalled that accused 6

aggressively demanded the money. He conceded that he was not able to give a description of the clothing the assailants were wearing due to passage of time. It was put to him that he did not give a detailed description of the assailants to the police to which he remarked that perhaps the police omitted to write it. He was unable to recall whether accused 6 entered into the house running in or walked in. He remarked that accused 6's version that he was at Tembisa during the robbery was a lie.

[102] On 13 December 2017 **Ms Rachel Molatelwa Mohale** went to Giyani Nedbank accompanied by her daughter to withdraw forty thousand rand. She was assisted by a lady teller who enquired from her what she intended to do with such a large sum of cash. She explained to her. She was then given the cash contained in two envelopes each with twenty thousand rand which she placed inside a bag. After asking where they are residing, the teller advised her to take on a taxi to take. She followed the advice. At Molototsi they boarded a taxi which dropped them at Bellevue. It was around 12h00 pm. She recalled four passengers alighted from the taxi and she noticed a young man who stood on the tarred road speaking on his cell phone.

[103] When crossing the tarred road, a green car appeared and flashed lights at them. Then a man who had been speaking on the cell phone accosted her from behind and grabbed her bag. This caused her to fall down. She sustained scratches on her knees as a result of the fall. Her daughter Kgomotso tried to grab the assailant who kicked her and she also fell down. The assailant got the bag, ran and boarded the car and it drove off towards direction of Giyani. She then recalled that the assailant had travelled in the same taxi with them and had been speaking on his phone in a low voice throughout the journey. She confirmed that photos in Exhibit 'KKK' depicted her and daughter inside the bank.

[104] Ms Mohale was invited three times to attend an ID parade which did not materialize. The first I.D parade was arranged at Bolobedu, the second ID parade was at Giyani and the third ID parade was a photo ID parade held at Giyani. Other people were also invited to the third ID parade. She explained what transpired and the procedure that was followed (in the ID parade). There

were photographs pasted on the wall. She was not told who to point out. She indicated that photo 20 of Exhibit 'HHH' depicted her during the photo ID parade where she pointed at a photo of accused 6 thereafter she was taken to another room. Under cross examination she explained that the reason she noticed accused 6 was because he was on the phone from the time they boarded the taxi until destination. She explained that accused 6 was seated at the back seat.

[105] She conceded that when the car appeared she paid attention to it as a result she failed to notice accused 6 when he crossed the tarred road. She was adamant that she did see accused 6's face while they were in the taxi. It was put to her that she had insufficient time to observe the assailant (identified as accused 6) during the robbery incident, she conceded to not having sufficient time at that moment. She indicated that during the photo identification the police only explained to her that she had to point out the person who robbed her and was not advised that the assailants may not be in the photo line-up.

[106] When asked to describe distinguishable features on accused 6 which enable her to identify him she indicated that he had big (wide) cheeks, dark complexion. She said she was even able to identify accused 6 in court who was wearing a mask because she recognised his face. She conceded that she could not recall the type of clothing accused wore that day. She refuted as a lie the accused 6's version that he was in Tembisa, Gauteng during the robbery.

[107] **Ms Kgomotso Sarah Maake** is Ms Mohale's daughter. She related how the events unfolded starting from the bank until the scene where the robbery took place. In essence her testimony corroborated her mother's version on how the incident took place. She added that when she tried to assist her mother who was in a struggle with the assailant over the bag which contained the money, the assailant kicked her and she fell on the ground. The assailant managed to get the possession of the bag after the bag straps broke and ran into a grey car. She confirmed that the assailant was the same man who had been speaking on the cell phone.

[108] **Constable Winnie Maluleke** was on duty on 26 March 2018 at Tzaneen LCRC.³ She received a cell phone which had photographs from L/Col Mathebula. She downloaded the photographs from the cell phone onto a computer and made a photo album. They were marked Exhibit 'LLL'. She conceded that the quality of the photographs was not clear.

[109] On 28 December 2017 **Ms Melvein Selowa** accompanied her husband Godfrey Mookamedi to Giyani town. They had gone to town for different errands- her errand was to do grocery shopping while her husband was to withdraw money towards lobolo. Around 10h00 she received a call from her husband requesting her to meet him in the car. Upon arrival at the car, he showed her a brown envelope containing R 31 000.00 (thirty-one thousand rand). He then placed the envelope in a bag and hid it underneath the driver's seat in the car. After doing other errands they proceeded home. On the way home, her husband indicated that he first needed to drop a bag of pigs feed at Hosi Mothomogolo's place. They proceeded to Mr Mothomogolo's premises and parked at the gate. Her husband got out of the car after he requested her to get the receipt for the purchase of the pigs feed.

[110] While she was looking for receipt for the purchase of the pigs feed, she saw on the passenger mirror an unknown young man approaching on her side armed with a knife. That unknown male blocked the passenger door preventing her from alighting. She went on to the driver's side and it was then that she noticed that a second person held a gun pointed at her husband's head. The assailant who was armed with a knife came to the driver's side and ordered her to lie on the ground. That assailant put a knife on her neck and demanded the money. There was an assailant that she was unable to see who went to search the car and took items from the car. After the assailants took items from the car they went to a silver vehicle which drove off not before she saw the registration number of the getaway car to be CYY 804L. They got up and went to the car to check what was taken and discovered that the money was also taken, four cell phones, a tablet and her handbag with its contents.

³ Local Criminal Record Centre.

[111] After some time, she was contacted by the police to attend an ID parade. The first ID parade did not materialize. A second ID parade was then arranged. During the second ID parade the procedure to her. She was kept in one room before being taken to another. In that first room there were others but they were not allowed to discuss the cases and not told who to identify. She was then taken to another room which had photos on the wall and found a police officer who explained the procedure. She was informed that pictures which were on the wall were there for her to identify.

[112] She identified one picture and a photo was taken. She confirmed that it was her depicted in Exhibit 'HHH' photo 23. She further confirmed that it was her and her husband as depicted in Exhibit 'LLL' photo 3. She identified accused 6 in court as the person who allegedly held a knife to her neck during the incident. She confirmed that it was accused 6 depicted in Exhibit 'LLL' photo 3 standing between her and her husband. She explained in cross examination that the robbery incident took place on a sunny afternoon.

[113] She indicated that she had three occasions to observe accused 6 – (i) when she saw him in the mirror; (ii) at the time he went around the car to the driver's side and (iii) at the time the money was demanded. Despite being scared for her life, however she still looked at the accused 6's face which was imbedded in her mind. She indicated that the shape of accused 6's face and his body built (described as stout) were the features that enabled her to identify him. She reaffirmed that the police did indicate to her during the photo ID parade that the people who robbed her may not be in the photos. She remarked that accused 6's version that he was not present during the robbery as he was at Tembisa in Gauteng was not the truth.

[114] **Tshepo Godfrey Mookamedi** is Ms Selowa's husband. He related how the robbery incident took place and corroborated in essence the evidence of his wife except for few differences. He indicated that he had bought chicken feeds which he had to drop off at Tshikwarani Village before proceeding home. He parked his vehicle at the gate of the house where he had to deliver the chicken feeds and alighted. A silver car stopped next to his car and two armed assailants emerged from it. One assailant was armed with a firearm and the

other was armed with a knife. The assailant armed with a firearm placed it on his left temple while the other assailant placed the knife on his wife's neck and demanded the money. When he looked at the assailant that was armed with a firearm, he was slapped and instructed him to look down. A third assailant went to search the car and took the items. After taking all of the items the assailants got into a silver vehicle (a Ford Fiesta) and it sped off.

[115] He remarked that the firearm depicted on Exhibit 'DDD' resembled the firearm he saw the day of the incident. He confirmed that the photos on Exhibit 'LLL' depicted how the incident of the robbery took place. He stated that he did not attend an ID parade and due to passage of time and the fact that he was frightened during the incident he was not in a position to identify the assailants.

[116] **Constable Mufanadzo Mashila** testified that on 27 February 2018 he was on duty. He was requested to assist with the ID parade which was conducted by Sgt Shimange. He took photographs during the parade and compiled a photo album which was marked Exhibit 'HHH'. He explained that the photos were changed after each identifying witness was brought into the ID parade room. With each identifying witness the process was explained and was not told who to point out. He reaffirmed in cross examination that his role was to take photos while Sgt Shimange was responsible for changing the photo line-up. He stated that he did not assist with the compilation of the photos and on his arrivals the photos were already lined –up on the wall. He was unable to recall if Sgt Shimange explained to the identifying witnesses that the assailants may not in the photo line-up.

[117] **Mr Tumelo Mothomogolo** was home on the 28 December 2017 waiting for the delivery of chicken feeds from Mr Mookamedi. Mr Mookamedi arrived and he saw him alighting from his vehicle. He then saw two males who alighted from a silver Ford Fiesta. One assailant who was in possession of a firearm approached Mr Mookamedi while the second assailant who was armed with a knife approached Mr Mookamedi's wife who went to the driver's seat. He heard the assailants demanded money. Mr Mookamedi was assaulted several times by the assailant who was in possession of a firearm. A third assailant, who was the driver of getaway car alighted and approached Mr Mookamedi's vehicle and

searched the car together with the assailant who had a knife. The assailants took a brown envelope and a bag and returned to their vehicle which drove off. As the incident was unfolding he was taking pictures. He only left the house after the assailants drove away. He confirmed that he took the photos in Exhibit 'LLL' with a cell phone which were handed to the police. He indicated in cross examination that the incident took place at an estimated distance of ten to twelve metres from the window he was watching from. He stated that he had unobstructed view of the robbery incident unlike Mrs Mookamedi.

[118] **Warrant Officer Makhasela Nation Magasela** was on duty on 25 May 2018 and received a USB (universal serial bus) flash drive in a forensic bag with number FSC 636125 from Sgt Shabalala. The USB contained a video footage. Sgt Shabalala requested him to produce still photographs from the footage and to compile an album. He compiled the album and it was handed as Exhibit 'EEE.' On 30 April 2018 he received a DVD from Col Mathebula in a forensic bag with number PA 500020539J who also requested still photographs. He stated in cross examination that Col Mathebula did not explain to him why he wanted the still photographs. After making the photographs he returned both the USB and the DVD.

[119] **Sergeant Adolf Ndonga Matukana** was on duty on 6 January 2018 together with Sgt Khoza. He corroborated Sgt Khoza's evidence with regard to the events leading to the arrest of accused 2 and accused 6. There were slight differences in some instances. According to Sgt Matukana's testimony, after they joined the pursuit and were given the direction of the suspects, they came across officers Makhubele and Mthombeni who were chasing the suspects. One suspect dropped a green bag with Spar logo. He testified that together with Sgt Khoza they alighted from their police vehicle and chased the suspects into a certain homestead. The suspect appeared fatigued and collapsed on the ground still in possession of firearms. One suspect was in possession of a revolver and the other suspect in possession of a pistol (Berreta) with an obliterated serial number.

[120] The suspects were instructed to drop their firearms and they were arrested. After the arrest of the suspects, the community became violent and blocked the

paths of the police however they managed to contain the situation. They went to retrieve the green bag which was empty. The suspects were searched and three hundred and twenty rand was found in their socks and pockets. He confirmed that Exhibit 'DDD' depicted the firearms they found in possession of the suspects. He stated that accused 6 was in possession of the revolver and the pistol was in possession of accused 2. He gave testimony on the events of 7 January 2018 which led to the arrest of accused 5. He reaffirmed that he was the driver that day and had given chase to the Run X. During the chase, the driver of the Run X later identified as accused 5 fired randomly at the police. When they caught with the Run X the driver was outside the car and was bleeding. An ambulance was called for the driver as well as tow truck.

[121] He testified that the driver was treated at the scene by the paramedics and taken into custody. Accused 5 was informed of his legal rights. He confirmed that Exhibit 'CCC' depicted the scene. He explained in cross examination that on 6 they parked their police vehicle and chased the suspects on foot after the suspects ran into a homestead. He then clarified that the suspects lay on the ground because they were tired and they had been instructed to do so. The green bag was booked into the SAP13. He indicated that he recalled the type of clothing that the suspects were wearing. He reaffirmed that he did not lose sight of the suspects and the weather was sunny.

[122] He was confronted with the content of his statement in reference to the clothing, he conceded that he omitted to note in the statement that accused 2 did not have a top on. He was also confronted about his statement in reference to the manner the suspects were arrested (in that one was standing by the tree and the other was lying under a tree), he remarked that it may be the way he phrased it. He conceded that he did not mention in his statement that he found money from accused. He dismissed as lies accused 2's version that he was arrested at the homestead of accused 6. He remarked that there was no party going on at the homestead that accused were arrested from. He explained that the reason he gave chase to the Run X the following day was due to the information received that it was linked to the Spar robbery.

[123] He estimated the following distance between their vehicle and the Run X to be seven to ten metres. Accused 5 drew a firearm and shot randomly was when he was by the village and realised that the road was blocked. Accused 5 made a U-turn and faced their direction. He was unable to comment on Constable Khoza's version who testified that they were following the Run X when the driver took out a firearm and fired randomly. When asked if he shot at the Run X he indicated that he did not. He had no knowledge if other police officers shot at it. He testified that he did not notice any bullet holes on the Run X. He stated that the only injury he observed on accused 5 was on his head, not on his foot. He denied as untrue accused 6's version that he was home when the police accosted him and remarked that in fact accused 6's home was six kilometres away from where he was arrested. He reaffirmed that both accused 2 and accused 6 were informed of their rights after their arrest and given SAP 14 notice of rights. He remarked that accused 2 and accused 6 were searched twice- (i) first at the scene and (ii) second at the police station. He conceded that in his statement he omitted to mention what clothes accused 2 was having on his upper body.

[124] On 6 November 2017 Ms **Topisa Johannah Maswanganyi** was employed as a cleaner for Mabunda bottle store. On the day in question she received a call from Mavis Nkuna with a request to go to the bank to make a deposit. She was given an undisclosed amount of cash which was contained in a black plastic bag. An arrangement was made with one Vincent to transport her to First National Bank. They proceeded to the bank and upon arrival Vincent parked near the entrance. Ms Maswanganyi alighted from the car while she walked towards the entrance of the bank. Before reaching the bank entrance, she was bumped by an unknown male who instructed her to give him the money. While she was undecided whether to hand over the money, she noticed that the assailant was in possession of a firearm which was pointed towards her stomach. Fearing for her life, she handed over the plastic bag containing money.

[125] The assailant took the money and walked away. As the assailant walked away it was at that time that she noticed that there were other armed assailants on

her right and left sides. All three assailants walked away with the firearms pointed towards the ground. She screamed for Vincent who was busy closing the car windows alerting him that she has been robbed. Vincent ran towards her and she pointed at the assailants who were getting into a grey car. She was so frightened that she was unable to see. The employer was notified about the robbery. She conceded that it was for the first time to be sent to the bank for depositing.

[126] **Ms Mavis Tsakani Nkuna** is also an employee at Mabunda bottle store. Her duty was the collection of monies for banking purposes. On the day of the incident she collected all the monies from the bar lounge and the bottle store. She testified that she placed the money on the table. She counted the cash which was an amount of R 248 146.40 (two hundred and forty eight thousand one hundred and forty six rand and forty cents). She recorded the amount on a deposit book. She placed the money in a plastic bag and noticed that the plastic bag was transparent she then placed it in a black plastic bag. She called Ms Johanna Maswanganyi and informed her that she needed to go to the bank and deposit the money as per their boss's instruction. A short while later she received a report from Vincent who transported had Ms Maswanganyi to the bank that they were robbed. She indicated in cross examination that she recorded all monies in a business book. She indicated that she called Ms Maswanganyi in person contrary to the testimony of Ms Maswanganyi who said she was telephoned.

[127] **Mr Lucky Vincent Mabunda** was on duty as a driver employed by Mabunda liquor store. He testified that on the day in question he transported Ms Johanna Maswanganyi to the First National Bank in Giyani. He parked in front of the bank and Ms Maswanganyi alighted in possession of a black plastic bag. He then heard Ms Maswanganyi screaming. He ran to her and noticed that she was scared and was trembling and reported that the money was taken. She pointed at a silver grey Mercedes Bens 'C' class. At that moment he noticed one assailant entering into the car and it sped off. There were four occupants inside the getaway car. He sought the assistance of the community who chased the vehicle by foot. He also attempted to chase the vehicle. Upon noticing that

people were chasing them the driver of the getaway car forced an escape by means of side - swipe collision with other cars. He was only able to see the assailants' backs. He explained under cross examination that the Mercedes Bens was at an estimated distance of ten metres away from where Ms Maswanganyi was. He indicated that when Ms Maswanganyi requested to be accompanied to the bank there were a lot of people present. He conceded that he did not see the money inside the black plastic bag which was in possession of Ms Maswanganyi.

[128] On 1 December 2017 **Ms Eunise Basani Macevele** went to First National Bank in Giyani to cash cheques on behalf of Mninginisi Early Learning Centre. She appended her signature on the two cheques which she presented to a teller. The teller inspected the cheques and enquired about the whereabouts of the person who was regularly cashing cheques. She explained that the person was at home. The other signatories arrived at the bank and countersigned and left. She remained in the bank. As she had to wait after she was advised that the system's network was not working. Eventually she left after the bank closed at 16h00 and arranged to return on 4 December 2017.

[129] On 4 December 2017 she returned to the bank and approached the same counter that she had gone to previously. She presented the two co-signed cheques to the same teller who assisted her the previous occasion. The teller asked her to wait. She waited for about twenty minutes before she was called back to the counter. There was another customer at the counter nevertheless the teller counted the amounts and handed over R 20 000.00 (twenty thousand rand) and R 25 000.00 (twenty-five thousand rand) in cash. She left the bank and went to do errands then proceeded to Nedbank where she withdrew two thousand rand from her personal account. She boarded a taxi that took her to her village. She alighted and proceeded to her employment.

[130] She noticed a motor vehicle that drove opposite her direction and it turned and drove parallel to her. She had reached the gate of her employment when a male appeared and greeted her. The male asked for her bag. She grabbed the gate and the male attacked her by grabbing her bag and pushing her to the ground. She did not fall but was in a kneeling position. The assailant kicked her

on her back and the assailant produced a firearm which was placed on her neck. She was screaming. He ordered her to stop making noise and demanded her bag. The assailant pulled the bag from her shoulder causing the straps to break. The assailant took the bag with its contents. She noticed two other males and one had a firearm. The assailant that accosted her together with the two other males she had noticed all ran into the waiting vehicle and it sped off. She was not able to identify the assailant save to say that he was slightly taller with a lean built and light to dark complexion. She explained under cross examination that on 4 December she went to the same teller because she had been assisted by the same teller on the previous occasion so the process was going to be shorter.

[131] **Ms Patron Grace Hobyani** is Ms Macevele's colleague. She was on duty on the day of the robbery. It was around noon day when she noticed a white vehicle which was moving slowly at the same time she noticed a male who was walking near the fence. She observed that Ms Macevele was at the gate when the car stopped near her. The male who was walking near the fence grabbed Ms Macevele and dispossessed her of her bag. She with other colleagues heard her (Ms Macevele) screaming. They rushed to the gate in order to assist her but two armed males alighted from the white vehicle and ordered them to go back inside. Ms Macevele was on the ground. The assailants ran off with a small bag which had been in Ms Macevele's possession into the white car and it sped off. She described the male who attacked Ms Macevele as tall. She conceded that after they were ordered to go back they complied due to fear. It was put to her that according to Ms Macevele's testimony only one of the assailants that alighted from the car was armed, she remarked that two were armed.

[132] **Ms California Baloyi** is also a colleague of both Ms Macevele and Ms Hobyane. She corroborated Ms Hobyane in how the incident involving Ms Macevele took place. She testified that she was standing in the kitchen when she noticed a white car whose occupants looked around like people who were lost. She also noticed a male that had been standing by the corner approach Ms Macevele when she alighted from the taxi. When Ms Macevele was at the

gate of the school, the assailant who had a black firearm dispossessed her of the bag causing her to fall on the ground in a kneeling position. She observed the assailant kicking her colleague. She described the assailant as tall slim with coffee colour complexion. She noticed another armed assailant who alighted from the white car. At that stage as colleagues they came in order to assist Ms Macevele but were ordered by the second armed assailant to go back. It was put to her that according to Ms Macevele the firearm which was in possession of the assailant that accosted her was silver; she remarked that she was testifying on what she observed.

[133] On 28 November 2017 **Ms Tintswalo Mercy Ngwenyama** who is a treasurer at Mafumani High School was on duty. She travelled with her two colleagues Mr Manombe and Ms Makamu from work to First National Bank in Giyani. They were all travelling in Ms Makamu's vehicle. The purpose was to cash some cheques. She testified that upon arrival at the bank she approached a teller and handed over an endorsed cheque and received cash. She requested the teller to change R 500.00 (five hundred rand) into R 20.00 (twenty rand) denomination. She received the change in the sum of R 554.00 (five hundred and fifty-four rand) which she put inside an envelope and hid it inside her bra on the right breast. The rest of the amount in the sum of R 10 884.00 (ten thousand eight hundred and eighty-four rand) was placed inside her left side breast. She then moved from the teller and sat in the waiting area where she waited for her colleague Mr Manombe who was also inside the bank to complete transactions.

[134] Sitting nearby in the same waiting area was a male with a fair complexion who was wearing a red t-shirt who scribbled something on a piece of paper and left. She received a call from Ms Makamu who was checking if they were finished at the bank. After they finished and they left the bank and got back into Ms Makamu's car. They proceeded to Great North in order to pay for a bus on behalf of the school. They parked outside the premises of Great North on instruction of the security guards. Mr Manombe alighted and went into the premises. She and Ms Makamu remained in the car. She testified that after a short while they were accosted by two armed assailants. One assailant (i.e.

first assailant) got into the back seat while the other one (i.e. second assailant) was by the front passenger side. She described the assailant who sat next to her at the back seat as young; short with lean built of a medium complexion and was armed with a small silver firearm. He demanded money from her in isiZulu.

[135] Ms Ngwenyama initially lied to the assailant that she had no money until she was instructed not to play game. She then handed the envelope to the assailant who opened it, checked the contents and demanded the money she withdrew at the bank. The second assailant was described as dark in complexion was armed with a silver firearm with black part. A voice spoke in Shangaan (presumably the second assailant) identified her as the person who was in possession of the money. That assailant proceeded to put his hand inside her breast and took the money and they got into a silver car and it sped off. During the incident Ms Makamu was dispossessed of her cell phone, car keys. The police and the school were duly notified. She conceded that she attended photo identification but was unable to point out anyone.

[136] **Mr Mzamani Peter Manombe** is a member of School Governing Body of Mafumani High School who was in company of his colleagues on the day in question. They proceeded to the bank in order to cash a cheque for the payment of a hired bus on behalf of the school. He was quickly attended to and received six thousand rand. Afterwards Ms Makamu called to find out if they were finished at the bank and they indicated that they were done, Ms Makamu fetched them and they proceeded to Great North bus services. Ms Makamu parked outside the premises as instructed by security. He went inside the company to pay for the bus as he was in possession of the funds. After making the payment he went back to the car and received a report that his colleagues have been robbed.

[137] **Sergeant Mulalo Ramashia** is stationed at Booyesen Police Station and was involved in the Booyesen matter. He confirmed that it was his signature on accused 3's notice of rights marked Exhibit 'TTT'. When asked to explain the connection between accused 3 and Bongani Mnikazi he indicated that after the arrest of Bongani Mnikazi he was interviewed and reported that he received

information from Shaun Khumalo. He stated that the exact nature of the information was not indicated. Under cross examination it was refuted that accused 3 gave any information to Bongani Mnikazi, he remarked that he had no comment save for what Bongani had alleged.

[138] On 23 December 2017 **Mr Fumani Mathebula** went to withdraw money in the sum of R49 900.00 (forty-nine thousand nine hundred rand) at First National Bank in Giyani. After receiving the money, he proceeded home. He was accompanied by his friend Mhlamulo Baloyi. On arrival home he parked his vehicle at the gate. He hooted to alert someone to open the gate for him. He noticed a white Rio Kia which parked behind his car. Three males alighted quickly from that car. One armed assailant approached his window while the other approached the passenger side. The assailant pointed him with a firearm and demanded that the door be opened. He activated a central locking mechanism which opened all the car doors.

[139] The armed assailant insulted him in an unrefined Tsonga and demanded the money. He handed the money to the assailant who was next to him without looking at him who moved back. He testified that there was another assailant approached the car and took their cell phones. All the assailants retreated back to their car and it drove off. He was unable to describe the firearm which was pointed at him save to indicate that the firearm had faded paint and the one depicted in Exhibit 'DDD' photo 4 resembled the assailant's firearm. He conceded in cross examination that he attended ID parade where he was unable to point out anyone in the line- up.

[140] On 7 December 2017 **Ms Mapule Lucia Rasoko** went to Standard Bank Giyani to withdraw money. The bank was not busy and was attended by one teller that she informed that she wanted to withdraw R 60 000.00 (sixty-two thousand rand). The teller queried her on where she got such a huge sum of money from and what was she going to do with it. She explained that it was proceeds of her pension and was going to use it to pay builders in cash. Appeased by the explanation the teller asked her to wait while she verified the information. She was there to withdraw R 62 000.00 (sixty-two thousand rand) so she waited for two hours eventually the teller called her back and handed her the requested

sum. The teller counted it which caused Ms Rasoko some security concerns. She took the money, placed in a bag and left the bank. She went to buy food before she boarded a taxi home. She noticed that the taxi was being followed by a white sedan.

[141] When it was her turn to alight, she noticed the very same car. She crossed the road and noticed that the same car made a quick turn. While she was greeting the driver of the lorry which was there to deliver timber she was accosted by an unknown male who grabbed her bag. They fought over the possession of the bag until the assailant fell after she grabbed his one leg. Two other armed assailants came to assist the assailant she was fighting with. A shot was fired in the air. She got frightened and let go of the bag. The assailant she was fighting with took possession of the bag while another assailant pointed a gun at the lorry driver to prevent him from assisting her. All three assailants went back to their car and it drove away.

[142] On 4 January 2018 **Michael Makepisi Rasesepa** accompanied Mr Mulaudzi to First National Bank in Giyani who withdrew forty thousand rand. He testified that after getting the money Mr Molausti handed to him twenty thousand rand to carry. Mr Mulaudzi had hired one Joseph Raseropo to drive him to the bank. After leaving the bank they first proceeded to the filing station before heading home. On the way home they gave a lift to Raseropo's uncle. After dropping off Raseropo's uncle at his home they were driving off and they noticed a white sedan that almost collided with their vehicle. He testified that they drove to Mr Mulaudzi's house and upon entering the house he handed over the cash to Mr Mulaudzi. As he was putting chairs on the veranda he heard a warning by Raseropo and noticed three assailants who demanded the forty thousand rand. The first assailant pulled a silver firearm and pointed it at his forehead; the second assailant had a knife. The third assailant who stood a distance away was armed with a firearm. He testified that he managed to push the assailant who was in possession of a knife away using a chair and he ran away. He hid behind a heap of wood.

[143] He observed the assailants assaulting the Mulaudzi. A shot was fired. This prompted Mr Mulaudzi's wife who had been cooking to come out of the kitchen.

The assailants casually walked away. He testified that upon the assailants walking away, he went to check on Mr Mulaudzi and found him lying on the floor full of blood. Together with Mr Mulaudzi's wife they took Mr Mulaudzi to the clinic where he received medical treatment. Afterwards Mr Mulaudzi reported that he has been robbed. He described the assailant who stood a distance away was slim, tall and light in complexion. He indicated that the firearm that was pointed at him looked similar to the one depicted in Exhibit 'DDD'. He conceded that the incident happened quickly.

[144] **Mr Christiaan Johannes Koekemoer** is an investigator for Bidvest that is contracted to Nedbank. On 17th January 2018 he received a request for a video footage from the police. The following day he went to Nedbank where he downloaded the requested footage on a DVD and jet flash using a code to gain access to the system. He testified that he was the only person who had the code to download footage. He confirmed that Exhibit 'GGG' depicted Giyani Nedbank. He agreed that he knew the details of the date and charges after he was given section 205⁴ document which gave details of the dates and charges.

[145] **Mr Phetule Joseph Raseropo** had accompanied Mr Mulaudzi on 3 January 2018 to withdraw money from First National Bank in Giyani. He testified that while Mr Mulaudzi went inside the bank, he was around the shopping centre. Mr Mulaudzi came back and reported that he was told to return the next day as there was no money. The following day again he accompanied Mr Mulaudzi to the bank and that day they were joined by Mr Michael Rasesepa. After withdrawing the money, they drove back home and on the way home he gave a lift to his uncle and drove him home. When driving out of his uncle's premises he noticed a white sedan. They proceeded to Mr Mulaudzi's home. Upon arrival at Mr Mulaudzi's home, Mr Rasesepa and Mulaudzi got inside while he remained in the veranda.

[146] He then noticed three young men approaching the house who gestured that he must keep quiet. The one who was slim and light in complexion drew a firearm. Another who was dark in complexion and stout took out a knife. He could not see the weapon that the third assailant who was dark in complexion had in his

⁴ Criminal Procedure Act 51 of 1977.

possession. He testified that he called out a warning to Rasesepa and he managed to leave the veranda. The assailants left Mr Mulaudzi's house and got into a white vehicle. The assailant who had a light complexion fired a shot. Mr Mulaudzi came out of the house and noticed that he was bleeding profusely and was taken for medical treatment. Later Mr Mulaudzi reported that he was robbed of twenty thousand rand. It was put to him that he failed to mention that after leaving the bank they first went to the filing station, he conceded. He further conceded that there was nothing strange about the white vehicle he noticed near his uncle's place.

[147] **Ms Adele Van der Merwe** left her house on 21 January 2015 to do her morning run. She left the house around 8h00 and returned around 9h15. Before leaving the house she made sure that it was securely locked. On her return she realised someone was inside her house. She retreated and called 10111. She waited until the arrival of the police. She discovered that someone broke in and stolen some items. One of the items which were stolen was her husband's revolver with ammunition which was kept in the safe.

[148] **Mr Petrus Stephanus Van der Merwe** testified that his licensed 357 Magnus revolver with ammunitions was stolen when his home was broken into. The serial number of his firearm was MD 770507. He positively identified a revolver which was in the exhibit bag as his firearm by means of a broken handle which was caused when he dropped it. He conceded that he was not in a position to confirm that it was his firearm.

[149] **Dr Frans Stephen Rahube** testified that during the period December 2017 to January 2018 he was commuting between Thohoyandou and Shayandima using his Toyota Hilux double cap with registration CYY 804 N.

[150] During November 2017 **Ms Sheila Sodi Maphogole** left her residence and drove to Giyani in order to withdraw money at Standard Bank. She withdrew R 5000.00 (five thousand rand) from an ATM before proceeding to the bank. She joined the queue for tellers. Upon reaching the teller she was assisted by a male teller. She informed the teller that she wanted to withdraw R 24 000.00 (twenty-four thousand rand). She was advised that the requested amount was

not immediately available. She left the bank. After thirty minutes she returned and was assisted by the same teller who then gave her the requested amount. She left the bank and drove straight to her home. She got inside her living quarters and locked the door. She saw through the window a black Toyota Yaris. She hid the money in a special hiding place.

[151] She opened the door intending to go back to work. She noticed a white Ford. She observed that the door of the Ford was opened and then closed. The car left. A short while later a tall male with a light complexion appeared from the right side. He instructed her in Sotho to go back inside her quarters. When she went inside the male pushed her onto the bed and said he wanted the money. A second male described as stout and dark in complexion arrived and spoke in Tsonga and also demanded the money. The second assailant who spoke in Tsonga was armed with a firearm which he placed on her temple. A third assailant appeared who was dark and stout also entered the room. Initially she told the assailants that she had no money and handed to them her bag. The assailants searched her bag but found no money. She changed her story and said the money was in the car. One assailant went to search the car and found no money. Upon finding no money the assailants threatened to kill her and she relented and gave them the money. After quickly counting the money the assailants left the quarters locking her inside.

[152] She first peeped through the window and one assailant threatened her. She left the window and hid behind a cabinet. She then heard the car driving away. The assailants took her phone and the room keys. She went back to the window and shouted for help and people came. She was able to send someone to fetch her spare room key. She conceded that she felt scared and that she could not recall what the assailants were wearing.

[153] On 22 December 2017 **Mr Dallah First Ngulele** drove to Standard Bank in Giyani to cash a cheque in the sum of R34 128. Upon arrival in Giyani, he parked the vehicle and went into the bank. At the bank he approached a teller and handed him a cheque who then processed it. After the money was counted it was placed inside a bag and handed over to him who returned to his car. He placed the bag containing money next to him and drove back to work at section

'A' Vahlavi Complex. He parked at the designated parking within the complex. He noticed a white sedan which drove into the complex but did not pay any attention to it thinking that it was a customer.

[154] Mr Ngulele alighted from his vehicle and walked into the passage in possession of the money. When he was two paces from the entrance, he felt someone pulling his work clothes from behind. This person placed a gun on his forehead, gestured to him to keep quiet and come with him. They walked back towards the door. Near the door, it was then that Ngulele noticed two other armed assailants. One assailant was in possession of a gun and the other in possession of a knife. Upon realising that his life was in peril, he threw the bag full of money and cell phone on the floor and screamed. He observed one assailant picking up the items from the floor thereafter all three assailants fled the scene. He described the three assailants as follows- the first was tall, medium built with a slightly dark complexion, the second was light in complexion, thin and almost similar height as the first one, the last was dark in complexion, with a slightly smaller body built. He identified one of the assailants on Exhibit 'UUU' photo 2 as the one who placed a firearm on his forehead.

[155] On 22 November 2017 **Mr Hlengani James Sithole** drove to First National bank Giyani in order to withdraw forty thousand rand. Upon arrival at the bank, he approached a teller and requested the required amount. On the request by the teller, he handed over his bank card and identity book. Sithole was instructed to wait while the transaction was being processed. He waited for approximately fifteen to twenty minutes before being advised by the teller that she was struggling with network. He went back to sit and waited for another fifteen to twenty minutes before being called and given requested the cash. Sithole placed the cash inside the t-shirt he was wearing and left the bank. He proceeded to his car and drove home. He parked his vehicle and was in the process of alighting from the car when he noticed a blue car with three occupants stopping next to him. He initially thought it was customers for his spaza shop.

[156] Two of the occupants alighted from the car and one of them pointed a firearm on his fore head. He testified that the one who pointed him with a firearm was

tall, thin with light complexion. The second assailant put a knife on his side. They demanded the money and grabbed the t-shirt and the money fell down. They took his cell phones, car key, identity book, bank card and money before fleeing. He first composed himself before taking another car and going to the police station to report. After reporting the incident at the police station he proceeded to the bank to make a report.

[157] **Sergeant Edward Walter Makhubele** is stationed at Giyani attached to the K 9 unit. On 6 January 2018 he was on duty working with Warrant Officer Mthombeni patrolling around Giyani. He heard an explosion before noticing a white car that was being driven at a high speed. A blue car appeared and the occupants from the blue car reported that the white car just robbed Spar. On receiving the report, they pursued and asked for back up. The suspects fled until Homu Village. During the chase the suspects' car stopped and two of the suspects alighted from the car armed with firearms and ran on foot. He chased the suspect on foot. One of the suspects had a green Spar bag. At the time the suspects ran into a certain yard back up had arrived. The suspects were cornered and instructed to surrender their firearms which they did. Both suspects were apprehended and searched. R320 was found in their possession. The suspects were identified as accused 2 and accused 6 they were arrested. He testified that accused 2 was in possession of a Berreta with no serial number which was confiscated and accused 6 was in possession of a revolver with three bullets which was confiscated.

