Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
CAPE OF GOOD HOPE PROVINCIAL DIVISION

CASE NO: 67 / 2005

In the matter between:

THE STATE

versus

SELWYN WINSTON DE VRIES	Accused number 1
VIRGIL LENNITH DE VRIES	Accused number 2
JULIAN MICHAEL VAN HEERDEN	Accused number 3
VERNON NOEL VICTOR	Accused number 4
ALEX ANNA	Accused number 5
GARY WILLIAMS	Accused number 6
LLEWELLYN SMITH	Accused number 7
FRANCIS JAMES NGARINOMA	Accused number 8
EDWARD MOAGI	Accused number 9
DARRYL PITT	Accused number 10
ACHMAT MATHER	Accused number 11

JUDGMENT : 10 JUNE 2008

BOZALEK, J:

INTRODUCTION

[1] On 24 June 2003 a truck carrying a large consignment of cigarettes belonging to *The British American Tobacco Company of South Africa* (hereafter referred to as "BATSA") was intercepted and hijacked by armed robbers near Rawsonville in the Western Cape. Most of the contents of the truck were loaded into another truck whilst the BATSA driver and his assistant were removed from the scene and later released unharmed. Less than 2 months later, on 12 August 2003,

another BATSA truck was intercepted on the West Coast road near Darling. On this occasion the entire consignment of cigarettes was stolen in the same manner. Again the driver and his assistant were removed from the scene but later released unharmed. A month and a half later, on 2 October 2003, a BATSA truck was intercepted and robbed near Kinkelbos, outside Port Elizabeth. The entire consignment of cigarettes was once again offloaded into a truck driven by the robbers and disappeared.

[2] In each case the *modus operandi* used to stop the BATSA truck was a bogus police vehicle equipped with a flashing blue light and driven by persons wearing police or traffic officer uniforms. After flagging down the BATSA truck and making some initial enquiry relating to the driver's licence or the cargo being carried, the bogus police officials produced firearms and held up the driver and his assistant. No trace of the stolen cigarettes was ever found, however, a week after the last robbery, the police conducted a series of simultaneous raids at a number of residences in Ennerdale, Johannesburg. Five of the accused were arrested in this operation and, in due course, were charged with offences arising out of the robberies.

[3] In subsequent weeks further arrests were made and eventually twelve accused came before this Court on 1 August 2005 to face a total of 25

charges arising out of or relating to the robberies. Whilst the bulk of the charges, namely counts 3 to 20 were the common law offences of theft, robbery with aggravating circumstances, kidnapping and attempted murder, six counts, counts 3, 7, 8, 9, 13 and 14 related to the alleged theft of vehicles allegedly used or intended to be used in the robberies. The three robberies, namely, Rawsonville, Darling and Kinkelbos were the subject matter of counts 4, 10 and 15. Each robbery was coupled with two counts of kidnapping relating to the driver and assistant of the BATSA vehicle, the subject matter of counts 5 and 6, 11 and 12 and 16 and 17. There was moreover, an additional robbery and kidnapping count the subject of counts 18 and 19. In this instance, it was alleged, certain of the accused, after the commission of the Kinkelbos robbery committed a secondary robbery, so to speak, involving one of the original Kinkelbos robbers and kidnapped him. The subject matter of count 20, the charge of attempted murder, was an alleged shooting incidents involving a number of the accused in Lenasia South, Vereeniging on the day after the Kinkelbos robbery.

[4] As far as statutory offences are concerned, counts 21 and 22 deal with alleged contraventions of the Firearms Control Act, 60 of 2000 in the form of a charge of possession of a firearm and ammunition. The remainder of the statutory charges, namely counts 1, 2 and 23 to 25 deal with alleged contraventions of provisions of the Prevention of

Organised Crime Act, 121 of 1998 (hereinafter referred to as “POCA”).

[5] Count 1 alleged that several of the accused managed an enterprise conducted through a pattern of racketeering activities. Count 2 charged that all of the accused, whilst managing or employed by or associated with the enterprise, conducted or participated in the conduct of the enterprise’s affairs through a pattern of racketeering activity. Count 23 to 25 charged that certain of the accused were guilty of “money laundering”, in contravention of s 4 of POCA, in that with knowledge that the stolen cigarettes were the proceeds of unlawful activities they sold them to accused 11. Counts 23 to 25 alleged, in the alternative, various other statutory offences in terms of POCA. Not all of the accused were charged with all 25 counts and at the close of the State’s case, in terms of s 174 of Act 51 of 1977, the following accused were acquitted of the following charges:

Accused 1:	Counts 3, 7, 13 and 14
Accused 2:	Counts 3, 7, 13, 14 and 20
Accused 3, 4 and 5:	Counts 3 and 7
Accused 6:	Counts 7 and 20
Accused 7**:**	Count 7
Accused 8 and 9:	Counts 3 and 7
Accused 10:	Counts 7, 15 and 18
Accused 11:	Count 1

[6] The bulk of these discharges, namely, those on counts 3, 7, 13 and 14 related to the alleged theft of motor-vehicles intended to be used in the various robberies. All of the accused pleaded not guilty to all charges

and were legally represented throughout the trial although certain accused changed their legal representation on one or more occasions. Ultimately accused number 1 and 7 were represented by Adv. J Mihalik, snr, accused 2 by Adv. S Banderker, accused 3 and 4 by Adv. L Thompson, accused 5, 6, 8 and 9 by Adv. A Petersen, accused 10 by Adv. D Johnson and accused 11 by Adv. J Spangenberg. Only accused 1 and 2 gave a plea explanation or made any formal admission. Their plea explanations were essentially the same, containing formal admissions, *inter alia*, that the three robberies of the BATSA trucks and associated kidnappings took place, but stating that neither accused 1 nor 2 had any part therein. Much of the two plea explanations consisted of an argumentative attack upon the character and credibility of a certain Mr. Vernon Aspeling ("Aspeling"), described as the "section 204 witness" and the allegation that he was the perpetrator of the offences who had falsely implicated accused 1 and 2 in such offences. It was alleged, *inter alia*, that Aspeling was "a self-confessed robber, kidnapper, thief, attempted murderer and consummate liar…" but who the accused were convinced would "be exposed for the liar that he is during the course of the trial". As it turned out the allegations regarding Aspeling accurately presaged the thrust of the defence of each accused in the trial.

[7] In a trial lasting more than 160 court days, the State alone led the

evidence of over 90 witnesses. Accused 2, 3, 6, 7, 10 and 11 testified on their own behalf and, in some instances, called witnesses. Neither accused 1, 4, 5, 8 and 9 testified although accused 4 called witnesses in support of his case.

THE STATE CASE

[8] The chief pillar of the State's case was the evidence of the s 204 accomplice witness, Vernon Aspeling. The second pillar of the State's case consisted of the records of the cell phone activity of various cell phones allegedly used by, *inter alia*, accused 1, 2, 3, 4, 6, 7 and 8. Through this evidence the State sought to demonstrate *inter alia* that the accused were present at the scenes of one or more of the three robberies and were in contact with each other before, during and after such robberies. The State also sought to introduce the cell phone records of Aspeling to corroborate his evidence and substantiate the case against the accused. The cell phone evidence was contested by all of the accused. As a consequence of this challenge by the accused various "trials-within-a-trial" were held. A further subject of one of these trials-within-a-trial was the admissibility of exhibits seized by the police from the residences of accused 1, 2, 3, 6 and 7 in the series of police search and seizure operations conducted on the night of 8/9 October 2003 when those accused were arrested. In each case one or more cell phones were seized from each accused's premises. The State

sought to link such cell phones to the records of cell phone activity allegedly linking the accused to one or more of the robberies. The State sought, furthermore, to strengthen such linkages by information downloaded from the cell phones so seized. The State also seized certain other articles from the residences of the accused, including motor vehicles seized from the premises of accused 3 and accused 7, the subject matter of counts 9, 13 and 14 and, in the case of accused 2, various items of police uniform and police insignia. Over and above this the State led the evidence of one or more drivers or assistants employed by BATSA who were the victims of the three robberies. One such driver gave identification evidence implicating accused numbers 4 and 7.

[9] After first dealing with certain preliminary issues, I propose to deal with the two main pillars of the State's case i.e. the evidence of Aspeling and the cell phone evidence, separately before dealing in more detail with the evidence in regard to each of the accused in turn and, thereafter, the case each such accused made out.

PRELIMINARY ISSUES

[10] The charges cover a wide geographical area, the first two robberies having taken place within the jurisdiction of this Court in the Western Cape but the last two robberies in the Eastern Cape. Seven accused hail from Ennerdale or Lenasia in the Vereeniging district. According to

the State's case, the gunfight which is the subject matter of count 20 plus the ancillary charges under the Firearms Control Act, counts 21 and 22, as well as the so-called money laundering charges, counts 23 to 25, are alleged to have taken place in the districts of Vereeniging or Soweto. The State thus commenced its prosecution by handing in an authorisation in terms of s 2(4) of POCA, given under the hand of the then National Director of Public Prosecutions, Adv. VP Pikoli, for the institution of the prosecution in respect of certain contraventions of POCA against the accused. The scope and terms of that authority were the subject of a full scale challenge by the accused to the lawfulness of the prosecution at a late stage in this trial. A judgment was given dismissing the challenge and it is unnecessary for any detail to be given in that regard.

[11] A further document handed up at the commencement of the trial and relied upon by the State was a centralization direction in terms of s 111 of Act 51 of 1977 to the effect that the proceedings against the accused be commenced in this Court thereby conferring jurisdiction on it. Similarly, that direction was the subject of a legal challenge by the accused at a late stage in the trial which was dismissed in the judgment referred to above.

THE EVIDENCE OF VERNON JAMES ASPELING

[12] Mr. Vernon Aspeling was called as the State's principal witness and, at

the request of the prosecutor, was warned by the Court that he was regarded by the State as an accomplice and that he would have to answer all questions fully and frankly in order to qualify for indemnity from prosecution notwithstanding that such answers might incriminate him. At the time of giving evidence Aspeling was a 43-year-old former driver and business man who had recently married his second wife. He had three children by his first wife and lived for many years in Ennerdale where he became a well-known businessman. Aspeling was arrested on 7 November 2003 in connection with the Darling robbery.

[13] After a number of weeks the State decided to use him as a State witness. Ever since that time he has been in a witness protection programme. Aspeling had formerly been employed as a bus driver and had a code 14 driver's license. He had also in recent years owned a night club, a bottle store and a taxi business. He had also had a transport business, known as *Vernie's Transport*. The latter business had run into difficulties and he used the night club to finance the business. Eventually his trucks and trailers were repossessed and his bottle store and night club ceased trading. In the late 1990's he started running a shebeen, a business he operated without a liquor license. By 2003 it appears that he had fallen upon hard times, comparatively speaking, and was making a living by selling pirated DVD's. To a lesser or greater extent those of the accused who hailed from Ennerdale were

well-known to Aspeling. He had met accused 1, Selwyn De Vries, more than 12 years previously in Ennerdale through his nightclub and other business ventures. Accused 1 was generally known as “Man” and is a paraplegic who uses a wheelchair. Similarly, Aspeling had come to know accused 2, Virgil De Vries, at the same time as he got to know his brother, accused 1.

[14] Accused 2 was the younger brother and had frequented his nightclub. He was known as “Viega”. Although they had not visited each other socially, Aspeling and accused 2 had enjoyed a good relationship. Aspeling met accused 3, Julian Van Heerden, through a friend, Christopher Van Reenen, known as “Zallie”. Their first meeting had been about a month before the first robbery which took place in Rawsonville on 24 June 2003. Aspeling met accused 4 when the witness arrived in Cape Town in June 2003 shortly before the first robbery. They were introduced to each other at the witness’ place of temporary accommodation, the *Waterfront Suites* in Green Point. Similarly, the witness had met accused 5, Alex Anna, at the same time at the *Waterfront Suites*. Although there was no actual physical introduction he had got to know him as “Mandoza” which had been the witness’s abbreviation for accused 5’s name, “Mandula”.

[15] Accused 6, Gary Williams, had been known to the witness for a

number of years and had grown up in front of him, his mother being known as “aunty Joyce”. The witness had never had any fall out with accused 6 who was often to be seen in the company of accused 7, Llewellyn Smith.

[16] Similarly, Aspeling had known accused 7 for a number of years as someone who lived in mid-Ennerdale, the same area where the witness used to live. He was also known as “Wellie”. Aspeling knew accused 7’s uncle, his late mother and his younger brother “Roykie”. The witness first met accused 8, Francis James Ngarinoma, in Cape Town at the time of the first robbery. Accused 8 was accompanied by accused 5. He had not been introduced to accused 8 and had not called him by any name. Likewise, Aspeling had met accused 9, Edward Moagi, at the *Waterfront Suites* prior to the first robbery. He had not been formally introduced to him.

[17] The witness had known accused 10, Darryl Pitt for a number of years from the Ennerdale area. His father, like Aspeling, had worked for the Johannesburg City Council. Accused 10 was a friend of Aspeling’s eldest son, Clayton and is a mechanic who did maintenance work on accused 1’s taxi’s.

[18] Aspeling identified accused 11 as “Achie” whom he had not known

personally but whom he had met for the first time when he, Aspeling, and accused 2, delivered the consignment of stolen cigarettes to accused 11's nursery business in Lenasia shortly after the first robbery.

[19] As the evidence revealed the eleven accused formed two main groups. One group came from the Johannesburg area and the other from Cape Town. In the first group was accused 1 and 2, the De Vries brothers, and their fellow Ennerdale residents, accused 3, Julian Van Heerden, accused 6, Gary Williams, accused 7, Llewellyn Smith and accused 10, Darryl Pitt. To their number can be added accused 11, whose business was in Lenasia. The first member of the Cape Town group was accused 4, Vernon Victor, the only white man amongst the group and whose race is of some significance in the evidence. The other members of the Cape Town group were accused 5, Alex Anna, accused 8, Francis James Ngarinoma and accused 9, Edward Moagi, the three of whom appear to initially hail from other countries in Africa.

[20] Aspeling also sketched his knowledge of other persons who played a role in the events which he recounted. They included Jimmy Maseko, whom he met through accused 7 and who used to keep company with Zallie, and Denzil Boyles who originally was accused number 12 but had all charges withdrawn against him by the State on the opening day of the trial. Aspeling knew Boyles by face from Ennerdale and had

known his brother and father. Aspeling also testified that he knew Clayton Paulsen very well as a fellow Ennerdale resident and someone who used to frequent his nightclub. He was also a good friend of accused 7.

EVENTS PRIOR TO THE FIRST ROBBERY

[21] About a month before the first robbery Aspeling had been contacted by Zallie (Christoper van Reenen) who arranged to meet him at the taxi rank in Ennerdale. There Zallie introduced him to accused 3, referring to him as “Jan”. He informed him that accused 3 was in the business of buying smashed cars in order to salvage spares and transporting them via train to Johannesburg. That transportation was too slow, however, and he was now considering using a truck. Zallie knew that Aspeling had a code 14 driver’s license and had contacts in the transport business. He asked Aspeling whether he could hire a closed-body six-ton truck which would be required for two days for transportation from Klerksdorp. There and then Aspeling phoned one Sayub Bera who was in the transport business. Bera asked for a deposit of R2000,00 for the hire of such a truck provided that Aspeling himself drove it and ensured that it was filled with diesel. Accused 3 said little during these discussions.

[22] The following day Zallie called Aspeling and arranged to give him R2000,00 as a deposit for the truck. Aspeling immediately went to the

premises of Bera's transport business in Lenasia and paid the deposit in return for which he was issued with a receipt. Later that day Zallie and Jimmy Maseko picked Aspeling up and they went to fetch the truck, the idea being that the trip would commence immediately. The truck was filled with diesel for which Zallie paid. The trip had been planned as a two-day affair and the witness took a change of clothing with him. Immediately thereafter Zallie advised Aspeling and Jimmy Maseko that they would actually be travelling to Cape Town. Aspeling felt aggrieved about the change of plan because it could ruin his relationship with Bera from whom he had hired the truck on a different basis. Aspeling and Zallie had argued about the sudden change of plan but Aspeling had felt that he was in a "catch 22" situation and reluctantly decided to make the trip to Cape Town. Zallie said that Aspeling and Jimmy Maseko should continue towards Cape Town and that he, Zallie, would catch up with them at a later stage. The truck hired had a movable loading platform hydraulically controlled at the rear of the truck.

[23] During the trip to Cape Town Zallie remained in contact with Aspeling through his cell phone. He told him to stop at the *Ultra City* in Bloemfontein. There the witness had found Zallie in a *BMW* vehicle belonging to accused 3, but with accused 2 driving it and accused 1 as front seat passenger. Although Aspeling had expected accused 3 on

the trip he was surprised to see accused 1 and 2 with him at Bloemfontein. Aspeling also refuelled the truck at Three Sisters which Zallie paid for. Seeing accused 1 and 2 he now had feelings of unease about the trip. Driving through the night they reached Cape Town at approximately 09h00 on the Thursday morning prior to the robbery and booked into the *Waterfront Suites* in Green Point. By Saturday, when the truck was due back, Aspeling started getting worried and called Bera saying that he was still in Klerksdorp waiting for the load. Bera was angry and concerned about the safety of the truck and Aspeling promised to ring him later that evening. Whilst at the *Waterfront Suites* several of the accused arrived at different times as well as a certain Zakkie. Aspeling remained in the apartment but late on Saturday night received a text message from Zallie who arrived shortly thereafter and asked Aspeling to accompany him somewhere in the *BMW*. They drove to an industrial area where Zallie got out and ran through the veld towards a building. He returned shortly thereafter with two firearms and bolt-cutters. By this time Aspeling was angry with Zallie and demanded to know what was happening. They drove to a nightclub and gradually Aspeling eked out of Zallie that there had been an unsuccessful break-in attempt at the building in question.

[24] Later Jimmy Maseko told him that they had attempted to break-in to the cigarette company but that the alarm had gone off. Later on the

Sunday, accused 1, 2, 3, 4, 5, 9 and Zallie had discussed a "job" that was going to be done the next day. Aspeling had asked for details but both Zallie and accused 1 simply told him that it would be an easy job and he should not worry. From this point onwards Aspeling was no longer under the impression that he was in Cape Town to fetch spare parts for cars. Some time later accused 3, 4, 5 and 9 said that they were going out to look for a white *Golf* or a white *Polo* vehicle with which to do the job on Monday.

[25] On Monday, 23 June 2003 accused 1 woke Aspeling and the others early telling Aspeling that they were going to work now and he must pack his kitbag. Aspeling drove the truck alone to Montague Gardens following a *Volkswagen Caravelle* containing other of the accused and parked outside BATSA's premises. Sometime thereafter accused 1 phoned Aspeling on his cell phone and told him to drive the truck to the N1 truck stop *en route* to Paarl which he did and where he waited for some time. Accused 1 eventually called Aspeling to return to Green Point where he and the others were told by accused 1 that they would follow the same plan the following morning. Later that afternoon accused 4 arrived in a white *City Golf* and handed accused 3 a small round blue light, the type used in police vehicles.

[26] Early the following morning, 24 June 2003, in accordance with the

instructions he received from accused 1, Aspeling drove the truck directly to the N1 truck stop. He had been given Jimmy Maseko's cell phone and at about 07:00 was called by accused 1 and told to proceed along the N1. *En route* he was passed by accused 1, who although paralysed in his lower limbs and confined to a wheelchair, was driving alone in the *BMW*. The vehicle was not specially adapted for accused 1 but Aspeling presumed that he was driving the automatic vehicle by manipulating the pedals with his walking stick. Halfway between the Huguenot tunnel and Worcester, accused 1 directed him, from the side of the road, to a stationary BATSA truck on the other side of the road. Aspeling backed his truck up to the BATSA truck. Also present on the scene were accused 2, 3, 4, 5, Jimmy and Zallie as was a white *Golf* with a blue light on the top of the roof. Accused 2 emerged from the BATSA truck walking very close to its driver who appeared very nervous. Also on the scene was a *Volkswagen Caravelle*, maroon coloured, apparently belonging to accused 5. Accused 4 was dressed in a blue police uniform. Boxes of cigarettes were loaded from the BATSA vehicle into Aspeling's truck. Before all the contents could be offloaded Aspeling was told to leave and drive towards Cape Town. *En route*, however, accused 1 called Aspeling and told him to turn around and follow the BATSA truck. Arrangements were made for him to meet his accomplices at a filling station in Worcester.

[27] When he arrived there Aspeling met Zallie who gave him money to fill the truck up with diesel. Accused 1 then called him and told him to follow the road to Robertson. Along that route he came across the BATSA truck again and pulled off next to it. He, accused 2, Jimmy and Zallie transferred further cigarette boxes from the BATSA vehicle to his truck. Again this was done hurriedly without the boxes being properly packed and ultimately some of the boxes were left behind in the BATSA truck. Aspeling then drove the truck back to the *Waterfront Suites* in Green Point and waited some time for further instructions. At approximately 13h00 Aspeling drove his truck, following the *BMW*, to a suburb where accused 5 stayed. Much later Aspeling identified the house as one in Oak Street, Observatory, near the railway line. Aspeling spent some hours at the house in the presence of accused 1, 2, 3, 4, 5, 8, 9, Jimmy, Zallie and Zackie. At approximately 18h00 that evening the Johannesburg contingent began their return journey to Gauteng using the long coastal route. Aspeling drove straight to accused 1's house in Ennerdale to offload the truck. One hundred and sixty three boxes of cigarettes were offloaded and packed near the stoep area. Accused 2 left saying that he was going to see the buyer. Accused 2 initially said that they would only get R2 300,00 per box of cigarettes. Aspeling intervened, however, saying that he could get a higher price. Aspeling's intervention appeared to upset accused 1 and 2. Eventually accused 1 announced that they would now obtain

R3800,00 per box.

[28] After the boxes were counted and repacked into the truck Aspeling drove it to Lenasia following accused 2 and 3 who were in a gold *Golf* vehicle. Aspeling followed accused 2 to certain premises in Lenasia which he described as a nursery. There he was instructed by accused 11's employees to reverse into a yard where the boxes of cigarettes were offloaded onto pallets. Aspeling himself had no direct dealings with accused 11 and had not known him previously. Accused 2 and 11 had emerged from the building initially and after the offloading accused 2 fetched accused 11 from the building and they came out together. Accused 2 then said to him: "*Bra Achie, ek nodig die parcel*". Accused 11, who was dressed in Muslim dress (a "kurta"), took a bundle of notes totalling R10 000,00 out of his pocket and handed it to accused 2 who in turn handed it to Aspeling. The witness then left the nursery to drive the truck back to *Bera's Transport* and paid the R10 000,00. This was the balance of the hire for six days taking into account the deposit already paid. The rate for the extended trip had earlier been arranged by Aspeling with Bera in a telephone conversation using accused 3's cell phone. Aspeling received a receipt from Bera for the payment.

[29] Over the next few days Aspeling was in telephonic contact with Zallie wanting to know when he would be paid his share. He was initially told

that accused 11 would pay the following day and that they had no choice but to wait. It was arranged, eventually, that everyone would meet at accused 1's house on the Friday morning. Present at that meeting were accused 1, 2, 3, Jimmy, Zallie and the witness. The latter three were each given R53 000,00. Accused 3 said it would be arranged that the Cape Town contingent, would receive their monies in Cape Town. Aspeling complained about his share of the proceeds after accused 1 explained that he and accused 3 would receive an additional R10 000,00 each in respect of hotel expenses and that a further R10 000,00 would be held back to replace accused 3's tyres. He also explained that amounts would be held back for other expenses including lawyers' fees.

EVENTS PRECEEDING THE DARLING ROBBERY

[30] Shortly before the second robbery, which took place some seven weeks later on 12 August 2003, accused 1 telephoned Aspeling and asked him whether he could again hire the same kind of truck for a similar job. In response to Aspeling's enquiry accused 1 told him that Zallie was just about to reach Cape Town. Aspeling told accused 1 that he would let him know in the morning about hiring the truck. The following morning accused 3 arrived with the deposit for the hire of the truck and Aspeling drove to Bera's transport business to make the necessary arrangements. It was agreed with Bera that the hire rate would be the same as had previously been the case save that no

payment would be made for the Saturday and the Sunday. Later that afternoon Aspeling collected the truck, picked up accused 2 and set off for Cape Town. Prior to departing accused 1 furnished Aspeling with a telephone number saying that it was accused 2's wife's cell phone which he would be using. Aspeling entered the number onto his own phone.

[31] They drove through the night and arrived in Cape Town the following morning at 08h00. Aspeling was directed to drive to the Engen truck stop en route to Malmesbury. After arriving there they were joined by accused 4 and 5 in the maroon *Volkswagen Caravelle* that had been used in the previous hi-jacking. From there they drove to the Waterfront Suites where he met accused 6, 7 and 10. Aspeling was upset with accused 1 over the presence of accused 6, 7 and 10 since he did not feel comfortable about their involvement. In his eyes they were "children" whom he knew from Ennerdale and who had respected him. When Aspeling asked accused 1 where Zallie was he was told that Zallie would not be with them and that he had not told Aspeling this earlier because accused 1 knew that he, Aspeling, would then not have seen to the hiring of the truck.

[32] Aspeling stated that had he known that Zallie would not be part of the trip he himself would not have agreed to be part of the group. When

they arrived at the *Waterfront Suites*, Aspeling recognised a red *Jetta* and received confirmation from accused 10 that it belonged to accused 1 and 2 and had been used to bring accused 1, 3, 6, 7 and 10 down to Cape Town. Accused 4 later arrived driving the blue *BMW* which had been used in the previous robbery. Earlier, at the Engen truck stop accused 1 had called accused 2 to say that the job was off that day.

[33] That day, Friday, accused 2 said he would be flying back to Johannesburg to celebrate his birthday. Aspeling and accused 10 took him to the airport that evening. On the Saturday morning Aspeling went with accused 1, 6 and 10 for breakfast to the Waterfront. They used the red *Jetta*, parking it in a bay reserved for people with disabilities. When they returned to the vehicle its wheels had been clamped. An official was called who unclamped the wheels telling accused 1 that he needed a sticker on his car to use such a bay. Later, in cross-examination, accused 1's counsel put it to Aspeling that his client had "bumped into" Aspeling at the Waterfront at that time when he, accused 1 was on a trip to the Cape to source car parts. There had been no breakfast however Aspeling denied these additional details.

[34] Returning to Aspeling's evidence, that same day, the Saturday, Zackie had arrived at the Waterfront Suites and then left with a number of the accused, apparently to go and purchase police uniforms. They returned

with police boots, pants, shirts and illuminated vests. There was a discussion about who would pose as police officers and accused 1 decided that accused 4 and 6 would fulfil these roles. Accused 3, 6 and Zackie left the apartment saying that they were going to look for a white *Golf* or a white *Polo* with which to do the job on the Monday. The following day, Sunday, Aspeling went with accused 1, 6 and 7 to the Grand West Casino where accused 6 and 7 applied for a "most valued guest" card (an "MVG card"). Aspeling was present when they made their applications and the cards were issued to them. Later that evening accused 2 returned from Johannesburg.

[35] The following morning, Monday, accused 2 and Aspeling went back to Montague Gardens, parked the truck near the BATSA depot and waited for further instructions. At approximately 10h00 accused 1 called number 2 and told him that the job was off and that they should return to the *Waterfront Suites*. Aspeling clarified that accused 6, 7 and 10 had not been in Cape Town earlier on the occasion of the first robbery. Early the following morning, Aspeling packed his belongings and drove with accused 2 to Montague Gardens. Accused 1 called accused 2 and told him to swap places with accused 8. Accused 2 then got into the *Caravelle* which had been used in the previous robbery and was replaced by accused 8 who directed Aspeling onto the Malmesbury road. En route they were passed by accused 1 and Zackie

Isaacs in a two-door silver *Audi*. At a certain point in the road Aspeling spotted accused 10 indicating to him to pull off the road alongside a BATSA truck the doors of which were already open. The *Audi* was a little further up the road whilst accused 4 was circling the area in a white *Polo* equipped with a blue light. The *Caravelle* was parked on the opposite side of the road. Accused 4 and 6 both wore blue police uniforms. Accused 2 and 3 were also present as were accused 9 and 10 who assisted in offloading the cigarette boxes from the BATSA truck into the hired truck. When the boxes had been transferred Aspeling and accused 8 drove the truck back to Cape Town along the way spotting a police helicopter hovering near the spot where the BATSA truck had been hijacked. Isaacs and accused 1 escorted them back to Cape Town in the silver *Audi* driving ahead of the truck. Shortly after arriving at the *Waterfront Suites* the *Caravelle* arrived carrying accused 2, 3, 5, 6, 7, 9 and 10.

[36] The Johannesburg contingent then left for home, Aspeling and accused 2 driving in the hired truck. They arrived in Gauteng the following morning at 08h00 and followed the red *Jetta* back to accused 1's house. When they offloaded the cigarettes and counted them there were again 163 boxes. Once again Aspeling drove the truck to accused 11's place of business following accused 2. There he reversed the truck into a warehouse. Accused 11 was present for a short while and

told his employees to help accused 2 and Aspeling to offload the truck and to pack the boxes properly, putting the boxes of mixed cigarettes to one side.

[37] After the unloading accused 2 went back to accused 11 to collect the balance of R6 000,00 owing for the truck hire. Aspeling assumed that accused 11 gave accused 2 the money because accused 2 emerged and gave this amount to the witness. Aspeling then drove the truck back to *Bera's Transport*, followed by accused 2 in the *Golf*, where the balance owing was paid and together they drove back to Ennerdale. Shortly afterwards Aspeling was contacted by accused 1 and the group met again at accused 2's house where each was paid R33 000,00 as his share of the proceeds. Once again there was dissatisfaction, this time from accused 6, 7 and the witness, regarding the amount deducted for expenses.

THE KINKELBOS ROBBERY

[38] Some four weeks after the Darling robbery Aspeling was contacted by accused 1 and met him and accused 2 at the former's house where they ascertained from him that he was agreeable to participating in a similar robbery in Port Elizabeth. Aspeling traced the change of the location of the proposed robbery back to a discussion that he had had with accused 2 when they drove back to Gauteng after the Darling robbery. They had agreed that the next robberies should take place in

the Eastern Cape – first in Port Elizabeth and then, possibly, East London. Some two weeks later accused 1 called Aspeling to arrange a trip to Port Elizabeth to scout in preparation for the robbery. Accused 1, 2 and Aspeling drove down to Port Elizabeth that night in the latter's *Mercedes Benz*. When Aspeling asked why accused 3, 6 and 7 were not accompanying them, accused 1 said that accused 3 had accused him (accused 1) of robbing his aunt of R90 000,00. In Port Elizabeth they began searching for BATSA's premises and eventually found the depot in the industrial area. Later an 8 ton truck pulled out of the depot and they followed it on its route to Alexandria. They passed the truck alongst the route and looked for a suitable place for the armed robbery. After finding such a location they headed back to Johannesburg stopping at Port Alfred along the way and then driving through Grahamstown. It was agreed that they would do the job at the month end. The following Saturday accused 1 called Aspeling and told him to hire the truck to leave on the Tuesday night for Port Elizabeth with a view to performing the robbery on the Thursday. On the Sunday, however, accused 3 visited Aspeling at his home and told him that accused 1 and 2 would no longer be going to Port Elizabeth. Aspeling assumed that this development had something to do with accused 1 being suspected of robbing accused 3's aunt of R90 000,00.

[39] Aspeling testified that he asked accused 3: "*What about accused 1 and*

2?". Accused 3 replied: "*Moenie oor hulle worry nie, hulle is nie ons base nie*". Accused 3 also said that accused 1 and 2 did not have the manpower to do the job since the Cape Town group would no longer work with them. Aspeling decided to go along with accused 3's arrangement and hired the same truck from *Bera's Transport* paying a deposit of R1500,00 on the Tuesday with his own funds. Later that day he returned to *Bera's Transport* with accused 7 to collect the truck and arranged to meet accused 3 at the Kroonvaal Toll Plaza. Accused 7 was driving a white BMW 5 series with accused 3 as passenger. At Colesberg they stopped to fill the truck with diesel and met up with accused 6, 7, Otto Watson and a certain "Grant". It was the first occasion that Aspeling had met Grant but he knew Watson from Ennerdale. They were driving a new white *Golf*.

