IN THE HIGH COURT OF SOUTH AFRICA

KWA-ZULU NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR 152/2015

CASE NO: CC 169/07

In the matter between:

MFANUFIKILE GOODWILL SHANGE	**Accused 1**
FOX SITHOLE	**Accused 2**
ZOFANIA MTHETHWA	**Accused 3**
SAKHELE JAN SIBISI	**Accused 4**
FANI JOHANNES MBONAMBI	**Accused 5**
SIBUSISO BENEDICT SHABALALA	**Accused 6**
XOLANI MHLUNZI BUTHELEZI	**Accused 7**
THEMBA NQOBITZITHA KHATIDE	**Accused 8**
MPHO PATRICK TSOTENSI	**Accused 9**
LEBOHANG LEBO MOTHEPU (now deceased)	**Accused 10**
FLAVIO JOSE MBONAMBI	**Accused 11**
BHEKINKOSI LEAONARD KUNENE	**Accused 12**
JOHANNES KHEHLA LANGA	**Accused 13**
SIPHO MHLONGO	**Accused 14**
THABO OSCAR MAHOA	**Accused 15**
SIPHO PERCY KUNENE	**Accused 16**
THABANI MGISI ZONDO	**Accused 17**

LUCKY BUTHEZ PHASHA	**Accused 18**
VUSI PELE NJOKO	**Accused 19**
SIPHO VUSI MPONDO GUMEDE	**Accused 20**
BONGANI SHIPA TSHABALALA	**Accused 21**
ERNEST NDLANGAMANDLA	**Accused 22**
HAMILTON LIZOKO MAZIBUKO	**Accused 23**
MBUSO MNCUBE	**Accused 24**
EDDIE KALANGA UBISI	**Accused 25**
THULANI BLESSING MTHETHWA	**Accused 26**

and

THE STATE	**Respondent**

JUDGMENT

KOEN J

INTRODUCTION:[1]

[1] On 2 October 2006 two motor vehicles of Fidelity Cash Management Services ('Fidelity'), conveying inter alia cash, drop safe cash bags, deposit slips

[1] This judgment deals with the appeal against the judgment of Combrink J in the court *a quo*. It therefore proceeds on the premise that the reader is familiar with that judgment, the full details of the individual charges against the accused as per the indictment and the categorisation of the charges adopted by the learned judge according to whether they relate to what was referred to as the Penicuik incident or the Charters Creek incident. The trial spanned some five years giving rise to a considerable record, which although not as voluminous as that in *Price Waterhouse Coopers v National Potato Co-operative* [2015] 2 All SA 403 (SCA), nevertheless comprised 10 782 pages. In the interest of brevity evidence led before the court *a quo* will not be repeated in this judgment in any great detail unless material to the conclusions reached. Readers of this judgment are referred to the judgment of the court *a quo* and the record if any additional details are required. To facilitate reading, the same terminology as adopted in the court *a quo* will be followed to ensure consistency and hopefully ease of understanding.

and cash boxes were ambushed in two separate incidents some 34.89 kilometers apart along the N2 National Road in north-east KwaZulu-Natal. In each instance the *modus operandi* was the same. The Fidelity vehicles were rammed and pushed off the road resulting in them overturning. Any possible resistance was overcome by the threat of and the use of assault rifles and firearms. The two incidents occurred almost simultaneously. The first was a robbery near the Charters Creek turn-off ('Charters') from the National Road near Mtubatuba involving a Toyota Hi-Ace Fidelity vehicle. It occurred at approximately 18h25 to 18h40. Access was gained to this vehicle by force and *inter alia* money was removed before the attackers fled the scene. This robbery became the subject matter of count 9 in the court *a quo*. The second incident, not for any lack of trying on the part of the perpetrators, became an attempted robbery near the Penicuik turn-off ('Penicuik') near KwaMbonambi involving a Dyna vehicle. This occurred at approximately 18h30 to 18h50. The Dyna vehicle was an armoured one which successfully resisted attempts, even the use of some mechanical device, possibly an angle grinder, to prize it open to remove the contents. This attempted robbery became the subject matter of count 6 in the court *a quo*. It is common cause that the robbery and attempted robbery were accompanied by 'aggravating circumstances'.[2] These two primary offences in turn gave rise to or involved a number of secondary offences.[3] The secondary offences in respect of the Charters incident are reflected in counts 1, 2, 10,11,12,13 and 14. The secondary offences in respect of the Penicuik incident gave rise to counts 3, 4, 5, 7, 8, 15, 16, 17, 18, 19, 20, 21, 22 and 23. Counts 24 to 30 related to charges framed under the Fire Arms Control Act[4] in respect of firearms and ammunition retrieved at the time of the arrest of some of the suspected offenders late on the evening of 2 October 2006 to the early hours of 3 October 2006 at the Mvoti Toll Plaza ('Mvoti').

[2] Specifically as defined in paragraph (b) of the definition of aggravating circumstances in s1 of the Criminal Procedure Act no 51 of 1977.
[3] For details of these see paragraph 2 below.
[4] Act 60 of 2000.

[2] The appellants shall in this judgment be referred to as they were in the court *a quo*, with reference to the numerical number allocated to each accused.[5] The complainants in the different counts and witnesses will in certain instances be referred to by their surnames only and without any appellation. No disrespect is intended. The former accused number 10 died during the trial. Accused number 12 was acquitted on all the counts.[6] At the conclusion of the trial,[7] the following verdicts were returned and sentences imposed in respect of the remaining accused:

Count 1 – Theft of a Mercedes Benz motor vehicle on 2 October 2006, which vehicle was abandoned at Charters – all the accused were convicted and each sentenced to seven years' imprisonment.

Count 2 – Theft of a BMW 730i motor vehicle on 2 October 2006 which vehicle was found abandoned at Charters – all the accused were convicted and each sentenced to seven years' imprisonment.

Count 3 – Theft of an Isuzu bakkie on 12 September 2006 which vehicle was found abandoned at Penicuik – all the accused were convicted and each sentenced to seven years' imprisonment.

Count 4 – Theft of Nissan bakkie on 13 September 2006 which vehicle was found abandoned near Penicuik – all the accused were convicted and each sentenced to seven years' imprisonment.

Count 5 – Theft – All the accused were acquitted.

Count 6 – The attempted robbery with aggravating circumstances at Penicuik – all the accused were convicted and each sentenced to ten years' imprisonment.

Count 7 – The attempted murder of the crew member of the Dyna, Wiseboy Ncwane at Penicuik – all the accused were convicted and each sentenced to seven years' imprisonment.

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[5] This is inter alia to avoid any confusion and facilitate references to extracts from the trial record.
[6] No cross appeal was pursued by the Respondent.
[7] The accused were indicted in the High Court, their trial commenced on 17 October 2007 and they were finally convicted on 29 March 2012.

Count 8 – The attempted murder of the driver of the Dyna, Graham Thring at Penicuik – all the accused were convicted and each sentenced to five years' imprisonment.

Count 9 – Robbery with aggravating circumstances at Charters – all the accused were convicted and each sentenced to fifteen years' imprisonment.

Count 10 – The attempted murder of Bheki Mnqayi, an occupant of the Fidelity Hi-Ace at Charters – all the accused were convicted and each sentenced to five years imprisonment.

Count 11 – The attempted murder of Sipho Mnguni, the driver of the Fidelity Hi-Ace at Charters – all the accused were convicted and each sentenced to five years' imprisonment.

Count 12 – The attempted murder of Constable Thulani Biyela near Charters – all the accused were convicted and each sentenced to ten years' imprisonment.

Count 13 – The attempted murder of Inspector Etwell Khoza near Charters – all the accused were convicted and each sentenced to ten years' imprisonment.

Count 14 – The attempted murder of Constable Mbuso Mthethwa near Charters – all the accused were convicted and each sentenced to ten years' imprisonment.

Count 15 – The robbery with aggravating circumstances of Vezubuhle Msweli near Penicuik by taking his vehicle ignition keys – all the accused were convicted and each sentenced to two years' imprisonment.

Count 16 – Kidnapping - All the accused were acquitted.

Count 17 – Kidnapping - All the accused were acquitted.

Count 18 – The robbery with aggravating circumstances involving the hijacking of Mthokozisi Masango's vehicle at Penicuik – all the accused were convicted and each sentenced to fifteen years' imprisonment.

Count 19 – The attempted murder of Mthokozisi Masango near Penicuik - all the accused were acquitted.

Count 20 – The kidnapping of Masango's daughter, Nothile, near Penicuik - all the accused were acquitted.

Count 21 – The murder of Thembinkosi Gumede, the Maxim security guard, near Penicuik – all the accused were convicted and each sentenced to life imprisonment.

Count 22 – The attempted murder of the Maxim security guard, Oscar Nkabinde, near Penicuik – all the accused were convicted and each sentenced to eight years' imprisonment.

Count 23 – The attempted murder of the Maxim security guard, Sicelo Ntombela, at Penicuik – all the accused were convicted and each sentenced to eight years' imprisonment.

Counts 24 to 26 – The unlawful possession of the handguns – All the accused were acquitted.

Counts 27, 28, 29 and 30 – Unlawful possession of two AK47 rifles, one LMG and 69 live R5 rifle rounds, 72 live AK47 rounds, 48 live 9mm pistol rounds and 5 live .38 special rounds ammunition, at the time of arrest at Mvoti – Accused 2, 3, 4, 6, 9, 11, 13, 15, 17, 18, 21, 23 and 24 only were convicted, all these counts were taken together for the purpose of sentence and each of these accused sentenced to fifteen years' imprisonment. The remainder of the accused were found not guilty on these counts.

Count 31 – Unlawful failure by accused 14 to lock away his 9mm Luger firearm in a prescribed safe – Accused 14 found was found guilty and sentenced to 3 months' imprisonment.[8]

[3] *Ex facie* the record, leave to appeal was granted to all the accused by the trial court in respect of their convictions on counts 1 to 4, 6 to 15, 18, 21 to 23 and 27 to 29.[9] Count 30 was not listed when leave to appeal was granted, but this appears to have been a patent omission and counsel all argued the appeal on the

[8] This means that the accused were all acquitted on counts 5, 16, 17, 19, 20, 24, 25 and 26. In addition accused 1, 5, 7, 8, 14, 16, 19, 20 22, 25 and 26 were acquitted on counts 27, 28, 29 and 30. Count 31 did not concern any of the accused other than accused 14.

[9] Paragraph (b) of the court order dated 16 November 2012 at page 10775.

basis that the leave to appeal extended to count 30 as well. This judgment will therefore also deal with the merits of the conviction on count 30. Accused 14 was not granted leave to appeal in respect of count 31. The conviction on that count accordingly falls outside the subject matter of this judgment. Leave to appeal against sentence was granted only in respect of the life sentence imposed on count 21.

ISSUES ON APPEAL:[10]

[4] It is not in dispute that the State proved the commission of the crimes which featured in the trial. The central issue arising however is whether the court *a quo* erred in concluding that the State had proved beyond a reasonable doubt that it was the various accused who had committed the offences[11] of which they were convicted, or were guilty of those crimes.[12]

[5] In the appeal accused 1, 6, 7, 8, 13, 14, 20, 22, 24, 25 and 26 were represented by Mr Slabbert. Accused 2, 3, 9, 15, 16, 17, 18, 19, 21 and 23 were represented by Mr Fraser. Accused 4, 5 and 11 were represented by Mr Seedat. Mr Slabbert had indicated in his Practice Note that no reasons would be submitted by him why the conviction of accused 6, 7, 14, 20, 22, 24 and 25 of the Charter's Creek robbery (count 9) or the conviction of the secondary offences in respect of that robbery should be set aside. The secondary offences relating to the Charter's robbery are those in counts 10, 11, 12, 13 and 14. In argument he made a similar but varied concession extended to also include accused 1, but confined to counts 9, 10 and 11. I shall proceed in this judgment on the basis of what was conceded in argument before us, namely that accused 1, 6, 7, 14, 20, 22, 24 and 25[13] concede that they were convicted correctly on counts 9, 10 and 11. Mr Fraser indicated that

[10] The grounds of appeal submitted on behalf of the appellants are, *inter alia*, the following:
(a) There was no evidence against any of the accused in respect of the Penicuik incident and the conviction in respect of all these charges should be set aside.
(b) The incorrect interpretation of the evidence and the court's failure to objectively apply its mind to the facts as well as the requirements of the doctrine of common purpose.

[11] Notably counts 1 to 4, 6 to 15, 18 and 21 to 23.

[12] Notably counts 27 to 30.

[13] That left accused 8 and 13 of the accused he represented who made no concessions.

no reasons would be advanced by him on behalf of accused 2, 9, 15, 16, 18, 21 and 23[14] in respect of their conviction of attempted robbery at Penicuik (counts 6) and the attempted murders of Ncwane and Thring at Penicuik (counts 7 and 8 respectively) and the Robbery at Charters (count 9) and the attempted murder of Mnqayi and Mnguni, the occupants of the Hi-Ace (counts 10 and 11 respectively), which were described as 'justified'. Mr Seedat did not make any concessions in respect of accused 4, 5 and 11.

[6] A reading of the record will immediately reveal that the aforesaid concessions made by Mr Slabbert and Mr Fraser are correctly made. The case against those accused on the counts conceded was, for reasons set out in the judgment of the court *a quo*, overwhelming and their conviction undoubtedly correct. Nothing further needs to be said in this judgment.

[7] What is left then in respect of the individual accused, grouped according to their representation, and dealt with in this judgment, are:

<u>Accused represented by Mr Slabbert</u>:

Accused 1, 25 and 26 – their conviction on counts 1 to 4 (theft of motor vehicles), count 6 (attempted robbery at Penicuik), counts 7 and 8 (attempted murders at Penicuik), counts 15, 18, 21, 22 and 23.

Accused 6, 7, 8, 13, 14, 20, 22 and 24 – their conviction on counts 1 to 4 (theft of motor vehicles), count 6 (attempted robbery at Penicuik), counts 7 and 8 (attempted murders of at Penicuik), counts 15, 18, 21, 22 and 23, and counts 27 to 29, and count 30.

Accused 25 and 26 – their conviction on counts 1 to 4 (theft of motor vehicles), count 6 (attempted robbery at Penicuik), counts 7 and 8 (attempted murders at Penicuik), count 15, 18, 21, 22 and 23.

[14] That left accused 3, 17 and 19 of the accused he represented who made no concessions.

Accused represented by Mr Fraser:

Accused 2, 9, 15, 16, 18, 21 and 23 – their conviction on counts 1 to 4 (theft of motor vehicles), count 12, 13, 14, 15, 18, 21, 22 and 23, counts 27 to 29, and count 30.

Accused 3, 17 and 19 – their conviction on all counts i.e. counts 1 to 4, 6, 7 to 8, 9, 10 to 14, 15, 18, 21, 22, 23, 27 to 29 and 30.

Accused represented by Mr Seedat:

Accused 4, 5 and 11 - all counts i.e. counts 1 to 4, 6, 7 to 8, 9, 10 to 14, 15, 18, 21, 22 to 23, 27 to 29 and 30.

SCHEME OF THIS JUDGMENT:

[8] In this judgment I shall discuss the following *seriatim*:

(a) Whether any of the accused should have been convicted of counts 1 to 4 - the theft of motor vehicles counts;

(b) Whether the accused who were convicted of counts 26 to 30 – the possession of firearms and ammunition counts, should have been so convicted;

(c) Whether accused 1, 6, 7, 14, 20, 22, 24 and 25 who have conceded the correctness of their conviction on counts 9, 10 and 11, relating to Charters, should also be convicted on counts 6, 7 and 8 relating to the attempted robbery and attempted murders at Penicuik. That will involve a consideration of the doctrine of common purpose;

(d) Whether accused 8 and 13 (the ones not making any concessions and represented by Mr Slabbert) and accused 3, 17 and 19 (the ones represented by Mr Fraser and not making any concessions) and accused 4, 5 and 11 (represented by Mr Seedat and not making any concessions) should have been convicted on 6 and 9, and further whether they should have been convicted of counts 10 and 11 and

counts 7 and 8. This will likewise involve a consideration of the doctrine of common purpose;

(e) Whether any of the accused should have been convicted of the further subsidiary offences on counts 12, 13 and 14 (the attempted murder counts in respect of the policemen near Charters) and counts 15 (robbery of Msweli), count 18 (robbery of Masango) and counts 21 to 23 (murder and attempted murders of the Maxim security guards) near Penicuik, which will entail a consideration of the terms of any alleged prior agreement amongst the accused and whether the State proved a common purpose in respect of these offences beyond reasonable doubt;

(f) Finally, I shall consider the appeal against the sentence of life imprisonment on count 21, and if so which determinate sentences should be directed to run concurrently.

SOME OBSERVATIONS REGARDING THE EVIDENCE:

[9] With the exception of DNA evidence in the form of blood of accused 25 being found on one of the abandoned vehicles, and evidence of a finger print of accused 17 being found on a money container retrieved from the blue Hyundai sedan motor vehicle in which accused 14 and 19 were arrested on 3 October 2006, there is no forensic real evidence, such as for example ballistic evidence linking any firearms that were retrieved to any of the crime scenes, nor other fingerprints found connecting any of the accused to the crime scenes.[15] The evidence against the accused is therefore entirely circumstantial, being based largely on records of cell phone numbers used by the accused and/or items found in their possession after their arrest. The cell phone records cannot prove the precise location where the accused were when calls were made and sms's sent or received on their cell phones, but places them in the approximate communication range from the physical location of the cell phone towers which relayed these various

[15] The latter is perhaps not surprising as a large number of hand gloves were retrieved at various places during the arrest of the accused and subsequent clean up at Mvoti.

communications. The detailed analysis of these records as reflected in the transcribed evidence, some of which was also summarized in the judgment of the court *a quo* was not attacked. This evidence will not be repeated herein.

[10] Circumstantial evidence can however sometimes be more compelling than direct evidence.[16] A court is always enjoined to examine all the evidence; it must neither look at evidence implicating the accused in isolation to determine whether there is a proof beyond reasonable doubt, nor should it look at exculpatory evidence in isolation to determine whether an accused's version is reasonably possibly true. The correct approach is to consider all the evidence 'in the light of the totality of the evidence of the case'.[17] This court, as a court of appeal, shall not interfere in the findings of the trial court in regard to conviction unless there is a material misdirection which resulted in an incorrect conclusion being reached. An appeal lies against the conclusions reached and not against the trial court's reasons for convicting. If the reasoning of the trial court might be open to criticism, but the conclusion reached is nevertheless correct for different reasons, then the appeal must nevertheless fail.[18]

[11] In drawing any inferences from circumstantial evidence, it is trite law that:

(a) Firstly, the inference sought to be drawn must be consistent with all the proven facts; and

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[16] In *S v Musingadi and others* 2005 (1) SACR 395 (SCA), the Court at para 20 quoted with approval a passage from Zeffertt, Paizes and Skeen's *The South African Law of Evidence* at page 94 which stated the following:
'…circumstantial evidence may be the more convincing form of evidence. Circumstantial identification by fingerprint will, for instance, tend to be more reliable than the direct evidence of a witness who identifies the accused as the person he or she saw. But obviously there are cases in which the inference will be less compelling and direct evidence more trustworthy. It is therefore impossible to lay down any general rule in this regard. All one can do is to keep in mind the different sources of potential error that are presented by the two forms of evidence and attempt, as far as possible, to evaluate and guard the dangers they raise'

[17] *R v Hlongwane* 1959 (3) SA 337 (A) at 431A.

[18] *Mabaso v Law Society, Northern Provinces and another* 2005 (2) SA 117 (CC) para 20, referred or quoted in *S v Shaik and others* 2008 (5) SA 354 (CC) para 64 at fn 45; *Mogorosi v The State* [2010] ZASCA 147 para 7; *Florence v Government of the Republic of South Africa* 2014 (6) SA 456 (CC) para 114 at fn 96.

(b) Secondly, the proven facts must be such that they exclude every other reasonable inference.[19]

[12] Due to the two main crimes[20] having been committed at almost the same time some distance apart, it is physically impossible for the individual accused to have been physically present at both scenes to perpetrate the crimes including the subsidiary offences relating to each. The cell phone records show that accused 1, 2, 6, 7, 9, 11, 14, 15, 18, 20, 21, 22, 23, 24, 25 and 26 were all in the vicinity of Charters at the time of the robbery at Charters and not near the attempted robbery at Penicuick. There are no cell phones records of accused 3 and 17 placing them in the vicinity of any of the crime scenes. The cell phone records of accused 4, 5, 8, 13, 16 and 19 are inconclusive.