[158] He confirmed that the firearms depicted in Exhibit 'DDD' were the ones confiscated that day. He testified that he did not have a chance to get the details of the person in the blue car that made a report about Spar robbery. He indicated that one of the suspects threw away the green bag. It was put to him that accused 2 was arrested at accused 6's home, this was refuted. He stated that when accused 6 was arrested he was clothed. He reaffirmed that the legal rights were explained to both.

[159] **Mr David Noza Maswanganyi** testified that on 22 December 2017 he sent one of his managers Mr Ngulele to cash a cheque. Later he then heard a scream and went outside to check what was happening. He found Ngulele lying on the

ground who reported that he had been robbed. A case was opened and police took their statements. The police viewed the video footage and requested the footage which was downloaded and handed over to the police in a USB. He confirmed that he was familiar with photos depicted in Exhibit 'UUU'

[160] On 23 December 2017 **Mr Hlamulo Baloyi** was in company of Mr Fumani Mathebula who wanted to withdraw money from Giyani First National Bank. Mr Mathebula went inside the bank and returned with the money contained in a bag. They had been travelling in a BMW when Mr Mathebula's wife wanted to use the car so they swapped the BMW for the NP 200 bakkie. The money was placed under the driver's seat in the bakkie and they drove to Mathebula's home. On arrival while waiting for someone to open the gate, a white Kia approached at a high speed and parked behind the bakkie. A person alighted in possession of a firearm and stood in front of the bakkie while another approached on the passenger side.

[161] A second assailant ordered them to open the car doors. He complied but Mr Mathebula did not open the door. He testified that the assailant dragged him out of the bakkie who forced him to lie on the ground and stepped on his head. Mr Mathebula did not open the doors immediately until the assailants threatened to kill him. Thereafter he heard sounds of slapping indicating that Mathebula was being assaulted. The assailants made a demand for money. He attempted to change position by turning the head but the assailant who was the driver of the get-away car insulted him and instructed him to look the other way which he did. A few minutes he heard the Kia being driven away. The assailant took the keys to the bakkie, their cell phones and the two hundred rand note that had been tucked behind the cell phone and the money that Mathebula had just withdrawn. They stood up and ran into the house and make a report. The police were called. He described the assailant who remained in the Kia as having a bald head with a dark complexion.

[162] **Ms Basani Forget Makamu** was the driver of the car that transported Mrs Ngwenyama and Mr Manombe to the bank. After dropping the two colleagues at the bank, she proceeded to a stationary shop to pay. After paying she waited a little while until she was called by Mrs Ngwenyama who reported that they

were done. She went to pick them up from the bank and the three of them proceeded to Great North Transport in order to pay for a bus service. Mr Manombe alighted while she remained with Mrs Ngwenyama in the car. She observed two males who were crouching near the car. One male opened the driver's door while the other opened Mrs Ngwenyama's door. They were pointed with firearms and the assailants demanded money. She offered the assailant who pointed her with a firearm on her neck the car and remarked that she had no money. Initially Mrs Ngwenyama denied that she was in possession of money until the one assailant who stood next to her insisted that she had it. Mrs Ngwenyama handed the money over, while the same assailant put his hand inside her chest to take the money. The assailants fled taking the victims' car keys.

[163] The State utilised the provisions of section 236 of the CPA and handed into evidence the statements of the following witnesses —

1. Tinyiko Shirinda as Exhibit 'WWW';
2. Violet Rikhotso as Exhibit 'XXX';
3. Awelani Mashila as Exhibit 'ZZZ'
4. Violet Rikhotso as Exhibit 'AAAA'
5. Violet Rikhotso as Exhibit 'BBBB'
6. Awelani Mashila as Exhibit 'CCCC'
7. Violet Rikhotso as Exhibit 'DDDD'

[164] **Warrant Officer Rhulani Thelma Shimange** is a lecturer at SAPS Academy. She testified that on 22 February 2018 she was requested by Captain Bopela to conduct a photo ID parade and furnished her with photographs. Captain Bopela also indicated who the suspects were. Pursuant to the request, two photo ID parades were held on 27 February 2018 at different times. Afterwards she completed the ID parade form. She explained that the content in each form

reflected what occurred during each identification parade. On the parade form marked Exhibit 'HHH' regarding the difference in handwriting, she explained that she completed the whole form herself however she used different pens. She confirmed that the signature appearing on the form was hers. She proceeded to read the content of Exhibit 'HHH' into the record. She testified that during the photo identification, she kept changing the order of the photographs after each identifying witness was done. The first identifying witness was Mr Johannes Malema who took three minutes to point out suspects Nkuna, Shamase and Mabunda.

[165] She stated that Mr Melvin Silowa was the identifying witness in the second photo ID parade who positively pointed out the suspects. She conceded that she was familiar with Judges Rules and there were ten photographs which were furnished by Captain Bopela. She conceded that she did not delete some portion. She indicated that Ms Rachel Mohale positively pointed out Mabunda as depicted in photos 21 and 23.

[166] **Sergeant Nancy Mashimpye** testified that on 27 February 2018 she assisted in a photo ID parade after she was requested by W/O Shimange. Her involvement was to escort witnesses to the parade room. She explained that W/O Shimange would announce the witness she wanted and her duty was to shout the name of the requested witness who will be escorted to the parade room. She stated that she was unable to see into the parade room. The witnesses in the waiting / guard room were quiet.

[167] **Constable Emily Baloyi** assisted in the photo identification parade that was held on 27 February 2018 after she too was requested by W/O Shimange. She testified that her duty was to receive witness once they were done in the parade room. She testified that she knew that the witness was done in the parade room and was ready to be escorted when the parade door was opened. She indicated that she was not able to see inside the parade room and she did not speak with the witnesses while escorting them.

[168] **Sergeant Rirhandzu Lilian Baloyi** also assisted in the photo identification parade which took place on 27 February 2018 after W/O/ Shimange requested

her. Her role was to guard the witnesses who were finished in the parade room escorted by Constable Emily Baloyi. Constable Baloyi would knock on the door upon opening the door the witness would enter the room. She testified that she was guarding the witnesses in one of the offices

[169] On 6 January 2018 **W/O Hlayiseka Charles Mthombeni** was on duty working with Sgt Makhubela patrolling within the vicinity of the Giyani Magistrate Court. They heard a gunshot coming from the direction of Mopane Spar. Soon thereafter a white Hyundai was observed driven at a high speed passed them being pursued by a blue car. The blue car stopped and the occupant(s) in the blue car made a report that the white vehicle had just robbed Spar. They pursued the white Hyundai. They called for back- up using the police radio. The Hyundai took the direction to the village called 14. He testified that the Hyundai stopped briefly allowing two passengers who were armed and in possession of a green bag to alight then it continued driving at a high speed. Sgt Makhubela climbed out of the police vehicle and chased the suspects on foot. The suspects ran until the edge of the village which was full of bushes however he managed to block the suspects from running into the bushes using the police vehicle. The suspects then jumped over the fence into a certain yard with Sgt Makhubela in close pursuit. At that moment Sgt Matukana and Sgt Khoza arrived as back-up and the suspects were cornered and instructed to surrender the firearms they had in their hands. The suspect called Mabunda (identified as accused 6) had a revolver with serial number ND 770507 which had three bullets and the suspect called Shamase (identified as accused 2) had a pistol.

[170] When the two suspects were searched money was found in their socks. Sgt Makhubela retrieved the green bag with Spar logo. The incident drew the attention of the villagers who demanded that the suspects be handed over to them to assault. The suspects were arrested and taken to the police station. He was cross examined extensively. He testified that the green bag was booked into the SAP 13. He was asked to describe the fence and he indicated that it was a wire fence. When he was informed about accused 2's version his remark was that it was a lie.

[171] **Let/Col Christaan Mangena** received exhibits for analysis in a sealed evidence bag with serial number FSC 636115. The exhibits comprised of .357 Magnum calibre revolver with an obliterated serial number; a 9mm Beretta pistol with an obliterated serial number; three fired revolver cartridge cases; three revolver cartridges. On 14 February 2018 he examined both the revolver and the pistol and found that they both functioned normally without any defects and found insufficient markings on the cartridge cases to be able to say conclusively that they were fired from the revolver. He was able to extract the serial number on the revolver after using an etching method. The exhibits were kept under his custody and locked until 19 February 2018. He noted his findings in a ballistic report compiled as a statement in a section 212⁵ which was marked Exhibit 'NNNN'. When shown Exhibit 'DDD' he confirmed that the firearms depicted therein were the ones he examined. He testified in cross examination that the serial number on the revolver though obliterated it was on the surface where else the pistol the serial number was completely removed and despite using etching he was unable to extract its serial number. He explained that the Giyani Cas number 79/1/18 mentioned in his report he obtained such number from the covering letter which came with the exhibits.

[172] **Sergeant Tintswalo Doreen Mapindane** assisted in the ID parade which took part at Giyani Police Station on the 27 February 2018 after she was requested by Sgt Shimange. Her role during the ID parade was to guard the witnesses who were inside the room that was allocated to them. The witnesses did not speak to each other and she also did not speak to them. She explained that Sgt Mashimpye would knock on the door and would call out the witness's number and she would open the door and the witness that was being called would stand up and follow Sgt Mashimpye. She was unable to recall how many witnesses took part in the ID parade. She stated that from the guard room she was unable to see the ID parade room and also did not know who the suspects were. She indicated in cross examination that she was not informed whether there were any suspects taking part in the ID parade. She testified that she could not see the actual parade room. She also was unaware that it was a photo ID parade.

⁵ Of the Criminal Procedure Act 51 of 1977.

[173] **Sergeant Nkensani Sithole** is the former investigating officer of Makwakwaila Cas 115/2/2018. On 22 February 2018 he had a meeting with W/O Shimange and Captain Bopela wherein a decision was made to arrange for a photo ID parade. This followed the realisation that the modus operandi of the various robberies were similar where people who withdrew substantial amounts of money would be followed home. He got in touch with Sgt Shabalala who was investigating a similar case. He then made the arrangements for the ID parade which included contacting the witnesses and explaining the process to them. The ID parade was held on 27 February 2018 he was absent. He testified that the witnesses were transported from home to the parade by Sgt Ngobeni who had no knowledge of the identity of the suspects. He also did not know the identity of the suspects in his case and in the case that Sgt Shabalala was investigating. He explained that the docket reflected that the suspects were unknown. It was after the ID parade that the suspects were arrested. He explained in cross examination that to his recollection three suspects were involved.

[174] He testified that later on he handed the docket over to Lieutenant Colonel Mathebula. He reaffirmed that he did not know how many suspects were going to be in the ID parade and the number of photographs. He conceded that he had no knowledge on how the photographs were selected and by whom. When asked to elaborate on the meeting he had with W/O Shimange, he stated that the purpose of the meeting was in order to request W/O Shimange to assist in the ID parade after it was explained that it was going to be a photo ID parade. He explained that the Commanders had the photographs and he did not see them. It was put to him that W/O Shimange had testified that the witnesses were informed that some of the suspects could be among the photographs; he remarked that such an instruction was standard (norm) which must be given to witnesses. He denied that the identity of the suspects was known before the ID parade.

[175] **Captain Semathwane Jockonea Bopela** was the investigating officer of Bolobedu Cas 188/12/2017. He testified that he was aware of the meeting that took place on the 22 February 2018 in which arrangements for an ID parade

were made. He made arrangements to be part of that ID parade following a report from Sgt Shabalala that there were suspects who were arrested. A photo ID parade was arranged after receiving report from Sgt Shabalala that the suspects were refusing to participate in an ID parade. He then requested W/O Shimange to assist in the parade who agreed. The ID parade was arranged for 27 February 2018 and he was present at Giyani. Since there were no suspects in the case he was investigation, he decided to approach the witnesses and enquired if they were in a position to identify the suspects. One witness, Mr Malema, indicated to him that he would be able to identify the suspects. He then requested his colleague Constable Letsie to fetch Mr Malema for the ID parade which was done. He stated that he had a suspicion that the suspects in Sgt Shabalala's case were also involved in his own case.

[176] Prior to holding the photo ID parade, the suspects' photographs per Exhibit 'HHH' were reportedly obtained from the National Photo Image System and distributed during a police provincial meeting that he attended which took place in Polokwane. He handed the photographs to W/O Shimange a day prior to the photo ID parade. It was only after the photo ID parade was held that he learnt that suspects were identified. During cross examination he indicated that he did see when Mr Malema was taken to the identification room but denied that he spoke to him. He conceded that he was present at the police station on the day (the photo ID parade was held) but maintained that he did not speak to the witness Mr Malema.

[177] He testified that it was W/O Shimange who decided on the number of photographs depicted in Exhibit 'HHH'. He explained that he first obtained the suspects' photographs before approaching the witnesses but he did not show the photographs to the witnesses. He conceded that he was not familiar with the rules governing ID parades hence he requested assistance from W/O Shimange. He stated that he had never conducted a conventional ID parade. He was unable to say why W/O Shimange found ten photographs in the ID parade to be sufficient. It was put to him that the number of photographs in the ID parade was insufficient which affected the evidential weight thereto; he remarked that it was for the court to decide. It was put to him that he was under

pressure to arrest; he remarked that it was important for Provincial to find a solution.

[178] **Mr Martinez Stephanus Els** is an investigator for the British American Tobacco Company (BAT) who obtained photo 12 Exhibit 'FF' from the Forum which was constituted for information sharing which he attended. He took the photo 27 to his office for purposes of comparison from the data base of suspects which comes from intelligence gathering of suspicious individuals around BAT business. He found a match with a name of Vusi though he at the time could not recall the surname. He gave the information to Ms Maureen Coetzee. During cross examination he conceded that he did not take the photograph himself and did not know who took it. He indicated that he was not informed why the photographs were taken.

[179] **Captain Mzamani Rodgers Khanye** testified that he took down statement of accused 2 and confirmed that the signatures that appeared at the bottom of annexure 'A' was his and that of accused 2. He told the court it was accused 2 who appended the name Sbu as the signature. He explained that content of the statement came from accused 2 which was written down. During cross examination he testified that on the day he took down the statement he had eyesight problems which caused him at times to lose sight and to regain it. It was put to him that the information on Exhibit 'PPPP' was not in accordance with the state's case; he remarked that what was contained therein (Exhibit 'PPPP') was what accused 2 related. It was put to him that it was highly improbable that accused 2 would have self-incriminated himself, he stated that what he wrote down was what the suspect related to him.

[180] Ms **Maureen Coetzee** with the leave of the court was recalled twice. On the first instance she was recalled, she gave testimony in order to lay a basis for new evidence in respect of Exhibit 'NNN' and Exhibit 'OOO'. She explained that she saw both exhibits by chance on 1 November 2019 on the table in the office of the prosecution after she finished with her initial testimony and was excused by the court. She stated that upon seeing the photographs she made enquiries about the cases that the suspect depicted on those photographs was linked in. She was given a report by Sgt Shabalala that the suspect was never identified.

She knew the suspect well and disclosed to Sgt Shabalala that the suspect was convicted for bank following. In cross examination it was put to her that her involvement in the matter was completed, she conceded to that. She expounded further on her latter involvement which was after she identified the suspect on the exhibits and explained that it was in her job description to make a follow up. She indicated that she was aware of other bank following incidents which took place in Limpopo that did not involve ABSA Bank.

[181] On the second instance Ms Coetzee was recalled, the video footage was played in court. She went through the footage explaining in detail what was depicted on the actual footage in comparison to Exhibits 'OOO'; 'GGG'; 'KKK'; 'MMM'; 'NNN'. She testified that she received three discs from the prosecution containing video footage. With the assistance of Sgt Shabalala she was able to identify the victims depicted on the footage and she was able to identify the suspect on the footage as Velaphi 'Veli' Mathebula. She stated further that she copied onto her flash drive the footage. The flash drive was then copied onto an external hard drive. The flash drive was put in a forensic bag with serial number 00182006205969. She then made still photographs from the footage. She concluded that the suspect Veli Mathebula's role on the footage was that of a 'spotter'.

[182] Ms Coetzee was then shown Exhibit 'VVV' and she testified that Sgt Shabalala had requested her to identify individuals depicted on Exhibit 'VVV'. She identified a lady as Lindiwe Madi who was accused 2's girlfriend. She indicated that she interviewed Ms Madi. She was cross examined extensively. Her conclusion that Veli Mathebula acted as a spotter was challenged. She testified that based on her experience, his behaviour was strange in that he was with the teller for only fifty-seven seconds which was too short to transact. She also conceded in relation to Exhibit 'GGG' per photo 9 and 10 that she was not in a position to say what happened after the suspect and the victim exited the bank. It was put to her that the footage revealed that the queue was long and everyone in the queue was restless, she disagreed. She testified that according to her the lady depicted on Exhibit 'VVV' was the same lady she found in SOWETO who identified herself as Lindiwe Madi.

[183] On 10 January 2018 **Warrant Officer Moses Chauke** made arrangements for an ID parade after he was requested by Sgt Shabalala. Other than the information that the suspects were facing robbery charges he had no other details about the matter. On arrival at Giyani Police Station that day, he met the suspects named Calvin Mabunda, Sibusiso Shamase and Sticks Nkuna. He informed the three suspects of the intention to hold an identification parade on 12 January 2018. He further informed the suspects of their rights to have legal representatives present who advised him that they already had an attorney.

[184] On 12 January 2018 he was approached by an attorney who introduced himself as Mr Mnguni and they agreed to proceed with the ID parade. He testified that despite making arrangements, he was later advised by the attorney Mr Mnguni that the ID parade will not take place on instructions of his clients. After receiving the report from Mr Mnguni he approached the suspects in the cells to speak to them. Two of the suspects refused to participate in the ID parade with the exception of the suspect Mr Nkuna who indicated a willingness to participate. The investigating officer Sgt Shabalala later on was informed of the developments.

[185] W/O Chauke testified that the witnesses who were present in a room under guard were informed that the ID parade would not take place before they were released. He stated that from the room where the witnesses were kept, they were unable to see the suspects. He reaffirmed that he saw Sgt Shabalala after the cancellation of the ID parade. He conceded that after Mr Mnguni advised that the suspects were no longer going to participate, he went to the suspects in order to find out the reason why they were refusing to participate. He explained that the reason he approached the suspects was because Mr Mnguni did not disclose why the suspects were refusing to participate. It was put to him that the reason the suspects refused to participate was that their photos were taken using cell phone, he remarked that he had no such knowledge.

[186] It was further put to him that on the day of the identification, Sgt Shabalala was observed talking to the witnesses and showing the witnesses a cell phone, and he remarked that he had no such knowledge. When he was asked why he failed to proceed with the ID parade in respect of Mr Nkuna who was reportedly

willing to participate he explained that he was waiting for Sgt Shabalala to direct if the parade should proceed. He explained further that as he was unable to get hold of Sgt Shabalala in order to get approval from him to proceed with the ID parade, he cancelled it despite the willingness by Mr Nkuna. He conceded that he failed to explain Regulation 5 right to the suspects and explained that he would have explained it if the ID parade had proceeded.

[187] **Colonel Solani Gladys Mhlarhi** testified that during 2017 to 2018 she was part of the team that was investigating dockets Bolobedu Cas 121/12/2017 and Makwakwaila Cas 115/12/2017 dockets. The team was headed by the late Let. Col. Mathebula. During the investigation of the two incidents, the team obtained two video footages after she and the late Let. Col Mathebula met Mr Koekemoer on 13 April 2018 the purpose was to request for the footage which was in a format of two DVD. The footage was processed by W/O Mathebula from Polokwane Local Criminal Record Centre who produced photographs depicted on Exhibits 'NNN to 'OOO'. The two DVD were returned to the investigating officer Sgt Shabalala. She also testified that the team received information that someone identified as Larry Mogoloboto was in possession of a cell phone which was connected to the Makwakwaila docket.

[188] She stated that together with Let. Col Mathebula they arranged a meeting with Mr Mogoloboto which took place on 23 March 2018. During the meeting Mr Mogoloboto showed them certain pictures on a Hisense cell phone. Let. Col Mathebula confiscated the cell phone and handed it to the Local Criminal Record Centre at Tzaneen on 26 March 2018 in order to produce the pictures depicted on Exhibit 'LLL'. She testified in cross examination that the team was formed after it was noticed that there were different cases which had a similar pattern. She indicated that the cell phone after it was confiscated and the DVD were kept in Let/Col Mathebula's safe. She conceded that she was not present when the cell phone and DVD were placed in the safe however she was present when they were taken out of the safe.

[189] **Constable Redgewell Sizeka Rikhotso** is employed at SAPS as a communication officer with ten years and six months' experience. He testified that he received a subpoena calling upon him to verify the version that the

suspects' pictures were displayed in the media during the reporting of the matter. As a result of the subpoena, he proceeded to search for any article he could find. He managed to find an article (marked Exhibit 'SSSS') on the internet reported by Giyani Views dated 10 January 2018. He stated that the article did not have pictures of any suspects. He explained that the communication section of SAPS did not disclose any pictures of the suspects during January 2018. He explained that the policy followed by SAPS when reporting information to the media is that before a suspect appears in court, the only information on the suspect that is released is age and gender. After the suspect has appeared in court, further details that will be released are the suspect's name and the date of next court appearance. Only after judgment will the suspect's picture be released with the approval of the SAPS provincial office.

[190] In respect to this matter, he stated that he searched all known journalists around the area of Giyani and found no pictures of the accused. He testified further that during January 2018 the only local newspaper that he or his colleague was giving information to as part of SAPS communication section was Giyani Views. He indicated also that he was not aware of any other local newspaper in the area other than Giyani Views. He stated in cross examination that he extended his search for articles to three local newspapers- Giyani Views; Mopane Herald and Tzaneen Voice but only printed the Giyani Views. When asked to give a reason for printing the Giyani Views article, he explained that it was the only newspaper which was in existence during January 2018. He conceded that some of the information contained in Exhibit 'SSSS' was sent by his office to provincial office. He also conceded that he was not in a position to say whether there were journalists at court during the accused's appearance.

[191] **Constable Jeffrey Ngobeni** is a member of Giyani Local Criminal Record Centre and an official photographer and draftsman. He testified that as instructed, he took photographs of Giyani Police Station and drew the plans as well as the layout of the buildings. He also compiled a statement. He proceeded to describe what each photo depicted. He testified that he visited each of the seven cells which were similar. He reasoned that the cells were arranged in a similar manner hence he did not deem it necessary to

photograph each cell. He explained that he only took pictures of one cell which was number 4 in order to depict what the interior looked like. He stated that the structure of the cell building has never been renovated but remained the same from the time he was stationed at the police station in 2013.

[192] Constable Ngobeni described the condition of the cell windows as following- they were welded closed with no means of opening them, they had a total of three security layers - the two layers are mash bars and burglar bars as the top layer. He indicated that the windows were arranged in a manner that obscured visibility into the cell or out of the cell. He was asked how often he visited Giyani Police Station; he indicated that it was on the regular basis because of the nature of his duties. He reaffirmed that he would have access to all of the police station buildings. He conceded that the first layer on the window was thinner with smaller square design. He conceded further that the mash layer on the cell number 4 window was patched up. It was put to him that it was not possible to know the conditions of the other cell windows because he only photographed cell number 4, he remarked that all the cells were of similar condition. He informed the court that he stood inside the cell he was not able to see outside. He stated that the other cell windows were not patched up.

[193] The last witness called was **W/O Khazamula Robert Shabalala** who is stationed at Giyani Police Station and the investigating officer in the matter. In relation to Exhibit 'VVV', he stated that towards the end of November 2021 while Ms Maureen Coetzee was seated outside court, he showed her the exhibit and enquired if the male depicted in the photo was known to her. Ms Coetzee reported that the male was unknown but the lady depicted was known as Lindiwe Madi. She further reported that she met the female in SOWETO during the investigations and provided an address at 749 Ralebutse Street in Moletsane. Later that day he went to visit the given address but did not find anyone. He went back at least three times to this address but did not find anyone.

[194] W/O Shabalala testified next about the investigations pertaining to Giyani Cas 78/1/2018 and 79/1/2018. He told the court that on 7 February 2018 he booked out the exhibits (firearms and ammunitions) from the SAP 13. He took the

exhibits to Pretoria Forensic Science Laboratory for analysis. The serial number 636115 which appeared on the forensic report was in relation to the evidence bag that had contained the firearm. On 11 January 2018 he received the footage of the robbery at Giyani Spar from Robert Maswanganyi on a memory stick. The memory stick was also booked into the SAP 13 and then later given to W/O Mathebula in order to download pictures. The downloaded pictures were handed over to him (witness) for filing in the docket.

[195] On 18 January 2018 W/O Shabalala he received three DVD that contained footage of the Nedbank incident from Mr Koekemoer. The three DVD were also handed to W/O Mathebula who downloaded pictures. He positively confirmed Exhibits 'NNN' and 'OOO' as the pictures downloaded from the three DVD. He stated that they were the same pictures which Ms Coetzee testified about as having noticed in the office of the state counsel. Ms Coetzee identified one suspect as Velaphi Moses Mathebula who was also unknown until then. Ms Coetzee was given the three DVD who downloaded photographs marked Exhibits 'MMM', 'KKK', 'GGG' which were filed in the dockets.

[196] W/O Shabalala testified that he requested the assistance of W/O Chauke from Malamulele Police Station to hold an ID parade which was scheduled for 9 January 2018. The ID parade had to be cancelled because the suspects wanted the presence of their legal representatives. The witnesses were duly informed. The ID parade was rescheduled for 12 January 2018 however it was again cancelled because the suspects refused to participate. Another arrangement was made to hold the ID parade on 22 February 2018. Other than informing the complainant Mr Ngobeni and other witnesses, he played no other role and was not present at any of the arranged ID parades.

[197] W/O Shabalala testified that from February 2014 when he was stationed at Giyani Police Station the holding cell building was never renovated. He explained that only marked police vehicles were permitted to park in the area near the holding cells. It was put to him that accused 2 had no knowledge of the Moletsane address; he remarked that he was not in a position to dispute the proposition. He conceded that accused 2 was not depicted on Exhibit 'VVV'. He agreed that W/O Chauke did not inform him after the ID parade fell through

that he consulted with accused 2. He denied that he was seen at Giyani Police Station consulting with witnesses. When asked if he was in a position to give the condition of all the cells in Giyani Police Station, he conceded that he was not in any position to provide the condition of the cells. He conceded that he had no information if the cartridges found at Spar robbery was linked to the firearm. It was put to him that the male depicted in Exhibit 'VVV' was identified by Basani Makamu as the assailant who robbed her, he stated that he was not informed and denied that he was so informed.

[198] The State closed its case. There was an application for the discharge of accused in terms of section 174 of the CPA which was duly considered and dismissed.

[199] **Accused1** gave a brief personal background and told the court that he was self-employed. He was selling cool drinks and liquor from a container. He maintained that he was neither a part of nor managed any enterprise. He informed the court that he only knew accused 4 because they attend the same society club (stockvel) and the other co-accused were unknown to him. On 13 August 2013 he went with Malandani to Randfontein ABSA bank to get change for his business not to act as a spotter but decided to leave because the bank was full. After leaving the bank he went to buy food. On 23 January 2015 he testified that he was going to Turffontein and decided to go past Southdale ABSA Bank to pay for his satellite television subscription as it was on the way. He denied that he was involved in the robbery of Mr Momah. On 21 November 2015 he testified that he was at home and was not present at Kliprivier when Mr and Mrs Phele were robbed. They were falsely implicating him in the robbery.

[200] Accused 1 informed the court that the reason Mr Phele and Mrs Phele pointed him out in the ID parade was because they were shown pictures of him which the police took at the time of his arrest. He questioned the reliability of the identification made against him because Mrs Phele failed to mention his gold teeth. He indicated that during 2015 he owned A3 Audi, Golf 4 GTI, VW Caravelle and Honda Ballade. He denied that he knew Veli Mathebula who was depicted in Exhibit 'NNN'. He testified that it was possible that members of an

enterprise may not know each other. He denied that after arrest he pointed out accused 2's home. He was cross examined extensively. In cross examination he conceded that he was arrested with accused 4 and during the arrest police took pictures of both of them. He indicated that other than being told that the police wanted to check their vehicle, he had no knowledge why they were arrested. He testified that exhibit 'BB' was never shown to him and saw it for the first time in court.

[201] Accused 1 stated they went to the bank in order for accused 4 who was owing him money could withdraw money and pay him. Regarding the pictures which depicted Malandani exiting the bank twice, he explained that this was due to a call he received. He stated that he decided to go with Malandani to Mohlakeng as he was bored. When asked why he drove to Randfontein to get change for his business, he indicated that it was because he was in the vicinity (en route to Mohlakeng). It was put to him that a different version was put to the witnesses (that he went to Randfontein to get change for his business) not that he was there due to boredom.

[202] He attributed the difference in versions to personal issues which were causing him mental stress and to the fact that he disclosed to his counsel important instructions. It was put to him that it made no sense and he conceded that it made no sense to go to Randfontein to get change He conceded that his attorney was present during the ID parade where he was pointed out. He testified that he had raised a complaint with his attorney that there was no fair representation in physique in the line-up. He denied that he provided information to Col Kruger. He distanced himself against the allegations (preferred against him). The case for accused 1 was closed.

[203] **Accused 2** gave a brief personal background and informed the court that he was employed as a taxi driver. His working hours were from 8h00 to 20h00. He testified he was in a relationship with the mother of his children from 2011 and were staying together until his arrest in 2018. He informed the court that he knew accused 6 for approximately three years through their girlfriends who were siblings. On knowing his co accused, he testified that he met accused 1 and accused 3 in court, he met accused 4 in Johannesburg prison and he met

accused 5 in Giyani after he was arrested on 6 January 2018. He denied that on 3 May 2011 he was at Mabeskraal and indicated that Raymond Mosidi who identified him was unknown. He testified he saw him (Mosidi) for the first time in court. Regarding the partial print which was found on the post office door at Mabeskraal and alleged to be his, he stated that he had no recollection of being at that place.

[204] Accused 2 informed the court that he had no recollection where he was on 13 August 2018 however he insisted that he was never at Mrs Meyer's premises. He testified that during the period 4 to 8 December 2017 he was at Chris Hani Baragwanath Hospital after he was involved in a car accident and sustained bruises and scratches on the shoulder. Specifically, on 4 December 2017 when Ms Basani Macevele was robbed he was still in hospital. After he was released from hospital on 7 December 2017 he took his pregnant girlfriend to hospital to give birth. The baby was born premature. The mother and baby remained in hospital. He used to get up in the morning to visit his girlfriend and the new baby. He did this until his girlfriend was discharged from hospital on 17 December 2017. He continued to visit the baby until 29 December 2017 when also the baby was discharged from hospital.

[205] 4 January 2018 he travelled to Giyani with accused 6. The purpose of the visit was to attend a party. They travelled in accused 6's car and arrived in the evening. They slept at accused 6's home. The following day the festivities commenced. On 6 January 2018 he was outside in the yard with accused 6 who wanted to smoke when they heard people screaming and running followed by a shot. Shortly thereafter police officers appeared and arrested him. He was taken to the police station and detained. He was only informed about the reason for his arrest when he got to the police station. He testified that the witnesses made a mistake by identifying him for the robbery which took place at Giyani Spar. He maintained that no firearm was found in his possession. He insisted that he was never in Giyani during the robberies.

[206] Accused 2 testified that on 20 December 2017 he was in hospital visiting his new born baby and was not present when Mr Malema was robbed. He was unable to explain why Mr Malema pointed him during a photo ID parade. He

confirmed that on 12 January 2018 he together with accused 5 and accused 6 refused to participate in an ID parade. He informed the court that he was given a report that Sgt Shabalala was having a discussion with witnesses coaching them and showing them pictures. Upon getting that report, he tried to peep through the cell window to see for himself but by then Sgt Shabalala had moved away. He informed his attorney Mr Mnguni of this fact and the ID parade was cancelled. In cross examination, it was put to him that accused 1 used the same name of Malindi when referring to his girlfriend, he remarked that he had no knowledge why accused 1 used that phrase. He was cross examined extensively. Full cross examination is on record. He conceded that he also found it strange that he was implicated with accused 1. When questioned further on the reasons for his arrest he stated that police have a habit of framing people.

[207] Accused 2 conceded that after his case was withdrawn in Germiston Court, he was rearrested with Linda Mkhize. He indicated that he was transported from Germiston to Randfontein, on the way the police were conversing in English and Afrikaans which he did not understand. He insisted that he did not hear Linda telling him to exonerate him from the allegations and to tell police that he (Linda) was not involved. He stated that he was framed by Randfontein police as well as Giyani police. It was put to him that it was a new version that a shot was fired on the day of his arrest which was a fabrication; he remarked that it was the truth. He denied that he was present when Mr Mosidi and his wife were robbed. When asked to explain his finger prints at the Mabeskraal Post Office, he indicated that he has never been there. When confronted about being pointed out by Mr Malema and Mr Monama, accused remarked that the reason they were able to point him out long after the robbery was because they were shown his pictures.

[208] Accused 2 called **Ms Lindiwe Ignētius Madi** as his witness. She testified that accused was her boyfriend and biological father of her four-year-old son. He was also a father figure to two other children. During the period when accused was arrested, they were not staying together but visited each other. She was residing at Naledi while accused had his own room at Lufhereng. She testified

that from the time she met the accused she was working at South African National Blood Service as a professional nurse and the accused was working as a taxi operator. Due to the accused's working hours, he used to visit her on Sundays or if he was not busy he would spend three days with her. She told the court that during the period of 4 to 8 December 2017 the accused was in hospital after he was involved in a motor vehicle accident and sustained injuries in the ribs and suspected head injuries. She received a report from the accused's brother that he was discharged from hospital on 8 December 2017.

[209] On 12 December 2017 she started feeling sick as she was pregnant and had to be admitted to hospital. Her colleagues reported to the accused that she might be admitted and accused came with her to see her doctor who had to explain to the accused the medical issues. She underwent an emergency C-section. The baby was born prematurely suffering from respiratory problems. The last saw accused when he escorted the baby to the ICU. She and the accused took turns to check on baby. She remained in hospital until she was discharged on 16 December 2017. They continued taking turns to check on the baby even after she was discharged until the baby was discharged on 28 December 2017.

[210] Ms Madi testified that the accused was not comfortable to visit the baby at home due to cultural reasons. They arranged times when he came to see the baby which was for an hour or two. The accused visited the baby on 29, 30 and 31 December 2017 at her home. On 5 January 2018 despite promising to visit, the accused did not come. The following day she received a report that accused had been arrested. She had no knowledge why accused was in Giyani. She indicated that other than accused 2 the other co accused were unknown to her. She informed the court that on request from accused's family she obtained certain documents.

[211] Ms Madi recalled a night when police arrived at her home in Naledi looking for the accused. One police officer who introduced himself as Kruger was with a lady called Maureen. She had a chat with Maureen who wanted to know her name, occupation and details about how she knew accused. Maureen enquired from her if she knew a place called Lefhereng and when she replied that she knew the place, Maureen requested her to take the police to that place. She

voiced her concern about leaving the children alone at night, Maureen assured her that the children would not be left alone as there were police around the yard. She agreed to take the police to Lefhereng. Upon arrival she pointed out accused's home and they drove back. She was cross examined at length.