[40] In Port Elizabeth they booked into accommodation for the night meeting up with accused 5, 8 and 9 who had travelled up from Cape Town in a white *Caravelle*. Someone mentioned that accused 4 was on his way up to Port Elizabeth by bus since he was scared to travel in the *Caravelle* because it contained the equipment. Aspeling assumed that the equipment was the blue lights and the police uniforms. At the accommodation, *Bantry Executive Suites*, Aspeling booked the party in under the false name of Hokai. Before this Aspeling had shown his accomplices where the BATSA depot was. After booking in Aspeling

showed them the BATSA truck's route to Alexandria and the spot which had been chosen on the scouting expedition as suitable for the stopping and robbing of the truck. That night accused 2 called him wanting to know when they would be leaving for Port Elizabeth. Aspeling fobbed him off saying that there was a problem with the truck and that in any event he was busy gambling at a casino. Accused 2 insisted on meeting Aspeling who told him that he would not be able to make it for the Thursday. When he relayed the discussion with accused 2 to the rest of the group their response was: "*Laat hulle gaan k-k, hulle is nie ons base nie, hulle rob ons in elk geval*".

[41] Nonetheless Aspeling believed that accused 1 and 2 suspected that he was in Port Elizabeth because they probably drove past his house in Ennerdale and saw that his vehicle was still parked in the yard. However, accused 1 also called Aspeling that evening and said that he was not feeling well and they should cancel the job. Those who stayed at the *Bantry Executive Suites* were accused 3, 6, 7, Grant, Otto Watson and Aspeling. Accused 4, 5, 8 and 9 stayed at other accommodation. As in the previous robberies Aspeling had his licensed firearm, a 9mm pistol containing live ammunition, with him. Accused 3 was in charge of the operation and instructed accused 4 and 6 to use the white *Golf* and to act as police officers. The following morning, on the way to the site of the robbery they met at a garage along the route.

When Aspeling pulled out of the garage the BATSA truck drove past.

[42] Accused 3 called him, saying: "*Die ouens het klaar gespan*". This signified to Aspeling that they had hijacked the truck and removed the driver and co-driver. When he arrived at the spot chosen for the robbery the BATSA truck was already there as well as the white *Golf* on the roof of which was a long blue light. The *Volkswagen Caravelle* was also on the scene. All the cigarette boxes were offloaded from the BATSA truck into Aspeling's truck whereupon he began to drive the truck alone back towards Johannesburg following the *BMW*. Otto was supposed to join him as passenger but climbed into the *Caravelle* instead.

[43] The route which Aspeling followed was towards Cradock. The *BMW* was supposed to drive ahead as an escort but it went off at great speed and he lost sight of it. As Aspeling was driving slowly up a steep pass a white *BMW*, which he recognised as a friend's vehicle, pulled alongside him with accused 1 as front seat passenger and Denzil Boyles as the driver. In the back of the vehicle, hanging out the window, was accused 2 brandishing a firearm which he pointed at Aspeling and said: "*Trek af of ek skiet jou deur jou kop!*". This took place at approximately 10h00 and approximately 50 km away from the scene of the robbery. Aspeling stopped the vehicle and accused 2, who

was very angry, climbed in and hit him in the face with the firearm saying: "*Vandag hijack die hijackers die hijackers*". Accused 2 took Aspeling's firearm from his kitbag, loaded it and also took his cell phone. He instructed the witness to resume driving and to follow the white *BMW* containing accused 1 and Denzil Boyles. Aspeling was re-routed on to the Queenstown route stopping occasionally to fill the truck with diesel or to eat. Aspeling stated that he was nervous and scared. At some point he asked accused 1 whether the dispute could not be resolved in some other manner. They proceeded in convoy to Johannesburg. At the Kroonvaal toll plaza accused 10 was waiting in a gold *Golf*. Accused 1 swopped from the *BMW* to the Golf and was driven off by accused 10.

[44] Accused 2 then instructed Aspeling to follow Denzil Boyles in the *BMW* to a *Formula 1* hotel in Alberton. All three booked into the same room at the hotel using accused 1's credit card. In the room Aspeling begged accused 2 to be allowed to make a call to his girlfriend and was allowed to do so. Accused 2 slept alongside Aspeling with a firearm under his pillow whilst Denzil Boyles slept on a bunk above. They left the hotel early the next morning stopping on the highway short of Johannesburg when accused 2 remembered that he had left Aspeling's firearm behind in the hotel room. He ordered Denzil Boyles to drive back to the hotel to fetch the firearm and the truck driven by Aspeling

on the instructions of accused 2 took the Comaro off ramp from where he was directed to the house of a relative of accused 2.

[45] Early that morning, outside the house, after a conversation between accused 2 and the relative, a person who was unknown to Aspeling, he was instructed to reverse the truck through the gate into the property. Accused 2 and the witness then loaded the cargo of stolen cigarettes into the garage. Denzil Boyles arrived in time to assist with the offloading and handed Aspeling's firearm to accused 2. Aspeling then heard accused 2 apparently speaking to accused 11 on his cell phone. He overheard accused 2 say: "*Bra Achie, as die trok loop sal ek jou bel dan moet jy jou trok stuur om die cargo te kom aflaai*". Aspeling was then instructed to follow Denzil Boyles in the *BMW* with the truck, accused 2 remaining behind and retaining his firearm and cell phone. Some 20km short of Frankfort in the Free State Denzil Boyles turned around leaving Aspeling with the truck low on fuel and with little money, some 200km from Johannesburg.

[46] The witness drove into Frankfort and called accused 1 from a public phone in a café. Accused 1 told him to call his accomplices himself and that he would have to see. The previous day accused 1 had told him that he should tell his accomplices that he had been hijacked by black men. Aspeling then called accused 3 and 7 on their cell phones. They

told him to wait there and that they were on their way to him. Accused 3, 6, 7, Otto and Grant eventually arrived in accused 7's *BMW*. Accused 3 gave Aspeling money to fill the truck with diesel which Aspeling then began to drive back towards Johannesburg with Otto as a passenger. After a short while Otto received a telephone call and told Aspeling to stop the truck. Otto then pulled Aspeling out of the truck and ordered him to climb into the *BMW*. They all drove off in the *BMW* leaving the truck behind unlocked.

[47] Accused 6 threatened to shoot Aspeling and cocked his firearm. Aspeling was pressed to tell the truth regarding what had happened to the cargo of cigarettes and he then explained how he had been hijacked by accused 1, 2 and Denzil Boyles. The witness was asked to take his accomplices to where the goods had been offloaded. He directed them to the dwelling in Comaro but when they looked through the windows of the garage there was no sign of the cigarettes. They then proceeded to fetch accused 3's *Golf* and the two vehicles left for accused 11's nursery in Lenasia. There they found accused 11 and told him that they were there for the cigarettes that accused 2 had delivered to him or for their money. Accused 11 denied that accused 2 had given him any goods and told them that accused 2 had called him in the morning saying that he had a "parcel" but that he would only deliver it to him during the course of the day. Accused 11 then used his

cell phone to call accused 2 and explained the problem. Accused 2 apparently asked to speak to Aspeling and accused 11 handed the phone to him. Aspeling then told accused 2 that they were there for the cigarettes or their money. Accused 2 suggested that they come to Ennerdale to meet at accused 1's house.

[48] Aspeling, accused 7 and Grant left for accused 1's house in the *white BMW* with accused 3, 6 and Otto in the *Golf*. En route they spotted accused 1, 2 and Denzil Boyles in the red *Jetta* travelling in the opposite direction. That vehicle stopped, u-turned and parked next to the stationary *BMW*. Accused 2 jumped out of the *Jetta*, screaming and threatening to shoot Aspeling's party. Accused 7 appealed for the dispute to be settled in a peaceful manner. Accused 2 remained in a fury, however, whilst accused 1, seated in the red *Jetta* was brandishing a firearm. The *Golf* carrying accused 3, 6 and Otto then pulled up whereupon accused 1 shot the front tyre of the *BMW*. As Aspeling tried to get out of the vehicle accused 1 fired a shot towards him but missed him. Accused 6 ran into the middle of the street armed with a firearm and began shooting in the direction of the red *Jetta*. Accused 2 was shot and lay on the ground screaming with pain. A large police truck driven by a policeman with two women passengers arrived on the scene and was noticed by the participants in the shootout.

[49] Accused 7 urged Aspeling and others to drive away saying that he would tell the police that accused 1 and 2 had tried to hijack them. Aspeling and Grant climbed in to the red Jetta in which accused 1 was seated and immediately drove off towards Ennerdale with the police truck in pursuit. Sitting in the rear Aspeling noticed a firearm and was instructed by accused 1 to throw it out the window which he did. Otto stopped the vehicle outside accused 1's house and both fled leaving accused 1 there. Aspeling went to his friend's place of business, borrowed a car and then arranged for a friend to take him to Frankfort. There he collected the truck where he had left it and drove it back to Bera's Transport, leaving it there.

[50] The following day Aspeling made contact with accused 3 and met him at his aunt's house where he found accused 4, 5 and 9. Negotiations began between accused 3 and 7 on the one hand and accused 1 for their group's share of the proceeds of the Kinkelbos robbery. Accused 3 and 7 told the others that accused 1 was waiting for accused 11 to bring money. At accused 1's insistance it was agreed that R60 000,00 of the proceeds would be held back to cover accused 2's medical expenses at Lenmed Clinic where he had been admitted. Accused 3, 4, 5, 6, 7, 9 and Aspeling continued to wait for their share of the proceeds.

[51] On the Saturday evening they were told that accused 1 had given R100 000,00 and Aspeling received R20 000,00 thereof. A day or two later Aspeling received another R4 000,00 which he had to use to settle the truck hire costs. Some days later, anxious to recover his firearm and cell phone, Aspeling called accused 1 who was upset about the loss of his own firearm which Aspeling had thrown out of the car on his instructions. He eventually agreed to return Aspeling's firearm and cell phone to him in return for the payment of R1 000,00 which Aspeling reluctantly paid. He received his firearm and his cell phone minus the ammunition and his sim card. From his proceeds of the robbery he had paid *Bera's Transport* R4 500,00. Thereafter he had no further contact with the accused until Otto Watson called to tell him that accused 1, 2, 3, 6, 7 and Clayton Paulsen had been arrested. For some time Aspeling tried to evade arrest by staying with different family members. Accused 3, 6 and 7 contacted him from prison and asked him to purchase airtime for them which he duly did and rang through the pin numbers. Accused 3 told Aspeling not to panic because they would not implicate him.

[52] On or about 7 November 2003 Aspeling was arrested at his residence on charges relating to the Darling robbery and he was warned of his rights. He surrendered his firearm and his cell phone to the police and

was taken to Germiston police station where he was charged and detained. In his initial interrogation by the police he denied any knowledge of the robbery but asked to consult his lawyer, a Mr. David May. On the latter's instructions he made detailed notes of his involvement in the robberies which were reduced by his attorney to affidavit form. These affidavits were eventually put before the police and the Director of Public Prosecutions and after some time Aspeling was told that the State had decided to use him as a s 204 witness. He co-operated with the investigating officer, Insp. Heydenrich, Supt. Du Plessis who was handling matters in Gauteng and Heydenrich's successor, Insp. Jonker. During the following weeks Aspeling was taken by the police to Port Elizabeth to identify various sites and to various locations in the Western Cape and Gauteng.

[53] After his appearance in the Malmesbury magistrates' court charges were withdrawn against Aspeling and he was placed in a witness protection programme. Amongst the places to which he was taken by the police were *Bantry Executive Suites* in Port Elizabeth, the Waterfront Suites in Green Point and the house in Observatory, Cape Town occupied by accused 5. Although initially uncertain where exactly it was, Aspeling eventually found the house. There he identified accused 8 who was arrested. Aspeling was shown a wide range of exhibits by the prosecutor including many photographs taken at various

scenes involved in the robberies and of vehicles confiscated in Gauteng. Amongst the exhibits he identified was an extract from the register of *Bantry Executive Apartments* under the name "Hokai", photographs of the guardhouse at accused 11's business premises, aerial photographs of accused 1's residence, photographs of the red *Jetta*, of the scene of the shooting incident in Lenasia, an extract from a docket containing cell phone numbers and names downloaded from the memory of his cell phone after his arrest, his cell phone record for the period 1 June to 18 September 2003 under his then cell phone number, extracts from the documents purporting to be cell phone records relating to Jimmy Maseko's phone which he had used during the first robbery and copies of three receipts issued to *Vernie's Transport* by *Bera's Transport*.

[54] That, in broad outline was the evidence in chief given by Aspeling over a period of four days. He was then cross-examined by six different counsel for a further eight days. Various themes were repeatedly expressed in the cross-examination. These included that Aspeling was a self-confessed liar and criminal; his expressions of remorse for his participation in the robberies were decried as false and he was accused of testifying for the State merely to save his own skin. He was also accused of having a criminal past. It was acknowledged by his cross-examiners that he participated in each of the robberies but, it

was said, he was falsely implicating each one of the accused.

[55] Instead, it was put to him, he in fact had been the ringleader in each of the robberies with his own gang of robbers and what he was attempting to do through his testimony was to protect those of his colleagues who were implicated by falsely substituting the accused for them. Limited admissions of certain aspects of Aspeling's evidence were made on behalf of certain of the accused, notably accused 1 and 2 relating to the scouting expedition to Port Elizabeth, and the aftermath to the Kinkelbos robbery including the shooting incident in Lenasia. Where these admissions were made, however, they were glossed with an innocent explanation. I shall deal with these aspects more fully when I deal with evidence corroborating that of Aspeling and when I analyse each of the accuseds' cases individually.

[56] Aspeling was subjected to lengthy cross-examination regarding the alleged discrepancies between his evidence and three statements drawn up on his behalf reduced to affidavit form by his attorney. He was probed, time and again, on the detail of his testimony regarding the three robberies and vigorously challenged on what were put to him were improbabilities, even gross improbabilities, in his evidence. Chief amongst these were his account of how he came to be drawn into the first robbery in Cape Town through his dealings with Zallie. It was put

to him that the entire account of how he was prepared to come down to Cape Town, notwithstanding the lies which Zallie had told him concerning the initial reason for the trip, was entirely improbable. So too, it was put to him, was his account of spending days in Cape Town before the realisation dawned that his accomplices were about to embark on a major criminal enterprise.

[57] Another area which attracted the attention of Aspeling's cross-examiners was his account of how the shootout in Lenasia South had ended with him jumping into accused 1's vehicle with Grant and driving off, in the process throwing away accused 1's firearm. This, it was put to him, and argued, was wholly improbable. Another area focussed upon was what was said to be the improbability of Aspeling being hijacked after the Kinkelbos robbery by accused 1 and 2 and, throughout the trip to Alberton, Comaro and Frankfort, his making no attempt to escape his captors.

[58] In regard to the criticism of Aspeling's evidence based on alleged omissions in and discrepancies between his affidavits and his evidence in court, it should first be noted that defence counsel chose to prove only one of Aspeling's three affidavits. It is not possible therefore for the Court to properly evaluate such alleged discrepancies or omissions within the context of the entire picture. Secondly, Aspeling's own

explanation for some omissions, namely, that he and his attorney envisaged that he would flesh out the affidavits in *viva voce* evidence, has both common sense and judicial approval in its favour. The courts have repeatedly emphasized that discrediting a witness on the basis of minor discrepancies in his/her prior statement/s is unjustified given that the purpose of an affidavit is to obtain the details of an offence, so that it can be decided whether a prosecution should be instituted against the accused or, in this case, to determine whether Aspeling would be be an appropriate s 204 witness. It was not the purpose of such affidavits to anticipate the witness's evidence in court to the last detail and it is absurd to expect of a witness to furnish precisely the same account in his statement as he would in his evidence in open court. See *S v Bruiners and Another* 1998 (2) SACR 432 (SE).

[59] It is, significant, however, that important aspects of Aspeling's evidence were confirmed or corroborated either by independent evidence, in several instances documentary evidence, and also by admissions or evidence emanating from the accused themselves. Firstly, it was apparent to all that Aspeling's account of the three robberies of the BATSA trucks was that of a firsthand participant. The detail which Aspeling gave about the robberies left no doubt that he was involved and, furthermore his account of the robberies was confirmed by a series of independent witnesses including the BATSA drivers and their

assistants involved in each robbery. As I have mentioned, Aspeling's account of the scouting trip to Port Elizabeth involving accused 1 and 2 was confirmed in broad outline by accused 2 when he testified. He stated, however, that the trip had nothing to do with a planned robbery of a BATSA truck but had ensued because Aspeling had approached accused 1 and 2 and told him that he was bringing goods from Port Elizabeth but was scared of accused 3 and required their protection. For this reason accused 1 and 2 had travelled down to Port Elizabeth with him so that he could show them the road which he would take back from Port Elizabeth when he fetched the goods. Likewise, accused 2 admitted that he and accused 1 had escorted Aspeling from the Eastern Cape back to Alberton and Johannesburg shortly after the initial scouting trip.

[60] During this trip accused 2 had indeed stayed at the *Formula One* hotel with Aspeling. However, at no stage had accused 1 and 2 been aware of what goods Aspeling was transporting back from the Eastern Cape in his truck. Accused 2 also admitted that he and accused 1 had been involved in a shooting incident at the same spot in Lenasia South described by Aspeling and that many of the participants whom Aspeling had described had indeed been involved. During that shootout accused 2 had indeed been shot in his leg and hospitalized in *Lenmed Clinic*, however, it had not been for the reasons contended for

by Aspeling. When accused 2 was arrested by the police he was still bandaged and he could only walk with the aid of crutches.

[61] It was impossible for accused 1 or 2 to deny that the shootout took place because the State led the evidence of Sergeant J Dlamini of the Lenasia South police station who drove the police truck which happened upon the scene of the shootout on 3 October 2003. He confirmed that it involved approximately ten men in a white *Golf*, a red *Jetta* and a white *BMW*. He confirmed too that after following the red *Jetta* he eventually came upon it standing outside an address in Ennerdale with accused 1 in the front passenger seat. Later at *Lenmed* clinic he found accused 2 lying on a stretcher in pain from a bullet wound. When accused 2 and several of the other accused later testified they all admitted the shooting incident but portrayed Aspeling, accompanied by unnamed black men, as the aggressor.

[62] Aspeling testified hearing that accused 4 had travelled to and from Port Elizabeth by bus rather than risk travelling in the Caravelle carrying equipment to be used in the robbery. The State led the evidence of various employees of *InterCape* mainliner which proved that the passenger list for a coach from Cape Town to Port Elizabeth on 1 October 2003 (exhibit "W") contained the name "V Victor" and a cell phone number, **072 105 7155** which was later linked to accused 4.

Similarly, the passenger manifest for a coach returning to Cape Town the following day, 2 October 2003, contained the same name and telephone number (exhibit "X"). An extract from the accommodation register for *Bantry Executive Suites* for the night 1/2 October 2003 showing the main occupant as "Hokai J", was similarly proved. Mr. Bradley Dantu, the driver of the BATSA truck robbed at Kinkelbos, identified accused 7 in an identification parade as one of the persons involved in the robbery. He also made a dock identification of accused 4 as the white man who had been dressed as a policeman at the scene of the robbery. When accused 2 was arrested an outside room on his property was searched and South African Police Services insignia and several sets of police uniform in the form of dark blue pants and light blue shirts were found. Accused 2 never tendered an explanation for this material beyond testifying that he had no knowledge thereof and implying that it had been planted there by the police.

[63] The State tendered in evidence copies of four invoices allegedly issued by *Bera's Transport* in respect of the hire of the truck used by Aspeling during 2003. The preface to the handing in, however, was that the State intended calling someone from *Bera's Transport* to verify the documents. This in fact was never done. In the circumstances it appears that all evidence and cross-examination relating to all but one of the invoices is inadmissible. Under cross-examination, Aspeling

explained that the invoice apparently issued on 6 August 2003, exhibit "UUU (3)" was in fact written out by him using *Bera's Transport's* invoice book. This evidence was not challenged and, since Aspeling no longer had the original of the receipt issued, provided corroboration that he had indeed hired a truck from *Bera's Transport* in August 2003 involving a deposit of R2000,00 and later paying the balance owing of R6 000,00, just as he had testified.

[64] Aspeling testified that shortly before the second robbery he had breakfast with accused 1 and others at the Waterfront on which occasion the latter's red *Jetta* had been clamped for parking in a disabled bay. The State called Mr. Klaas Van Rooyen, a security officer at the Victoria and Albert Waterfront who confirmed that he clamped such a vehicle on that day. Through him an original control sheet was handed up confirming the incident and identifying the *Jetta* and the driver as accused 1 who had furnished a cell phone number **072 460 4655**. Van Rooyen's evidence was not challenged in cross-examination. Accused 1 never testified. Accused 2 denied that he was in Cape Town at the time although he did admit that it was his car which was clamped and that accused 1 had been in Cape Town at the time. As stated earlier, accused 1's counsel admitted on his behalf in cross-examination that he was in Cape Town at the time. There is thus independent corroboration that accused 1 was in Cape Town shortly

before the Darling robbery, as was his red *Jetta*.

[65] Aspeling testified that on the Saturday preceding the Darling robbery accused 6 and 7 applied for an "MVG card" at the *Grand West Casino*. Mr. Alfred Hall, who was employed as a surveillance investigator by the casino, testified that on that date a Mr. Llewellyn Smith applied for and was issued with an "MVG card". His identity number was recorded as **770404 5246 089** and his cell phone number as **072 270 1704**. Hall testified that this person would have had to apply for the card in person and show his identity document. Apart from the discrepancy of one day between the dates, this witness's evidence corroborates that of Aspeling. In evidence accused 7 simply denied being either in Cape Town or at the casino at that time. A warning statement made by accused 7 was proved in evidence in which the accused furnished the same identity number as that recorded by the *Grand West Casino* (exhibit "S x 6"). (The proliferation of exhibits in this matter led to the alphabet being used up to seven times to identify all the exhibits. For ease of reading, exhibit "OOO", for example, will be shortened to exhibit "O x 3".)

[66] Aspeling testified that one of the participants in both the Rawsonville and Darling robberies was one, Zackie Isaacs, a member the Cape Town group. On the night of his arrest on 9 October 2003 accused 1's

red *Jetta* was searched by Superintendent Du Plessis, the officer in overall charge of the search and seizure operations. In the vehicle's cubby-hole he found a number of duplicate deposit slips. One of them, exhibit 25(4) reflected the depositor as being a Llewellyn Smith (accused 7) and the date as 15 August 2003. There a telephone number attributed to the said Llewellyn Smith is the same as that furnished to the *Grand West Casino* by the Llewellyn Smith who applied for an "MVG card" from *Grand West Casino*, namely, **072 270 1704**. Furthermore the deposit slip records a deposit of R47 000,00 in cash to a *First National Bank* account in Grassy Park, Cape Town to the credit of one Isgak Isaacs who the prosecution argued could have been none other than the selfsame "Zakkie" Isaacs. Although it must be said that the duplicate deposit slip is unclear, if scrutinized carefully these details are legible. Accused 7 denied any knowledge of the deposit slip or making the deposit in question but it offers some independent corroboration of Aspeling's evidence that at least one member of the Cape Town contingent in the Darling robbery received payment from a member of the Johannesburg group of a large sum of money shortly after the robbery.

[67] On 14 October 2003 Inspector Herselman conducted a search of a dilapidated house on a property adjoining that of accused 1. The occupant of the house, a Mr. Vincent Matthysen, as well as accused

1's wife both confirmed that the property belonged to accused 1. In the ceiling of the house an orange and yellow reflective jacket with the word "Police" prominently displayed as well as a South African Police Services inspector rank insignia was found as well as a bullet proof jacket with the word "Police" again prominently displayed in front and behind and carrying a police serial number. Also found was the outside cover of a bullet proof jacket but with no serial number. The reflective jacket was also identified by the witness as police issue and as having an official number. Matthysen was not arrested because he appeared to have a mental disability. Since accused 1 did not testify no explanation was proffered by him for the presence of this equipment on what appeared to be his property.

[68] A major potential source of corroboration for Aspeling's evidence lies in the voluminous records relating to the cell phone activity of cell phones allegedly used by the accused or other participants in the robberies. The admissibility of that evidence is disputed, however, and therefore I propose to deal with it separately. What can be said at this point however, is that Aspeling's own cell phone data, and that of Jimmy Maseko, who was not an accused, bears out Aspeling's evidence of being present on at least two of the crime scenes and being in telephonic contact with various accused at the time.

[69] Aspeling's evidence was extensively criticized by various counsel appearing for the accused. They argued that he repeatedly contradicted his own written statements and that he had clearly been "schooled" in his evidence. It was said that a distinctive feature of his evidence were the lies which Aspeling had told in the course of the three robberies including lies to his girlfriend, to the Bera's, the staff of the hotel in Port Elizabeth and to the South African Police immediately after his arrest. This criticism has, in my view, limited weight. All of these lies were readily admitted by Aspeling and were functional in the sense that they were necessary in order to keep his involvement and that of his fellow accomplices in the robberies known to as few people as possible. The only exception to this was when Aspeling initially lied to his accomplices in the Kinkelbos robbery as to how he had been robbed of the stolen cargo.

[70] Aspeling's evidence was also criticized on the basis that he sought constantly to diminish his role in the robberies. However, Aspeling freely testified that he was a full and knowing participant throughout the second and third robberies and, furthermore, that by the time that the first robbery was executed he knew in what he was involved. There may be stronger grounds to contend that Aspeling was not completely frank regarding at what stage he became aware that the purpose of the trip to Cape Town was to commit a major robbery. His account of how

he only slowly prised this information out of Zallie is not entirely in keeping with what appeared to be Aspeling's nature i.e. an assertive person who was unlikely to sit around in Cape Town for two or three days not knowing exactly what he was involved in. On the other hand his account of initially being gulled into the trip by Zallie on the basis that it was to fetch spare car parts from Klerksdorp is also credible. It is quite possible that for their own reasons the accused and Zallie kept vital information from Aspeling regarding the true purpose of the trip to Cape Town until late in the day.

[71] As far as another major area of improbability is concerned, at least according to defence counsels' arguments, I find nothing improbable in Aspeling's account of either the shooting or the aftermath thereto. In the first place the fact of the shooting is both established and admitted. Quite clearly, once the police vehicle was spotted the feuding factions comprising the accused and others were faced with a common and greater enemy. In the face thereof they immediately buried their differences for the time being and either fled the scene or furnished false explanations as to what had just taken place. To have done otherwise would have been to risk all being arrested and the three robberies being exposed. That they resolved their differences ultimately is borne out by Aspeling's evidence that a compromise was reached and the proceeds of the entire robbery was shared between

the original hijackers and, as accused 2 is said to have put it, “the hijackers of the hijackers”.

[72] As the summary of his evidence indicates, Aspeling testified over an extended range of subject matter namely, four robberies, the preparations for three of them and the aftermath of each robbery. This covered a period between June and October 2003 and involved, in the case of each robbery, up to ten persons. Aspeling testified in extraordinary detail regarding his role and that of the other persons whom he implicated in the robberies. He did so with great assurance and without being prompted by the State, so much so that during cross-examination Mr. Thompson, on behalf of accused 3 and 4 put it to Aspeling that his evidence in chief was delivered in a “faultless manner” and that his “demeanour was unshakable”. Aspeling was subjected to eight days of cross-examination by six counsel during which he was repeatedly questioned concerning the roles of various persons in the robbery. Notwithstanding this, counsel were unable to trip up Aspeling on more than a few details. In fact in his evidence Aspeling from time to time corrected counsel’s mistakes regarding the evidence he had already given. One aspect where he can be criticized in this regard was his evidence relating to the presence of accused 8 on the morning before the first robbery something which will be dealt with in greater detail in due course.

[73] This Court had an extended opportunity to observe the witness. He was, as was put to him on several occasions by counsel, clearly a man of considerable intelligence. He was, furthermore, articulate with a confident and assertive personality. He appeared to bear no particular malice or resentment against the accused despite oblique references to incidents which he regarded as threatening to his or his wife's safety and that of his son by his first marriage. This lack of malice was borne out by the fact that he had no hesitation in testifying that certain of the accused were not involved in certain of the robberies. So for example Aspeling testified that accused 6, 7 and 10 were not involved in the first robbery and that, in relation to the third robbery, accused 10 did no more than pick up accused 1 at the Kroonvaal toll plaza.

[74] For the most part Aspeling appeared to enjoy the battle of wits involved in his cross-examination. This was manifest in his tendency to sometimes become somewhat argumentative under cross examination, to ask the cross-examiner questions and to argue his own position or to seek to demolish the position being advanced by counsel on behalf of one or other of the accused. Notwithstanding these criticisms Aspeling's evidence as a whole and in cross-examination was most impressive. Counsel for accused 11, Mr. Spangenberg, placed great reliance on what he argued was Aspeling's failure to answer a critical

question in cross-examination. This incident must be seen in context, however. In the first place it occurred towards the end of Aspeling's marathon stint in the witness box and towards the end of his lengthy cross-examination. The cross-examination in question was at times aggressive if not ill-tempered with neither the cross-examiner nor Aspeling prepared to give an inch. Aspeling referred to it as a "tug of war". Its tone was evidenced by State counsel's objections to aspects of the cross-examination as being "bullying" and "sarcastic".

[75] Towards the end of his eleventh day in the witness box Aspeling declined to answer further questions concerning the issue of Zallie misleading him as to the true purpose of the trip to Cape Town. He did so on the basis that the answer would become "too lengthy". He continued to answer all other questions until Court adjourned for the day shortly thereafter. The following morning at the re-commencement of his cross-examination, Aspeling immediately declared himself willing to answer any further questions on the topic. He explained that he and the cross-examiner had "started on a rocky road" the previous day. Asked by the cross-examiner why he had refused to answer the previous day he explained, "but to me, it seemed as if we were at a type of war or something". In my view the explanation furnished by the witness for his refusal to answer was entirely credible. Further, his preparedness to answer the question the following day after more

mature reflection of his position largely negated any criticism that this incident adversely affected his credibility or indicated an inability to answer the question.

[76] Notwithstanding the extremely favourable impression which Aspeling made as a witness, his evidence was not without fault. I have already alluded to the improbability of aspects of his evidence relating to how he was drawn into the first robbery. A similar criticism can perhaps be levelled at his evidence regarding his initial false explanation to his accomplices as to what had happened to him whilst driving away from the scene of the Kinkelbos robbery with the cargo of cigarettes. Aspeling's explanation of his behaviour in this regard is that he did not want to disclose accused 1 and 2's role in the post-Kinkelbos hijacking because he wished to avoid the spectre of his accomplices charging off to Johannesburg to engage in a violent confrontation with accused 1 and 2. This explanation cannot be rejected out of hand since, given his intelligence and the fact that he'd already made the suggestion to accused 1 and 2, it seems clear that Aspeling had already then seen the possibilities of negotiating with accused 1 and 2 for a share of the proceeds of the robbery.

[77] Aspeling impressed as someone who had decided to make a clean breast of things and was quite prepared to admit to the criminal actions

in which he had been involved. He revealed himself as someone who kept cool in a situation of crisis or pressure and as someone who would invariably talk his way out of a tight corner rather than resort to violence or threats of violence. As far as accomplice witnesses are concerned, I have never previously encountered a witness who testified over so wide a terrain and in such great detail but with so little damage being done to his evidence. The above observations were made and impressions formed, on a *prima facie* basis, after hearing Aspeling testify in February 2006. Given the elapse of more than two years before argument was eventually heard I re-read his transcribed evidence in full after hearing argument which transcription was available to counsel throughout. If anything, this re-reading strengthened my first impressions of his evidence arrived at more than two years before.

[78] In summary then, Aspeling's evidence, although not flawless, contained no material contradictions or inconsistencies. What improbabilities there may be in his evidence are not of such a degree as to render his veracity suspect and certainly he has not been shown to be a deliberately untruthful witness. Notwithstanding the highly favourable impression which we have of Aspeling's evidence, the fact remains that he is both an accomplice witness and a single witness in respect of many material aspects of the State's case against the

accused. In terms of s 208 of the Criminal Procedure Act, 51 of 1977 an accused may be convicted of any offence on the single evidence of any competent witness.