[13] The crimes were also not all committed at the actual Charter's robbery and Penicuik attempted robbery scenes. The attempted murder counts in respect of the policemen (counts 12 to 14) who were driving along the N2 where they encountered traffic did not take place at the actual scene of the robbery at Charters, but a short distance away, but nevertheless in the general area. The robbery of Msweli's vehicle keys (count 15) also did not take place at the actual scene of the attempted robbery at Penicuick but at a point on the N2 before Msweli reached Penicuik where his way was blocked by a bakkie, he was stopped and two persons unknown to him removed the keys to his vehicle. The hijacking of Masango's vehicle (count 18) occurred it seems after the attempted robbery at Penicuick and in a plantation about 1 km from that scene. The murder of Gumede (count 21) and the attempted murder of Nkabinde and Ntombela (counts 22 and 23) also occurred along the gravel road through the same plantation when they came across apparently the same persons who had confronted Masango, who then fired at them fatally injuring the deceased.

[19] *R v Blom* 1939 AD 188.
[20] The robbery at Charters and the attempted robbery at Penicuik.

[14] The evidence has been referred to in detail in the judgment of the court *a quo*. I refer only briefly to the following apparent chronological sequence of events to contextualize this judgment:

(a) At about 4am on the morning of 2 October 2006, Sithole, a tactical support officer employed by Fidelity was driving along the R34 road near Jabulani towards Empangeni. He came across four vehicles travelling in convoy, each occupied by a number of adult African males. One of the vehicles was a 7 series BMW similar to one used three weeks before in another Fidelity cash in transit robbery to capsize the Fidelity vehicle. This caused him to pay particular attention to these vehicles. The vehicles included:

(i) A 7-series BMW, 'old model' greyish in colour, bearing a Gauteng Province registration number;

(ii) A white Nissan LDV bearing a registration number NRB […]80;

(iii) A white Mercedes Benz C-class with registration number RZF […] GP; and

(iv) A 7-series BMW, greyish in colour, bearing registration number KRY […] GP.

All the vehicles had a number of adult male occupants.

(b) He recorded the aforesaid registration numbers. He furthermore also noted that the Mercedes Benz C series vehicle emitted sparks from its one rear wheel consistent with a tyre that has been worn to the extent that the steel lining comes into friction with the road surface. He kept them under observation, his suspicion clearly aroused, and followed these vehicles at a safe distance through Empangeni, and then to Richards Bay to Meerensee a suburb in Richards Bay and eventually to Mzingazi another suburb, where the four vehicles with occupants *in situ* all turned into the yard to the house of, as subsequently discovered, accused 24. Sithole left them there and then went to work where he reported his suspicions.

(c) Late afternoon on 2 October 2006, Mnqayi (count 10) and Mnguni (count 11) were travelling in the Fidelity Hi-Ace in the area of

Charters on the N2 having collected cash and other documents from various collection points earlier that day, when their vehicle was rammed off the road, causing it to overturn on the side of the road, an act which could easily have had fatal consequences for them. A group of heavily armed men descended on their vehicle. Access was obtained by forcing the vehicle open and various cash boxes and other containers and a Rossi revolver were removed (count 9) by the assaillants who then fled the scene.

(d) Late afternoon Ncwane (count 7) and Thring (count 8) were travelling in the Fidelity Dyna truck along the N2 but in the area of Penicuik after having collected cash and other documents from various collection points earlier in the day. They had travelled ahead of the Hi-Ace. Near Penicuik their vehicle was also rammed off the road causing it to capsize at the side of the road, a very dangerous manouvre which could easily have resulted in them being killed. Various assaillants descended on their vehicle and attempts were made to cut open their armoured vehicle by some motorized mechanical device which could be heard inside the Dyna. These attempts were however unsuccessful and the assailants eventually fled the scene empty handed.

(e) Three policemen constable Biyela (count 12), inspector Khoza (count 13) and constable Mthetwa (count 14) were travelling along the N2 late afternoon on 2 October 2006 when they encountered some traffic as though there had been an accident. They stopped behind a Clover truck. Whilst parked there the Mercedes Benz C series referred to above approached and parked some 4 meters behind their marked police vehicle. They were ordered out of their vehicle by an occupant of the Mercedes Benz and an exchange of fire ensued. Biyela returned fire and an assailant was apparently wounded and taken to a dark coloured BMW on the scene. The policemen fled for their lives. A subsequent examination of their police vehicle revealed that the driver's window was shattered, two bullet holes showed where

the bonnet to the vehicle was penetrated up to the instrument panel, the windscreen revealed that shots had been fired just in front of the driver and in front of the passenger, and the rear glass behind the passenger's headrest and the headrest itself had holes. This shooting occurred at Charters within view of the Fidelity Hi-Ace which was lying on its side.

(f) Msweli (count 15), whilst driving his Opel Corsa on the N2 in the direction of Penicuik attempted to overtake a bakkie travelling in the same direction, but was blocked by this bakkie which came to a standstill. This was some distance away from the actual Penicuik scene. Msweli was dispossessed of his vehicle's keys by two occupants of the bakkie who got back into the bakkie and drove off.

(g) One Masango (count 18) and his daughter were travelling home in his double cab Ford Ranger. He decided, after following the suggestion of a neighbour, who passed him when he had come to what he thought was a stoppage due to an accident, to take a route home along a gravel road. However, when he came upon what he thought was a crime scene, he backed towards the N2. When he was about to enter the N2, at a point approximately 1km from the attempted robbery scene at Penicuik he was confronted by men with guns, forced to stop and robbed of his vehicle.

(h) Gumede (count 21), Nkabinde (count 22) and Ntombela (count 23) were travelling in a security firm vehicle of their employer, Maxim Security, on their way back to their depot in KwaMbonambi along the gravel route through the plantation in the greater Penicuik area. They came upon apparently the same persons who had confronted Masango, who started firing at them in their vehicle. Gumede who was in the back of the vehicle that was fitted with a canopy, was wounded fatally.

(i) Late in the afternoon of 2 October 2006 Sithole received a report of the attempted robbery at Penicuik on the N2. He proceeded to the scene and observed the Dyna which had capsized and come to rest

on its left side off the road. He observed a BMW which apparently had been used to ram the Dyna. He recognised the BMW as one of the motor vehicles he had encountered on the R34 during the early hours of that morning. He discovered that the registration plate of that BMW had been changed. He found the registration plate with the number he had recorded earlier that morning, on the rear seat inside the BMW vehicle.

(j) While still at the Penicuik crime scene Sithole was informed of some abandoned motor vehicles at the murder scene on the gravel road in the nearby plantation. Upon arriving there he saw the Nissan LDV which he had encountered early in the morning on the R34. The Nissan LDV still bore the registration numbers which he had recorded earlier.

(k) Next Sithole received a report of the robbery at Charter's Creek and proceeded there. At that scene he identified the white Mercedes Benz C-class vehicle which was stationary behind the police vehicle which had transported Biyela, Khoza and Mthetwa. He identified the Mercedes Benz as the one he had encountered that morning on the R34 as part of the convoy with the same worn right rear tyre with the steel mesh exposed. The registration plate had however been changed. Upon inspection he found that the 'new' registration plate had been placed over the number plate which he had observed and recorded earlier.

(l) Govender, a Fidelity inspector, arrived at Charter's Creek scene. He introduced Sithole to Captain Mncube of the South African Police. Sithole narrated all he knew up to that stage to Mncube. Mcube with Govender then requested Sithole to take them to the house at Mzingazi to which he had followed the four vehicles which had contained the suspects that morning, which Sithole did. Having been shown the house in question Mncube and Govender dropped Sithole at Meeresee, Richards Bay and returned to the house at Mzingazi.

(m) On approaching the home of accused 24, Govender and Mncube were passed from the front by a BMW vehicle, which they had noticed earlier when Sithole was with them, turning out of the property of accused 24. They approached the home cautiously. A white Toyota kombi vehicle occupied by various adult males turned out of the driveway of the property in front of them in the same direction as they were travelling. They drove slowly past the property and noticed a number of African males standing around in the yard of the property. They noticed a dark BMW which was in the process of reversing out of the yard, a blue Hyundai sedan with its engine idling, and a red Toyota Hi-Ace kombi parked in the yard, all readying to leave. A large number of adult males were standing around the vehicles in the yard. Govender and Mncube followed the white kombi along the John Ross highway to where it turned south onto the N2 national road in the direction of Durban. It then temporarily left their sight while Govender proceeded to the Caltex garage at Empangeni where he dropped off Mncube who transferred to a 'flying squad' police vehicle, which he had called for and in which he then sped south along the N2 highway, towards Durban in pursuit of the white kombi. Having confirmed with the toll gate operator at Mtunzini that a white kombi occupied by various males had passed through earlier, Mncube continued with the high speed hot pursuit until the white kombi was eventually stopped by blocking the only open lane allowing traffic through at Mvoti. Mncube observed the occupants seated at the back were discarding money onto the floor of the kombi. Accused 2, 3, 4, 6, 9, 11, 13, 15, 17, 18, 21 and 23 with accused 24 as driver of the kombi were all apprehended;

(n) Shortly thereafter the blue Hyundai sedan which Mncube recognized as one of the vehicles he had seen at accused 24's house arrived at Mvoti with accused 14 as driver and accused 19 as passenger. Mncube identified accused 19 as one of the men he had seen in the

vicinity of the gate at accused 24's house earlier that evening because of his 'dreadlocks' and dress. They were arrested;

(o) Next the red Toyota Hi-Ace driven by accused 12 and with accused 5, 7, 16 and 22 as passengers arrived at Mvoti, and they were all arrested;

(p) Finally, the dark BMW, driven by accused 8 with accused 1 and 20 as passengers, arrived at Mvoti. They were also duly arrested.

(q) At the time of their arrest at Mvoti the various accused were found in possession of inter alia the following:

Accused no 1 – R56 009 in cash, a Fidelity drop safe bag[21] which was utilized by Baobab Service Station and which had been collected by Fidelity from that Service Station on 2 October 2006 and was in the Hi-Ace at the time of the robbery, and a Nokia 6230 cell phone.[22]

Accused no 2 – R44 300 cash, a Fidelity drop cash bag[23] which was identified as a bag from the Petroport at Hluhluwe which was collected by Fidelity, and a Nokia 2600 cell phone.[24]

Accused no 3 – R23 550 cash and a Nokia 6230 cell phone.[25]

Accused no 4 – R2 770 cash and Nokia N70 and Alcatel cell phones.[26]

Accused no 5 – R23 100 cash and a Nokia 6600 cell phone.[27]

Accused no 6 – R7 440 cash and a Nokia 1100 cell phone.[28]

Accused no 7 – R42 550 cash.

Accused no 8 – R21 520 cash, a pair of white gloves[29] and a Nokia 3310 cell phone.[30]

Accused no 9 – R28 640 cash and a Nokia 1600 cell phone.

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[21] Exhibit QQ
[22] Exhibit 7.
[23] Exhibit S4A.
[24] Exhibit 15.
[25] Exhibit 6.
[26] Exhibit 23.
[27] Exhibit 11.
[28] Exhibit 13.
[29] Exhibit OO13 – 14
[30] Exhibit 18.

Accused no 10 – R23 030 cash and a grey glove.[31]

Accused no 11 – R34 450 cash, a pair of brown woollen gloves[32] and a Samsung cell phone.

Accused no 12 – R2 350 cash, Nokia 8310, Samsung and Nokia 6230 cell phones, and another Nokia 6230 cell phone which was later established through cell phone records to belong to accused 7.

Accused no 13 – R1 250 cash.

Accused no 14 – R13 400 cash and a Nokia 6230i cell phone.[33]

Accused no 15 – R3 710 cash, a black beanie/balaclava cap[34] and a Nokia 2100 cell phone.[35]

Accused no 16 – R22 190 cash and a Motorolla V3 cell phone.[36]

Accused no 17 – R22 230 cash, a pair of black gloves[37] and Nokia 6100 and Nokia 7610 cell phones.[38]

Accused no 18 – R4 350 cash and Nokia 6680 and Motorolla V3 cell phones.[39]

Accused no 19 – R28 430 cash (in the cubbyhole in front of him), a FNB deposit slip[40] of Bridge Wholesalers at Ingwavuma which was taken at Charters, and a Nokia 6822 cell phone.[41]

Accused no 20 – R35 890 cash and a Nokia 6260 cell phone.[42]

Accused no 21 – R370 cash and a Nokia 7250i cell phone.[43]

Accused no 22 – R710 cash and a Samsung D500 cell phone.[44]

Accused no 23 – R3 650 cash and a Nokia 6020 cell phone.[45]

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[31] Exhibit OO11-12.
[32] Exhibit OO7 – 8
[33] Exhibit 14.
[34] Exhibit OO25 – 26
[35] Exhibit 20
[36] Exhibit 17
[37] Exhibit OO4 – 5.
[38] Exhibit 16.
[39] Exhibit 22.
[40] Exhibit RR.
[41] Exhibit: 10.
[42] Exhibit 21.
[43] Exhibit 24.
[44] Exhibit 25.
[45] Exhibit 5.

Accused no 24 – R4 040 cash and Nokia 6820 and Nokia N70 cell phones.[46]

(r) Inside the white Toyota Hi-Ace kombi, owned and driven by accused no 24 with accused 2, 3, 4, 6, 9, 11, 13, 15, 17, 18, 21 and 23 as the other occupants, were inter alia:

- A Nokia cell phone,
- R79 990 cash strewn over the floor in the rear passenger area,
- A pair of yellow plastic kitchen gloves,
- Two balaclavas one which DNA comparison established has sweat emanating from accused 25 on it,
- A white glove,
- A glove with blood which blood a DNA comparison test showed was blood from accused 25,
- Another glove established through DNA comparative tests as belonging to accused 23,
- Two AK47 rifles,
- Four AK47 magazines,
- Two R5 magazines,
- A Z88 pistol with 15 rounds of ammunition in the magazine,
- An R5 rifle without a serial number, and,
- a large black bag with a petrol driven angle-grinder.

In the red Toyota Hi-Ace driven by accused 12 with accused 5, 7, 12, 16 and 22 as passengers was:

- R30 296 cash,
- A Blue beanie,
- A Black cap/hat.

In the blue Hyundai with registration number ND […]36 driven by accused 14 with accused 19 as passenger were inter alia:

- R2 800 cash,
- A Blue cap,
- A pair of brown woollen gloves,

[46] Exhibit 19.

- Rossi .38 revolver loaded with ammunition taken during the Charters robbery,
- Three unopened and charged Fidelity Guard money boxes, one of which had a palm print of accused 17.

All these items were later identified to be the property of Fidelity robbed at Charters.

In the red kombi, a money bag and R30 296.00 were found on the floor.

In the blue BMW were a

- A Standard Bank and Stop Card of accused 5 (who was travelling in the red kombi.
- A Standard Bank Debit Card of accused 5.
- A flight ticket for accused no 5.
- An identity book of accused 14 (who was driving the blue Hyundai sedan).
- A 9mm Luger pistol belonging to, and the identity book of, accused no 14.

(s) Although accused no 5 was travelling in the red kombi, his identity book was found in the BMW which was driven by accused no 8 with accused no 1 and 20 as passengers. Although accused no 17 was travelling in the white Toyota Hi-Ace kombi, his palm print was found on one of the cash boxes recovered in the boot of the Hyundai which was driven by accused 14, with accused 19 as passenger. Although accused 14 was driving the Hyundai his firearm and identity book were found in the BMW.

(t) A search by Mncube and an inspector Ntomblea was conducted at the house of accused no 24 on 4 October 2006. A bucket found in one of the toilets contained various items, subsequently handed by them to the investigating officer, and later identified by various persons as indicated below as items collected by Fidelity and being transported in the Fidelity vehicles at the time of the robbery:

Exhibit No.	Item recovered	Identifying person
SS1	P-bag of Shamula Water Scheme	Thoko Duzi
SS2	FNB deposit slip of Shamula Water Scheme	Thoko Duzi
SS3	P-bag of Supertrade Spar, Mbazwana	Kabongile Zika
SS4	FNB deposit slip of Supertrade Spar, Mbazwana	Kabongile Zika
SS5	P-bag of Pep Stores, Mbazwana	Rosemund Mlambo
SS6	2 x FNB deposit slips of Pep Stores, Mbazwana	Rosemund Mlambo
SS7	2 x FNB deposit slips of Pep Stores, Mbazwana	Rosemund Mlambo
SS8	2 x FNB deposit slips of Pep Stores, Mbazwana	Rosemund Mlambo
SS9	Stop-loss bag of Ellerines, Kosi Bay	Velaphi Mthembu
SS10	P-bag of Spar, Kosi Bay	Princess Mthembu
SS11	FNB deposit slip of Spar, Kosi Bay	Princess Mthembu
SS12	P-bag of Hilltop Camp, Hluhluwe	Ian Oglesby
SS13	2 x FNB deposit slips of Hilltop Camp, Hluhluwe	Ian Oglesby
SS14	2 x FNB deposit slips of Hilltop Camp, Hluhluwe	Ian Oglesby
SS15	FNB document of Wildlife	Ian Oglesby
SS16	FNB document of Hilltop Camp, Hluhluwe	Ian Oglesby
SS17	P-bag of Spar, Kosi Bay	Princess Mthembu
SS18	FNB deposit slip of Spar, Kosi Bay	Princess Mthembu
SS19	Stop-loss bag of Barnetts, Emanguzi	Nozipho Ngobese
SS20	Stop-loss bag of Total garage, Kosi Bay	Sibusiso Mzimela
SS21	Stop-loss bag of Expo Liquors	Bheki Buthelezi
SS22	Stop-loss of Town Talk, Emanguzi	Patience Ngubane
SS23	Stop-loss of Bambanani T-Junction	Vusi Tembe

SS24	P-bag of Jet Stores, Emanguzi	Thandi Masinga
SS25	P-bag of Baobab Service Station, Hluhluwe	Rudi Meyer
SS26	FNB deposit slip of Baobab S/ Station, Hluhluwe	Rudi Meyer
SS27	FNB deposit slip of Jet Stores, Emanguzi	Thandi Masinga
SS28	FNB deposit Slip of Jet Stores, Emanguzi	Thandi Masinga
SS29	3 x FNB deposit slips of Barnetts, Emanguzi	Nozipho Ngobese
SS30	2 x FNB deposit slips of Barnetts, Emanguzi	Nozipho Ngobese
SS31	2 x FNB deposit slips of Barnetts, Emanguzi	Nozipho Ngobese
SS32	3 x FNB deposit slips of Barnetts, Emanguzi	Nozipho Ngobese
SS33	2 x FNB deposit slips of Barnetts, Emanguzi	Nozipho Ngobese
SS34	2 x FNB deposit slips of Ellerines, Kosi Bay	Velaphi Mthembu
SS35	2 x FNB deposit slips of Ellerines, Kosi Bay	Velaphi Mthembu
SS36	2 x FNB deposit slips of Ellerines, Kosi Bay	Velaphi Mthembu
SS37	2 x FNB deposit slips of Ellerines, Kosi Bay	Velaphi Mthembu
SS38	2 x FNB deposit slips of Ellerines, Kosi Bay	Velaphi Mthembu
SS39	2 x FNB deposit slips of Ellerines, Kosi Bay	Velaphi Mthembu
SS40	2 x FNB deposit slips of Town Talk, Emanguzi	Patience Ngubane
SS41	2 x FNB deposit slips of Town Talk, Emanguzi	Patience Ngubane
SS42	2 x FNB deposit slips of Town Talk, Emanguzi	Patience Ngubane
SS43	2 x FNB deposit slips of Town Talk, Emanguzi	Patience Ngubane
SS44	FNB deposit slip of Expo Liquors, Mkuze	Bheki Buthelezi
SS45	Fidelity Bulk Receipt	Mr Clarke
SS46	3 x FNB deposit slips of Total garage, Kosi Bay	Sibusiso Mzimela
SS47	3 x FNB deposit slips of Total garage, Kosi Bay	Sibusiso Mzimela

SS48	3 x FNB deposit slips of Total garage, Kosi Bay	Sibusiso Mzimela
SS49	3 x FNB deposit slips of Total garage, Kosi Bay	Sibusiso Mzimela
SS50	3 x FNB deposit slips of Total garage, Kosi Bay	Sibusiso Mzimela
SS51	3 x FNB deposit slips of Total garage, Kosi Bay	Sibusiso Mzimela

Also discovered at accused 24's house was a bullet proof vest and an assortment of motor vehicle registration plates.

(u) The cell phone records of the accused reflect calls made and received by the accused on their handsets from 1 September 2006 to 3 October 2006. Some 72 126 calls were analysed by an expert, Mrs Botha. These have been summarized correctly and the import thereof dealt with in the judgment of the court *a quo*, which will not be repeated herein.