[212] The authenticity of Exhibit 'VVVV' was challenged in that the name Dr Nada was not registered with the Health Professions of Council South Africa and the reflected speciality of the doctor did not exist, she remarked that she had no such knowledge. When asked for what purpose was Exhibit 'WWWW' obtained, she stated that the accused's attorney Mr Mnguni had requested it for alibi. It was put to her that it made no sense to obtain an alibi document even before the accused was charged; she remarked she had no knowledge. From the court's question she related movements from 14 December 2017 until 28 December 2017 which was the day the baby was discharged accused was in hospital daily to perform a kangaroo mother care. The case for accused 2 was closed.

[213] **Accused 3** testified that he was single father of two children. He attended school until grade 12. Before his arrest on 17 February 2015 he was employed at Southdale ABSA Bank as a treasury and bulk teller. He denied that he was part of a gang. He further denied that he ever possessed a firearm and ammunition. He stated that Mrs Meyer made a mistake in identifying him as he has never been to Randfontein. He informed the court that he has never been to these places – Vereeniging, Rustenburg Sun City, Limpopo, and Giyani. He denied that he conspired with unknown people to rob Mr Momah. Mr Momah came to the branch to make a large withdrawal and was assisted by another teller Ms Nomathemba Nyembe. The bank policy or procedure on large withdrawal which exceeded available cash was that the bank required a notice of twenty-four hours. He made the required notice on Friday.

[214] On Saturday when the money was available, he advised M Nyembe of the availability of funds and to call Mr Momah. Ms Nyembe reported that she was going to pay Mr Momah on Monday. On Monday shortly after reporting for duty there was power failure and clients had to vacate the bank. The power failure did not last for long and when power was restored they resumed their duties.

Ms Nyembe who was the front teller reported that Mr Momah was there to make the withdrawal. She processed the transaction on her system before approaching him to request the use of the bulk area to make the payment which was two hundred thousand rand for security reasons. He vacated and gave her the use of the bulk area. He peeped into the bulk area twice to check if they were finished counting the money. After receiving the funds Mr Momah left the bulk area. He denied that he gave information to anyone. He agreed that he was interviewed by Ms Coetzee but denied making a statement to her. On the day of the interview, Ms Coetzee came to the branch with two colleagues. He was called into an office. Ms Coetzee informed him about an arrest that was made of two suspects Bongani and Jabu who implicated him and alleged that he gave information in exchange for ten thousand rand. He denied knowing those people. He was informed by Ms Coetzee that Bongani was his brother in law. He informed them that the only Bongani he knew was Mnikazi who has a child with his sister.

[215] He testified that during the interview he denied giving information in exchange for money. Ms Coetzee took his phone and saw one picture where he was with his friends having a party. After the interview he was taken to Booyens Police Station for further questioning and put inside Sgt Nefurenyele's office. He was not informed of his rights. In cross examination he testified that on 23 January 2015 he did not see accused 1 at the bank. He indicated that prior to that date he did not have any conversation with accused 1. He was asked what his thoughts were when Ms Coetzee moved the interview to the police station, he remarked that he thought nothing of it as he did not realise that something was wrong. He thought he was going to be questioned and released to continue with his duties. He indicated that if he had refused to go to the police station he would have looked like he was hiding something so he decided to comply and to cooperate. He conceded that he went to the police station voluntarily. He further conceded that he did not deal personally with Mr Momah.

[216] It was put to him that he left out from his evidence in chief what happened when Mr Momah returned to the bank after he was robbed. He testified that it slipped his mind to tell the court what happened after Mr Momah returned to

the bank after the robbery. He stated that he got a report that when Mr Momah returned to the bank he was shouting but he did not hear it. He denied that he saw and spoke with Mr Momah at the police station. He insisted that the police gave him documents to sign without giving him an opportunity to read. He was asked to sign so he signed. He was asked if anyone at the police station put pressure on him he replied no. He conceded that he was also not threatened.

[217] Accused 3 testified that he only signed the document Exhibit 'UU' because he was told to. He indicated that the personal information on the document was correct. He denied that he saw and spoke to Capt. Sam Makwakwa. He further denied that he made a statement to Capt. Makwakwa and he saw Capt. Makwakwa for the first time in court. He remarked he had no knowledge how accused 1 knew that he was a custodian in the bank. The case for accused 3 was closed.

[218] **Accused 4** informed the court that on 2 February 2016 he was with accused 1 whom he knew from being members of the same stockvel. They travelled to Standard Bank in Vereeniging in order to meet his cousin who promised to give him money in order to pay accused 1 for the stockvel contribution money. He was supposed to go alone however accused 1 asked to go with him.

[219] He testified that on the same day they were stopped by police. There were lots of police officers at the scene. They were pointed with firearms and made to lie on the ground. Instead of complying with the order he asked for a reason. One officer approached him and hit him with a firearm on the right shoulder forcing him to lie on the ground. Their pictures were taken. They were searched but nothing illegal was found. He heard one police officer telling others to let them go and it was decided to take them to the police station for profiling. They were taken inside a prefab building. He testified that accused 1 was mistaken when he informed the court that they were taken to a charge office. He stated that he did not see Exhibit 'BB' (identikit) while he was at the police station. He denied that he drove fast. He testified that they were arrested on a Friday and charged on Sunday and appeared in court on a Monday.

[220] An ID parade took place when it was arranged for the second time and after the court ordered them to attend. He was not satisfied with the people in the line - up. During the ID parade he was pointed out by Ms Phele which he maintained was a mistake. On 21 November 2015 which was the day the Pheles were robbed according to his cell phone records he was in Braamfischer. His thoughts were that he was pointed out because of the pictures that the police took of them because Ms Phele first went to the end of the line-up and on her return she pointed him. He denied any involvement in the robbery of Ms Lethuo. He denied that he was the assailant depicted on Exhibit 'V' who was taller in height where else during the demonstration in court he was of the same height as Ms Lethuo. He informed the court that he did not know the co - accused. Accused was cross examined extensively. In cross examination he testified that he did not see Exhibit 'BB' on the (police) notice board.

[221] He stated that the reason he went to Standard Bank was to meet his cousin Mbuso Ngcobo after they agreed to meet that Saturday at 10h00. He explained his cousin had promised to give him money. Upon arrival he looked for his cousin's car at the parking lot and when he did not see him he decided to look for him inside the bank as he thought that the cousin used a taxi. He looked for his cousin inside the bank and could not find him so he went outside to send a 'call back'. He conceded that it was his photo depicted on Exhibit 'AA' and conceded he joined the queue and that as depicted in Exhibit 'AA' he was the only person leaving the queue. When asked why he joined the queue to the teller, he explained that he was looking for his cousin. He also conceded further that he left the queue without conducting any business. He conceded that the pattern of joining the queue and leaving it was repeated. He testified that his cousin did not come and he left intending to drop accused 1 at the crèche when they were arrested. He indicated that accused 1 was under a mistaken impression that his cousin worked at the bank. It was put to him that the version he put during the bail application did not mention that he owed accused 1 money, he agreed. When it was put to him that there was a difference in the version he put during the bail application compared to the version he was putting at trial he denied that the versions differed.

[222] He reaffirmed that he was not involved in the robberies. He testified that the only person he recalled who pointed him out during the ID parade was Ms Phele which was a mistake this was because on the day the Pheles were robbed he was in Braamfischer at his brother's place. He conceded that the cell phone records showed that the cell phone 0608598138 was in SOWETO on the day of the Phele robbery. He was confronted about an earlier version that he had been in Braamfischer, he remarked that he normally visited Braamfischer and he had made a mistake. It was put to him that irrespective which area the cell phone records showed it did not mean that he was absent during the robbery and that he was in SOWETO. He then informed the court that he was running errands that day. It was put to him that the Pheles compiled the identikit identifying him which was done before the identification parade, he conceded to that. He conceded that it was him that was pointed out by Mr Phele. He told the court that Ms Lethuo first looked at someone else but pointed at him as proof that she was shown his pictures. He testified that the witnesses conspired against him. He denied that he was observed by Mr More following a client who had withdrawn money and stood to the version that he was looking for his cousin. When asked where he was on the day Ms Lethuo was robbed, he indicated that he could not remember. He stated that Ms Lethuo lied when she pointed him as one of the people who defrauded her. He conceded that he did not have a firearm licence.

[223] **Sergeant Tshediso Simon Nyofane** was called as defence witness. He informed the court that he took over the docket Kliprivier Cas 107/11/2015 from Sgt Ntabeni. The case was involving robbery against Mr and Mrs Phele. Cell phones were then confiscated from the suspects and he made a section 205 of CPA application to obtain records for cell phone numbers 060 859 81 38 and 076 482 9300. The service provider was VODACOM. He testified that the purpose of confiscating the suspects' cell phones was to check where they were and to check for any communication. He testified that upon receiving the data which he analysed and found that the suspects' devices and the crime scene did not correspond and times did not match. He read into the record the content of his affidavit in this regard. In his affidavit he declared the tower location does not link them to the crime area and that fingerprints were lifted

from the Microbus but did not link the suspects. In cross examination, he stated that he asked from the accused their contact details which he used to apply for section 205. He conceded that accused could have given him any number for him to follow. He conceded that he has dealt with cases of bank following and the suspects do not use personal cell phones when they go to commit robbery.

[224] He explained that the reason the suspects do not take personal cell phones along was because they knew that the police will apply for section 205. He informed the court that the fingerprints linked a guy who stays in Atteridgeville. He testified that he had noted in his affidavit that the POLO which belonged to accused 4 had false number plates. He conceded that in his affidavit he wrote that the suspects were linked by ID parade where the complainant Ms Lethuo pointed accused 1. When asked why the case was struck off the roll when there were two positive results linking the accused, he conceded and explained that the reason the case was struck off the roll was due to outstanding DNA results. He testified that in his experience robberies done by the robbers they buy cheap cell phones to commit crime which they discard thereafter. The case for accused 4 was closed.

[225] **Accused 5** gave a brief personal background. He testified that he was staying with the mother of his two children at Risinga View in Giyani. He informed that court that on 21 December 2017 he was at home and was never at Giyani Standard Bank. He explained that he has a business of transporting groceries for people and goes to Giyani for that purpose. He informed the court that it was not true that he robbed and assaulted Mr Malema with a firearm. On 13 December 2017 he was in Giyani town conducting his business as usual. On 7 January 2018 which was the day he got arrested, he was driving a Run X on his way home from Ben's store when his front tyre were shot at by the police. He was surprised when his car was surrounded by several police officers who were using marked police vehicles. He informed the court that the police officers pointed him with firearms and demanded that he hand over his firearm.

[226] He informed the police that he had no firearm thereafter the police officers approached his car and ordered him to alight from his vehicle. He was made to sit on the ground while the police his searched his car but found nothing. One

police officer hit him on the head with what he presumed to be a butt of a firearm and he bled. He was then handcuffed. More police officers arrived on the scene. The police officers who shot at his car drove off. He testified that an ambulance was called to attend to his injuries. His head was sutured. He informed the court that he sustained an injury on the leg when the police fired at his car.

[227] He stated that after he was treated for the injuries, he was transported to Giyani detectives' offices where he found accused 6 in the charge office. The police officers questioned him about accused 6 and he informed the police that he was his nephew. Afterwards he was taken to the police station cells until his first appearance in court. On 12 January 2018 he was informed that there will be an ID parade but it had to be cancelled because of the complaints from the other participants. On 20 January 2018 he went to Nkhensani hospital after his release on bail. He testified that he was not aware that on 27 February 2018 a photo ID parade was held. He conceded that it was him depicted in Exhibit 'HHH.' He told the court that the picture was taken at Bolobedu Police Station. He denied that he was not a spotter.

[228] It was put to him that according to Sgt Matukana's evidence he took out a firearm and fired at the police, he denied it. He further denied that after he was arrested his legal rights were explained. What happened upon arrival at the police station was that his personal items were taken and was told to sign a document which he thought he was signing for his personal items. In cross examination he indicated that the other co accused were unknown to him and he did not form an enterprise with any of the accused. He testified that he was surprised when he found accused at the police station. He informed the court that he was never told by any of his family members that there was a disruption during lobolo negotiations. It was put to him that it was improbable that accused 2 who was a stranger was invited to the lobolo agreement; he remarked that he could have missed the invitation due to the fact that his family is big. He remarked that in fact the party was not lobolo negotiations; it was a child's party. When confronted with accused 2's version who stated that it was lobolo party, he indicated that he made a mistake.

[229] He testified that on the day of his arrest he did not hear siren and did not see the police. He explained that he did not see the police following him due to the dust of the grave road. It was only when the police shot at him did he notice them (i.e. he only saw the police when they shot at him). He informed the court that his car was shot at twice, on the tyre and the door. He indicated that after his tyre was shot, his car came to a stop. He indicated that he was driving normally when shot at. He was asked regarding the angle of the shot to his vehicle, he indicated that the police were driving parallel to his car and when he looked at back he noticed the police. He was then confronted changing his earlier testimony that he did not see the police due to the dust; he explained that when the police shot at him, they were driving parallel to his car. He stated that he did not realise that it was the police. It was put to him that such a version was improbable in view of Exhibit 'CCC' which depicted that the police vehicle which was big and bright, he just remarked that is how it happened. He indicated that the bullet holes on the police vehicle were caused by other police officers not him. It was put to him that the injury he sustained on the head was as result of the lengthy chase, he denied that he was not chased.

[230] It was put to him that the doctor's findings did not mention that he was shot at, he remarked that he did inform the doctor. It was put to him that if J88 was accepted as correct, it meant he was shot from behind therefor his version was discredited. He indicated that he was not present when the J88 was completed. When confronted with Exhibit 'HHH' which depicted him sitting with legs crossed, and he stated that the photo was taken on the day of his arrest. It was put to him that it was improbable that he would have sat with legs crossed after sustaining a bullet wound. He remarked that it did not mean anything and he made a mistake when he said the photo was taken on the day of his arrest. In relation to his earlier testimony that the other co-accused were unknown, he was asked to explain how accused 1 knew the name Bhova, he remarked he was not that same Bhova that accused 1 referred to.

[231] **Sergeant Vincent Nkuna** was called as a defence witness. He testified that he is employed at SAPS in Giyani Public Order Policing. He informed the court that accused was his uncle's son whom he regarded as a brother. On 7

January 2018 he was not on duty and was on his way home from Giyani town when he noticed a crowd of people along the street. He also went to investigate. He met Col Mabasa who reported that his brother was arrested. He obtained permission to see the accused from Col Mabasa. He found the accused seated on the ground next to the Run X handcuffed. He made enquiries from the accused who reported that he was arrested and shot on the leg and the car shot at. Sgt Matukana approached him and reported that he was the one who arrested accused 5. As he did not want to interfere with police duties he moved aside.

[232] He stated that the accused pointed to the bullet hole on the car and pulled up his trousers to show him the leg injuries. He saw blood and did not see any other injury. He informed the court that on arrival at the scene the police vehicle drove off and it was only on its return that he saw that it had dents. He stated that when accused 5 was taken to the police station he was not present. When asked why he stopped at the scene because he was not on duty, he explained that as a community member he was surprised by the group of people on the street and wanted to know what was happening. It was put to him that Col Mabasa who was a head of detectives would not have allowed an off duty officer to interfere with the crime scene, he did not have an answer. He remarked that it was Col Mabasa who gave him the report about the arrest of accused 5 and allowed him because they know each other. He conceded that he was not in a position to say that it was a bullet wound. He was asked to comment on the testimonies by Mkhari and Matukana who testified that the Run X did not have bullet holes; he testified that he did see bullet holes on the door of the Run X. When questioned how the accused could pull his pants up when he had his hands handcuffed, after initially denying that that he had said that, he stated that it was his mistake as he did not explain it clearly.

[233] He clarified that what he meant to explain was that he pulled accused's pants. He informed the court that from his own observation the position of the wound was on the inside of the left leg below the knee. When confronted with Exhibit 'AC' (J88) in which the wound was recorded as being on a central back position, he reluctantly conceded to the discrepancy and remarked that he was

unsure if there was another wound. He testified that he did not see any head injury on the accused. It was put to him that it was improbable that accused would show him the injury on his leg and omit to show him the injury on his head; he remarked that he did not know what the accused's reasons for the omission were. He conceded that he did not see blood on accused 5's head and stated that this was because he was not paying attention.

[234] When asked how far he was in relation to the police vehicle at the scene he stated that he was three metres away. He informed the court that he did not see any bullet holes on the police vehicle. It was put to him that his behaviour was improbable; he remarked that he was afraid to interfere because the suspect was his brother. It was further put to him that he had discussed with accused 5 on what his testimony should be, he had no clear answer to that question. His remark instead was that the aspect of the dent on the police vehicle arose after the State's question. It was put to him that it was not probable that Col Mabasa would have allowed the crime scene to be contaminated by allowing the police vehicle to drive off, his remark was that he had no knowledge if Col Mabasa was aware that the police vehicle was shot at. It was also put to him that the police vehicle did not leave the scene, he maintained that it moved before photo of the scene were taken.

[235] When asked to show any bullet holes on the Run X on Exhibit 'CCC', he conceded that he was unable to see clearly on the photo. He testified that he did see a hole on the door of the Run X. He was unable to comment on the angle of the bullet hole which was allegedly on the door in relation to the alleged injury on the leg. He refused to comment on the accused 5's version that when his car was shot at the police vehicle was parallel to his. He only remarked that he did not know what happened as he was not there. He conceded that as accused 5's relative he was unaware of any lobolo negotiations which were allegedly taking place at accused 5's home. The case for accused 5 was closed.

[236] **Accused 6** gave a brief personal background and told the court that at the time of his arrest he was thirty-eight years old. He testified that his place of residence was Block 14, Homu Village and prior to his arrest he had been

residing in Tembisa from 2003. He has four dependants and generated an income from selling braai chicken and from his tenants. He testified that he knew accused 2 because their girlfriends are siblings they met on the day when his girlfriend had a birthday party. He informed the court that accused 5 was his relative whose respective homes were an estimated distance of twenty-seven kilometres apart. He told the court that he grew up referring to accused 5 as his uncle. Before the day of his arrest, he last saw accused 5 late 2016 to early 2017. Regarding the allegations levelled against him, he stated that he had no knowledge about the charges. He denied that he committed any robberies.

[237] He testified in relation to counts 1 to 2, 32 to 34, 35 to 38, 44 to 49, 50 to 52, 56 to 59, 62 to 64 that the State made a mistake in linking him to those charges as he had no knowledge about the allegations. He informed the court that during the periods⁶ in which the robberies took place he was in Tembisa. On 6 January 2018 which was the day when the Spar robbery took place he was at home in Giyani Block 14 to facilitate in lobolo negotiations as he was the only surviving male in the family. He arrived home on Friday in company of accused 2 who requested to come along because he wanted to see Giyani which his child liked to visit. They arrived late in the evening and they slept. The following morning after accused 2 had taken a bath, they went to the back of the house for a smoke.

[238] He explained that he did not want to smoke in front of his family and children hence he asked accused 2 to go to the back of the house. While smoking the people in the homestead ran towards their direction screaming and he also ran into a plantation. He was arrested by the police and taken to the police cells. He recalled that one of the arresting officers of the four who were at the scene was Sgt Matukana. Police officers who were at the scene and those in the cells took pictures of him. He testified that to date he was baffled by the arrest. He informed the court that he did not hear any gun shots because of the loud music and the screams. He remarked that the State's version that was put before the court that the police chased him from Giyani central business district was a lie. He further denied that he was topless that day. He denied that he

⁶ The periods when the various offences were allegedly committed -21 January 2015; 6 November 2017; 22 November 2017; 28 November 2017; 4 December 2017, 22 December 2017.

had a firearm and money in his possession. He informed the court that two cell phones were confiscated. He indicated that the police did not inform him of his legal rights.

[239] He testified that he was detained in cell number 1 which was not depicted on Exhibit 'UUUU'. His remark in relation to count 28 was the witnesses pointed him because his photo was shown to them or saw his picture in the newspaper. He maintained that the witnesses who identified him were mistaken. He was insistent that from inside the cell he was able to see outside. He told the court that there was a photo ID parade because he refused to participate in a normal ID parade. He was cross examined extensively also. He remarked that he met accused 1 here in court. He was aware that accused 2 had a baby. He was also aware that accused 2 spent time in hospital following a motor vehicle accident. He conceded that he did not own a firearm license. When asked to explain why he ran he testified that on the day of his arrest he ran because people were running. He indicated that there were no community members who interfered with the police and if there were, it would be his family. He was asked a direct question whether there were any community members; he replied that there were some ladies from a stockvel (society) who were there to cook. It was put to him that the version put to Constable Olga Khoza was that community members took pictures of him. He remarked that the version was a mistake because only the stockvel ladies were there no community members were present.

[240] When asked why he did not invite accused 5 to the lobolo negotiations, he stated that it was because accused 5 did not drink alcohol. It was put to him that accused 2 did not mention that upon arriving at the police station photo of them were taken. His response was that perhaps accused 2 forgot about it. It was put to him that Sgt Matukana's evidence was that where the arrest was carried out was not his home. He remarked that Sgt Matukana was lying. He testified that the police officers were conspiring against him and lied against him that he was in possession of a firearm and was seen dropping a green bag with Spar Logo. He indicated that Mr Malema was mistaken as he was never at his house. He denied that he robbed Ms Mohale and he further denied that he

alighted from a taxi. He denied that he held a knife on the neck of Ms Selowa. He was insistent that he saw Sgt Shabalala through the cell window talking to the witnesses. He denied any involvements in the robberies. Accused 6 was cross examined extensively before he closed his case.

The law

1. Onus

[241] In criminal proceedings, the applicable legal principle is that the burden is always on the State to prove the allegations beyond reasonable doubt. The question whether the State has discharged the onus of proof requires that the elements of each offence must be proved with evidence which evidence must be evaluated holistically⁷. The correct approach in evaluating evidence is trite.⁸ In evaluating the evidence, I had to guard against a tendency to separate the body of the evidence into separate compartments, though this was recognisably a useful tool. It was necessary to take a step back in order to critically examine the body of evidence in totality.⁹

Equally trite is that the six accused were not required to prove their innocence but where they gave an explanation the court had to be satisfied that it was reasonable possibly true. This meant that if there was a reasonable possibility that the explanations were substantially true, then the six accused were entitled to be acquitted. The court was only entitled to reject an explanation if an explanation was not only improbable but beyond reasonable doubt false. Therefore, it was permissible to weigh up all the elements that point towards the guilt of the six accused against those elements indicative of their innocence. It was equally permissible to take proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and then decide on which side the balance weighed.¹⁰ Where there are

⁷ This burden did not denote that the prosecution must close every avenue of escape which may be open to an accused- *R v Mlambo* 1957(4) SA 727(A) at 738A-C.

⁸ See *S v Van der Meyden* 1999 (1) SACR 447 (W) para 82C -D.

⁹ See *S v Hadebe* 1999 (1) SACR 422(SCA) at 426F-H; *S v Shilakwe* 2012(1) SACR16 (SCA) para 11.

¹⁰ See *S v Chabalala* 2003 (1) SACR 97 (SCA) para 15.

shortcomings in the evidence, the trier of facts must be satisfied that despite the shortcomings the truth has been told¹¹.

2. Cautionary rules

[242] Two cautionary rules were applicable in this matter- (a) single witness evidence and (b) identification evidence. Cautionary rules require of the trier of facts to approach with caution the evidence of a single witness and evidence of identification. Cautionary rule in respect of single witness evidence is aimed at reducing the risk of a wrong conviction. It must be highlighted that the exercise of caution did not denote that a conviction based on the evidence of a single, competent, credible and reliable witness cannot be secured; on the contrary, section 208 of the CPA can serve as a tool to secure a conviction.¹² Where the State was reliant on the evidence of a single witness, a final evaluation is rarely made without considering whether or not such evidence was consistent with the probabilities in the case.¹³

[243] Similarly, the correct approach to the evidence of identification is to treat it with caution.¹⁴ And it is subjected to a close and careful scrutiny for its reliability due to the fallibility of human observation and memory.¹⁵ Therefore reliability of identification evidence must be tested against facts such as lighting, visibility, proximity and opportunity for observation, the identifying witness's degree of attention, the circumstances prevailing at the time of the incident, the length of time the crime took. This is not a closed list. A careful examination of circumstances under which the identification was made taking into account all the evidence holistically is the correct approach. A trier of facts should be mindful that the honesty and conviction of an identifying witness should not displace or influence the separate investigation into the reliability of the

¹¹ See *S v Sauls and Others* 1981 (3) SA 172 (A) at 180E-G.

¹² Section 208 of CPA provides that an accused may be convicted of any offence on the single evidence of any competent witness. See *Stevens v S* [2005] 1 All SA 1 (SCA) para [17].

¹³ See *S v Teixeira* 1980 (3) SA 755 (A) at page 761.

¹⁴ See *S v Mehlape* 1963 (2) SA 29 (A) at 32A-F; *S v Mthetwa* 1972 (3) SA 766 (A) at page 768A; *S v Tandwa and Others* 2008 (1) SACR 613 (SCA) paras 129-131; *S v Ngcamu* 2011 (1) SACR 1(SCA) para 10. *Machi v S* [2021] ZASCA 106 para 10.

¹⁵ See *R v M.B.*, 2017 ONCA (*Court of Appeal for Ontario*) 653 at para [29] where it was held that an eyewitness' identification is inherently unreliable. It was also held that it is difficult to assess, is often deceptively reliable because it comes from credible and convincing witnesses, and is difficult to discredit on cross-examination for those same reasons.

identification by that witness.¹⁶ The probative value of any subjective identification will of course depend upon all the surrounding circumstances and each case has to be decided on its merits.

c. *The doctrine of common purpose*

[244] From the substantial facts, the State alleged that the six accused committed the various offences through common purpose. It was prudent to outline what are the legal principles where criminal liability is based on the doctrine of common purpose. The purpose of this doctrine is to overcome an unjust result by removing causation from criminal liability and replacing it with imputing the deed (or crime) to all co-perpetrators. In order for common purpose to be present, the following requirements must be met as compounded in *S v Mgedezi*¹⁷—

- a. The accused must have been present at the scene where violence was being committed (scene of crime);
- b. He must have been aware of the assault by someone else on the victim;
- c. He must have intended to make common cause with those who were perpetrating the assault;
- d. He must have manifested his sharing of a common purpose with the perpetrators; and
- e. He must have had the required fault (mens rea) for the particular offence.

[245] Moseneke J explained the doctrine of common purpose in *Thebus and Another v S*¹⁸ as follows —

¹⁶ See *S v Mlati* 1984 (4) SA 629 (A) at 632H-I; *S v Khumalo* 1991 (4) SA 310 (A) page 328. See *S v Charzen and Another* [2006] 2 All SA 371 para 11 (SCA) it was recognized that personal assurance by an identifying witness is not enough.

¹⁷ 1989 (1) SA 687(A)

¹⁸ 2003 (6) SA 505 (CC) para [36]

“The doctrine of common purpose sets a standard of criminal culpability. It defines the minimum elements necessary for a conviction in a joint criminal enterprise. The standard must be constitutionally permissible.”

At paragraph [40] he explained the purpose of this doctrine was held as follows —

“The doctrine is rationally connected to the legitimate objective of limiting and controlling joint criminal enterprise. It serves vital purposes in our criminal justice system. Absent the rule of common purpose, all but actual perpetrators of a crime and their accomplices will be beyond the reach of our criminal justice system, despite their unlawful and intentional participation in the commission of the crime.”

[246] In *Tshabalala v S; Ntuli v S*¹⁹ it was held —

“The liability requirements of a joint criminal enterprise fall into two categories. The first arises where there is a prior agreement, express or implied, to commit a common offence. In the second category, no such prior agreement exists or is proved. In the latter instance the liability arises from an active association and participation in a common criminal design with the requisite blameworthy state of mind.”

[247] Simply put, the State placed reliance on the doctrine of common purpose, it had to prove the commission of the crime against the six accused and had to establish the two liability requirements (liability based on prior agreement or liability based on active association).

[248] The correct approach for a trial court faced with the doctrine of common purpose is that it must determine in respect of each accused the location, timing, sequence, duration, frequency, the nature of the conduct alleged to constitute sufficient participation or active association and its relationship to the criminal result.²⁰

d. Similar Facts

¹⁹ 2020 (2) SACR 38 (CC) para [48]

²⁰ *Thebus* above at para [45].

[249] The State was also reliant on similar fact evidence. Generally, similar fact evidence is inadmissible because it is irrelevant. Evidence is only admissible if it is relevant. It has been said that similar fact evidence involves a consideration of the requirement that evidence must be logically relevant and of sufficient probative value that it warrants its admission despite the disadvantages its admission may cause²¹. Evidence of *modus operandi* is admissible to corroborate an otherwise inadequate evidence of identification.²² To warrant legal relevance and admissibility of similar facts, there must be a sufficient *nexus* between the evidence sought to be led and the issue in respect of which it is sought to be led.²³ While similar fact evidence is admissible to prove the identity of an accused as the perpetrator of an offence, it cannot be used to prove the commission of the crime itself.

[250] Where similar fact evidence becomes more focused and relevant to the charges, the more its probative value becomes cogent. The core to the assessment of the probative value of such evidence is its connectedness to the alleged offences. Factors that may support the admission of such evidence include proximity in time of the similar acts, similarities in detail, the number of occurrences of similar acts, similarities in circumstances and distinctive features of the acts. This list is not exhaustive. Assessed holistically whether evidence of similar facts has sufficient probative value to outweigh its prejudicial effects is a matter to be decided in each case. The Constitutional Court per obiter by Madlanga J recognised that there is room for a less restrictive approach to the admission of similar facts.²⁴

[251] In *Nduna v S*²⁵ it was stated that evidence of a *modus operandi* can be invoked to establish the cogency of the evidence of a systematic cause of wrongful conduct to render it probable that the offender committed each offence. It was further held that the ultimate test is and must always be the relevance of such similar fact evidence as the foundation for its admissibility against the accused.

²¹ See *S v Mogale* [2011] ZAGPJHC 57 (18 March 2011) para [131].

²² See *S v Moti* 1998 (2) SACR 245 (SCA).

²³ See *S v Letsoko and Others* 1964 (4) SA 768 (A) at 775.

²⁴ See *Savoi and Others v National Director of Public Prosecutions and Another* [2014] ZACC 5 para [58].

²⁵ 2011 (1) SACR 115 (SCA) para [18]

It was further stated that the evidence will be admissible if it is relevant to an issue in the matter.

e. Identification Parades

[252] The State led evidence on the ID parade evidence. Issues of identification are difficult as correctly found in *R v Shekelele and Another*²⁶. In order to safeguard fairness of any identification parades, eighteen rules of police good practice have been formulated. These good practice guidelines ensure that if observed a trial court is placed in a better position to assess the reliability of such identification in order to attach the necessary evidential weight. The corollary is that in instances where these guidelines were not observed they affect the evidential weight to be attached. In other words, any alleged irregularity would not necessarily vitiate the identification parades but rather affected the evidential weight.

[253] In *S v Vilakazi*²⁷ the court expressed the view that any irregularity which occurred during the identification parade affected the weight to be attached to such evidence. Similar views were expressed in *S v Mokoena*²⁸ where it held while an accused was not advised of his constitutional rights would affect the weight but not its admissibility.

[254] In the proceedings emphasised was on Rules 8, 9 and 17 guidelines which covered both photo ID and conventional ID parades. Rule 8 provides that the suspect and the persons in the parade should be more or less of the same build, height, age and appearance and should have more or less the same occupation and be more or less similarly dressed. Rule 9 states that it is extremely desirable that at least one photograph should be taken of all the persons (including the suspect) at the parade depicting them as they appeared in the line-up and standing next to each other. Rule 17 states that the policeman in charge of the parade should inform each identifying witness that the person whom the witness say may or may not be on the parade and that if he (or she) cannot make a positive identification to say so. In respect of Rule

²⁶ 1953 (1) SA 636 (T)

²⁷ 1996(1) SACR 425 (T).

²⁸ 1998 (2) SACR 642 (W)

17, Dowling J in *R v Nara Sammy 1956 (4) SA 629(T)*²⁹ opined that the failure to include this disclaimer to a witness particularly illiterate ones they may think it was his duty to point out somebody and it would be an act of disrespect or criticism of the police if he does not do so.

f. *Alibi as a defence*

[255] The legal principle is that the accused bears no onus to prove his/ her alibi.³⁰ Once an alibi is raised the onus is on the State to prove it is false. If an alibi might be reasonably true an accused must be acquitted. The correct approach is that an alibi must be considered in light of the totality of the evidence. In *R v Hlongwane*³¹ it was held —

‘The legal position with regard to an alibi is that there is no onus on an accused to establish it, and if it might reasonably be true he must be acquitted. *R v Biya 1952 (4) SA 514 (AD)* . . . { } . . The correct approach is to consider the alibi in the light of the totality of the evidence in the case, and the Court’s impressions of the witnesses.’ An alibi may only be rejected by court where it is proved beyond reasonable doubt that it is false.³² The effect of a false alibi is that an accused is placed in a position as if he has not testified at all.³³

[256] The legal position also is that if there is evidence of an accused person’s presence at a place and at a time making it impossible for him to have committed the crime and if in the totality of the evidence there is a reasonable possibility that the alibi evidence is true, the effect is that there is a possibility that he has not committed the crime.³⁴ The onus does not change, however it was observed that the vulnerability of an unsupported alibi defence will depend on the court’s assessment of the truth of the accused’s testimony.³⁵ It is good practice that an alibi defence be raised timeously; however, as stated in *S v Thebus* above at para [64] – [68], it is not a legitimate basis for a court to draw an adverse inference against an accused for failing to raise an alibi timeously.

²⁹ Para 631B to 632A.

³⁰ See *S v Shabalala 1986 (6) SA 734 (A)*.

³¹ 1959 93) SA 337 (A)

³² See *Shusha v S [2011] ZASCA 171* para 10.

³³ See also *S v Liebenberg 2005 (2) SACR 335 (SCA)*.

³⁴ See *R v Biya 1952 (4) SA 514 (A)* at 521E-D.

³⁵ *S v Mathebula 2010 (1) SACR 55 (SCA)* para [11]

The legal principles in respect of the specified charges

[257] As indicated above that the determination whether the State has proved all allegations is interlinked with whether all the definitional elements of each offence have been proved beyond reasonable doubt. In this judgment it was found prudent to set out applicable legal principles for the offences that the six accused are charged with.

1. Contravention of sections 2(1) (e) and 2(1) (f) of the Prevention of Organised Crime Act 121 of 1998 (POCA)

[258] The allegations (in count 1) were that the six accused formed an enterprise for racketeering purposes in contravention of the POCA³⁶. It was further alleged that the offences were committed in order to benefit the enterprise, its managers, members, employees and persons directly involved therein. It was prudent to first give a brief overview on the POCA legislation

[259] POCA is the statutory instrument that addresses organised crime. Its preamble specifies its objectives. This legislation is similar to the RICO Act³⁷ of the United States of America with slight difference to the definitions. The similarities in the two legislations permit one to refer to applicable RICO Act cases. For example in *U.S. v. Perholtz*³⁸ the appeal court opined that an enterprise was an entity, a group of persons associated together for a common purpose of engaging in a course of conduct and the pattern of racketeering activity as a series of criminal acts. That court further held that enterprise was proved by evidence of an ongoing organization, whether formal or informal and that the various associates function as a continuing unit.

[260] It is recognised that POCA seeks to ensure that the criminal justice system reaches far and wide in order to deal with organised crime and its

³⁶ Count 1 on the indictment; count 2 (accused 1 and 2 only).

³⁷ Racketeer Influenced and Corrupt Organizations Act of 1970. In terms of the RICO Act, the state must prove that the defendant engaged in two or more instances of racketeering activities and the defendant maintained an interest or participated in a criminal enterprise.