[79] It is trite law, however, that, as a result of the danger of relying exclusively on the sincerity and perceptive powers of a single witness, a judicial practice has evolved that such evidence be treated with special care. The cautionary rule originated in remarks made by De Villiers, JP in *R v Mokoena* 1932 OPD 79 to the effect that the evidence of a single witness should only be relied upon where it is "*clear and satisfactory in every material respect*". However, over the years a more flexible approach to the testimony of a single witness has been generally accepted. This follows the decisions in cases such as *R v Nhlapo* 1953 (1) PH H 11 (A), *R v Bellingham* 1955 (2) SA 566 (A) , *R v Abdoorham* 1954 (3) SA 163 (N), *R v Mokoena* 1956 (3) SA 81 (A) and *S v Webber* 1971 (3) SA 754 (A). In the last mentioned case Rumpff, JA remarked, at 758G – H:

> "Dit is natuurlik onmoontlik om 'n formule te skep waarvolgens elke enkele getuie se geloofwaardigheid vasgestel kan word, maar dit is noodsaaklik om met versigtigheid die getuienis van 'n enkele getuie te benader en om die goeie eienskappe van so 'n getuie te oordeel tesame met al die faktore wat aan die geloofwaardigheid van die getuie kan afdoen".

[80] In *Nhlapo's* case Schreiner JA stated that:

> "…….. the cautionary rule (enunciated in ***R v Mokoena* supra) may well be helpful as a guide to the right decision, it naturally requires judicious application and cannot be expected to provide, as it were**

> ***automatically, the correct answer to the question of whether the evidence of the crown witness should be accepted as truthful and accurate".***

The learned judge added that it does not mean that an appeal must succeed *"if any criticism, however slender, of a witnesses evidence were well founded"*.

[81] In *R v J* 1966 (1) SA 88 (SRA) Mac Donald AJP expressed the view that the cautionary rules are "no more than guides, albeit very valuable guides, "which assist the Court in deciding whether the Crown has discharged the *onus* resting upon it". He added (at 90 E – F):

> "The exercise of caution should not be allowed to displace the exercise of common sense. And once a judicial officer has anxiously scrutinised the evidence of a single witness he should not be 'swayed' by fanciful and unrealistic fears."

In *S v Sauls* Dichmont JA stated as follows (at 180E – F):

> "There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness… The trial Judge will weigh his evidence, or consider its merits and de-merits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. "

[82] I am acutely aware, furthermore, that in respect of key elements of the State's case, Aspeling is not only a single witness but is, moreover, an accomplice witness. The evidence of such a person is treated as suspect for a number of reasons. Where such a person is seeking indemnity from prosecution, as is the case with Aspeling, his evidence may be motivated by a desire to implicate the accused irrespective of

the truth simply in order to improve his chances of obtaining indemnity. Secondly, because of the accomplice's particular knowledge of the crime or crimes concerned, he can easily phrase untruthful evidence in such a manner that it acquires a semblance of truth. This danger was expressed as follows by Schreiner JA in *R v Ncanana* 1948 (4) SA 399 (A) at 405:

> ***"…for an accomplice is not merely a witness with a possible motive to tell lies about an innocent accused. Such a witness is peculiarly equipped, by reason of his inside knowledge of the crime, to convince the unwary that his lies are the truth."***

[83] For these reasons our Courts have adopted a cautionary rule which was classically expressed, together with the reasons for such a rule, in *S v Hlapezula* 1965 (4) SA 439 (A) where Holmes JA stated (at 440 D – H) as follows:

> "It is well settled that the testimony of an accomplice requires particular scrutiny because of the cumulative effect of the following factors. First he is a self-confessed criminal. Second, various considerations may lead him falsely to implicate the accused, for example the desire to shield a culprit or, particularly where he has not been sentenced, the hope of clemency. Third, by reason of his inside knowledge he has a deceptive facility for convincing description – his only fiction being the substitution of the accused for the culprit. Accordingly… there has grown up a cautionary rule of practice requiring –
>
> ***(a) recognition by the trial court of the foregoing dangers, and***
>
> ***(b) the safeguard of some factor reducing the risk of a wrong conviction, such as corroboration implicating the accused in the commission of the offence, or the absence of gainsaying evidence from him, or his mendacity as a witness, or the implication by the accomplice of someone near or dear to him; see in particular R v Ncanana 1948 (4) SA 399 (A) at 405 to 406; R v Gumede 1949 (3) SA 749 (A) at 758; R v Nqantweni and Another 1959 (1) SA 894 (A) at 897 G – 898 D."***

[84] Satisfaction of the cautionary rule does not necessarily warrant a conviction, for the ultimate requirement is proof beyond reasonable doubt, and this depends upon an appraisal of all the evidence and the degree of the safeguard aforementioned. Thus although s 208 of the Criminal Procedure Act provides that an accused may be convicted of any offence on the single evidence of a witness, even an accomplice witness, it does not follow that the cautionary rule has ceased to apply. Before a Court will rely on the evidence of an accomplice therefore it will generally seek to find some circumstances which will reduce the danger that it might convict the wrong person. Amongst such safeguards are corroboration, the fact that the accused has chosen not to deny the accomplices evidence on oath, or where the accused has proved to be a lying witness.

[85] As was pointed in *S v Snyman*, however, the recognition by the court of the inherent dangers of accepting an accomplice's evidence and even despite the existence of some safeguard reducing the risk of wrong conviction such as corroboration, the failure to testify or mendaciousness ***"will not per se warrant a conviction, for the ultimate requirement is proof beyond reasonable doubt: and this depends upon an appraisal of the totality of the evidence and the degree of the safeguard aforesaid"***. Homes, JA went on to quote with approval Mac Donald AJP's dictum to the effect that the exercise

of caution should not be allowed to displace the exercise of common sense when assessing the evidence of witnesses whose evidence must be approached with caution. In *S v Francis* 1991 (1) SACR 198 (A) Smalberger JA, considering the evidence of an accomplice stated as follows:

> "It is not necessarily expected of an accomplice, before his evidence can be accepted, that he should be wholly consistent and wholly reliable, or even wholly truthful in all that he says. The ultimate test is whether, after due consideration of the accomplice's evidence and the caution which the law enjoins, the Court is satisfied beyond all reasonable doubt that in its essential features the story that he tells is a true one. (R v Kristusamy 1945 (AD) 549 at 556.)"

[86] Applying this collected wisdom to the circumstances of the present case, and not withstanding the most impressive quality of the evidence of Aspeling, the single and accomplice witness, I have come to the conclusion that it will be not be safe to rely, for a conviction, on the evidence of Aspeling alone. Instead, this Court will seek guarantees for the reliability of Aspeling's evidence against each and every accused, be that in the form of corroboration in some material respect, the failure of an accused to testify (obviously where there was a proper case for the accused to meet) or the mendaciousness of an accused in his evidence or in the evidence of his witnesses. In doing so the Court will have regard to all the factors which may be material in this regard, the above factors not being a closed list. The Court will bear in mind that the ultimate test is proof of guilt beyond reasonable doubt and that the case of each accused must be decided on its own particular

circumstances.

[87] As previously noted the State relied heavily on documentation recording cell phone activity as providing corroboration for the involvement of many of the accused in the robberies. That evidence was contested at every turn by defence counsel and it is necessary, therefore, to consider its general ambit and its admissibility.

[88] What I will refer to generally as the cell phone documentation, which was largely the evidence purporting to record, in written form, the cell phone activity relating to various cell phone numbers, was obtained by the State from various cell phone service providers through the issue of various subpoenas in terms of s 205 of the Criminal Procedure Act, 51 of 1977. The accused disputed the admissibility of all such cell phone evidence hence the first trial-within-a-trial which was held. The ambit thereof was furthermore extended to the admissibility of articles seized by the South African Police Services following the searches of the premises of various accused on or about 9 October 2003. The Court ultimately made the following order at the conclusion of that trial-within-a-trial:

> "1. The evidence derived from the s 205 subpoenas, exhibits RR2 and RR3, relating to the following accused's cell phone numbers and exhibits (where applicable) namely:
>
> ***Accused 1:*** ***<u>072 460 6755</u>*** ***exhibit "TT"***
> ***Accused 2:*** ***<u>072 221 2408</u>*** ***exhibit "….."***
> ***Accused 3:*** ***<u>072 565 6571</u>*** ***exhibit "SS"***
> ***Accused 6:*** ***<u>072 373 1856</u>*** ***exhibit "UU"***

is held to be inadmissible.

2. The evidence of and related to the articles seized following the search of accused 1, 2, 3, 6 and 7 on the premises occupied by them on or about 9 October 2003 is held to be admissible."

[89] No reasons were given for that order at the time but they are handed down together with this judgment. The following articles were seized from the following accused:

Accused 1: two cell phones as well as documentation removed from the cubby-hole of accused 1's red *Jetta*;

Accused 2: two cell phones and a black plastic bag containing various items of police uniform and insignia;

Accused 3: a cell phone and a white *Volkswagen Golf* ;

Accused 6: a cell phone; and

Accused 7: a white *Volkswagen Polo*, a white *BMW* vehicle, two cell phones and documentation relating to the vehicles.

[90] A further trial-within-a-trial was held concerning records relating to the usage of certain cell phone records before, during and after the third robbery near Kinkelbos in October 2003. Those records were similarly obtained from the service providers through s 205 subpoenas authorised by the Port Elizabeth magistrate. Once again that documentation was held inadmissible when the evidence brought to light that the magistrate had failed even to appreciate the test which he was required to apply in considering the applications for a subpoena. That order was made on 11 April 2006 and held that the evidence derived from exhibit "B x 4" and "C x 4" namely, s 205 subpoenas

issued by the magistrate, Port Elizabeth, was inadmissible.

[91] The third trial-within-a-trial was then held in relation to the admissibility of much the same cell phone records but procured from cell phone service providers by way of further subpoenas issued in terms of s 205 of Act 51 of 1977. In that matter judgment was delivered on 20 April 2006 with full written reasons which culminated in the following order:

> "The evidence obtained by the State pursuant to the subpoenas authorised in respect of Vodacom on 24 February 2006 and MTN on 9 March 2006 (pages 1 – 4 of annexure "EEEE") is admissible."

The said annexure comprised two s 205 subpoenas. The first was addressed to Ms Petro Heynecke or a representative of *Vodacom* to place the following information before the prosecutor or investigating officer:

> "1. Detailed billing records pertaining to the under-mentioned cellular telephones, including calls made and received, location of the user and handset queries for the period 2003/06/01 at 00.00 till 2003/09/02 at 24.00:

1.1: ***072 200 9633***
1.3: ***072 460 6755***
1.4: ***072 565 6571***
1.5: ***082 776 2314***
1.6: ***072 231 2408***
1.7: ***072 373 1856***
1.8: ***072 105 7155."***

The second subpoena was addressed to Ms Hilda du Plessis or a representative of *MTN* and required her to produce the following:

> "1. Detailed billing records pertaining to the under-mentioned cellular telephones, including calls made and received, location of the user and handset queries for the period 2003/06/01 at 00.00 till 2003/09/18 at 24.00:

1.1: ***083 971 4426;***
1.2: ***083 364 3235;***

1.3: 073 269 9117."

[92] Paragraph 3 of the subpoena read as follows:

> ***"It is requested that it be established as to which sim card numbers (cell phone numbers) was used in under-mentioned cell phones (handsets/IMEI) for the period 2003/06/01 until 2003/11/01:***
> "3.1: ***350148-20-807320-8***
> ***3.2: 449342-20-267307-13***
> ***3.3: 350606-20-930114-2."***

In due course Ms Hilda du Plessis testified she was employed by *MTN* as a forensic data analyst and had access to *MTN's* database. She was then the only person who dealt with forensic requests for access to *MTN"*s database. The witness testified that from time to time *MTN* received requests from the South African Police Services for cell phone data in terms s 205 of Act 51 of 1977. In its basic form the data is in electronic format and cannot be manipulated or falsified. It can only be manipulated when copied to *Excel* spread sheets but certainly no such manipulation takes place within *MTN*. Data which is older than two or three years is kept in a back-up system in the company's archives.

[93] The witness was aware of the subpoena issued in 2006 by the Cape Town magistrate, namely, the subpoena contained in exhibit "EEEE". The data which was sought was not immediately available because it had been archived. *MTN* personnel worked after hours and over weekends to make the data available and convert it into a readable format. She was not able to retrieve data in respect of the number **083 364 3235**. The witness's attention was directed to exhibits

"QQQQQ(1)" – "QQQQQ(5)" and identified the documentation as emanating from *MTN*'s computerized database. She identified exhibit "QQQQQ(2)" as cell phone data relating to the number **073 267 9117** for the period 1 June 2003 till 18 September 2003. The State seeks to link this cell phone number to Jimmy Maseko whose phone Aspeling testified he used during the first robbery. Du Plessis identified exhibit "QQQQQ(4)" as being data pertaining to the number **083 971 4426**. This number was allocated to "Telematrix", a satellite tracking company. The State sought to link this phone to accused 3. The witness then identified exhibit "QQQQQ(5)" as relating to telephone number **083 364 3235**. The State sought to link this number to accused 8.

[94] In cross-examination it was put to the witness that the data was not reliable, a proposition with which she disagreed. The authenticity of the documentation was not challenged in cross-examination. Another employee of *MTN*, a Mr. Cornelius Basson, testified that he was responsible for the operation of the systems which generate, select, mediate and supply call data records (CDR's) to the *MTN* billing system. He stated that the operating systems are pre-tested to the highest possible level of security and error-free operation and are protected against hardware failure. He added that the systems involved in generating, transporting, collecting and processing CDR's are

properly maintained, monitored on a continuous basis and deliver a very high level of reliability and security. There were no reasons to infer that any information or records provided by these systems were in any way inaccurate or had been tampered with.

[95] Pursuant to the other subpoena issued, contained in exhibit "EEEE", Ms Petro Heyneke, an employee of *Vodacom*, was called to testify. She is the forensic liaison manager at *Vodacom's* head office and is responsible for releasing call-related information by means of a directive from *Vodacom*. She had received internal training in the usage of cell phones and the working of the *Vodacom* systems from engineers, technicians and various other responsible persons. The systems in question are the billing and administration systems whereby cell phone data and ownership is determined. The *Vodacom* systems hold the history of a sim card of a handset since 1998 and only a specified user group is allowed to use the system. The data contains all cell phone activities such as incoming and outgoing calls, sms's and voice messages left by other parties. It contains both successful and unsuccessful calls, the only thing not being registered being a missed call.

[96] The witness's attention was directed to exhibit "VVV", being a guide to explain what is meant by the various columns in *Vodacom*'s standard

form cell phone data. The first column contains the cell phone number, being the number allocated to a sim card by *Vodacom*. The second column contains the IMSI number which is encrypted into a sim card and read by the system. It is a unique number identifying a cell phone number and is not visible on the sim card. A third column contains the IMEI number which identifies the handset being used. The fourth column contains the call date and the fifth column the call type. “MOC” stands for mobile originating call and indicates that it is an outgoing call. “MTC” indicates that it is a received call. The sixth column reflects call duration which is measured in seconds, “0” indicating that it is an sms. The seventh column is the number dialled or a call received. Only outgoing sms’s appear because this is what the customer pays for. The cell phone number of incoming sms’s does not appear. The ninth column is the cell ID. This reflects base stations which are cell phone towers along roads which transmit the cell phone signal. Each base station has a unique number. The tenth column contains the base station which transmits the strongest signal in relation to calls made or received in a moving vehicle. The originating base station will be indicated in the data but the system will not pick up another base station if passing through the radius of another base station.

[97] The witness’s main responsibilities related to the data. It is released in the encrypted portable version format (PDF) to show that the data has

not been tampered with. The exhibits before Court are in the *Excel* spreadsheet format since the information was requested in e-mail format and printed in e-mail format. The police requested the data to be e-mailed because of the volume thereof and because the encrypted version cannot be e-mailed. Only once the data is moved from PDF to *Excel*, can it be tampered with. The data is processed in massed volumes. Since *Vodacom* receives many subpoenas they do not know the detail of the various cases. *Vodacom* cannot change one set of data without changing another set of data emanating from Vodacom.

[98] The witness then had her attention directed to various bundles of documentation. She identified exhibit "QQQQ(3)" as *Vodacom's* data relating to the number **072 105 7155**, listed as 1.8 in the relevant subpoena. The State sought to link this number to accused 4. She identified a further portion of the exhibit as relating to the number **082 776 2314**, item 1.5 in the subpoena. She testified, using exhibit "OOOO", that *Vodacom's* ownership profile of the number reflected it as having been allocated to one Yolanda Zeelie in a contract whose term was from 1 March 2003 until August 2003 when it was deactivated. The State sought also to link this number to accused 4.

[99] Ms Heyneke identified exhibit "QQQQ 1" as being *Vodacom* cell phone data relating to telephone number **072 200 9633**, item 1.1 in the

subpoena and, according to the evidence of Aspeling, his cell phone number in or about June 2003. The witness then identified the next portion of the exhibit as the *Vodacom* data pertaining to a prepaid number **072 105 7155**, item 1.8 in the subpoena, another number which the State sought to link to accused 4. The witness identified a further portion of the bundle of *Vodacom* documentation pertaining to cell phone number **072 565 6571**, a cell phone number the State sought to link to accused 3.

[100] The next portion of the exhibits was identified by the witness as being the **Vodacom** cell phone data pertaining to the number **072 372 1856** (item 1.7 in the subpoena), a number which the State sought to link to accused 6. She identified exhibit "TTTT" as being a printout of documentation in respect of that cell phone number. Heyneke identified exhibit "QQQQ(5)" as being the cell phone documentation pertaining to the number **072 565 6571**, item 1.4 in the subpoena, and the number which the State sought to link to accused 3. She identified exhibit "SSSS" as being a profile of the sim card in question. The witness identified exhibit "QQQQ(6)" as being the *Vodacom* documentation relating to the number **072 460 6755** and exhibit "UUUU" as being the sim card profile relating thereto. The number in question, item 1.3 in the subpoena, was one which the State sought to link to accused 1. The witness identified exhibit "QQQQ(7)" as being the *Vodacom*

documentation pertaining to **072 221 2408**, for the period September to early October 2003, this being the number the State sought to link to accused 2. She identified exhibit "VVVV" as being the *Vodacom* sim card profile relating to such number.

[101] The witness testified that she personally downloaded all the data she identified as well as the data supplied to the investigating officer in the encrypted format. The data was never tampered with nor changed in any way except to sort it into chronological order. The system which delivered the documentation was designed in accordance with a global system for telecommunication and is regulated in terms of law relating to licence agreements. The witness confirmed that the data was received from the archives in encrypted form and then printed in *Excel* form, the format thereby being altered.

[102] Mr. Jasper Smit, employed by *Vodacom* as manager of billing support, testified that he was responsible for the integrity of *Vodacom's* systems as far as the retrieval of data was concerned. He stated that over the past three years the provider had experienced no problems in relation to said systems and that cell phone data cannot be manipulated. Data files are kept in the system for a period of six months and retained for a number of years in *Vodacom's* archives. Various arguments were raised by counsel in support of the submission that the cell phone

documentation was not properly before Court.

[103] Mr. Spangenberg contended that the data or information arising from electronic communications must, in criminal proceedings, be proved in accordance with the provisions of s 15(4) of the Electronic Communications and Transactions, Act 25 of 2002, which reads as follows:

> "A data message made by a person in the ordinary course of business, or a copy or printout of an extract from such data message certified to be correct by an officer in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law… admissible in evidence against any person and rebuttable proof of a fact contained in such record, copy, printout or extract."

His argument proceeded that the *Vodacom* and *MTN* employees did not qualify as an "officer" nor were the cell phone records certified as required by s 15(4) of the Act.

[104] However, the clear purpose of s 15(4), assuming that it is applicable to the cell phone data or documentation at issue in the present matter, is the placing of such evidence before a court or tribunal without the necessity of having to call a witness to prove the authenticity and veracity of such documentation. The existence of the section in no way precludes the State, or any other party for that matter, from placing such documentation before a court and proving its authenticity and accuracy through, *inter alia*, *viva voce* evidence. In my view the evidence of Messrs Heyneke, Du Plessis, Smit and Coetzee

adequately established the authenticity and accuracy of the cell phone documentation and the submission that it is not properly proved on this ground is without substance.

[105] Counsel for accused 2 also argued, at a late stage, that the cell phone documentation had not been properly proved. The additional argument which he raised, and with which counsel for the other accused associated themselves, was that the subpoenas pursuant to which the service providers had furnished cell phone documentation were nullities for want of compliance with the provisions of Uniform Rule 54(5), more particularly in that they had not been signed by the Registrar of the High Court. Counsel did not indicate, however, which subpoenas he referred to. On the assumption that they were those contained in annexure “EEEE”, the first point to be noted is that the subpoenas were issued in terms of s 205 of Act 51 of 1977 out of the magistrates’ court. They bear, in the first place, the signature of the Director of Public Prosecutions pursuant to his request to the witness to attend before the magistrate of Cape Town for examination by the public prosecutor. The subpoenas are counter-signed by the magistrate of Cape Town who orders all police officers to subpoena the witnesses to appear in person before a magistrate on a given day for examination but with the proviso that should the witness furnish the required information to the satisfaction of the authorised prosecutor

prior to the examination date, he/she will be under no further obligation to appear before the magistrate.

[106] The reference by counsel to uniform Rule 54(5) appears to be misplaced since the subpoena was issued out of the magistrates' court and therefore s 179(1)(a) of Act 51 of 1977 would ordinarily be applicable. That section provides that the prosecutor may compel the attendance of a person to give evidence or to produce any document in criminal proceedings "*by taking out of the office described by the rules of court the process of court for that purpose*". The applicable rule of court is magistrates' court rule 64 which requires the subpoena to be issued by the clerk of the court. The subpoenas in question do not bear the stamp or the signature of the clerk of the court. However, the witnesses in question obviously considered and responded to the subpoenas on the basis that they were lawful and valid, the process having been signed and issued by the Director of Public Prosecutions and the magistrate, Cape Town. In any event and even if there is some formal defect in the subpoenas this does not nullify the evidence given by the service providers pursuant thereto. Commenting on the practical application of s 205(1), and after reviewing the authorities, Du Toit, Commentary on the Criminal Procedure Act, published by Juta, states (at page 23-52 B) that s 205 does not require the issue of a subpoena. It merely provides that a magistrate may "require" the attendance of a

person concerned and this may be done in an informal fashion.

[107] Du Toit points out, furthermore, that s 205(1) has been substituted again by s 59 of The Regulation of Interception of Communications and Provision of Communication–related Information, Act 70 of 2002. S 15 of that Act deals with the availability of other procedures for obtaining real-time or archived communication-related information and provides as follows:

> "(1) Subject to subsection (2), the availability of the procedures in respect of the provision of real-time or archived communication-related information provided for in s 17 and 19 does not preclude obtaining certain information in respect of any person in accordance with the procedure prescribed in any other Act."

[108] It is clear, therefore, that neither of the challenges raised by the accuseds' counsel in any way supports the notion that the documentary cell phone evidence was not properly proved by the State. Further, in my view, subject to adequate proof that individual cell phone numbers can be attributed to the accused or other parties involved in the robberies, not only is such evidence admissible against the accused, but potentially carries significant evidentiary weight.

THE WEIGHT OF THE CELL PHONE EVIDENCE

[109] The cell phone evidence can be likened to a cobweb, both in its intricate and interlinked nature and its potential to enmesh the users of the cell phones in its strands.

[110] I propose to deal with this evidence, in the main, on an accused by accused basis save for those aspects which are more conveniently dealt with on a general basis. These areas include but are not necessarily limited to, Aspeling's cell phone data, and how certain of the accused's numbers were proved from an independent source.

THE EVIDENCE OF THE INFORMER MENTOOR

[111] Cell phone numbers connected to the robberies first came to the fore through information provided through an informer, Mr. Alfred Mentoor. A policeman, Detective-Sergeant Kenneth Speed and a Mr. Henry Cottle, a security official in the employ of BATSA, testified regarding meetings they held with Mentoor whilst he was in custody in the Roodepoort area in late September 2003 and after he had contacted the police with a view to furnishing information relating to the Rawsonville and Darling robberies. Mentoor explained that he had a cellular phone in his possession containing the names and cellular phone numbers of persons involved in the robbery. Speed accessed the phonebook facility on Mentoor's sim card and wrote down the names and numbers displayed. Mentoor later testified that accused 1, 2, 3, 6 and 7 were all known to him. Accused 1's number was recorded as **072 460 6755**, accused 2 as **072 221 2408**, accused 6 as **072 373 1856**, and accused 7 as **072 270 1704**.

[112] Speed was also involved in executing a search warrant at the premises of a Ms. Yolanda Zeelie in Durbanville in an effort to track down accused 4. From her cell phone he downloaded the following references to "Vernon", being accused 4's Christian name, in her cell phone's directory: "Vernon Liefie, number **082 776 2314**" and "Vernon No. 2, number **072 105 7155**".

ASPELING'S CELL PHONE EVIDENCE

[113] Aspeling testified that the cell phone number which he used from June until the beginning of October 2003 was **072 200 9633**. His evidence was further that during the first robbery, as a result of a lack of airtime, he used the cell phone belonging to Jimmy Maseko who was also involved in the robbery, the latter's number being **073 267 9117**.

[114] Analysis of the *Vodacom* data indicates that Aspeling's cell phone was indeed active in the Cape Town area around the period of the first robbery, namely, 20 – 24 June 2003 and for the period around the second robbery, that in Darling, namely, 7 – 12 August 2003. In fact his cell phone was used in the immediate vicinity of the crime scene in the Darling robbery on 12 August 2003. The records also reveal that Aspeling's cell phone was active in the Eastern Cape on 18 September 2003, namely, the time, according to his evidence, when he went down

to Port Elizabeth on a scouting trip with accused 1 and 2.

[115] An analysis of the *MTN* cell phone data relating to the number Aspeling attributes to Jimmy Maseko indicates that the cell phone was indeed active in the immediate vicinity of the BATSA depot in Montague Gardens and on the crime scene on 24 June 2003 – the day of the commission of the robbery in Rawsonville. In short, then, Aspeling's cell phone data and the data emanating from the number attributed to Jimmy Maseko corroborate Aspeling's evidence of his involvement in the first two robberies and the scouting trip to the Eastern Cape. The evidence was that after being arrested for his part in the first robbery Jimmy Maseko escaped from custody but not before Detective-Inspector Jonker, then the investigating officer, completed an information profile of Maseko for use by the Serious and Violent Crimes Unit. Jonker obtained certain personal information from Maseko for use in that form including two cell phone numbers one of which matched the number given by Aspeling as Maseko's number.

THE ANALYSIS OF THE PHONES SEIZED FROM THE ACCUSED

[116] Various police officers testified concerning the cell phones seized from the accused during the search of their residences on the night of their arrest, namely, 8/9 October 2003. The evidence was that the cellular phones seized during the arrest were handed to Superintendent Du Plessis who was in overall charge of the operation on the night in

question. The phones were sealed in forensic bags either by the arresting officers or by Du Plessis himself and the particulars of the phones were recorded on the forensic bags. Superintendent PJ Viljoen received in due course a sealed forensic bag which contained cell phones and ten sim cards. Through a network of evidence the State was able to match, in most instances, such phones and sim cards to individual accused and, upon an examination of the cell phone data relating to such cell phone and/or sim card, link the phone to one or more of the robberies. I do not propose to deal with the detail of this evidence *en bloc* but rather deal with it *seriatim* as I deal with each of the accused.

[117] General criticisms were made by defence counsel of the reliability and accuracy of the cell phone data. The first such challenge was based on what was said to be a lack of technical competency on the part of the *Vodacom* and *MTN* representatives to testify regarding the integrity of their data recording and retrieval systems and the accuracy thereof. As I stated earlier, in my view this challenge has no substance. The second criticism was that because of various alleged discrepancies found in certain billing records, the data as a whole was unreliable. One example was an instance where a phone call appeared to have been made from a base station in George when this would have been physically impossible and, secondly, a large discrepancy in the number

of phone calls made and received over a certain period by a cell phone number. The confusion relating to the base station was adequately explained by the service provider's representative. Even assuming the lack of an adequate explanation for the second discrepancy, a point sprung upon the witness, the existence of this one discrepancy amidst hundreds if not thousands of pages of cell phone documentation, whose accuracy was uncontested, in no way serves to discredit the evidence's general accuracy and reliability.

[118] During cross-examination of one or more police witnesses defence counsel demonstrated that, contrary to the witness' belief up to that point, it is possible to manipulate the so-called IMEI number of the cell phone so that the same cell phone appears to have two such numbers. That evidence alone does not, in my view, assist the accused in contesting the accuracy or reliability of the cell phone data. A number of the accused who testified repeatedly suggested that incriminating cell phone data had been fraudulently contrived by the police or BATSA to falsely implicate them in the robberies. These allegations were never backed up by any evidence at all. When one has regard to the volume and complexity of the cell phone documentation it will be appreciated that a conspiracy by the police or BATSA to falsely implicate one or more of the accused by manipulating cell phone data or phone directories would require an extraordinarily detailed and

sophisticated conspiracy involving not only a good number of police officials and BATSA security officials but also, in all probability, *MTN* and *Vodacom* employees. If I understood the submissions of the defence correctly this conspiracy was embarked upon with a view to falsely implicating innocent persons in the three robberies. In my view the conspiracy allegations are both unsubstantial and completely far-fetched.

[119] The cell phone evidence went further than simply placing the phones of various accused at the scenes of one or more robberies. It also recorded numerous linkages between the accused as they communicated with each other before, during and after the robberies and during scouting expeditions. The State led the evidence of a Mr. Peter Schmitz, an expert in the area of geographic profiling and a field he termed “geo-infomatics”. On the basis of the cell phone data supplied to him by the police as well as BATSA’s data regarding the electronically logged movement of the three BATSA trucks involved in the robberies as recorded in their electronic tracking system, the witness produced maps depicting such cell phone activity by combining the data. He linked calls and linked the cell phone locations using call tower identification and on this basis prepared four maps each in respect of the Rawsonville and Darling robberies, two in respect of the first Kinkelbos robbery and two in respect of the second Kinkelbos

robbery.

[120] The maps present a damning picture of how the robberies were accompanied, preceded and followed by cell phone activity linking various cell phone numbers attributed to certain of the accused involved in the robberies. They both illustrate and confirm Aspeling's general account of the dates, timing and chronology of the robberies and much of his evidence concerning the role of a number of the accused therein.

THE CASE AGAINST INDIVIDUAL ACCUSED

ACCUSED NUMBER ONE AND TWO

[121] I now propose to focus on the case of each accused. Accused 1 did not testify. However, accused 2, his brother, did. In doing so he made extensive reference to accused 1. The details of his defence, in many instances, covered accused 1 as well. Accordingly I shall deal with the cases of accused 1 and 2 together.

[122] Aspeling implicated accused 1 in the first two robberies. He implicated accused 1 in the scouting expedition in respect of the third robbery and then in Aspeling's robbery immediately after the commission of the Kinkelbos robbery. Aspeling identified accused 1 as having used a firearm in the confrontation in Lenasia South on 3 October 2003. Independent evidence directly implicating accused 1 was that relating

to the wheel clamping of accused 1's red *Jetta* at the Waterfront, Cape Town on 9 August 2003, three days before the Darling robbery and the discovery of police insignia and police bullet-proof jackets in the ceiling of the dilapidated house on the property owned by him, adjoining his own residence. There was also the evidence that the accused's red *Jetta* was found outside his residence with a shattered window and with himself inside shortly after the shooting incident in Lenasia South. On the night of his arrest the selfsame vehicle was searched and certain deposit slips, one of them recording a substantial payment to a certain Isgak Isaacs in Grassy Park, was found.

[123] Notwithstanding this large body of incriminating evidence accused 1 chose not to take the stand. Instead he relied upon evidence given on his behalf by accused 2.

[124] Aspeling similarly identified accused 2 as being deeply involved in the first and second robbery, in a scouting expedition to Port Elizabeth and in Aspeling's robbery and hijacking after the commission of the Kinkelbos robbery. Aspeling furthermore identified accused 2 as a central figure in the shooting incident in Lenasia South on 3 October 2003 when he was wounded. When accused 2 was arrested seven days later he was on crutches recovering from a bullet wound to his thigh. A large bundle of police uniforms and insignia was found in an

outhouse on his property on 9 October 2003 when accused 2 was arrested.

CELL PHONE EVIDENCE RELATING TO ACCUSED NUMBER ONE

[125] Mentoor furnished accused 1's number as **072 460 6755** under his first name, "Selwyn". That same number was found on the phone directory of phones seized from accused 3 and 7. The same number was given by Aspeling in respect of accused 1. Two phones and three sim cards were seized from accused 1 upon his arrest. Evidence of a subscriber profile from the *Vodacom* representative linked one of the sim cards to that particular number. The data relating to that telephone number indicates that the cell phone was active on or in the immediate vicinity of each of the three robbery scenes.