THE THEFT OF THE FOUR MOTOR VEHICLES – COUNTS 1 TO 4:

[15] The case advanced by the State was that these vehicles were stolen for the purpose to be used in the primary robberies and thereafter abandoned at the respective scenes. The vehicles in counts 1 and 2 were found abandoned at Charters and those in counts 3 and 4 were found abandoned at Penicuik. The trial court correctly observed that:

> 'There is no evidence that the perpetrators who used and thereafter abandoned the stolen vehicles at the scene of the robbery were themselves the original thieves thereof'.

The trial court however convicted the accused saying:[47]

[47] Judgment: page 10145 - 10147

'…, the basis upon which the perpetrators of the offences in which the motor vehicles were used, are guilty of theft, rests on the principle that theft is a continuing offence. …. Only two possibilities appear from the facts – the vehicles were either stolen or acquired, knowing that they were stolen. Either way, the perpetrators who used the stolen vehicles at the crime scene, would be guilty of theft of the respective vehicles'.

Specifically, the court held:

'As it has been proved beyond reasonable doubt that the accused (save accused 12), were all party to the common purpose to rob the Fidelity vehicles; and that the commission of the motor vehicle thefts were seen as germane to the proper execution of the robberies, we hold that the guilt of the accused concerned has been proved beyond reasonable doubt.'

[16] Mr Selepe, on behalf of the Respondent, has argued that the need for the use of stolen vehicles in the circumstances of the robbery and attempted is glaringly obvious; that it is quite inconceivable that the perpetrators would have used and jettisoned their own vehicles at the crime scene as that would be too costly and would enable the police to trace the vehicles back to them as registered owners. He quotes from the judgment of the court *a quo* where it was said that:

'. . . the principle that theft is a continuing offence, has application in respect of the second of the aforementioned possibilities. When an object such as motor vehicle is obtained from the thief or his successor, knowing that it was stolen, the acquisitor (*in casu*) has the requisite *animus furandi* and undoubtedly intends to permanently deprive the owner of the vehicle, more so knowing the use to which the vehicle would be put. In the instance the BMW was used to ram the Hi-Ace, while the Mercedes was involved in the attempted murder of the police officials (Counts 12, 13 and 14).

The inference is inescapable that all the accused who shared the common purpose to rob the Hi-Ace, knew or subjectively foresaw that stolen motor vehicles were needed for the execution of the robbery and were indifferent thereto. Accordingly the actions of the thief or acquisitor of the motor vehicles in question are imputed to them also.'

[17] Mr Selepe argued further that the inference drawn by the trial Court is justified, if one has regard to the evidence as a whole, and that with theft being a continuous crime, it makes no difference that the appellants were not involved in the original stealing of the motor vehicles but that their subsequent participation in permanently depriving the owners of their vehicles makes them just as guilty as the original thief.

[18] In the discussion that follows I shall deal with:

(a) The principle that theft is a continuing offence;[48] and thereafter

(b) The conclusion that the accused all knew that the vehicles were stolen or acquired knowledge that they were stolen.

[19] It is trite law, as was held in *S v Cassiem*[49] that:

> 'By the same token, *contrectatio* and knowledge of the theft need not be proved by direct evidence. Their existence can be inferred from the facts and circumstances of the case'.

[20] The principle that theft is a continuing offence, correct as that statement is, it does not however impose criminal liability on all persons who subsequently come into possession or even control of a stolen vehicle, even if they could strongly be expected to have suspected that it must be stolen, otherwise there would be no place for the separate existence of the offence of receiving stolen property knowing it to be stolen. The principle that theft is a continuous offence, is essentially aimed at overcoming the problem where stolen items may be conveyed to the geographical restricted different area of jurisdictions of different courts. It provides for the theft 'to continue' and hence to be continued to be committed and hence justiciable within the jurisdiction of any court into which the stolen goods are

[48] At page 10145 of the judgment the trial judge remarked: '… the basis upon which the perpetrators of the offence in which the motor vehicles were used, are guilty of theft, rests upon the principle that theft is a continuing offence '.

[49] *S v Cassiem* 2001 (1) SACR 489 (SCA) at page 493A – B.

brought. Snyman, *Criminal Law*[50] correctly summarizes the principles in this respect in remarking:

> 'The rule that theft is a continuing crime means that theft continues to be committed as long as the stolen property remains in the possession of the thief or someone who has participated in the theft or someone who acts on behalf of such a person' (my emphasis).

It however also does not follow that a person who was not the original thief cannot in appropriate circumstances where he exercises control over the stolen car with knowledge of the theft, be guilty of theft. Thus in *R v Brand*[51] where the accused exercised control over a stolen vehicle jointly with the original thief who continued to control the vehicle, the theft continuing whilst it is under his control, it was held that:

> 'Where one only of two persons has stolen a car and thereafter, the other being aware that it is a stolen car, they join in a venture in which the car is made part, as it were, of the joint capital, so that the control over it is exercised on behalf of both of them, it may be assumed that even if the original thief continues to do all the driving, his partner would also be guilty of theft as from the time when the venture came into operation'.

[21] In *Brand's* case the 'original' thief remained in possession and control of the stolen vehicle, and the physical act of the theft or *actus reus* continued with the other culprit then joining in that continuing criminal deed with the required knowledge that it was a stolen vehicle, and with the *mens rea* to permanently deprive the true owner of ownership. *In casu*, there is no evidence identifying the thief or thieves who initially stole the vehicles from their owners as being amongst the accused. Accordingly, there can be no continuing act of taking to deprive, to which the accused, assuming them to have known of such thefts, can become a party by assuming joint control thereof as part of the 'joint capital'.

[50] CR Snyman *Criminal Law* 5ed (2008) 500.
[51] *R v Brand* 1960 (3) SA 637 (A) at 641E – F.

[22] Mr Selepe accepts that when the original thief / thieves took control of the motor vehicles for the purpose of appropriating them for themselves and to permanently deprive the owners of their motor vehicles, the crime of theft was complete. He argues however that 'the intervention by the persons (accused) who followed them as possessors of the vehicles, which led to the abandonment of the motor vehicles at the robbery scenes, does not undo the theft of those motor vehicles and does not absolve the accused from criminal liability'. I cannot, with respect, agree with that submission. Even if it is accepted as correct that it is an integral part of any robbery as *in casu*, to the knowledge of those involved in its planning, that stolen vehicles would have to be sourced and used as 'stopper' vehicles, as vehicles to ram the Fidelity vehicles off the road, and as get-away vehicles to avoid detection, it does not render all the accused guilty of some continuous crime of theft of the vehicles by persons who remain unidentified, but could at most render them guilty of possession of stolen property knowing it to be stolen, an offence they were not charged with but which could have been a competent verdict to theft in terms of section 264(1)(a) of the Criminal Procedure Act 51 of 1977.

[23] None of the accused was found to have been one of 'the original thieves'. There was no evidence that they had participated in the theft of the vehicles, or that they had acted on behalf of the original thieves or anyone who had participated in the original thefts. On that basis alone the convictions on counts 1 to 4 cannot be sustained.

[24] However, also in regard to the requirement that the accused allegedly knew that the vehicles were stolen, the State failed to discharge the onus of proof.[52] The Mercedes Benz (count 1) was stolen in Gauteng on 7 February 2006 several months prior to the offences in question. It had travelled more than 40 000 km since being stolen. The BMW 730i vehicle (count 2) was also stolen in Gauteng. The Isuzu bakkie (count 3) and the Nissan bakkie (count 4) were stolen in

[52] Accordingly a conviction on the competent verdict of receiving stolen property knowing it to be stolen would also not be competent.

KwaZulu-Natal on 12 and 13 September 2006 respectively. Some of the accused are from Gauteng, others from KwaZulu-Natal. No legally justifiable inferences can be drawn. Having regard to the time when the vehicles were stolen, the present was also not an instance of the stolen vehicles being found in the possession of the accused such a short time after the thefts were committed as to give rise to the inference that it was necessarily the accused who stole the vehicles, as the only legally justifiably factual inference.[53] It also cannot be inferred from those facts as the only reasonable inference that any of the accused knew of the theft of vehicles.

[25] Even a suggestion that it must be inferred from the descriptions of the robbery and attempted robbery that the accused who admit guilt or were found guilty of the robbery and attempted robbery were at the time of the robbery in possession of the vehicles referred to in counts 1 to 4, is subject to some criticism. Mr Slabbert points out that the reasoning of the trial court in regard to the BMW motor vehicle in count 2, as having been used in the Charters incident, appears mistaken.[54] Such mistake is however immaterial to the conclusion reached in this appeal and will not be considered further in any detail.

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[53] Often referred to, but incorrectly, as the 'doctrine of recent possession. It is not a doctrine but simply an inference to be drawn from established facts.

[54] In respect of the theft of the BMW sedan vehicle, i.e. count 2, Mr Slabbert pointed out that the court found: 'Given the circumstances described above the presence of the BMW at the Charters scene of crime and the damage thereto, is consistent with it having been used to smash the Hi-Ace out of control which resulted in it capsizing off the road as already described. The BMW also played a pivotal role in the evidence of one, Sithole, to be mentioned later. The photographic evidence before us depicts the BMW in question, identified by the witness Sithole, from photograph 31 in album "E" and which is also depicted in photograph 101 in album "L". The photograph "E" 31 shows the rear of the vehicle with a drawn blind over the back window. Photograph "E 29" depicts damage to the left front and side thereof.'
This Mr Slabbert points out was an incorrect interpretation of the evidence in the following respect. This vehicle was not the one seen by Sithole on the morning of 2 October 2006. Sithole saw the vehicle depicted in Exhibit "D" photo 8 found at the Penicuik scene - See Exhibit "D" Vol 67 page 6 431. The vehicle shown in Exhibit "E" was not damaged at all as described by the Court - Exhibit "E" Vol 68 pages 6 497 to 6 501. There was also no evidence that the blood on the seat was the blood of accused number 25 as the results of any analysis of this blood sample was never submitted. The vehicle depicted in Exhibit "H" photo 74 and 75 does not appear to be damaged – Exhibit "H" Vol 69 page 6622 to 6624. Mans testified about the damage but this evidence related to the vehicle in Exhibit "L" photo's 65 to 70. Photo 65 is not the vehicle depicted in photo 74. The two BMW vehicles identified by Sithole were found at the Penicuik scene – record Vol 4 page 328 line 10 to page 329 line 10. The Court was accordingly wrong in finding that "Accordingly, Sithole's identification of the BMW recovered at Charters appears to be accurate" as Sithole did not see or identify the BMW recovered at Charters.

[26] Further, even accepting in favour of the State that the four vehicles in counts 1 to 4 were used in the robbery and attempted robbery and generally that robbers would know that stolen vehicles are required for that purpose to avoid detection, the only justifiable inference to be drawn is not only that it was the accused who stole the vehicles. Possession of the vehicles could have been obtained through some fraudulent scheme and/or possibly with the intervention of middle men. Even if the accused required suitable vehicles to commit the crimes, rather than one or more steal the vehicles themselves, one or more of them might equally have purchased or through some other transaction acquired the vehicles to use in the robbery. More than one possible inference can arise. The doubt that exists is reasonable and the accused must get the benefit thereof. The convictions and sentences on counts 1 to 4 accordingly fall to be set aside and substituted with a finding that the accused are all found not guilty and are discharged on those counts.

THE CHARGES UNDER THE FIRE ARMS CONTROL ACT – COUNTS 27, 28 AND 29 RELATING TO THE RIFLES, AND COUNT 30 RELATING TO AMMUNITION, FOUND IN THE WHITE TOYOTA CONVEYING ACCUSED 2, 3, 4, 6, 9, 11. 13, 15, 17, 18, 21, 23 AND 24 AT THE TIME OF ARREST:

[27] These charges relate to the automatic rifles and ammunition found at Mvoti in the white kombi occupied by accused number 24 (the driver), 2, 3, 4, 6, 9, 10 (now deceased), 11, 13, 15, 17, 18, 21 and 23. Mr Selepe, on behalf of the Respondent, conceded that these convictions could not be sustained. That concession was correctly made for the brief reasons set out below.

[28] The trial court found:

> ‘According to the evidence the rifles were observed in the white kombi immediately after the vehicle was stopped by the police at the Umvoti tollgate. They were protruding from the top of an open bag on one of the seats in the rear of the kombi’.

And further:

> 'In the result we hold that the accused in the white kombi were in joint possession of the rifles as envisaged by the prohibition or, whoever was in actual possession of the rifles did so within the ambit of their common purpose to rob and to possess the rifles. Given the position and visibility of the bag with the rifles protruding from it on the seat of the kombi, all the accused in the vehicle will have seen the firearms. After all, there was no ordinary luggage in the vehicle'.
> (my underlining)

[29] The finding that the rifles were protruding from the top of an open bag is however not supported by the evidence. None of the witnesses claimed that the firearms were protruding from the top of an open bag. Inspector J J Dean, who was the first policeman to enter the kombi testified:

> '…en dan op die tweede sitplek agter die bestuursitplek het ek nog 'n swart sak waar geneem een van hierdie groot kleresakke. Binne in die sak was daar een LM6 geweer en twee magasyne. Daar was twee AK 47 gewere.'

Further on his evidence revealed the following:

> 'Now, when you saw the bag, did you see anything that was suspicious or that raised your eyebrows or were you just curious to see what's inside? --- Die eerste sak of tweede?
> No, no, the second one. Die tweede een. --- Ek het net gaan kyk wat is in die sak om seker te maak ...[onhoorbaar].
> Say for instance a butt of a firearm was sticking out, you would have seen it? --- Ja.
> You didn't see anything like that? --- Nee, ek het geen vuurwapens gesien `uitsteek ...[onhoorbaar]. Ek het net gekyk wat is in die sak.'

Dean was thus the first one to inspect the bag and did not claim that the fire arms were 'protruding from the bag.

Inspector Herbst, who was with Dean, testified:

> 'Inspekteur Dean het die sak oopgemaak en na verdere ondersoek gevind dat daar drie vuurwapens in die sak was.'
> (my underlining)

Mncube testified:

> 'Yes. --- The third thing that I saw was a big bag that was black in colour, the one when I threw my eyes in I then saw that it contained big firearms.
> MR SLABBERT Right, now just explain to the Court that, how your threw your eyes in.
> COMBRINCK J Before we get to that intricate question, could you say, was the – when you saw the bag first was it unzipped or zipped, or was it buttoned, or how did it work? --- It was unzipped.
> And were rifles protruding from it? --- No, there were not protruding
> because it was a big bag that could …[intervention]
> It was a long bag. --- Yes, that could …[intervention]
> MR SLABBERT You had to open the bag to see what's inside. --- It was in fact open, so for me it was to make that gap more so as to see clearly'.
> (my underlining)

[30] Doubt accordingly exists as to whether all the accused in the white kombi could have seen that the bag contained rifles. They certainly would not have had such knowledge from simply looking at the bag, as it was closed and nothing protruded therefrom.

[31] Furthermore, the aforesaid factual misdirection as to whether the firearms were protruding from the bag apart, it is doubtful that there was an evidentiary basis to conclude, as a matter of law, that the state proved beyond a reasonable doubt that the accused in the white kombi were in joint possession of the fire arms.

[32] The trial court held:

> 'When the facts outlined above are collectively considered against the requirements of the doctrine of common purpose, I have no doubt that the

possession of the rifles in *casu*, was well within the ambit of the doctrine in so far as those principles are relevant to this case'.

[33] In *S v Mbuli*[55] it was however held that possession of firearms will exist simultaneously in respect of more than one person if they have common (or joint) possession of the offending article, and that a contravention of the relevant section in those circumstances does not arise from the application of principles applicable to common purpose at all. Nugent JA held:

'Perhaps Olivier JA had in mind the principles of joint possession, rather than the doctrine of common purpose, when he said in *S v Khambule* 2001 (1) SACR 501 (SCA) at para [10] that there is no reason in principle why a common intention to possess firearms jointly could not be established by inference, but I do not agree with the further suggestion that a mere intention on the part of the group to use the weapons for the benefit of all of them will suffice for a conviction. In my respectful view, Marais J set out the correct legal position (apart from a misplaced reference to common purpose) when he said the following in *S v Nkosi* 1998 (1) SACR 284 (W) at 286h - i:

"The issues which arise in deciding whether the group (and hence the appellant) possessed the guns must be decided with reference to the answer to the question whether the State has established facts from which it can properly be inferred by a Court that:

(a) the group had the intention (animus) to exercise possession of the guns through the actual detentor and

(b) the actual detentors had the intention to hold the guns on behalf of the group.

Only if both requirements are fulfilled can there be joint possession involving the group as a whole"'.

[34] In *S v Mbuli* supra a pistol and hand grenade were found wrapped in a jersey on one of the occupants of the vehicle. Nugent JA held:

'I do not agree that the reasonable inference from the evidence is that the accused possessed the hand grenade jointly. It is equally possible that …the hand grenade was possessed by only one of the accused. Mere knowledge by the others that he

[55] 2003 (1) SACR 97 (SCA).

was in possession of a hand grenade, and even acquiescence by them in its use for fulfilling their common purpose to commit robbery, is not sufficient to make joint possessors for purposes of the Act. The evidence does not establish which of the accused was in possession of the hand grenade and on that charge, in my view, they were entitled to be acquitted'.[56]

[35] In *S v Kwanda*[57] the Supreme Court of Appeal stated:

'[4] The only question on appeal is whether the state had established that the appellant possessed the firearm jointly with Mahlenche. In this regard the state must prove that the appellant had the necessary mental intention (animus) to possess the firearm. I accept, for the purpose of this judgment, that the appellant conspired with his co-accused to rob the bank.

[5] The fact, that the appellant conspired with his co-accused to commit robbery, and even assuming that he was aware that some of his co-accused possessed firearms for the purpose of committing the robbery, does not lead to the inference that he possessed such firearms jointly with his co-accused. In *S v Nkosi* Marais J said that such an inference is only justified where 'the state has established facts from which it can properly be inferred by a court that: *(a)* the group had the intention (animus) to exercise possession of the guns through the actual detentor and *(b)* the actual detentors had the intention to hold the guns on behalf of the group'. Nugent JA, in *S v Mbuli*, referred to the above- quoted passage from *Nkosi* and commented that Marais J had 'set out the correct legal position'. In *Mbuli* the appellant and his two co-accused were charged with and convicted of being in possession of a hand grenade that had been found in their vehicle shortly after they had robbed a bank (this is the only charge of relevance to this matter). Nugent JA found that the evidence did not establish that the appellant and his co-accused had possessed the hand grenade jointly and that it was possible that the hand grenade had been possessed by only one of them. Nugent JA concluded with these words:

> "I do not agree that the only reasonable inference from the evidence is that the accused possessed the hand grenade jointly. It is equally possible that, like the pistols, the hand grenade was possessed by

[56] *S v Mbuli* supra para 72.
[57] 2013 (1) SACR 137 (SCA).

only one of the accused. Mere knowledge by the others that he was in possession of a hand grenade, and even acquiescence by them in its use for fulfilling their common purpose to commit robbery, is not sufficient to make them joint possessors for purposes of the Act. The evidence does not establish which of the accused was in possession of the hand grenade and on that charge, in my view, they were entitled to be acquitted."

[6] Adopting the reasoning in *Nkosi* and *Mbuli*, and even if the appellant was aware that Mahlenche was in possession of the firearm, such knowledge is not sufficient to establish that he had the intention to jointly possess the firearm with Mahlenche. In this matter there are no facts from which it can be inferred that the appellant had the intention to exercise possession of the firearm through Mahlenche or that the latter had the intention to hold the firearm on behalf of the appellant.'

(footnotes omitted)

[36] The legal position has now been summarized by Van Oosten J[58] in *S v Zumani and others*[59] as follows:

'The principles applicable to joint ownership have authoritatively been dealt with, laid down and explained in a trilogy of cases: the ratio in *S v Nkosi* 1998 (1) SACR 284 (W) was approved in *S v Mbuli* 2003 (1) SACR 97 (SCA) ([2002] ZASCA 78) and thereafter explained and summarised by Joffe J in *S v Motsema* 2012 (2) SACR 96 (GSJ) in para [29] as follows:

"I therefore conclude that, on the basis of *S v Nkosi* and *S v Mbuli*, the law may be stated as follows:

1. There is no rule of law to the effect that, when an armed robbery is committed by two or more persons with a common purpose to commit an armed robbery, joint possession of the weapons used in the robbery is to be inferred.
2. Joint possession of the weapons can only be inferred if the facts proved leave no room for any reasonable inference other than that:

[58] Buthelezi AJ concurring.
[59] *S v Zumani and others* 2015 (1) SACR 84 (GJ) para 4.