³⁸ 842 F.2d 343 (D.C. Cir. 1988)

manifestations.³⁹ An enterprise is defined in section 1 of POCA.⁴⁰ The term ‘enterprise’ has been given a broad context that has passed the constitutional muster.⁴¹ What attracts the provisions of POCA to any enterprise is a pattern of racketeering activities.⁴²

[261] In this matter the State alleged that the kind of enterprise the six accused formed consisted of bank following with resultant robberies. These were related activities to constitute the predicate offences that constitute ultimately the pattern of racketeering activities.

[262] Conducting an enterprise is the essence of the offence nature under section 2(1) (e) of POCA. Section 2 (1) (e) provides as follows —

“2 Offences-

(1) Any person who —

(e) Whilst managing or employed by or associated with any enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise’s affairs through a pattern of racketeering activity.”

[263] The net is wide enough to cover a manager or employee or associate. Racketeering activity refers to the involvement in ongoing criminal activities. The term ‘a pattern’ denotes an ongoing arrangement of activity. It was sufficient for the state to prove that the predicate acts are part of an ongoing (criminal) enterprise’s regular way of doing things.

³⁹ See *National Director of Public Prosecutions and Another v Mohamed NO and Others* 2002 (4) SA 843(CC) para 14 to15. See *Savoi and Others v National Director of Public Prosecutions and Another* 2014 (5) SA 317 (CC) para 15 it was held ‘POCA seeks to ensure that the criminal justice system reaches as far and wide as possible in order to deal with the scourge of organised crime in as many of its manifestations as possible.’

⁴⁰ Section 1 of POCA defines “**enterprise**” to include— “any individual, partnership, corporation, association, or other juristic person or legal entity, and any union or group of individuals associated in fact, although not a juristic person or legal entity”. POCA defines a “**pattern of racketeering activity**” to mean the planned, ongoing, continuous or repeated participation or involvement in any offence referred to in Schedule I and includes at least two offences referred to in Schedule 1, of which one of the offences occurred after the commencement of this Act and the last offence occurred within 10 years (excluding any period of imprisonment) after the commission of such prior offence referred to in Schedule 1.’

⁴¹ See *Savoi and Others v National Director of Public Prosecutions and Another* above.

⁴² See *United States v. Parness* 503 F.2d 430 (2d Cir. 1974) the court of appeal held that a pattern of racketeering activity could be established by any two predicate acts, even if the acts occurred on the same day, in the same place, and as part of the same criminal episode.

[264] Section 2 (1) (e) of POCA was described by the Supreme Court of Appeal *in S v Eyssen*⁴³ as follows -

“The essence of the offence in subsection (e) is that the accused must conduct (or participate in the conduct) of an enterprise’s affairs. Actual participation is required (although it may be direct or indirect). In that respect the subsection from subsec (f), the essence of which is that the accused must know (or ought reasonably to have known) that another person did so. Knowledge, not participation, is required. On the other hand, subsection (e) is wider than subsection (f) in that subsec (e) covers a person who was managing, or employed by, or associated with the enterprise, whereas subsection (f) is limited to a person who manages the operations or activities of an enterprise . . .

It seems to me that the association would at least have to be conscious; that there would have to be a common factor or purpose identifiable in the association; that the association would have to be ongoing; and that the members would have to function as a continuing unit. There is no requirement that the enterprise be legal, or that it be illegal. It is the pattern of racketeering activity, through which the accused must participate in the affairs of the enterprise, that brings in the illegal element; and the concepts of ‘enterprise’ and ‘pattern of racketeering activity’ are discrete. Proof of the pattern may establish proof of the enterprise, but this will not inevitably be the case. . .

It will therefore be important to identify what those affairs are. It will also be important for the State to establish that any particular criminal act relied upon, constituted participation in such affairs...The participation may be direct or indirect. . .

The participation must be by way of ongoing, continuous or repeated participation or involvement. The use of ‘involvement’ as well as the word ‘participation’ widens the ambit of the definition. So does the use of the words ‘ongoing’, ‘continuous or repeated’.”

[265] For contravention of section 2(1)(e) of POCA, the State had to prove the following —

- i. An enterprise existed;

⁴³ 2009(1) SACR 406 (SCA) paras [5] – [7] and [9]

- ii. The accused were associated with the enterprise;
- iii. The accused engaged in a pattern of racketeering activities; and
- iv. The accused participated in the conduct of the enterprise through pattern of racketeering by committing acts of racketeering.

[266] In order to secure a conviction under section 2(1)(e) of POCA, the State needed more than merely to prove the underlying predicate offences. It also needed to demonstrate the accused's association with an enterprise and a participatory link between the accused and that enterprise's affairs by way of a pattern of racketeering activity. Acts of racketeering needed to be proved beyond a reasonable doubt. Secondly the acts of racketeering must have been connected with each other by some common scheme, plan, or motive so as to constitute a pattern and not simply be a series of disconnected acts. Simply put, where the state has proved two or more predicate acts that are not isolated events (even if such events are separate in time but in furtherance of a single criminal scheme), that sufficiently satisfies the pattern requirement.

[267] Section 2 (1) (f) of POCA provides —

"2 Offences —

(1) Any person who-

(f) manages the operation or activities of an enterprise and who knows or ought reasonably to have known that any person, whilst employed by or associated with that enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity; or.."

[268] For the offence of contravention of section 2(1)(f) of POCA, the State had to prove the following elements⁴⁴—

- i. The existence of an enterprise;
- ii. That the accused managed the operations or activities of the enterprise;

⁴⁴ See *S v De Vries and Others* 2009 (1) SACR 613 (C) at para 380.

- iii. That a pattern of racketeering activity took place; and
- iv. That the accused knew or should reasonably have known that a pattern of racketeering activity took place.

[269] In *Prinsloo v S*⁴⁵ it was recognised that the offence in terms of section 2(1)(f) was committed by a person managing the operation or activities of an enterprise and who knows or ought reasonably to have known that the enterprise's affairs are conducted through a pattern of racketeering activity. The SCA further opined that the intention of the legislature is to hold those involved in organised crime liable for the different roles played by them in the conduct of an enterprise's affairs through a pattern of racketeering activity⁴⁶. The word 'manage' is not defined in POCA and must be given its ordinary meaning. In *Eyssen* above it was held that the knowledge not participation was the essence of section 2(1)(f).

b. Attempted robbery with aggravating circumstances

[270] The nature of the crime of attempted robbery is that the assailant must take steps towards fulfilling all the definitional elements of robbery with aggravating circumstances. This offence must be considered in the context of the definitional elements of the crime. According to C.R. Snyman- Criminal Law, 7th ed. (2020), the definitional elements contain the minimum requirements for liability necessary to constitute a comprehensible criminal norm and correspond to those requirements of a crime which the prosecution has to prove in order to incriminate the accused.

[271] Where the activities of a person who intends to commit a crime are interrupted, the test is whether the person has unlawfully engaged in conduct that was not merely preparatory but has reached the stage of commencement of the execution of the intended crime⁴⁷. This is a factual enquiry.

[272] In *R v Schoombie*⁴⁸ it was held 'attempts seem to fall naturally into two classes:
(a) Those in which the wrongdoer, intending to commit a crime, has done

⁴⁵ 2016 (2) SACR 25 (SCA) para [52]

⁴⁶ Para 56.

⁴⁷ See *S v Du Plessis* 1981 (3) SA 382 (A) at 399H to 400B.

⁴⁸ 1945 AD 541 at 545

everything which he set out to do but has failed in his purpose either through lack of skill, or of foresight, or through the existence of some unexpected obstacle, or otherwise, (b) those in which the wrongdoer has not completed all that he set out to do, because the completion of his unlawful acts has been prevented by the intervention of some outside agency.’ The court further held that ‘[c]onsequently, if a wrongdoer has finally made up his mind to commit a crime and has taken steps to carry out his resolution, the exact moment at which he is interrupted and prevented from fulfilling his intention should not be the sole determining factor in deciding whether or not his morally wrongful act should be regarded as a crime.’⁴⁹

[273] In *S v Agliotti*⁵⁰ the court stated the following —

“A person is guilty of attempting to commit a crime if, he/she intending to do so, unlawfully engages in conduct that is not merely preparatory but has also reached at least the commencement of the execution of the intended crime. A person is equally guilty of attempting to commit a crime even though the commission of the crime is impossible, if it would have been possible in the factual circumstances which he/she believes exist or will exist at the relevant time. A person will also be guilty of an attempt even when he/she voluntarily withdraws from its commission after his/her conduct has reached the commencement of the execution of the intended crime. The stage of commencement of execution is also called the stage of consummation. Once this state is reached, ‘attempt’ at a crime is complete.”

c. Fraud

[274] *Snyman* defines fraud as the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another. Fraud is committed if the telling of a lie brings harm to another (whether actual or potential). From this definition, the State was required to prove the following —

xliv. Misrepresentation;

xlv. Prejudice or potential prejudice;

⁴⁹ *Id* at 547

⁵⁰ 2011 (2) SACR 437 (GSJ) para [10]

xlvi. Unlawfulness; and

xlvii. Intention.

[275] In *S v Gardener and Another*⁵¹ it was held that it is trite that fraud consists in unlawfully making, with the intent to defraud, a misrepresentation which causes actual prejudice or which is potentially prejudicial to another.

d. Murder

[276] Murder is defined as the unlawful and intentional causing of the death of another human being. The State had to prove the following —

- i. Causing of the death;
- ii. Of another person;
- iii. Unlawfully; and
- iv. Intentionally.

[277] The form of intention (*dolus*) that arises in murder is either *dolus directus* or *dolus eventualis*. In *S v Pistorius*⁵² it was held —

“In the case of murder, a person acts with *dolus directus* if he or she committed the offence with the object and purpose of killing the deceased. *Dolus eventualis*, on the other hand, although a relatively straightforward concept, is somewhat different....a person’s intention in the form of *dolus eventualis* arises if the perpetrator foresees the risk of death occurring, but nevertheless continues to act appreciating that death might well occur, therefore ‘gambling’ as it were with the life of the person against whom the act is directed.”

The State had to prove beyond reasonable doubt that subjectively there was an intention to kill Mr Meyer.

e. Contravention of section 18(2) (a) of the Riotous Assemblies Act 17 of 1956

⁵¹ 2011(1) SACR 570 (SCA) para [29]

⁵² 2016 (1) SACR 431 (SCA) para 26

[278] Section 18 (2) (a) provides —

“Any person who conspires with any other person to aid or procure the commission of or to commit any offence, whether at common law or shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.”

[279] Criminalisation of conspiracy performs an important function of preventing group criminality as conspiracy increases power to do wrong. The word ‘conspire’ requires an agreement.⁵³ The crime of conspiracy is the illegitimate agreement, and the agreement is the crime. The crime of conspiracy is mainly mental in composition⁵⁴

[280] In *S v Moubaris and Others*⁵⁵ it was stated ‘A conspiracy is thus not merely a concurrence of wills but a concurrence resulting from agreement.’ To establish a criminal conspiracy, the State needed to prove an agreement on the part of two or more persons, and that the common intent flowing from such an agreement is criminal. Courts may infer from the evidence that an unlawful agreement existed despite the absence of direct evidence of agreement.⁵⁶

[281] Conspiracy may either be express or tacit. Conspiracy (whether expressed or tacit) requires that an agreement must have been reached as to the scheme to be utilized, although the exact manner in which the crime is to be committed is not required to be agreed.⁵⁷ Immediately an agreement has been reached, the

⁵³ See *Ngobese v S* 2019 (1) SACR 575 (GJ) (7 December 2018) para [26].

⁵⁴ See *R v S* 1959(1) SA 680 (C) at 683C—D where it was held ‘Conspiracy to commit a crime requires an agreement on the part of two or more accused to commit a criminal act (see *R v Solomon* 15 SC 107, and *R v Dhlamini* 1941 OPD 154). Mere intention is insufficient: there must be an actual concurrence of minds in an agreement to do the act in question. Such concurrence need not necessarily be by way of explicit, spoken words, for the agreement to commit a crime, as any other agreement, can be arrived at tacitly and by conduct (see e.g. *R v B* 1956 (3) SA 363 (E) at 365). Where, however, the agreement is sought to be inferred solely from the conduct of the alleged conspirators such inference must be on the cardinal rules of logic enumerated in *R v Blom* 1939 AD 188 at 202 and 203, be consistent with all the proved facts, and the proved facts in turn must be such that they exclude every reasonable inference from them save the one to be drawn.’

⁵⁵ 1974 (1) SA 681 (T) at 687A

⁵⁶ See *Direct Sales Co. v United States* 319 U.S. 703 (1943). The defendant company, a wholesaler of narcotics, provided large amounts of morphine sulfate to a physician practicing in a rural community. The defendant argued that it had not entered into an agreement with the doctor to sell the drugs illegally and had not intended that the doctor sell the goods illegally. The Supreme Court affirmed the conviction because the company must have known that the doctor was distributing the drugs illegally. This knowledge was sufficient to sustain the existence of an agreement in the form of a “tacit understanding.”

⁵⁷ See *S v Adams* 1959 (1) SA 646.

crime of conspiracy is complete and it becomes unnecessary to prove the commission of any further act in the execution of such conspiracy.⁵⁸ Simply put, the criminal conduct lies in the common design or purpose to commit an unlawful act.

[282] In *S v Basson*⁵⁹ it was held that criminal conspiracy is an offence whether it is implemented or not and that the failure of a conspiracy is not relevant to the conspirators' guilt.

[283] This offence is accomplished when a person brings his/her intention into concurrence with that of the other. Where a person conspires with another to commit a crime and the crime is committed the conspirator is liable for the crime itself.⁶⁰ To prove a charge of conspiracy the evidence must establish that there was unity of intent on the part of two or more persons to accomplish the end charged. It is important to prove a common design and that the accused had the intent to become a party to that common design with knowledge of its implications. It is possible for a co-conspirator to disassociate from the conspiracy.⁶¹

f. Contravention of section 3 (a) (i) of the Prevention and Combatting of Corrupt Activities Act 12 of 2004 (PCCA)

[284] Section 3 of PCCA provides —

“Any person who directly or indirectly —

Accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person:

or

...

in order to act personally or by influencing another person so to act in a manner-

⁵⁸ See *S v Sibuyi* 1993 (1) SACR 235 (A) 249D – E.

⁵⁹ 2007(3) SA 582(CC) para [209]

⁶⁰ See *S v Frazer* [2005] 4 All SA 500 (31 March 2005) para [7].

⁶¹ See *S v Nduli and Others* [1993] ZASCA 120 (14 September 1993 at 504D).

that amounts to the -

(aa) illegal, dishonest, unauthorised, incomplete, or biased: or

(bb) misuse or selling of information or material acquired in the course of the exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation:

(ii). . .

(iii). . .

(iv). . .

is guilty of the offence of corruption.”

[285] The State was required to prove the following —

- i. The acceptance;
- ii. Of a gratification (some benefit);
- iii. In order to act in a certain way;
- iv. Unlawfulness; and
- v. Intention.

[286] In *Selebi v S*⁶² it was held that the essential elements the general crime of corruption are (i) acceptance ; (ii) of a gratification (payment of some other benefit); (iii) in order to act in a certain way; (iv) unlawfulness and (v) intention.

g. Kidnapping

[287] C.R. Snyman defines kidnapping as consists in unlawfully and intentionally depriving a person of his or her freedom of movement and or if such person is under the age of 18 years, the custodians of their control over the child.

[288] The State had to prove —

⁶² [2012] 1 All SA 332 (SCA)

- xliv. The deprivation of;
- xlv. A person's freedom of movement;
- xlvi. Unlawfulness; and
- xlvii. Intention.

h. Attempted Murder

[289] The legal principles on attempt were outlined supra. The nature of this offence was described in *Kruger v S*⁶³ where it was stated 'The elements of the crime of attempted murder are (1) an attempt (ii) to kill another person unlawfully (actus reus) (iii) with the intent to kill and with appreciation that the killing will be unlawful (mens rea). The state of mind required for attempted murder is the same as for murder.'

9. Robbery with aggravating circumstances

[290] C.R. Snyman defines robbery as consists in theft of property by unlawfully and intentionally using —

- i. Violence to take the property from somebody else or;
- ii. Threats of violence to induce the possessor of the property to submit to the taking of the property.

[291] The State had to prove —

- xliv. Theft of property;
- xlv. Through the use of violence or threats of violence;
- xlvi. a causal link between the violence and the taking of property;
- xlvii. Unlawfulness; and
- xlviii. Intention.

⁶³ [2014] ZAWCHC 196 para [14] (17 December 2014)

10. Contravention of section 3(1) of the Firearms Control Act 60 of 2000 (FCA):

[292] In terms of section 120 (1) (a) of FCA, a person is guilty of a crime if he or she contravenes section 3, section 4 and section 121 of FCA. Section 3 provides that '*No person may possess a firearm unless he or she holds a licence, permit or authorization issued in terms of this Act for that firearm.*'

[293] The State was required to prove —

- xliv. Possession;
- xliv. A firearm (as defined in section 1 of FCA);
- xlvi. Unlawfulness; and
- xlvi. Culpability.

[294] Possession is not defined in the FCA, however, courts have attempted to define what constitutes 'possession'. In *Adams v S*⁶⁴ possession was defined as follows —

"In general the concept of 'possession' ('besit'), when found in a penal statute, comprises two elements, a physical element (corpus) and a mental element (animus) – Corpus consists either in direct physical control over the article in question or mediate control through another. The element of animus may be broadly described as the intention to have corpus, i.e. to control, but the intrinsic quality of such animus may vary, depending upon the type of possession intended by the statute."

[295] In *S v Hoosain*⁶⁵ it was held —

"In general the concept of 'possession' ('besit'), when found in a penal statute, comprises two elements, a physical element (corpus) and a mental element (animus). Corpus consists either in direct physical control over the article in question or mediate control through another. The element of animus may be broadly described as the intention to have corpus, i.e. to control, but the

⁶⁴ 1986 (4) SA 882 (A) at 890H

⁶⁵ 1987(1) SA 1 (A) para [26]; See also *S v Humphreys* 2013 (2) SACR 1 (SCA) para 13.

intrinsic quality of such animus may vary, depending upon the type of possession intended by the statute.”

11. Contravention of section 90 of the Firearms Control Act 60 of 2000

[296] Section 90 of FCA provides —

“No person may possess any ammunition unless he or she —

- (a) holds a licence in respect of a firearm capable of discharging that ammunition;
- (b) holds a permit to possess ammunition;
- (c) holds a dealers licence, manufacturer’s licence, gunsmith’s licence, import, export or in-transit permit or transporter’s permit issued in terms of this Act;
- (d) is otherwise authorized to do so.”

[297] The State had to prove —

- xliv. The Act (possession);
- xlv. Unlawfulness;
- xlvi. Fault (mens rea);
- xlvii. Ammunition.

[298] The unlawfulness for this offence is in the fact that the accused do not hold a licence in respect of a firearm capable of discharging that ammunition and or do not hold a permit to possess ammunition, and or do not hold a licence or permit mentioned in section 90(c); and or do not have authorization to possess the ammunition. In order to prove that the accused committed this offence, the State had to prove that the ammunition (primer or complete cartridge) was found in possession of the accused, has the capability to fire. In terms of section 1 ammunition’ means a primer or complete cartridge.

12. Theft

[299] According to C.R. Snyman above, a person commits theft if he unlawfully and intentionally appropriates movable, corporeal property which —

- xliv. belongs to, and is in the possession of, another;
- xlv. belongs to another but is in the perpetrator's own possession; or
- xlvi. belongs to the perpetrator but is in another's possession and such other person has a right to possess it which legally prevails against the perpetrator's own right of possession provided that the intention to appropriate the property includes an intention permanently to deprive the person entitled to the possession of the property, of such property.

[300] The State had to prove —

- xliv. An act of appropriation;
- xlv. In respect of property;
- xlvi. Unlawfulness;
- xlvii. Intention.

[301] Smalberger J in *S v Boesak*⁶⁶ defined theft in similar terms where he held that [t]heft, in substance, consists of the unlawful and intentional appropriation of the property of another. The intent to steal (*animus furandi*) is present where a person (1) intentionally effects appropriation (2) intending to deprive the owner permanently of his property or control over his property, (3) knowing that the property is capable of being stolen, and (4) knowing that he is acting unlawfully in taking it.

[302] It is trite that theft is a continuous crime. As long as the stole property is in the possession of the thief or of some person who was a party to the theft or some

⁶⁶ 2000(3) SA 381(SCA) para [96]

person acting on behalf of or acting in the interest of the original thief or party to the theft, the crime of theft continues.⁶⁷

13. Contravention of section (4)(1)(f)(iv) of the Firearms Control Act 60 of 2000

[303] Section 4(1) (f) (iv) of FCA provides –

“4(1) The following firearms and devices are prohibited firearms and may not be possessed or licensed in terms of this Act, except as provided for in sections 17, 18(5), 19 and 20(1)(b):

- (a) Any fully automatic firearm;
- (b) any gun, cannon, recoilless gun, mortar, light mortar or launcher manufactured to fire a rocket, grenade, self-propelled grenade, bomb or explosive device;
- (c) any frame, body or barrel of such a fully automatic firearm, gun, cannon, recoilless gun, mortar, light mortar or launcher;
- (d) any projectile or rocket manufactured to be discharged from a canon, recoilless gun or mortar, or rocket launcher;
- (e) Any imitation of any device contemplated in paragraph (a), (b), (c) or (d);
- (f) any firearm-
 - (i) the mechanism of which has been altered so as to enable the discharging of more than one shot with a single depression of the trigger;
 - (ii) the calibre of which has been altered without the written permission of the Registrar;
 - (iii) the barrel length of which has been altered without the written permission of the Registrar;

⁶⁷ See *S v Cassiem* 2001(1) SACR 489(SCA) para [8].

- (iv) the serial number or any other identifying mark of which has been changed or removed without the written permission of the Registrar.’

[304] The State was required to prove:

- xliv. Possession;
- xlv. Prohibited firearms;
- xlvi. Unlawfulness;
- xlvii. Culpability (in the form of intention to possess).

14. Contravention of section 120(10)(b) of FCA

[305] Section 120 (10) (b) provides —

“It is an offence to —

(b) be in possession of any firearm, imitation firearm or ammunition , with intent to commit an offence or to use the firearm or an imitation firearm to resist arrest or prevent the arrest of another person.”

[306] The State was required to prove that the possession of the firearm or ammunition was with the necessary intent to either commit an offence or use it to resist an arrest. The subjective state of mind (intention) can be inferred from the surrounding circumstances.

o. Contravention of section 2(1) of Dangerous Weapons Act 71 of 1968 as amended

[307] The State charged the accused in count 68 for contravening section 2(1) of Act 71 of 1968 for the offence which took place according to the indictment on 3 January 2018. Section 2(1) provides —

“Any person who is in possession of any dangerous weapon, or of any object which so resembles a firearm that, under circumstances such as those under which such person is in possession thereof, it is likely to be mistaken for a real firearm, shall be guilty of an offence, unless he is able to prove that he at

no time had any intention of using such weapon or object for any unlawful purpose, and shall on conviction be liable to a fine or to imprisonment for a period not exceeding two years.”

[308] In my respective view, Act 71 of 1968 was repealed by the new Act Dangerous Weapons Act 15 of 2013 which was promulgated and came into operation on 2 January 2014.⁶⁸ I was of this view on the basis of section 4. Section 4 provides —

“Repeal of laws

The laws specified in the Schedule are hereby repealed to the extent indicated in the third column thereof.’ In the corresponding Schedule, Act 71 of 1968 is listed and the third column ‘extent of repeal’ it reads ‘the whole’.”

[309] The corresponding section for the prohibition is section 3(1) which provides —

“Any person who is in possession of any dangerous weapon under circumstances which may raise a reasonable suspicion that the person intends to use the dangerous weapon for an unlawful purpose, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three years.”

[310] The defence did not object to this. However, this did not relieve the court’s duty of safe-guarding the rights to a fair trial as compounded in section 35(3) of the Constitution. The court was mindful of the provisions of section 270 of the CPA⁶⁹ and the qualification that the original offence may not be an offence referred to in Chapter 26 (competent verdicts) and the essential elements to invoke the provisions of section 270 was a matter of interest of justice.⁷⁰

Submissions made

⁶⁸ *Government Gazette* number 36704 dated 24 July 2013

⁶⁹ Section 270 provides that ‘whenever the evidence presented at a criminal trial fails to prove the elements of the offence so preferred but proves commission of an offence which by the nature of the latter’s essential elements is incorporated in the original offence so charge, a conviction may follow for offence so incorporated.’

⁷⁰ See *S v Dikole* 1982 (4) SA 731 (NC).

[311] Both the State and the Defence provided written heads of arguments and oral submissions together with the referred case law. All submissions have been duly considered as well as the referred case law.

1. *The State's submissions*

[312] Counsel for the State contended that accused 2,5 and 6 were linked to the robbery in Giyani Spar and Accused 6 was linked to the matter where Mrs Selowa was the complainant. On the racketeering offence, he argued that a number of persons may be liable for conviction by their individual acts of association with the enterprise and referred among others to *S v Dos Santos and Another*⁷¹.

[313] It was contended that it was not essential that two or more accused charged together should know each other as long as they associate themselves with the enterprise. Counsel listed characteristics of an enterprise as- differentiation of roles and tasks, a system of command, a shared or common goal, the intention was to make a profit, continuity of personnel.

He argued that the evidence established that the accused conducted an enterprise that constituted in a loose association where the accused would identify a customer withdrawing large amounts of money from a bank. The information would be passed on to another member of the enterprise waiting outside the bank. The client would then be followed until an opportunity to rob. He referred among others to *S v Brown and Others*⁷².

[314] He contended that the accused was guilty of section 2(1)(e) by virtue of involved in an enterprise and the prosecution was only required to establish the existence of the enterprise and the commission of two or more offences. He submitted that the relationship of the activity of the enterprise was important as it advanced the goals of the enterprise, benefits and acts where each participant in the enterprise.

⁷¹ 2021 (2) SACR 382 (SCA)

⁷² [2019] 2 All SA 622 (ECP) para [284].

[315] He argued that there was no duplication of charges as there was a distinction in the elements of the predicate offences and that of racketeering. He submitted that any argument that accused cannot be convicted of both the predicate offences and POCA was misplaced. In regard to the charge of conspiracy against accused 3, it was argued that he conspired with accused 1 to give information which led to the robbery. He argued that these were not one act as these took place at different times or place.

[316] On the aspect of similar fact evidence, it was argued that the State was allowed to lead such evidence if it can convince the court it was relevant to some of the issues in dispute. He referred to *S v Nduna*⁷³.

[317] He further contended that Ms Coetzee's evidence should be accepted as that of an expert on bank following and her experience and knowledge on bank following was never placed in dispute. Ms Coetzee described the modus operandi for these robberies. It was argued that the role of each accused furthered the business of the enterprise.

[318] It was submitted that the six accused were part of a group that moved from one bank to another to identify persons that were withdrawing money. Accused 1 admitted that he was at ABSA Bank in Randfontein and at the scene of the murder. He placed himself at the scene of murder in the confession he made to Col Kruger. Accused 2 also placed himself at the scene of crime through the formal confession to Col Kruger. The requirements in Mgedezi have been met.

[319] Counsel for the State highlighted the various improbabilities in respect of each accused and argued that the evidence of all six accused was full of improbabilities and contradictions. He made a concession that there was no evidence in respect of counts 41 to 43, 53 to 55. In respect of counts 59 to 61 the State was reliant on the evidence of Mrs Meyer and accused 6 should be convicted of these charges.

[320] He argued that there was sufficient evidence to convict accused on the following counts —

⁷³ 2011 (1) SACR 115 (SCA) para 18

xliv. Accused 1- counts 1 to 8; 10 to 14.

xlv. Accused 2- counts 1 to 2; 3 to 6; 17 to 20; 21 to 24; 26 to 40; 44 to 52; 56 to 58; 62 to 67.

xlvi. Accused 3- counts 1; 7 to 9.

xlvii. Accused 4- counts 1; 12 to 16.

xlviii. Accused 5- counts 1; 21 to 40; 56 to 58; 62 to 67.

xlix. Accused 6- counts 1; 21 to 24; 26 to 40; 44 to 52; 56 to 58; 62 to 68.

2. The Defence's submissions

[321] Counsel for accused 1 reminded the court that it was the State's duty to prove its case beyond a reasonable doubt. He argued that accused 1 gave versions why he was at the banks and contrary to the state's submission that accused 1 placed himself at the scene of crime. He contended that accused 1 could not be a spotter since he was unaware that Momah had withdrawn money. He argued that the (informal) confession made to Col Kruger was denied and the information came from an informer. It was argued that the confession made by accused 2 per Exhibit 'AAA' did not implicate accused 1. He conceded that accused 1 was at the bank per Exhibit 'FF²' and per Exhibit 'GG²'. He was at the bank to pay for DSTV disk and could not have been a spotter when Mr Momah was at the bank because he had been made aware that Mr Momah went to draw money at the bulk cubic teller. Accused 1 denied that he knew accused 3 and only knew accused 4. He conceded that the State failed to prove that accused committed racketeering and had no knowledge of the allegations made by the State that he passed information regarding clients that would be withdrawing large amounts of money. Accused 1 denied that he was a spotter to any incidents where robberies took place. He conceded that the version that accused 1 went to Mohlakeng was never put to the state witnesses, however, that issue was immaterial because accused 1 went to ABSA Randfontein. Accused 1 denied that he told Col Kruger of his involvement in the Randfontein incident. It was argued that the description that

Mrs Phele gave was too general. The Pheles were shown photos before the ID parade. It was argued that there was insufficient evidence to prove accused 1 committed counts 1 and 2. The State failed to prove its case beyond reasonable doubt and prays for acquittal.

[322] Counsel for accused 2 highlighted the various contradictions in the evidence of the state witnesses. In relation to the confession which was ruled admissible against accused 2 she submitted that the court has discretion to reconsider the admissibility of the confession. She contended that Col Botha who was called as finger prints expert conceded that of the twelve points of similarities, points 3, 4, 7 and 12 were unclear while point 5 seemed not to be pointing out the same point. She submitted that it was a partial fingerprint and this court should not rely on such evidence as proof beyond reasonable doubt. She argued that the report allegedly given by accused 2 to Col Kruger was made en route from Germiston to Randfontein and amounted to a confession. Counsel contended that the court remained with discretion to reconsider the admissibility of the report. She maintained that accused 2 who spoke IsiZulu was addressed in Afrikaans by Col Kruger and W/O Le Roux and his rights were explained in a manner he did not understand.

[323] She highlighted aspects in the evidence she contended were improbable. She argued that the statement by accused 2 contradicted the evidence of Ms Meyer on the number of assailants that accosted them. She argued that there was a material contradiction in the state's case on who shot the deceased. She submitted that the identification parades did not meet the basic criteria of the rules of practice specifically Rules 5; 6; 8; 17. Counsel referred among others to *S v Mohlate*⁷⁴. The arguments made during the application for the discharge of the accused 2 terms of section 174 of the CPA were incorporated. She questioned the reliability of the identification made by Mr Malema and referred among others to *S v Shandu*⁷⁵. She argued that Exhibit 'OOOO' contained many omissions which had to be viewed against the backdrop of the concession that Captain Khanye has eye problems. She referred to *Mudau v*

⁷⁴ 2000(2) SACR 530 (SCA) 541d-e

⁷⁵ 1990 (1) SACR 80 (N)

S⁷⁶ . It was submitted Ms Coetzee's evidence on Veli Mathebula did not take the State's case any further. She argued that accused 2's alibi which was corroborated by his defence witness was reasonably possibly true. She submitted that the state failed to prove its case beyond reasonable doubt.

[324] Counsel for accused 3 contended that accused should be acquitted on counts 2; 21 to 61. It was submitted that there was no evidence implicating accused 3 to counts 12 to 21, count 61, count 20; counts 62 to 68. Counsel argued that in respect of counts 3-6, the only evidence against accused 3 was the identification made by Mrs Meyer and highlighted the following short comings in her testimony which affected the reliability of the identification —

- xliv. Mrs Meyers' evidence constituted a dock identification;
- xlv. She saw the assailant through the rear view mirror;
- xlvi. She had indicated in both her statement that she was not in a position to identify the assailants;
- xlvi. She was a single witness;
- xlvi. Mrs Meyers's dock identification amounted to an impromptu ID parade
- xlix. The reliability of dock identification due to passage of time;
- I. Exhibit 'AAA' in which accused 2 admitted that he shot the deceased, this was corroborated by Exhibits 'LL'3 contradicted the evidence of Mrs Meyers.

[325] He submitted in respect of counts 7 to 11 that the only evidence against accused 3 were alleged admissions he made to Ms Coetzee and the alleged statement he made to Captain Makwakwa in Exhibit 'UU'. It was argued that accused 3 denied that the content in Exhibit 'UU' came from him but accepted that that he appended his signature. It was submitted that there was no evidence that accused knew that a robbery would take place and there was no

⁷⁶ [2017] ZASCA 34(29 March 2017)

relationship between accused 1 and him. Exhibit 'UU' was exculpatory and was not a confession.

[326] The contention was that in the event the court accepted that accused 3 shared information; it was under duress and constituted one offence. In respect of racketeering charges, it was argued that that racketeering denoted the repetition of a racket. It was not proved that accused 3 was implicated more than once in specific block of interconnected offences and should be acquitted. The contention further was that if he was acquitted on racketeering that all links in respect of the counts should fall away. It was argued that accused 3's version was reasonably possibly true.

[327] Counsel for accused 4 submitted that the court dismissed the application for discharge of accused 4 with the expectation that he would supplement the State's case and either implicate himself or be implicated by the co –accused. He argued that there was no indication that the co-accused would incriminate accused 4 consequently there was no discretion to be exercised by the court in circumstances on the basis of the right guaranteed in terms of section 35 (3) of the Constitution. It was submitted that the evidence exculpated accused on the counts 1, 12 to 16.

[328] He contended that in order to prove the existence of an enterprise, there should be a person who manages or operates such enterprise and the State failed to prove such a person. He argued that the submission by the State that there was loose association amounted to the shifting of the goal post. He submitted that the State in past cases was assisted by invoking the provisions of section 204 of the CPA which enabled the witness who participated in the enterprise to point out the person managing it. He maintained that it was not clear if accused 4 even participated in the enterprise. He prayed that the court should reject the existence of an enterprise.

[329] In respect to the charge of racketeering, Counsel for accused 4 argued that the State was reliant on the evidence of Mr Thabo More to prove that accused 4 acted as a spotter when he entered and exited the bank. He contended that

there was no complaint that someone suffered a loss that day. It was submitted that accused 4 gave a reasonable explanation for his conduct that day.

[330] In respect to counts 12 to 14 the State was reliant on the evidence of Mr and Mrs Phele, in which accused 4 was alleged to have touched the sliding door of the complainant's vehicle, Counsel argued that the finger prints which were lifted were not positive for accused. He submitted that the assurances made by Mrs Phele that she would never forget the face of accused 4 could not be a classical infallibility of human observation. He argued further that Mrs Phele failed to describe features she recalled accused 4 by and the cell phone records did not place accused 4 within the vicinity of the robbery. He contended that it was not far-fetched that Mr and Mrs Phele were shown photos of accused 4. It was submitted that Ntabeni visited Mr and Mrs Phele after the arrest of accused 4 and Ntabeni was among the police officers who effected an arrest on accused 4. The contention was that it was improbable that the Pheles assisted in drawing the identikit due to the prevailing circumstances at the time of the robbery and the fear they experienced. In his oral submission, Counsel for accused 4 reemphasised the argument that Mrs Phele was mistaken that one assailant alighted from the back door of a Mercedes Bens CLK which had no back doors. This error, so the argument went, clearly proved that the I/O showed the Pheles photographs of the accused 1 and 4 which were taken at the time of their arrest.