CELL PHONE EVIDENCE RELATING TO ACCUSED NUMBER TWO

[126] Mentoor testified that accused 2 used the cell phone number **072 221 2408**. The same number was found on the phone directory of phones seized from accused 3 and 7 under name of "Virgil" and "Viega". Two cell phones and two sim cards were seized from accused 2's premises upon his arrest. One of the sim cards was identified by the *Vodacom* representative as linking to the aforementioned cell phone number. An analysis of the cell phone data relating to such number indicated that the phone number was active in the vicinity of the crime scene on 2

October 2003 during the commission of the Kinkelbos robbery.

[127] Accused 2 gave evidence and called three witnesses. He denied his involvement in any of the three robberies or in the hijacking and robbery of Aspeling. He raised an alibi defence in respect of the first robbery stating that he was in Johannesburg at the time and attended the funeral of a friend, one Reggie Marais, on Saturday, 21 June 2003. He handed in a funeral programme listing himself, accused 6 and accused 7 as pallbearers. He testified that his brother, accused 1, also attended the funeral. When asked why his alibi in respect of the first robbery was not put to Aspeling he could give no answer. Questioned regarding the details of the funeral he was vague.

[128] The two witnesses whom he called to substantiate his alibi, Mrs. Eleanor Marais and Mr. Josia Van der Merwe, gave unsatisfactory evidence. The former stated that both accused 2 and 1, a paraplegic, were pallbearers, later correcting this to say that only accused 2 was a pallbearer. She was uncertain even of the date of the funeral. A contradiction arose between Marais's evidence that accused 1 and 2 were in the house and accused 2's evidence that they sat outside in the car. Significantly, the programme reflects accused 6 and 7 as pallbearers and Aspeling's evidence was that they were indeed not involved in the first robbery.

[129] Accused 2 denies that he was in Cape Town at the time of the Darling robbery on 12 August 2003. Interestingly, he testified, initially that his birthday was on 10 August but then changed this to 12 August. He denied, however, that he was taken to Cape Town Airport by Aspeling on the night of 9 August 2003 to fly back to Johannesburg to celebrate his birthday, as Aspeling had testified. Accused 2 gave an account of his activities over the period and called an employee, Mr. Josia van der Merwe, to confirm that he was busy with taxi duties and also that he was at the funeral. This witness's evidence was very poor and he could give no satisfactory explanation as to how he could remember seeing accused 1 and 2 and other accused at the funeral after having been first approached to give evidence in this regard two and a half years after the funeral.

[130] In regard to the third robbery, accused 2 denied being part of the scouting expedition to Port Elizabeth on or about 17 September 2003 but testified that he was involved in a trip to Port Elizabeth with accused 1 and Aspeling on 24 and 25 September 2003. His evidence in this regard is gainsaid by Aspeling's cell phone records which do not place him in Port Elizabeth at this time. Accused 2 testified, furthermore, that at the time of the Kinkelbos robbery Aspeling had called him and accused 1 from Port Elizabeth and asked them to come

down and escort him back to Johannesburg because he was afraid that accused 3 and his people would attack him. According to accused 2 Aspeling was fetching "goods", and that he, accused 2, had driven down in a *BMW* motorcar belonging to one "Clint" accompanied by Denzil Boyles and accused 1. These details, namely, that he was in a *BMW* motorcar and accompanied by Denzil Boyles and his brother matched Aspeling's evidence.

[131] Other details where his evidence dovetails with that of Aspeling is that the latter drove a truck and they stopped at the *Formula One* hotel in Alberton where they slept the night. It will be recalled that there was evidence that accused 1's credit card was used to pay for the hotel room even though he was not present at the time. Accused 2 explained his and accused 1's participation in the Port Elizabeth trip on the basis that accused 2 owed money to Aspeling as a result of having purchased "stamps" from him.

[132] Suffice it to state regarding this alleged debt owed by accused 2 to Aspeling that the version surfaced very late in the day and remained extremely vague throughout. Also remarkable in this regard was accused 2's vagueness regarding details of the scouting trip and how willing he and accused 1 were to jump into a car and accompany Aspeling to Port Elizabeth and, on another occasion, escort him back

at the drop of a hat for no apparent reward. Also, improbable, was accused 2's utter lack of curiosity as what "goods" Aspeling was transporting which had so excited the interest of accused 3 and others.

[133] Accused 2 denied that the cell phone number attributed to him was his and denied that his trip to Port Elizabeth to escort Aspeling back from Port Elizabeth had ever taken him anywhere near the vicinity of Kinkelbos. This evidence is belied by the cell phone data placing his phone at or near the scene of the Kinkelbos robbery and the post-Kinkelbos hijacking.

[134] As far as the Lenasia shooting was concerned accused 2 was constrained to admit that he had been shot and wounded in the incident. According to him however the only aggressor had been Aspeling who had arrived at the scene in a white *Golf* accompanied by various unidentified black men. Without any explanation Aspeling had demanded his "stamp money" and pulled out a firearm whereupon accused 2 ran away and was shot. Notwithstanding this Aspeling had loaded him into the *Golf* and taken him to hospital. All this took place only hours after he had parted from Aspeling at the *Formula One* hotel, Alberton, apparently on good terms.

[135] Regarding his arrest accused 2 denied that the police clothing and insignia found by the police, according to their evidence, in his "wendy house" were ever there. He denied that the cell phone attributed to him was his and gave another number as his cell phone number. Quite apart from the fact that

the former number appeared on two deposit slips in his name, accused 2 furnished no evidence that the number which he claimed was in fact his.

[136] The accused was at a loss to explain why his counsel had not put it to various witnesses that the number attributed to him was not his. Nor could the accused give a satisfactory explanation why, if this was his cell phone number at the time of the various robberies, he himself did not subpoena the service provider for his billing records and thereby prove his presence in Johannesburg at the relevant time. Nor could he give any explanation for the evidence from a number of sources that the cell phone number which the State attributed to him was in fact his. As far as the Waterfront clamping incident was concerned, accused 2 denied being in Cape Town at the time but and stated that accused 1 was in Cape Town at the time and had borrowed his vehicle.

[137] Accused 2 initially made a reasonably good impression when testifying in chief, speaking in a very confident manner. However, he soon demonstrated a marked inability to answer any question directly, instead going off at a tangent and repeatedly arguing his case instead of furnishing facts or factual replies. The ultimate impression left by accused 2 was an exceptionally poor one. He was argumentative and evasive in the extreme. He would frequently repeat the question asked by the cross-examiner not because he did not hear it but in order to play for time. He made numerous unfounded claims of a conspiracy

against him and his fellow accused. Few of these allegations were put to the State witnesses by his counsel. For these omissions the accused could offer no explanation although he did claim that on most occasions he had advised his counsel thereof.

[138] When pressed to substantiate these conspiracy claims accused 2's answers came down to no more than argument or his belief therein, occasionally bolstered by one or two facts, usually of limited relevance. Many of his replies in cross-examination were speculative and argumentative. His evidence varied between detailed and extremely vague. He would often supply considerable detail when testifying about something which was not in dispute but was often vague in the extreme when pressed for detail regarding his exculpatory explanations.

[139] Accused 2 did give a considerable degree of detail relating to some aspects of Aspeling's alleged involvement in other misadventures. He gave a detailed account of how Aspeling had allegedly been pursued by accused 3, how he eventually admitted to robbing the latter's aunt Ruby of a large sum of money and had promised to pay it back in instalments after seeking the help and intercession of accused 1. According to accused 2 a complicated deal was then entered into whereby Aspeling gave accused 2 stolen stamps who then sold them to his cousin and promised to pay R20 000,00 or R30 000,00 back to

Aspeling. Accused 2 claimed that he went off on the Eastern Cape expedition in the hope that Aspeling would let him off the balance of the debt. This version was only put to Aspeling almost in passing and then only in the broadest and vaguest of terms. Another feature of the accused's evidence was the manner in which he sought to draw accused 1 into virtually everything he did thereby neatly furnishing him with an alibi to which accused 1 did not testify.

[140] The third witness called by accused 2 was a Mr. Samuel Julies, an inspector in the service of the South African Police Services who had been stationed for many years at Ennerdale police station. He testified that he knew accused 1 and 2 and several of the other accused. The purpose of his evidence seemed to be to blacken Aspeling's name by alleging that he was arrested on several occasions for contravening the liquor laws and for the possession of stolen property arising out of a robbery at the *Big Apple Warehouse*. Under cross-examination the witness could give no detail to substantiate his allegations and was excused from the witness box and called back a long time thereafter to furnish such detail. He was unable to do so. In further cross-examination it emerged that his trip to and from Cape Town from Johannesburg had been funded by accused 2's wife and that he had been suspended from the police force for a long time on charges of defeating the ends of justice and corruption. This witness created an

extremely poor impression and was the first of a number of policemen who had worked at Ennerdale police station called on behalf of one or more the accused and whose evidence was most suspect.

[141] As I have stated accused 2 was an extremely poor witness and his evidence bore all the hallmarks of having been contrived at a late stage to meet the State case against him. Important elements of his defence were either not put at all to the State witnesses or only in the sketchiest of detail.

[142] The correct approach to the evaluation of alibi evidence was set out by Holmes AJA (as he then was) in *R v Hlongwane* 1959 (3) SA 337 (A) at 340 H – 341 B as follows:

> "The legal position with regard to an alibi is that there is no ***onus on an accused to establish it, and if it might reasonably be true he must be acquitted. R v Biya 1952 (4) SA 514 (A). But it is important to point out that in applying this test, the alibi does not have to be considered in isolation. I do not consider that in R v Masemang 1950 (2) SA 488 (A), Van den Heever JA had this in mind when he said at 494 and 495 that the trial Court had not rejected the accused's alibi evidence "independently". In my view he merely intended to point out that it is wrong for a trial Court to reason thus: "I believe the Crown witnesses. Ergo, the alibi must be rejected." See also R v Tusini and Another 1953 (4) SA 406 (A) at 414."***

The correct approach is to consider the alibi in the light of the totality of the evidence in the case, and the Court's impressions of the witnesses. In *R v Biya* 1952 (4) SA 514 (A), Greenberg JA said at 521:

> ***"…if on all the evidence there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime."***

Accused 2 raised an alibi defence as did accused 1 albeit through

accused 2's evidence. Both chose to disclose their alibis to the Court at a late stage and this is a factor which must be taken into account in considering their credibility as witnesses.

[143] Aspeling gave clear and detailed evidence implicating accused 2. That evidence was corroborated by cell phone evidence, emanating both from Aspeling and from accused 2's own cell phone. Other evidence pointed towards accused 2's involvement in the robberies, notably the evidence of the finding of police uniforms and insignia on his premises and the deposit slip. Accused 2's response was an unconvincing denial, weak alibi evidence and unsubstantiated and wide-ranging allegations of a plot against him and his fellow accused. He was an extremely poor witness. His witnesses fared little better. Weighing the evidence as a whole I have no hesitation in accepting Aspeling's evidence in relation to accused 2 and rejecting the latter's version as not reasonably possibly true.

ACCUSED NUMBER ONE

[144] If anything, the case made out by the State against accused 1 was much more damning. Cell phone evidence implicated him in each of the three robberies and elicited no reply from him. In *S v Boesak* 2001 (1) SACR 1 (CC) at 11d – 12a the Constitutional Court confirmed that a decision not to give evidence might have adverse consequences for an accused, notwithstanding that in terms of the Constitution, Act 108 of

1996, an accused person has the right to remain silent. The Court expressed itself in the following terms:

> ***"The right to remain silent has application at different stages of a criminal prosecution. An arrested person is entitled to remain silent and may not be compelled to make any confession or admission that could be used in evidence against that person. It arises again at the trial stage when an accused has the right to be presumed innocent, to remain silent, and not to testify during the proceedings. 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. What is stated above is consistent with the remarks of Madala J, writing for the Court, in Osman and Another v Attorney-General, Transvaal, when he said the following:***
>
> > ***'Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice.'"***

[145] The State established a strong *prima facie* case against accused 1. He chose not to answer it and, to the extent that his defence was dependent on evidence given by accused 2 and his witnesses, it must suffer the same fate as that of accused 2.

[146] In the circumstances I accept the evidence of Aspeling implicating accused 1 corroborated as it is by damning cell phone evidence and other corroboratory material as set out above. Accused 1's version, insofar as it was put before Court, is rejected as false beyond any reasonable doubt.

[147] I do not propose, at this stage, to analyse which of the charges brought against accused 1 and 2 has been

properly made out by the State on the accepted evidence but shall do so at a later stage.

ACCUSED NUMBER THREE

[148] Aspeling's evidence implicated accused 3 directly in the first, second and third robberies. When the police arrested him on 9 October 2003 they seized his cell phone and a white *Golf 4* motor vehicle which is the subject matter of the theft charge in count 14.

CELL PHONE EVIDENCE

[149] Mentoor testified to knowing accused 3 and, that he had given his cell phone number to Cottle, the number being **072 565 6571**. Cottle, BATSA's security manager, testified that he was in attendance at accused 3's arrest. Accused 3 had denied being Julian or Jan van Heerden. At that stage Cottle had memorized the cell phone number which had been attributed to accused 3. He used a cell phone belonging to one of the police officers to dial that number and the cell phone which had just been confiscated from accused 3 rang in their presence, putting the issue of the identity of accused 3 and the ownership of the phone number, beyond any doubt. That phone, a *Nokia 6210* was seized. Inspector Ramogobedi Berends testified that accused 3 himself gave him his cell phone number as **072 565 6571** and the pin number of the phone at his request upon his seizure of the phone.

[150] Detective-Inspector Jonker testified that names and cell phone numbers were downloaded from the phone and included numbers later attributed to accused 6, 8, Jimmy Maseko, accused 1, Aspeling, accused 4, accused 2 and accused 7. The phone was later examined by Superintendent Viljoen. Cell phone data was obtained from *Vodacom* relating to the sim card found in the phone. Analysis of the data indicated that the cell phone was active on or in the immediate vicinity of each of the three robbery scenes. The data furthermore recorded two incoming calls on 3 October 2003 at 09:08:43 and 09:08:48 respectively from the number **058 813 2641**. That number was proved by the State, through the evidence of a former employee of a shop in Frankfort and by a *Telkom* official to have been allocated in 2003 to the *Golden Star Supermarket* in Brand Street, Frankfort. This evidence dovetailed with Aspeling's that he had called accused 3 from a café in Frankfort after being hijacked by accused 1 and 2 after the Kinkelbos robbery.

[151] Further analysis of cell phone data relating to the number attributed to accused 3 on the day of the Rawsonville robbery shows the cell phone was active at 08:18 near Klapmuts and at 08:50 near Rawsonville until 09:18, the same time at which the BATSA truck was robbed. The cell phone then moves back to Cape Town and, later that day, in the direction of Gauteng. On the day of the Darling robbery the cell phone number was active in Cape Town and then in the region of Montague Gardens, where BATSA's depot was situated. The cell phone was then active on the West Coast at around 08:41 to 09:00, the latter being the time when the Darling robbery took place. The phone then moves back towards Gauteng.

[152] Accused 3 testified in his own defence that he was neither involved in nor present at the scene of any of the three robberies. Regarding the first robbery he testified that he too attended Reggie Marais's funeral and that on the night prior to the Rawsonville robbery he was engaged in a business deal with Alfred Mentoor regarding the purchase of certain motor vehicle wheels. None of the details of these dealings were put to Mentoor when he testified. In regard to the second robbery the accused's alibi defence was that he was in Johannesburg purchasing a vehicle from one Kenneth Coppen and, as luck would have it, was at Ennerdale police station that very day when an affidavit recording details of this sale was attested to by Kenneth Coppen, since deceased. Furthermore, on the day of the Kinkelbos robbery he was in Johannesburg when his *Golf* vehicle, later confiscated by the police, was being tested for roadworthiness.

[153] Accused 3 gave the most detailed account of the alleged robbery of his aunt Ruby of the amount of R109 000,00 in cash in Ennerdale. He testified that Aspeling eventually admitted to him that he had robbed his aunt and had, moreover, paid him back R30 000,00 in the presence of a policeman. He had threatened Aspeling that he would pursue a theft case against him if he did not pay the balance owing and this, according to accused 3, was the reason why Aspeling had a grudge against him and had falsely implicated him in the three robberies.

[154] Accused 3 was cross-examined regarding the original affidavit he handed up purporting to record the purchase of a vehicle from one Kenneth Coppen on 12 August 2003. He had to admit that he had furnished a false address in the affidavit and that he had never registered the vehicle in his name. In further evidence on this issue he testified that he intended calling Kenneth Coppen as a witness since he had now heard that he was alive. In the event he never did call him as a witness. To substantiate his alibi evidence in relation to the first robbery accused 3 called a witness, an Inspector Thomas Ralekgogo, employed at the vehicle identification section, SAPS, Soweto. This witness was called to confirm that he administered

the oath relating to the affidavit (exhibit "J x 6"). According to him Coppen, the deponent, was there and signed the document and the buyer, accused 3, "must" have been present although he was unable to identify him in court. Under cross-examination it became clear that the witness had virtually no independent recollection of the circumstances in which the affidavit was signed and attested. He made no entry in his pocket book of the incident. The affidavit itself is written on a photocopied SAPS form and was one of several such affidavits on exactly the same form produced by various accused by which they sought to confirm their presence before a policeman at Ennerdale Police Station, in Johannesburg, on or about the days of the robberies. The witness stated that he had been approached to come to court by Captain Segapo, another of accused 3's witnesses whose evidence will be discussed shortly. Suffice it to say this introduction did not enhance the already limited credibility of this witness's evidence.

[155] Accused 3 also sought to bolster his alibi in respect of the second robbery through his evidence that he accompanied his ill son to a doctor together with the son's mother on 8 August 2003. To this end he handed in a receipt issued by the doctor in respect of payment for his medical services. The receipt was made out to the infant son, Lester Stevenson and as such takes the matter no further. Accused 3 did not call the son's mother as a witness in this regard. He alleged that on 13 August, the day after the Darling robbery, he and the child's mother again took the child to the doctor for a consultation and in this regard he tendered yet a further receipt. The receipt was issued to Mast. L Stevenson and again did not support his alibi. No explanation was given as to why his son's mother, Miss Glynis Stevenson, was not called as a witness for the accused.

[156] In respect of the third robbery the accused's alibi again related to a motor vehicle, on this occasion a *Golf* which he claimed to have sold to one ST Da Costa. According to documentation which he handed in the vehicle was road tested on the day of the Kinkelbos robbery, namely, 2 October 2003. All that the documentation establishes, however, being the motor vehicle license and licence disk issued to the said ST Da Costa and then only on 27 October 2005, is therefore that the vehicle was subjected to a roadworthy test on 2 October 2003. As to who its owner was at the time or who attended the roadworthy test the document is silent. Accused 3 claimed that he had sold the vehicle in question to Da Costa on 30 September 2003 notwithstanding that it was still in his possession when he was arrested on 9 October 2003. He explained that he had still to fit certain tyres to the vehicle. It transpired that the Da Costa in question was accused 3's cousin but he was not called by accused 3 to confirm that he had purchased the vehicle from accused 3, that accused 3 and not he had attended at the roadworthy test on 2 October 2003 and why it was that, although Da Costa had allegedly purchased the car ten days previously, it was found

in accused 3's possession when he was arrested on 9 October 2003. The accused, although declaring his intention to call Glynis Stevenson, the doctor, his cousin – Shaun Da Costa – and Kenneth Coppen as witnesses, ultimately did not call any of them.

[157] Captain Segapo of the SAPS, Protea-Glen was called by accused 3 to substantiate evidence by him and several of the accused that Aspeling had robbed accused 3's aunt Ruby of cash in the region of R90 0000,00 to R109 000,00, had confessed to this crime and was in the process of redeeming his indebtedness when the Kinkelbos robbery took place. This, it was said by various accused and argued on their behalf, was part of the motive for Aspeling falsely implicating various accused in the robbery. Given the importance which it assumed in the defence of various accused these allegations had extremely humble origins.

[158] The topic was first raised by Aspeling when he testified in chief that accused 1 had explained at the time of the scouting trip to Port Elizabeth that accused 3 would not be involved in the robbery because he, accused 3, was accusing accused 1 of having been behind the robbery of R90 000,00 odd from his aunt Ruby. In cross-examination the subject was fleetingly touched on by counsel for accused 1 who put it to Aspeling that he had approached accused 1, 2 and 3 and told them that he was going to bring goods down from Port Elizabeth but was scared of accused 3 because he and his family suspected him (Aspeling) of stealing money from them. Aspeling rejected that proposition as a lie and the matter was taken no further. The same proposition was put to Aspeling by counsel on behalf of accused 2 but this time in a slightly different form. It was again flatly denied by Aspeling who pointed out that after the robbery he, Aspeling, had sat at accused 3's house, apparently also occupied by his aunt Ruby, for hours and that the matter was never raised. When Aspeling was cross-examined by counsel for accused 3 the subject of the alleged robbery of aunt Ruby was not even raised with him.

[159] Accused 3's witness, Captain Segapo testified that he had had dealings with accused 3 who had told him in effect that Aspeling had stolen the monies from his aunt Ruby. He was present at an encounter at the Ennerdale police station when Aspeling handed over a white envelope to accused 3 saying it was the money which he had taken from the house during the robbery. In return for this accused 3 said that he was going to withdraw the case against Aspeling. Segapo stated however that he was not the investigating officer in the robbery and that, notwithstanding the apparently incriminating nature of Aspeling's conduct which he witnessed, he did not file a statement or make an entry in the investigating diary or any docket

relating to the alleged robbery. Nor, it appears, did he ever even contact the investigating officer in the matter to advise that the matter was resolved, the culprit having been found and having admitted to his guilt.

[160] Although accused 3 had testified that the handing over of money took place in the parking area of the Checkers/Shoprite centre near the police station with Segapo in the vehicle, Segapo himself said that it took place outside the Ennerdale charge office and outside the vehicle. His evidence contained not only internal contradictions but also further discrepancies between his account of what took place involving Aspeling and accused 3 and the latter's version. Segapo struggled to explain why he played any role in the robbery case and was not able to take issue with the prosecutor's proposition that the docket in question had been closed as "undetected". When asked why he had not arrested Aspeling once he handed over the large sum of money to accused 3 and thereby damningly admitted his complicity in the robbery, Captain Segapo's answer was, strangely, that he did not have "enough evidence". Nor did Segapo take issue with the further proposition by the prosecutor that there had been an abrupt mass transfer of policemen out of Ennerdale police station including Captain Segapo and a previous witness, Inspector Julies, on account of "problems" within the police station.

[161] Captain Segapo was yet another in a long line of policemen who had been stationed at Ennerdale police station, the area in which accused 1, 2, 3, 6, 7 and 10 had long resided, and who were apparently eager to travel down to Cape Town to testify on behalf of one or more accused and, in some cases, to blacken Aspeling's name on the basis of allegations which, once probed, proved to be unsubstantiated. Apart from the fact that Captain Segapo's description of his involvement in the matter amounted to highly unorthodox and unprofessional police conduct, he left a poor impression as a witness.

[162] Accused 3 was another extremely talkative witness who preferred to argue his case rather than answer questions directly. On many occasions the prosecutor would eventually interrupt him to ask him what the question which had been put to him was only to find that the accused had quite forgotten the question in the course of arguing his case on some or other point. As previously mentioned he promised to call certain witnesses to substantiate his alibi but they were never forthcoming.

[163] Accused 3 was unable to furnish any acceptable explanation as to why it was never put to Aspeling that he

had confessed to robbing accused 3's aunt Ruby and had even gone so far as to pay back a large sum of money to accused 3 in the presence of a policeman. In my view, the only inference which can be drawn in relation to this aspect of accused 3's evidence is that the entire version was a late fabrication. Confirmation of this view is the fact that the central figure in the entire version, accused 3's aunt Ruby, was not called as a witness. She would have been able to cast a great deal of light on the entire subject but no explanation was ever given for the failure to call her. Accused 3's version of Aspeling's alleged involvement in the robbery bristled with improbabilities. The basis upon which he learnt that it was Aspeling who committed the robbery was never made clear. Yet when he found Aspeling and met him at accused 1's house, Aspeling meekly admitted to the robbery and apologized.

[164] The account of the deal done between Aspeling and accused 3, also involving accused 1 and 2 playing a mediatory role, is replete with detail including several meetings. However, not even the broadest outline of this version was put to Aspeling. Accused 3 also struggled to explain why it was that, according to an affidavit allegedly made by aunt Ruby in the criminal docket, she had said that a white man and four black men had robbed her. The prosecutor eventually put it to accused 3 that after accused 1's counsel had fleetingly referred to Aspeling as being the person who had robbed aunt Ruby accused 3 had decided that this was a plausible story which he could embellish. This observation, it appears was not far off the mark.

[165] The accused denied giving his cell phone and pin number to the police on the night of the arrest but was unable to explain its presence on the forensic bag. Accused 3 also took refuge in the claim that the police were involved in a far-reaching conspiracy against him and his fellow accused including Alfred Mentoor, Aspeling and Cottle. With regard to the witness Mentoor, it was part of his case that the former had assaulted him because he owed him money and tyres. This was not put to Mentoor when he testified. Interestingly, it was Aspeling who first testified that Mentoor had indeed thrashed accused 3. An important element of accused 3's evidence was that a certain "Humphrey" was involved with Aspeling in the robbery of his aunt Ruby. Accused 3 and his colleagues had sought and found Humphrey, then assaulted him and taken his car as part compensation for the robbery. Notwithstanding this, accused 3 had not told his counsel of this and he furnished a risible reason when asked why he had not furnished instructions to his counsel about this aspect so that it could be put to Aspeling. It was common cause that up to the time of testifying accused 3 had never made a statement to the police regarding his knowledge of and dealings with Aspeling in relation to the latter's alleged role in aunt Ruby's robbery.

[166] Regarding the Lenasia South shooting incident accused 3 broadly supported accused 2's version which portrayed Aspeling, backed by four unknown black men, as having been the only aggressor albeit for no apparent reason other than his demand for his "stamp money". He too testified that the black men accompanying Aspeling had, perplexingly, loaded the wounded accused 2 into Aspeling's car and driven him away presumably to Lenmed Clinic.

[167] Accused 3 testified that he had not laid a criminal complaint in relation to this incident but that accused 1 had. The prosecutor then read out to accused 3 accused 1's sworn version in the criminal complaint, which describes a *Golf* motor vehicle pulling up, four black men jumping out, firing shots but then jumping into accused 1's car and driving wildly away with him only to stop his vehicle outside his house, jump out and run away. The statement makes absolutely no mention of Aspeling. Accused 3 could not explain this rather extraordinary omission nor the further discrepancies which the statement threw up.

[168] It was put to accused 3 that his cell phone records indicated that he was in Frankfort on 3 October 2003 which allegation he could do no more than deny. (See exhibit QQQQ 4 relating to 3 October 2003.)

[169] Regarding his alibi for the Rawsonville robbery, accused 3, although maintaining that he attended Reggie Marais's funeral, stated that he was not in the church and nor was he at the grave. He had no explanation for the incriminating cell phone records placing his phone at the scene of all three robberies beyond his unsubstantiated claim that it was not his cell phone number. However, the phone directory on that cell phone number downloaded by the police, and which includes an aunt Ruby, points directly to him. Accused 3's evidence concerning Aspeling's alleged involvement in his aunt Ruby's robbery was not only far-fetched but was not put to Aspeling.

[170] What the Court then has is Aspeling's detailed evidence implicating accused 3 in all three robberies, cell phone data recording the presence of accused 3's phone at the scene of each robbery and with the cell phone activity tying in completely with Aspeling's account of how these robberies played out. This account included the culmination to the third robbery with Aspeling being fetched from Frankfort *inter alia* by accused 3. The cell phone data confirms not only a cell phone call to accused 3 from Frankfort but also cell phone activity by accused 3's phone in Frankfort on the morning of 3 October 2003. Accused 3's response to this mass of evidence is an unsubstantiated denial that the cell phone records related to his cell phone

number and an alibi which was not foreshadowed in cross-examination of Aspeling and only partly substantiated by two dubious witnesses.

[171] The version which he ultimately gave in evidence contains far-reaching allegations against and involving Aspeling which were never put to the latter by his counsel. In my view accused 3's evidence and that of his witnesses can be rejected as false beyond any reasonable doubt whilst Aspeling's evidence regarding accused 3's involvement in the robbery can be safely accepted in full. As with accused 1 and 2 an analysis of exactly what charges were proved against accused 3 will be deferred.

ACCUSED NUMBER FOUR

[172] Aspeling's evidence implicated accused 4 in each of the three robberies as the person or one of two persons who would don a police or traffic officer's uniform and drive or be driven in a white motor-vehicle, usually a *Volkswagen Golf* or a *Polo* equipped with a flashing blue light. Aspeling explained that accused 4 was invariably chosen for this role because drivers would be more likely to stop for a white man in police uniform. Using this ploy the BATSA truck would be stopped on some or other pretext before the driver and his assistant were held up at gunpoint. The driver of the truck robbed at Kinkelbos, Dantu, identified accused 4 in a dock identification as one of those involved in the robbery. The assistant to the BATSA driver in the Rawsonville robbery also made a dock identification of accused 4. The State led evidence of a V Victor traveling to and from Port Elizabeth on a coach on the day before and of the Kinkelbos robbery. This evidence accorded with Aspeling's account that accused 4 had apparently refused to drive up to Port Elizabeth in the *Caravelle* for fear of being caught with incriminating equipment and had arrived separately.

[173] The State also led the evidence of a Ms Jeanine Harding who had been a friend and business associate of accused 4 in Cape Town during 2002 and 2003. She was with him when he was arrested by the police on the present charges on 5 December 2003. Ms. Harding gave evidence, substantiated by a document, that one of accused 4's cell phone numbers was **082 776 2314**. She testified that on the night of his arrest accused 4 told her that he was in deep trouble but that the police would not catch him because he changed his cell phone regularly and did not stay at the same place but moved around. He also told her that he had been involved in armed robberies. She did not want to hear any further details and he did not provide any. However, he did say later that he was involved with 15 or so persons who had previously committed the

R10 million Heidelberg robbery. He added that in what he had now been involved, they had used police vehicles and clothes and this was why the police were so put out. There was an objection from accused 11's counsel to the aforesaid evidence but the evidence was admitted in a separate ruling.

[174] In cross-examination accused 4's counsel admitted the relationship and friendship between accused 4 and the witness but accused her of betraying accused 4 to the police in a sting operation. The witness denied this and stood up well to cross-examination from every quarter. It was noteworthy that the witness's account of what accused 4 had told her in the club concerning the trouble in which he found himself was not denied or disputed in terms by accused 4's counsel.

[175] I consider the witness's evidence to be entirely credible, and unshaken in cross-examination and accept it.

CELL PHONE EVIDENCE

[176] The second major area of evidence against accused 4 was cell phone evidence. The State led testimony that the **072 105 7155** number, a number attributed by the State to accused 4 during the Darling and Kinkelbos robberies, was found on the phone directory of accused 3. Similarly the number was found on the phone directory of the phone seized from accused 7. Superintendent Mike Barkhuizen testified that he executed a search warrant at the premises of a Ms. Yolanda Zeelie, a woman with whom accused 4 apparently had a relationship, in Durbanville on 9 October 2003. There he found a traffic summons made out in respect of a Vernon Noel Victor in which his cell phone number was given as **082 776 2314**. Ms. Zeelie also surrendered cell phone billing records addressed to her in respect of the selfsame cell phone number.

[177] Passenger manifests relating to the bus trip to and from Port Elizabeth on 1 and 2 October 2003 record the passenger Victor's cell phone number as **072 105 7155**. Analysis of the *Vodacom* cell phone data in respect of the number **082 776 2314** indicates that the cell phone was active in the immediate vicinity of the crime scene on 24 June 2003, the day of commission of the Rawsonville robbery. Similarly, *Vodacom* cell phone data in respect of the number **072 105 7155** indicates that the cell phone was active in the immediate vicinity of the crime scene on 12 August 2003, the day of the commission of the Darling robbery, and again on 2 October 2003, the day of the commission of the Kinkelbos robbery.