(a) each participant in the common purpose to rob, who had physical control of a weapon, intended not merely to use it, but also to possess it, both for himself and also on behalf of one or more other participants; and

(b) each alleged joint possessor, who did not himself have physical control of a weapon, intended that one or more of the weapons should not merely be used, but should also be possessed by another participant on his behalf."'

[37] The trial Court *in casu* commented that:[60]

'To answer the question whether all the accused, alternatively all fourteen of the accused in the white kombi, could be said to have had possession of the rifles at the relevant time, the circumstances which led to the presence of the rifles in the vehicles, needs to be considered…

The use of automatic rifles played a pivotal role in the robbery at Charters and the attempted robbery at Penicuik. In both cases the moment the Fidelity vehicles came to a rest after being capsized, the assailants appeared out of nowhere, as it were, and simultaneously gunfire erupted from the assailants, using rifles. At and around the upended vehicles in both cases the rifle fire was clearly used as a show of force *in terrorem*, presumably to convey to the crew that resistance was futile and potentially fatal. At Penicuik the rifles were only used on the overturned vehicle itself, when the crew refused to open the driver's cab and the bin. So too, in the case of the hijacking of Masango's motor vehicle and the kidnapping of his daughter (Counts 18 and 20). Aside from pointing the rifles at the Masangos to subdue them the shots fired there were not directed at Masango, but to instil fear. The same pattern manifests in the confrontation of Msweli and the robbery of his car keys (Counts 16 and 17). The rifles were pointed at him but no shots were fired.'

The Court then found that:[61]

'We are in no doubt that, if a single police motor vehicle on ordinary patrol duties had routinely stopped the kombi, the accused would unhesitatingly have used the firearms to avoid arrest. Judging from the way in which Constable Biyela *et al* were

[60] Judgment: page 10 157 – 10 158
[61] Judgment: page 10 160 lines 12 – 25.

fired upon at Charters and the deceased and his fellow security officers at Penicuik, there can be no doubt that the accused would have tried to shoot their way clear. In the latter event it is scarcely conceivable that the individual accused would carefully have selected his own automatic rifle in order to address the immediate threat and, even if he did so, he would have acted on behalf of himself and his fellow accused in the white kombi. That action would have taken place in execution of the common purpose to rob. A safe "getaway" is as much part of the robbery as the events at the scenes of crime. Besides, the money in the "smart" boxes in the Hyundai still had to be removed from the boxes and shared.'

And that:[62]

'In the result we hold that the accused in the white kombi were in joint possession of the rifles as envisaged by the prohibition or, whoever was in actual possession of the rifles did so within the ambit of their common purpose to rob and to possess the rifles. Given the position and visibility of the bag with the rifles protruding from it on the seat of the kombi, all the accused in the vehicle will have seen the firearms. After all, there was no ordinary luggage in the vehicle. They were in the vehicle with the firearms in it from the time they left the house of accused 24 at Mzingazi all the way to the tollgate where they were arrested, about 120 kilometres and a little over one hour apart.'

[38] The trial Court analysed and compared the cases mentioned above, and sought to distinguish the facts of this case from those in *Mbuli*. The learned judge said:[63]

'As I understand the reasoning of NUGENT JA in point, the qualification which he placed on the decisions in both *Khambule* and *Nkosi*, is that those courts in reality were dealing with the question of joint possession of the firearms and not possession as part of a common purpose, as the latter "is concerned with liability for joint activity" and that "a mere intention on the part of the group to use the weapons for the benefit of all of them", is insufficient to sustain a finding of common purpose.

[62] Judgment: page 10 161 lines 7 – 16.
[63] Judgment: page 10 164 – 10 165

> The facts in *Mbuli* differ fundamentally from the facts *in casu*, as in this case our findings as recorded above in regard to common purpose and joint possession, are not founded on such a narrow compass and are, accordingly distinguishable from the facts outlined in *Mbuli* and NUGENT JA's qualification of the decisions in *Khambule* and *Nkosi*. With regard to the first-mentioned case, a hand grenade, like a handgun, will not be left to roll around loose, but in all probability would be on the person of a single possessor'.

[39] In my respectful view, the facts *in casu* although different, are not distinguishable so as to render the *ratio decidendi* in *Mbuli* inapplicable. Taking due cognizance of the factual misdirection regarding the visibility of the rifles in the bag which clearly featured prominently in the court's reasoning, the reality that the rifles were not visible, and that the bag was one which a single but unidentified accused could have carried on to the vehicle, makes the position hardly distinguishable from the position of a hand grenade which could also have been withheld from view.

[40] The accused must get the benefit of the doubt in this regard. Accordingly, the convictions and sentences in respect of these counts cannot stand and must be set aside.

WHETHER ACCUSED 1, 6, 7, 14, 20, 22, 24 and 25 SHOULD BE CONVICTED ON COUNT 6 RELATING TO THE ATTEMPTED ROBBERY AT PENICUIK:

[41] These accused have admitted their liability in respect of the robbery at Charters but not in respect of the attempted robbery at Penicuik. In respect of the attempted robbery at Penicuik the trial court found:

> 'As to the identity and criminal liability of the perpetrators none of the accused was proved beyond reasonable doubt to have been present at the primary scene at Penicuik'.

[42] The issue then specifically is whether these accused, represented by Mr Slabbert and who had admitted liability in respect of the robbery and the secondary offences at Charters (limited to only counts 10 and 11) and whose cell phone

records place them at or near Charters (which means they could not simultaneously have been at Penicuik) can be guilty of the attempted robbery at Penicuik when they could not have been present physically.

[43] The only possible basis upon which criminal liability can be imputed to them would be common purpose, or possibly some conspiracy or incitement. The prosecution has not relied on any conspiracy or incitement. Accordingly, the court *a quo* correctly remarked:

> 'In the absence of evidence that any of the accused directly took part in or was present at the scene of the attempted robbery, the prosecution relies solely on the principles of common purpose to prove that the accused were party to the common design to rob the Dyna on 2 October 2006'.

After considering all the evidence the trial court concluded:

> '…we hold that the accused shared a common purpose to rob the Dyna at Penicuik'.

[44] Mr Fraser objects to this conclusion of the trial court seemingly on the basis, if I understand him correctly, that the finding that there was a prior agreement to commit the robberies at both scenes, was no basis to find that there had been a common purpose. This conclusion he argued (more strongly in his heads of argument, but with less force during his address), failed to maintain a clear distinction between two categories of joint criminal enterprise; in his view a shared purpose being nothing other than a prior agreement, but not constituting a common purpose. This submission was foreshadowed in a bit more detail in his heads of argument where he submitted that the State and the court *a quo* confused the application of the common purpose doctrine with a conspiracy to commit the crimes of which the accused were convicted. When pressed during argument he did not however persist with this submission, and in my view clearly correctly so. The court *a quo* was clearly correct in dealing with the matter on the basis of common purpose. That is what the State alleged in the indictment and it is also the

basis upon which the accused presented their defence. The accused were not taken by surprise and were not prejudiced in any way.

[45] The confusion to which Mr Fraser alludes arises, I would respectfully venture to suggest, from a failure to clearly distinguish the different forms that common purpose may take. These include notably:

(a) Common purpose where there is a prior agreement amongst co-accused to commit a crime, in which instance all the participants will incur criminal liability, even if they are not present at the scene of the crime. It was held in *S v Thebus*[64] that where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number which falls within their common design. Liability arises from their 'common purpose' to commit the crime.[65] Where co-accused are charged with having committed a 'consequence crime', it is not necessary for the prosecution to prove beyond reasonable doubt that each participant committed conduct which contributed causally to the ultimate unlawful consequence.[66] It is sufficient that it is established that they all agreed to commit a particular crime or actively associated themselves with the commission of the crime by one of their number, with the requisite fault element (*mens rea*). If this is established, then the conduct of the participant who actually causes the consequence is imputed or attributed to the other participants and it is not necessary to establish precisely which party to the common purpose caused the consequence, provided it is established one of the group brought about this result.

(b) Common purpose, where there is no prior agreement amongst co-accused but they spontaneously join in or participate in the commission of a crime. This is the situation that was dealt with in *S v*

[64] 2003 (6) SACR 505 (CC).
[65] *S v Thebus and another* supra para 18.
[66] *S v Thebus and another* supra paras 18, 22, 34 – 37, including fn 60.

Mgedezi[67] here the Appellate Division held that in the absence of proof of any prior agreement; liability can only arise if certain pre-requisites are satisfied, namely:

(i) The accused must have been present at the scene where the crime was committed;

(ii) The accused must have been aware of the crime;

(iii) The accused must have intended to make common cause with those who were actually perpetrating the crime;

(iv) The accused must have manifested his sharing of the common purpose with the perpetrators of the crime by himself performing some act of association with the conduct of the others;

(v) The accused must have had the requisite *mens rea*.

[46] The Appellate Division in *S v Mgedezi*[68] drew this distinction between common purpose liability where there is a prior agreement, expressed or implied, to commit a crime (a mandate situation) and instances where there is no such prior agreement. In the last-mentioned situation, the additional requirements outlined above have to be satisfied before the principle of imputation, which is the characteristic of common purpose liability, can arise. The Constitutional Court in *S v Thebus*[69] upheld the constitutional validity of the common-purpose rule as set out in *S v Mgedezi*. Both the Appellate Division and the Constitutional Court confirmed that the liability of a participant in a common purpose to commit a consequence crime is not dependent upon the proof of a causal connection between the act of every participant in the common purpose and the eventual unlawful consequence. This means that before embarking on an examination of causal questions in consequence crimes one must first determine the extent of the causal enquiry by assessing whether participation in a common purpose is involved or not. If participation in a common purpose is involved, then a factual and legal causal link between the conduct and unlawful consequence need only be established in

[67] *S v Mgedezi and others* 1989 (1) SA 687 (A) at 705 – 706B.
[68] *S v Mgedezi* supra.
[69] *S v Thebus and another* supra n64 per Moseneke J.

regard to at least one of the participants, whoever he or she may be. His or her causal contribution is then attributed to the others in terms of the common purpose doctrine.

[47] Patently the requirements of *Mgedezi* cannot apply where it is physically impossible for the accused to be present at both Charters and Penicuik at the same time. To establish a link between the offences at Charters and Penicuik and the various accused, the State accordingly relied on the accused jointly having formed a common purpose[70] to commit the crimes, 'in the furtherance of the execution of a common purpose' embarked upon by the assailants. In argument, Mr Selepe submitted that the present is a combination of the two types of common purpose; it being primarily a mandate (prior agreement) situation although there are also aspects of active collective participation, where the inference of active involvement and participation in some of the crimes by some of the accused is irresistible. I am not persuaded that the latter necessarily applies. In any event, in the absence of any evidential basis as to the actual presence and degree of participation by any one of the accused in the different crimes, it seems to me that there is no basis to find a common purpose on the basis of participation. The state is in my view confined, at best, to establishing the guilt of the accused on the basis of a prior agreement to commit the robberies. This then raises issues as to the existence, nature and ambit of such prior agreement.

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[70] Paragraphs 2 and 3 of the Preamble to the indictment. Paragraph 3 records that 'The guilt of that/those accused in respect of crime(s) where he/they was/were not present on the crime scene or did not physically participate in the crime(s), is imputed to that/those accused by virtue of the doctrine of common purpose. This is on the basis that all the accused, whether expressly or by inference, formed and embarked upon the aforesaid design, and that all the crimes were perpetrated and or acts which were committed during the commission of the aforesaid crimes, indeed fell within the scope of the common design and within the mandate of the individual accused and other assailants.'
The doctrine of common purpose is of course something entirely separate and distinct from conspiracy. Paragraph 3 of the indictment, although expressly referring to common purpose, perhaps inaccurately in the language normally associated with conspiracy, sought to impute liability to the accused not present at the scenes of the crimes or not having physically participated in the crimes, on the basis that all the accused had embarked on this 'design' and that 'the commission of the aforesaid crimes', indeed fell within the scope of the 'common design and within the mandate of the individual accused and other assailants'. Although this might also suggest reliance on conspiracy. Although the indictment might inaccurately refer to this as the 'basis' for imputing liability based on 'common purpose', the indictment did in my view sufficiently appraise the accused that the State would rely on the doctrine of common purpose with the detail being simply the manifestation of that common purpose.

[48] The existence of such a prior agreement, and its ambit, purview and parameters, are all matters for inference from the surrounding circumstances. The trial court quite correctly pointed out that:

> 'Whether or not the accused acted pursuant to or in execution of a common purpose to rob the Fidelity vehicles**,** and**,** in order to do that successfully**,** to also commit the secondary offences**,** is a question of fact and may be inferred from their associative conduct before**,** during and after the commission of the offences and must be determined on the evidence as a whole'.[71]

It held that:

> 'In the result, there can be no doubt whatsoever that all the accused and the accomplices**,** save accused 12**,** acted collaboratively and concertedly towards the attainment of a single purpose common to all of them to rob the two Fidelity vehicles**.**
>
> We accordingly hold that the principles of the doctrine of common purpose apply**.** In the result**,** the actions of any participant in the execution of the cash**-**in**-**transit robberies and the secondary offences to be referred to here below**,** are imputed to all the participants in the common purpose**."**[72]

[49] As regards a prior agreement and hence common purpose in respect of the robbery at Charters and the attempted robbery at Penicuik, the trial court cautioned that:

> 'To sustain that contention the State is required to prove beyond reasonable doubt that both the robbery and the attempted robbery were common objectives of the perpetrators of the respective offences'.

The two offences, the robbery and attempted robbery, having occurred contemporaneously, some 31 km apart it followed as a matter of logic, as was held, that:

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[71] See the Judgment of the court *a quo*: page 10 127 lines 19 – 24.
[72] Judgment: page 10136 lines 4 – 12.

'Accordingly the perpetrators of the robbery of the Hi-Ace could not have taken part directly in the attempted robbery of the Dyna and vice versa. From that it would follow that the two offences were either unrelated or committed by members of the same gang of perpetrators, who had divided their forces to achieve the same goal, ie the robbery of the Hi-Ace and the Dyna'.

Any notion, as suggested by the defence, that these were two totally unrelated robberies can safely be rejected. All the indications are that the offences were committed by members of the same gang of perpetrators. The learned trial judge correctly found:

'We disagree with that. In our view, *prima facie* at this point, the offences at Charters and Penicuik and the perpetrators thereof are inextricably bound and the offences occurred during the execution of a common purpose between the accused that are before the Court and certain other accomplices who are not.'[73]

[50] The following reasons were justifiably and correctly advanced by the trial Court in support of that finding:[74]

1. The areas where the Fidelity vehicles were rammed and overturned were clearly chosen with care**.** At both scenes, the road was straight and flat.[75]

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[73] Judgment: page 10 012 lines 15 – 19

[74] Judgment: page 10 012 line 22 – page 10 025 line 7

[75] These factual statements have been criticized by the defence as factually incorrect with reference to the photographs that were taken of the scenes. Mr Slabbert was critical of these twenty seven reasons, submitting that:

(a) These reasons can be applicable to any other robbery at any other place in South Africa.
(b) The second finding is based on an incorrect interpretation of the evidence, The court found that
'In each case the terrain on the sides of the road was wide and level with the road surface and free of possible impediments such as culverts, drainage ditches……'.
(c) The photos exhibit "L" photo 47 did not support this finding and a drain is depicted where the Dyna capsized. The road is also not 'level with the road'.
(d) The majority of the findings were based on speculation. Objects and vehicles that were at the one scene were not at the other scene.
(e) Despite the 27 reasons the court made the same incorrect application of the doctrine of common purpose as in the *Dewnath* case. [See Dewnath v S [2014] ZASCA 57]
(f) The Court did not consider the differences in the two scenes such as:
(i) There was no evidence as to what make of vehicle was used to collide with the Hi-Ace at Charters Creek. The State and the investigating officer were both speculating what kind of vehicle was used;
(ii) The different languages spoken by the perpetrators at the scene;

2. In each case, the terrain on the sides of the road was wide and level with the road surface and free of possible impediments, such as culverts, drainage ditches, rocks or the like, which would make access to the cash in transit vehicle and the extraction of the loot difficult.

3. The relevant stretches of road had plantations on either side or places such as bridges and side-roads, where the vehicles which conveyed the robbers and their firearms, equipment, and tools to break into the capsized vehicle could be kept out of sight. At Penicuik it was the plantation road where the stolen vehicles were abandoned and the deceased killed. It is common cause that the distance between the plantation road and the point where the Dyna was capsized is approximately 700 metres. In testimony Sithole estimated this distance at 500 metres. At Charters, it was a bridge marked "L" from which the plantation leads to where the BMW, which was used to ram the Hi-Ace was abandoned. In addition, blood samples were obtained which matched the blood of accused 25 on DNA analysis.

4. The evidence was that the vehicles, which were abandoned in the plantation at Penicuik, drove directly to it at speed. The perpetrators knew exactly where the road was, given that it was deep dusk, overcast, and raining intermittently at the time.

5. The areas in which the "stopper groups" and their vehicles to be used in controlling the traffic on both sides of the scene of the crime had to be determined. At Charters, Constable Biyela was hemmed in and shot at by members of such a group. At Penicuik, Msweli (in the Opel Corsa) was stopped on the northern side of the crime scene by a "stopper group" using the white Nissan 1 Tonner, subsequently abandoned on the plantation road where it was identified by Sithole as one of the vehicles which he had followed to accused 24's house that

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(iii) The one BMW found at Charters was not one of the vehicles which was seen by Sithole on the morning of 2 October 2006.

Such factual inaccuracies as there may be do not however detract from the persuasiveness of the collective impact of the remaining reasons advanced by the trial court for the conclusions that were reached.

morning. The "Telkom" LDV and the "police" kombi appear to have fulfilled that role on the southern side of the Penicuik crime scene. These two bogus vehicles used the plantation road to keep out of sight. The selection of the two crime scenes in question demonstrates that the robbers were aware of the practice employed by the two Fidelity vehicles upon their return from their collecting rounds in the northern part of Zululand. Thus they were aware that the Hi-Ace and Dyna travelled in tandem all the way to Petroport and that the Hi-Ace would turn into Petroport whilst the Dyna continued driving on towards Richards Bay. The distance of the two scenes from each other is obviously determined by the distance the Dyna would have travelled from the time that the Hi-Ace turned off into the Petroport filling station. Accordingly the perpetrators would have endeavoured to calculate the area in which the Dyna was likely to be, given its probable speed and the time it took to Penicuik. As it happened later, the attacks on the Hi-Ace and the Dyna took place more or less contemporaneously at Charters and Penicuik respectively.

6. The assailants were well informed of the return routes of the targeted Fidelity vehicles and the expected contents, given that both vehicles were returning from their cash collection rounds. Clearly the gang as a whole were possessed of accurate and detailed "inside information" in regard to the inner workings at Fidelity and in regard to the large amounts of money carried in their transit vehicles. This was on a Monday following a month-end weekend. These vehicles were specifically targeted as they were both using the same route at the time.

7. The robberies had to take place at more or less the same time. Both vehicles were carrying substantial amounts of cash and, for reasons mentioned, driving apart. The selected ambush sites were along the N2. If, for example, the Charters robbery were to have taken place say, one hour earlier than Penicuik or *vice versa*, the N2 would have been teeming with police vehicles as happened in reality shortly after

the robberies were reported. The risk of any substantial time interval between the robberies was obviously too high and required contemporaneity.

8. Both the Fidelity vehicles were incapacitated and immobilised in a similar way. A stolen motor vehicle, a 7-series BMW, was used to smash into the travelling Fidelity motor vehicle in such a way that its driver lost control of the vehicle, causing it to leave the road and upend. Thereafter the incapacitated vehicle would be broken into and robbed.

9. Once the Fidelity vehicle was incapacitated, the road on both sides would be closed off by other members of the gang of robbers. The traffic to arrive on the scene first would find a motor vehicle stopped in their way, accompanied by heavily armed men, as in the case of the witness, Msweli. The first arrivals would be forced into submission and the later arrivals would encounter motor vehicles which had come to a stop ahead of them, causing the belief, as some of the evidence revealed, that they had happened on an accident scene further ahead. For the greater part, the motor vehicles used by the robbers to convey them to the scene of crime and to immobilise the Fidelity vehicles were abandoned at or in the vicinity of the scenes of crime. On both crime scenes, stolen vehicles were used, which in the nature of things could not be traced back to the perpetrators. In both instances, the scene of the crime was located in an area with plantations on both sides of the road. The motor vehicles were abandoned on gravel roads inside the plantations, except for the Mercedes Benz which was abandoned at the spot where it was used to park in the police vehicle at Charters and where accused 25 was shot. The other vehicle which was not hidden was the 7-series BMW used to ram the Dyna at Penicuik. This vehicle from the photographic material indicates severe damage to the left front section thereof, caused by the force of the impact required to upend the heavy armoured Dyna vehicle. This vehicle, which was abandoned on the grass verge off the tar road at the Penicuik scene,

was clearly immobilised by the force of the impact. This vehicle was depicted as point "C" on photo album "D", photograph 8, and bore the registration number NJ […]7. Earlier that day, it was seen by Sithole on the R34 bearing the number plate KRY […]1 GP. That number plate was seen by Sithole on the back seat of this vehicle after it had been abandoned.