[331] He contended that the ID parade did not comply with the requirements and this court had to exercise caution. He submitted that the following facts were questionable- the reference to a CLK having four doors and asked that this court should take judicial notice of the CLK not having four doors, the lack of accused 4's fingerprints on the complainant's vehicle, the fact that photo were taken of accused 4 by the police and the cell phone data did not place accused at the scene.

[332] In respect of counts 15 and 16 it was submitted that Ms Lethuo pointed accused 4 as the person who defrauded her, however the height of the person who was in the bank with her was taller than accused 4. He contended that it was clear that it was not accused 4 who was with her in the bank. He argued

further on this aspect that the State steered clear from addressing that aspect. The contention further was that due to the difference in height, there was doubt that Mrs Lethuo pointed out the right assailant.

[333] Counsel argued that Ms Coetzee's evidence was irrelevant to accused 4. He contended that the State deliberately failed to place before the court some photographs of accused 4 while inside the bank which failure was indicative that the State did not take the court into its confidence and prayed that a negative inference should be drawn.

[334] On the aspect of similar facts, Counsel contended that there was nothing strikingly similar on fact to the charges of theft, fraud and robbery. He argued that the issue of the admission of similar fact evidence had no reference or impact to the fairness of the trial rather the issue was that such evidence did not find application especially against accused 4.

[335] Lastly, in relation to the doctrine of common purpose Counsel argued that the doctrine of common purpose did not apply to accused 4. He argued that there was no evidence which directly linked accused 4 to the charges and he should be acquitted.

[336] Counsel for accused 5 contended that accused did not fire at the police vehicle and he was not in possession of a firearm. He submitted that W/O Chauke's conduct violated accused 5's legal rights. It was submitted that Mr Malema made a mistake in pointing out accused 5 and his evidence must be rejected. He submitted that there was no evidence which placed accused 5 at the Spar robbery and he was not pointed out by any of the witnesses.

[337] Counsel incorporated the arguments advanced during section 174 of the CPA application were relied upon in which he had argued that there was no evidence that accused 5 committed any offence. He contended that the identification of the accused was not reliable based on the principles in *S v Mthetwa* above. He argued that the incidents happened quickly, the victims were scared of the armed assailants. In respect of the photo ID parade, he submitted that the number of photographs was insufficient and the photo ID parade did not meet the requirements. In respect of the incident of 6 January

2018 he questioned the angle with which the shot was made in relation to the evidence given by the police officers. In regard to the remainder of the charges he argued there was no evidence against the accused. It was contended that there was no link between the firearm allegedly found with accused to theft of it. Counsel submitted that the State did not prove the case against accused 5 and he should be acquitted.

[338] Counsel for accused 6 argued that if the evidence of the arresting officers was correct that the suspect was in allegedly in possession of firearms, it made no sense why the members of the community would want to obstruct the police. Though he made a concession that accused 6 was pointed out by Ms Mohale, Mr Malema and Ms Selowa, he submitted that accused raised an alibi that he was in Tembisa. Counsel attacked the reliability of the identification by these witnesses on the basis that the robberies happened quickly, the witnesses were scared and therefore did not have sufficient time to observe and identify the assailants. He placed reliance among others *S v Mehlape*⁷⁷ where it was held that a judicial officer must scrutinize identity evidence closely and be satisfied that the witness's recollection of the person goes beyond an impression.

[339] In relation to the ID parades, he argued that fairness was compromised because there was failure to adhere to Rule 17 of the Police Rules.⁷⁸ It was submitted that the State failed to prove that accused 6 was employed by or managed or operated an enterprise.

[340] Counsel incorporated the arguments he made during section 174 application in which he argued that the State failed to prove counts 1 and 2 against accused 6 on the basis that there was no evidence that accused 6 was either a member of or operated an enterprise. It was also argued that in regard to counts 32 to 34 involving Mr Mathebula, counts 35 to 37 involving Ms Macevele, counts 38 to 40 involving Ms Maswanganyi, counts 44 to 46 involving Ms Ngulele, counts 50 to 52 involving Ms Rasuka, counts 56 to 58 involving Mr Sithole, count 59

⁷⁷ 1963(2) SA 29 (A)

⁷⁸ Rule 17 provides that the official in charge should inform each identifying witness that the person whom the witness saw may or may not be on the parade and if he/she is unable to provide positive identification, he/she should refrain from doing so.

involving Mr Meyer and counts 62 to 64 involving Ms Maphogole none of these witnesses linked accused 6. It was submitted that the description given by the victims did not fit accused 6.

[341] He argued that in instances where victims failed to identify the assailants, the doctrine of common purpose cannot be applied. In relation to the issue of joint possession, Counsel reiterated the principle that the fact that an accused participated in a robbery where the co-perpetrators were in possession of firearms did not sustain an inference that such accused jointly possessed the firearm with them. He referred among others to *Leshilo v S*⁷⁹ where this principle was reiterated. He prayed for the acquittal of accused 6.

Evaluation

[342] Having outlined the law and the applicable legal principles, the evidence was evaluated and the law was applied to the facts. The prosecution case rested on viva voce testimonies of the witnesses as summarized, a large volume of documentary evidence. It was also based on extra-curial statements made by some of the accused and circumstantial evidence.

[343] The State by means of a concession was not seeking a conviction only in respect of counts 41 to 43 and 53 to 55. The Defence prayed for the acquittal of all six accused.

[344] The following facts were common cause or at the very least were not reasonably disputed:

1. There were victims who were robbed of money and some personal items;
2. The robberies were committed by a group of assailants;
3. The six accused were arrested by the police;
4. Mr Meyer was shot and killed on 13 August 2013 and the correctness of the cause of death as found from the post mortem.

⁷⁹ [2020] ZASCA 98 para [11] (8 September 2020)

[345] There were various factual disputes in this matter same are on record. One of main issues in dispute was identity i.e. whether or not the six accused committed the offences. To resolve irreconcilable factual disputes the court had to make findings on credibility of the various factual witnesses, their reliability and probabilities.⁸⁰

1. *POCA Offences*⁸¹:

[346] The State charged all the six accused in respect of count 1 and charged only accused 1 and 2 in respect of count 2. The crux of the State's case in respect of count 1 was that the six accused during May 2011 to January 2018 either by managing or being employed by or by association with the enterprise participated in the conduct of the enterprises' affairs through a pattern of racketeering activities to wit robberies.

[347] The State led the evidence of the robbery victims and Ms Coetzee to prove the existence of an enterprise and the similarities in the robberies to prove by inferential reasoning the identity of the assailants on the underlying predicate offences. In terms of POCA offences, similar fact evidence is admissible as provided in section 2(2) of POCA, with a proviso that such evidence does not render the trial unfair.⁸² Counsel for accused 4 correctly submitted that the admissibility of similar evidence as impacting on the fairness of the trial was not placed in issue, rather it was whether such evidence found application in respect of all six accused.

xliv. Count 1

[348] In respect of count 1, the first issue for determination was whether or not an enterprise existed and the second issue was whether the six accused associated themselves with an enterprise. By definition, an enterprise includes among others a group of individuals who are associated by fact. Defence

⁸⁰ See *Stellenbosch Farmers' Winery Group Ltd and another v Martell et CIE and Others* 2003 (1) SA 11 (SCA) pages 14 I-J to 15 A-G; *S v Singh* 1975(1) SA 227(N) at 228. See also *S v Singh* 1975(1) SA 227(N) at 228.

⁸¹ On the specific allegations, refer to the indictment and substantial facts.

⁸² This section provides that the court may hear evidence, including evidence with regard to hearsay, similar facts or previous convictions, relating to offences contemplated in subsection (1), notwithstanding that such evidence might otherwise be inadmissible, provided that such evidence would not render a trial unfair.'

Counsels argued that there was no evidence which proved an enterprise and submitted in respect of each individual accused to persuade this court that there was no evidence that the six accused associated themselves with any enterprise. It was even argued that the State's main witness Ms Coetzee made her findings or drew her conclusions on assumptions. In response, Counsel for the State submitted that persons may be convicted by their individual acts of association with the enterprise where the modus operandi of the criminal syndicate was similar and it was not essential that two or more accused charged together should know each other.

[349] It appeared that the defence placed much emphasis on the word 'manage' in the definition of 'enterprise' to support the contention that there was no evidence that any of the accused managed the enterprise and or evidence who was managing the enterprise. After the evaluation of the evidence and applying Eysen in respect to count 1, this court found that the enterprise definition was wider and included to 'association'. This definition was not just limited to 'managing'. Therefore the ordinary meaning of the term 'association' which is defined as a connection or a relationship between people had to apply.⁸³

[350] Ms Coetzee went to great lengths to explain how the syndicate of bank followers operated. Her expert knowledge was not strenuously challenged. I was satisfied that her knowledge on bank following robberies qualified her to be regarded as an expert⁸⁴. She described in detail the structure of a bank following syndicate and their different but intertwined roles. The following exhibits lent credence to her testimony-

- aa. Exhibit 'Q':
- bb. Exhibit 'FF'
- cc. Exhibit 'U'
- dd. Exhibit 'AA'

⁸³ Oxford Advanced Learner's Dictionary 9th edition page 77. According to www.dictionary.cambridge.org an association is a group of people or organizations who work together for a particular purpose. According to www.thesaurus.com an association is a group with common interest or pursuit.

⁸⁴ See *R v Jacobs* 1940 TPD 142 at 147.

- ee. Exhibit 'YY'
- ff. Exhibit 'KKK':
- gg. Exhibit 'MMM'
- hh. Exhibit 'NNN'
- ii. Exhibit 'OOO'

[351] The context of Ms Coetzee's evidence was to prove that in bank following robberies the assailants would form a structure whose members would have different roles. The evidence was assessed holistically before this court proved that the various robberies were not committed by an individual assailant and randomly. There was a golden thread that ran within the majority of the victims – which was that they had gone into their respective banks to withdraw a fairly large amounts, they were then followed and robbed. These similarities could be observed in respect of Mr Momah, Mr and Mrs Phele, Mr Mookamedi, Mr Ngobeni, Mr Malema, Ms Mohale, Mr Mathebula, Ms Macevele, Mr Chabalala, Mr Ngulele as examples. It was highly improbable that it was a mere coincidence that victims who had withdrawn money were then accosted and robbed. Simply put, how did the assailants know who the target was in each instance? The only reasonable inference to be drawn in each incident was that the target was identified prior to the robbery. Ms Coetzee articulated the role that each member of the two groups placed. The key element was the fact that no legitimate business transaction was conducted by the 'spotter' who would get a sudden urge to leave the queue without conducting any business.

[352] The argument by Counsel for accused 2 that the testimony on Veli Mathebula did not take the State's case anywhere with respect missed the context. The context of that evidence lent credence to the existence of bank following and the various signs used by the banks to identify suspicious individuals in order to foil any incidences. This explained the suspicion and intervention by Mr More and Mr Labuschagne.

[353] The Defence's contention that there was nothing strikingly similar with the robbery incidents was unattainable. In evaluating similar evidence, I had to evaluate- the degree of similarity between the acts and whether there was sufficient similarity, to determine if the modus operandi was similar to prove the identity of the perpetrator, proximity in time of the acts, similarities in details, circumstances and unique or distinctive features of the acts.

[354] I found that the following factors were strikingly similar in the various robbery incidents —

- aa. The victims were not randomly selected as in the so called 'wrong place and wrong time' but were purposely selected;
- bb. The assailants worked in a group never individually;
- cc. Particular victims were targeted were bank clients who had withdrawn money from the bank and were followed from the bank, intercepted and robbed at gunpoint;
- dd. In each robbery, the assailants indicated to the victims they want the money which was indicative they were not randomly targeted;
- ee. In each footage involving the victims, there would be a suspicious person who joined the queue but would leave without conducting any business in the bank;
- ff. The assailants targeted specifically those were in possession of large sums of cash.
- gg. The description of the assailants given by some victims sounded similar (one was described as tall, slim/ slender with fair/ light complexion; another described as slim with dark/ coffee complexion)
- hh. Taking all of these similarities in facts, I found that there was a high degree of similarities which rendered the likelihood of a

mere coincident highly improbable. The evidence of modus operandi in the incidents in counts 3, 7, 12, 21, 24, 28, 31, 33, 35, 47 was of legal relevance and admissible.

[355] The contention that Ms Coetzee's opinion was based on still photographs did not detract from her expertise to analyse and find certain signs in the behaviour of suspects which are consistent with those of spotters. Having assessed Ms Coetzee's evidence, it was evident that for an associated robbery to be successful it required a measure of planning. This included mode of transport to and from the bank; it required time for the spotter to either observe and identify a target in the bank or get information on a specific target; it required the gun man to secure weapons to be used to overcome resistance of the victim to the taking by force of the money. Without someone taking the time and effort to get to a bank to either observe the people or recruiting an insider or bank employee, (in other words without a spotter), the group would not be in a position to rob anyone.

[356] Similarly, without someone taking the effort to obtain weapons and accost and rob (in other words without the gunmen), there would be no robbery. Objectively assessed the incidents of robberies in this matter had hallmarks of the existence of an enterprise within the definition of POCA. The argument by Counsel for accused 4 that to prove the existence of an enterprise required proof of the manager of such enterprise was unattainable. To give such interpretation to enterprise would in my view be restrictive and narrow as well as to defeat the purpose of section 2 (1) (e) of POCA. Such an argument was better suited for count 2.

[357] I was satisfied that the evidence proved the existence of an enterprise. The association by fact had to do with robbing people from the bank who had withdrawn money. The evidence from the robberies consistently proved that they were on-going which criminal conducts fell within the definitional elements of racketeering. His denial of any association with an enterprise was not reasonably possibly true.

[358] The evidence against accused 1 was overwhelming. He was involved in Randfontein incident, Booyens incident and Kliprivier incidents. The statement he made to Col. Kruger as per Exhibit 'LL' coupled with Ms Coetzee's expert assessment and conclusion that in these three banks he was that of a spotter was conclusive that he associated himself with the enterprise. This conclusion was based on the fact that there was more than one predicate offence he associated himself with. He was asked by his counsel 'Q: If you were managing this enterprise you would know this person Veli Mathebula'. He answered 'No. There is a possibility you can be in a group of fifteen and may not know all the rest (of the members).' A strange comment for someone who was supposedly clueless about the operation of a syndicates. I was satisfied after the evidence was assessed in totality that accused 1's conduct fell within the definitional elements of racketeering. His denial of any association with an enterprise was not reasonable possibly true.

[359] The evidence against accused 2 was not as glaring or obvious. Counsel for accused 2 correctly argued that the incident of Mabeskraal did not qualify as bank following in respect of which he raised an alibi defence. The evidence required an assessment that pierced all the pieces together and called for one not to have a narrow view. He placed himself at the scene of bodged robbery against Mr Meyer as per Exhibit 'AAA'. His partial finger prints which were lifted at Mabeskraal Post Office constituted objective evidence which placed him at the scene of crime. The contention that it was not bank following failed to consider one important fact which was that Ms Mosidi was not randomly selected. In addition, Exhibit 'PPPP' was damning evidence that he was linked to the Giyani Spar robbery. He was at pains to distance himself from the knowledge of accused 1. It was surprising that accused 1 who was alleged to be a stranger to accused 2 knew so many personal details such as where accused 2 resided, the endearment name accused 2 called his girlfriend, and the alias of 'X'. It was not surprising accused 1 distanced himself from the information given to Col Kruger. His conduct assessed cumulatively fell within the ambit of racketeering and his alibi was rejected as false beyond a reasonable doubt. Accused 2's connection to Mr Meyer's incident and to the robbery at Giyani fell within the definitional elements of racketeering. His denial

of any involvement or association in the enterprise was not reasonably possibly true.

[360] The evidence against accused 3 was insufficient to prove that he associated himself with an enterprise. Counsel for accused 3 correctly contended that the State was required to prove two or more predicate incidents where else he was only linked to one incident involving Mr Momah. The contention that the accused did not provide information on Exhibit 'UU' was a lie. That Exhibit was relevant to another count not count 1. The further contention that such information was given under duress of threat against his daughter was found to be a lie. After the evidence was assessed holistically, the involvement of accused 3 within the context of the definition of pattern of racketeering failed to prove a pattern of racketeering. His alleged involvement in giving information against Mr Momah could not be said to be on-going. The State's contention in respect of accused 3 that there was loose association was not persuasive consequently I was not satisfied that accused 3's actions fell within the definitional element of pattern of racketeering. He was given the benefit of doubt.

[361] In respect of accused 4, the evidence had to be assessed globally by piercing all the pieces of evidence together and not viewed in a narrow manner. Counsel for accused 4 contended that there was no evidence linking accused 4 to count 1. Emphasis was placed on the fact that no complaint was made on 5 of February 2016. That was factually correct. However, that was not the end of the assessment. The dictates of the interest of justice required that probabilities had to be looked at. Something drew Mr More's attention to accused 4. It had to be recalled that Mr More testified that accused 4 was acting suspiciously and was following a client who had withdrawn a large sum of money. Accused 4 was in company of accused 1 whose conduct was assessed and found to be that of a spotter. Having assessed and found accused 1 acted as a spotter in Randfontein incident (per Exhibit 'FF²', Exhibit 'GG²') it was improbable that he was inside the bank on 5 February 2016 innocently.

[362] When accused 4's behaviour was considered within the totality of the evidence, including the veracity of the version why he was at the bank, one had to infer

that the conduct of the accused was strikingly similar to the conduct of a spotter in bank following. The only inference I could draw was that the involvement of the bank officials Mr More and Mr Labuschagne foiled what may have ended as another bank following robbery on the client who had withdrawn a large sum of money. The contention that no complaints was made on 5 February 2016 did not mean that the evidence of Mr More and Mr Labuschagne had to be disregarded. On the contrary, it gave weight to the probability that the presence of accused 1 and accused 4 inside the bank on 5 February 2016 was not innocent. In my view facts would have supported (a charge of) conspiracy. It had to be recalled from Ms Coetzee's testimony that the role of a spotter required no weapons but the passing of information on the target. The contention that common purpose did not find application to accused 4 was in my view incorrect. How then did they end up together that day and for what purpose? I accepted the evidence that once accused 1 and accused 4 became aware that they were being followed by Mr More and Mr Labuschagne the car was driven in a manner classified as 'reckless' which factor was inconsistent with innocence.

[363] Accused 1 was at pains to explain accused 4's behaviour that day by saying he had received a disturbing call which was rejected as a weak attempt to explain the behaviour in the bank. The evidence that accused 4 drove a car with false number plates was not a factor that could be ignored or deemed insignificant. When viewed holistically within Ms Coetzee's evidence only one inference could be drawn, which was that both accused 1 and accused 4 acted as spotters on 5 February 2016. Mr and Mrs Phele identified accused 4 as being one of the assailants at the robbery scene which had the hallmark of bank following. It was significant that the Pheles also identified accused 1 for the same robbery. There is a common factor. In respect of the robbery involving the Pheles common purpose found application. Holistically assessed, the denial by accused 4 that he had no association with an enterprise was not reasonable possibly true. I was satisfied that he associated himself with the enterprise. The State proved count 1 against accused 4.

[364] In respect of accused 5, after the evidence was assessed holistically I was satisfied that there was sufficient circumstantial evidence of his association with the enterprise. Counsel for accused 5 argued that he was not linked to count 1 on the basis that in order to be convicted of POCA he must have committed more than one incident in respect of which he raised a defence. It was true that accused 5 was only directly linked in the incident which involved Mr Malema who identified him as one of the assailants who robbed him allegedly hit him with a firearm. However, Exhibit 'EEE' depicted a blue hatch back, the significance of that car was articulated by Sgt Matukana's evidence which led to accused 5's arrest on 7 January 2018. The manner under which accused 5 was arrested caused me to draw as the only reasonable inference that he attempted to fight his way out because he was involved in the Spar robbery. The probabilities that a blue hatch car was captured on the CCTV of Spar per Exhibit 'EEE' and the following day accused 5 was arrested driving a blue hatch car with striking resemblance are slim. For purposes of pattern of racketeering, these two incidents in my view were sufficiently connected to find that he associated himself with the enterprise. The State proved count 1.

[365] In relation to accused 6, despite his Counsel's contention that he should be acquitted, having evaluated the evidence holistically I was satisfied that he associated himself with the enterprise. He was identified by Mr Malema in his robbery as the assailant who dispossessed him of the bag with the cash. He was identified by Ms Mohale as an assailant in her robbery. He was identified by Ms Selowa as the assailant who placed a knife on her neck on the day her husband was robbed. The identification made by these witnesses despite the operation of cautionary rules was reliable on the basis that they were robbed in broad day light and within close proximity to each other. Accused 6's behaviour fell within the definitional elements of racketeering. Accused's denial of any involvement in an enterprise was not reasonably possibly true. In respect to count 1, I was satisfied the State proved the existence of an enterprise and the evidence proved beyond reasonable doubt that accused 1, accused 2, accused 4, accused 5, accused 6 associated themselves in the enterprise and are found guilty as charged.

ii. Count 2

[366] In respect of count 2, the State argued that it proved that accused 1 and 2 were managing this enterprise. The key element for the contravention of section 2 (1) (f) of POCA was that accused 1 and accused 2 managed the enterprise. Applying the Prinsloo case, the State had to prove beyond reasonable doubt evidence of managing the enterprise. There was evidence of the existence of an enterprise which was but one elements of the offence. Having evaluated the evidence holistically I was not satisfied that there was sufficient evidence to prove that accused 1 and accused 2 managed the enterprise. Participation or association to an enterprise did not equate to managing it. More was required than participation in the affairs of an enterprise. Evidence had to be presented to prove that (each) accused was not just a member of the enterprise, rather that he was managing it. In the absence of evidence that they managed the enterprise, the two accused were entitled to the benefit of doubt and found not guilty.

iii. Count 3

[367] The State alleged that on 13 August 2013 Mrs Meyers and the late Mr Meyer had withdrawn twelve thousand rand. The evidence clearly demonstrated that they were followed home. Mrs Meyer was a single witness as trite cautionary rules applied. The only reasonable inference was that the assailants were looking for the money. The objective facts proved that the intention of the assailants was to rob Mr and Mrs Meyer which failed due to an altercation that ensued and ended with the shooting of Mr Meyer. The issue was identity of these assailants.

[368] On the identity of the assailants, Counsel for the State submitted that accused 1 to accused 3 were positively identified for this offence. Accused 1 gave two conflicting reasons why he was at the bank. The first version was that he went to the bank in order to get change for his business and during cross examination his version changed to that he was in the vicinity because Malandani was in Randfontein to get some things after he was done at Mohlakeng. The informal statement that accused 1 made to Col Kruger per

Exhibit 'LL' was inconsistent with an innocent explanation for the presence at the bank. The version that the information on Exhibit 'LL' came from an informer was a lie. Exhibit 'YY'² proved that accused 1 was at the bank without conducting any business. Ms Coetzee's conclusion which I accepted was that accused 1 acted as a spotter. When all of these pieces of evidence are put together the only inference I could draw was that accused 1 associated himself with the intention to rob the Meyers. The State proved count 3 against accused 1.

[369] In respect of accused 2, I ruled that Exhibit 'AAA' was admissible. There was internal contradiction between his oral testimony and Exhibit 'AAA'. In his oral testimony accused 2 denied that he was at the Meyer premises where else he placed himself there in Exhibit 'AAA'. As trite, contradictory versions had to be considered and evaluated holistically, taking into account the circumstances under which the versions were made, the reasons for the contradictions and their effect on the reliability on the witness.⁸⁵ Counsel for accused 2 argued that accused's alleged statement and the testimony of Mrs Meyer constituted different versions within the State's case. It was important to reiterate that the State was under a constitutional duty to place all available evidence before the court and it was the duty of the court to assess holistically every piece of evidence. Having found that Mr and Mrs Meyer were followed from the bank after the withdrawal of cash, the resistance that Mr Meyer offered against the taking of his cash botched the robbery. The court weighed Exhibit 'AAA' and the necessary weight was attached. Accused 2 was one of the robbers and his conduct fell within the definitional element of attempted robbery with aggravating circumstances.

[370] In respect of accused 3, Mrs Meyer identified him as the assailant who was at her home. The reliability of the identification by Mrs Meyer of accused 3 was assessed holistically. Applying the legal principles on evidence of identification⁸⁶, Mrs Meyer's subjective assurances that she identified the right person left me with serious reservations for the following reasons- she identified accused 3 for the first time in court (dock identification) which carried little

⁸⁵ See *S v Mafaladiso and Others* 2003 (1) SACR 583 (SCA).

⁸⁶ See *S v Charzen* [2006] 2 All SA 371 (SCA); *S v Mthetwa* 1972 (3) SA 766 (A) at 768.

weight as it was not preceded by a previous identification. There was no ID parade held, no description of the assailants was given on both her statements, in fact she positively stated that she was not in a position to identify the assailants. The following factors were also considered in assessing reliability of Mrs Meyer's identification —

- aa. The fact that Mrs Meyer was observing the shooting through a mirror;
- bb. Mrs Meyer and the assailants met for the first time that day of the incident;
- cc. The impact, if any, of the shock that Mrs Meyer experienced as a result of the shooting of her husband;
- dd. The fact that Mrs Meyer was a single witness;
- ee. The length of time between the time when the incident took place and the time when Mrs Meyer testified;
- ff. The absence of other confirmatory evidence;
- gg. It was a moving scene.

Mrs Meyer (i.e. her identification) was found to be unreliable. In respect of accused 4, accused 5 and accused 6 there was insufficient evidence to prove that they committed this offence and were given the benefit of doubt.

iv. Count 4

[371] The killing of Mr Meyer and the cause of death were common cause. The only issue was the identity of the killers. According to the State's allegations per the substantial facts the deceased and his wife were observed while they were in the bank by Accused 1 with one Malandani who related the information to accused 2 and accused 5 who were outside the bank. The Meyers were followed home. Accused 2 and accused 5 entered the premises while accused 1 and Malandani parked in the street. Accused 2 who was in possession of a firearm confronted the deceased and shot him before they fled the scene. The

State led evidence of Mrs Meyer who was a single witness who testified how her husband was killed. Mrs Meyer identified accused 3 as the alleged killer.

[372] Starting with accused 1, the State was also reliant on the informal statement made by accused 1 to Col Kruger implicate him to the killing of Mr Meyer. I accepted that accused 1 associated himself to the intended robbery of Mr Meyer by the application of the doctrine of common purpose. The question was whether liability should be extended to the killing of Mr Meyer. The answer was yes. Accepting that the modus operandi to the bank following was that the information would be given to the gun men who would carry out the actual robbery under the threat of a firearm, the only reasonable inference was that accused 1 was aware that accused 2 was armed. Accused 1 should have foreseen a likelihood of resistance by the victim. I was satisfied that accused 1 by doctrine of common purpose liability was imputable to him as well. Accused 1 was guilty of the death of Mr Meyer. The (type of) intention was similar to the one of accused 2.

[373] In respect of accused 2, he placed himself at the scene through the statement (Exhibit 'AAA') which was ruled admissible as an admission. As correctly argued I retained the discretion to reconsider the matter. The classification of a statement whether it was a confession or admission is determined by the extent to which it implicates its maker.⁸⁷ An exculpatory statement cannot amount to a confession because by definition a confession is 'unequivocal acknowledgement of guilty, the equivalent of a plea of guilty before a court of law.'⁸⁸ The definition of an admission is 'a statement or conduct that is adverse to the person from whom it emanates.'⁸⁹ An admission while it may contain self- incriminatory evidence, it still required the State to prove some element of the crime⁹⁰. Accused 2 described the shooting as an 'accident' which was indicative that accused 2 did not admit to the shooting as intentional. For the charge of murder, the State was only required to prove the element of intention (dolus). That was the reason that Exhibit 'AAA' was classified as an admission. The provisions of section 219A of the CPA applied.

⁸⁷ See *S v Mhlongo; S v Nkosi supra* para 33. See *R v Matsitwane* 1942 AD 213.

⁸⁸ See *R v Becker* 1929 AD167 at 171.

⁸⁹ See *S v Mhlongo; S v Nkosi* 2015 (2) SACR 323 (CC) para 33.

⁹⁰ See Zeffert and Paizes, *The South African Law of Evidence*, 2nd ed page 524 and 517.

[374] Section 219A provides that -

“Admissibility of admission by accused

(1) Evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence, and is proved to have been voluntarily made by that person, be admissible in evidence against him at criminal proceedings relating to that offence.”

[375] According to Exhibit ‘AAA’ accused 2 was armed with a pistol and accosted the victim when he got home. He admitted that he shot the person albeit accidentally. Though accused 2 did not disclose the name of the victim in his statement, it was clear by inferential reasoning that the victim was Mr Meyer. Accused 2’s admissions in Exhibit ‘AAA’ that he shot at the victim was corroborated by Exhibit ‘R’ in which Sgt Molefe in his section 212 of CPA statement found empty cartridges on the ground in the drive way later forensically tested per Exhibit ‘WW’. The evidence proved that the purpose for being at Mr Meyer’s premises was to rob him of the cash. Accused 2 was armed and ought to have reasonably foreseen that there might be resistance from Mr Meyer. It was evident that accused 2 reconciled himself with the possibility. The objective facts constituted sufficient evidence to draw the only reasonable inference that this killing of Mr Meyer was intentional. There was no evidence that Mr Meyer was armed causing accused 2 to use a firearm.

[376] Upon receiving resistance from the deceased referred to in Exhibit ‘AAA’ as a fight, accused 2 shot the deceased. Applying *Pistorius*⁹¹ to the facts, I was satisfied that the murder of Mr Meyer was committed with *dolus eventualis*. Accused 2’s contention that the shooting was accidental was a feeble attempt to exculpate himself which was rejected as not being reasonably possibly true. Imputing liability on accused 1 was not based on Exhibit ‘AAA’ rather on the application of common purpose. Accused 5 were placed at the scene by Exhibit ‘AAA’ which statement was inadmissible against them on the application of *Litako and Others v S*⁹² and without Exhibit ‘AAA’ there was no other

⁹¹ 2016 (2) SA 317 (SCA) para 26.

⁹² It was held para [67] ‘Having regard to what is set out above, we are compelled to conclude that our system of criminal justice underpinned by constitutional values and principles which have, as their

objective and credible evidence linking him to the murder of Mr Meyer. He was given the benefit of doubt.

[377] In respect of accused 3, Mrs Meyer's subjective assurance that it was accused 3 who killed her husband was unreliable as already found. The only evidence linking accused 3 to the killing of Mr Meyer was dock identification which was not preceded by any prior identification. In her statement marked Exhibit 'T' she wrote *'I won't be able to id him if can see him again. I didn't have time to look at his face properly'* which caused doubt whether the right person was identified and in turn made the identification unreliable. There was insufficient evidence against accused 3, accused 4, accused 5 and accused 6 and are found not guilty. For accused 1 and accused 2 the State proved this count.

v. Counts 5 and 6

[378] The State alleged that on 13 August 2018 the six accused unlawfully possessed firearm particulars of which was unknown without being the holder of a licence. Evidence was assessed. Mrs Meyer was the single witness who was present when her husband was shot and killed by means of a firearm. There was evidence against accused 2 by virtue of his extra – curial statement Exhibit 'AAA' and he had no license therefore he was unlawfully in possession of firearm and ammunition and found guilty of counts 5 and 6. Any reference made in Exhibit 'AAA' to accused 1, 5 was inadmissible.⁹³ After applying the principles on joint possession⁹⁴ I was not satisfied that accused 2 possessed the firearm on behalf of the co-accused and accused 1, accused 3, accused 4, accused 5 and accused 6 were given the benefit of doubt and are found not guilty. Accused 2 found guilty.

objective, a fair trial for accused persons, demands that we hold, s 3 of the Act notwithstanding, that the extra-curial admission of one accused does not constitute evidence against a co-accused and is therefore not admissible against such co-accused.'

⁹³ See *Mhlongo v S ; Nkosi v S 2015 (2) SACR 323 (CC)* .

⁹⁴ The two elements for joint possession to wit that (a) the group had the intention to hold the firearm on behalf of detentor and (b) the actual detentor had the intention to hold the firearm on behalf of the group. See *S v Nkosi 1998(1) SACR 284(W)*; *S v Mbuli 2003(1) SACR 97 (SCA)*; *Kwanda v S 2013 (1) SACR 137 (SCA)*; See *Makhubela v S, Matjeke v S 2017 (2) SACR 665 (CC)* in which it was opined at para [55] that there would be few factual scenarios which meet the requirements to establish joint possession because of the difficulty in proving that the possessor had the intention of possessing a firearm on behalf of a group.

vi. Count 7

[379] This charge related to the robbery of Mr Momah which took place on 23 January 2015 at Southdale ABSA Bank. The State alleged that accused 3 conspired with accused 1 and other unknown people to procure the commission of robbery with aggravating circumstances. Mr Momah was a single witness whose evidence was treated with caution. He related how he was robbed of R200 000 under the threat of a firearm and he recalled seeing accused 1 in the bank. Mr Momah's evidence that he saw accused 1 was corroborated by Exhibit 'GG²'. Mr Momah created a good impression to court. He testified in a confident manner and related in logical and chronological manner what happened the day he was robbed.

[380] Accused 1's version that he was at the bank to pay for his satellite dish prescription was not reasonable possibly true. He left without conducting any business and blamed it on the fact that the bank was full. Ms Coetzee's evidence that accused 1's behaviour that day was that of a spotter had a ring of truth and acceptable. It had to be recalled that Mr Momah did not place notice for the withdrawal of the money on the day he received the money but on a previous occasion. Secondly when Mr Momah was handed the cash he was in a secluded area as correctly conceded by Counsel for accused 1. Yet mysteriously when Mr Momah was accosted, the assailants asked specifically for the cash. The only inference was that the assailants knew the identity of Mr Momah as a target. The only inference was that the assailants were informed about the amount Mr Momah had. It could not be a coincidence that accused 1 was at the bank whose conduct was found to be a spotter then Mr Momah was robbed. Circumstantial evidence proved accused 1 was involved. Accused 3's defence against this charge was also a bare denial and distanced himself from Exhibit 'UU'. Mr Momah's testimony that he briefly had a chat with accused 3 soon after his arrest and accused 3 made informal admissions had a ring of truth in it. Mr Momah articulated his misgiving about the fact that accused 3 kept coming into the room to check if they were finished counting the money. That was the only manner the assailants knew Mr Momah had the money. As already found, the true was that Exhibit 'UU' was made by accused 3 freely and

voluntarily. I was satisfied that the accused 3 conspired to have Mr Momah robbed that day. The State proved this charge against accused 1 and accused 3. There was insufficient evidence to link accused 2, accused 4, accused 5 and accused 6 and they were given the benefit of doubt and found not guilty.

vii. Count 8

[381] This count was in relation to the robbery committed against Mr Momah where R200 000, two cell phones, BMW X3 were taken. The evidence clearly proved that the assailants had prior knowledge that he had withdrawn money. Accused 1 wanted this court to believe that he was at the bank for legitimate reasons. When his version was assessed in totality to the evidence the only reasonable inference drawn was that he was at the bank as a spotter. He took the trouble to go to the bank in order to allegedly pay for his satellite, joined the queue and then left. That was odd.