[178] In response to this evidence accused 4 chose not to testify and called only one witness, a Ms. Mariza Potgieter who previously had a relationship with accused 4's brother. She testified that during 2003 she

had lived in Bloemfontein and that accused 4 had stayed with her between 21 and 26 June and then later for four or five days around 12 August 2003. These dates coincide with the Rawsonville and Darling robberies. In substantiation of these alibi's, neither of which were foreshadowed by accused 4's plea explanation or in cross-examination of Aspeling, the witness produced two invoices. The first purported to support her evidence that the accused had assisted her in taking her television set to a Bloemfontein shop for repairs on 11 August 2003 and fetched it the next day. The witness contradicted her evidence in chief when she stated, under cross-examination, that she was not in the TV repair shop when the invoice was issued.

[179] Cross-examination of the witness and later evidence led by the State revealed the invoice to be fraudulent. The stamp which it bore had only been obtained by the business in question on 20 January 2004, four months after the invoice was allegedly issued and stamped. Furthermore, the original invoice book was produced which showed that the duplicate page of the invoice was blank whilst the immediately preceding and succeeding invoices were dated August 2004, a year after the television set was allegedly brought in and the invoice issued (exhibit "N x 6"). In substantiation of the second part of accused 4's alibi the witness handed in an invoice purporting to confirm that on the day in question she had accompanied the accused to purchase clothing at a shop in Bloemfontein. The invoice, (exhibit "O x 6") does not appear to be an original and makes no direct connection to accused 4. Furthermore, as the witness conceded, it was possible to create such an invoice simply using the fonts of a personal computer. The witness struggled to explain how she came to retain these invoices until 2004 when the accused had asked her for them. She testified that she only had copies of the invoices because they had become lost when she had posted the originals to accused 4's mother.

[180] The State presented a powerful *prima facie* case against accused 4 comprising Aspeling's evidence implicating him in all the robberies, cell phone corroboration of his involvement in each such robbery, two dock identifications of him as the "policeman" involved in two of the robberies, the bus coach evidence of his trip to and from Port Elizabeth immediately before and after the Kinkelbos robbery and, finally, Janine Harding's damning evidence. Accused 4's only response was an alibi defence to which he himself was not prepared to testify. His witness, Ms. Potgieter, was unimpressive and at least one of the documents which she put up in substantiation of the alibi was proved to be false. The other invoice was of little if any value. In my view the State case against accused 4 is proved overwhelmingly and Aspeling's evidence implicating accused 4 must be accepted in full.

ACCUSED NUMBERS 5 AND 9

[181] The cases in respect of accused 5 and 9 are similar and will be dealt with together. Aspeling implicated accused 5 and 9 in all three robberies. He testified that he first met them at the *Waterfront Suites* shortly before the first robbery and last saw them in Johannesburg shortly after the Kinkelbos robbery when they

arrived to claim their share of the proceeds. He was only able to identify them however as “Mandoza” and “Edward” respectively. His evidence was moreover that he was never formally introduced to either accused. According to Aspeling’s evidence their role in the various robberies seems to have consisted largely of driving either a maroon or a white *Volkswagen Caravelle* and lending general support.

[182] After his arrest, Aspeling took the police to the house in Observatory where accused 5 stayed. When he eventually found the house however accused 5 was not there. Instead Aspeling identified accused 8 who was then arrested at the house. On a later occasion the police showed him a range of photographs. He recognized accused 9 amongst them. Aspeling was neither present at nor could he explain the circumstances under which accused 5 and 9 were arrested. The State never placed the relevant photograph before the Court nor led any further evidence regarding the identification of accused 5 and 9 or the circumstances in which they were arrested. No cell phone was confiscated from either accused 5 or 9 and no cell phone records were handed in by the State purporting to be those of either accused.

[183] Ultimately, on Aspeling’s own evidence accused 5 and 9 remained rather shadowy figures in the robberies playing very limited roles. In the final result the only evidence implicating them was that of Aspeling. Prior to the robberies he had not known accused 5 and 9 and he did not share any accommodation with them in any of the three robberies. According to Aspeling’s evidence accused 5 and 9 were part of the Cape Town contingent and therefore he would generally only see them on the days before and after each robbery. Looked at as a whole, Aspeling’s evidence regarding the involvement of accused 5 and 9 is very limited in detail and unsubstantiated by any independent corroborating evidence.

[184] In these circumstances accused 5 and 9’s failure to testify does not necessarily attract an adverse inference. In keeping with the general approach outlined above to Aspeling’s evidence we are of the view that it would not be safe to find that the State has proved beyond reasonable doubt that accused 5 and 9 were involved in the three robberies.

ACCUSED NUMBER SIX

[185] Aspeling implicated accused 6 as being involved in the second and third robberies and as playing a leading role in the shootout at Lenasia. When accused 6 was arrested on the night of 9 October 2003 the police confiscated a cell phone from him. Mentoor testified that accused 6 was well known to him and that his cell phone number was **072 373 1856**. This number was downloaded by Detective-Sergeant Speed from Mentoor's cell phone directory. The same number appeared in a phone directory attributed to accused 3's cell phone directory under the name "Gary Bad Boy" as well as the phone directory of a number attributed to accused 7 under the name "Gary the Dru". Analysis of the cell phone data relating to the aforesaid number indicated that the cell phone was active in the immediate vicinity of the BATSA depot in Montague Gardens and on the crime scene on 12 August 2003 – the day of the commission of the Darling robbery.

[186] The cell phone seized from the house of accused 6 was later identified by the defence witness Norbert Pong as a cellular phone with the number **083 212 2047**, one used by him during his term of employment at *MTN*. Analysis of the data relating to that phone indicated that it was active in the immediate vicinity of the crime scene in the Eastern Cape on 2 October 2003, the day of the commission of the robbery in Kinkelbos. Accused 6 testified in his own defence and called two witnesses, Messrs. Sheilan Julies and Norbert Pong.

[187] Accused 6 denied knowing Aspeling or playing any part in the robbery at Darling and Kinkelbos. He testified however that he knew accused 1, 2, 3, 7 and 10 from long before the case and was good friends with accused 3 and 7. He testified that in the week of the Darling robbery he was at his place of employment in Alberton. He called no witness to substantiate this allegation, however. He testified that on 7 August 2003 he was requested by his friend, Mr. Clayton Paulsen, to accompany the latter in transporting two women to Durban by motor vehicle on the Friday and returning the following morning. On the Monday morning he again traveled to Durban to collect the women and returned on the Tuesday. Clayton Paulsen was later called as a witness by accused 7 but neither of the women referred to in this trip to Durban testified.

[188] As far as the Kinkelbos robbery was concerned accused 6 testified that he was in Johannesburg throughout the period and that, on the day in question, in yet another striking coincidence, he had been at the Ennerdale police station with one Sheilian Julies to whom he sold the front section of a *Jetta* motor vehicle. At the police station an affidavit had been attested to recording this transaction. The affidavit was handed up as exhibit "M x 6".

[189] The accused admitted being part of the shooting incident in Lenasia South on 3 October 2003 as described by Aspeling. However, he adopted the version given by accused 2 and 3 in which Aspeling, together with a team of four unknown black men was the aggressor. According to accused 6 he himself had not used the firearm at the scene although Clayton Paulsen had done so.

[190] He testified that Aspeling was falsely implicating him in the robberies because he and others had meted out "mob justice" to Aspeling's friend, one Humphrey. Further, he testified, Aspeling had tried to shoot him in the Lenasia South shooting incident because Aspeling regarded him as a "nuisance". Regarding Norbert Pong's cell phone, accused 6 denied ever using it and explained his possession thereof by stating that he had found it in his (accused 6's) vehicle after one "Easy", Norbert Pong's friend, had worked on the vehicle. Accused 6's credibility was dealt a fatal blow in cross-examination when he admitted that he had been required to attend at the Johannesburg magistrates' court on 1 October 2003 as an accused. It was common cause that accused 6 had not attended the court proceedings on the day in question. According to him he was in town, however, and his absence was solely as a result of transport problems which he had experienced. On the day he had telephoned his attorney, a Mr. Clarry Botha, to advise of this problem.

[191] On behalf of the State, however, advocate Booysen handed up the original charge sheet and notes of the magistrate in the matter. The magistrate's notes (exhibit "P x 6"), insofar as they are relevant, made on 1 October 2003, read as follows:

> "Beskuldigde om 09:19 van hof afwesig. Mnr. C Botha: 'Beskuldigde het my gisteraand gebel. Sy werk het hom Kaap toe gestuur. Hy is nie betaal nie en sit gestrand. Hy sal moontlik vandag betaal word en dan dadelik deurkom. Vra dat lasbrief oorgehou word. Handig faks in, bewysstuk A.'"

The attached exhibit, an original hand-written fax dispatched from the Port Elizabeth post office on 1 October 2003 at 8:38 am, reads as follows:

> ***"ATT: MR BOTHA***
> ***To whom it may concern:***
> ***I, Mr. J van Heerden am currently employing Mr. Gary Williams. We are stationed in Eastern Cape sub-contracting for Day Glow. He had put it to my attention that he had to attend court on 1/10/2003. We are expieriancing (sic) a cash problem which is the bank's fault. All employees' money was supposed to have been paid in on 29 September 2003 and no money was received. Due to the financial setback he could not pay for the bus. My contact number is 072 1800 935."***

[192] Although accused 6 admitted that Mr. Clarry Botha had been his attorney and had represented him on the day in question, he denied any knowledge of the fax put up by Mr. Botha justifying his non-appearance in court on the day in question. Accused 6 did not call Mr. Botha to clarify the matter and the inference is unavoidable that accused 6 lied about his whereabouts on 1 October 2003 and that he was indeed not only in the Eastern Cape but in Port Elizabeth from where the fax was dispatched. The reference in the fax to a Mr. J van Heerden, accused 3's name, furthermore, is instructive since on Aspeling's evidence accused 3 was the leading figure in the Kinkelbos robbery.

[193] Accused 6, although found in possession of Norbert Pong's phone, denied using it in the Eastern Cape. According to him he found it in his car and had it in his possession only for a short period. It was put to accused 6, however, that he had furnished the cell phone number of Norbert Pong's cell phone to the police who had recorded it on his warning statement taken shortly after his arrest (exhibit "C x 7"). When asked to explain this accused 6 stated that he had furnished his mother's landline number and that a policeman must have deviously filled in Pong's cell phone number afterwards. Not only was this unsubstantiated allegation farfetched, it is not borne out by the warning statement which records Pong's cell phone number in the place on the form for the accused's telephone number with the landline number added above.

[194] Norbert Pong testified on behalf of accused 6. He too claimed that his phone must have been stolen by one of the persons who occupied his house, a certain "Easy". He was extremely vague about the allegations, however, and regarding when, if ever, he had reported it to the police or his employer, *MTN*, who had issued him the phone as a perk. In cross-examination it emerged that Pong had been an extremely elusive witness. He had been sought for a long time by the police who had wished to take a statement from him explaining the use of his cell phone in the Kinkelbos robbery. A sworn statement made by Pong to the police in August 2005 was put to him but he claimed that pressure had been brought to bear on him to sign the statement which he had merely "browsed". In that statement (exhibit "Y x 6"), Pong stated unequivocally that he had lent his phone to accused 6, his friend, on a regular basis during 2003 with the number being **083 212 2047**. His introductory paragraph to the statement makes it quite clear that Pong was advised that the police were investigating a truck hijacking in the Eastern Cape in which his phone was allegedly involved. His account of his phone having been stolen by "Easy" appears nowhere in his statement to the police and, by the time he testified, the equally elusive Easy had vanished. Pong was

an evasive witness who clearly found himself in a tight corner in his efforts to explain how his phone came to be used by accused 6. He was unable to dispute that his *MTN* sim card and cell phone were found in accused 6's possession on his arrest on 9 October 2003.

[195] The second witness called by accused 6 was Sheilan Julies who was called to confirm that on 2 October 2003 he was present when accused 6 deposed to a sworn affidavit at the Ennerdale police station concerning the sale of a vehicle to Julies. The sworn affidavit (exhibit "M x 6"), is another affidavit in the series commissioned at the Ennerdale police station and relied on by various accused. Julies had no independent recollection, other than the affidavit which he claimed to have found in his records long after the incident, of the date on which the affidavit was attested to. He did not dispute that the hand-written date on the original affidavit appeared to have been altered from another year to 2003 and that the stamp date itself casts doubt as to whether it related to 2 October or not. That was not the only apparent alteration in the document since accused 6's identity number was also altered in at least three places casting yet further doubt on the authenticity of the document.

[196] The State called a handwriting expert, Superintendent Marco Van der Hammen, to testify regarding his examination of and conclusions regarding the sworn affidavit which accused 6 claims to have signed. His conclusions were that the evidence strongly suggested that the deponent's (accused 6's) signature was a forged signature.

[197] In evidence in chief accused 6 claimed that three cell phones had been seized from his premises upon his arrest, his mother's, Pong's and his own. In cross-examination, when it was put to him that the police had only seized one phone, accused 6 then claimed that two phones had been seized from his premises and neither had been placed in a forensic bag. Inspector Ngobeni testified that he seized one phone and placed it in a forensic bag and sealed it in front of the accused. Accused 6 was then asked why it was never put to Ngobeni that two or three phones had been taken and not sealed in a forensic bag. Accused 6 stated that he could give no explanation for this omission but stated that he had furnished these details to his counsel.

[198] Accused 6 repeatedly claimed in his evidence that he was a victim of a conspiracy, along with other accused, at the hands of Mentoor, Aspeling, Aspeling's "police friends", various police officials and BATSA officials. He stated that he had instructed his counsel that all these persons were part of a plot against him but did not know why his counsel had not put this to those witnesses.

[199] The accused presented as an evasive witness who frequently avoided answering direct questions. It was notable, however, that as and when the prosecutor began to back him into a corner on a particular topic, he would suddenly anticipate the prosecutor's line of questioning and supply a flurry of exculpatory information. Overall, accused 6, made a poor impression as a witness and, as I have said, his credibility was dealt a fatal blow when he was trapped in the lies he had told about his non-appearance in court on 1 October 2003. Another witness who gave evidence on behalf of accused 6 was Mr. Clayton Paulsen. He testified along the lines of the account given by accused 2 and 3 in relation to the Lenasia shootout incident. However, it was his evidence that he had been armed and fired five or six shots at the scene. In his evidence in chief he stated that he had seen Aspeling shooting at the Lenasia shootout but under cross-examination he stated that he had not seen this.

[200] Paulsen testified that accused 6 had indeed accompanied him to and from Durban transporting two women during August 2003 at around the time of the Rawsonville robbery. The witness was very vague about dates and times, however, and furthermore contradicted accused 6's version of the details in various respects. For example, he stated that he had not originally contacted accused 6 at his place of work because accused 6 had not been employed at the time. To the contrary, accused 6's evidence was that he had been in permanent employment at that time and that he had been contacted there by Paulsen to invite him to come along on the trip. Overall, Paulsen's evidence was unsatisfactory. He was, moreover, close friends with accused 6 and was well-known to several of the other accused. In fact he was arrested at accused 7's residence at the same time as accused 7 and briefly held before being released. It was clear that he was a compatriot of all the accused who hailed from Ennerdale.

[201] In summary the State case against accused 6 comprised Aspeling's evidence implicating him in two robberies and the shooting incident as well as cell phone data placing his cell phone at the scene of the Darling robbery and the borrowed cell phone of his friend, Norbert Pong, at the scene of the Kinkelbos robbery. Accused 6 was constrained to admit that he was involved in the shooting incident and

furnished the improbable explanation that Aspeling had attacked him and his colleagues for no good reason. He denied, unconvincingly, that the first cell phone was his. He admitted that he had been found in possession of Norbert Pong's cell phone furnishing an unlikely and largely unsubstantiated account of how it accidentally came to be in possession. He claimed nonetheless that he had never used the phone in the Eastern Cape. Accused 6's denial that he was in the Eastern Cape at the time of the Kinkelbos robbery was completely undermined by his false evidence regarding his non-appearance in court on 1 October 2003.

[202] Accused 6 was a poor witness and the evidence which he brought to support his alibi was exposed as being founded on a suspect affidavit attested at the Ennerdale police station, the date of which had apparently been tampered with. The remainder of his alibi was supported by the evidence of Clayton Paulsen whose evidence was similarly unsatisfactory and who was a close friend of several of the accused. In the circumstances I am satisfied that accused 6's evidence can be rejected as false beyond any reasonable doubt. I am satisfied, furthermore, that Aspeling's evidence implicating accused 6, corroborated as it is by independent evidence of accused 6's presence at both the Darling and Kinkelbos robberies, can be accepted in full.

ACCUSED NUMBER SEVEN

[203] Accused 7 was implicated in the Darling and Kinkelbos robberies by Aspeling who testified that he had not taken part in the first robbery. Aspeling also put accused 7 on the scene of the Lenasia shooting incident. The Kinkelbos BATSA driver, Dantu, identified accused 7 without hesitation at a full scale identification parade. In his evidence Dantu, an excellent witness, identified accused 7 as one of two men standing around a white *BMW* at the scene of the robbery. Accused 7 approached him and challenged him when he observed him pressing what was in fact a panic button. At this stage Dantu's driver's window was all the way down and accused 7's face was about 50cm from him.

[204] Other evidence implicating accused 7 was the issuing to him of an "MVG card" at the Grand West Casino in Goodwood, Cape Town on or about 10 August 2003, two days before the Darling robbery as well as the discovery of the *First National Bank* deposit slip indicating a deposit by one "Llewellyn Smith" of a cash amount of R47 000,00 to one Isgak Isaacs into *FNB* Grassy Park branch on 15 August 2003, a few days after the Darling robbery.

CELL PHONE EVIDENCE

[205] When accused 7 was arrested the police seized two cell phones from his premises as well as two vehicles, namely, a white *Volkswagen Polo* and a white *BMW*. Accused 7 told the arresting officer that one of the

phones was his and the other belonged to a girlfriend. On one of the phones seized from accused 7, having the cell phone number **082 220 7718**, cell phone numbers later attributed to accused 1, 2, 3, 4 and 8 as well as Norbert Pong, Alfred Mentoor and Aspeling were found. Upon further examination by the police the phone was found to contain two sim cards.

[206] Ms Du Plessis of *MTN* later gave evidence that the handset had been used in combination with a "Telematrix" sim card having cell phone number **083 971 4426**. The relevant cell phone data indicated that the phone had been active around the crime scene of the Darling robbery at that time.

[207] On accused 7's other phone, with cellular phone number **072 296 1979**, a number attributed to accused 6 was found under the name "Gary the Dru". Analysis of the cell phone data relating to the "Telematrix" card, number **083 971 4426**, revealed that the cell phone had been active in the immediate vicinity of the BATSA depot in Montague Gardens and the crime scene on 12 August 2003, the date of commission of the Darling robbery.

[208] Other evidence linking accused 7 to the robbery potentially was the discovery of a white *BMW* and a white *Volkswagen Polo* on his

premises. These vehicles are the subjects of count 13 and 9 and will be discussed separately.

[209] Accused 7 testified on his own behalf and called witnesses. He admitted that he was involved in the Lenasia shooting incident but denied that he was either in the Western Cape or Eastern Cape at the time of the various robberies or in any way implicated in the Darling or Kinkelbos robberies. Accused 7 testified that during the period around 12 August 2003 he was working out of a taxi rank and on the day of the Darling robbery he had visited someone in prison. With regard to the day of the Kinkelbos robbery he stated that he had attended a court case in Johannesburg and thereafter was involved in a motorvehicle accident in Ennerdale. As a result of this accident he signed an affidavit, commissioned that day at Ennerdale police station, acknowledging his liability for the other party's damages. Accused 7 produced the affidavit and called the policeman who allegedly commissioned it, one Mr. Clinton Fritz, who testified that on that same day accused 3 had taken him to Lenasia to buy spares for his vehicle.

[210] Regarding the Lenasia South shooting incident accused 7 told a tale similar to those of previous accused, namely that Aspeling was the aggressor together with several unknown black colleagues and who later removed the wounded accused 2 in their white *Golf*. Accused 7

denied any knowledge of the *FNB* deposit slip.

[211] He denied involvement with any other cell phone number other than **082 220 7718** but produced no evidence to substantiate that this was his number. He alleged that the evidence against him formed part of a conspiracy by the investigating officer Jonker which conspiracy included Aspeling, *Vodacom*, *MTN*, *BATSA*, the workers from the *Grand West Casino*, Ms Hilda du Plessis from *MTN*, Cottle and Detective-Sergeant Speed. He denied being at *Grand West Casino* on the date in question and applying for an "MVG card".

[212] The SAPS handwriting expert, van der Hammen, also examined the sworn affidavit allegedly attested to by accused 7 on 20 October 2003 at Ennerdale police station and which was used by accused 7 to substantiate his alibi. Van der Hammen concluded that although there was some evidence suggesting the deponent's signature was genuine he could not determine with any degree of certainty that this was the case. It is notable that although both the affidavits examined by the expert purported to have been signed at the Ennerdale police station on the same day, namely, 2 October 2003, the date of the Kinkelbos robbery they bear different police stamps, bearing the words "Administration Management Ennerdale" and the other "Client Service Centre Ennerdale".

[213] The affidavit handed up by accused 7 was another in the series of affidavits bearing Ennerdale police station stamps whose content was unrelated to any criminal matter but serving the purpose of partly corroborating the alibis raised by one or other accused. This particular affidavit contains the innocuous information that accused 7 bumped into a certain vehicle on that day and undertook to fix all the damages caused. Mr. Clinton Fritz was called to testify that he was a police reservist working at Ennerdale police station on the day in question. In chief he stated that he had attested the affidavit as the commissioner of oaths and had written it out in his handwriting.

[214] In cross-examination he contradicted himself saying that he did not write out this statement. His evidence was that he had no more than a vague recollection of the incident. He did not know accused 7 but was aware that he worked in the taxi business although accused 7 knew that he worked at the Ennerdale police station. He made no note of the incident in the charge office's incident book and took no steps to establish whether the information contained in the affidavit was correct or not. He testified that any member of the public could attend at the Ennerdale police station to have their private agreements stamped and attested to by the police in affidavit form. He could give no explanation as to why official police documents such as sworn affidavit forms were

used for the private affairs of members of the public.

[215] The State's handwriting expert, Van der Hammen, later pointed out various unsatisfactory features of the stamps used on the affidavit. Fritz did not create a good impression as a witness, his evidence being vague and at times contradictory. It is, moreover, difficult to conceive how he or any other policeman for that matter could recall, years after the event, such a trifling incident as commissioning an innocuous affidavit.

[216] When the State was granted leave to re-open its case it called a Mr. Raymond Stewart as a witness. He testified that from 2000 – 2006 he had worked as an unpaid reservist at the Ennerdale police station. He was unemployed and a resident of Ennerdale. He stated that he had previously been called by accused 6's legal representative as a witness but upon arrival at court had been told that his evidence was no longer necessary. In evidence in chief he testified that he had personally completed all the handwritten material on the two sworn affidavits allegedly attested at Ennerdale police station and put up in substantiation of accused 6 and 7's alibi for 2 October 2003. He stated also that he would have made the various changes to figures and dates which appeared in the affidavit and not accused 6. He testified that he had attested only to accused 6's affidavit and not accused 7 even

though this attesting would only have taken a few seconds. According to him he did not attest to the second affidavit because he had gone to the toilet or to the shop. This evidence did not accord with that of accused 7's witness, Clinton Fritz.

[217] The witness stated that in both affidavits (exhibits "M x 6" and "W x 6") the same charge office date stamp was used. The sloping cipher or mark before the "2" in the first affidavit in the date stamp, contrasted with the "0" before the "2" in the second Statement was as a result of the fact that the stamp was defective and sometimes fell open. Stewart left an unfavourable impression as a witness and was another fulltime or reservist police official who claimed to have played a role in affidavits, executed on poor copies of an original SAPS affidavit form, concerning matters which do not appear to fall within the province of a police station charge office. In each case the witness claimed to have remembered the incident in some detail despite the trivial nature of his involvement in the execution of the affidavit which in each case coincidentally purports to support an accused's alibi.

[218] Accused 7 called Ms Maxine Khumalo to testify regarding his alleged attendance at the funeral of a family member on 9 August 2003. It is worth noting that accused 7 elected not to disclose this alibi during the plea proceedings and it was mentioned for the first time during

Aspeling's evidence. Ms Khumalo testified that accused 7 was her cousin's son who came to Sabie, to where the witness moved in 1999, to visit his granny. The latter died in August 2003 in a residential area near Sabie and at her funeral on 9 August 2003 the witness states she saw accused 7. She added that "she thinks" that accused 7 stayed over for two days. The witness was an elderly woman, some 68 years of age, and she testified that there had been hundreds of people at the funeral in question.

[219] Accused 7 himself left an extremely poor impression as a witness. He was argumentative and longwinded in the extreme, taking every opportunity to argue his case rather than supply factual answers. The accused made repeated claims of a conspiracy against him involving a wide range of State witnesses and the various agencies involved in this matter. Ultimately this was his answer when he was confronted with most evidence pointing to his direct involvement in the robberies or his presence in the Eastern Cape. The accused could offer no substantive explanation for the evidence indicating that he had applied for an "MVG card" at the *Grand West Casino* a day or two before the Darling robbery. That evidence, the clear identification of him by Dantu, his apparent involvement in the deposit of a large sum of money to the credit of Isgak Isaacs as well as the linking of the "Telematrix" sim card to his phone which in turn was active on the scene of the Darling

robbery all served as corroboration for the evidence of Aspeling implicating him in both the Darling and Kinkelbos robberies. Accused 7's involvement in the Lenasia South shooting incident was yet further evidence that he was part of the group which committed the Kinkelbos robbery only to be hoodwinked by accused 1's group and hence the confrontation in Lenasia South.

[220] The accused's alibi defence rests upon the somewhat vague evidence of his family member relating to a funeral and the dubious affidavit recording his involvement in a motor accident on the day of the Kinkelbos robbery, coincidentally attested at the Ennerdale police station.

[221] I can find no reason to reject the evidence of Aspeling implicating accused 7 in the two robberies. There is independent corroboration for his evidence in a number of forms. Accused 7's alibi evidence does not stand up to close scrutiny, in my view, and in the circumstances I am satisfied that the State has proved the involvement of accused 7 in the Darling and Kinkelbos robberies beyond any reasonable doubt and that his alibi evidence can be rejected as not reasonably possibly true.

ACCUSED NUMBER EIGHT

[222] Aspeling implicated accused 8, James Francis Ngarinoma, in all three of the robberies. Accused 8 was one of those whom he met at the

Waterfront Suites shortly prior to the Rawsonville robbery. He had not met him before. In his evidence in chief he did not specify what role accused 8 played in the Rawsonville robbery but did testify that he was present at accused 5's house after the robbery where they spent several hours together. When the proceeds of the first robbery became available Aspeling heard accused 3 say that it would be arranged that the Cape Town contingent, including accused 8, would receive their money there.

[223] In regard to the second robbery, Aspeling's evidence was that accused 8 climbed into his truck at Montague Gardens on the morning of the robbery and directed him to the site of the robbery. When the truck was loaded up with the stolen cigarettes accused 8 drove back with Aspeling to the *Waterfront Suites*.

[224] With regard to the Kinkelbos robbery, Aspeling came across accused 8 in Port Elizabeth on the night beforehand together with other members of the Cape Town contingent. He travelled up in a white *Volkswagen Caravelle*. The Cape Town contingent stayed at other accommodation that night. When Aspeling arrived at the scene of the robbery accused 8 was amongst those who were in the BATSA truck. After the Lenasia South shooting incident the Cape Town contingent arrived in Johannesburg, but accused 8 was not amongst them. He testified that

accused 8 also received a share of the Kinkelbos robbery's proceeds but he did not know to whom it was given in the first place.

[225] Later in cross-examination Aspeling was asked about the amount of time he had spent in the company of accused 5, 8 and 9. He testified that after the first robbery he had spent approximately four hours with them, in the house in Observatory. Aspeling pointed out that on the occasion of the second robbery accused 8 was with him in the truck going to and from the scene of the robbery. On that occasion they spent approximately two hours together. On the occasion of the third robbery accused 8 and 9 had travelled together with him in the truck from the hotel in Port Elizabeth to a filling station where they waited for further instructions. Again on that occasion they had been in each other's presence for about two hours.

[226] Aspeling testified that after his arrest he had eventually led the police to the house in Oak Street, Observatory. He showed them where accused 5 stayed. At the house two men had come to the front door, one of them being accused 8. He had immediately recognised accused 8 and, pursuant to Aspeling's identification, accused 8 had there and then been arrested by the police. Aspeling had not recognised the other man who was consequently not arrested.

[227] The State proved a police profile of accused 8 prepared by the investigating officer in which his residential address was given as 4 Oak Street, Observatory and one of his telephone numbers as **083 364 3235**. Some weeks before preparing this profile, but after his arrest, the police took a warning statement from accused 8 on which he furnished the same address and telephone number but declared that he did not wish to make a statement. In a phone directory linked to accused 3 the selfsame number was found in the directory under the name "James". In a phone directory found in a phone linked to accused 7 the aforesaid number was again found with the name "J" and "James Cape". Analysis of the cell phone data obtained from *MTN* relating to this number indicated that the cell phone was active in the immediate vicinity of the crime scene on 12 August 2003, the day of the commission of the Darling robbery, and again on 2 October 2003, the day of the commission of the Kinkelbos robbery.

[228] In response to this evidence accused 8 chose not to testify nor did he call any witnesses. However, on his behalf and by agreement between the State and his counsel, a document was handed up (exhibit "A x 7") namely, a charge sheet in the Wynberg magistrates' court in which accused 8 was the first accused. The agreement between the State and defence counsel was to the effect that the charge sheet, a J 15-form, together with the accompanying magistrate's notes, was a true

copy of the original, although the State did not admit that the James Francis Ngarinoma who, according to the document, appeared in court on 23 June 2003, was in fact the accused. The charge sheet and the notes appear to indicate that the accused was arrested at 23h00 on 21 June 2003 and was granted bail of R1000,00 on his first appearance before court on 23 June 2003.

[229] Accused 8's counsel, Mr. Petersen, argued that the State had failed to prove any charge against the accused and concentrated his attack upon what he submitted was the inadequate dock identification of the accused by Aspeling. He also criticized what he submitted was Aspeling's contradictory and unsatisfactory evidence regarding the involvement of accused 8 in the first robbery.

[230] Whilst it is correct that accused 8 was not identified by Aspeling pursuant to a formal identification parade, in my view, Aspeling's identification of the accused can safely be relied upon. According to his evidence he spent many hours in close contact with accused 8 on several different occasions and conversed with him at some length. A month or so after the last robbery he led the police to the Oak Street house where he immediately identified accused 8. As I have said the latter was accompanied by another black man whom Aspeling did not claim to recognise and who was consequently not arrested.

[231] Aspeling initially testified that accused 8 was part of the group which made their way to BATSA's Montague Gardens depot early on the morning of 23 June 2003. It appears that on that day the plan was to rob the BATSA truck but that it was aborted mid-morning. When Aspeling was challenged in cross-examination that accused 8, by reason of being in custody at the time, could not have been present, Aspeling conceded that he could well have been mistaken in stating that accused 8 was present on the morning of 23 June 2003. The balance of Aspeling's testimony regarding accused 8's involvement in the Rawsonville robbery was rather vague. It was only in cross-examination that he appeared to firmly place accused 8 at the scene of the robbery. Furthermore, although there is cell phone evidence placing accused 8 at the scene of the Darling and Kinkelbos robberies such evidence is lacking for the Rawsonville robbery. Notwithstanding that accused 8 did not testify it appears to us to be reasonably possible that Aspeling was mistaken as to the involvement of accused 8 in the Rawsonville robbery as a whole and he is therefor entitled to the benefit of the doubt on the counts relating to this robbery.

[232] The same factors do not apply however to the second and third robbery where Aspeling's evidence clearly implicated accused 8 which evidence was corroborated by evidence placing accused 8's cell phone

at the crime scenes. In this regard accused 8's counsel argued that the only evidence linking the accused to the cell phone number in question was improperly obtained from him through the warning statement. In the first place the submission is not factually correct since the phone directories of both accused 3 and 7 contained the same phone number identified as belonging to "James" and "James Cape". No other James appears amongst the accused or was ever mentioned by any witness in evidence. In support of his argument that the accused's cell phone number had been improperly obtained from him, Mr. Petersen contended that the police knew full well the importance of cell phone records and should have first warned accused 8 that giving his cell phone number could lead to incriminating evidence being found. He argued, furthermore, that the accused was not informed of his rights prior to making the warning statement. However accused 8 gave no evidence about what warning, if any, he was given prior to giving the personal information which was included in the warning statement. The statement itself records that he was warned of his right to remain silent and that anything he said might be used in evidence against him in a court of law; further that he had the right to legal representation and that he was not obliged to make a statement.