10. According to the evidence the scenes of crime were approximately 30 kilometres apart, and required approximately 15 minutes travelling time between them. When the respective primary scenes of crime are superimposed on the official Topo Cadastral Chart from the Surveyor General, it becomes immediately apparent that a myriad of back-roads exist, leading on to and away from the N2 at those points, which could be used to reach Mtubatuba, Empangeni and the Richards Bay areas. In fact, the Penicuik scene of crime is approximately 13 kilometres from a short-cut along a well-maintained back road through the plantation to Mzingazi where accused 24 lived, 18 kilometres away.

11. The use of tools specifically required for the task at hand, namely the petrol-driven angle grinder or power tool with special blades for cutting steel and hardened steel, suggested that the perpetrators no doubt knew beforehand that one of the targeted victims was an armoured vehicle. The other tools used were an axe and a heavy hammer, ideal for penetrating the roof of the Hi-Ace at Charters. The Isuzu LDV abandoned at the Penicuik scene had an axe and a hammer in the bin thereof.

12. Similar types of firearms were used at both crime scenes namely fully automatic assault rifles. The plan was clearly to nullify any opposition by sheer fire power. A heavy calibre rifle was also used to penetrate the armour of the Dyna vehicle at Penicuik. Although not established by ballistic linking, this was probably the .416 Weatherby rifle later found in the abandoned cache of firearms at the bus shelter at Nseleni. Some of the rifles found in that cache were, by unchallenged ballistic evidence, found to have been used in the Charters robbery.

13. On both scenes false number plates were used. This is proved by the Mercedes at Charters and the BMW at Penicuik, if one compares the registration plates recorded by Sithole *en route* on the R34 from Eshowe to accused 24's house. During the police search of accused 24's house a number of loose registration plates were also found.
14. No fingerprint was identified amongst all the vehicles involved in this case, numbering some fourteen. One has to couple this fact with the extraordinary number of gloves found in the arrested motor vehicles and on the accused persons – this during early summer in the warm climate of Zululand.
15. "Stopper groups" were employed as an essential and integral part of the operations to allow the actual robbers undisturbed access to the cash vehicles after they had been capsized, and to prevent any persons or vehicles to access the scenes of the upturned vehicles. The stopper groups were heavily armed and well organised. They were prepared to shoot to kill where necessary, as was apparent from the attacks on the police vehicle at Charters. Where no resistance was offered they simply, under the threat of firearms, took keys (as in the case of Msweli), or in the case of Masango and his daughter, a motor vehicle.
16. In order to erase suspicion, the perpetrators used what appeared to be Telkom and police vehicles, with other paraphernalia, such as reflective jackets, emblems, etc.
17. There can be no doubt that a larger group than those that were arrested was involved. Simple arithmetic shows that an amount of approximately R1 million was stolen at Charters and only R661 000.00 recovered from the possession of the accused.
18. The Penicuik and Charters scenes are bound as one unlawful enterprise. This is confirmed by the fact that two of the vehicles observed and identified by Sithole and followed by him to accused 24's house were abandoned at Charters, that is the Mercedes Benz with the worn tyre and the one BMW with accused 25's blood on it.

This BMW was identified by Sithole in photograph B31. It is also depicted on photograph L 101. This particular BMW was depicted in the photograph with its back window-blind drawn, a fact observed by Sithole when following the convoy through Empangeni that morning. He mentioned that the blind had been drawn by a back-seat passenger when the vehicle had stopped at a red robot with him behind it. The other two vehicles, also identified and followed by Sithole, the Nissan 1 tonner and the other BMW with the white cloth petrol cover, were abandoned at Penicuik. This BMW did not have a drawn rear blind according to the photographic evidence. These above facts inextricably bind the two crimes as one, as well as demonstrating that the robbery and attempted robbery were committed by one gang, operating from accused 24's house.

19. The probabilities overwhelmingly favour the inference that the four suspect vehicles encountered by Sithole on the R34, were driven to accused 24's house by the Johannesburg group of accused. The cell phone communications between the accused, slot in perfectly with Sithole's evidence as to how he followed the four vehicles from Jabulani (the Horseshoe Sugar Estate tower) right up to accused 24's house. Collectively the facts above point to the inference that the four vehicles were ferried down from Johannesburg by those accused to be employed in the intended robberies at both Charters and Penicuik.

20. It must also be borne in mind that the Johannesburg group, the Durban group, and certain accomplices, "fused" as it were at 24's house before the scouting excursion. The second excursion placed those involved at the Charters scene of crime. Thereafter they again gathered at accused 24's house where the spoils were shared.

21. The meticulous way in which the robberies were planned and executed leads one to the inevitable conclusion that the participants must have gathered at one place to finally muster their forces and finally assign various roles before departure on the unlawful mission. This points unerringly to accused 24's house as the meeting place. His house was

ideally suited for that purpose, being in a back street in a rural area, but easily accessible to the crime scenes and escape routes.

22. The conclusion that one gang was involved in both crimes, is further supported by the number of vehicles available to the perpetrators to return home. The following vehicles appear to have been involved and were available: The bogus white police kombi and the Telkom LDV; the vehicle used to convey accused 25 to hospital; the vehicle that turned around and sped away from the scene of arrest; Spiwet's vehicle (his cell phone records show that from Richards Bay he travelled to Durban – Hammarsdale – Pietermaritzburg, and from there on to Gauteng); Mzet's vehicle (which travelled from Richards Bay to the Hluhluwe area (according to his cell phone records); Msimango's vehicle (which according to his cell phone records travelled via Melmoth to Gauteng); accused 26 (who on 3 October 2006 travelled to Gauteng from accused 24's house).
23. Compare the aforegoing with the number of people arrested in the four vehicles stopped at the Umvoti Plaza. Sight should also not be lost of the impact on the transport arrangements of the perpetrators, by the six vehicles that were dumped at the two scenes of crime.
24. The fact that the robberies were clearly well planned and executed with military type precision, leads one to the inference that planning must have occurred prior to 2 October 2006**.** The roles of the participants could not have been allotted spontaneously if one has regard to the *modus operandi.*
25. Certain of the perpetrators clearly escaped**,** taking routes other than the N2 south. Some of the other escapees could well have been in the vehicle, which turned around at the Mvoti Plaza and sped away from the scene of arrest**.**
26. To suggest that the two scenes were purely coincidental as to time and method by two separate groups or gangs**,** each unaware of the other**,** would unbearably stretch reason and logic**.**
27. Finally, if the robbery and attempted robbery were indeed committed

> by two separate gangs operating independently, then the conduct of the accused, who were involved in the robbery at Charters, appears totally at odds with that notion. The cell phone records of the accused involved at Charters reveal that all of them, on their return to accused 24's house, passed the Penicuik scene of crime, at a stage when the attempted robbery had just been aborted and, in respect of some of them, after the police had already arrived. They could not have failed to see the upended Fidelity Dyna with its distinctive green colour, which was lying in the open. Anyone would have realised that the Dyna which had passed them at Charters, had been robbed at Penicuik by a gang independent and unbeknown to them. Given the accused's continual cell phonic communication between them, as apparent from their cell phone records in point, one would have expected a frantic exchange of calls between the accused who had come across the Penicuik scene of crime. Instead, any such expected flurry of calls is notably absent. What the cell phone records do show is that the accused appear to have lingered at that scene before travelling on to accused 24's house at Mzingazi.

[51] I concur with and support the material aspects of that reasoning.

[52] Some of the reasons might individually rightly be open to criticism, as counsel have done. I have referred to some, but not all, of those criticisms in footnotes to the trial court's reasoning so as to not detract from the flow of this judgment. Some of the reasons given may be incidental to many robberies and hence not unique to this case. However overall, the reasons listed leave no reasonable doubt that the two robberies were part of the prior agreement of the members of one gang who had embarked on a military styled operation to rob the two Fidelity vehicles. Certainly, I am not persuaded that the trial court erred in coming to the conclusion that the accused were all part of the prior agreement to rob the Fidelity vehicles at Charters and Penicuik. Particularly convincing to me, are the following:

(a) That there was a single gang of robbers involved in both robberies appears from Sithole having seen some of the vehicles, notably the Mercedes Benz C series and BMW and Nissan LDV travelling together in what clearly was a convoy with a single determined destination, early on the morning of 2 October 2006, and he followed them to where they all turned in at the home of accused 24 at Mzingazi;

(b) Significantly, that is the address where a police search after the robberies discovered various bags and the like, which were removed from the Fidelity vehicles during the robbery;

(c) It is also the same address from where Govender and Mncube followed the white kombi later that evening, which kombi was eventually stopped at Mvoti with large sums of money in it, for which some of the accused do not give any account at all, as they did not testify.

(d) Significantly, Govender and Mncube also observed the red kombi, blue Hyundai and the dark BMW at accused 24's home and they all are encountered again at Mvoti, travelling in the direction of Durban later that evening, with large sums of money found inside. All of this is not simply a coincidence. The only irresistible inference, is that the accused were all party to a prior agreement to rob the two Fidelity vehicles, by ramming them off the road, and shooting at or threatening the occupants to achieve that purpose and to overcome resistance.

The above all points to an interwoven web of association in the robberies which point to the guilt of the accused, unless they could advance an explanation which could be said to be reasonably possibly true. They failed to do so and accordingly their guilt in respect of both robberies was established.

[53] Accused 1, 6, 7, 14, 20, 22, 24 and 25[76] have accepted guilt on counts 9, 10 and 11. It follows from what I have said above, that the attempted robbery at Penicuik was also part of these self-confessed robbers' prior agreement to rob the Fidelity vehicles. They were accordingly correctly convicted also on count 6. The concession by accused 2, 9, 15, 16, 18, 21 and 23[77] who conceded guilt in respect of both counts 9 (Charters) and 6 (Penicuik), was correctly made.

The trial court was correct in concluding that:

> '…the accused … shared with the actual perpetrators the common purpose to rob both the Hi-Ace and the Dyna'.

THE POSITION OF VARIOUS REMAINING ACCUSED IN REGARD TO COUNTS 6 AND 9:

[54] I next consider the legal position of accused 8, 13 and 26 (the remainder of the accused represented by Mr Slabbert), accused 3, 17 and 19 (the remainder of the accused represented by Mr Fraser) and accused 4, 5 and 11 (represented by Mr Seedat) in respect of counts 6 and 9.

[55] In *S v Le Roux*[78] the Supreme Court of Appeal, albeit in the context of common purpose arising from active participation as *S v Mgedezi and others*,[79] cautioned that a general and all-embracing approach regarding multiple accused charged is not permissible. The position of each accused must be considered individually, with a view to determining whether there is a sufficient basis for holding him liable on the ground of common purpose. A view of the totality of the case cannot legitimately be used as a brush with which to tar each accused individually, nor as a means of rejecting a defence version *en masse*. In *S v Thebus*[80] the Constitutional Court confirmed this approach. The position of each

[76] Represented by Mr Slabbert.
[77] Represented by Mr Fraser.
[78] 2010 (2) SACR 11 (SCA).
[79] 1989 (1) SA 687(A).
[80] 2003 (6) SA 505 (CC).

accused must be considered separately and the onus always remains on the state. That caution is similarly apposite in this appeal.

[56] In what follows I do not intend repeating all the considerations that persuaded the trial court to convict the accused in respect of those counts where convictions were in my view proper. Needless to say my comments below must be read with those reasons. I shall only refer to some of the considerations which to me pointed irrefutably to the guilt of the accused, or where the convictions are set aside, my reasons for arriving at that conclusion.

ACCUSED 8:

[57] In respect of accused 8 the trial court correctly found that *inter alia*:

(a) He was in the company of accused 5, 20 and Xha from the time that he arrived in Richards Bay and on the evidence of accused 20**,** he was in the latter**'**s company in Durban for some time before their departure from there**;**

(b) He made a number of calls from the Richards Bay central business district at the same time and places as accused 5, 20 and Xha. His cell phone went silent at 15h18 on 2 October 2006 and was never activated thereafter**.** The court found that he could have been at either of the scenes of crime;

(c) Mncube and Govender did not see who were in the blue BMW when it left the house of accused 24, but the evidence established that accused 8 was arrested in the company of accused 1 and 20 in the dark BMW at Mvoti**.** Accused 8 was driving the dark BMW. When he was arrested R21 000 in cash was found on his person**,** whilst his passengers accused 1 had R56 000 on his person and accused 20 had R35 890.[81]

[81] The apparent disproportionate shares are probably due to the fact that accused 1 was a leader or co-ordinator of the Durban accused and accused 20 took part in the successful robbery at Charters**,** whilst accused 8 probably was not at Charters and therefore did not receive an equivalent sum. It is however unnecessary to speculate.

(d) Although his phone appears to have been turned off, or the battery was run down, from 15h18 onwards**,** the accomplice Spiwet tried to contact accused 8 from Kwambonambi. These attempts extended to the time that Spiwet and others involved at Charters would have reached the Penicuik area on their way back from Charters**.** The cell phone records reveal a marked sparseness of communication between the accused after the Charters robbery and their return from that area**,** except for accused 9, 24 and accused 26.

[58] Captain van Tonder testified that two days before these incidents accused 8 had phoned him and alerted him to the possibility of such a robbery. Accused 8 was to get back to him. He never did and two days later he was arrested at Mvoti. In response to a question by Smith from Fidelity to accused 8 whether he and the other accused were the ones who had robbed Fidelity, accused 8 replied in the affirmative and said there were others still coming towards Mvoti, which indeed there were[82] as the subsequent arrests evidence. Accused 5's bank cards and flight tickets[83] were discovered in the dark BMW driven by accused 8. This BMW which he was driving is owned by the wife of accused 20 who was a passenger in the vehicle with him. Accused 8 and 20 had travelled to near Durban earlier that day to fetch accused 5 from the airport. Accused 8 was clearly an integral part of this group of accused.

[59] Notwithstanding all the aforesaid and the inferences arising therefrom, which clearly called for an explanation from accused 8, he elected not to testify. It was not sufficient for him, as was argued, to try and advance a version through accused 20.[84] He is required to advance his version himself for it to be tested in

[82] I take due cognizance of Mr Slabbert's argument that this was possibly inadmissible as it was in the nature of a confession which although not made to a policeman, was made in the presence of a policeman. But even if it is ignored, the other considerations outlined in this paragraph remain. Persuasive.

[83] Accused 5 was travelling in the red kombi.

[84] Mr Slabbert argued that accused 20 provided an explanantion for accused 8's possession of the money and why accused 8 was driving the car of the wife of accused 20, the latter apparently being too tired. But this was for accused 8 to explain so that his evidence could be tested on these aspects.

cross examination and to have any probative value which would rebut the irresistible inferences arising from the above evidence.

[60] An accused person is of course not obliged to testify. However in that regard, the Constitutional Court in *S v Boesak*[85] held that:

> 'The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence.'

[61] In *S v Thebus and another* supra the Constitutional Court confirmed that the right to remain silent has different applications at different stages on the criminal prosecution. On arrest a person cannot be compelled to make a confession or admission that may be used against him or her. At trial there is no obligation to testify. The fact that he is not obliged to testify does not mean that no consequences arise as a result. In *S v Mavinini*[86] the Supreme Court of Appeal remarked that the accused's choice to remain silent in the face of the evidence clearly implicating him in criminal conduct suggests that he had no answer to it.

[62] The defence argued that although the BMW was seen leaving the residence of accused 24 there was no evidence as to who were in the vehicle and who was the driver of the vehicle and that in the absence of such evidence the Court erred in arriving at the conclusion that accused 1, 8 and 20 were in the BMW when it left the house of accused number 24. Accused 8 was however subsequently arrested with accused 1 and 20 in the dark BMW sedan at the Umvoti toll plaza. In the absence of any evidence from him, his presence in the BMW with persons who were clearly at Charters remains unexplained and there is

[85] 2001(1) SA 912 (CC) para 24 at 923E-F.
[86] 2009 (1) SACR 523 (SCA).

no explanation to the inference that he would have started the journey in the BMW with those he was indeed arrested with when the journey for them ended at Mvoti.

[63] I am satisfied for the reasons advanced by the court *a quo* and those briefly alluded to above that accused 8 was correctly convicted of counts 6 and 9.

ACCUSED 13:

[64] Mr Slabbert submits that accused 13 did not have a fair trial in that:

(a) The State used the statements of accused numbers 13 and 26 which were ruled admissible by the court on 16 February 2009[87] and also what was stated by other co-accused in their statements[88] during cross-examination to discredit their evidence; more specifically that what was stated in the warning statement was used against these and other accused.

(b) No cell phone records proved beyond a reasonable doubt to be those of accused 13 were submitted during the State case. The State had presented the evidence of Supt Van Rensburg who stated the following in relation to accused 13;

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[87] The court held in regard to the statement of accused 13:
'To determine the factual issues would require that I pronounced upon credibility at this stage, which is ill-advised. Certain of the issues placed before us during the inner trial required that the evidence be evaluated and that this Court should pronounce on whether it believes the State witnesses as opposed to the accused, as well as the effect on admissibility of the factual issues in respect of the inferences to be drawn from the silence of those accused who decided not to testify in the inner trial.
In the circumstances I am constrained to deal at the end of this case during the final judgment with the reasons for allowing certain statements and disallowing certain statements, as I shall announce anon. Certain legal issues which require determination resulted from the issues highlighted in the inner trial. Those too I shall address, for the sake of convenience, fully during the final judgment in these proceedings. However, with regard to the statements I have decided to disallow I shall very briefly furnish some of the reasons that moved us.
In the result I allow to become part of the body of the evidence before this Court the statements marked KK13, in other words the one applicable to accused 13, KK17, KK18, KK19, KK22 and KK23. The numerical reference in the exhibit is a reference to the number of the accused, whilst the letters refer to the number of the exhibit in question. Expressed differently, the statements made by accused 13, 17, 18, 19, 22 and 23 are admitted in evidence.'

[88] In respect of accused number 13 see record page 4 284 and more specifically page 4 295. Extra curial admissions are not admissible against a co-accused – see *S v Litako* 2014 (2) SACR 431 (SCA) para 67 at 451g and *Mhlongo v S; Nkosi v S* [2015] ZACC 19.

'MR SELEPE Oh, cellphone records for the accused. --- Before Court. Yes. Some of the accused provided you with their cellphone numbers? --- They provided us with cellphone numbers when we obtained their warning statements to get their personal particulars, where they stay, how old they are, ID number, address, contact numbers, and that's how we obtained some of the cellphone numbers.
Did you verify those numbers as correct numbers furnished to you? --- I verified the numbers, and some of the accused before Court gave wrong cellphone numbers at that time.
Is it wrong or false numbers? --- Some are totally wrong numbers, some are false that does not even exist.'

Very importantly further on Van Rensburg said:
'Accused No 13, Johannes Langa, did not supply us with a cellphone number and he was not in possession of a cellphone.'

There was accordingly no reason for the trial court to reject the evidence of accused 13 when he stated that he was not in possession of a cell phone and his explanation that his statement in his bail application that he had a cell phone was wrong, accordingly cannot be said not to be reasonably possibly true.

(c) At the close of the State's case the only evidence against accused number 13 was that he was a passenger in the white kombi and he had R1 250.00 in cash on him. That amount of money is not sufficiently disproportionately high as to arouse suspicion. He had no cell phone with him and no cell phone records were submitted[89] in respect of accused number 13. The high water mark for the State was that close to R80 000.00 in cash lay on the floor of the taxi in which he was arrested.

[89] During the State's case.

(d) It was submitted by Mr Slabbert that this evidence was insufficient and that accused 13 should have been discharged, *mero motu* by the trial court if necessary, at the end of the State case.

(e) If there is insufficient evidence on which a court acting carefully could convict accused 13 at the end of the state case, then he should have been discharged pursuant to section 174 of the Criminal Procedure Act, if necessary *meru motu*. In *S v Lubaxa*[90] at page 707 Nugent AJA held:

> 'I have no doubt that an accused person … is entitled to be discharged at the close of the case for the prosecution if there is no possibility of a conviction other than if he enters the witness box and incriminates himself. The failure to discharge an accused in those circumstances … is in my view a breach of the rights that are guaranteed by the Constitution and will ordinarily vitiate a conviction based exclusively upon his self-incriminatory evidence.'