[382] Mr Momah recalled seeing accused 1 the day of the robbery. I accepted the truthfulness that he saw accused 1 at the bank that day for the simple reason that by his own admission, accused 1 was in the bank to allegedly pay for his satellite subscription. It could not have been a coincidence that soon after accused 1 was in the bank without doing any transaction then Mr Momah was robbed. As already found, accused 1 acted as a spotter and formed a common purpose with the robbers to accost and rob Mr Momah. After assessing all the evidence holistically, the following reasonable inferences were drawn —

- aa. That accused 1 did not conduct any business in the bank because he was there as a spotter;
- bb. That accused 1 formed part of the assailants whose intention was to rob Mr Momah.
- cc. That the robbers knew how much money had been withdrawn by Mr Momah which pointed to one logical conclusion- they were told by someone who had inside information;

- dd. That the person who gave the information was accused 1 who associated him to the common design;
- ee. That Ms Nyembe played no role in the robbery for the simple reason that she would not have taken the trouble to safeguard the security of her client to turn around and conspire to have him robbed.
- ff. The money was handed over to Mr Momah in a secure area and there was no chance that a spotter would have known how much he was withdrawing. This meant that there was communication between accused 1 and accused 3 who acted as an inside person. Having accepted that accused 3 acted as an inside person and well knew that he was associating himself by common design to rob Mr Momah. His conduct fell within the definitional element of robbery with aggravating circumstances. It was improbable that accused 3 and the group communicated for the first time the morning of the robbery. Otherwise how did the bogus officers get to be there? The reasonable inference was that there was prior communication.

[383] I was satisfied that accused 3 provided information when and how much Mr Momah was going to withdraw. Accused 3 knew or reasonably must have known that by providing information, he was associating himself with the robbery of Mr Momah. After all the evidence was assessed it was evident that Mr Momah would not have been robbed but for the role of accused 3 who gave information. It was disingenuous for accused 3 to want this court to believe that he was unaware that by giving the information on Mr Momah of the day and amount he was going to make the withdrawal was for no purpose. When accused 3 gave the information he well knew that he had set the robbery in play. Accused 3's version that should this court disbelieve his bare denial that he was involved, it should find that he did so due to threats was a blatant lie. As already found nothing could be further from the truth. Such a proposition and version was not reasonably possibly true for the simple reason that no blackmailer would reward his target. Accused 3' version that after he was

taken to Booyens Police Station he was not informed of his rights against the existence of Exhibit 'TT' (notice of rights) was so improbable that it was beyond reasonable doubt false. It was not surprising that accused 3 remarked that it was not read to him. The proposition that he was made to sign documents by the police with some having some writings on them was a blatant lie and rejected. The acceptable evidence was that Ms Coetzee had a cordial interview with accused 3. He was not threatened in any manner and he made the statement freely. It was unchallenged that upon making the statement, accused 3 appeared relieved according to Ms Coetzee. The relief she saw taking place on accused 3 was consistent with Mr Momah's testimony that accused 3 apologized to him. The evidence clearly proved that all the common purpose requirements were met in that accused 3 associated himself with the common design to rob Mr Momah and was guilty of robbery with aggravating circumstances. In respect of accused 2, accused 4, accused 5, accused 6, there was insufficient evidence to link them to the robbery of Mr Momah and were given the benefit of doubt.

viii. Count 9

[384] During the interlocutory application for the discharge of the accused in terms of section 174 of the CPA, Counsel for accused 3 argued that by charging accused 3 with the crime of corruption in contravention of section 3(a)(i) of Act 12 of 2004 amounted to a duplication of charges. I steered clear from making any ruling at that stage as I was of the view that an appropriate time to rule on that aspect was at the end of the trial.

[385] Counsel referred to *Maphakela v S*⁹⁵. In that matter, the court found that the violence which constituted an offence of robbery equated to the detention of the complainants. As a result, the court in that matter correctly found that there was a duplication of charges in convicting the appellant for robbery and kidnapping as there was no intention to kidnap.

[386] In order to determine whether there was splitting of charges, a better approach was proposed in *S v Dlamini*⁹⁶ which held that the court may apply common

⁹⁵ [2016] ZAGPPHC 978 (29 November 2016)

⁹⁶ 2012 (2) SACR 1 (SCA)

sense, wisdom, experience and sense of justice. I agreed with this approach. I was not persuaded that this amounted to splitting of charges for the simple reason that there was no single intent.

[387] The evidence assessed cumulatively proved that someone inside the bank supplied information to the robbers (this aspect was dealt more under counts 8). It was evident that accused 3 was the link to the robbery. Not only did accused 3 supply information, but his conduct went further as he obtained a benefit from giving information. The contention that he supplied information under threat was devoid of any truth. He was a poor witness. On the one hand accused 3 testified that he decided to cooperate as he did not want to appear he was hiding something and on the other hand distanced himself from Exhibit 'UU' was a feeble attempt to exonerate himself. I was satisfied that Exhibit 'UU' was made by accused 3 freely and voluntarily and based on Exhibit 'UU' accused 3 received a benefit. That admission nullified the version that he was threatened or any other innocent explanation.

[388] As already found it was highly improbable that a blackmailer would threaten and then reward his victim. He well knew that the ten thousand rand was a reward for having associated himself with the common design of the group which intended to rob Mr Momah. Applying the case of *S v Selebi* to the facts, the moment accused 3 received a benefit his conduct fell within the ambit of corruption. The cross examination revealed the many improbabilities in his version which affected his credibility as a witness. For example, his testimony that he was unaware that he was under arrest at the time he was taken to the police station and expected to return to work. That was so improbable that beyond doubt false. Ms Coetzee was a credible witness whose testimony was acceptable by the court. She created a good impression and conceded to aspects not favourable to her. I was satisfied that she spoke the truth that the interview she held with accused 3 was cordial and there was no threats.

[389] Accused 3 distanced himself from the informal confession he made to Mr Momah that he apologises to him. There was no reason for Mr Momah to lie against accused 3, and I found a ring of truth in the testimony of Mr Momah. I accepted that accused 3 apologized to Mr Momah and when assessed

cumulatively with the totality of evidence the only inference I drew from that apology was that accused 3 knew that he was caught out and was taking responsibility for the role he played in the robbery. His version that he was not involved and the bare denial when assessed holistically within the ambit of Exhibit 'UU' was not reasonable possibly true and was rejected. It followed that accused was guilty of contravening section 3 (a)(i) of PCCSA (corruption).

xliv. Count 10 and Count 11

[390] Mr Momah testified about how he was robbed by assailants who made themselves out to be police officer and traffic officer under threat of firearms. The assailants who carried out the actual robbery were never caught. Applying the principles of joint possession there was insufficient evidence that the robbers possessed the firearms and ammunition on half of the six accused before court. There was no credible evidence that the six accused had the necessary mens rea to possess the firearms and ammunition in possession of the robbers. In fact, in respect of count 11, there was insufficient evidence that the robbers had possession of any ammunition. All six accused were given benefit of doubt and found not guilty.

x. Count 12

[391] This charge was in relation to the robbery on 21 November 2015 which involved Mr and Mrs Phele. They related how they were accosted and robbed and identified accused 1 and accused 4. Accused 1 denied that he was present when Mr and Mrs Phele were robbed. The defence took issue with the reliability of such identification which was duly assessed. Accused 1 and accused 4 denied any involvement and raised alibi that they were not at the scene. The contention was that the Pheles identified them because the police showed them their pictures thereby alluding that there was a conspiracy against them by the police. The veracity of this version was assessed within the totality of the evidence and found improbable. Accused 1 changed his version from saying he was home, to implying that he was at a clinic and then to say he could not recall where he was. Accused 1 was a poor witness whose version was full of improbabilities. When cornered he unjustifiably blamed his Counsel.

[392] Mr Phele was able to describe how accused 1 was dressed that day and the role he played during the robbery. He even described him as being more aggressive which created an impression that he wanted to shoot him. Mr Phele and Mrs Phele identified accused 1 at the ID parade. The contention that the Pheles were shown accused's photo was rejected as not reasonable possibly true. According to accused 1's version, when he was arrested in company of accused 4 police took pictures of him which were shown to the Pheles which enabled them to identify him. That supposition could not be true on the basis that the Pheles already drew an identikit which was used by the police to effect an arrest on accused 1 and accused 4 which took place on 5 February 2018.

[393] The Pheles had some strong points and some weak points. As witnesses their strong points were in relation to the manner they related the robbery in a chronological manner. The weak points had to do with inconsistencies in their testimony. The assessment on inconsistencies was done and it was found that despite inconsistencies which were not material. What remained was that they spoke the truth. In conclusion the court found accused 1 guilty. Counsel for accused 4 in challenging the reliability of such identification placed emphasis on the fact that the cell phone data did not place accused 4 at the scene. That may be factually true, however it had to be remembered that Sgt Nyofane testified that in his experience, robbers do not take their personal cell phones to commit the crime which explained the lack of data. The fact that the cell phone data did not place the accused at the scene did not equate to the truthfulness of their versions. After all, Sgt Nyofane was given the numbers by the accused. It would have been extremely stupid for a person implicated by eye witnesses to provide cell phone details which could have added to the body of circumstantial evidence against him. Mrs Phele's testimony was challenged on the basis that she indicated that the assailants alighted from a backdoor of the CLK. Despite this aspect, having evaluated the evidence holistically I was satisfied that the identification made by the Pheles in respect of accused 1 and accused 4 was reliable.

[394] The absence of finger prints on the door did not detract from the eye witnesses who placed accused 4 at the scene. To raise the evidential burden that the

absence of finger prints should automatically equate to innocence in the face of other evidence was not in the interest of justice. That would elevate the onus to 'beyond every shadow of doubt' and would defeat crime prevention and prosecution thereof. There are not enough resources for such. At the final analysis, the trier of fact must ascertain that evidence was reliable. Not only did the Pheles assist in drawing the identikit, they pointed out the suspects during the ID parade and years later were still able to identify them in court. The necessary evidential weight to their dock identification was attached. Identity was reliable. The State proved beyond reasonable doubt that accused 1 and accused 4 robbed the Pheles and were guilty of robbery with aggravating circumstances. In respect of accused 2, accused 3, accused 5 and accused 6 there was insufficient evidence against them and were given the benefit of doubt and found not guilty.

xi. Count 13

[395] Mr Phele's evidence was that accused 1 pointed and assaulted him with a firearm which he called 'baby brown'. He gave a description of the clothes accused 1 wore that day. In response accused 1 raised an alibi that he was nowhere near the robbery scene or in possession of a firearm. The veracity of his alibi crumbled under cross examination. As already found, first he testified that he was home and later changed and made reference to his clinic card but at the same time he didn't really follow the aspect of the clinic as he was waiting for his Counsel to inform him of the dates. Having assessed the evidence holistically, I found that accused 1's alibi was false, as trite, he had to be placed in a position that he never testified. Mr Phele was certain that it was a real firearm and his contention was corroborated by his wife. I accepted that Mr Phele was pointed by accused 1 with a firearm which shifted the evidential burden to prove the lawfulness of such possession which he failed to do. I was satisfied that that accused 1 was at the scene when Mr and Mrs Phele were robbed in possession of firearm which accused 1 had no license for it. I was satisfied that the State proved all the elements of unlawful possession and accused 1 was found guilty.

[396] In relation to the co – accused, there was no evidence that accused 1 possessed the firearm on behalf of the group. It was not clear what was in possession of accused 4. Applying the principles of joint possession, I found that there was insufficient evidence against accused 2, accused 3, accused 4, accused 5 and accused 6 and they were entitled to the benefit of doubt.

xii. Count 14

[397] Mr Phele testified that accused 1 gave him an impression that he wanted to shoot him. No doubt something happened which created such an impression on Mr Phele, however his subjective opinion did not equate to proof beyond reasonable doubt. Under cross examination Mr Phele conceded that there was a possibility that the firearm was not loaded. The mere fact that an assailant was in unlawful possession of a firearm did not denote without other evidence (such as firing a shot during the robbery incident or firearm recovered or found with ammunition) that the only reasonable inference was that the firearm contained ammunition. It could very well be that there was no ammunition on the basis that the mere presence of a firearm was sufficient to overcome any resistance during the robbery. It followed that the State failed to prove beyond reasonable doubt that accused 1 was in unlawful possession of ammunition. All six accused given benefit of doubt and found not guilty.

xiii. Count 15

[398] Ms Lethuo explained how she lost the cash she had withdrawn and the one funds she voluntarily withdrawn after she was ill advised by the bogus police officer to do so. The State was calling for conviction on robbery while the defence sought an acquittal of the accused. The evidence as outlined by Ms Lethuo in my view did not fall within the definitional elements of robbery with aggravating circumstances. One of the elements of robbery is that the taking of the property must be through violence. The only reasonable inference was that Ms Lethuo was smeared with a substance for the sole purpose to steal from her by falsely pretending that she was in danger of suffering some calamity. The evidence clearly proved that money was stolen from her. In terms of section 260(d) of the CPA theft is a competent verdict on a charge of robbery. I was

satisfied that the evidence proved the definitional elements of theft by false pretences.⁹⁷ The only issue was the identity of the assailants who stole. Ms Lethuo identified accused 4 as the assailant who went with her inside the bank.

[399] The question was whether the identification made by Ms Lethuo was reliable. The assessment of reliability required that her evidence had to be looked at holistically applying the *Mthetwa* case. I accepted that the incident took place in broad daylight. I accepted that she had opportunity on two occasions to look at the assailant- i.e. inside the bogus police vehicle and inside the bank. However, Ms Lethuo was a single witness who conceded that her eye sight had deteriorated. Her affirmation that she could see at that time was not sufficient. There was a demonstration in court where she stood next to accused 4 and it was placed on record that they were of similar height. An argument was made about the height difference between the Ms Lethuo and the assailant who was with her inside the bank and accused 4 before court which was demonstrated to be different. The difference in height was a factor which was glaring and worrying. Exhibit 'EE" photo 3 depicted a difference in height with Ms Lethuo being visually shorter than the perpetrator. This aspect was unfortunately not pursued. No plausible explanation was advanced for this glaring difference in height which caused some lingering doubt. No forensic face recognition was done. It followed that accused 4 had to benefit from that doubt. For that reason, the State failed to prove beyond reasonable doubt that accused 4 was the assailant who stole Ms Lethuo's money by means of false pretences. There was also no evidence linking the other co- accused and it followed that they had to benefit from the doubt.

xiv. Count 16

[400] The State alleged that the accused committed fraud on the day Ms Lethuo lost her money. The evidence proved that an offence of fraud was committed however the State failed to prove the identity of the assailants on the same sentiments as expressed in count 15. On that basis all six accused had to benefit from the doubt.

⁹⁷ See *S v Mia and Another* 2009 (1) SACR 330 (SCA).

xv. Count 17

[401] This charge related to the robbery which took place on 3 May 2011 against Mr and Mrs Mosidi. The State called three witnesses to prove this offence. The Mosidi's articulated how they were accosted at home by unknown assailants and robbed under threat of firearms and a knife. I was satisfied that the robbery took place that evening. The only issue was the identity of the perpetrators. Mrs Mosidi was unable to point out any assailant and could not identify any of the accused before court. Mr Simon Mosidi approximated accused 2 as looking familiar to one of the assailants but would not commit to the positive identification of accused 2. Identification rested upon Mr Raymond Mosidi who positively identified accused 2 as the assailant whose face was not covered who was a single witness and his evidence was approached with caution. The Counsel for accused 2 challenged the reliability of his identification and highlighted contradictions in the evidence of the witnesses. The reliability was assessed holistically as well as contradictions.

[402] Counsel for accused 2 contended that Mrs Mosidi spent more time with the assailants yet she was unable to identify them. The positive identification of an accused in court forms part of the fundamentals of a criminal process and rightfully acknowledged that identification is fraught with dangers hence the requirement for identification evidence to be assessed for reliability. The time spent by the identifying witness and the accused is one factor to be considered towards reliability. However, I paused to remark that identification is subjective. The power of observation is always dependant on individual identifying witness. Mrs Mosidi was honest when she conceded that she was unable to identify anyone. Mr Simon Mosidi was non-committal in his identification which made him a credible and honest witness on the basis that if he was unsure it was best not to make a positive identification.

[403] Counsel for accused 2 questioned the lapsed of time from when the incident took place to the time Mr Raymond Mosidi identified accused 2 and argued that a vague general description was given which was unsatisfactory. The evidence by Mr Raymond Mosidi was that he identified accused 2 by his height, body structure, eye intensity, movement, and complexion. Applying the principles in

Mthwetwa, Mr Raymond Mosidi testified that the robbery incident took thirty minutes and during that time while the other two assailants whose faces were covered, accused 2 remained in the bedroom. The question to be asked was whether thirty minutes constituted sufficient time to observe the assailant. In my respective view it was ample time to observe. The mere fact that Mrs Mosidi was not able to identify anyone did not denote that Mr Raymond's observation and identification had to be discarded and disbelieved for the simple reason that the power of observation is always subjective. It was true that Mr Raymond Mosidi's identification was dock identification which ordinarily carried little evidential weight however such identification evidence did not stand alone. It was corroborated by circumstantial evidence of finger prints which were found at Mabeskraal Post Office.

[404] The presence of accused 2's finger prints constituted strong probative value that he was not in Tembisa and lent credence that indeed Raymond Mosidi was not mistaken. It had to be recalled that the assailants drove from the home of the Mosidi's to the Post Office. Finger prints constitute objective and independence evidence which placed accused 2 at Mabeskraal Post Office rather than Tembisa. It followed that the accused 2's alibi was false and he was placed in a position as if he did not testify. The presence of his finger prints at the scene of crime shifted the evidential burden upon him to explain the finger prints which he failed to do. The reliability of the finger prints was challenged. However, the area where the prints were found (which was on the locking mechanism of the gate where the public did not have access), the number of points found by Col Botha provided sufficient reliability that identification of accused 2 was correct. After all Col Botha marked twelve points which objectively placed accused 2 inside the post office which points were above the norm.

[405] The criticism that the prints were not perfect did not distract from the fact that Col Botha found points over the norm that was required. I was satisfied that Col Botha was competent in his field to give evidence in this matter and well trained with thirty-three years of experience to be considered a finger prints expert. I was satisfied that he conducted a proper enquiry in comparing the two sets of

prints (from the scene and from accused 2). Col Botha found a unique feature in the accused 2's finger prints which was a bifurcation which ended with another bifurcation which was not challenged. I was satisfied that Col Botha was experienced enough to find sufficient points of similarities which exceeded the norm of seven points.

[406] The likelihood that the fingerprints could belong to another person was refuted by Col Botha who indicated that in his thirty-three years' experience he has never come across fingerprints which were similar. I was satisfied that the fingerprints were strong, persuasive and of probative value which linked accused 2 to the crime at Mabeskraal. Having assessed the evidence holistically I found that accused 2 was part of the group that robbed the Mosidi's and that he acted in common purpose with two of the assailants. The State proved beyond reasonable doubt that accused 2 was guilty of robbery with aggravating circumstances. Accused 2's version of denial and alibi were rejected as false and not reasonable possibly true. In respect of accused 1, accused 3, accused 4, accused 5 and accused 6 there was insufficient evidence against them and there were given benefit of doubt and found not guilty.

xvi. Count 18

[407] The State alleged that on the 3 May 2011 Ms Mosidi was kidnapped.⁹⁸ She testified how she was taken from her home to open the safe at Mabeskraal Post Office as being against her will. She was unable to point out any person. However, the objective circumstantial evidence of finger prints placed accused 2 at the crime scene. I was satisfied that all the requirements of common purpose were satisfied and that accused 2 acted in common purpose with the other assailant to kidnap Mrs Mosidi. I was satisfied that Mr Raymond Mosidi reliably identified accused 2. I found accused 2's alibi was false and he was placed in a position as if he did not testify. As indicated in count 17, the presence of accused 2's finger prints inside the gate at Mabeskraal placed an evidential burden to explain how his prints came to be there which he failed to do. I was satisfied that the State proved beyond reasonable doubt that accused 2 acted in common purpose and deprived Mrs Mosidi of her right of movement and he was guilty of this count. There was insufficient evidence against accused 1, accused 3, accused 4, accused 5 and accused 6 and were given the benefit of doubt and found not guilty.

xvii. Count 19

[408] The State alleged that on 3 May 2011 the accused were in unlawful possession of a firearm the particulars of which was unknown to the State. Mr Simon Mosidi and Mr Raymond Mosidi testified that the assailants were armed. Mr Simon Mosidi was unable to identify any one while Mr Raymond Mosidi identified accused 2 as being in possession of a firearm. I addressed the reliability of such identification in count 17 and the sentiments expressed and the findings were applicable in this count. Mr Raymond Mosidi was confident and gave his evidence in a satisfactory manner. He conceded to aspects which were not favourable to him which was indicative of the fact that he was an unbiased witness⁹⁹. Having assessed the evidence holistically accused 2's version was rejected as indicated in count 17 and I was satisfied that the State proved beyond reasonable doubt that accused 2 was in unlawful possession of

⁹⁸ In that she was deprived of her right of movement.

⁹⁹ He conceded that he did not indicate in his statement that he was in a position to identify the assailants because he was not asked.

a firearm in contravention of section 3(1) of FCA and guilty. In relation to the co-accused, applying the principles of joint possession there was insufficient evidence that accused 2 possessed the firearm on behalf of the whole group and accused 1, accused 3, accused 4, accused 5 and accused 6 were given benefit of doubt and found not guilty.

xviii. Count 20

[409][411] There was insufficient evidence that the firearm in possession of accused 2 had ammunition on the same grounds as addressed in count 14. The mere unlawful possession did not equate or caused me to draw as the only reasonable inference that the said firearm had ammunition. It followed that all six accused were given benefit of doubt and found not guilty.

xix. Count 21

[410]The State alleged that accused 2, accused 5 and accused 6 robbed Mr Mookamedi on 28 December 2017. The State led the evidence of Mr Mookamedi who explained how the robbery took place. At the time of the robbery he was with his wife Ms Selowa. He attempted to look at the assailants but was assaulted by one assailant who was armed with a firearm by means of a slap. He conceded that he did not attend any ID parade and due to the passage of time, he was not in a position to identify the perpetrators. Mr Mookamedi was found to be a fair witness and no improbabilities was found in his testimony. Ms Selowa was not only the identifying witness but a single witness her evidence was treated with caution. She identified accused 6 as the assailant who held a knife to her neck.

[411]She identified him during a photo ID parade as depicted in Exhibit 'HHH' photo 23 and 24 and in court (dock identification). She reaffirmed that accused 6 was the assailant on Exhibit 'LLL'. During her cross examination, she confidently indicated that she had three occasions to observe accused 6 and his face was imbedded in her memory. Defence took issue with the reliability of the photo ID parade on the basis that it did not meet the requirements set out in Police Rules. In my view how and by whom the photographs were produced was immaterial. The main issues are the reliability of such identification and

fairness. It is trite that the irregularities in an ID parade affect the evidential weight.

[412] Acceptance of photo ID parades is nothing new in our courts.¹⁰⁰ I was mindful that a photo ID parade does not create the conditions found in ordinary ID parade where a witness gets to look at the line-up and singles out a suspect from among the people with physical resemblance. Therefore, I was alive to treat with caution.

[413] Didcot J in *S v Shandu*¹⁰¹ explained the pitfalls of such evidence as follows —

“The reliability of any identification that is made from a photograph rests to a large extent [. . .] on the number of photographs exhibited to the witness. [. . .] The witness is not confronted with a line up where the suspect gets studied in the company of persons resembling him in countenance, complexion, physique, age and general appearance, that very resemblance and the test it sets the witness in telling him apart from them. Instead photographs are produced of various suspects whose features may differ markedly, one alone looking like the individual whom the witness saw at the time. Nor is the perusal of such photographs then governed by the settled procedures or subject to the strict control of an identification parade, procedures and control that have specifically been designed to insulate the witness from influence and suggestion. The occasion by comparison is private. No safeguard exists against prompting. And any that occurs seem unlikely to come to light, since such will be known only to the policeman guilty of and the witness assisted by it, neither of whom may feel inclined to admit so much.”

[414] When assessing evidence based on photo-ID parade, two pertinent questions had been asked — (a) was the identification proper and (b) was the evidence reliable. The evidence of photo ID parade was assessed holistically and I was satisfied that despite that there was omission to observe the Rules it stood unimpeached. The identifying witnesses were not instructed who to point. The contention that the identifying witnesses were shown photos prior to the ID parade was rejected as false and found to have been a feeble attempt to

¹⁰⁰ See *S v Maphumulo* 1996 (2) SACR 84 (N) ; *S v Zwayi* 1997(2) SACR 772 (CK).

¹⁰¹ 1990 (1) SACR 80 (N) at 84

exonerate the accused. The identification was reliable and so probative weight was attached.

[415] Ms Selowa was found to be a credible witness who testified in a logical and chronological manner. She created a favourable impression as a witness. The reliability of the identification made by Ms Selowa was assessed holistically. Applying the case of *Mthetwa* Ms Selowa's evidence was found to be reliable for these reasons – (a) she was in close proximity of the perpetrator at the time the knife was placed on her neck, (b) she had three occasions to observe the assailant and (c) the incident took place during the day. She described accused 6 as stout. Accused 6's bare denial that he did not rob Mr Mookamedi was rejected as a lie as well as the alibi that he was in Tembisa. The State proved the charge against accused 6 and was guilty. In respect of accused 2, and accused 5, they were not identified by either Ms Selowa or Mr Mookamedi and there was insufficient evidence linking them to this offence and they were given the benefit of doubt and were found not guilty.

xx. Counts 22 and 23

[416] According to Ms Selowa, accused 6 held a knife to her neck. There was insufficient evidence to prove the requirements of joint possession of the firearm which was allegedly to be in possession of the one perpetrator. There was also no evidence that the firearm had any ammunition. It followed that accused 2, accused 5 and accused 6 were given the benefits of doubt and found not guilty.

xxi. Count 24

[417] The allegations were that on 6 January 2018 the accused 2, accused 5 and accused 6 robbed Mr John Ngobeni an employee of Mopani Super Spar. One material piece of evidence was that the money was placed inside a uniquely Spar branded bag. Mr Ngobeni affirmed during cross examination that the bag was only used by cash office staff. The circumstantial evidence was that accused 2 and accused 6 were seen alighting from a white vehicle which looked similar to the one involved in the robbery at Spar which I found to be persuasive and

carried probative value. Accused 6 was observed discarding a green Spar bag which was later identified by Mr Ngobeni on the 8 February 2018.

[418] In addition, Mr Ngobeni had gone to the bank in order to get change which was in ten and twenty denominations and on the arrest of accused 2 and accused 6 cash in twenty denominations was found in their socks. The probabilities of that being a coincidence are slim. The bare denial and the alibi that they were attending a party or lobolo negotiations at accused 6 was rejected as false beyond a reasonable doubt. The contention that Constable Khoza, Sgt Matukana arrested accused 2 and accused 6 without any cause was improbable. The circumstantial evidence linking accused 5 to this robbery was dealt with in count 1 and found application in this charge. The evidence was assessed holistically and drew as the only inference that accused 2, accused 5 and accused 6 were the perpetrators of the robbery at Mopani Super Spar. I was further satisfied that they acted in common purpose. It followed that the State proved this offence beyond reasonable doubt and were guilty (of count 24).

xxii. Count 25

[419] The allegation was that on 7 January 2018 accused 2, accused 5 and accused 6 attempted to kill Constable Khoza and Sgt Matukana. The evidence by both Constable Khoza and Sgt Matukana was that accused 5 fired shots randomly towards their direction. That evidence was consistent with the bullet holes as depicted in Exhibit 'CCC' photos 7 and 8. Photo 7 clearly depicted the bullet holes to be on the front of the police vehicle very close to the windscreen near the driver's side. The contention that the police officers after the arrest of accused 5 that day left the scene and returned with the bullet hole on the police vehicle was so improbable that beyond reasonable doubt false.

[420] The insinuation that the police officers did that in order to falsely implicate accused 5 was rejected as highly improbable. Counsel took issue with the angle of the bullet hole however Exhibit photo 7 clearly depicted that the shooter was aiming at the driver. That was the only inference I could draw. The bare denial by accused 5 that he was driving normally when shot at by the

police was rejected as not reasonable possibly true. After assessing the evidence in totality, I was satisfied that the State proved beyond reasonable doubt that the shooter was accused 5 with the intention to kill the officer Sgt Matukana in a form of dolus directus. He is found guilty of this count. There was insufficient evidence that accused 2 and accused 6 acted in common purpose with accused 5 and it followed that they were given the benefit of doubt and were not guilty.

xxiii. Counts 26 and 27

[421] The evidence was that the robbers who were at Mopani Super Spar were armed with firearm and a shot was fired when they fled the scene. Accused 2 was shortly arrested in possession of a pistol with no serial number and accused 6 was in possession of a revolver. These two officers gave their testimony in a satisfactory manner and inconsistencies were immaterial. I was satisfied that the two firearms depicted in Exhibit 'DDD' were recovered from accused 2 and accused 6. I accepted the evidence of Let/Col Mangena that both the revolver and the pistol were functional as marked in Exhibit 'NNNN'. Accused 2 and accused 6's versions that they were not arrested under the circumstances as related to by the arresting officers in that they were arrested in the yard of accused 6's home smoking was a blatant lie which was rejected. The acceptable evidence was that accused 6's home was few kilometres away from the place where they were arrested. It followed that the State proved that both accused 2 and accused 6 were in unlawful possession of the firearms and ammunition and were guilty as charged. There was insufficient evidence that accused 2 and accused 6 exercised joint possession on behalf of accused 5 and he was given the benefit of doubt and found not guilty.

xxiv. Count 28

[422] The allegations were that on 20 December 2017 accused 2, accused 5 and accused 6 robbed Mr Johannes Malema. The evidence by Mr Malema was that on that day he was accosted home by accused 5 who allegedly hit him with a firearm, accused 6 who dispossessed him of the bag which contained the cash and accused 2 who stood by the door. Mr Malema was a credible and a single

witness on the finding that Mr Monama's identification was unreliable therefore the necessary caution was applied. Counsels challenged the reliability of Mr Malema's identification. After assessing the evidence holistically, I was satisfied that despite some of the concessions made by Mr Malema such as the fact he did not take note of accused 2's height and built that his identification was reliable for the following reasons- Mr Malema was able to testify on the role of each respective accused. The incident took place during the day, within close proximity to each other, he had indicated in his statement that he was in a position to identify the perpetrators; he made a positive identification during the ID parade.

[423] All of these factors assessed cumulatively caused Mr Malema's identification to be reliable even with the applicable cautionary rules (in respect of single witness and identification). The accused's alibi and bare denials were found to be false. The contention that Mr Malema was told who to point out was rejected as false. The identification made by Mr Monama was assessed but found to be unreliable on the basis that it was a dock identification which carried little weight as it was not preceded by an earlier identification and the serious concessions he made. All accused are guilty as charged.

xxv. Counts 29 and 30

[424] The allegations by the State were that accused 2, accused 5 and accused 6 unlawfully possessed a firearm and ammunition. Mr Malema identified accused 5 as the perpetrator who was in possession of a firearm during the robbery. After the evidence was assessed, I was satisfied that accused 5 was in unlawful possession of a firearm. The bare denial by accused 5 of any involvement in this robbery was rejected as a lie, in turn was in possession of firearm. In respect of accused 2 and accused 6 there was no evidence proving the requirements of joint possession of the firearm and they are given the benefit of doubt. Accused 5 was guilty of count 29 and accused 2 and accused 6 were not guilty. There was also no evidence proving that the said firearm had any ammunition and all three accused were given benefit on count 30 and found not guilty.

xxvi. Count 31

[425] This charge related to the incident which allegedly took place on 13 December 2017 when Ms Mohale was robbed. Ms Mohale related in chronological manner how she was accosted and robbed of the cash she had withdrawn from Nedbank. She identified accused 6 at a photo ID parade. Counsel for accused 6 took issue with the fact that she was not informed that the suspects may not be part of the line-up. I did not get the impression that the failure to make the disclaimer in any manner affected the outcome. The mere fact that the ID parade was imperfect did not mean that such evidence had to be disregarded. It was the issue of evidential weight. Ms Mohale informed the court that she had opportunity to observe accused 6 from the time they boarded the taxi described as a young man who was busy on the cell phone. She testified that she identified accused 6 by his dark complexion and wide cheeks. She even identified him in court (dock identification). I had to caution myself that Ms Mohale was a single witness as far as identification but was also an identifying witness and having treated her evidence with the necessary caution, I was satisfied that despite the imperfect ID parade Ms Mohale spoke the truth.

[426] The following factors such as the robbery took place during the day and Ms Mohale had ample of time during the taxi ride to observe accused 6 persuaded this court and provided safeguards on reliability. She was able to point accused 6 in court confidently even after the passage of time which created some measure of reliability. The alibi that accused 6 was not at the scene but was at Tembisa was rejected as false. I found that the State proved the charge beyond reasonable doubt and found guilty of robbery with aggravating circumstances. There was insufficient evidence against accused 2 and accused 5 that they took part in the robbery and were given the benefit of doubt and found not guilty.

xxvii. Counts 32, 33 and 34

[427] This charge related to the incident which took place on 23 December 2017 when Mr Mathebula was robbed. He conceded that he was unable to point any. Regrettably Mr Mathebula did not provide any specific description of the

assailants. I was not satisfied that the only inference to be drawn was that accused 2, accused 5 and accused 6 committed these despite it being bank following robbery and there was also insufficient evidence that they were in unlawful possession of firearms and ammunition and they are given the benefit of doubt.

xxviii. Count 35

[428] The allegation was that accused 2, accused 5 and accused 6 robbed Ms Macevele on 4 December 2017. The State led the evidence of Ms Macevele who articulated how she was accosted by an unknown male and robbed. She was unable to identify the assailant save to give a description that he was taller with a lean built and light to dark complexion. Ms Hobyani and Ms Baloyi who were eye witnesses to the robbery also described the assailant as tall with Ms Baloyi describing the complexion as coffee complexion. It was the State's contention that accused 2, accused 5 and accused 6 were identified by a number of witnesses in other matters and there was striking similarities to the facts and circumstances that similar fact evidence be accorded probative value to the identity of the accused where perpetrators were not identified. I agreed.

[429] The car which was used by the assailant who grabbed the bag which contained money was described as white. On the day accused 2 and accused 6 were arrested following the Super Spar robbery in Giyani, they alighted from a white car with accused 5 already found to have been involved in that robbery by inferential reasoning. Macevele robbery had the hall mark of bank following. Consistent description was given. I was satisfied that similar fact evidence was legally relevant and admissible and having applied the established principles in the evaluation of similar fact evidence I found the similarities of fact, rendered likelihood of coincidence highly improbable and pointed to the involvement of the three accused to the robbery committed against Ms Macevele. Three assailants were involved in the robbery of Ms Macevele. The robbery took place within Giyani area involving the same white car. The only reasonable inference I could draw was that the three accused were the perpetrators of the robbery. It followed that the three accused were found guilty of robbery with aggravating circumstances.

xxix. Counts 36 and 37

[430] The evidence was that the assailants were armed. Count 36 related to the unlawful possession of firearms the particulars of which were unknown to the State and count 37 related to the unlawful possession of ammunition. There was discrepancy in the description of the firearm- Ms Macevele described it as silver while Ms Baloyi described it as black. Another worrying issue was that according to Ms Macevele, only two of the assailants were armed that was the assailant who physically accosted her and one of the assailant that alighted from the white car. According to Ms Hobyani both assailants that alighted from the white car were armed. Ms Baloyi testified that an armed assailant alighted from the white car thereby corroborating Ms Macevele that from the white car only one assailant was armed. In as much as Ms Macevele, Ms Hobyani and Ms Baloyi were found to be credible witnesses, their power of observation differed.