[233] There is no evidence that the police duped accused 8 into furnishing his cell phone number and I am not prepared to draw this inference on

the basis of speculation. A suspect is entitled, no doubt, to refuse to give the police such basic information as his name and address. In certain circumstances even such basic information could incriminate a suspect. It does not follow, in my view, that even before requesting a suspect for even such basic information, the police must, in every instance warn a suspect that such information might be incriminating. Every case has to be determined on its own facts. In the present case accused 8 had been arrested pursuant to a direct identification of him by Aspeling and there is no evidence to suggest that at that stage the police apprehended that their case against accused 8 might stand or fall, or even be significantly enhanced, by cell phone evidence and that he was duped into providing his cell phone number.

[234] In my view, given the paucity of the evidence in respect of the first robbery, the accused's failure to testify does not necessarily lead to an adverse inference against him. However, Aspeling's clear evidence regarding accused 8's involvement in the second and third robberies, corroborated as it was by the evidence placing accused 8's cell phone on the scene of those robberies and being active thereat, called for a response from the accused. In the absence of any countervailing evidence from him, the State's *prima facie* case was immeasurably strengthened. I am satisfied that the State proved accused 8's involvement in the Darling and Kinkelbos robberies beyond any

reasonable doubt.

ACCUSED NUMBER TEN

[235] Aspeling implicated accused 10 in Darling robbery. He testified that accused 10 was not involved in the first robbery and that his involvement in the last robbery was limited to meeting accused 1 and 2 at the Kroonvaal toll plaza where accused 1 changed over to accused 10's car and was driven away by accused 10. At the end of the State case accused 10 was discharged on the counts relating to the Kinkelbos robbery.

[236] The State was unable to produce any further evidence implicating accused 10. Accused 10 testified on his own behalf but called no witnesses. He denied any involvement in the Darling robbery. He testified that he knew accused 1 and 2 well and that he was acquainted with accused 3, 6 and 7. He raised an alibi defence stating that on 11 August 2003 he had taken his father to a doctor at Lenmed Clinic in Ennerdale but advised that the doctor was not prepared to testify and that he did not intend to call his father as a witness.

[237] He testified that there was bad blood between him and Aspeling over certain Vodacom recharge vouchers which Aspeling's son, Clayton, had stolen from his father and which he and Clayton had sold to a Pakistani person. Aspeling testified that there were dealings between

him, his son and accused 10 regarding such recharge vouchers but gave a different version to the effect that he had refused to purchase such vouchers from accused 10 and his colleagues. Accused 10's counsel objected to a certain line of questioning of his client on the basis that he had not been allowed to play a full role in the trials-within-a-trial. Although accused 10's counsel had, on a good many occasions, questioned witnesses within the trials-within-a-trial, there were occasions when the State objected to his cross-examination on the basis that he had no interest therein. Accordingly, in a separate and substantive ruling, I ruled that the State could not pursue a line of questioning arising out of evidence aired or obtained as a result of the trial-within-a-trial.

[238] Furthermore there was no agreement from accused 10's legal representative that the contents of the trial-within-a-trial could be treated as evidence within the trial as a whole. That part of the hearing then is hermetically sealed from the balance of the evidence against accused 10 in the main trial. The ruling was, moreover, held to be applicable to accused 11 as well since the same factors applied to him.

[239] Although there were various discrepancies between the the evidence given by accused 10 and the versions put on his behalf to Aspeling, in my view it cannot be said that accused 10 fared so poorly in cross-

examination that he was revealed as a mendacious witness. Although he was clearly implicated by Aspeling in the Darling robbery, there was no evidence corroborating that of Aspeling's in any way.

[240] In the circumstances I consider that it would not be safe to convict accused 10 solely on the basis of Aspeling's uncorroborated evidence and given that he was not exposed as having given any clearly false evidence. He is therefore given the benefit of the doubt and acquitted on the balance of the charges against him.

ACCUSED NUMBER ELEVEN

[241] Accused 11 was implicated by Aspeling as the purchaser of the consignments of cigarettes stolen in the Rawsonville, Darling and Kinkelbos robberies. Aspeling testified that, after the cigarette boxes were counted at accused 1's house on 25 June 2003 he drove the truck containing the cigarettes, following accused 2 and 3 in a gold *Golf*, to accused 11's business premises in Lenasia. There he waited for the security guard to open the gate and drove down a road to the end of the building complex where he was instructed by one of accused 11's workers to reverse the truck into a yard closed with precast walling and assisted the workers to offload the cigarettes onto the pallets. At the time he did not know accused 11 or his name but accused 2 and 11 emerged and the former, who was dressed in traditional Muslim clothing, said to the latter: "*Bra Achie, ek nodig die*

parcel". Thereafter accused 11 handed R10 000,00 in cash to accused 2 who later gave it to Aspeling. This amount was the exact amount owing to *Bera's Transport* for the balance of the hire of the vehicle and Aspeling used it when he returned the truck and paid the sum of money over to *Bera's Transport*.

[242] On the day after the Darling robbery and again after counting the boxes of cigarettes at accused 1's house, Aspeling again drove the consignment to accused 11's business premises following accused 2. On this occasion he reversed into the warehouse around midday where he briefly saw accused 11 who told his employees to help Aspeling and accused 2 to offload the cigarettes from the truck and pack them with the boxes with mixed contents to one side. Accused 2 went back to accused 11 to collect the balance owing on the hired truck in the amount of R6 000,00 and handed it to Aspeling.

[243] After the Kinkelbos robbery and his subsequent hijacking, Aspeling assisted accused 2 to unload the consignment of cigarettes into a garage in Comaro. Aspeling overheard accused 2 on his phone saying: "*Bra Achie, as die trok loop sal ek jou bel, dan moet jy jou trok stuur om die cargo te kom oplaai*". When Aspeling returned later in the day the cigarettes were gone from the garage. He, accused 3, 6, 7 Grant and Otto then drove to accused 11's place of business and confronted

him saying they wanted the cigarettes that accused 2 had delivered to him or their money. Accused 11 denied that he received any goods from accused 2 but stated that the latter had phoned him that morning to tell him that he had a "parcel" for him but would deliver it during the course of the day. Accused 11 then phoned accused 2 in their presence and told him that Aspeling and his colleagues were there. Accused 11 then handed his phone to Aspeling to speak to accused 2 in the same call and an arrangement was made for them to meet at accused 1's house. Aspeling and the others left accused 11's premises and on their way to accused 1's house the shootout in Lenasia South occurred when accused 1 and 2 arrived in their car together with Denzil Boyles and a confrontation took place.

[244] In the negotiations that followed Aspeling and his colleagues were told, when they were impatiently demanding their share of the proceeds, that accused 1 and 2 were waiting on accused 11 to come up with the money.

[245] In answer to the Court's questions Aspeling testified that he had not spoken to accused 11 directly on the first two occasions and on the third occasion accused 11 was talking mainly to accused 6 and 7. On the occasion of the first offloading accused 11 had been in his presence for approximately 25 minutes. On the second occasion

accused 11 had been in his presence for about 5 of the 20 minutes. On the third occasion accused 11 had been in his presence, and that of his colleagues, for about half an hour.

[246] Accused 11 testified in his own defence and called one witness. He denied knowing or meeting Aspeling. He denied, furthermore even, knowing any of his fellow accused or that he ever received or purchased cigarettes from them. Accused 11 testified that his business, Lenasia Nursery, is in fact a closed corporation of which he was the only member. He stated that it was a nursery which sold plants, a cigarette wholesaler and a supermarket. He handed in a photograph, exhibit "YYY(2)" showing the entry to the business which would appear to consist of two sliding steel gates, one giving access to the retail section, one giving access to the wholesale section separated by a short length of palisade fencing behind which stands a two-story building on which appears the name of the business, "Lenasia Nursery" and identifies the structure as the "Security Office". This building came to be known as the "guardhouse". The photograph is cropped at the top and does not show any structure on top of the first floor. Accused 11 testified that Capital Tobacco supplied cigarettes to him and that his average turn-over of this product was about R750 000,00 per week.

[247] He testified that he was first arrested on the present charges in early

December 2003, released and then re-arrested in June 2004. Accused 11 devoted a good deal of his evidence to the security arrangements of his business premises the sliding gate, the palisade fencing, namely, the guardhouse. He testified that he first instructed a builder to construct the guardhouse in May 2003 but by June of that year it consisted of no more than a large hole which was to accommodate a septic tank. It was only in July 2003 that his builder started with the foundation of the guard house which was completed in February 2004. Accused 11's evidence was very specific in this regard, namely, that on his fiftieth birthday, on 5 August 2003 he had said to his builder that he was 50 years old and the wall was 9 bricks high. At this point he was suffering from a cash flow problem so he instructed his builder to stop the construction on the guard house. He went ahead, however, to order and install the sliding gate because he needed it to protect the building material which would arrive for the guardhouse. Accused 11 handed in an invoice in respect of this guardhouse indicating that it had been installed, invoiced and paid for on 26 September 2003. Only after the gate was built did the building material arrive and the structure of the building was completed towards the end of November or the first week of December 2003 but without doors and windows. Accused 11 described the structure as a double storey being the ground floor and the first floor which comprised a shop.

[248] Accused 11 confirmed that at the rear of his premises near the warehouse there were pallets which were used when flour were delivered. Accused 11 testified that the internal road to the warehouse was not gravel but cement and that he closed his premises on Fridays between 12h00 an 13h00 for Muslim prayers. He confirmed that he wore traditional Muslim dress from time to time. He confirmed, furthermore, that he was called “Achie” and that no one else in his business had the same name. He confirmed that since the erection of the sliding gate to the wholesale section persons wanting access thereto would have to wait at the gate until the guard opened it. It was put to him in cross-examination that the guard house looked much older and his answer was that this was a result of dust which came from the nearby veld and because it stood on the main road. When he was asked why Aspeling would falsely accuse him of purchasing the cigarettes his answer was that he could only speculate that Aspeling was trying to protect his true buyer. To accused 11’s knowledge there was no other nursery in Lenasia with an owner called “Achie”. It was put to him that in two of Aspeling’s three statements he had mentioned accused 11. Accused 11 did not take issue with this proposition but stated that he was not described in any of these three statements.

[249] The witness called on behalf of accused 11 was a Mr. John Mangongwa. He testified that he was the builder who had built the

guardhouse for accused 11 and that he had commenced construction towards the end of July 2003. At the beginning of July he had built the foundations and begun work on the brick work towards the end of July. He had first built to the height of nine bricks but had then stopped as a result of a shortage of materials. Instead he had begun doing building work on accused 11's house. He had recommenced work on the guard house towards the end of September and finished the job in the third week of December 2003 when only the windows and doors were still to be done.

[250] The witness was led on no other subject other than his building of the guard house. He gave detailed evidence as to how he was able to remember the relevant dates with such accuracy. The witness appeared to be in ongoing contact with accused 11, testifing that he had purchased a truck from accused 11 and that every month he had worked for accused 11's children to pay for the truck which was still standing at accused 11's premises.

[251] The detailed evidence given by accused 11 and his witness regarding the construction of the guard house was foreshadowed in his counsel's cross-examination of Aspeling. Aspeling was cross-examined at some length regarding the guard house and the sliding gate and it was put to him that it only came into (partial) existence in September 2003. He

denied this stating that he had travelled the road on countless occasions and the building had been standing for "years". Aspeling also expressed the opinion that it looked like a very old building, far older than two years old as was put to him by counsel. It was put to Aspeling that if the Court accepted the evidence concerning the gate and the guardhouse there was only one inference to be drawn, namely, that Aspeling had never been at the premises.

[252] At a later stage in the trial the State was granted leave to re-open its case and to lead evidence regarding aerial photographs taken of the area on 2 August 2003. To this end the State called three employees of *AOC Geomatics*, Mr. Graham Slough, Mr. Meshack Thathane and a Mr. Allan Roy. Slough, a photogrammetric surveyor testified that AOC was one of two companies in South Africa which did all phases of aerial photography work including developing the film and producing the prints. The company had done work for the Johannesburg City Council since 1950 including aerial mapping in 2000 and 2003.

[253] The witness identified a flight index print (exhibit "G x 7(1)") as the document recording the various overlapping negatives taken from a camera mounted on board of the aircraft during the course of aerial photography on the given day. The flight index print in question included the negative number 478 taken on 2 August 2003. Exhibits "G

x 7(2)-(5)" comprise the composite photographs reflecting the negative, numbers 477, 478 and 479 and then being blown up to reflect, ultimately, what was captured only by the negative number 478. Using other aerial photographs taken by the SAPS and admitted at an earlier stage of the trial, the State was able to demonstrate that the premises appearing on a different scale on each of the photographs were that of accused 11's business in Lenasia. See exhibit "JJJ", a photo album comprising photographs taken in 2005. Slough testified that he had 40 years experience in the interpretation of aerial photographs and, when his attention was directed to the largest scale blow-up of the photo in question, stated that he was able to identify a structure circled on the photograph and a nearby tree, casting a shadow of almost equal size. It became common cause that the structure in question was the guardhouse on accused 11's premises.

[254] He testified further that the height of the structure could be calculated from the aerial photograph using *AOC*'s computer software. The witness also identified exhibit "H x 7" as a photograph of the same structure shown in stereoscopic vision. When the photograph was viewed through exhibit "J x 7", a set of cardboard spectacles with one green and one red lens, the detail on the stereoscopic photograph could be seen in three dimensions. This exercise was performed by members of the Court and counsel using the said exhibits. The witness

identified exhibit “K x 7” as the logbook in the aircraft which records the date of the relevant flight and the details of the photography carried out on a particular flight including the film number and the number of the photo exposures.

[255] The witness confirmed that the original negatives were taken on 2 August 2003. Examining what was common cause was a picture of accused 11’s business premises in Lenasia, the witness identified what appeared to be a large hoarding or billboard on top of the guardhouse. As mentioned earlier this hoarding or billboard does not appear on exhibit “YYY (2)”, the photograph of the guard house handed in by accused 11 but, on the top right-hand corner, a small portion of what appears to be a stanchion of the hoarding is pictured. The witness expressed the opinion that the shadow cast by the built structure in exhibit “J x 7 (5)” was much higher than one that would be cast by a structure only nine bricks high.

[256] Mr. Thathane testified that he was a qualified camera operator and ground surveyor employed by *AOC* Geomatics. In 2003 the company had taken aerial photographs of the Johannesburg metropolitan area for the local authority. The photographs are aligned by a GPS system and are taken in strips, every strip having a certain number of overlapping photographs. The films were then taken to the company’s

lab where they were processed. His job entailed *inter alia* inserting the film into the camera fitted to the aircraft and then, afterwards, retrieving the magazine from the camera and conveying it to the company's offices in film canisters. He was also required to complete a logbook with details of the flight including details of the film used. He identified exhibit "K x 7" as the original and a copy of the relevant log recording details of the flight, film number and numbers of the exposure taken in respect of a flight on 2 August 2003 when the negatives which produced the photos in exhibit "H x 7 (2)-(5)" were taken. Every detail in the flightlog save for those in Koki pen had been entered by him, those in Koki pen having been completed by the lab technician, Johan Steyn.

[257] Using a light table brought into Court for this specific purpose, the witness identified exhibit "L x 7" as the original negative number 478 of those taken on 2 August 2003 and recorded in the flightlog, exhibit "K x 7", and comprising the central negative from which the photographs in the exhibit "G x 7 (2) to (5)" and exhibit "H x 7" were produced. The number appears in a counter on the top right-hand corner of exhibit "L x 7". That negative, number 478, was one of many on film number V13928. The witness was also involved in the process of checking prints produced from the film in question. He also identified the canisters before Court in which the film V13928 was stored and

identified furthermore the numbers of the negatives on the flight index print (exhibit “J x 7”) evidencing the numerous negatives taken during the aircraft flight on 2 August 2003. The witness confirmed that he took the negative number 478 and that what was depicted thereon was shown in the photographs in exhibit “G x 7 (2) to (5).

[258] Mr. Roy testified that he was employed by the company as a draftsman and was also trained as photogrammatist. Since 1999 he had worked for the company as a soft copy photogrammatist. He testified that he had produced the exhibit “H x 7” and copies thereof which was an anaglyph, a type of three-dimensional photo, by using certain software purchased by a company originally designed for military purposes. He used the same software to perform measurements of the guardhouse visible at the entrance of the premises depicted in exhibit “H x 7”. With the software he was able to measure the ground height adjacent to the building and the top point of the building and, by subtracting them was able to determine that the building at the time the photographs were taken was 5,7 meters high, give or take half a metre. The height of the total structure, including the billboard on top, was, he calculated as being 9,5 metres, give or take a half a meter.

[259] He confirmed that images 477, 478 and 479 were the negative which produced the photos depicted in exhibit “G x 7(2) – (5)”. Exhibit “G x

7(5)", he confirmed, reflected the same image as the anaglyph but the anaglyph is an overlap of two images, namely, the negatives 477 and 478. The witness testified further that the structure on the anaglyph was consistent with that shown on exhibit "YYY (2)", the photograph of the guardhouse handed in by accused 11. He confirmed that he had not been shown a photograph before his evidence depicting the guardhouse at ground level. Nor had he previously been alerted by any person to the presence of a sign or billboard on top of the structure. In response to a further question the witness confirmed that the structure on top of the billing was approximately 3,8 meters in height.

[260] None of the evidence of the employees of *AOC Geomatics* led by the State was substantially challenged and accused 11, although afforded full opportunity to do so, declined to re-open his case either by testifying himself in response to such evidence or by calling a witness or witnesses.

[261] The State urged the Court to accept the evidence of Aspeling insofar as it implicated accused 11 and reject the evidence of the accused and his witness as false. On behalf of accused 11 it was argued that Aspeling's evidence should be rejected as being unreliable particularly in the light of his being a s 204 accomplice witness. In particular it was argued that Aspeling's identification of accused 11 was suspect if not

irregular in that it was a so-called “dock identification” to which no weight could be attached. Before making that identification Aspeling had last seen accused 11 at the latter’s business premises on 3 October 2003. It was argued, furthermore, that there was no corroboration for Aspeling’s evidence and in the circumstances the evidence of the accused and his witness, which could not be faulted, had to be accepted.

[262] It is so that an identification parade is not only an accepted investigative procedure but also serves an important evidential purpose in that it can provide the prosecution with evidence which is of far more persuasive value than an identification in court. See in this regard *R v Sebeso* 1943 AD 196 and *R v Mputing* 1960 (1) SA 785 (T) at 788G. In *S v Maradu* 1994 (2) SACR 410 (W), Blieden J expressed the view that he could see no reason why a dock identification should also not be inadmissible, save in certain special circumstances. This dictum was rejected in *Bailey v The State* (unreported CPD full bench decision, case number 215 / 2000, 31 August 2000) where Griesel J concluded, noting the validity of “the proposition that a dock identification by itself, without more, has limited, if any, evidential value” concluded that it “is completely unnecessary… to go one step further by ruling a dock identification inadmissible “save in special circumstances”. In *S v Matwa* 2002 (2) SACR (E) 350E Leach J qualified the *dictum* in

Maradu supra as follows (at 355i to 356a-b and 356f to g):

> ***"My conclusion is that in a case such as the present, the question in issue is not the admissibility of the dock identification but the evidential value to be placed thereon. Where a witness identifies an accused in the dock, it forms part of the evidential matter upon which the case must be decided and I see no reason in principle to exclude it solely due to it having been done in court. In many, if not the majority, of cases coming before our courts, the first occasion a witness has to identify the offender is when he or she gives evidence. The admissibility or otherwise of evidence cannot be determined by having regard to the degree of seriousness of the offence upon which an accused is tried, and it is wholly impractical to suggest that the police should, for example, be obliged to hold an identification parade for the material witnesses to attend in each and every minor case of disputed identity in order to render their identification of the accused admissible at a subsequent trial… No fixed rules can be laid down. In each and every case the judicial officer must decide upon what weight, if any, is to be afforded to the dock identification, regard being had to all the material circumstances – including those prevailing when the initial observation took place as well as those under which the identification in court is made. But to exclude evidence of identity as inadmissible purely on the basis of it being tendered in the presence of the accused in the dock, is, in my respectful view, incorrect."***

I am in respectful agreement with the aforementioned views which, in my view, can be applied to the present matter.

[263] Whilst an identification by Aspeling of accused 11 pursuant to an identification parade may have added something to the value of his evidence in this regard, in my view, in the circumstances of this matter it was by no means necessary and its absence is not a significant factor telling against this aspect of Aspeling's evidence.

[264] Aspeling's identification of accused 11 was not based upon a fleeting encounter in adverse lighting conditions or similar adverse circumstances. Aspeling encountered accused 11 on three separate

occasions between 25 June and 3 October 2003. In all, his estimate was that accused 11 had been in his presence for approximately one hour. The identification of accused 11 rested, furthermore, not only on Aspeling's identification of accused 11's facial features or bodily characteristics. Aspeling identified accused 11 as "Achie", the owner or proprietor of the Lenasia Nursery. When accused 11 came to testify he conceded that he was known as "Achie" and that there was no other "Achie" of whom he was aware who ran a nursery in Lenasia.

[265] Finally, the circumstances of Aspeling's identification of accused 11 in Court were not those which pertain in many or most criminal cases with the accused being the only person in the dock and therefore the obvious person for a witness to point out when asked to identify the alleged offender. The accused was one of eleven persons, all of them men, some young but others older. It does not follow, as was contended, that he was the only person to whom the witness would point as being a shopkeeper or business person.

[266] Although accused 11, of course, bears no *onus* in this regard, when asked why Aspeling, who according to him was a total stranger, would implicate him in the robberies, accused 11 could do no more than suggest that Aspeling was seeking to protect his true purchaser. That of course begs the question. Furthermore, the evidence is persuasive

that Aspeling knew the premises by reason of his description of where he drove the truck, where the goods were offloaded and what was to be found at the back of the warehouse in the form of pallets etc. Aspeling mentioned other convincing detail such as accused 11 wearing traditional Muslim clothing and the presence of his son at some stage.

[267] It is noteworthy that accused 11 did not call any employee to testify that they had never offloaded cigarettes brought by Aspeling during the period in question and nor did he call his son as a witness. A further important factor was that accused 11 fitted the profile of someone who could dispose of a large quantity of cigarettes. He ran a substantial wholesale cigarette business with a weekly turnover of R750 000,00. Significantly, furthermore, on all the signage relating to the business there is no indication that the Lenasia nursery was also a cigarette wholesaler. This would mean, if Aspeling was indeed falsely implicating accused 11, that he would have had to have prior knowledge from some other source that accused 11 was indeed a cigarette wholesaler.

[268] It was argued that Aspeling's evidence could not be accepted in the absence of corroborating evidence implicating the accused. It is correct that there was no direct corroborating evidence in the main trial. In terms of the Court's ruling, furthermore, none of the evidence

emanating from any of the trials-within-a-trial could be treated as admissible against accused 11. As previously explained in relation to accused 10, accused 11's counsel too, although his client was not a direct party to the various trials-within-a-trial was allowed to cross-examine and at times did so quite extensively. However, there were occasions on which the prosecutor objected to such cross-examination on the grounds that accused 11 had no direct interest in such trials-within-a-trial.

[269] By way of background, State counsel initially did not indicate that the State might seek to rely on the cell phone records relating to other accused in order to implicate accused 11 and there was no disputed search of accused 11's premises and thus it appeared accused 11 had no direct interest in the trials within the trial. As a consequence of the Court's ruling, when State counsel sought to put certain material to accused 10, who was similarly affected, the Court ruled that the State was precluded from doing so. In the result the only evidentiary material which can be held against accused 11 is that which was presented in the main trial, accused 10 and 11 having additionally refused to agree to the contents of the trials-within-the-trial being made part of the record of the trial as a whole.

[270] Notwithstanding the Court's ruling that evidence in and derived from

the trials-within-the-trial could not be used against accused 11, it was additionally argued on his behalf that the limitation on his counsel's right to cross-examination therein was so gross an irregularity that it rendered his trial unfair. It was further contended that, using its powers in terms of s 173 of the Constitution, Act 108 of 1996, the Court should on the basis of this alleged irregularity alone, acquit accused 11. In terms of the relevant section a High Court has the inherent power to regulate its own process and develop the common law. Whatever that power encompasses, however, it does not entitle this Court to function as a court of appeal or review in respect of its own decisions. There is, therefore, no merit in this submission.

[271] Ultimately, the question is not solely whether there is material corroborating the evidence of the accomplice witness but whether the State has proved its case against an accused beyond reasonable doubt. In making this determination the Court can also have regard to other factors or safeguards such as the accused's failure to testify or the fact that he is a lying witness.

[272] It is in this context that the evidence relating to the guardhouse assumes critical importance. From the full account given of the evidence led in this regard it is quite apparent that the accused made the alleged non-existence of the guardhouse until its final completion in

December 2003 one of the foundations of his defence and a major, challenge to Aspeling's credibility. However, if the evidence of the employees of *AOC Geomatics* company is accepted it follows ineluctably, that as of 3 August 2003, at a time when accused 11 stated the structure was nine bricks high, not only was the structure there in its full size but it had a large billboard on top. In my view the evidence of the three employees of *AOC* is not only graphic but is unassailable.

[273] The only challenge which accused 11 could mount to this evidence was the submission that it was not properly proved that the negative number 478 had been taken on the day and on the flight in question because the frame and film numbers had been entered on the flight log sheet by another *Geomatics* employee who was not called by the State. This line of attack was, moreover, raised in argument and not clearly put to any of the three witnesses for them to comment upon.

[274] In my view, the evidence of the three employees called by the State and most notably that of Thathane proved beyond any reasonable doubt that the negative placed before the Court was that from which exhibit "G x 7(2) – (5)" and all the photographic images handed up into Court was derived, was taken on 2 August 2003.

[275] Accused 11 chose not to respond to the evidence in any substantive

manner and in my view the only inference that can be drawn from his failure to do so was that he saw no likelihood of successfully disputing the evidence and was unwilling to expose himself to further cross-examination on this subject.

[276] It must also be borne in mind that, from the time that it was first made, Aspeling disputed the proposition that the guardhouse had only been built recently and indeed expressed the view *inter alia* on the basis of the photograph, exhibit "YYY (2)" that the building was far older than one or two years old. Having regard to the exhibit in question Aspeling's view does not appear to be obviously incorrect and the explanation that dust caused its aged appearance carries no weight. It appears furthermore that that photograph (exhibit "YYY (2)") is deliberately framed in such a manner as to obscure the top of the structure and thus the billboard on top.

[277] It follows from this that accused 11 lied deliberately and at length in his evidence when he testified as to the age of the building and the circumstances in which it came to be built. Not content therewith he procured the false evidence of his builder, Mangongwa, to support him in these lies, this false evidence only being exposed by the fortuitous co-incidence of the aerial survey photography carried out in August 2003. The question that must be asked is why would someone,

innocent of any involvement in the purchase of stolen consignments of cigarettes, systematically lie to Court and procure false evidence in this regard?

[278] Prior to the re-opening of the State's case and the leading of the evidence which effectively destroyed his credibility, accused 11 did not create a particularly unfavourable impression as a witness and he fared reasonably well, for the most part, in cross-examination. What did become clear however was that accused 11 was adept at adapting his evidence to suit what he saw as the exigencies of the situation. A clear example of this was his evidence relating to his first arrest in December 2003 which he said was effected by three policemen and four people from BATSA. He mentioned "Captain" Cottle and "Inspector" Jones as showing him the warrant of arrest.

[279] Later in cross-examination the main actors in this arrest became Jones and a Captain Vassen. The accused stated unequivocally that Inspector Heydenrich, the original investigating officer before his death, and Inspector Jonker, his successor, were not present. However, the particulars of claim in a civil action issued out on his behalf as plaintiff were then put to him (exhibit "V x 6"). In the action he sued for unlawful detention following upon his initial arrest and the particulars named only "Inspector Heydenrich and/or member of the SAPS whose names

and ranks are unknown to the plaintiff" as those who arrested him. Clearly, until he was unexpectedly confronted with the particulars it suited accused 11, to contend, as had many of his fellow accused that the prosecution was a conspiracy driven by BATSA security officials and that such officials were in the forefront of his arrest. It must also be said that Mr. Mangongwa initially created a good impression as a witness before the evidence of the aerial photography destroyed his evidence.

[280] The exposure of accused 11 as a lying witness, and guilty not merely of a passing lie, provides, in my view, the guarantee or safeguard which makes it safe to accept Aspeling's evidence and to reject that of the accused regarding his involvement in the purchase of the cigarettes. I reach this conclusion not simply on the basis of the finding that accused 11 gave false evidence in regard to a significant area of dispute, but also in the light of Aspeling's evidence as a whole and the probabilities as discussed above.

[281] I accept then Aspeling's evidence of the delivery of the consignments of cigarettes to accused 11's premises immediately after the Rawsonville and Darling robberies. There was, however, no direct evidence of the delivery of cigarettes to accused 11 after the Kinkelbos robbery or, for that matter, of his purchase thereof. There is

considerable indirect evidence pointing in that direction, namely accused 2's phone call to accused 11 overheard by Aspeling at Comaro on the morning of 3 October. There was furthermore the conversation between accused 11, Aspeling and others at accused 11's business premises later that day when accused 11 stated that accused 2 had promised to deliver the parcel that day but had not yet done so.

[282] There is also the evidence that in later days the delay in payment to Aspeling and others of their share of the proceeds of the robbery was ascribed to the delay in accused 11 paying for the cigarettes. However, even accepting this evidence, it is not the only inference that can be drawn therefrom that the cigarettes were indeed delivered to accused 11 and purchased by him. It is possible, although not probable, that accused 1 and 2 found another purchaser for the last consignment of cigarettes and used accused 11's name to disguise the true recipient of the cigarettes, thereby protecting the consignment from the attentions of accused 3, 6, 7 etc. In the result I am not satisfied that accused 11 can be found guilty, beyond reasonable doubt, of purchasing the last consignment of cigarettes.

THE COUNTS OF MOTOR THEFT

[283] The State charged various accused with a total of 6 counts of theft of motor vehicles, namely counts 3, 7, 8, 9, 13 and 14. All of the accused

were discharged on counts 3 and 7 at the close of the State case. In relation to count 8 the State conceded in final argument that it had made out no case on this count against any of the accused. This leaves counts 9, 13 and 14. Counts 9 and 13 relate respectively to a white *Volkswagen Polo* and a white *BMW* vehicle found on the premises of accused 7 upon his arrest on 9 October 2003. The remaining count, count 14, related to a white *Volkswagen Golf 4* vehicle found on the premises of accused 3 upon his arrest.

COUNT 9 : THE WHITE *VOLKSWAGEN POLO*

[284] In this count it was alleged that the accused had stolen the vehicle, the further particulars of which were unknown, it being the property or in the lawful possession of a person unknown to the State. No evidence was ever led as to the true identity or ownership of the vehicle or where and when it was stolen. Two police witnesses testified regarding vehicles. Captain Grobler testified that he examined the *Polo*, a white 2002 model 1.6 litre, on 8 March 2004. He ascertained that this vehicle's chassis number had been cut out and replaced with a chassis number of another Volkswagen vehicle, a 2001 model *Polo* 1.4 . The original engine number of the 1.6 engine had been removed with a grinder and replaced with the particulars of the 1.4 *Polo*. This was clearly visible with the naked eye. The transponder inserted by the factory during the manufacturing process had also been removed and

replaced with another.

[285] Captain Grobler was of the opinion that the vehicle's identity had been deliberately changed. Aspeling's evidence was that a white *Volkswagen Polo* had been used as the "police vehicle" during the Darling robbery which took place on 12 August 2003. Grobler also testified that all three of the vehicle's original code numbers had been removed and replaced with other numbers. The chassis number in the body work in the front panel of the engine cabin had been professionally removed and another number put in its place. The shock absorber housing had also had the new chassis number inserted onto it. The original engine number on the engine block had been scoured out with a grinder. It had been so deeply ground out that the original number could not be detected. All the windows of the vehicle had been replaced with new windows on which no numbers appeared.