See also *S v Nkosi and another*.[91]

(f) Mr Slabbert accordingly submitted that the failure to discharge accused 13 resulted in him not receiving a fair trial. He argued that accused 13 was prejudiced as the only reason why he was placed on his defence was to supplement the State's case and to be cross examined by the State.

(g) There is some force in that submission. However, there was some R80 000.00 lying on the floor of the vehicle in which he was arrested. Whether that is sufficient per se for a court acting carefully to convict, is a difficult question. I incline to the view that accused 13 was not entitled to a discharge at the end of the State case. R80 000.00 is a substantial sum, in respect of which he was required to provide an

[90] 2001 (1) SACR 703 SCA.
[91] 2011 (2) SACR 482 (SCA).

explanation failing which a court could draw an inference that he was part of the robbery earlier that afternoon where a substantial sum of cash was stolen. If his case had thereafter been closed without leading any evidence, in which case it is trite the enquiry becomes one whether a court 'should convict', that evidence *per se* would, in my view, be insufficient to sustain a conviction. At the conclusion of the trial the trial court was of a different view and clearly influenced by the presence of the R80 000.00 in cash on the floor of the vehicle held that:

'Upon his arrest with the other accused at Umvoti Plaza he had only R1 250 on his person but at his feet lay R80 000 in cash. As addressed earlier there can be very little doubt that he had shed his share of the loot into the pool of money at his feet. His claim to the contrary apparent from his testimony will be evaluated at the appropriate stage'.

That inference by the trial court was not in my view justified based solely on the presence of the R80 000.00, and more particularly in the light of accused 13's evidence. That aspect will however be dealt with again below.

(h) The focus then shifts[92] to whether accused 13's explanation as to how he came to be present in the white kombi, could be reasonably possibly true. He testified that he was there as a passenger who had been picked up. Ultimately, the trial court would have to be satisfied that on the evidence overall including his evidence, his version could not be reasonably possibly true and that the inference sought to be drawn from the presence of the R80 000.00 is the only reasonable inference to be drawn beyond a reasonable doubt.

[92] There is of course not two tests involved. There is only one test in a criminal case and that is whether the evidence establishes the guilt of the accused beyond a reasonable doubt. This test has two perspectives. Ultimately the issue remains, as was stated in S v Sithole and Others 1999 (1) SACR 585 (W) at 590g-i, quoted with approval in S v Musiker 2013 (1) SA 517 (SCA) at 523 b-e, that 'In order to convict, there must be no reasonable doubt that the evidence implicating the accused is true, which can only be so if there is at the same time no reasonable possibility that the evidence exculpating him is not true.'

(i) It was only during the cross examination of accused 13 by the State that accused 13 was confronted with certain cell phone numbers alleged to have been used by him. As with all the other accused, the cell phone records pertaining to these cell phone numbers eventually featured prominently in the judgment to discredit accused 13. This cell phone evidence was described as 'new evidence', introduced by the State only during the cross-examination of accused number 13, and likened by Mr Slabbert to a trial 'by ambush'.

(j) This evidence emerged as follows during the cross examination of accused 13 by the prosecutor:

'MR SELEPE Mr Langa, the number **0766352808,** I am in possession of these cell phone records. M'Lord, for the record, we did not present evidence of this number. It was only made available to me yesterday afternoon, as well as the cell phone records for the number **082[…]4**. I have records for these numbers, the cell phone records.

COMBRINK J Yes, now as I understand you, you said these records became available to you yesterday for the first time?

MR SELEPE Yesterday afternoon.'

The cross examination then continued in the following vein:

In the phonebook of accused 19, that is Vusi Njoko, there is a number saved by the name of Kehla which is your name or similar to your name, but let me read the number. It's **076[..]8**. --- I hear that.

Is this not your number? --- No, it's not mine.

I see. Accused 7 ...[intervention].

……..

Accused 7 had the same number stored in his phonebook, but now the name is, under which it was stored, Seveni4.

……..

MR SELEPE Accused 23, Hamilton Mazibuko, has got the same number stored in his phonebook, but under the name Kehlis [spelt]. --- I hear that.

I see. Accused 9, Mpho Tsotetsi, he had the same number saved under the name KG.

……..

Accused 11, Mr Louis, he had the same number stored in his phonebook under the name Kehla, but this is how he spelt Kehla. Kelha [spelt].

Let's look, the number 082[…]4, do you know this number? --- I do not remember that number.

Is it possible that you could have used this number when you opened an account? --- I do not know whose number is this.'

(k) Thereafter the following exchange occurred regarding the status of the cell phone records relating to the cell number with which accused 13 was confronted but had denied knowledge of:

'COMBRINK J But it can't be before the Court properly until such time at it is placed before the Court by way of evidence.

MR SELEPE As the Court pleases.

COMBRINK J That would entail that at some appropriate stage you'll have to make application to lead in rebuttal.'

(l) The State never presented any evidence that the cell phone records were those of accused 13. Mr Slabbert submitted that a 'very strange procedure' was followed and that it appears that the trial Court without notifying any party, arranged for two witnesses to appear at Kokstad C Max Prison where the evidence of these witnesses was received. There is further no indication whether the cell phone records were properly obtained in terms of section 205 of the Criminal Procedure Act.

(m) On 8 September 2011 after all the evidence had been concluded, the following appears in the record, seemingly unexplained:

'COMBRINK J I have been informed by the Registrar that the two witnesses who were intended to be called today is not present and arrangements are being made to get their attendance as soon as is

physically possible. Subpoenas have been issued and served and the returns are at hand, I am told. Will you confirm that, Mr Selepe?'

and subsequently:[93]

'COMBRINK J Thank you. Just for the record, I considered in the interests of justice that the testimony of this witness be received. The reason is that certain exhibits reflecting cell phone communications have been used on the basis that it was subject to proof or admission. No common ground could be found between counsel for the State and counsel for the defence with regard to the admission of this evidence. As a consequence, I decided that it's in the interests of justice that I caused the witness to be called. Will you rise please?'

The two witnesses were thereafter called, after the defence cases had been closed, by the court to give evidence of the cell phone communications on that particular cell phone number, but still without proof that the numbers were in fact that of accused 13.

(n) In rejecting the version of accused 13, the trial court remarked:

'Another improbability inherent in his testimony concerns his claim that he was picked up as an ordinary passenger by accused 24. As mentioned earlier, that claim was so grossly improbable as to be noted as an outright lie. Earlier we held that accused 13 was indeed "Kehla", whose cellphone record was placed before the Court. That record places accused 13 squarely amongst the accused who travelled from Johannesburg to Durban, as fully treated of earlier in the judgment'.

This conclusion by the learned trial judge raises two components which require to be scrutinized more closely, namely whether accused 13's explanation as to how he became a passenger could be reasonably possibly true, and whether the cell phone records placed before the court indeed were his. I deal first with the latter.

[93] At page 6353.

(o) Mr Slabbert submits that the trial court still erred in drawing an inference that because the nick name of accused number 13 is Kehla, therefore the number must be his number. The State failed to prove that the cell numbers were those of accused number 13 and closed the State's case nearly four years after the arrest of accused 13 without any proof of such number. The evidence presented by the State during the State's case was that accused number 13 was not in possession of a cell phone. Mr Slabbert pointed out that there was, for example, no evidence that any of the other accused in the white Kombi was not known by the nick name 'Kehla', or that the phone books might not refer to another person altogether, this especially where the number was not stored in all the phone books under the name 'Kehla'.

(p) The version of accused 13 was that he had boarded the kombi as an ordinary passenger and that he was not part of the group that left from accused 24's house.

(q) Mr Selepe has criticized this version on the basis that the evidence of accused 13 that he was picked by the white Kombi which Mncube and Govender had initially followed from the house of accused no 24, was not put to Mncube and Govender for comment. He also said that accused 13 could not explain why he did not instruct his legal representative to put this to Mncube and Govender.

(r) That argument is however premised on accused 13 having been picked up as a passenger after Mncube and Govender started following the white kombi (leaving aside also the difficulty that they did not keep the white kombi in sight throughout from the time it left the home of accused 24 until it was stopped at Mvoti but left to drop off Mncube at the garage where he met up with the 'flying squad').

Accused 13's version was not that he had been picked up by accused 24 after the white kombi left the house of accused 24, but that he had boarded the kombi earlier at the BP garage when the kombi was driving from the rank to the home of accused 24. Mr Selepe and the court *a quo* seem to have relied on a portion of the evidence of accused 24 who testified:

'As I was leaving, intending to take the road leading to the direction of Durban, one of the passengers asked me to go via the garage in order to pick up his friend who was there …'

That evidence was however equivocal, did not identify the 'friend', and did not exclude the possibility that accused 13 was indeed picked up by accused number 24 whilst he was driving the taxi from the rank to his house. The criticism of accused 13's version therefore seems misplaced.

(s) That left only the evidence that accused 13 had R1 250 on his person at the time of his arrest and that on the floor of the white kombi lay some R80 000.00 in cash. Mr Selepe argued that it is highly improbable that accused no 13 knew nothing about the money which was discarded by the occupants of the white Kombi when stopped by the police. However, if it is accepted, as indeed it must, that accused 13 must get the benefit that his version as to how he became a passenger might be reasonably possibly true, then accused 13 could reasonably possibly also not have known of the presence of R80 000.00 in the kombi, until it was 'shed' when the white kombi was stopped by the police at Mvoti..

(t) The trial court concluded;

'There is no evidence placing accused 13 at any of the crime scenes. However, given the frequency of his calls before and after the ten hour period of silence, presents as unusual.'

There was however no proof that the record of calls related to his phone. The trial court had simply inferred that it was the number used by accused 13 on the following basis:

'(a) The question is who is "Kehla"? On a conspectus of the relevant evidence, we are satisfied that it was accused 13. Our reasons are:

(b) Accused 13's common name is Kehla. It is the name by which he is known by his family and friends.

(c) Whilst accused 13 admitted in his evidence during these proceedings that he was known as Kehla, he emphatically denied that he had a cellphone with him at the time of arrest at the Umvoti Plaza tollgate. This denial flies in the face of directly contradictory evidence in the affidavit submitted by accused 13 during his application to be admitted to bail pending the outcome of this trial. There he said that he was in possession of a cellphone at the time of arrest, but that it had been taken by the police.[94]

(d) He was arrested in the company of accused 9, 11 and 23 in whose phonebooks his[95] number was recorded. He was arrested in the white kombi with highly incriminating evidential material in it – e.g. some R80 000.00 in cash on the floor of the vehicle, literally at his feet where he was seated in the rear, together with the automatic rifles protruding from a bag on one of the rear seats of the vehicle.

(e) The reliable evidence in point emanating from Captain Mncube is that the white kombi left from accused 24's house at Mzingazi with a full complement on board. They followed the white kombi, which proceeded, without stopping, from accused 24's house directly to the John Ross Highway and from there on to the N2 south, from where the vehicle continued up to the point of arrest at the tollgate.[96]

(f) Accused 13 was not a fare-paying passenger in the kombi as he claimed. It defies all imagination that a vehicle, in which on the face of it, the divided proceeds of a robbery was being conveyed would

[94] The police however denied, consistent with the version of accused 13) that he was in possession of a cell phone at the time of his arrest.
[95] There was no proof whatsoever that it was his number.
[96] Not that it is all that material, the correct position is that the evidence was not that Mncube kept the white kombi within sight all the way from accused 24's home to Mvoti.

pick up an outsider as a fare-paying passenger. The fact that the police have no record of a cell phone found in possession of accused 13 is not dispositive of the question whether he had one on him at the time of his arrest. Given the extreme circumstances in which the arrests and processing of the exhibits took place, as described supra, accused 13, could have jettisoned the cellphone unnoticed or it could have been missed or mislaid by the police.

(g) Finally, the puzzle is completed by accused 13's mendacity, when questioned about the cellphone and his affidavit evidence aforementioned and as to how he happened to be in the white kombi at the time.'

[65] As pointed out above some of these findings were based on an incorrect interpretation of parts of the evidence:

(a) The police did not find a cell phone in the possession of accused number 13 at the time of his arrest. It is not just simply a case that they have no record of a cell phone; the State case positively was that no cell phone was found on him. This supports the correctness of accused 13's evidence that the statement in the bail application that he had a phone is incorrect.

(b) The Court erred in interpreting the evidence of the money at his feet, which was not that unequivocal. Its findings regarding the fire arms was clearly contrary to the evidence and seems to possibly have influenced the inferences drawn also regarding any 'collective' possession of the money found in the vehicle.

(c) The accused never claimed that he was a "*fare paying passenger*". He was not questioned on this aspect and he did not say what the Court found.

[66] Mr Slabbert also pointed to a number of further incorrect findings in the Judgment regarding accused number 13, namely:

(a) It was found that he was a rear seat passenger in the white kombi. There were however various others who the court found were also

rear seat passengers. They could not all be rear seat passengers. There was no witness who placed accused number 13 on the rear seat. Accused number 13 indeed testified that he was sitting in the second row from the back and that evidence was not challenged.

(b) The witness Dean testified that the money was '*op die vloer voor in die voertuig'* and at the rear. Not a single witness testified specifically that there was '…money at his feet'.

(c) The Court found that:

'there is no evidence placing accused 13 at any of the crime scenes. However, given the frequency of his calls before and after the ten hour period of silence, presents as unusual.'

(d) There was however no evidence that this cell number was that of accused 13.

(e) The Court found that:

'We have already held, for reasons to be elaborated upon later, that he was in fact "Kehla", whose cellphone records were placed before the Court under that name. His number was stored in the phonebooks of accused 7 (in the red kombi) and accused 9, 11 and 23 (in the white kombi)'.

[67] Apart from there being no direct proof that accused 13 was indeed the 'Kehla" referred to in the phone books of some of his co-accused, the court did not appear to have considered that there was no communication between accused 7, 9, 11 and 23 and accused 13 at all at any stage.

[68] Although the court rejected the evidence of accused 13, and one might have suspicions, possibly even strong suspicions whether as a matter of probability his version might be the more probable, the test is of course not one of probability but proof beyond reasonable doubt. It seems to me that it cannot safely be concluded that the version of accused 13 as to how he came to be present in the white kombi cannot be reasonably possibly true. It seems that the trial court was heavily influenced by its conclusion that the Kehla referred to in the phonebooks of some of the other accused, was a reference to accused 13 who it concluded was the

Kehla. The word Kehla is however commonly used in the isiZulu language to denote an old or older person[97], especially an older male person, and is often descriptive rather than unique. According to the indictment accused 13 was 34 years old and thus hardly a 'kehla'.

[69] Accused 13 should have been found 'Not Guilty' on the evidence tendered. However, even if I was wrong in that regard, there seems to be force in the argument by Mr Slabbert that the trial court erred in concluding that it was in the interest of justice that the court call the two cell phone witnesses after all the evidence had been led. The effect of the court calling these two witnesses was to fill a *lacuna* which had arisen in the State's case and which the State failed to address after its attention had been drawn thereto by the learned judge. By calling these witnesses the court filled that *lacuna*. The evidence could only have the purpose of strengthening the state case, and if it properly proved the records as belonging to accused 13, could indeed have had that effect. It might then even be said that accused 13 did not have a fair trial.[98] On either basis his appeal must succeed and he is found not guilty and is discharged on all the counts.

ACCUSED 26:

[70] Similar submissions as in respect of accused 13 have been advanced by Mr Slabbert in respect of accused 26. I do not intend repeating equally applicable principles found to apply in respect of accused 13, but will mainly deal with the aspects where the case of accused 26 departs from that of accused 13. The most significant distinguishing aspect relating to accused 26 is that he was not arrested at Mvoti with the majority of the accused, but only subsequently on 14 October 2006. There was no evidence against him other than cellular communications

[97] The trial judge himself remarked at page 6361 line 20, that 'Kehla is a common name. It means an old respected person'.

[98] In the light of the conclusions reached earlier it is not necessary to consider this aspect further. Suffice it to conclude, as in *S v Musiker* 2013 (1) SACR 517 (SCA) at 527d-e para 26, that 'Had it not been for my conclusion that the appellant's alibi was wrongly rejected these various factors, taken together, may well have justified a finding that the appellant had not had a fair trial. In the light of that decision, however, it is unnecessary to reach a conclusion in regard to this latter issue.'

made to and from his alleged cell phone number. The cell phone records did however establish that his cell phone number was used during the afternoon reconnaissance trip preceding the robbery, and later at times which might have been crucial to the robbery and attempted robbery. Specifically the cell phone records revealed a communication with the cell phone of accused 1 on 1 October 2006, another for 179 seconds at 5h39 on 2 October 2006, 46 instances of communication with one Msimango (an accomplice) from 1 September 2006 to 3 October 2006, 126 communications with one Mzet (another accomplice), during the period from 1 to 30 September 2006, 200 communications with accused 1, 29 communications with accused 7, 34 communications with accused 14, 1 communication with accused 20, 2 communications with accused 19, 18 communications with the accomplice Fana, 3 communications with the accomplice Spiwet, 1 communication with the accomplice Xha, 106 communications with the accomplice Mzet, and 28 communications with the accomplice Msimango. On 1 October 2006 there were 24 communications between the cell phone of accused 26 and that of accused 1, two with that of accused 7, two with that of accused 22, one with that of accused 14, four with that of accused 20, two with that of Spiwet, one with Xha, three with Mzet and three with Msimango. On 2 October 2006 accused 26's cell phone records reflect calls through the Meerensee tower to accused 19, accused 14 and Mzet and later back at Mzingazi through the Richards Bay Lighthouse tower from 11h11 with accused 14 and 19. Later through the Meerensee the phone reveals two communications each with accused 14, 19 and 24. This trend continued into the evening when calls were signposted through towers all the way to Penicuik and Charters and back again to Mzingazi by 20h08.[99] Inspector Ntombela also testified as to the circumstances in which accused 26 was arrested. Accused 26 knew accused 1, 7, 8, 14, 19, 20 and 24.

[71] The investigating officer testified regarding accused 26 and the use of the cell number registered to him as follows during cross examination:

[99] These calls were fully analysed in the judgment of the court *a quo inter alia* when dealing with what was termed the so-called 'second excursion' and will in the interests of brevity not be repeated herein.

'Now you didn't ask him what is your cellphone number of the cellphone you used on the 2 October 2006? --- No, I didn't ask him that.

So if I ask you now, you referred to the cellphone of accused 26, will you agree with me if I say you've got no evidence that he used that cellphone which the number he used to obtain the number, that he used that cellphone on the 2 October 2006? --- No, I can't say that he used that phone or we used it.

[Indistinct] --- If I did then I was part of the robbery.

COMBRINK J The suggestion he might have given it to somebody else or somebody else used it and then subsequently he got the phone, is that the suggestion?

MR SLABBERT That's it. --- If I knew he was using that phone then I would have been part of the robbery.

You didn't know at that stage because you didn't have the cellphone records? --- No."

[72] Mr Slabbert argues that at the end of the State case there was no evidence that it was indeed accused 26 who had used his cell phone causing the communications reflected on the cell phone records and hence *prima facie* linking accused 26 to any of the offences, that he therefore should have been discharged at the end of the State case, and that the trial court erred in not discharging accused 26. I am not persuaded that this is so. *Prima facie* accused 26 had a case to meet and if nothing else, had to testify that he was not responsible for the communications reflected on the records relating to his cell number during the material time, particularly on 2 October 2006.

[73] Although the trial court rejected the evidence of accused 1, accused 1 testified when asked about nine calls he made to the cell phone of accused 26 on 1 October 2006 that he spoke to both accused 26 and one Bheki.[100] That evidence might suggest confirmation of part of accused 26's version. However, accused 1 further testified, based on the cell phone records, that he had spoken to accused 26 for no less than 179 seconds at 5h39 on 2 October 2006, which evidence was not challenged by accused 26's counsel in cross examination. This is of

[100] Bheki had been with accused 26 on the day of his arrest.

considerable significance. This evidence would be inconsistent with accused 26's version that he had handed his telephone to Bheki between 22h30 and 23h00 on 1 October 2006 and that the phone was only returned to him by Bheki between 12h00 and 12h30 when he was leaving for Johannesburg. This was direct unchallenged evidence from a co-accused, a competent witness, that he spoke to accused 26 on the material day when he said he did not have the use of his cell phone.