[431] Evidence was assessed in totality in order to determine which assailant was in possession of the firearms and whether the requirements of joint possession were proved beyond a reasonable doubt. Regrettably in view of the inconsistencies I was unable to make the determination regarding who was in possession of firearms between the three assailants. In my view, the robbery of Ms Macevele and the unlawful possession of firearms and ammunition constituted three separate offences each of which had to be proved beyond reasonable doubt. I was required to be satisfied that the guilt of the possessor or possessors of the firearms and ammunition after applying the legal principles for joint possession was proved beyond reasonable doubt. Only if both requirements are fulfilled can it be said that there was joint possession. The mere knowledge by others in the group that one member had a firearm is insufficient to make the group joint possessors.¹⁰²

[432] The inconsistencies in the evidence created some doubt which in turn raised pertinent questions with no answers- who possessed the firearms during the robbery? Was it both the assailants who alighted from the white car or was it

¹⁰² See *Makhubela v S, Matjeke v S* 2017 (2) SACR 665 (CC). Para [55] it was opined that there would be few factual scenarios which meet the requirements to establish joint possession because of the difficulty in proving that the possessor had the intention of possessing a firearm on behalf of a group.

the assailant who dispossessed Ms Macevele of the bag and one of the assailant who alighted from the car? Was there sufficient evidence justifying the inference that all three assailants jointly possessed the firearm? Since I was unable to make the determination that the assailants had the necessary intention to possess jointly the firearm, the dictates of the interest of justice compelled me to therefore give the three accused the benefit of doubt and they were found not guilty.

xxx. Count 38

[433] The allegations were that on 6 November 2017 accused 2, accused 5 and accused 6 robbed Ms Maswanganyi. The evidence was that she was requested to do banking for Mabunda bottle store and given an undisclosed amount of money. Ms Maswanganyi was a credible witness who gave her testimony in a clear manner. Her evidence was treated with caution because she was a single witness. I was satisfied that Ms Maswanganyi was accosted and robbed upon arrival at the bank by three assailants whom she was unable to identify. Ms Nkuna who was not present received a report of the robbery and I found her to be a credible witness with no exaggerations. After the evidence was assessed in totality I was of the view that similar fact evidence did not find application for the following reasons- (a) The robbery did not emanate from the bank to constitute bank following, (b) According to Mr Mabunda who was the designated driver, when Ms Maswanganyi asked him to drive her to the bank to deposit money there were a lot of people who were present within earshot, and (d) When considering the probabilities, I could not draw as the only reasonable inference that the robbery was committed by the three accused before court as there were other reasonable inferences such as the people who heard Ms Maswanganyi informing Mr Mabunda to go to the bank to deposit or Ms Nkuna could have set up the robbery.¹⁰³ In the absence of reliable and adequate identification all three accused were given benefit of doubt and found not guilty.

xxxi. Counts 39 and 40

¹⁰³ This last remark was made not to impute the good name of Ms Nkuna but was stated to reflect the presence of other reasonable probabilities.

[434] In respect to these counts, the evaluation and sentiments expressed in count 38 were applicable to these counts. I was not convinced that similar fact evidence found application and the three accused were given the benefit of doubt and found not guilty.

xxxii. Counts 41 to 43

[435] Counsel for the State correctly conceded that it failed to prove the evidence that on 18 November 2017 the accused by common purpose committed robbery with aggravating circumstances against Mr Chabalala beyond reasonable doubt and the three accused are found not guilty.

xxxiii. Count 44

[436] The allegations were that on 22 December 2017 accused 2, accused 5 and accused 6 robbed Mr First Ngulele who related how he was accosted and robbed by three armed assailants upon arrival at his work after withdrawing money. He was a single witness and his evidence was treated with caution. Mr Ngulele was found to be a credible witness who gave his testimony in a clear manner. I was satisfied that Mr Ngulele was indeed robbed of the cash. The only issue was identity. Mr Ngulele was unable to identify the assailants. The State was reliant on similar fact evidence to prove by inferential reasoning that the three accused were the perpetrators.

[437] Mr Ngulele gave a description of the three assailants as follows- one assailant was tall with medium body built with a dark complexion, the second assailant was thin with a light complexion and the third assailant was dark in complexion with a small built. Mr Ngulele indicated that the assailant depicted in Exhibit 'UUU' photo 2 was the one who held a firearm to his forehead. I found that there were similarities of fact as follows- (a) three assailants robbed Mr Ngulele, (b) the robbery had a hall mark of bank following, (c) the robbery took place within Giyani area, (d) the assailants travelled or used a white car and (e) the consistency in the description of the assailants.

[438] I was satisfied that similar fact evidence was legally relevant and admissible and having applied the established principles in the evaluation of similar fact

evidence I found the similarities of fact, rendered likelihood of coincidence highly improbable and pointed to the involvement of the three accused to the robbery committed against Mr Ngulele. The only reasonable inference I could draw was that the three accused were the perpetrators of the robbery. It followed that the three accused were found guilty of robbery with aggravating circumstances.

xxxiv. Counts 45 and 46

[439] These counts were in relation to the unlawful possession of firearms the particulars of which were unknown to the State. Evidence was assessed in totality in order to determine which assailant was in possession of the firearms and whether the requirements of joint possession were proved beyond a reasonable doubt. In relation to these charges, the robbery of Mr Ngulele and the unlawful possession of firearms and ammunition constituted three separate offences each of which had to be proved beyond reasonable doubt. I was required to be convinced that the guilt of the possessor or possessors of the firearms and ammunition after applying the legal principles for joint possession was proved beyond reasonable doubt. The description (such as the one given by Mr Ngulele) was subjective. In relation to these charges two of the assailants were alleged to be in possession of firearms and one was alleged to be in possession of a knife.

[440] I faced a similar legal dilemma as the one expressed in counts 36 and 37. After the evidence was led I had to ask these pertinent questions but found no answers for - which of the accused as described by Mr Ngulele allegedly possessed a knife and which allegedly possessed firearms? Was there sufficient evidence justifying the inference that all three assailants jointly possessed the firearm? Was there sufficient evidence to conclude that even the one assailant who was in possession of a knife had the necessary intention to also possess the firearm? I was unable to make the determination that the assailants being the three accused had the necessary intention to jointly possess the firearm. I was unable to even determine who was in possession of the knife. There was insufficient evidence in my view to sustain a conviction that the three accused unlawfully possessed firearms and ammunition. Under

those circumstances the dictates of the interest of justice compelled me to therefore give the three accused the benefit of doubt and they were found not guilty for both counts 45 and 46.

xxxv. Count 47

[441] The allegations were that on 28 November 2017 accused 2, accused 5 and accused 6 robbed Ms Ngwenyama and Ms Makamu. Ms Ngwenyama testified and related how she was robbed by two armed assailants of the money she had received in exchange for the endorsed cheques she handed to the bank teller. She described the assailant who was next to her as young, short with a lean body built and of medium complexion. That assailant spoke IsiZulu to her and was in possession of a silver firearm. Ms Makamu who was in company of Ms Ngwenyama related how the robbery took place. Mr Manombe who was also in company of Ms Ngwenyama was not present when the robbery took place merely received the report. All three witnesses were found to be credible. I found no exaggerations in their testimonies. Both Ms Ngwenyama and Ms Makamu were not in the position to point out the two suspects who robbed them. The State was reliant on similar fact evidence to prove the identity of the assailants as the accused.

[442] Having assessed the evidence holistically, I was satisfied that Ms Ngwenyama and Ms Makamu were robbed. The only issue was the identity of the assailants. The following similarities of facts were noted- (a) the robbery had the hall mark of bank following, (b) the area of Giyani, (c) the description of the assailants, (d) the robbery was committed by a group (albeit two actually carried the robbery while the third was the driver). I was satisfied that similar fact evidence was legally relevant and admissible and having applied the established principles in the evaluation of similar fact evidence I found the similarities of fact, rendered likelihood of coincidence highly improbable and pointed to the involvement of the three accused to the robbery committed against Mr Ngwenyama and Ms Makamu. The only reasonable inference that was drawn was that the three accused were the perpetrators of the robbery. It followed that the three accused were guilty of robbery with aggravating circumstances.

xxxvi. Counts 48 and 49

[443] These counts related to the allegation that the three accused unlawfully possessed the firearms and ammunition. I was faced with these pertinent questions with no answers- which of the assailants as described by Ms Ngwenyama and Ms Makamu allegedly possessed firearms? Was there sufficient evidence justifying the inference that all three assailants jointly possessed the firearm? Both of these witnesses described that the two assailants who robbed them both had firearms which left the driver of the get-away car. In relation to this charge as well, the robbery which took place and the unlawful possession of firearms and ammunition constituted three separate offences each with elements which had to be proved beyond reasonable doubt. I was unable to make the determination that the third assailant who was the driver had the necessary intention to possess jointly the firearm. There was insufficient evidence in my view to sustain a conviction that the three accused unlawfully possessed firearms and ammunition. Under those circumstances the dictates of the interest of justice compelled me to therefore give the three accused the benefit of doubt and they were found not guilty for both counts 48 and 49.

xxxvii. Count 50

[444] This count related to the allegations that on 7 December 2017 accused 2, accused 5 and accused 6 robbed Ms Rasoko. The testimony by Ms Rasoko was that on that day after withdrawing money from Standard Bank Giyani she was accosted by three armed assailants and robbed. In addition, she informed the court that she resisted to the taking of the bag which contained the money until a shot was fired. Ms Rasoko was a single witness and her evidence was treated with caution. She described that when she boarded a taxi home she noticed a white sedan that was following the taxi until she alighted upon reaching her premises. She described that the assailant who accosted her had his face covered up to the forehead before two other assailants joined who were armed with firearms. She conceded that she was unable to identify the assailants. The assailant she fought with she described him as tall and slender

with a fair complexion. Ms Rasoko created a favourable impression and was found to be a credible witness who related the incident in a clear manner.

[445] Ms Rasoko conceded that she attended an ID parade and as depicted in Exhibit 'HHH' photo 17 she pointed at someone in order to make a point of the resemblance between the person in the line -up and the assailant not that she was making a positive identification. The State was also reliant on similar fact evidence to prove the identity of the assailants as being the three accused. I found the following similar facts- (a) the robbery had the hall mark of bank following, (b) three assailants accosted Ms Rasoko, (c) the incident took place within Giyani area, (d) the assailants used a white vehicle, (e) similar description of one of the assailant. I was satisfied that similar fact evidence was legally relevant and admissible and having applied the established principles in the evaluation of similar fact evidence I found the similarities of fact, rendered likelihood of coincidence highly improbable and pointed to the involvement of the three accused to the robbery committed against Ms Rasoko. The only reasonable inference I drew was that the three accused were the perpetrators of the robbery. It followed that the three accused were found guilty of robbery with aggravating circumstances.

xxxviii. Counts 51 and 52:

[446] These counts related to the allegations that on 7 December 2017 the three accused unlawfully possessed firearms and ammunitions. The evidence was assessed holistically. I was faced with these pertinent questions with no answers- which of the assailants as described by Ms Rasoko possessed firearms? Was there sufficient evidence justifying the inference that all three assailants jointly possessed the firearm? In relation to this count as well, the robbery which took place and the unlawful possession of firearms and ammunition constituted three separate offences each with elements which had to be proved beyond reasonable doubt. I was unable to find that all three accused had the necessary intention to possess firearms on the application of joint possession and ammunition as the elements of the crime were not proved beyond reasonable doubt. The three accused were given the benefit of doubt and found not guilty on counts 51 and 52.

xxxix. Counts 53 to 55

[447] In respect to these counts Counsel for the State correctly conceded that no evidence was proved that accused 2, accused 5 and accused 6 committed robbery with aggravating circumstances on 7 January 2018 against Mr Mabunda while in unlawful possession of firearms and ammunitions beyond reasonable doubt. It followed that they were entitled to an acquittal.

xl. Count 56

[448] The allegations were that on 22 November 2017 accused 2, accused 5 and accused 6 robbed Mr James Sithole after withdrawing money from the bank. Mr Sithole was a single witness and his evidence was treated with caution. Mr Sithole related in a chronological manner how he was accosted and robbed of his cash. He made a good impression. The issue was the identity of the assailants. Mr Sithole testified that he was accosted by three assailants- two of the assailants robbed him under threat of a firearm and a knife while a third was the driver of a blue vehicle. He was only able to give the description of the assailant who pointed him with a firearm as light in complexion and tall. The State was reliant on similar fact evidence to prove the identity.

[449] I found the following similar facts- (a) the robbery had the hall mark of bank following, (b) three assailants accosted Mr Sithole, (c) the incident took place within Giyani area, (c) similar description of one of the assailant as tall with light complexion. I was satisfied that similar fact evidence was legally relevant and admissible and having applied the established principles in the evaluation of similar fact evidence I found the similarities of fact, rendered likelihood of coincidence highly improbable and pointed to the involvement of the three accused to the robbery committed against Mr Sithole. The only reasonable inference I drew was that the three accused were the perpetrators of the robbery. It followed that the three accused were found guilty of robbery with aggravating circumstances.

xli. Counts 57 and 58

[450] The allegations were that the three accused unlawfully possessed firearm and ammunition on the day Mr Sithole was robbed. The evidence was assessed holistically and I was unable to find that all three accused had the necessary intention to possess firearms on the application of joint possession and ammunition. One of the assailant was in possession of the knife which prompted the following question- was there evidence to prove that the assailant had intention to possess firearms? In relation to these charges as well, the robbery which took place and the unlawful possession of firearms and ammunition constituted three separate offences each with elements which had to be proved beyond reasonable doubt. I was not satisfied that it was proved that all of the assailants had the intention to possess. The elements of the offences were not proved beyond reasonable doubt. The three accused were given the benefit of doubt and found not guilty.

xlii. Count 59

[451] The State alleged that on 21 January 2015 at Weltevredenpark in Johannesburg accused 2, accused 5 and accused 6 stole a .357 Magnum calibre revolver with serial number MD 770507 which was the property of Mr Van der Merwe. The State called Mr and Mrs Van der Merwe to prove the charge. Both witnesses related how the firearm was stolen from their home during a house breaking incident. I found both witnesses to be credible witnesses and I had no reservations in accepting their testimonies. The evidence was assessed and I was satisfied that the revolver that Let/Col Mangena retrieved the serial number by means of etching per Exhibit 'NNNN' belonged to Mr Van der Merwe. I was also satisfied that the said firearm was recovered on 6 January 2018 when accused 2 and 6 were arrested. As indicated, theft is a continuous crime. Sgt Matukana testified that on the day accused 2 and accused 6 were arrested he confiscated a revolver from accused 6. The denial by accused 6 was an attempt to exonerate himself. At the time the revolver was found years had passed which factor proved the necessary intention to permanently deprive the rightful owner of the firearm. I was satisfied that the revolver was found in possession of accused 6 which shifted the evidential burden to explain the possession thereof which he failed

to do. In the totality of the evidence I was satisfied that accused 6 was guilty of the theft of the revolver. Accused 2 and accused 5 were given benefit of doubt and found not guilty.

xliii. Count 60

[452] The allegations were that on 6 January 2018 at Mopani Spar accused 2, accused 5 and accused 6 were in unlawful possession of prohibited firearms to wit of a .357 Magnum and 9mm Berretta. The State was reliant on circumstantial evidence that the three accused during the robbery at Spar they were in unlawful possession of prohibited firearms. Constable Khoza created a good impression to this court. I found no biasness in her. There were minor and immaterial inconsistencies between her and Sgt Matukana, which did not adversely affect their overall credibility as witnesses. I was satisfied that Sgt Matukana was a credible witness. The acceptable evidence was that during the Mopani Spar robbery the assailants were armed and a shot was fired. Shortly thereafter, accused 2 and accused 6 were arrested in possession of these prohibited firearms. The denial by accused 2 and accused 6 in the face of such overwhelming evidence affected their credibility adversely. It was highly improbable that the arresting officers would have arrested them under the circumstances they described. The inference that accused 2 and accused 6 were in possession of the same prohibited firearms during the robbery was unescapable. I was satisfied that the firearms were indeed prohibited and had been used during the robbery, accused 2 and 6 were found guilty of contravention of 4 (1) (f) (iv) of FCA. There was insufficient evidence linking accused 5 on application of joint possession and he was given the benefit of doubt and found not guilty.

xliv. Count 61

[453] This charge was in relation to contravention of section 120(10) (b) of FCA in that accused 2, accused 5 and accused 6 were in possession of prohibited firearms with the intention to commit robbery. After the evidence was assessed cumulatively the only inference I could draw was that accused 2, accused 6 were in possession of the prohibited firearms in order to rob Mopani Spar. Their

versions were rejected as false beyond reasonable doubt. Accused 2 and accused 6 were guilty of this charge. There was insufficient evidence against accused 5 on application of joint possession that he had the necessary intention and was given benefit of doubt and found not guilty.

xlv. Count 62

[454] The allegation in relation to this count was that on 30 November 2017 all six accused robbed Ms Sheila Maphogole. The evidence proved that Ms Maphogole was robbed. The issue was the identity of the assailants. She related in a clear manner how she was accosted by three assailants. She described that the first assailant was tall, slender with light complexion who spoke Sotho, the second one was stout of built with dark complexion who spoke Tsonga and the third one was tall of average stout built with dark complexion. Ms Maphogole was a single witness and her evidence was treated with caution.

[455] I found the following similar facts- (a) the robbery had the hall mark of bank following, (b) three assailants accosted Ms Maphogole, (c) the incident took place within Giyani area, (d) the assailants used a white vehicle of Ford brand, (e) similar description of the assailants. I was satisfied that similar fact evidence was legally relevant and admissible and having applied the established principles in the evaluation of similar fact evidence I found the similarities of fact, rendered likelihood of coincidence highly improbable and pointed to the involvement of the three accused to the robbery committed against Ms Maphogole. The proximity in acts and time caused me to conclude that and to draw the only reasonable inference that accused 2, accused 5 and accused 6 were the perpetrators of the robbery. It followed that accused 2, accused 5, accused 6 were found guilty of robbery with aggravating circumstances. Accused 1, accused 3, accused 4 are given the benefit of doubt and are found not guilty.

xlvi. Counts 63 and 64

[456] The State alleged that the six accused were in unlawful possession of firearms the particulars of which were unknown to the State and in possession of ammunitions. I was faced with these pertinent questions with no answers- which of the assailants as described by Ms Maphogole allegedly possessed firearms in view of her testimony that the first assailant possibly was not armed? Was there sufficient evidence justifying the inference that all three assailants jointly possessed the firearm? In relation to these charges as well, the robbery which took place and the unlawful possession of firearms and ammunition constituted three separate offences each with elements which had to be proved beyond reasonable doubt. After the evidence was assessed holistically I was not satisfied that all the elements of the offences of unlawful possession of firearms and ammunitions were proved beyond a reasonable doubt. The six accused were given the benefit of doubt and found not guilty.

xlvii. Count 65

[457] This charge was in relation to the allegations that the six accused robbed Mr Mulaudzi of his money. The indictment alleged that the robbery took place on 3 January 2018. The evidence was that Mr Mulaudzi was robbed on 4 January 2018 after he withdrew money from the bank. In my respectful view the charge was amended by evidence in terms of section 88 of the CPA as there was no prejudice to any of the accused on the basis that the allegations were fully ventilated. Mr Rasesepa could not identify the assailant save to indicate that the first assailant pointed a silver firearm and pointed it to his head, the second assailant was in possession of a knife and the third assailant who was a distance away was in possession of a firearm. A shot was fired during the robbery. It was Mr Raseropo who provided the description of the assailants and the vehicle that they were using. He testified that the one assailant was young with a slim body and a light complexion, the second was dark in complexion and stout.

[458] I found the following similar facts in relation to this charge- (a) the robbery had the hall mark of bank following, (b) three assailants accosted Mr Mulaudzi, (c)

the incident took place within Giyani area, (d) the assailants used a white vehicle, (e) similar description of two of the assailants. I was satisfied that similar fact evidence was legally relevant and admissible and having applied the established principles in the evaluation of similar fact evidence I found the similarities of fact, rendered likelihood of coincidence highly improbable and pointed to the involvement of three of the accused to the robbery committed against Mr Mulaudzi. The proximity in acts and time caused me to conclude that and to draw the only reasonable inference that accused 2, accused 5 and accused 6 were the perpetrators of the robbery. It followed that accused 2, accused 5, accused 6 were found guilty of robbery with aggravating circumstances. Accused 1, accused 3, accused 4 were given the benefit of doubt and found not guilty.

xlvi. Count 66 and 67

[459] The allegations were that all six accused unlawfully possessed of firearms the particulars of which were unknown to the State and ammunition. The evidence was assessed and I was not satisfied that all the elements of the offences were proved. After applying the principles of joint possession there was insufficient evidence justifying the inference that all three assailants jointly possessed the firearm. This was on the basis that one of the assailants was in possession of a knife who clearly had intention to possess a knife as a weapon. In relation to these charges the unlawful possession of firearms and ammunition constituted separate offences with elements which had to be proved beyond reasonable doubt. After the evidence was assessed holistically I was not satisfied that all the elements of the offences of unlawful possession of firearms and ammunitions were proved beyond a reasonable doubt All six accused were given the benefit of doubt and found not guilty of counts 66 and 67.

xlvi. Count 68

[460] The State charged the accused under a repealed legislation, the court was of the view that there was no prejudice in invoking the provisions of section 270 of the CPA where the charge was proved beyond reasonable doubt for the following reasons —

- aa. The essential elements of the offence remained the same in both the repealed Act and the new Act.
- bb. The evidence remained the same and it was fully ventilated and challenged.
- cc. It was not a matter of nullum crimen sine lege and the alleged conduct which prompted the prosecution still remained an offence.
- dd. The failure to invoke section 270 would elevate form above substance which would bring the administration of justice into disrepute.¹⁰⁴

[461] After invoking section 270 of the CPA, the charge would be referred to section 3 (1) of Act 15 of 2013. The allegations were that on 3 January 2018 at Jamela Village the accused were in unlawful possession of two knives. Mr Joseph Raseropo testified that on 3 January 2018 while at Mr Mulaudzi's home he was accosted by three young men who were armed with firearm and knife. The only inference drawn from the evidence was that the knife was used as means to overcome resistance. The only issue was the assailant who possessed the knife. The elements of possession were highlighted supra. The evidence was assessed holistically and found that there was insufficient evidence to prove that the six accused possessed the knife and were given benefit of doubt and found not guilty.

[462] I have pronounced the verdict in respect of each count, there are other aspects which I deemed important to remark on in this judgment.

[463] The veracity of the testimony by Raymond Mosidi was challenged with reference to the reliability of his identification. I ruled his identification to be reliable. One aspect of his testimony was that while the two other assailants ransacked his home, accused 2 was in the lit bedroom with him and his family. Exhibit 'G' photo 16, photo 21, photo 25, photo 28 lent credence to the truthfulness of his testimony. The necessary evidential weight was attached to

¹⁰⁴ See *S v Nedzamba* 2013 (2) SACR 333 (SCA).

Exhibit 'G'. He went further to tell this court that he was locked inside his parental bedroom and had to kick his way out, Exhibit 'G' photo 19 lent credence to the truthfulness of Raymond Mosidi's testimony. It made no sense why he would then lie against a total stranger like accused 2. The reliability of his power of observation, the truth of his testimony was evaluated after assessing all of the relevant evidence as compounded by *S v Van der Meyden* above. The reliability of the points of similarities in the partial finger prints of accused 2 inside the Mabeskraal Post Office was strenuously challenged and I ruled as admissible and reliable. Mrs Mosidi's evidence was that where the prints were found, only the post office staff had access and not the public, Exhibit 'G' photo 42 and Exhibit 'K' lent credence to the truthfulness of that evidence and the necessary evidential weight was attached.

[464] Counsel for accused 2 challenged the reliability of the finger prints found at Mabeskraal Post Office and prayed that this court should attach no evidential weight thereto. I assessed Col Botha's evidence as indicated supra. In addition, I found that the manner he explained the process which gave rise to his findings expressed in Exhibit 'P' enabled this court to combine such evidence with that of Mr Raymond Mosidi and in fact provided that necessary assurance that he spoke the truth which added value by providing the necessary reliability. One material averments made in Exhibit 'P' which was not challenged in my view was the following- *'I compared above mentioned set of finger- and palm prints with a photo of the scene of crime prints of TAPE 2-2- RUSTENBURG LCRC 49/05/2011 and found them to correspond with the LEFT RING FINGERPRINT of COMFORT MKHONAZI, in regards of the type, size, direction and relation to each other and that no unexplainable differences could be found.'* What was challenged was Col Botha's oral testimony in relation to the results he found. It followed that the necessary evidential weight had to be attached to Exhibit 'P'. The evidence of Col Botha was of such a nature that I received appreciable help from him.¹⁰⁵

2. ID Parades

¹⁰⁵ See *Gentiruco AG v Firestone SA (Pty) Ltd* 1972(1) SA 589 (A) at 616H.

[465] Another aspect which required remarks was the ID parade involving the Pheles.

The Defence took issue with the identification made by Mr and Mrs Phele with special reference to the disparity in the ages of the people in the line-up which was brought up during the proceedings. However, when looking at Exhibit 'W' and Exhibit 'Z' visually the people in the line-up (save for the individual in photo 1 with hair on his head), the complexion of the people and height looked similar or at the very least was not too far apart or glaringly different. Yet despite the line-up make up which in my view levelled the 'playing field' so to speak, Mr and Mrs Phele pointed out accused 1 and accused 4. Exhibit 'DD' reflected that Mr Phele was calm at the time he identified accused 1 and accused 4. Despite the failure to note the time it took for Mr Phele to point at accused, I found that the omission did not adversely affect the evidential weight of such identification. Exhibit 'KK' reflected that it took Mrs Phele only two minutes to make a positive identification of accused 1 and accused 4. The necessary evidential weight was attached to Exhibit 'W' and Exhibit 'Z'.

[466] In all instances where accused were identified, the contention was that the identifying witness was shown photographs and there was even an unfortunate averment that Sgt Shabalala was seen showing witnesses photographs. It was not surprising that such averments were made which in my respectful view were feeble attempts by the accused to discredit the pointing out or identification. The State went to the extent of producing evidence that no pictures of accused were printed on the papers. The veracity of the version that the witnesses were placed in a position to identify the accused during the ID parade because their photos were taken and shown to them was rejected as false beyond reasonable doubt. I have also found the version that accused's photos were displayed in the media was also false beyond reasonable.

3. *Missing photographs*

[467] The contention of the missing photographs required some remarks for the completion of the judgment. Counsel for accused 4 strenuously argued for adverse findings to be made in relation to some of the missing photographs on Exhibit 'AA' on the basis of difference in time between 10:39 to 10:42. Counsel for accused 4's argument that an adverse inference should be drawn on the

basis that the state failed to take this court into its confidence. In reply to that contention, Counsel for the State argued that the state did not have the photograph in its possession hence it was not disclosed. The right to full disclosure in democratic jurisdictions is universally accepted and recognised. See *Shabalala and Others v Attorney General, Transvaal, and Another 1996(1) SA 725(CC)* para [50]. It was noteworthy that no application was made by the accused to the State in terms of section 179 (1) of the CPA read with Rule 54(5) and Rule 38 of Uniform Rules for better discovery if it believed that the evidential material existed. There was also no application for further particulars in terms of section 87 (2) of the CPA.

[468] As an officer of the court, the response by the Counsel for the State that the State was not in possession of the missing photographs in my respectful view that settled the issue. At the very least, when the totality of the evidence was assessed, the alleged missing photographs did not affect the fairness of the trial. On the plea for an adverse inference, it was important to reiterate the legal principles on that. An adverse inference can only be made against a party where it can be shown that there was a deliberate attempt to mislead the court. In this matter I was not convinced that an adverse inference was justified. The sentiments expressed by Nugent JA found application in the present matter in which he stated that criminal proceedings are not a consensual affair.¹⁰⁶

4. *Liability based on common purpose*

[469] In the judgment I ruled in some of the counts that liability was imputed on the basis of common purpose. I deemed necessary to indicate the type of liability whether through prior agreement or active participation in the common criminal design. In respect of count 4 the evidence in my view proved that the type of liability applicable to accused 1 was active association or participation in the common criminal design. In count 8 the evidence also proved that the liability applicable to accused 3 was also active association or participation. In counts 17 and 18 I was satisfied that the evidence proved that the type of liability applicable to accused 2 was also active association or participation.

¹⁰⁶ *National Director of Public Prosecutions v King 2010 (2) SACR 146 (SCA) Para [58].*

5. *Assessment of dock identification*

[470] Once more for the completion of the judgment it was necessary to indicate the reasons for the findings that dock identification was reliable. The correct approach in assessing dock identification is that unless it is shown to be sourced in an independent preceding identification it carries little evidential weight¹⁰⁷. I ruled that Mr Tumelo Monama's dock identification was not reliable on the basis that it was not preceded by any previous identification and on the basis of concessions he made. When Mr Monama was probed as to how the assailants entered the house he stated 'I don't know, I don't remember. I was just surprised when I saw him right before me.' During cross examination when asked about the number of assailants that entered the house, he conceded that he could not recall details clearly due to the passage of time. When I assessed the identification done by Mr Monama duly applying the cautionary rules I found that Mr Monama's assurance on the dock identification was simply unreliable. I made this finding based on the fact that by Mr Monama's own concession that he was shocked and the incident happened quickly.

[471] The dock identification made by Mr and Mrs Phele, was preceded by ID parades and carried probative value. I was mindful that Counsel for accused 1 and Counsel for accused 4 took issue with the ID parades on the basis they were tainted.

[472] Ms Rachel Mohale identified accused 6 in court. However, this was preceded by a photo ID parade. Despite her concession that during the actual robbery incident it happened fast, I was satisfied that the dock identification attracted the necessary evidential weight. This was based on Ms Mohale's evidence that the assailant who was inside the taxi with her was the same assailant who grabbed her bag. In my view she had ample time to observe accused 6 during the taxi ride where the conditions were normal. In addition, Exhibit 'HHH' clearly depicted Ms Mohale pointing at accused 6. When she identified accused 6 in court, it was years after the incident. One would have expected with passage of time that an identifying witness would have difficulty in recollection but Ms Mohale consistently pointed at accused 6 as the assailant who robbed her. All

¹⁰⁷ See *Tandwa and Others* 2008(1) SACR 613 (SCA) para [129].

of these factors considered combined ensured the reliability of Ms Mohale's dock identification.

[473] Ms Selowa identified accused 6 in court as the assailant who allegedly held a knife to her neck during the robbery incident which took place in broad day light. She had three occasions in which to observe the accused during the incident. One important factor was the close proximity in which she was in relation to the accused 6 when he held a knife to her neck. This dock identification was preceded by a photo ID parade. I was satisfied that such identification was reliable.

[474] Taking into account the fact that the dock identification took place years after the incidents yet the same accused were pointed out by the witnesses was persuasive and provided a measure of reliability. I was satisfied that the necessary probative value must be attached to such identification made by the identifying witnesses. They were consistent. I rejected the contention that the witnesses were shown photos prior to the ID parade. This contention amounted to nothing short of speculation.

[475] Once more for the completeness of this judgment it was also important to address another aspect. During the proceedings Ms Coetzee testified that she later was able to identify the person on the Randfontein matter as accused 1. Counsel for accused 3 objected there to on the basis it amounted to an impromptu ID parade. The State argued that it was not. I was not persuaded that it was an impromptu identification parade for the simple reason that already the Ms Coetzee was shown a photo of a person of interest to the Tobacco industry per Mr Els and was provided with a name. In court it was not a new identification. I could not find that Ms Coetzee's evidence caused prejudice to the accused. In my view the testimony of Ms Coetzee at the very least could be argued be as a form of dock identification. Even that argument was in my respectful view legally unsound because she already knew accused 1 prior to the court proceedings as she was instrumental in his arrest.

6. *Photo ID parade*¹⁰⁸

¹⁰⁸ The necessary evidential weight was attached after all the evidence was assessed.

[476] Another aspect which required comment was in relation to the photo ID parade which was conducted in respect of the victims from Giyani. I deemed it important to expand on this aspect. Counsel for accused 5 initially objected to the photo identification on the basis that there was no evidence where these photographs originated from. It became clear after Counsel was engaged that the main issue with the photo ID parade was the probative value thereof. The evidence was accepted subject to the evidential weight to be assessed and was attached. According to W/O Shimange who was in charge of the photo ID parade, her testimony was that the identification form reflected what transpired during the photo ID parade. According to Exhibit 'HHH' Mr Malema took three minutes to positively identify Sibusiso Shamase, Sticks Nkuna and Calvin Mabunda. There was no evidence that Mr Malema was influenced to point to any particular person.

7. *Facial recognition*

[477] In respect to facial identification (recognition), the State led the evidence of Captain Corne Brits to prove that accused 1 was the person depicted on the digital close circuit television (CCTV) related to the Randfontein incident. Captain Brits' expertise was not strenuously challenged, rightfully so on the basis of sixteen years of experience in facial recognition and the training. I was satisfied that Captain possessed sufficient skill so assist this court. He outlined the process he used to make the comparison of accused 1 where eleven points of similarities were found which conclusively proved that it was accused 1 on the footage as depicted on Exhibit 'QQ'.¹⁰⁹ I attached probative value to Exhibit 'PP'. Once more Sgt Modau also outlined the process used to make the comparison of accused 1 in relation to the Booyesen incident per Exhibit 'RR' and found nine points of similarities as per Exhibit 'SS'. In respect of all of these exhibits, I attached the necessary probative value.

8. *Unchallenged evidence*

¹⁰⁹ Point 1- shape of the cranial, point 2- forehead, Point 3- thick eyebrows, Point 3- nasal body, Point 5- nasal tip, Point 6- shape of the lip(upper), Point 7- shape of the lip(lower), Point 8- earlobe shape and size, Point 9- shape and angle of the corner of the eye, Point 10- visible crease, Point 11- similar mark.

[478] There were aspects in the evidence which were not refuted or challenged. As trite, if a point in dispute is left unchallenged in cross examination, the party who called the witness is entitled to assume that the unchallenged testimony is accepted as correct.¹¹⁰ The following evidence was not challenged —

- i. Mr Phele described accused 1 as the alleged assailant who wore a fawn hat and pair of blue Levis jeans at the time of the alleged robbery. This description was not challenged. The only aspect which was challenged was the fact that accused 1 was not at the scene of the robbery.
- ii. Sgt Matukwana's evidence that accused 6 was arrested six kilometres from his home was not challenged.
- iii. The content of Exhibit 'P'.

9. *Identikit*

[479] During the proceedings, the defence agreed to the admission of Exhibit 'BB' but later Counsel for accused 1 applied to recant the admission. The application was opposed by the State. I ruled that the admission amounted to section 220 admission.¹¹¹ I accordingly ruled that the admission had to stand in the absence of acceptable explanation consistent with bona fides why the accused should be relieved of the consequences of the admission.¹¹² Where an accused failed to object to an averment or admission made on his behalf during the proceedings a court is fully entitled to rely on such averment or admission. A party that decides to make an admission relieves the opposing party from proving those admitted facts. This ensures that a trial is conducted in a fair manner and not by ambush.

¹¹⁰ See *President of the Republic of South Africa & Others v South African Rugby Football Union and Others* 2000(1) SA 1 (CC) para 61.