[286] In the witness's opinion he could find no sign that the vehicle was a composite vehicle, the bodywork being one unit. According to the witness, externally the vehicle's identity had been changed from a 1.6 to a 1.4 *Volkswagen Polo*, however the bodywork, interior and engine was definitely that of a 1.6 cc *Polo* vehicle. The police computer system revealed that this vehicle had been registered on 3 September 2003 in the name of Mr. LG Smith of Ennerdale under identity number 770404

5246 089, namely, accused 7.

[287] Senior Superintendent Poolman, attached to the mechanical engineering section of the forensic laboratory, established his credentials as an expert witness in the area of the identification of stolen vehicles and related subjects. He testified that he had examined the relevant white *Volkswagen Polo* and white *Volkswagen Golf 4* and handed in a set of photographs in respect of the *Polo* vehicle (exhibit "B x 6"). He testified that in two places on the vehicle body work, portions had been removed and welded in. The vehicle had definitely not been involved in a serious accident and there was no apparent reason or need for those portions to have been patched into the vehicle. According to him it was clear that that portion of the bodywork on which the VIN number appeared had been removed from another vehicle in a manner which was associated with how criminal syndicates dealt with stolen cars.

[288] It was not disputed that the vehicle which Captain Grobler and Superintendent Poolman had inspected was that seized from the premises of accused 7. Accused 7 testified that the charge of theft against him in regard to the *Volkswagen Polo* was part of the plot against him. He stated that he had lawful papers for the vehicle, the *Polo* having been registered in his name. He purchased it at the

beginning of September 2003 from *Power Auto Spares* as it had been involved in an accident. He had purchased the 1.6 body together with a 1.6 engine. He had no receipt from *Power Auto Spares* to validate the purchase. When asked what he had done in three years to obtain such documentation the accused stated that he would ask his brother. He could not remember how much he paid for the *Polo* nor when the vehicle was registered in his name. He stated that he took the vehicle to panel beaters and they had put the car into working order. He stated that the police were in possession of the receipts in respect of payments to the panel beater. There had been no tampering with the chassis or the engine numbers.

[289] Asked about evidence that portions of the vehicle had been grafted in to disguise its original numbers, the witness attributed this to the panel beater. For their work he had paid them R8 000,00 – R10 000,00, explaining that this was a major job on the part of the panel beaters. Eventually the accused stated that the panel beaters had moved. He also alleged that the vehicle has been registered in his name on 9 October 2003 notwithstanding Grobler's evidence that the date of registration had been 3 September 2003.

[290] Accepting at face value accused 7's evidence that he purchased the vehicle in September 2003 it is impossible to see how he could have

registered it in his name on 3 September given that it required extensive panel beating work to place it in a roadworthy condition and would then have to have undergone a roadworthy test. There were numerous other improbabilities in the accused's version of how he came to be in possession of the vehicle. He did not explain the nature and extent of the work which must have been done to the vehicle by the panel beaters nor, for that matter, how the extensive work which they performed would have cost him only R8 000,00 – R10 000,00. The accused could not produce one document to prove his purchase of the vehicle or the extensive repairs commissioned from the panel beaters but sought refuge in the repeated allegation that police had seized this documentation.

[291] Despite having three years in which to procure duplicate proof of the purchase or the repairs, the accused failed to. From Poolman and Grobler's evidence it is clear that the vehicle had been extensively doctored to conceal the true ownership and origin of the vehicle. The accused was unable to produce any proof that he had acquired the vehicle lawfully or had it lawfully repaired despite more than adequate opportunity to do so. There is no reason to doubt any of the evidence given by the police concerning the nature of the work done to the vehicle and that its identity had been thereby concealed in a manner consistent with how criminals conceal the identity of a stolen vehicle. In

my view, the accused's version of how he came to be in possession of the vehicle must be rejected as false. It follows then, in the absence of an explanation for what was clearly a stolen vehicle the identity of which had been disguised, the only possible inference which can be drawn is that the accused either stole the vehicle himself or was knowingly in possession of a stolen vehicle and on that basis he must be found guilty of theft on this count.

COUNT 14 : WHITE *VOLKSWAGEN GOLF 4*

[292] Captain Grobler referred to several photographs of this vehicle (exhibit "S (3) to (5)") indicating what he testified was a 2001 model 1800 cc *Volkswagen Golf 4*. He stated that all the original code numbers had been removed from the vehicle and replaced with numbers relating to a 2000 model 1800 cc GTi *Volkswagen Golf*. The transponder had also been removed and all the windows replaced with windows without identifying numbers on them. In his original evidence he stated that the vehicle showed no signs of having been built up or patched together. The police information indicated that this vehicle had been registered on 30 September 2003 in the name of ST Da Costa of Toekomsrus, Randfontein. This was the person whom accused 3 later claimed was his cousin. When Captain Grobler was recalled to give evidence some months later he testified that Senior Superintendent Poolman had in the meantime inspected the vehicle and made findings different to

those which he, Grobler, had initially made. Grobler stated that he had erred in his earlier conclusions that the *Golf* showed no signs of cuts or welding marks and that it had not been built up or patched together. His opinion now was that the front portion of the *Golf* had been joined to the back portion of another vehicle and thus that it was a composite vehicle.

[293] In respect of the transponder found in the Golf 4 he advised that the Volkswagen factory indicated that they had no record of any such transponder. Although the new replacement identification numbers indicated that it was an 1800 cc GTi Golf, it was in fact a 2 litre Golf. The manner in which the Golf had been changed was that in which motor theft syndicates customarily changed the identity of stolen vehicles. In due course Superintendent Poolman testified regarding the Golf motor vehicle which he had inspected and handed in a set of 14 photos (exhibit “C x 6”). It was his conclusion that the vehicle consisted of two vehicles, the front portion having been welded onto the rear part of another vehicle thereby forming one vehicle. In his view the work had been done very professionally.

[294] When accused 3 testified he admitted that the Golf had been found on his premises but stated that it was a car which he had built up from scrap parts, both from the Cape and the Reef, and that he had sold the

vehicle to his cousin or nephew, one Shaun Da Costa. He was not able to produce any receipt for his purchase of the car parts or any documents evidencing the alleged sale of the vehicle to his cousin. He had some difficulty explaining why, if he had sold the vehicle to his cousin by the end of September, it was still sitting in his yard on 9 October 2003. Nor did he ever call Da Costa to confirm the purchase.

[295] Notwithstanding the problems with the accused's version the fact remains that, according to Poolman's evidence, the vehicle was a composite one and, furthermore, the State was not able to prove, except by inference, that either of the main parts of the vehicle had in fact been stolen and if so, from whom and when. The charge itself is extremely vague, alleging as it does that the vehicle was stolen at a location unknown to the State, on a date unknown but before 2 October 2003. Nor was the State able to allege any ownership details. No evidence was led of any such theft in relation to any of the composite parts of the vehicle. In the circumstances I am of the view that the evidence led by the State is insufficient to found a conviction of theft against accused 3 beyond any reasonable doubt and he is acquitted on this charge.

COUNT 13 : THE WHITE *BMW*

[296] Count 13 alleged that a white *BMW* vehicle with a specified engine number and the registration number **CA 344 730** had been stolen on 15

September 2003 at Mowbray in the district of Wynberg, Cape Town whilst it was the property or in the lawful possession of William James Jenkins. Mr. Jenkins testified that during September 2003 he had been the owner of a white *BMW* 325i vehicle with the aforesaid registration number. On 15 September 2003 he had been robbed of his vehicle by two black men who approached him on foot and threatened him with a knife. Towards the end of January or early February 2004 he had received a phone call from *BMW* and flew up to Johannesburg to identify his vehicle. He identified the *BMW* in a vehicle pound as his and took two photographs thereof which were handed in as exhibits "R (1)" and ""R (2)".

[297] The witness was shown exhibit "S(1)" – "S(5)" and testified that the vehicle therein depicted was his vehicle. The vehicle was damaged; it had a bullet hole in the bonnet, the right front fender was damaged, the right back window broken and the radio CD-shuttle was missing. Jenkins specifically mentioned the fact that he had bought special mats for the vehicle prior to it being robbed. They had been too big and he had had to cut them smaller. When he examined the vehicle in the pound he found the same cut-to-size mats in the vehicle.

[298] The witness's evidence was not disputed by any of the accused. A Mr. Gerrit van Rensburg testified that he had been employed by *BMW*, SA as a vehicle examiner. On 17 March 2004 he had examined a white *BMW* at the police vehicle storage depot, Van Rhyn Deep, Benoni. There he noticed that although the original engine was still in the vehicle both the engine and the chassis number had been changed. He examined the vehicle's windows on which a unique serial number always corresponded with the chassis number of the vehicle. He

noticed that the two numbers did not correspond in this instance. He nonetheless was able to determine ownership of the vehicle and contacted the owner, a Mr. WJ Jenkins, who later identified the vehicle. Gauteng number plates with registration **PPF 463 GP** were attached to the vehicle. There were bullet holes in the boot as well as the engine hood.

[299] Mr. Bradley Allan testified that he worked as a consultant for *BMW* and had purchased the *BMW* shown in the photo, exhibit "S (1)". New engine and chassis numbers had to be stamped on the engine and chassis by the police. He re-registered the vehicle and obtained police clearance. He determined from the original registration document that a Mr. Jenkins had been the previous owner.

[300] It will be recalled that Aspeling testified that accused 7 had driven a white *BMW* vehicle during the Kinkelbos robbery and that the same vehicle had been involved in the shooting incident in Lenasia South on 3 October 2003. Aspeling later testified, through the photographs of the vehicle confiscated from accused 7's premises, that it was the same vehicle as that used in the robbery.

[301] Captain Grobler testified that he examined the *BMW* and found that it was a 2001 325i model as depicted in the relevant exhibit pictures. The

vehicle's engine number had been removed and another number superimposed. The window on the driver's side was replaced and the engine number was sandblasted onto it. None of the original numbers punched into the vehicle or applied during the manufacturing process could be determined. The shock absorber cover on which the chassis number normally appears had been replaced as had the manufacturer's plate, evidencing a certain number, had also been replaced. Nonetheless, ownership of the vehicle was determined and the apparent owner, a Mr. Jenkins had in due course identified the vehicle as his property. He had identified the vehicle by the following features:

- the mats he had put into the car;
- electrical seats;
- a blind in the rear window;
- a boot spoiler on the boot;
- a central arm control;
- the dashboard being one decorated with wood;
- the seats being a unique shade of grey.

Jenkins had advised the witness of these characteristics even before he examined the vehicle. On the vehicle was damage which appeared to have been caused by bullets at the rear in the spoiler and the boot as well as a bullet hole in the bonnet. On the rear of the vehicle there was no sign indicating the size of the engine, a feature which Jenkins had specially ordered prior to purchasing of the vehicle. According to the police records this vehicle had been stolen on 15 September 2003 and registered in the name of a Mr. LG Smith of 47 Minerva Crescent,

Ennerdale on 19 September 2003. This was accused 7's address, initials.

[302] When accused 7 gave evidence he admitted that the *BMW* had been found on his premises as well as the Volkswagen Polo. He stated that the *BMW* had been lawfully registered in his brother's name because it was his brother who had taken the car for clearance and roadworthy. He explained that he had purchased the vehicle on 14 August 2003 from one "Kusa". The *BMW* was not "complete", the seats being loose, the doors off and the grille and lights being imperfectly attached. He added that a portion of the body work in the passenger's footwell and another portion of the vehicle's body was missing. Other small parts of the vehicle were missing. Asked if he had any documents which indicated that he purchased the car in August 2003, accused 7 replied that he did not. Nor did he have any documents showing that the vehicle was taken to panel beaters and returned to him on 29 September as he claimed. When asked whether he had made any attempt to obtain documentation from the panel beaters he answered that he had but they were "gone". He stated that he had ensured that the engine number and chassis number were the same as that reflected in the documentation, but that it was not an original engine, another engine having been fitted to the vehicle. According to him Tiza Thapelo, this being the full name of the person from whom he had

purchased the *BMW,* was dead. He alleged in general terms that the police officials who had testified regarding the *BMW* had lied.

[303] In my view the accused's evidence casts no serious doubt upon the evidence given by the police relating to the vehicle. The State evidence, particularly that relating to the identification of the vehicle, was in my view convincing and must be accepted. Similarly I accept, without reservation, the evidence relating to Jenkins's positive identification of the vehicle. Accused 7 was able to furnish no proof at all of how he came by the vehicle, its alleged repair in a panel beater shop and nor did he call his brother to confirm his account of how the vehicle came to be roadworthied and registered. Accused 7 also claimed that the police had seized his license papers to the vehicle, but even if this is so, however, the existence of papers registering the vehicle in the name of his brother or his name (four days after Jenkins was robbed) in no way offsets the evidence that the vehicle was the same one as was stolen from Jenkins on 15 September 2003.

[304] It will be noted furthermore that the vehicle was registered in his name three or four days after Jenkins was robbed of the vehicle in Cape Town. To my mind there is only one inference which can be drawn and that is that accused 7 acquired possession of the vehicle knowing that it was a stolen vehicle and registered it in his brother's name or his

name well knowing that the vehicle's identification marks had been changed to attempt to disguise its true origins. Given the elapse of only 4 days between the theft and the fresh registration, the probabilities are that the accused performed this work himself or commissioned the work but it is not necessary to make a finding in this regard. Whatever the case, given the accused's false explanation of how he came to be in possession of a very recently stolen vehicle, there can be no doubt that the State proved the count of theft against accused 7 beyond any reasonable doubt.

DISCUSSION OF THE COUNTS PROVED AGAINST THE ACCUSED

[305] Up to this point I have, save for three counts of theft of motor vehicles (counts 9, 13 and 14) dealt only in general terms with the evidence presented by the State against the various accused and their defence. I shall now deal with each of the accused *seriatim* in order to determine which counts were proved against them. I shall deal only with those counts on which the accused were not discharged at the close of the State case. However, I shall only deal with the POCA counts, namely, counts 1, 2 and 23 to 25 after dealing with the remaining counts. This would appear to be the most logical approach given the manner in which the State framed the charge i.e. alleging that the pattern of racketeering activities (as set out in annexure "A") comprised the acts charged in counts 1 and 2.

ACCUSED NUMBER ONE

Counts 4, 5 and 6

[306] These counts deal with the Rawsonville robbery and the abductions of the two BATSA employees, namely the driver and his assistant. Aspeling's evidence was that, although he had made a low-key entrance, by the day of the Rawsonville robbery accused 1 was in full control of the operation. It was he who instructed Aspeling telephonically to go to various spots and he himself was at the spot where the BATSA truck was first robbed. By reason of his disability accused 1 never physically participated in the robbing of the truck but he was clearly in charge of the entire operation and was at or near the scene of the robbery. Furthermore, Aspeling's evidence was that earlier, over the weekend, there were planning discussions in preparation for the robbery and accused 1 had played the leading role therein.

[307] It is not necessary for convictions on counts 4, 5 and 6, that accused 1 physically participated directly in the robbery or the kidnappings. The doctrine of common purpose provides that if two or more persons decide to embark on some joint unlawful activity the acts of one are imputed to the other/s which fall within their common purpose. See *R v Duma and Another* 1945 AD 410 at 415 and *R v Shezi and Others* 1948 (2) SA 119 (A) at 128. In *S v Thebus* 2003 (2) SACR 319 (CC),

2003 (6) SA 505 (CC) it was held that the doctrine of common purpose is not unconstitutional as it did not infringe on the right to dignity and freedom. The Constitutional Court found that the doctrine did not relate to a reverse onus and there is no reasonable possibility that an accused person could be convicted despite the existence of a reasonable doubt as to his/her guilt. In S v *Safatsa* 1988 (1) SA 868 (A), the leading case on common purpose, it was held that the doctrine was based on the concept of active association by one person with another's unlawful act.

[308] In accused 1's case it is not necessary to consider what part he played since on a conspectus of the evidence as a whole it is quite clear that there was a prior agreement to rob the BATSA vehicle and to temporarily abduct the driver and the passenger in order to accomplish this goal. It is clear furthermore that accused 1 was party to that agreement, as has been demonstrated by his overall overseeing of the operation and his presence at the various scenes of the physical robbery.

[309] In the circumstances I am satisfied that accused 1's guilt has been proved on these counts beyond reasonable doubt and he is convicted thereon.

Count 8

[310] On this count the State conceded that there is no case against any accused and accused 1 is acquitted thereon.

Count 9

[311] I have already found that accused 7 was guilty of the theft of this motor vehicle. The State failed to prove precisely when the vehicle was stolen, that accused 1 knew that the vehicle was stolen or indeed even that it was this particular *Volkswagen Polo* which was used in one or more of the robberies. In the circumstances there is no acceptable basis for finding accused 1 guilty on this count and he is acquitted thereon.

Counts 10 - 12

[312] These counts cover the Darling robbery and the associated kidnappings. Aspeling's evidence was that accused 1 initiated the Darling robbery and was in control of the operation from beginning to end. At one stage there was a discussion at the *Waterfront Suites* as to who would pose as the police officer. Accused 1 then decided that accused 4 and 6 would assume those roles. Aspeling testified that accused 1 was always doing the planning and phoning. Accused 1 was directly involved in the robbery on the morning in question being driven in a silver *Audi* by Zackie to the scene of the robbery and escorting Aspeling and his truck back to Cape Town after the robbery. As in the Rawsonville robbery the cigarettes were transported back to accused 1's residence in Gauteng where he oversaw their sale and the distribution of the proceeds to his accomplices. The *modus operandi* used in this robbery was exactly the same as that in the Rawsonville robbery, namely, the use of a bogus police vehicle to stop the BATSA truck, the removal of the driver and his assistant from the scene of the hold-up and the loading of the goods into the truck driven by Aspeling. On the same reasoning as that applied in relation to the Rawsonville robbery, I find the State to have proved accused 1's participation in these counts beyond reasonable doubt and he is

duly convicted thereon.

Count 15

[313] This relates to the first Kinkelbos robbery when the BATSA truck was stopped and the driver and his assistant were robbed of the contents and abducted. Aspeling's evidence in this regard was that the planning for the robbery was initiated by accused 1 and 2 who went as far as joining him in a scouting trip to the Eastern Cape which involved monitoring BATSA's premises, following one of its trucks along the Alexandria route and selecting a spot for the robbery. However, Aspeling's evidence is equally clear that disaffected members of the group, led by accused 3 decided to cut accused 1 and 2 out of the robbery and went ahead and executed the robbery on their own. Unbeknownst to them, however, accused 1 and 2 were aware that they were being double-crossed and were in the vicinity of the robbery when it took place. They took no part in such robbery, however, and therefore there is no basis upon which either can be convicted on this count. Accused 1 is acquitted on count 15.

Counts 18 and 19

[314] These counts deal with the robbery of Aspeling of the consignment of cigarettes robbed from the BATSA truck at Kinkelbos and the former's cell phone and firearm. It is alleged that aggravating circumstances were present in that a firearm was used. Aspeling's evidence was clear

that he was hijacked at gunpoint by accused 1, 2 and Denzil Boyles.

[315] Clearly accused 1 associated himself with this hijacking and, in all probability, in keeping with the usual *modus operandi*, conceived and managed the plan to "hijack the hijacker". During the course of the journey back to Gauteng he gave various instructions and his credit card was used for purposes of the stay in the *Formula One* Hotel, Alberton. The vehicle in which accused 1 was a passenger, escorted the hijacked truck carrying Aspeling and accused 2 back to Gauteng. In the circumstances the State has succeeded in proving its case under these two counts against accused 1 and he is convicted on counts 18 and 19.

Counts 20, 21 and 22

[316] Count 20 alleges that accused 1, 2 and 6 attempted to kill Aspeling and various police officials or employees at the scene of the confrontation in Lenasia South. It is clear that the wild shootout which occurred on the day in question was a confused scene. Gunshots were clearly fired as is evidenced by the fact that accused 2 was wounded and various bullet holes were found in the *Jetta* and the *BMW*. Aspeling's evidence was that accused 6 and accused 1 opened fire with firearms. Aspeling's evidence was quite clear that as he emerged from his vehicle accused 1 fired at him, narrowly missing him. On behalf of accused 1 it was denied that he had played an active part in the shooting incident. He and various other accused put up what can only be described as a completely fanciful version of the shootout casting Aspeling and various mysterious unknown black men as the aggressors.

[317] In my view that version must be rejected as false. Aspeling's account of what took place is entirely logical and consistent with his description of the events leading up to the shooting incident and in my view must be accepted. Accused 1 did not enter the witness box to testify and thus

Aspeling's evidence that he shot directly at him is essentially uncontroverted save by the false account various other accused gave of the incident. In the circumstances I am satisfied that the State has proven that accused 1 attempted to kill Aspeling. There is, however, absolutely no evidence that any of the accused shot at the police who inadvertently arrived upon the scene. Accused 1 is, therefore, convicted on count 20.

[318] According to Aspeling's evidence he eventually had to pay R1000,00 to accused 1 to regain possession of his firearm. Accused 1 handed him back his firearm upon receipt of the money after firstly removing the ammunition from it. All this took place in Ennerdale. In the circumstances the State has in my view proved its case against accused 1 on counts 21 and 22 namely that he was wrongfully in possession of the firearm in question and ammunition and he is found guilty thereon.

ACCUSED NUMBER TWO

Counts 4, 5 and 6

[319] Aspeling's evidence establishes that accused 2 was closely involved in the Rawsonville robbery. He was on the scene of the robbery and was seen climbing out of the cab of the BATSA vehicle with the truck driver. He thereafter assisted in loading boxes of cigarettes into the truck driven by Aspeling. As accused 1's brother and one of the core

members of the enterprise, he must have been well aware of the plan to abduct the driver and his assistant so as to both remove them from the scene of the robbery and the vehicle and to make it more difficult for them to contact their employers and raise the alarm. Accused 2 is found guilty on counts 4, 5 and 6.

Count 8

[320] The State sought no conviction against any accused on this count and accused 2 is acquitted thereon.

Count 9

[321] For the same reasons which led to the acquittal of accused 1, accused 2 is acquitted on this count.

Counts 10 – 12

[322] These counts relate to the robbery and kidnappings which constituted the Darling robbery. Aspeling's evidence again established that accused 2 played a central role in this robbery, was present on the scene of the robbery and assisted in offloading the cigarettes from the BATSA truck. He drove back to Gauteng as Aspeling's passenger in the truck. The State has in my view proved its case on these counts against accused 2 and he is convicted on counts 10, 11 and 12.

Count 15

[323] For the same reasons as those applying to accused 1 on this count, accused 2 is found not guilty on this count.

Counts 18 and 19

[324] As I have indicated, Aspeling's evidence that he was robbed by accused 1, 2 and Denzil Boyles is accepted. Accused 2 played a leading role therein, being the person who pointed a firearm at Aspeling, brought him to a halt, entered the cabin of the truck and at gunpoint required Aspeling to hand over his firearm and cell phone. Thereafter he held Aspeling at gunpoint whilst the latter drove back to Gauteng. I am satisfied that the State has proved these charges against accused 2 and he is found guilty on counts 18 and 19.

Counts 21 and 22

[325] It follows from the Court's acceptance of the evidence relating to accused 2's role in the robbery and kidnapping of Aspeling that accused 2 possessed Aspeling's firearm and ammunition without holding a license, permit or authorisation to possess that firearm or ammunition and he is found guilty on counts 21 and 22.

ACCUSED NUMBER THREE

Counts 4, 5 and 6

[326] Aspeling's evidence established that accused 3 participated in the Rawsonville robbery. Aspeling identified accused 3 as being at the scene of the robbery and emerging out of the cab of the BATSA truck. He clearly associated himself with the robbery and the concomitant kidnappings. He is found guilty on counts 4, 5 and 6.

Count 8

[327] The State sought no conviction against any accused on this count and accused 3 is acquitted thereon.

Count 9

[328] Accused 7 has been found guilty of the theft of the white *Volkswagen Polo* vehicle which is the subject matter of this charge. There is, however, no evidence linking accused 3 to the theft of that specific vehicle. Although there is evidence that a white *Volkswagen Polo* was used in one or more of the robberies the State has been unable to place any evidence before this Court indicating that the vehicle found on accused 7's premises was definitely used in any of the robberies. In the circumstances there is no basis to convict accused 3 on this count and he is acquitted on count 9.

Counts 10, 11 and 12

[329] Aspeling's evidence established that accused 3 was involved in the Darling robbery. Aspeling identified him at the scene of the robbery as being in the BATSA truck. Clearly he associated himself fully with the robbery and the abductions and he is found guilty on counts 10, 11 and 12.

Count 13

[330] Accused 7 has already been found guilty of the theft of the white *BMW* vehicle. According to Aspeling's evidence accused 7 drove the same vehicle during the Kinkelbos robbery, or at the very least, a similar vehicle. There is however no evidence linking accused 3 to the theft of this vehicle or even that he had knowledge that the vehicle was stolen. I find that the State has not proved him to be a party to the theft of the vehicle beyond reasonable doubt and he is acquitted on count 13.

Count 14

[331] Accused 3 has already been found not guilty of the theft of this vehicle which was found on his premises. In the result it is not possible to found a conviction against any other accused in respect of this vehicle. His acquittal on count 14 is confirmed.

Counts 15, 16 and 17

[332] These counts relate to the Kinkelbos robbery. Aspeling's evidence establishes that accused 3 was, together with him, the leading figure in the Kinkelbos robbery. It was accused 3 who initiated the plan of cutting accused 1 and 2 out of the robbery. He issued a variety of instructions including those relating to the hiring of the truck, who would pose as policemen and he remained in overall contact with Aspeling in the truck by cell phone whilst the robbery was taking place at Kinkelbos. Accused 3 was clearly aware that the robbery would take place in the manner in which the previous two robberies were conducted i.e. involving the stopping of the BATSA truck on false pretences and the kidnapping of the driver and assistant. The State has succeeded in proving his guilt on these counts and he is found guilty on counts 15, 16 and 17.

ACCUSED NUMBER FOUR

Counts 4, 5 and 6

[333] Aspeling's evidence established in the case of each of the three robberies that accused 4's role was to dress up in a police uniform and to bring the BATSA truck to a halt. Aspeling identified accused 4 as being on the scene of the Rawsonville robbery and it is clear that the latter was instrumental in bringing the BATSA vehicle to a halt in furtherance of the overall plan. He is accordingly found guilty of counts 4, 5 and 6.

Count 8

[334] The State seeks no conviction under this count and accused 4 is acquitted on count 8.

Count 9

[335] For the same reasons as those furnished in relation to accused 3, accused 4 is acquitted on count 9.

Counts 10, 11 and 12

[336] These counts relate to the Darling robbery where accused 4 played the same role as he had in the Rawsonville robbery. Aspeling identified accused 4 as being on the scene of the robbery and patrolling the area in a *Volkswagen*

Polo with a flashing blue light, dressed in a police uniform. The State has therefore established its case against accused 4 in this regard and he is found guilty on counts 10, 11 and 12.

Count 13

[337] For the same reasons furnished in respect of accused 3, accused 4 is acquitted on this count.

Count 14

[338] For the same reasons that apply to accused 3, accused 4 is acquitted on this count.

Counts 15, 16 and 17

[339] Aspeling's evidence established that accused 4 again played the role of a policeman in the original Kinkelbos robbery. There is ample evidence that accused 4 was in Port Elizabeth, having travelled up by bus, and that he later received a share of the proceeds. Accused 3 instructed accused 4 and 6 to use a white *Golf* and act as police officers. At the scene of the robbery Aspeling noticed the white *Golf* with the flashing blue light. There is no reason to believe that accused 4 did not play his customary role in this robbery in accordance with the established *modus operandi* and accordingly he is found guilty on counts 15, 16 and 17.

ACCUSED NUMBER FIVE AND NINE

[340] For the reasons given earlier both of these accused are acquitted on all counts.

ACCUSED NUMBER SIX

Count 8

[341] The State seeks no conviction here and accused 6 is acquitted on this count.

Count 9

[342] For the same reasons as apply to accused 1 accused 6 is acquitted on count 9.

Counts 10 – 12

[343] Aspeling's evidence established that accused 6 was involved in the Darling robbery. He testified that accused 6 was dressed in a blue police uniform and was at the scene of the robbery. Accordingly the State has established that accused 6 associated himself fully with the robbery and kidnappings and he is found guilty on counts 10 to 12.

Count 13

[344] For the same reasons as those applying to accused 3, accused 6 is acquitted on this count.

Count 14

[345] For the same reasons as those applied to accused 3, accused 6 is acquitted on count 14.

Counts 15, 16 and 17

[346] Aspeling's evidence establishes that accused 6 was involved in the

original Kinkelbos robbery. He was instructed by accused 3, together with accused 4, to dress and pose as a policeman and bring the BATSA vehicle to a halt. At the scene of the robbery Aspeling noticed the white *Golf* with a flashing blue light. There is no reason to believe that the accused did not fulfil this role. He was fully involved in the subsequent fetching of Aspeling from Frankfort, the attempts to recover the stolen consignment and in sharing the proceeds of the robbery. Accordingly accused 6 is found guilty on counts 15, 16 and 17.

Counts 21 and 22

[347] These counts relate to the unlawful possession of Aspeling's firearm and ammunition. Aspeling's evidence establishes that accused 6 was indeed at the scene of the Lenasia shootout and fired shots from a firearm. There is however no evidence that he possessed Aspeling's firearm or the ammunition relating thereto at any stage. If anything, he possessed another firearm and ammunition but the charge has not been framed in this manner. Nor is there any proof that the ammunition which he did use was 9mm ammunition. In the result accused 6 is acquitted on counts 21 and 22.

ACCUSED NUMBER SEVEN

Count 8

[348] Since the State seeks no conviction in this regard accused seven is acquitted on count 8.

Count 9

[349] As set out above accused 7 is found guilty on count 9.

Count s10, 11 and 12

[350] Aspeling's evidence establishes that accused 7 was involved in the Darling robbery. He played a role in purchasing policeman uniforms on the day preceding the robbery. Although Aspeling did not identify accused 7 as specifically being at the scene of the robbery he testified that when the *Caravelle* returned to the *Waterfront Suites* immediately after the robbery, accused 7 was one of the passengers. The selfsame *Caravelle* was at the scene of the robbery. In the circumstances I am satisfied that the State has proved accused 7's involvement in the robbery beyond reasonable doubt. In all probability accused 7 would have been made aware beforehand that the driver and his assistant were to be removed from the scene of the robbery and therefore his guilt on these counts is also proved by his involvement in the robbery itself. Accused 7 is accordingly found guilty on counts 10, 11 and 12.

Count 13

[351] As set out above accused 7 is found guilty on this count.

Count 14

[352] For the same reasons as apply to accused 3, accused 7 is found not guilty on this count.

Counts 15, 16 and 17

[353] Once again Aspeling's evidence establishes that accused 7 played a leading role in the Kinkelbos robbery. Aspeling identified accused 7 as being in the BATSA truck whilst the driver of the truck, Mr. Bradley Dantu, himself testified that accused 7 was at the scene of the robbery and challenged him regarding the panic button which he pressed.

[354] It follows then that the State has established accused 7's involvement both in the robbery and in the customary kidnappings which were part of the *modus operandi* of the robberies. Accused 7 is accordingly convicted on counts 15, 16 and 17.

ACCUSED NUMBER EIGHT

Counts 4, 5 and 6

[355] For the reasons already discussed, accused 8 is acquitted on counts 4, 5 and 6 i.e. the charges relating to the Rawsonville robbery.

Count 8

[356] The State seeks no conviction under this count and accused 8 is accordingly acquitted thereon.

Count 9

[357] For the same reasons as those advanced in respect of accused 1, accused 8 is found not guilty on this count.

Counts 10, 11 and 12

[358] Aspeling's evidence established that accused 8 was a participant in the Darling robbery. Accused 8 drove in Aspeling's truck and directed him to the scene of the robbery. After the cargo had been transferred from the BATSA vehicle to Aspeling's truck, accused 8 accompanied him back to the Waterfront Suites. The inescapable inference is that accused 8 associated himself with the robbery and the kidnappings. Accordingly he is found guilty on counts 10, 11 and 12.

Count 13

[359] For the same reasons as those advanced in respect of accused 3, accused 8 is acquitted on this count.

Count 14

[360] For the same reasons as those advanced in respect of accused 3, accused 8 is acquitted on count 14.