[74] Accused 26's defence as summarized correctly by the court *a quo* was as follows:

> 'At about 18h00 on 1 October 2006 he attended a braai at Hillview, Empangeni. During the course of the braai he went to Esikhawini to fetch his girlfriend, Zanele Makhanya. At the braai he was, amongst others, in the company of Bheki, his driver. He left before the braai ended as his girlfriend wanted to go home. When he left the braai, he also left his cellphone with Bheki, who had to make certain arrangements with accused 1 regarding a gearbox. Thus he left his phone with Bheki between 22h30 and 23h00 on 1 October 2006. The cellphone was only returned to him by Bheki on 3 October 2006 between 12h00 and 12h30, as he was leaving for Johannesburg and needed the phone. He testified that he was, accordingly, not in a position to account for the calls that were made or received by his cellphone between 1 October 2006 from about 22h00 to 23h00 to noon on 3 October 2006.'

[75] Accused 26 also testified as to how and the circumstances in which he was arrested by Ntombela. It differed in certain material respects from the evidence of Ntombela and he was unable to explain why Ntombela was not challenged with those parts of his evidence which differed materially from that of Ntombela. When he was cross examined on his reasons for handing his cell phone to Bheki, his answers became vague and in the view of the trial court, spurious. Having initially denied knowing Mzet, he was eventually constrained in the light of the cell phone records reflecting 106 communications with Mzet during the period from 1 to 30 September 2006, to concede that he knew Mzet. Accused 26 did not call any witnesses in his defence. He could hardly have been expected to call Bheki, even if

he could be persuaded to attend because if consistent with his version, Bheki would be complicit in the robbery and would be entitled to refuse any questions that may incriminate him. If Bheki's evidence was inconsistent with his evidence then calling Bheki would be self-defeating, a result he would not be required to produce in the light of the right he enjoys as an accused person in terms of the Constitution.[101]

[76] The trial court rejected his version, describing his claim that Bheki had the use of his cell phone at the material times as 'cynical and fatuous'. It concluded that he personally had used his cell phone at times crucial to the robbery and attempted robbery. Although it is so, as Mr Slabbert stressed, that the trial court gave no specific reasons why it came to the conclusion that it was indeed accused number 26 who used the cell phone, it is implicit in its rejection of accused 26's version. The mere fact that it rejected the version of accused 1 does not mean that accused 1's evidence insofar as it purported to confirm accused 26's version that he had his phone on 1 October 2006 and contradicted his version that he had passed it to Bheki who had it on 2 October 2006, is irrelevant or insignificant especially where accused 26 did not challenge this contradictory evidence when given by accused 1, at which time no ruling had been made rejecting accused 1's evidence. The trial court made a credibility finding, having had the opportunity of observing the witnesses, especially also accused 26, which a court of appeal should not interfere with lightly,[102] not that it means it can never be interfered with, and ever mindful of the fact that demeanour might not be an altogether reliable indicator of reliability.

[77] Mr Slabbert has however argued strenuously that events occurred following the cross examination of accused 26 which conclusively point to him not having received a constitutionally fair trial, and which *a fortiori* would taint the aforesaid

[101] Particularly section 35(3)(h) and (j) of the Constitution, which include the right:
'(h) to be presumed innocent, to remain silent, and not to testify during the proceedings'
(j) not to be compelled to give self-incriminating evidence'
[102] *R v Dhlumayo* 1948 (2) SA 677 (A).

credibility finding. During the cross examination of accused number 26 the following exchanges occurred:

> MR SELEPE Are you going to call her[103] to testify about the recovery of these exhibits? --- I do not see any need to call her, but may the Court decide. It's your decision.
>
> COMBRINK J And just understand something, the Court does not call defence witnesses neither does the Court call State witnesses. Whoever is the party who decides will be you in this case together with your counsel. --- I do understand.

Later Mr Selepe responds as follows:

> 'I have consulted with her again and the decision is that, M'Lord, I'm not going to call her. I have conveyed my decision to my learned friend Mr Botha and what transpired during the consultation. According to him, accused 26 is not calling Ms Zama. M'Lord, in that regard I'll like to bring an application to this Court in terms of section 186 of the Criminal Procedure Act.[104]
>
> COMBRINK J As you indicated in chambers, when counsel came to see me about this, intend applying that I exercise my discretion.
>
> MR SELEPE Yes.
>
> COMBRINK J To call this witness.
>
> MR SELEPE That's correct, M'Lord.
>
> COMBRINK J Well, these witnesses.
>
> MR SELEPE Yes.
>
> COMBRINK J I have to be satisfied that it is in the interests of justice that I do so.

[78] The trial court subsequently called accused 26's girlfriends Zama Magwaza and Zanele Makhanya as witnesses. Their evidence was led by one state counsel and Mr Selepe, the prosecutor was also allowed to cross examine them.

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[103] That is accused 26's girlfriend, Ms Zama.

[104] Having earlier indicated that the State did not intend calling Ms Zama but then applying that the court calls her as a witness is curious. It seems the only explanation is that the State did not want to call her and then not be allowed to cross examine her, whilst that option would be open if the court was persuaded to call the witness.

[79] The power of a criminal court to call witnesses *mero motu* is found in section 186 of the Criminal Procedure Act 1977,[105] which provides:

> 'The court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the court shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such witness appears to the court essential to the just decision of the case.'

[80] In *S v Gabaatlholwe and another*,[106] the Court considered the import of the phrase 'essential to the just decision of the case' and concluded that it means that:

> 'the court, upon an assessment of the evidence before it, considers that unless it hears a particular witness it is bound to conclude that justice will not be done in the end result. That does not mean that a conviction or acquittal (as the case may be) will not follow but rather that such conviction or acquittal as will follow will have been arrived at without reliance on available evidence that would probably (not possibly) affect the result and there is no explanation before the court which justifies the failure to call that witness. If the statement of the proposed witness is not unequivocal or is non-specific in relation to relevant issues it is difficult to justify the witness as essential rather than of potential value.' (my underlining)

[81] Mr Slabbert argues that the trial court decided to call these witnesses on what is a mere collateral issue solely to destroy the credibility of accused 26, and hence that accused 26 did not have a fair trial. In rebuttal Mr Selepe has argued that a court does not have the benefit enjoyed by the prosecution and defence of being in possession of the statements of witnesses and to consult with witnesses before calling them, and therefore the trial court would not know what the witnesses will testify, especially whether they will destroy the credibility of accused 26, or not.

[82] Where the defence of accused 26 was content to rest with only his evidence without calling the evidence of his girlfriends and Bheki, and the State disavowed any intention to call the witnesses, a court should be very slow to exercise its

[105] Act No 51 of 1977.
[106] 2003(1) SACR 313 (SCA) para 6.

discretion to call further witnesses. The evidence of the two witnesses that were called shows that they indeed endeavoured to support the alibi of accused no 26. However their attempts failed because the trial court found, whether correctly or not, that their evidence was unreliable based on the cell phone records of accused 26, which were the very records the State sought to rely upon, but which accused 26 had testified were in respect of communications made on his cell phone during the time he did not possess his cell phone.

[83] In my respectful view the trial court erred in calling these witnesses. The effect thereof was to afford the State an opportunity to place evidence which it had disavowed to advance as material and relevant before the court by evidence extracted during cross examination. That was a material misdirection. Indeed, the placing of this evidence before the court *a quo* has the effect, or at least creates the perception, that it was the evidence which emanated from these witnesses called by the court, which secured a sufficient evidential basis for a conviction. That would certainly create the perception that accused 26 had not had a constitutionally fair trial, a right he would be entitled to in terms of section 35(3) of the Constitution, which provides:

> 'Every accused person has a right to a fair trial, which includes the right -….'

[84] In my view, the fact that there was such a misdirection should not automatically result in success in the appeal and a dismissal of all the charges against accused 26. Plainly, the evidence of these witnesses, and the conclusions drawn therefrom by the trial court fall to be disregarded and to be re-evaluated by this court afresh. The question then becomes one as to whether on the evidence that remains, the conviction could be sustained. It is improbable in the extreme that co-accused (including some who have admitted liability on the counts under consideration) and acknowledged accomplices, would have had such extensive interaction by cellular communications with accused 26 during the run up to 2 October 2006, but then seemlessly communication being maintained with these self-same persons without apparent interruption, but now by and with Bheki, to whom accused 26 handed his phone for very doubtful reasons and not accused

26. This is also all the more so where accused 26 did not give a full disclosure of what all his conversations with the various co-accused to the build up to 2 October 2006 had entailed. Leaving aside the evidence of the witnesses called by the court and any inferences to be drawn from their evidence, the version of accused 26 cannot be reasonably possibly true. The only justifiable inference consistent with all the facts on a conspectus of all the evidence is that accused 26 was part of the group which planned and perpetrated these crimes. His version to the contrary falls to be rejected as false. Accordingly, accused 26 was rightly convicted of the crimes presently under consideration but for reasons different to that which were advanced by the court *a quo*.

ACCUSED 3:

[85] The material evidence against accused 3, apart from the intricate web of cell phone communications and interaction with a number of the other accused, inter alia included that:

(a) He was a rear seat passenger of the white kombi when arrested at Mvoti in which R80 000.00 was found on the floor.

(b) He had R23 550.00 in cash and a cell phone in his possession.

(c) He and accused 19 and accused 17 had reciprocally stored each other's cell phone numbers on their phones and he also had the number of accused 6 stored on his cell phone.

(d) Like many of the accused whose cell phone records established that they had travelled together to the Richards Bay area, he is from the Johannesburg area.

[86] These few facts clearly called for an answer in the form of a reasonable explanation for his presence in the white kombi under those circumstances. Accused 3 however elected not to testify. In the absence of any explanation the only inference the trial court could draw where accused 3 was found in the kombi with a substantial amount of cash on the floor and, as with many of his co-accused, large amounts of money and in some instances incriminating evidence in their

possession, so shortly after the robbery was committed, was the one it did. If accused 3 had an innocent explanation or even remotely an explanation that might be reasonably possibly true, then he should have advanced it. Accused 3 was correctly convicted of both counts 6 and 9.

ACCUSED 17:

[87] The case against accused 17 includes:

(a) Like accused 3 he was a rear seat passenger in the white kombi at the time of arrest at Mvoti.

(b) At the time of his arrest he was in possession of R22 230.00, two cell phones and one pair of gloves. .

(c) He, accused 3 and accused 16 had reciprocally stored each other's cell phone numbers in their respective phones. His phone number was also saved on the cell phones of accused 9 and 22.

(i) Accused 17's palm print was found on the smart box found in the boot of the Hyundai, which was driven by accused no 14. That is a damning piece of real evidence which he was required to explain.

(ii) Like many of the accused whose cell phone records established that they had travelled together to the Richards Bay area, he is from the Johannesburg area.

[88] The above notwithstanding, accused 17 elected not to testify. In those circumstances the inferences drawn by the trial court as the only justifiable inferences, cannot be faulted.

ACCUSED 19:

[89] Accused 19 resides in Gauteng. As with the other accused there is no direct evidence that he was a party to the prior agreement. However at the time of his arrest at Mvoti, he was the left front passenger of the Hyundai sedan driven by

accused 14. In the cubbyhole of the vehicle immediately in front of him was an ABSA Arboretum bag containing R28 430.00 in notes. On his person was an FNB deposit slip which accompanied the money handed to Fidelity by the Spar Grocer at Ingwavuma and which had been in the Fidelity Hi-Ace when it was robbed at Charters. In the Hyundai were *inter alia* three unopened Fidelity smart boxes with money which had been robbed from the Hi-Ace at Charters on one of which was the fingerprint of accused 17, R2 500.00 in cash on the floor, a .38 Rossi revolver belonging to Fidelity and which had been taken during the robbery at Charters, and two pairs of gloves.

[90] Accused 19, accused 1 and 8 had reciprocally stored each other's numbers on their respective cell phones and accused 19 had also saved the numbers of accused 13, 14, 15, 25 and 26 on his cell phone.

[91] Accused 19 admitted knowing accused 14 but he must also have known accused 1, 3, 8 and 18 who had his cell number/name stored on their cell phones, and accused 7, 13, 15, 25 and 26 whose numbers appeared in his phone book. Govender furthermore testified that he had seen accused 19 at the gate to accused 24's residence when he and Mncube drove past, before all the vehicles departed from that address on the evening of 2 October 2006.

[92] Clearly the aforesaid evidence called for a reply. Accused 19 did testify. His version was that he had arranged with accused 14 to take him from Newcastle where he had been visiting friends and relatives to the Durban station so he could board a bus to Johannesburg. One Mduduzi Zulu who accompanied accused 14 and accused 14 then said they were first going to Mtubatuba and accused 19 agreed to go along to visit his friend Mabiza who resides at Meerensee. One Khuzwayo and Mabiza took accused 19 along to look at a motorcycle which Mabiza wished to purchase at KwaMsane. He had arranged with accused 14 and Zulu to meet them at 20h00 at the Madunga tavern at Mzingazi. Mabiza took him to Madunga where he met accused 14 drinking at the tavern. Zulu arrived very late

that night in the blue Hyundai, handed the keys to accused 14 and they were travelling to Durban, when they were arrested at Mvoti.

[93] The trial court evaluated this version very carefully.[107] Accused 19's version was rejected. I am not persuaded that the trial court erred in doing so. Accused 19 was found to be evasive and was unable to explain satisfactorily why he did not advance this version immediately when arrested and confronted with the money in the cubby hole in front of him. He could have called a number of witnesses to support his aforesaid version, but this did not happen. In the absence of a satisfactory explanation for that failure, an adverse inference must be drawn. He was also unable to account adequately or at all for his possession of the deposit slip found on his person.

[94] Accused 19's version was contradicted by the objective cell phone evidence. His claim that he was travelling from New Castle to Richards Bay is false as his cell phone records place him in the midst of the convoy of vehicles with his co-accused who travelled from Gauteng. Similarly his denial that he was anywhere near Mzingazi at the relevant times is belied by his cell phone records which reflect nineteen calls made through the Richards Bay Lighthouse tower at Mzingazi. Aspects of his evidence also conflicted with the contents of his warning statement. Although he said that he had made calls while allegedly in Pongola, his cell phone records did not reflect any such calls.

[95] I am not persuaded that the trial court had erred in convicting accused 19 of counts 6 and 9.

ACCUSED 4:

[96] Accused 4 *inter alia*:

[107] At pages 10 090 ff of the Judgment.

(a) Was a rear seat passenger in the white kombi in which R80 000.00 was found on the floor, when he was arrested at Mvoti.

(b) Was found with two cell phones and R2 770.00 in cash in his possession.

(c) Like many of the other accused shown to have travelled together, accused 4 is also from the greater Johannesburg area.

[97] Accused 4 elected not to testify. Mr Seedat argued that he was justified in not testifying as his cell phone records for 2 October 2006 did not place him near the scenes, he could not be linked by cell phone records to having been at Mngazi, and that he was found with only R2 770.00 in his possession. On that basis he submitted that it was reasonably possibly true that he had nothing to do with the robbery.

[98] Accused 4's presence in the white kombi under the circumstances detailed above, regardless of the lack of other incriminating evidence referred to by Mr Seedat, clearly called for an answer from him failing which an adverse inference fell to be drawn. Where he has failed to do so, the inference is that he has no exculpatory explanation to being found with all the other accused in the same kombi with a large amount of money discarded on the floor, so shortly after the robbery at Charters was perpetrated a few hours earlier that evening.

[99] Accused 4 was correctly convicted by the trial court.

ACCUSED 5:

[100] Accused 5 was at the time of his arrest travelling in the red kombi with accused 7, 12, 16 and 22. He had R23 100.00 in his possession which he maintained he had brought with him from Johannesburg where he resides, to purchase stock for his clothing business. He had travelled by air from Johannesburg to Durban on 2 October 2006, he said for this purpose. Dissatisfied with stock and/or prices at the Durban station he was allegedly referred to Asmalls

in Stanger and then travelled to visit his girlfriend in Richards Bay. Later that evening he looked for transport to Johannesburg and he stood under a bridge on the N2 and subsequently boarded the red kombi. Upon entering he found accused 12 driving and with accused 7 as passenger. This version Mr Seedat argued, could be reasonably possibly true and that accused 5 should get the benefit of any doubt.

[101] Accused 5 admitted that he knew accused 1, accused 22 and accused 25. More importantly however, the cell phone records relating to his cell phone demonstrated that it did not allow sufficient time for his version that he first visited the Durban station before proceeding to Richards Bay. Not only does that place a question mark over his reasons for his trip to Richards Bay, but he was also unable to explain why his cell phone records reflected two calls made through the Richards Bay Lighthouse tower, one to accused 19, if he never went to Mzingasi. His version was also contradicted by accused 16 and 22 who were also in the red kombi when arrested, who seemingly wanting to support his version, in fact contradicted it by stating that he was picked up at Stanger on their way to Mvoti. He was also unable to explain why his denial that R30 000.00 was found lying in the red kombi was never put to the police when they testified about the discovery of this money.

[102] The trial court for inter alia the aforesaid reasons,[108] with which I agree, rejected the version of accused 5. I am not persuaded that it erred in doing so. In my view accused 5 was convicted correctly of counts 6 and 9.

ACCUSED 11:

[103] Accused 11 was a rear seat passenger in the white kombi when arrested at Mvoti. He had R34 450.00, a cell phone and one pair of woolen gloves on his person. He, accused 8 and 9 and 25 had reciprocally stored each other's cell phone numbers in their cell phones. He admitted that he knew accused 2, 9, 18, 21 and 23 and had accused 7 and 13's cell numbers stored on his phone. Like many

[108] See the court's detailed reasons at pages 10 063 to 10 066.

of the other accused who it was established had travelled together in convoy to Mzingazi, he is from the greater Johannesburg area.

[104] The evidence of accused 11 was that he and his brother Mario had left Johannesburg in a minibus traveling to Pongola to collect R35 000 from his brother in law who operates three of his (accused 11's) taxis in Maputo. After collecting the money, they returned to and had arrived at Richards Bay at about 16h00. Later his brother was to travel in the minibus to Maputo with passengers and he proceeded to the taxi rank at Richards Bay in order to find a taxi to take him to Durban and that was how he came to be a passenger in the white kombi at the time of his arrest with R34 354.00 in his possession. Mr Seedat maintained that this version was reasonably possibly true.

[105] The trial court had no hesitation in rejecting the version of accused 11. I do not intend repeating its reasons for doing so. I have not been persuaded that it erred in doing so. His evidence was unsatisfactory and did nothing to rebut the inferences arising from the State's evidence. The trial court correctly convicted accused 11 of counts 6 and 9.

COUNTS 7 AND 8, 10 AND 11, 12 TO 14, 15, 18, AND 21 TO 23:

[106] It follows from what I have set out above that in my view accused 1, 6, 7, 8, 14, 20, 22, 24, 25 and 26, accused 2, 3, 9, 15, 16, 17, 18, 19, 21 and 23 and accused 4, 5 and 11 were rightly convicted of the primary offences in counts 6 and 9. What remains to be considered is whether the aforesaid accused were convicted correctly of the remaining counts not dealt with earlier, irrespective of any concessions made in respect thereof.[109] These counts relate to the attempted

[109] Mr Slabbert had in his practice note conceded liability in respect of accused 1, 6, 7, 14, 20, 22, 24 and 25 in respect of the Charters robbery and the secondary offences in relation thereto. However in argument he made the concession in respect of accused 1, 6, 7, 14, 20, 22, 24 and 25 in respect of counts 9, 10 and 11 only. Possibly he was by then influenced by the concessions made by Mr Fraser for accused 2, 9, 15, 16, 18, 21 and 23 which although covering both the Charters robbery (count 9) and the Penicuik attempted robbery (count 6), extended insofar as the secondary offences were concerned, to only counts 7 and 8 in respect of Penicuik and counts 10

murders of Ncwane (count 7) and Thring (count 8) at Penicuik, the attempted murders of Mnqayi (count 10) and Mnguni (count 11) at Charters, the attempted murder of Biyela (count 12), Khoza (count 13) and Mthetwa (count 14) near Charters, the robbery of Msweli (count 15), the robbery of Masango (count 18), the murder of Gumede (count 21) and the attempted murders of Nkabinde (count 22) and Ntombela (count 23) all near Penicuik.

[107] The issue, as always in matters of criminal intent, is one of subjective foreseeability, but very importantly *in casu*, one of the ambit of the prior agreement between the parties. There is no direct evidence on what was agreed amongst the accused, but all the proven facts are consistent only with the inference that the two robberies would be carried out in a particular manner, with the Fidelity vehicles being incapacitated by being rammed off the road which would carry the risk of serious injury or death to the occupants, any resistance or possible threat to their operation being overcome by the use of or the threat of the use of assault rifles, any interference with the robberies in progress being prevented by approaching vehicles being halted by stopper vehicles, and once the loot was extracted from the Fidelity vehicles, all the participants making their way back to the house of accused no 24 where the bags would be opened and the spoils shared, before they would disperse. On all the evidence the accused subjectively foresaw this *modus operandi* and the risks inherent in that process, and were reckless as to whether such risk would eventuate or not.