¹¹¹ See *S v Groenewald* 2005(2) SACR 597(SCA) para 33 where Cameron JA held 'An admission is an acknowledgment of a fact. When proved or made formally during judicial proceedings, it dispenses with the need for proof in regard to that fact.'

¹¹² See *S v Mbelo* 2003(1) SACR 84(NC) at page 87 where it was held an accused is bound by the admissions made on his behalf except where the legal representative has not been properly instructed or the admission was made as result of a bona fide mistake.

[480] This principle finds application even in a criminal trial. Curlewis JA put it perfectly when he held —

“A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge’s position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figurehead, he has not only to direct and control proceedings according to recognised rules of procedure but to see that justice is done.”¹¹³

In any event it was open to an accused challenge the cogency of any admission (not based on any onus merely as an evidential burden).

[481] In the assessment of the evidence, Exhibit ‘BB’ was considered and the necessary evidential weight was attached¹¹⁴. I deemed it important to expand on the reasons for the acceptance of this evidential material. The use of identikit is a recognisable forensic tool in the fight against crime in many jurisdictions¹¹⁵. Its reliability had to be tested¹¹⁶. To my mind, an identikit constitutes identification which was circumstantial evidence. The approach to circumstantial evidence is trite. The evidence on Exhibit ‘BB’ was that it was the compiled by the Pheles. It had such a striking resemblance to the assailants as described by the Pheles that it led to the arrest of accused 1 and accused 4. Captain Harmse consistently stated that the two accused resembled the identikit he had seen at the police station on the basis of which they were arrested. In his statement per Exhibit ‘CC’ he noted the same reason for the arrest of accused 1 and accused 4. After the evidence was holistically assessed I was satisfied that the necessary probative value had to be attached to Exhibit ‘BB’ and it was on its strength that both accused 1 and accused 4 were arrested. Accused 1 during cross examination initially conceded that Exhibit ‘BB’ had some resemblance to him but later changed and denied same.

10. *Statements made by accused 1, 2, 3*

¹¹³ *R v Hepworth* 1928 AD 265 at 277.

¹¹⁴ See *S v Mpilo* 2021 (1) SACR 661 (WCC) para 23.

¹¹⁵ See *R (Bridges) v Chief Constable of the South Wales Police* [2019] EWHC 2341 (Admin) where the Court held that it was lawful for the police to use automated facial recognition software.

¹¹⁶ See *Mdlongwa v S* 2010 (2) SACR 419 (SCA) para 20 -21.

[482] I needed to remark on the statements made by accused 1, accused 2 and accused 3 were dealt with above for completion. I was satisfied that the rulings made during trial within trial had to stand in that the statements were admissible. Counsel for accused 2 placed reliance to *Mudau v S* to challenge the reliability of the confession made by accused 2 to Captain Khanye. The facts in *Mudau* were distinguishable to the present facts. In *Mudau* the confession of the first appellant was correctly excluded because the trial court ignored the evidence of one Insp. Munyai's concession that he influenced the appellant to confess. In this matter, the shortcomings identified in Captain Khanye's handling of the confession did not adversely impact the substance of the confession made by accused 2. I was satisfied that the confession made by accused 2 met all the statutory requirements and the necessary evidential weight was attached in respect of each statement made by the accused 1, accused 2 and accused 3.

11. *Inconsistencies in the evidence*

[483] There were several inconsistencies in the State's case which I had already found to a large extent were not material. The questions which had to be asked were what weight had to be attached to these inconsistencies and whether or not they were destructive to the State's case. The mere fact that the witnesses' observations were not the same did not necessarily render their versions untruthful or unreliable,¹¹⁷ The test was whether the truth was told, despite any shortcomings. In answering these questions I applied the correct approach when dealing with inconsistencies to wit with caution and all inconsistencies were holistically evaluated¹¹⁸. Not every error made by a witness affected his or her credibility. A trier of fact has to weigh up all the contradictions and discrepancies and defects and decide whether on the totality of the evidence the truth has been spoken. The inconsistencies were assessed within the totality of the evidence and found not to be detrimental to the State's case.¹¹⁹

¹¹⁷ See *Langa v S* [2017] ZASCA 2 (23 February 2017) para 11.

¹¹⁸ See *S v Mkhle* 1990 (1) SACR 95 (A); *S v Oosthuizen* 1982 (3) SA 571 (T) at 576G to H; *S v Mtsweni* 1985 (1) SA 590 (A) at 591a-d.

¹¹⁹ See *S v Mafatadiso en Andere* [2002] 4 All SA 74 (SCA) in which it was held 'Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation, affects the credibility of a witness. Non material deviations are not necessarily relevant.' See *Koopman v S* 2005 (1) All SA 539(SCA) where it was held that where conflicting evidence was adduced, the court was required to get the truth by assessing the evidence based on its observation regarding the credibility

These immaterial inconsistencies were indicative that there was no collusion between the witnesses.

[484] Hereunder are some examples of the inconsistencies —

- i. According to Mr Phele, he was assaulted below his eye and he bled profusely. This was refuted by Dr Fakir who only observed bruises on Mr Phele and no open wound. It was evident that Mr Phele was assaulted as observed by Dr Fakir who is an independent witness. The evidence of an open wound testified about by Mr Phele was not supported by independent medical evidence. I have found that the inconsistency was not material. On pertinent issues (on how the incident took place) the witnesses corroborated each other. The inconsistency was not destructive to the prosecution's case.
- ii. According to Mr Phele's version, his wife was next to him when they were assisted by the bank teller to withdraw the money. According to Mrs Phele, she only approached the teller in order to raise her concern about the teller's loud voice. It was immaterial whether Mrs Phele stood next to her husband or only stood up when she went to voice her concern about the teller's loud voice. The truth was that they went to the bank and withdrew funds. This inconsistency was not destructive to the prosecution's case.
- iii. According to Mrs Phele the bank teller enquired if they were going to deposit the money in another bank account. Mr Phele did not testify about this exchange with the teller. In assessing the discrepancy with the totality of the evidence, I was of the view that this was immaterial and not destructive to the prosecution's case.
- iv. According to Mrs Phele, one of the assailants opened the door and proceeded to assault her husband. Mr Phele on the other hand stated that he was assaulted through the door. This inconsistency was not material for the simple reason that both the witnesses attest

of the witnesses.

to the fact that Mr Phele was assaulted. It was immaterial whether the assault was through a door or through an open door. In any event, it must be recalled that there has been passage of time.

- v. The issue of the CLK with back door according to Mrs Phele. Clearly the type of Mercedes was incorrectly indicated, but that did not detract from the fact that the assailants were driving a Mercedes. Few people can differentiate between different brands of cars. The reference to a CLK was found not to be detrimental to the State's case.
- vi. There was inconsistency between Captain Malindi and Sgt Noge regarding the identikit. According to Sgt Noge the identikit was on display at Kliprivier Police Station's notice board. I have assessed this discrepancy and I found it to be immaterial on the basis that it was on display and it came down to the question of one witness being more observant than the other and did not distract from its existence. Accused 1 conceded that he saw it fleetingly.
- vii. In reference to Sgt Matukwana regarding the arrest effected on 6 January 2018, there was internal inconsistency – he stated that the suspects were tired and were ordered to lie on the ground where else in his statement he reflected that one suspect was standing by the tree while the other lay under the tree. This inconsistency in my view was really not material at all. The common cause fact was that the police reached the suspects and placed them under arrest. Similarly, on the issue of the condition of the tyres of the Run X, that aspect was not material. There was inconsistency in respect of money that was found with accused 2 and 6 on the day of their arrest. His statement reflected that after searching accused 2 nothing was found in his possession. Sgt Matukwana's evidence did not stand alone rather it was corroborated by Constable Khoza's evidence that three hundred and twenty rand was in the possession of the two suspects. This internal inconsistency should not be destructive to the State's case.

- viii. There was inconsistency between Constable Khoza and Sgt Matukwana in respect of the Run X to their vehicle. According to Khoza, they were following the Run X when the driver fired shots randomly. However, Matukwana indicated that they were facing the Run X at the time the shots were fired. It was not material whether the suspects were instructed to surrender their firearms or the police pleaded with them.
- ix. There was also an inconsistency whether accused 6 at the time of arrest was topless or clad. The state of nakedness or lack thereof was immaterial.
- x. There was inconsistency in the testimony of Ms Macevele and Ms Hobyane. Macevele indicated that only one of the assailants that alighted from the getaway car was armed with a firearm while Ms Hobyane stated that two assailants were armed¹²⁰.
- xi. Similarly, on the issue of the colour of the firearm there was inconsistency between Ms Macevele and Hobyane and Baloyi. On assessing the totality of the evidence this inconsistency was immaterial. Ms Hobyane was an eye witness while Ms Macevele was a victim. The perspective of two witnesses could not be expected to be the same. This inconsistency was not destructive to the prosecution case.
- xii. According to Mr Ngobeni, on the day of the robbery at Giyani Super Spar, he carried a green bag while Ms Maluleke stated that the bag was blue. The colour of the bag was not material and thus the inconsistency was immaterial.
- xiii. There was an inconsistency between Ms Nkuna and Ms Maswanganyi regarding whether Ms Maswanganyi was called in person or telephonically. It was not challenged that Ms Maswanganyi was called and instructed to go deposit the money. The manner she was called was inconsequential and immaterial.

¹²⁰ It was neither here or there.

- xiv. According to Constable Khoza accused 5's car had bullet holes while Desmond Mukhari's evidence was that he did not see any bullet holes. This inconsistency was assessed and it was found that it was the question of observation of the witnesses. Desmond Mukhari was clearly less observant than Constable Khoza in respect of the suspect's car which in my view should not have a destructive effect on the State's case.

12. *Credibility of the witnesses*

[485] It was important to reiterate that there are no perfect witnesses. The essential aspect of any witness's testimony was whether the truth has been spoken. The testimony of a witness raised two distinct concepts- (a) the veracity of what was being related and (b) accurate recollection of events. In short, a trier of fact has to assess the credibility and reliability of a witness¹²¹. All the witnesses were assessed.

[486] I made some credibility findings during the adjudication in respect of each count and not specified in respect of some witnesses. For the completeness of the judgment, hereunder were the credibility findings made:

[487] Col. Botha gave testimony as an expert. I found him to be a reliable and credible witness. No biasness was found and he created a favourable impression to the court.

[488] Ms Meyer to the best of her recollection she testified on who she saw as the assailant. I ruled that her identification was unreliable which ruling was made by applying cautionary rules which did not mean that she was a bad witness. Over all she was a satisfactory witness.

[489] Ms Lethuo was a satisfactory witness. The assessment I made regarding the reliability of her identification did not mean that she was an untruthful and bad witness, rather it was on the basis of doubt as indicated supra.

¹²¹ See *S v Sauls and Others supra*.

[490] Mr Labuschagne and Mr More were credible witnesses who gave their testimonies in a clear manner. There was immaterial inconsistency between these witnesses which did not adversely affect credibility.

[491] Captain Malindi was a credible witness whose testimony was of a formal nature.

[492] Captain Ntabeni gave his testimony in a chronological manner. I found no improbabilities in his testimony.

[493] Constable Ndlovu, Captain Mokoena, Sgt Dhlomo, Constable Nzapheza, Sgt Moko, Captain Tsibulane, Constable Makhubela, Sgt Sigo, Constable Mashila, Sgt Mashimpye, Constable Baloyi, Sgt Baloyi, Sgt, Mapindane, Sgt Sithole, Sgt Bopela, W/O Chauke were witnesses whose testimonies were of a formal nature. They testified on their respective roles during ID parades. They were all found to be unbiased and credible on the role played in an ID parade.

[494] Captain Rajah gave her testimony in a calm and confident manner. She came across as a truthful witness.

[495] Dr Fakier testified in a logical and clear manner. She came across as an unbiased witness who was credible.

[496] Ms Coetzee was an impressive witness. Her calm disposition during extensive cross examination was impressive. She was honest, straight-forward and I found no improbabilities in her testimony. She was a credible witness.

[497] Ms Nyembe gave her testimony in a clear and logical manner. She came across as unbiased and made a favourable impression to the court.

[498] W/O Mthombeni had strong points and weak points however on the pertinent issues his testimony was found to be credible and did not affect his overall credibility.

[499] Let/ Col Mangena gave evidence of a formal nature. He was a good and credible witness. No exaggerations were found in his testimony.

[500] Captain Khanye came across as an honest witness who conceded to aspects which were not favourable to his case. His overall credibility on pertinent aspects was solid and credible.

[501] Mr Els gave his testimony in a clear manner and created a good impression. He was a credible witness.

[502] Col Mhlarhi was an honest and credible witness. He gave his testimony in a confident manner.

[503] Constable Rikhotso was an impressive witness. He had a calm disposition and gave his testimony in a clear manner.

[504] Constable Ngobeni was a fair witness. There were no improbabilities in his testimony.

[505] Sgt Shabalala created a good impression. He narrated how he conducted the investigations in a clear manner and he was found to be a credible witness devoid of biasness. The attempts to tarnish his work ethics were rejected as false.

[506] Mr Kgomo was a good and credible witness. He related in a clear manner how the interview with accused 3 took place. I found no biasness in his testimony and he had a calm demeanour.

[507] Col Kruger was an impressive witness. He came across as an honest witness and I found no improbabilities in his testimony.

[508] Col Brits was found to be a credible witness. She conceded to aspects which were not favourable to her.

[509] W/O Modau gave testimony of a formal nature. She explained in a clear manner how she was able to find points of similarities for face recognition. Her evidence though of a technical nature, she was able to provide assistance to the court. She was found to be a credible witness.

[510] Sgt Nefuranele was found to be a fair witness. I did not find any improbabilities in his testimony.

[511] W/O Shimange gave testimony of a formal nature. He created a favourable impression. He had a calm disposition which created the impression that he was an honest witness.

[512] Captain Makwakwa was a credible witness who gave his testimony in a manner that created an impression that he was unbiased.

[513] W/O Nel gave his testimony which was of a formal nature. He created a good impression to the court.

[514] Captain Muller was found to be a fair witness. She conceded to aspects that were not favourable to her such as her admission that she had trouble with pronouncing certain words in IsiZulu. Over all I found her to be a believable witness.

[515] Ms Maluleke was a credible witness. She gave her testimony in a clear manner.

[516] Mr Zulu created a good impression. I found no exaggerations in his testimony.

[517] Mr Maswanganyi was found to be a fair witness and credible. There were no improbabilities in his evidence. He was able to describe how the robbery took place in a clear manner.

[518] Mr Ngobeni was a good witness. He was found to be honest and conceded that he was not able to identify the assailants who robbed him.

[519] Mr Mkosi was an honest witness. He described how the robbery took place and conceded that the position where he was standing he was not able to see the assailants.

[520] Mr Ngobeni gave his testimony in a clear manner. I found no exaggerations in his testimony. He was a credible witness.

[521] Mr Ramalepe gave his testimony in a clear manner. He created a good impression and was honest. He admitted that he was not in a position to identify the assailants.

[522] Constable Khoza and Sgt Matukana were found to be good witnesses. The inconsistencies in some aspects in their testimonies did not adversely affect their credibility.

[523] Mr Malema gave his testimony in a chronological manner. He created a good impression to this court.

[524] Mr Monama explained how the robbery took place. He made concessions which were not favourable to his case. He was a fair witness and the fact that his identification was found unreliable did not affect his overall credibility. The assessment of reliability of his power of observation and the application of cautionary rules which created a doubt.

[525] Ms Mohale was an impressive witness. She gave her testimony in a calm manner and created a favourable impression.

[526] Ms Maake gave her testimony in a clear and satisfactory manner.

[527] Constable Maluleke gave testimony of a formal nature. She related her role in the making of Exhibit 'LLL'. She was a credible witness.

[528] Mr Mothomogolo was found to be a good witness who related how the robbery involving Mr Mookamedi took place.

[529] W/O Magasela gave testimony of a formal nature on how he compiled Exhibit 'EEE'.

[530] Ms Hobyani gave her testimony in a confident manner. She related in chronological manner how the robbery involving Ms Macevele took place. I found no inherent improbabilities in her testimony. She created a favourable impression to this court.

[531] Ms Baloyi was well articulated. She was able to describe the suspect that she observed kicking her colleague. She did not come across as biased in her testimony. She gave her testimony in a clear manner. She was a credible witness.

[532] Sgt Ramashia gave evidence of a formal nature. Despite the contention by accused 3 that this witness fabricated the statement against him, I was satisfied that he was unbiased. He came across as honest. He was unshakable under cross examination.

[533] Mr Mathebula was found to be a credible. He gave his testimony in a logical and clear manner. He conceded to aspects which were not favourable to his case such as the concession he made that he was not in a position to describe the firearm that the assailants possessed on the day of his robbery. He was honest to say that despite attending an ID parade, he was not able to point out any person in the line -up. Mr Mathebula's testimony was critical in the value judgment which this court had to make on the veracity of the contention that the police showed the witnesses the photos of the suspects. The candid concession that he was not in a position to point out anyone was indicative of the honesty of this witness.

[534] Mr Rasesepa related in a logical and chronological the incident of Mr Mulaudzi's robbery. He gave his testimony in a confident manner. He was not argumentative. He created a favourable impression to this court. I found no exaggerations in his evidence.

[535] Mr Koekemoer gave testimony of a formal nature. He testified in a clear and unambiguous manner. He was found to be an honest and unbiased witness.

[536] Mr Raseropo was able to relate how the robbery of Mr Mulaudzi occurred in a logical manner. He made concessions which were not favourable to his testimony such as when he agreed that there was nothing peculiar or strange about the car he noticed near the vicinity of his uncle's home. He was honest in his testimony that he only received a report of the robbery. He was found to be a credible and clear witness.

[537] Ms Van der Merwe was found to be an honest witness. She did not exaggerate any aspect. She gave her testimony in a clear manner. Her testimony was of a formal manner on how her husband's revolver was stolen. She was found to be a good witness.

[538] Mr Van der Merwe gave his testimony in a logical manner. He was clear and answered questions in a straightforward manner. He came across as an honest witness who conceded to some aspects which were not favourable to his case, such as the concession he made that he was not in a position to confirm that the firearm which was confiscated was his.

[539] Dr Rahube gave evidence of a formal manner with regard to the registration plates of his vehicle. He testified in a confident manner.

[540] Ms Madi was found to be a biased witness which adversely affected her credibility.

[541] Sgt Makhubele had both strong and weak aspects in his testimony. The strong aspect was the manner he related his involvement in the arrest of accused 2 and accused 6. The weakness had to do with the inconsistency with his colleague W/O Mthombeni which was addressed in this judgment. As already found when inconsistencies were evaluated, the mere fact that there was inconsistency with his colleague did not equate that his credibility was destroyed. Overall impression was that he related his role on the day accused 2 and 6 were arrested.

[542] All six accused were found to be poor witnesses whose versions were improbable. They were not credible witnesses. They crumbled and performed dismally during cross examination.

[543] The last aspect I needed to remark on was the indictment which in my respectful view caused a bit of confusion in relation to count 26 (which was for the possession of the Taurus Model and the Berreta Model which were recovered by Const. Khoza and Sgt Matukana). The confusion was that count 26 referred to count 24 twice which related to the Spar robbery. This confusion in my view did not adversely affect the rights to a fair trial as it was a typographical error at best.

Conclusion

[544] In conclusion, having assessed the evidence holistically I was satisfied that the State proved identify beyond reasonable doubt in respect of the specified charges as found. I was further satisfied that the State proved beyond reasonable doubt that accused 1, accused 2, accused 4, accused 5 and accused 6 participated in the conduct of the affairs of the enterprise through a pattern of racketeering activities. The versions of all six accused were found not reasonable possibly true and not consistent with innocence. The evidence in respect of the robbery incidents clearly proved the requirements of aggravating circumstances as defined in section 1 of the CPA in that weapons in a form of firearms and knives were wielded against the victims.

Order

[545] In the result the following order is made —

1. Count 1 - Accused 1, 2, 4, 5 and 6 are guilty of contravention of section 2(1) (e) of POCA attracting the provisions of section 51 (2) of Act 105 of 1997. Accused 3 is not guilty and discharged.
2. Count 2 - Accused 1, 2 are not guilty and discharged.
3. Count 3 - Accused 1, 2 are guilty of attempted robbery with aggravating circumstances.
4. Count 4 – Accused 1, 2 are guilty of murder attracting the provisions of section 51(1) of Act 105 of 1997. Accused 3, 4, 5, 6 are not guilty and discharged.
5. Count 5 - Accused 2, is guilty of contravention of section 3 (1) of FCA. Accused1, 3, 4, 5 and 6 are not guilty and discharged.
6. Count 6 - Accused 2 is guilty of contravention of section 90 of FCA. Accused 1,3,4,5 and 6 are not guilty and discharged.
7. Count 7 - Accused 1 and 3 are guilty of contravention of section 18(2) (a) Act 17 of 1956.

8. Count 8 - Accused 1 and 3 are guilty of robbery with aggravating circumstances attracting the provisions of section 51(2) of Act 105 of 1997. Accused 2, 4, 5 and 6 are not guilty and discharged.
9. Count 9 - Accused 3 is guilty of contravention of section 3 (a) (i) of POCA attracting the provisions of section 51(2) of Act 105 of 1997.
10. Count 10 - All six accused are not guilty and discharged.
11. Count 11 - all six accused are not guilty and discharged.
12. Count 12 - Accused 1 and 4 are guilty of robbery with aggravating circumstances attracting the provisions of section 51(2) of Act 105 of 1997. Accused 2, 3, 5, 6 are not guilty and discharged.
13. Count 13 - Accused 1 is guilty of contravention of section 3 (1) of FCA. Accused 2,3,4,5 and 6 are not guilty and discharged.
14. Count 14 – All six accused are not guilty and discharged.
15. Count 15 - All six accused are not guilty and discharged.
16. Count 16 – All accused are not guilty and discharged.
17. Count 17 - Accused 2 is guilty of robbery with aggravating circumstances attracting the provisions of section 51 (2) of Act 105 of 1997.
18. Count 18 - Accused 2 is found guilty of kidnapping attracting the provisions of section 51(2) (c) of Act 105 of 1997. Accused 1, 3, 4, 5 and 6 are not guilty and discharged.
19. Count 19 - Accused 2 is guilty of contravention of section 3(1) of FCA. Accused 1, 3, 4, 5, 6 are not guilty and discharged.
20. Count 20 - All six accused are not guilty and discharged.
21. Count 21 - Accused 6 is guilty of robbery with aggravating circumstances attracting the provisions of Section 51(2) of Act 105 of 1997. Accused 2 and 5 are not guilty and discharged.

22. Count 22 - Accused 2, 5 and 6 are not guilty and discharged.
23. Count 23 - Accused 2, 5 and 6 are not guilty and discharged.
24. Count 24 - Accused 2, 5 and 6 are guilty of robbery with aggravating circumstances attracting the provisions of section 51(2) of Act 105 of 1997.
25. Count 25 - Accused 5 is guilty of attempted murder. Accused 2 and 6 are not guilty and discharged.
26. Count 26 - Accused 2 and 6 are guilty of contravention of section 3 (1) of FCA. Accused 5 is not guilty and discharged.
27. Count 27 - Accused 2 and 6 are guilty of contravention of section 90 of FCA. Accused 5 is not guilty and discharged.
28. Count 28 - Accused 2, 5 and 6 are guilty of robbery with aggravating circumstances attracting the provisions of section 51(2) of Act 105 of 1997.
29. Count 29 - Accused 5 is guilty of contravention of section 3 (1) of FCA. Accused 2 and 6 are not guilty and discharged.
30. Count 30 - Accused 2, 5 and 6 are not guilty and discharged.
31. Count 31 - Accused 6 is guilty of robbery with aggravating circumstances attracting the provisions of section 51(2) of Act 105 of 1997.
32. Count 32 - Accused 2, 5 and 6 are not guilty and discharged.
33. Count 33 - Accused 2, 5, and 6 are not guilty and discharged.
34. Count 34 - Accused 2, 5 and 6 are not guilty and discharged.
35. Count 35 - Accused 2, 5 and 6 are guilty of robbery with aggravating circumstances attracting the provisions of section 51(2) of Act 105 of 1997.

36. Count 36 - Accused 2, 5 and 6 are not guilty and discharged.
37. Count 37 - Accused 2, 5 and 6 are not guilty and discharged.
38. Count 38 - Accused 2, 5 and 6 are not guilty and discharged.
39. Count 39 - Accused 2, 5 and 6 are not guilty and discharged.
40. Count 40 - Accused 2, 5 and 6 are not guilty and discharged.
41. Count 41 - Accused 2, 5 and 6 are not guilty and discharged.
42. Count 42 - Accused 2, 5 and 6 are not guilty and discharged.
43. Count 43 - Accused 2, 5 and 6 are not guilty and discharged.
44. Count 44 - Accused 2, 5 and 6 are guilty of robbery with aggravating circumstances attracting the provisions of section 51(2) of Act 105 of 1997.
45. Count 45 - Accused 2, 5 and 6 are not guilty and discharged.
46. Count 46 - Accused 2, 5 and 6 are not guilty and discharged.
47. Count 47 - Accused 2, 5 and 6 are guilty of robbery with aggravating circumstances attracting the provisions of section 51(2) of Act 105 of 1997.
48. Count 48 - Accused 2, 5 and 6 are not guilty and discharged.
49. Count 49 - Accused 2, 5 and 6 are not guilty and discharged.
50. Count 50 - Accused 2, 5 and 6 are guilty of robbery with aggravating circumstances attracting the provisions of section 51(2) of Act 105 of 1997.
51. Count 51 - Accused 2, 5 and 6 are not guilty and discharged.
52. Count 52 - Accused 2, 5 and 6 are not guilty and discharged.
53. Count 53 - Accused 2, 5 and 6 are not guilty and discharged.

54. Count 54 - Accused 2, 5 and 6 are not guilty and discharged.
55. Count 55 - Accused 2, 5 and 6 are not guilty and discharged.
56. Count 56 - Accused 2, 5 and 6 are guilty of robbery with aggravating circumstances attracting the provisions of section 51(2) of Act 105 of 1997.
57. Count 57 - Accused 2, 5 and 6 are not guilty and discharged.
58. Count 58 - Accused 2, 5 and 6 are not guilty and discharged.
59. Count 59 – Accused 6 is guilty of theft of firearm. Accused 1 and 5 not guilty and discharged.
60. Count 60 – Accused 2 and 6 are guilty of contravention of section 4 (1) (f) (iv) of FCA attracting the provisions of section 51(2) of Act 105 of 1997. Accused 5 is not guilty and discharged.
61. Count 61 - Accused 2 and 6 are guilty of contravention of section 120(10) (b) of FCA. Accused 5 is not guilty and discharged.
62. Count 62 - Accused 2, 5 and 6 are guilty of robbery with aggravating circumstances attracting the provisions of section 51(2) of Act 105 of 1997. Accused 1, 3, 4 are not guilty and discharged.
63. Count 63 - All six accused are not guilty and discharged.
64. Count 64 - All six accused are not guilty and discharged.
65. Count 65 - Accused 2, 5 and 6 are guilty of robbery with aggravating circumstances attracting the provisions of section 51(2) of Act 105 of 1997. Accused 1, 3, 4 are not guilty and discharged.
66. Count 66 - All six accused are not guilty and discharged.
67. Count 67 - All six accused are not guilty and discharged
68. Count 68 - All six accused are not guilty and discharged.

**MNCUBE AJ
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG**

Appearances:

On behalf of the state : Adv. J.G Wassermann assisted by Adv. C Ehlers

Instructed by : DPP Johannesburg

On behalf of accused 1 : Adv. R. Xaba

On behalf of accused 2 : Adv. S. Johnson

On behalf of accused 3 : Adv. E. Crespi

On behalf of accused 4 : Adv. M.A. Khunou

On behalf of accused 5 : Adv. V. Soko

On behalf of accused 6 : Adv. T. Mpanza

Instructed by : Legal Aid South Africa

Dates of Judgment : 8 to 9 December 2022; 9 to 11, 26 to 27, 30 January 2023; 13 to 17 February 2023.

Annexure A: List of Exhibits:

Exhibits A, B: Authorisation in terms of Section 2(4) of POCA;

Exhibit C: Direction in terms of section 111 of the CPA;

Exhibit D: Admissions in terms of section 220 of the CPA;

Exhibit E: Medico Legal Autopsy report compiled by Dr Simbarashe Kemurai Chikwava;

Exhibit F: Minutes of the pre-trial conference;

Exhibit G: Statement and photo album compiled by Andries Petrus Viljoen;

Exhibit H: Statement by Raymond Oageng Mosindi;

Exhibit J: Fingerprint lifter compiled by L/ Colonel C.J. Botha;

Exhibit K: Photograph depicting L/Colonel C.J. Botha;

Exhibit L: SAP 192 form (for fingerprints comparison);

Exhibit M: Fingerprint comparison done by L/Colonel C.J. Botha;

Exhibit N: Description of marked out points on the court chart (SAP 333);

Exhibit O: Fingerprints of accused 2 taken before court for comparison;

Exhibit P: Section 212 statement by L/Colonel C.J. Botha;

Exhibit Q: Photographs from the footage in the Randfontein incident;

Exhibit R: Section 212 statement by Sergeant Thabiso Steven Molefe;

Exhibits S, T: Statements by Johnna Susana Meyer;

Exhibit U: Photographs from the footage in Booyens incident;

Exhibit V: Statement by Riaan Van Wyk;

Exhibit W: Photograph of the id parade line up;

Exhibit X: J88 form completed by Dr N. Fakier;

Exhibit Y: Copy of the bank (card) statement of Mr Phele;

Exhibit Z: Statement and photo album of the id parade line up compiled by Sergeant Thamsanqa Joseph Dhlomo;

Exhibit AA: Statement and Kliprivier footage photographs compiled by Vittorio Vomeri Labuschagne;

Exhibit BB: Copy of identikit for the Kliprivier incident;

Exhibit CC: Statement by Warrent Paul Harmse;

Exhibit DD: SAPS329 form (identification parade form);

Exhibit EE: Statement by Sergeant Thamsanqa Joseph Dhlomo;

Exhibit FF1: Statement by Maureen Coetzee;

Exhibit FF2: Photographs from the footage in the Randfontein incident;

Exhibit GG1: Statement by Maureen Coetzee;

Exhibit GG2: Photographs from footage in Booyens incident;

Exhibit HH: Forensic bag number PA5001365003 (Randfontein CAS 317/8/13);

Exhibit HH1 and HH2: Memory sticks (containing bank footage);

Exhibit JJ: Copy of SAP 329 (id parade form, Meyerton CAS 104/12/15);

Exhibit KK: Copy of SAP 329 (id parade form, Kliprivier CAS 107/11/15);

Exhibit LL: Investigation notes made by L/Col Botha;

Exhibit MM: Duplicate copy of Notice of rights of accused 1 (SAPS14A);

Exhibit NN: Certified copy of SAP 13 of forensic bag containing clothes per PAR0000393876(Randfontein Cas 317/8/2013);

Exhibit OO: Statement by L/Col Gerhardus Johannes Kruger (A20);

Exhibit PP: Facial Image Analysis Report by Lt Corne Brits;

Exhibit QQ: Images for comparison for court chart by Lt Corne Brits (Randfontein Cas 317/8/2013);

Exhibit RR: Facial Image Analysis Report by Sgt Michelle Miranda Modau;

Exhibit SS: Images for comparison for court chart by Sgt Michelle M Modau (Booyesen Cas 450/1/2015);

Exhibit TT: Duplicate copy of Notice of rights of accused 3 (SAP 14A);

Exhibit UU: Statement made by accused 3 to Captain Makwakwa

Exhibit VV: Statement by Insp. Sarel Petrus Niemand (control photos of accused1);

Exhibit WW: Section 212 statement by W/O Pheladi Abina Khotso (ballistic report);

Exhibit XX: Copy of SAP 13 of memory sticks per forensic bag PA5001297561(Randfontein Cas 317/8/2013)

Exhibit YY1: Section 212 statement by W/O Lebogang Pearl Maimane (on enhancement of photos of suspect, Randfontein Cas 317/8/2013);

Exhibit YY2: Photo album (Randfontein Cas 317/8/2013);

Exhibit ZZ: Copy of SAP 13 for the photos (Randfontein Cas 317/8/2013);

Exhibit AAA: Statement made by accused 2 to Captain Muller;

Exhibit BBB: Photo album (Giyani Cas 78/1/2018) compiled by W/O Mukhari;

Exhibit CCC: Photo album (Giyani Cas 78/1/2018) compiled by W/O Mukhari;

Exhibit DDD: Photo album (Giyani Cas 78/1/2018) compiled by W/O Mukhari;

Exhibit EEE: Photo album of crime scene at Giyani Spar (Giyani Cas 78/1/2018);

Exhibit FFF: Memory stick of the video footage of the incident at Giyani Spar;

Exhibit GGG: Photographs from the Nedbank video footage (Giyani Cas 78/1/2018).

Exhibit HHH: Photo album (Bolobedu Cas 188/12/2017) compiled by Cons. Mashila.

Exhibit III: Statement by Johannes T. Malema

Exhibit JJJ Statement by Tumelo Monama

Exhibit KKK: Photographs from footage

Exhibit LLL: Photographs from cell phone

Exhibit MMM: Photographs from footage

Exhibit NNN: Photographs from footage

Exhibit OOO: Photographs from footage

Exhibit PPP: Statement by Adolf Matukana

Exhibit QQQ: Notice of rights of Sticks Nkuna

Exhibit RRR: Statement by Adolf Matukana

Exhibit SSS: Notice of rights of Xolani Mkwanazi

Exhibit TTT: Copy of firearm licence

Exhibit UUU: Photographs

Exhibit VVV: Photographs

Exhibit WWW: Section 236 statement by Tinyiko Shirinda

Exhibit XXX: Section 236 statement by Violet Rikhotso

Exhibit YYY: Section 236 statement by Tinyiko Shirinda

Exhibit ZZZ: Section 236 statement by Awelani Mashila

Exhibit AAAA: Section 236 statement by Violet Rikhotso

Exhibit BBBB: Section 236 statement by Violet Rikhotso

Exhibit CCCC: Section 236 statement by Awelani Mashila

Exhibit DDDD: Section 236 statement by Violet Rikhotso

Exhibit EEEE: SAP 329 (identification parade form)

Exhibit FFFF: SAP 329 (Identification parade for)

Exhibit JJJJ: Statement by Rhulani Shimange

Exhibit KKKK: Statement by Rhulani Shimange

Exhibit LLLL: Statement by Rhhulani Shimange

Exhibit MMMM: Statement by Nancy Mashmbye

Exhibit NNNN: Section 212 Statement by Christiaan Mangena

Exhibit OOOO: Warning Statement by Sibusiso Shamas

Exhibit PPPP: Section 212 Statement by Pheladi Abina khotso

Exhibit RRRR Notice of rights for Calvin Mabunda

Exhibit SSSS: Newspaper article from the Giyani View generated from the internet by Constable R. S. Rikhotso.

Exhibit 'TTTT': Copy of identity book of Lindiwe Madi.

Exhibit 'UUUU': Album compiled by Jeffrey S. Ngobeni

Exhibit 'VVVV' (provisional)

Exhibit 'WWWW' (provisional)

Exhibit 'YYYY': Copy of Medical Aid documents.

Exhibit 'ZZZZ': Copy of J15 for Vusi Sibanyoni

Exhibit 'AA': Section 205 application

Exhibit 'AB': Statement by Simon Nyofane

Exhibit 'AD': J88