[108] In *S v Sibeko and another*,[110] the Supreme Court of Appeal held that where one member of a group of robbers was armed with a loaded firearm with the knowledge of others in the group, all of them must have foreseen the possibility of that firearm being used against the contingency of resistance. In that case the Court accepted the confrontation of the accused by the police 6 km away from the

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and 11 in respect of Charters and not also the other counts in respect of Charters. In the interest of justice I shall consider the guilt of the accused to all these secondary offences irrespective of any concessions made.

[110] 2004 (2) SACR 22 (SCA) para 9.

scene of robbery as resistance. Every case must however depend on its own facts. I shall therefore turn to consider the various categories of the remaining offences.

COUNTS 7 – 8 AND 10 – 11:

[109] These counts relate to the attempted murder of the occupants of the Fidelity vehicles namely Ncwane and Thring at Penicuik and Mnqayi and Mnguni at Charters, arising from the risks to their lives when their vehicles were forced off the road causing them to overturn. This conduct was clearly an integral part of the prior agreement amongst the accused and their conviction on these counts undoubtedly correct.

COUNTS 12, 13 AND 14:

[110] Mr Fraser conceded that the convictions on counts 6, 7, 8, 9, 10 and 11 were correct as these all fell within the prior agreement between the accused. He submitted however that the prior agreement extended and covered only those counts. The guilt of the accused on counts 12, 13 and 14 he submitted, would have to be determined on their own facts.

[111] The attempted murder of the three policemen Biyela, Khoza and Mthetwa forming the subject of counts 12, 13 and 14 occurred geographically separate from the robbery at Charters. They were shot at what appears to have been a stopper point, to halt traffic proceeding along the N2 which could interfere with the robbery at Charters while it was in progress. The three complainants on these counts were fortuitously all policemen travelling in a marked police vehicle. They were forced to stop because of the block of the traffic. Some of the assailants seemingly anticipated a threat to their plan from these policemen, and started firing at the policemen. The policemen fled in different directions and were very lucky to have escaped with their lives and unhurt.

[112] The trial court concluded:

> 'We hold that they all harboured the requisite *mens rea* (in the form of *dolus eventualis*)'.

Criminal liability could however only arise if these acts fell within their prior agreement to rob the Fidelity vehicles.

[113] If regard is had to the undisputed fact that numerous high velocity bullets, as would be discharged by assault rifles, were fired at the police vehicle, the assailants clearly are guilty of attempted murder. The accused would all be guilty of these attempted murders if this conduct was foreseen by the accused as part of their prior agreement. The stopping of the vehicles, and being armed with rifles, the use of those rifles to overcome or subdue any possible impediment to their plan, were, in my view, by necessary inference part of the prior agreement amongst the accused. The fact that the three complainants happened to be policemen travelling in a marked police vehicle does not remove their attempted murder from the parameters of the prior agreement. A civilian in a civilian vehicle posing any threat to their plan would no doubt have been dealt with similarly. Overcoming or subduing possible resistance where vehicles were stopped, to prevent any interference with the robberies which were in progress, is something the accused subjectively would have foreseen when planning the robberies. Their conviction on these counts is accordingly unassailable.

COUNT 15, COUNT 18 AND COUNTS 21 TO 23:

[114] Regarding the robbery of Msweli's keys (count 15), the robbery of Masango's motor vehicle (count 18), the murder of Gumede (count 21) and the attempted murder of the security officials, Nkabinde and Ntombela (counts 22 and 23, respectively) the issue likewise is whether this fell within the prior agreement amongst the accused. This enquiry entails *inter alia* whether, when the prior agreement was reached, the accused could have foreseen these events.

[115] More specifically, the question to be considered is to what extent it can be inferred from the evidence adduced that events which would only follow when their plan seemingly went awry, panick possibly set in and perceived resistance was encountered, and crimes were now being committed by individual accused in their desperate bid to escape, necessarily would fall within the ambit of their prior agreement to rob the Fidelity vehicles. Can the conduct of any one perpetrator, such as the one who fatally shot Gumede be said to have been foreseen by the remainder of the accused and formed part of their prior agreement beyond a reasonable doubt? In particular, a court must guard against extending the terms of a prior agreement, on which there is no direct evidence,[111] to all criminal conduct committed during the process of executing the prior agreement, as would follow from an application of the rejected *versari in re illicita* doctrine.

[116] The court *a quo* found as follows in this regard:

> '…*we* have no doubt but that the accused concerned, subjectively foresaw the possibility that the firearms might be used with fatal effect during the execution of the robberies, in which escape afterwards and the evasion of capture form an integral part; and that they were reckless as to the eventuation of such possibility.'

And thereafter specifically in respect of count 21:

> 'We are accordingly satisfied that the state has succeeded in proving beyond a reasonable doubt that Gumede had been murdered by persons who were part of the attempted robbery at Penicuik.'

[117] Mr Fraser submitted that these convictions cannot be sustained, as the prior agreement only covered counts 6, 7, 8, 9, 10 and 11, and that the crimes giving rise to counts 15, 18 and 21 to 23 were separate, unplanned and fortuitous and therefore could not have been foreseen when the prior agreement was concluded. He also pointed out that no reasons were furnished by the trial court for the conclusion that the accused's liability flowed from their foreseeability.

[111] As for example there would have been had an accomplice who was part of the prior agreement testified on behalf of the State.

[118] Mr Slabbert similarly stressed that counts 21, 22 and 23 were totally unrelated to the attempted robbery of the Dyna. He also points out that it is wrong to conclude that the shooting giving rise to counts 21 to 23 occurred when there was an escape afterwards, and that it is not clear when this shooting occurred, particularly whether it was before or after the attempted robbery? He submitted that that the trial court's finding was based on speculation and not on facts and further that its findings in respect of the murder charge (count 21) was based on an incorrect factual finding and/or interpretation of the evidence.

[119] The trial court had found that:

> 'It would not be an overstatement to say that the security vehicle was riddled with bullets. The testimony of Ntombela and Nkabinde in that regard is supported by the photographic material placed before us, which shows substantial damage to the windscreen, the windows and bodywork of the security vehicle. The deceased was fatally injured during the fusillade directed at the security vehicle and its occupants.

[120] Mr Slabbert points out correctly that it was not the evidence that 'the barrage of rifle fire was directed at the security guards', and that there was not a single photo depicting this vehicle, neither was there any evidence describing the bullet damage to the vehicle as recited by the court; nor did the evidence of Oscar Nkabinde support such a finding. Sicelo Moonshine Ntombela described the damage to their vehicle as:

> 'Two bullet holes on the bonnet which went into the engine section. Another hole was facing where my crew was sitting- it hit the brake fluid container. Another hit the right front tyre making it flat. Another two penetrated the canopy of the bakkie and of the two windows one was completely out and the glass behind the driver was shattered.'

[121] Mr Slabbert also criticized the trial court for not giving reasons why it arrived at the conclusion that Gumede was murdered by persons who were part of the attempted robbery at Penicuik, in circumstances where there is no evidence that the two incidents are related in the sense of similar spent cartridges being recovered at the two scenes, or cell phone records placing any of the accused at

the place where the murder occurred. He accordingly submitted that the Court was wrong, as a result of what he contended was its incorrect interpretation of the evidence, to find that the deceased was 'murdered' and that the high water mark of the State's case was that those who caused the death of the deceased might be guilty of culpable homicide.[112]

[122] I am not persuaded by that argument. Provided the killing fell within a common purpose, the conviction should be one of murder as opposed to culpable homicide. I do not set out my detailed reasons for that conclusion however, as in my view the State failed to discharge the onus of proving that the killing of Gumede fell within the common purpose amongst the accused.

[123] The trial court held:

> 'Given that we held that the accused had made common purpose with the attempted robbery at Penicuik, the question posed on the relevant facts and circumstances of the hijacking and kidnapping is whether these offences were foreseen by the accused involved as a possible occurrence associated with the intended robbery at Penicuik. As a safe "getaway" from the scene of the robbery at its conclusion, is part and parcel of the contemplated robbery, we have no doubt that all the parties to the common purpose to rob the Fidelity vehicles foresaw that a hijacking could possibly occur to allow the robbers to escape; …'

[124] I have reservations as to the correctness of that conclusion. Where the events giving rise to these counts occurred at a place geographically removed, albeit slight from the primary scenes, and occurred as a result of plainly unforeseen events, some doubt must exist whether the possibility of these crimes being committed was necessarily subjectively foreseen and thus were contemplated as

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[112] His submission is based on the evidence that the deceased was not visible in the rear of the LDV and the bullet according to Nkabinde first struck the canopy and then ricochet down to where the deceased was. The evidence was:

> 'M'Lord, there was a bullet that struck the truck where you …[indistinct] where you …[indistinct] struck there and the bakkie that we were travelling on, the canopy at the back had not glass and there is a bullet that went straight and struck the deceased and there were some other bullets …[indistinct]. When you look at those entrance of those bullets, they look like they were coming from on top of the canopy.'

part of the prior plan amongst the accused. It seems to me that such doubt must exist and that it is a reasonable doubt of which the accused must get the benefit. The accused are entitled to be acquitted on these counts.

COUNT 31:

[125] This count was not subject to appeal and correctly no argument was addressed on this count.

THE SENTENCE OF LIFE IMPRISONMENT ON COUNT 21:

[126] Leave to appeal against sentence was granted only in respect of the murder count. Where a sentence of life imprisonment is imposed, the effect thereof, *ex lege* by virtue of the provisions of section 37(1)(a)(i) of the Correctional Services Act[113] is that all the determinate sentences imposed on the other counts, would run concurrently with the indeterminate life sentence. Counsel were all agreed that if the appeal against sentence on count 21 succeeded that this court not only had to consider an appropriate sentence on whatever verdict might be returned on count 21, but that this court should also deal with the concurrency of the sentences which would otherwise follow and result in a total effective sentence of Methuselaen proportions. This accords with what the trial court had in mind in granting leave to appeal when it said:

> 'It follows that if a Court sitting on appeal on the question of sentence were to conclude that a lesser period of imprisonment was called for then the consequences which normally follow upon a sentence of life imprisonment would have to be reconsidered. When life imprisonment is imposed all other sentences imposed ex lege run concurrently with life imprisonment. If a lesser sentence is imposed that is not the case.
>
> The Court of Appeal accordingly will have to consider to what extent in its discretion concurrency of serving of sentences should take place. That does not apply to the quantum of sentences imposed in the lesser offences inasmuch as the

[113] Act No 101 of 1998.

appeal itself was not addressed to the quantum of the individual sentences, but more to the question of concurrency because that would determine the length of the stay in prison of the respective accused.

To the extent that it might be necessary this Court, in granting leave to appeal to include that, I grant such, but I believe it would be proper to add that I would have thought that it would follow automatically upon any change effected to any change to the sentence of life imprisonment, that concurrency would be reconsidered."

[127] In view of my earlier conclusion that the accused should all be acquitted on count 21, the sentence of life imprisonment falls away and the only issue[114] which remains to be considered is which sentences should be directed to run concurrently.

[128] It was submitted that the learned Judge erred in not considering the cumulative sentence of life and 153 years imprisonment in respect of the Applicants who were in the vehicle driven by Accused 24. It was further argued on the question of concurrency of the sentences that what the learned judge had in mind in sentencing the accused was not only that all the sentences would run concurrently *ex lege* with the sentence of life imprisonment, but even if all the sentences were running concurrently with the sentence of life imprisonment, a lesser period would be served if the prison authorities decide to release the accused on parole before the end of the 25 years minimum period. During argument the learned Judge said the following;

'COMBRINK J I did not know – I can assure you I did not, I thought that the Act still applied – that parole was susceptible before 25 years had passed. Do you

[114] Submissions were advanced in the heads of argument that certain of the sentences on the other counts, confined now to those in respect of which the convictions have been upheld, induce a sense of shock, or are inappropriate and in the case of the robberies the minimum sentence of 15 years imprisonment should not be imposed lightly having regard to the fact that the applicants were detained under very difficult circumstances and that they appeared in court in leg chains on each and every day that the court was sitting and were detained in the holding cells at court in leg chains. It is not open to this court on appeal to address the severity of any of those sentences.

agree that from the section that he had read in the Prisons Act, the Correctional Services Act, that life imprisonment means 25 years?

MR SELEBI That is correct, M'Lord. That is correct.'

[129] A Court does not however concern itself with parole provisions and when an accused might be released on parole, in determining an appropriate sentence.[115]

[130] The defence has also argued that the sentences imposed did not take into account the period that the accused were incarcerated awaiting finalization of their trial, stressing a comment by the trial judge during argument on the application for leave to appeal, albeit on the issue whether there were substantial and compelling circumstances present and not on the issue of concurrency of sentences, where he said:

'COMBRINK J Now, I did not in that regard take into account - for the purposes of establishing whether substantial and compelling circumstances exist I did not take the six years that they had served into account. Is that not susceptible to consideration as possibly substantial and compelling circumstances?'

[131] The law on this aspect has been summarized recently. In *S v Mqabhi*[116] the Court referred to the fact that the Supreme Court of Appeal has dealt with the pre-sentence period in custody, and the issues it raises, in four relatively recent decisions, *viz*. *S v Vilakazi*,[117] *S v Kruger*,[118] *S v Radebe and another*[119] and *S v Dlamini*.[120] The learned Judge stated the following:[121]

'In my respectful view the following appears to be evident from the four SCA cases mentioned:

(a) Pre-sentence detention is a factor to be taken into account when considering the presence or absence of substantial and compelling circumstances for the purposes of s 51 of the CLAA (*Radebe*, *Dlamini et al*);

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[115] *S v Matlala* 2003(1) SACR 80 (SCA) para 7.

[116] 2015 (1) SACR 508 (GJ)
[117] 2009 (1) SACR 252 (SCA).
[118] 2012 (1) SACR 369 (SCA).
[119] 2013 (2) SACR 165 (SCA).
[120] 2012 (2) SACR 1 (SCA).
[121] *S v Mqabhi* supra fn 114 para 38.

(b) such period of detention is not to be isolated as a substantial and compelling circumstance. It must be weighed as a mitigating factor, together with all the other mitigating and aggravating factors, in determining whether the effective minimum period of imprisonment to be imposed is justified in the sense of it being proportionate to the crime committed. If it is not, then the want of proportionality constitutes the substantial and compelling circumstance required under s 51(3) (*Radebe* at para 14);

(c) the reason for the prolonged period of pre-sentence detention is a factor. If the offender was responsible for unnecessary delays then that may redound to his detriment (*Radebe*);

(d) there is no mechanical formula or rule of thumb to determine the period by which a sentence is to be reduced. The specific circumstances of the offender, which may include the conditions of his detention, are to be assessed in each case when determining the extent to which the proposed sentence should be reduced. (*Radebe* at para 13);

(e) where only one serious offence is committed, and assuming that the offender has not been responsible for unduly delaying the trial (*Radebe* at para 14), then a court may more readily reduce the sentence by the actual period in detention prior to sentencing. (*Dlamini* and *Vilakazi*).'

[132] The learned trial judge however did take account of the time spent awaiting trial where in his judgment on the application for leave he stated:

'I did take into the fact that the accused had waited some six years in prison for the trial to reach its conclusion'.

He remarked:

'In respect of Count 6, the attempted robbery involving aggravating circumstances at Penicuik, I indicated I would have sentenced the accused to 15 years, but with due regard being had of the time spent waiting finality in this trial I shall impose a sentence of ten (10) years imprisonment upon all the accused in respect of that count'.

After sentence was imposed the trial judge commented:

> 'Because the accused had been in prison for approximately six years, a substantial portion thereof in difficult circumstances of Kokstad awaiting the conclusion of this trial, I have factored that into the sentences I have imposed and because of it in addition, I do not make any order stopping the accused from applying for, in due course and in accordance with the requisite provision, for parole'.

The trial court, taking into consideration the period of detention when imposing sentence, reduced the sentence in Count 6 to that of 10 years imprisonment. The time awaiting trial has accordingly already been taken into account to that extent. No appeal lies in respect of the individual sentences. In my view the time awaiting trial should therefore play only a very limited part in deciding on the issue of concurrency of sentences.

[133] Mr Slabbert has submitted that the sentences:

(a) In respect of counts 7 and 8 should run concurrently with the sentence imposed in respect of count 6;

(b) In respect of counts 10 and 11 should run concurrently with the sentence imposed in respect of count 9;

(c) In respect of counts 13 and 14 should run concurrently with the sentence imposed in respect of count 12;

He submitted that there is a substantial disparity between the effective sentence imposed by the court *a quo* and the sentence another court would have imposed and referred to *S v Dlamini*[122] where the accused was sentenced to an effective period of 43 years imprisonment but the SCA reduced the sentence to an effective period of 17 seventeen years imprisonment on appeal. He argued that the trial Judge should have considered a similar sentence and submitted further that there are various other judgments where sentences of forty years and more were reduced to a sentence of less than twenty years imprisonment. In conclusion, he contended that the trial Judge gave inadequate consideration to the possibility of

[122] 2012 (2) SACR 1 (SCA).

imposing a lesser custodial sentence and that there was no need to overemphasize rehabilitation without considering the other purposes of sentence.

[134] Although the individual accused could not physically execute the crimes at both Charters and Penicuik at the same time, their common purpose clearly was to rob the Fidelity vehicles of their contents at these two scenes and they are equally all guilty of the two separate primary incidents: the robbery with aggravating circumstances at Charters and the attempted robbery with aggravating circumstances at Penicuik. These two crimes were planned and executed with military precision and ruthlessness to satisfy their personal greed. This court would be failing in its duty if it did not punish the accused for both these separate events severely. As regards their personal circumstances, the accused's evidence on sentence revealed that they were gainfully employed or conducted private business before the crimes were committed. Their evidence did not reveal that their circumstances forced them into committing the offences. They did not show remorse and there is nothing to point to them being candidates for rehabilitation. The court found no substantial and compelling circumstances based purely on their personal circumstances and rightly so.

[135] The cumulative effect of the sentences imposed in respect of the secondary offences at each of these scenes is best ameliorated by directing that a portion thereof run concurrently with sentence imposed in respect of the primary offences. A suitable and appropriate direction in this regard, taking account of the personal circumstances of the accused, the nature of the crimes of which the accused have been convicted and the interests of society, appears at the end of this judgment.

[136] **ORDER:**

1. The appeal by accused 2, 3, 4, 6, 9, 11, 13, 15, 17, 18, 21, 23 and 24 against their conviction on counts 1, 2, 3, 4, 15, 18, 21, 22, 23, 27, 28, 29 and 30 succeeds, those convictions are set aside and they are found not guilty of these offences.

2. The appeal by accused 1, 5, 7, 8, 14, 16, 19, 20, 22, 25 and 26 against their conviction on counts 1, 2, 3, 4, 15, 18, 21, 22 and 23 succeeds, those convictions are set aside and they are found not guilty of these offences.

3. The appeal by accused 13 against his conviction on all the counts he was convicted of succeeds, those convictions are set aside and he is found not guilty and is discharged.

4. The appeals by accused 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26 against counts 6, 7, 8, 9, 10, 11, 12, 13 and 14 are dismissed and the convictions of the accused on those counts are confirmed.[123]

5. The appeal against the sentence on count 21 succeeds to the extent that the life sentence falls away.

6. It is directed that:

   (a) the sentences of seven years' imprisonment imposed on count 7 and five years' imprisonment on count 8 shall run concurrently with the sentence of 10 years' imprisonment imposed in respect of count 6, thus giving an effective sentence of ten years' imprisonment in respect of counts 6, 7 and 8 antedated to the date the accused were sentenced namely 29 June 2012; and

   (b) the sentences of five years' imprisonment imposed on count 10, five years' imprisonment on count 11, ten years' imprisonment on count 12, ten years' imprisonment on count 13 and ten years' imprisonment on count 14, shall all run concurrently with the sentence of 15 years' imprisonment on count 9, thus giving an effective sentence of 15 years' imprisonment in respect of counts 9, 10, 11, 12, 13 and 14 antedated to the date the accused were sentenced namely 29 June 2012;.

7. For the sake of clarity, the combined effect of the above is that accused 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26 are all required to serve an effective total period of imprisonment of 25 years'

[123] There was no appeal against count 31 and accused 14's conviction on that count is accordingly not affected by this judgment. The sentence of three months' imprisonment on count 31 does however feature in respect of this court's findings on the appeal against sentence.

imprisonment running from 29 June 2012. Accused 14 is required to serve an effective total period of imprisonment of 25 years and three months' imprisonment running from 29 June 2012.

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KOEN J

I agree

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KRUGER J

I agree

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JAPPIE JP