Counts 15, 16 and 17

[361] Aspeling's evidence establishes that accused 8 was a participant in the Kinkelbos robbery. Aspeling identified accused 8 as being at the scene of the robbery and being in the BATSA truck. In the circumstances the State has proved its case against accused 8 on these counts and he is convicted of counts 15, 16 and 17.

ACCUSED NUMBER NINE

[362] For the reasons already discussed, accused 9 is acquitted on all counts in this matter.

ACCUSED NUMBER TEN

[363] For the reasons advanced when his circumstances were discussed accused 10 is acquitted on all counts in this matter.

ACCUSED NUMBER ELEVEN

Counts 4, 10, 15 and 18

[364] Accused 11 was charged with robbery in relation to each of the four robberies. For the reasons already discussed, Aspeling's evidence in respect of accused 11's involvement in the receipt and purchase of the cigarettes has been accepted and accused 11's evidence rejected as being not reasonably possibly true.

[365] There was no evidence that accused 11 was aware of the circumstances in which his fellow accused came to possess the consignments of stolen cigarettes. However, given the value and size of the consignments, those in the Rawsonville and Darling robberies being R826 000,00 and R735 000,00 odd, respectively, he could not conceivably have been under the impression that the cigarettes were lawfully acquired. The only inference which can be drawn is that accused 11 must have realised, at the very least, that the consignments of cigarettes had been stolen. Theft being a continuing offence, our law draws no distinction between perpetrators and accessories after the fact. Therefore, a person who after the commission of the theft assists the thief (who is still in possession of the property) to conceal the property does not qualify as an accessory after the fact because his assistance is rendered at the time when the

original crime (theft) is still uncompleted. Accordingly accused 11 is, on the facts found, guilty of theft. See *R v Brett and Levy* 1915 TPD page 53.

[366] As I have already discussed, accused 11 is given the benefit of the doubt in relation to the consignment of cigarettes emanating from the Kinkelbos robbery, there being no direct proof of their delivery to him or his premises. That consignment forms the subject matter of counts 15 and 18 and therefor accused 11 must be and acquitted on these counts.

[367] On behalf of accused 11 it was contended that he could not be found guilty of theft as a competent verdict on the counts relating to the robberies in the Western and Eastern Cape. It was contended that this was because any such theft took place at or near Lenasia, outside the ordinary jurisdiction of this Court, and because accused 11 had not "submitted to the jurisdiction" of this Court in respect of such verdicts.

[368] However, as was fully discussed in the Court's judgment relating to the challenge to the validity of the prosecution, in terms of s 111 of Act 51 of 1977, the Deputy National Director of Public Prosecutions, Adv. JSM Henning SC, issued a directive, annexure "B", that the criminal proceedings in this matter be commenced within this Court's

jurisdiction. In that directive all of the charges are listed as is accused 11's name, together with the blanket statement that the offences were allegedly committed "at or near" Kinkelbos, Ennerdale and Lenasia in the district of Soweto.

[369] It is common cause that accused 11's business premises are situated in Lenasia. The directive neither reads nor suggests that the centralisation of charges within the jurisdiction of this Court restricted itself to the main charges and not to competent verdicts thereon. Giving the directive a purposive interpretation, it appears to me that this Court does indeed have jurisdiction to find accused 11 guilty on the competent verdict of theft, committed in Lenasia, notwithstanding the fact that the robberies took place in the Western or the Eastern Cape.

[370] In the circumstances, based on the acceptance of Aspeling's evidence, accused 11 is convicted of theft of the consignments of cigarettes involved in the Rawsonville and Darling robberies i.e. on counts 4 and 10. He is acquitted on counts 15 and 18.

THE POCA CHARGES

[371] Counts 1, 2 and 23 to 25 were all charges framed under the Prevention of Organised Crime Act, 121 of 1998 (the "Act").

[372] Under count 1 the State charged accused 1, 2 and 11 with managing

the operations or activities of "an Enterprise", whilst they knew or reasonably ought to have known that other persons, namely accused 1 – 11, or other persons known and unknown to the State, whilst employed by or associated with that enterprise, conducted or participated in the conduct of such enterprises' affairs through a pattern of racketeering activities. In the preamble to counts 1 and 2 the State averred that over the relevant period accused 1 and 2 constituted the "enterprise". It alleged further that all the accused, during the commission of the criminal activity, had the intention of benefiting the enterprise and the criminal activities were committed for the benefit of the enterprise. Further, the State alleged that the "pattern of racketeering activity" was as set out in annexure "A". In that annexure all the counts of which the accused were charged save counts 1 and 2 were cited, the preamble thereto reading "the planned, ongoing, continuous or repeated participation or involvement in the following offences referred to in schedule 1 and all of which occurred after the commencement of the Act." At the end of the State case accused 11 was discharged on this count.

[373] In terms of count 2 all of the accused were charged with contravening s 2(1)(e) of the Act that, whilst managing or employed by or associated with the enterprise, they conducted or participated in the conduct directly or indirectly of the enterprise's affairs through a pattern of

racketeering activity as described above.

[374] In terms of counts 23 to 25, accused 1, 2 and 11 were charged with contravening s 4 of the Act in that, after each of the three robberies and whilst knowing that each of the three consignments of cigarettes were the proceeds of unlawful activities, they arranged for the sale thereof to accused 11 on behalf of the enterprise which arrangement or agreement "had the effect of concealing or disguising the nature, source, location, disposition or movement of that property or the ownership thereof, which property was acquired as a result of the commission of an offence". On each of these three counts accused 11 alone was charged with certain alternatives in terms of s 5 and 6 of the Act, the details whereof are unnecessary for me to set out.

[375] The long title of the Act states its purpose *inter alia* as being "to introduce measures to combat organised crime, money laundering and certain criminal gang activities". In the Act's preamble there is reference to "a rapid growth of organised crime, money laundering and criminal gang activities, nationally and internationally…" which activity "present(s) a danger to public order and safety and economic stability, and has the potential to inflict social damage". It goes on to state that "South African common law and statutory law fails to deal effectively with organised crime, money laundering and criminal gang activities"

and also fails "to keep pace with international measures aimed at dealing effectively" with such evils.

[376] Contraventions of s 2(1)(f) and (e) fall under that chapter of the Act headed "offences related to racketeering activities". Such activities are defined under "a pattern of racketeering" activity as being "the planned, ongoing, continuous or repeated participation or involvement in any offence referred to in Schedule 1 and it includes at least two offences referred to in Schedule 1, of which one of the offences occurred after the commencement of this Act and the last offence occurred within ten years of the commission of such prior offence referred to in schedule 1".

[377] All of the offences listed in schedule "A" occurred after the commencement of the Act and within a ten year period. Schedule 1 includes the offences of robbery, kidnapping, attempted murder, theft, the unlawful possession of firearms and any offence referred to in chapter 4 of this Act i.e. the so-called "money laundering" charges which are the subject of counts 23 to 25.

[378] An "enterprise" is defined as including "any individual, partnership, corporation, association or other juristic person or legal entity and any union or group of individuals associated in fact, although not a juristic

person or legal entity". Section 2(1) of POCA consists of seven subsections containing prohibitions regarding racketeering activities. The first three, (a) to (c), concern property generated by the racketeering enterprise and are not relevant to this matter. The next three subsections, (d) to (f), concern participation in the enterprise. Counts 1 and 2 fall within these subsections. The final subsection, (g), prohibiting a conspiracy or attempt to violate the other sections is also irrelevant to the present matter.

[379] It appears that in order to prove a violation of either s 2(1)(f) or 2(1)(e) the relationship between three things must be demonstrated: the enterprise, the pattern of racketeering activity and the accused person/ s. Under both sub-sections it must be shown that the enterprise existed and that a pattern of racketeering activity was committed by some person or persons connected to the enterprise. Under subsection (e) the accused may have one of three types of relationships to the enterprise, namely, management, employment or association. The accused must have this relationship, however, through his/her participation in the pattern of racketeering activity. On the other hand, under subsection (f), the accused can have only one type of relationship to the enterprise, namely management, and the evidence must show that the accused knew or reasonably should have known that the pattern of racketeering activity was committed by some other

person/s.

[380] Thus, in order to prove count 1 the State must prove the following elements, namely, that:

i) an “enterprise” existed, and;

ii) accused 1 and 2 managed the operations or activities of the enterprise, and;

iii) a “pattern of racketeering activity” took place, and;

iv) the accused knew or should reasonably have known that a pattern of racketeering activity took place.

[381] It is no secret that the Prevention of Organised Crime Act owes much to its United States counterpart, the Racketeering-Influenced and Corrupt Organisations Act (RICO), 18 US CS § 1961. It follows that the judgments of the United States Supreme Court and subsidiary courts in that country may be of some assistance in interpreting some of the provisions and concepts established by the Act.

[382] In *United States v Kragness*, 830F.2d 842,856 (8th Cir.1987) the following was stated with regard to the enterprise and the proof of the existence thereof:

> "An enterprise is established 'by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.' ***Ibid. The enterprise 'is an entity separate and apart from the pattern of (racketeering) activity in which it engages,' ibid; see also United States v. Anderson, 626 F.2d 1358, 1365 (8th Cir. 1980), cert. denied, 450 U.S. 912, 67 L. Ed. 2d 336, 101 S. Ct. 1351 (1981), although the proof of these separate elements 'may in particular cases coalesce.' Turkette, 452 U.S. at 583."***

"Following ***Turkette, this Court in United States v. Bledsoe, 674 F.2d 647, 664-65 (8th Cir.), cert. denied, 459 U.S. 1040, 103 S. Ct. 456, 74 L. Ed. 2d 608 (1982), identified three characteristics that distinguish a RICO enterprise: First, there must be a common or shared purpose that animates the individuals associated with it. Second, it must be an 'ongoing organization' whose members 'function as a continuing unit', Turkette, 452 U.S. at 583; in other words, there must be some continuity of structure and of personnel. Third, there must be an ascertainable structure distinct from that inherent in the conduct of a pattern of racketeering activity."***

[383] In *Turkette's* case the US Supreme Court rejected arguments that a "*completely illegal organisation*" such as the one concerned in *Kragness's* case could not be a RICO enterprise. However, the Court was careful to make clear that it is not enough in the case of such an "*associational enterprise*" simply to establish a pattern of racketeering activity. Instead "*the existence of an enterprise at all times remains a separate element which must be proved by the Government*".

[384] In my view Aspeling's evidence establishes that an enterprise did indeed exist. It involved an association or group of persons who regularly planned and committed robberies of BATSA trucks carrying

consignments of cigarettes. Accused 1 and 2 were core members of the group throughout although all the accused and others were also part of the group or association before and during at least one of the robberies and in some cases, two of them. In the case of each robbery the *modus operandi* was the same, namely, stopping the BATSA truck through the pretext of one or more members of the enterprise disguising themselves as policemen, driving a white car with a blue light and flagging down the BATSA truck. Once the BATSA truck was brought to a halt the driver and his assistant would be held up at gun point and the cargo transferred to a truck especially brought down from Johannesburg for this purpose. The driver and his assistant would be removed from the scene of the robbery in one of the enterprise's vehicles. Shortly after the robbery the Johannesburg contingent of the enterprise, who came mainly if not exclusively from Ennerdale, would return to Gauteng where the consignment would be sold to accused 11 and the proceeds distributed amongst those of the Johannesburg contingent and the Cape Town contingent who had participated in the robbery. A portion of the proceeds would be retained for "legal and other expenses".

[385] The distinct identity of the enterprise *in casu* is evident from the fact that within four months the enterprise either executed or had planned three robberies of BATSA vehicles. When a break-away group

executed the last robbery, that in Kinkelbos, the enterprise reacted by taking steps to seize the consignment of cigarettes. Thereafter, when a common danger threatened in the form of the police, the enterprise re-absorbed the offending members and, after negotiations, shared the proceeds of that robbery with them. The continuity of the enterprise was also underlined by the fact that provision was made for the retention of certain of the proceeds to cover future legal expenses. Had the accused not been arrested it is highly probable other similar robberies would have taken place. Indeed it was Aspeling's evidence that another robbery in the Eastern Cape, possibly East London, was discussed.

[386] Similarly the State has, in my view, established that a "pattern of racketeering activity" took place, this being constituted by the various proved offences listed in annexure "A". These make up, in the main, the first two robberies and associated kidnappings. This pattern cannot, however, encompass the proven car thefts for lack of proof of a linkage to the robberies. Nor can it encompass the initial Kinkelbos robbery for the simple reason that it was not executed by "the enterprise". On Aspeling's evidence the first Kinkelbos robbery was committed by a break-away group of members of the enterprise who deliberately sought to exclude accused 1 and 2, the core members of the enterprise.

[387] The further requirement for a conviction in terms of s 2(1)(f) is that the accused knew or should reasonably have known that a pattern of racketeering activity took place. The State's case against accused 1 and 2 is not only that they knew of the pattern of racketeering activities but that they actively participated in it as well. This requirement is accordingly met in relation to accused 1 and 2.

[388] The first requirement for a conviction under count 1 is that the accused must have managed the operations or activities of the enterprise. **The Concise Oxford Dictionary**, tenth edition, revised, Oxford University Press, defines "manage" as being: "be in charge of", "supervise (staff)", "administer and regulate" or "maintain control or influence over (a person or animal)".

[389] From Aspeling's evidence it is clear that accused 1 was the person who managed the enterprise. By the time the first robbery commenced he was issuing instructions to the various members of the enterprise concerning their roles and responsibilities when the robbery would take place and where the consignment was to be taken for sale etc. He maintained this dominant managerial role throughout the second robbery, which he initiated. Thereafter he initiated the scouting trip preparatory to the commission of a third robbery. When the break-away

group excluded him and accused 2 from that robbery, accused 1 reasserted his control by overseeing the hijacking and robbery of Aspeling. I am satisfied, therefore, that the State has proved *vis à vis* accused 1 the elements of count 1.

[390] It did initially weigh with me that, given the formulation of the charges namely that of counts 3 to 25 comprising the pattern of racketeering activity taken together with accused 1's direct participation in the individual or "predicate" counts, his conviction both on the predicate offences and count 1 might constitute a duplication of convictions.

[391] As has often been stated there is no insoluble formula to determine accurately whether or not a duplication of convictions has occurred. Nor is it possible to develop a single guiding principle that applies to all circumstances. The result is that the question of whether an accused's criminal conduct gives rise to one or more offences must be decided on the basis of sound reasoning and on the Court's perception of fairness (*R v Kuzwayo* 1960 (1) SA 340 (A) at 344B and *S v Davids* 1998 (2) SACR 313 (C) at 316D. Tests which can be applied can be described as the intention test and the evidence test. See also *S v Mtsawakele* 1982 (1) SA 325 (T) at 338 – 341. Applying the latter test it appears to me that the elements of the racketeering offence constituted by s 2(1)(f) of the Act differs significantly from those of the individual predicate

offences. An accused person could thus be convicted of all the offences listed in annexure “A” but, for any number of reasons, for example that he/she was merely a foot soldier, escape conviction on a charge under s 2(1)(f) in which the “pattern of racketeering activity” covered those selfsame offences.

[392] Having regard to the purpose of Act as revealed both in its long title and its preamble, it seems to me that the legislature must have envisaged that in circumstances such as those which exist in the present case, an accused person could be found guilty both of the substantive, predicate offences and of managing, or participating in, the activities of the enterprise. I am satisfied then both that the State has established its case against accused 1 on count 1 and that such a conviction will not amount to a duplication of convictions. He is duly convicted on count 1.

[393] The State contends that accused 2 also planned and organised the offences constituting the pattern of racketeering activities and that he was second in charge and conveyed instructions given by accused 1 to the employees and supervised their implementation. The mere conveyance of instructions from a manager to others through a third party does not, in my view, necessarily make the middleman a manager. The prime example of accused 2 playing a more prominent

role in the activities of the enterprise was when he, together with Denzil Boyles, took Aspeling to the *Formula One Hotel* in Alberton and, the following morning, to Comaro and thence to Frankfort. The evidence suggests, however, that in doing so he was acting on the instructions of accused 1. The evidence further suggests that accused 2, although clearly much closer to accused 1 than any of the other members, similarly, generally took instructions from him. Accused 2's closeness to accused 1 arises, no doubt, both from the sibling relationship and the fact that accused 1, as a paraplegic, was unable to physically effect certain acts and tended to delegate some of these to his younger brother. It does not follow that accused 2 was, on these grounds, a manager of the enterprise. On an overall view I consider that the State has failed to prove that accused 2 also managed the affairs of the enterprise and thus he must be acquitted of contravening s 2(1)(f) of the Act. Accused 2 is therefore acquitted on count 1.

COUNT 2

[394] In order to gain a conviction on a charge of contravening s 2(1)(e) of the Act the State must prove that the accused, whilst managing or employed by or associated with the enterprise, conducted or participated in the conduct, directly or indirectly, of the enterprise's affairs through a pattern of racketeering activity.

[395] The elements of the offence are thus the existence of the enterprise,

the management of, employment by or association with the enterprise, a pattern of racketeering activity taking place and, finally, that the accused conducted or participated, directly or indirectly, in the affairs of the enterprise through the pattern of racketeering activity.

Accused 1:

[396] I have found that the enterprise existed and that a pattern of racketeering activity took place. In relation to accused 1 I have found, furthermore, that he managed the enterprise. The remaining question is whether the accused conducted or participated, directly or indirectly, in the affairs of the enterprise through the pattern of racketeering activity. To this the answer must be positive since the evidence reveals that the accused himself participated actively and directly in the various robberies committed on behalf of the enterprise. On this basis he has been convicted, *inter alia*, on the counts relating to the Rawsonville and Darling robberies and the associated kidnappings. However, once again, in the light of the fact that the accused has already been convicted both of contravening s 2(1)(f) and these predicate offences, the question arises whether an additional conviction on count 2 may not constitute a duplication of convictions.

[397] In my view there is no such danger. In the first place, the phrase "whilst managing the enterprise" in s 2(1)(e) clearly indicates that, apart from the criminal liability attaching for managing an enterprise, the "manager" can also be criminally liable where he or she participates in the conduct of the enterprise's affairs through a pattern of racketeering activity. All other things being equal, furthermore, there appears to be no good reason why a person who both manages and participates in the affairs of the enterprise, directly or indirectly, should only be criminally liable for one of the two roles.

[398] Secondly, in regard to a possible duplication of convictions in respect of the predicate offences, as discussed above in relation to s 2(1)(f), the elements of the offence of contravening s 2(1)(e) are quite different to those involved in the predicate offences themselves. Again, in my view, in creating the new statutory offences the legislature must have foreseen that in given circumstances an offender could be convicted of both managing and participating in the affairs of an enterprise through a pattern of racketeering activity and of committing the offences which make up the pattern of racketeering. Through its sentencing discretion a Court will be able to ameliorate any possible sentencing anomalies which may arise.

[399] In the result I am satisfied that the State has succeeded in proving a case against accused 1 on count 2 and he is convicted on such count.

Accused 2:

[400] I have found that accused 2 did not manage the affairs of the enterprise but, on the basis of Aspeling's evidence, there can be no doubt that accused 2 was closely associated with the enterprise. He participated directly in the affairs of the enterprise *inter alia* through his involvement in the Rawsonville and Darling robberies which are listed in annexure "A". Accused 2 is consequently found guilty on count 2.

Accused 3:

[401] Accused 3 was convicted on the counts arising out of the Rawsonville and Darling robberies and was, on the evidence, an integral member of the enterprise for most of the period of its existence. In the circumstances his conviction on count 2 must follow.

Accused 4:

[402] Accused 4 was similarly convicted, *inter alia*, in relation to the first two robberies and was a member of the enterprise for most of its existence. He too is convicted on count 2.

Accused 6:

[403] Accused 6 was convicted of the counts relating to the Darling robbery which included the associated kidnappings and the first Kinkelbos robbery and associated kidnappings. Accused 6 was clearly "associated with" the enterprise as is demonstrated by his full role in the Darling robbery. However, the question is whether his aforesaid participation in the two robberies constitutes participation in the conduct, directly or indirectly, of the enterprise's affairs through a pattern of racketeering activity. Such a pattern requires "the planned, ongoing, continuous or repeated participation or involvement in any of the offences referred to in Schedule 1…". The evidence is, however, that the enterprise, if such it be, which carried out the first Kinkelbos robbery was not the same enterprise which carried out the Rawsonville and Darling robberies. Accepting the State's case that the core of the enterprise was accused 1 and 2, when accused 3 and Aspeling, *inter alia*, cut accused 1 and 2 out of the robbery planned in respect of BATSA in Port Elizabeth they effectively excluded the enterprise from that criminal conduct. As a result the State cannot rely on counts 15 to 17 as forming part of the pattern of racketeering activity upon which it can rely in this prosecution.

[404] In the circumstances the only conduct on which the State can rely in seeking a conviction in terms of count 2 against accused 6 is the Darling robbery. Although that robbery involved, on accused 6's part, his involvement in and conviction on three separate Schedule 1 offences, namely robbery and two counts of kidnapping, in my view such conduct does not satisfy the requirement for a "pattern of racketeering activity". The three offences were committed virtually simultaneously and cannot be said to constitute "planned, ongoing, continuous or repeated participation or involvement" in any offence referred to in Schedule 1. Accused 6 is, therefore, acquitted on count 2.

Accused 7:

[405] Accused 7 was similarly found guilty of participation in the Darling and in the first Kinkelbos robbery. In addition he has been found guilty on two counts of car theft i.e. counts 9 and 13. For the same reasons as apply to

accused 6, his involvement in the Kinkelbos robbery cannot be used in securing a conviction against him under count 2. Nor can the car theft convictions be taken into account since I have found that the State failed to prove that his theft of the motor vehicles constituted participation in the conduct, directly or indirectly, of the enterprise's affairs. Put differently, the evidence does not exclude the reasonable possibility that, in stealing the vehicles, accused 7 was acting in his own interests alone. Accused 7 is therefor acquitted on count 2.

Accused 8:

[406] Accused 8 was acquitted on charges arising out of the Rawsonville robbery but convicted on charges arising out of the Darling and Kinkelbos robberies. For the same reasons which apply to accused 6, therefore, the State has failed to establish his guilt on count 2 and he is acquitted on this count.

Accused 11:

[407] The questions which arise in relation to accused 11 under this count are firstly, whether he was employed by or associated with the enterprise and, secondly, whether he conducted or participated, directly or indirectly in the affairs of the enterprise through the pattern of racketeering activity.

[408] Accused 11 has been found guilty on two counts of theft relating to his receipt and purchase of the consignments of cigarettes stolen in the Rawsonville and Darling robberies. These two acts satisfy the requirement for a "pattern of racketeering" in that they are offences listed in Schedule 1 of the Act and occurred within the stipulated timeframe. The sale of the cigarettes was a key element in the affairs of the enterprise whereby the proceeds of the robbery were converted into cash and distributed amongst the enterprise's members. In this stage of the enterprise's affairs accused 11 played a critical role, namely, that of purchasing the cigarettes, quickly, for cash and,

presumably, selling them on. In my view accused 11, through such conduct participated directly in the affairs of the enterprise, thereby satisfying the second requirement. This conclusion does not take into account the charges of money laundering against accused 11. If convicted on those counts his participation in the "pattern of racketeering activity" is enhanced.

[409] What remains is the question of whether accused 11 was employed by or associated with the enterprise, bearing in mind that he did not manage the enterprise. Clearly there is no evidence that the accused was employed by the enterprise in the sense that he was on its payroll. The concept of association is a wide one and is not limited by the Act. ***The Concise Oxford English Dictionary*** gives the meaning of association as *inter alia* to "*meet or have dealings, allow oneself to be connected with or seen to be supportive of, be involved with*". In my view it is not necessary for the State, in order to secure a conviction against accused 11 to prove that he was part of the enterprise in some more formal or direct sense than is conveyed by the broad concept of "association". Nor do I regard it as necessary to prove that persons "associated with" the enterprise knew about all its activities. In my view it is sufficient that the accused knows the general nature of the enterprise and that it extends beyond his individual role. See *United States v Rastelli*, 870F. 2d 822 827 – 28 (Second Circuit 1989).

[410] In accused 11's case he was approached on three separate occasions in a period of approximately three-and-a-half months by accused 2 to purchase a very large consignment of cigarettes. On two occasions accused 2 was accompanied by Aspeling. On the first occasion accused 3 was also present. I am mindful that on the third occasion there is no direct proof that accused 11 in fact received the consignment and it is for this reason, *inter alia*, that he is acquitted on charges related to the third robbery. Even if this evidence is left out of account, accused 11 was approached on at least two occasions to purchase a large consignment of cigarettes. He must have realised, at the very least, that there was a larger group of persons involved in the operations necessary to steal from or rob a third party of such large quantities of cigarettes. In my view such knowledge, together with accused 11's own participation in purchasing the consignments, is sufficient to meet the requirements of "association with" the enterprise and his participation in the affairs of the enterprise "directly or indirectly" through a pattern of racketeering activities. Accordingly I am satisfied that the State has proved its case against accused 11 on this count and he is found guilty on count 2.

COUNTS 23, 24 AND 25

[411] Under these counts accused 1, 2 and 11 were charged with

contravening s 4 of the Act in relation to the consignments of cigarettes stolen in the Rawsonville, Darling and Kinkelbos robberies. It is alleged that the accused knew or ought reasonably to have known that the boxes of cigarettes were the proceeds of unlawful activity, or formed part thereof, but nevertheless agreed and arranged that accused 1 and 2 would sell such consignments to accused 11 "for and on behalf of the enterprise". It is further alleged that this agreement had the effect of "concealing or disguising the nature, source, location, disposition or movement of that property or the ownership thereof".

[412] The offence created by s 4 appears in Chapter 3 of the Act under the heading "Offences Relating to Proceeds of Unlawful Activities" and is termed "money laundering". This term appears to be a misnomer, however, since the section criminalises conduct going far beyond concealing or disguising the source of money or currency alone which forms the proceeds or part of the proceeds of unlawful activities. The elements of the offence are knowledge, actual or imputed, property which forms part of the proceeds of unlawful activity; the conclusion of an agreement or arrangement in connection with that property; the performance of any act in that regard which has or is likely to have the effect of "concealing or disguising the nature, source, location, disposition or movement of the said property or the ownership thereof or enabling any person who has committed an offence to avoid"

prosecution or remove or diminish the property acquired as a result of the commission of such offence.

[413] The "proceeds of unlawful activities" is defined in the Act as meaning:

> "any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere at any time before or after the commencement of this Act in connection or as a result of any unlawful activity carried on by any persons …"**.**

[414] "Property" is defined as meaning:

> "money or any other movable, immovable, corporeal or incorporeal thing and includes any rights, privileges, claims and securities and any interest therein and all proceeds thereof".

[415] "Unlawful activity" means:

> "conduct which constitutes a crime or which contravenes any law whether such conduct occurred before or after the commencement of this Act and whether such conduct occurred in the Republic or elsewhere"**.**

[416] Finally, s 1(2) provides that:

> "For purposes of this Act a person has knowledge of a fact if –
>
> ***a) the person has actual knowledge of that fact; or***

b) the Court is satisfied that –

(i) the person believes that there is a reasonable possibility of the existence of that fact; and

(ii) ***he/she fails to obtain information to confirm the existence of that fact…".***

Subsection (3) provides:

"For the purposes of this Act a person ought reasonably to have known or suspected a fact if the conclusion that he/she ought to have reached are those which would have been reached by a reasonably diligent and vigilant person having both……. –

a) the general knowledge, skill, training and experience that may reasonably have been expected of a person in his/her position; and

b) the general knowledge, skill, training and experience that he/she in fact has."

<u>Accused 1 and 2</u>:

[417] On the basis of Aspeling's evidence, it is clear that both accused 1 and 2 knew that the property referred to in counts 23 to 25, the boxes of cigarettes, were the proceeds of unlawful activity. The evidence establishes further that they entered into an agreement or an arrangement with accused 11 to sell the consignments of cigarettes to him for cash. Aspeling's evidence was that accused 1 directed that the cigarettes would be sold to accused 11 and deputed accused 2 and

Aspeling to physically deliver the cigarettes to accused 11. In the cases of the Rawsonville and Darling consignments they also took delivery of the first tranche of monies forming part of the purchase price and used them to pay the amounts outstanding to *Bera's Transport* in regard to the hire of the truck. The effect of the agreement or arrangement to sell the consignments to accused 11 was to conceal or disguise "the source, location, disposition or movement of the boxes of cigarettes and the ownership thereof". Selling the cigarettes to a wholesaler with his capacity to dispose of them to a variety of sources relatively quickly, had twin benefits. Firstly, it converted the goods into cash for immediate consumption by accused 1 and 2 and other members of the enterprise. Secondly, it disposed of the stolen goods which might otherwise have implicated the accused in the commission of the robberies. The arrangement or agreement also had the effect of assisting the accused in avoiding prosecution and in removing or diminishing the property acquired as a result of the commission of the robberies.

[418] Aspeling's evidence suggests that the actual agreement with accused 11 was entered into by accused 1 although he, Aspeling, was not a direct party to the discussion between accused 1 and accused 11. That lack of direct evidence does not assist either accused 1 or accused 2 because, on Aspeling's evidence, both of them either entered into the

agreement or performed an action in connection with such property which had the necessary effect. Such action would be either the delivery of the cigarettes by accused 2 or, in the case of accused 1, reaching the agreement with accused 11 and/or deputing accused 2 and Aspeling to effect the delivery of the cigarettes to accused 11.

[419] It has earlier been found, in relation to accused 11, that the State failed to prove, beyond reasonable doubt, that he received the consignment of cigarettes stolen in the Kinkelbos robbery. Logically that finding must enure to the benefit of the accused charged with count 25. Proof of that charge involves proof of an arrangement or agreement between accused 1, 2 and 11 for the sale of those cigarettes. Given the lack of evidence regarding what happened to the consignment of cigarettes stolen in the Kinkelbos robbery, accused 1 and 2 are given the benefit of the doubt and acquitted on count 25. They are found guilty on counts 23 and 24.

Accused 11:

[420] On the basis of the reasoning employed in convicting accused 11 of theft in relation to the proceeds of the Rawsonville and Darling robberies, the State has gone a long way towards proving the commission of the offences in terms of s 4 of the Act against accused 11. If accused 11 did not know that the first two consignments of cigarettes were the proceeds of unlawful activity he “ought reasonably to have known” so. In my view it is utterly unlikely that accused 11 did not realise that the very large and valuable consignments of cigarettes being sold and brought to him by accused 2 and Aspeling had either been stolen or robbed from some third party. His conduct in agreeing to purchase the cigarettes had the effect of concealing or disguising the source,

disposition or movement of the said property or the ownership thereof and, the further effect of assisting accused 2, Aspeling and other members of the enterprise to avoid prosecution.

[421] It follows that accused 11 must also be given the benefit of the doubt in relation to the third consignment of cigarettes and he is therefore acquitted on count 25. He is, however, found guilty on counts 23 and 24.

[422] Finally, I record that the judgment of the Court herein is unanimous.

CONCLUSION

[423] In summary the accused are convicted and acquitted on the following counts:

Accused 5, 9 and 10:

[424] Accused 5, 9 and 10 are acquitted of all remaining counts against them.

Accused 1:

[425] Accused 1 is found guilty of counts 1, 2, 4, 5, 6,10, 11, 12, 18, 19, 20, 21, 22, 23 and 24.

[426] He is found not guilty on counts 8, 9, 15 and 25.

Accused 2:

[427] Accused 2 is found guilty on counts 2, 4, 5, 6, 10, 11, 12, 18, 19, 21, 22, 23 and 24.
[428] He is acquitted on counts 1, 8, 9, 15 and 25.

Accused 3:

[429] Accused 3 is found guilty on counts 2, 4, 5, 6, 10, 11, 12, 15, 16 and 17.
[430] He is acquitted on counts 8, 9, 13 and 14.

Accused 4:

[431] Accused 4 is found guilty on counts 2, 4, 5, 6, 10, 11, 12, 15, 16 and 17.
[432] He is acquitted on counts 8, 9, 13 and 14.

Accused 6:

[433] Accused 6 is found guilty on counts 10, 11, 12, 15, 16 and 17.
[434] He is acquitted on counts 2, 8, 9, 13, 14, 21 and 22.

Accused 7:

[435] Accused 7 is found guilty on counts 9, 10, 11, 12, 13, 15, 16 and 17.
[436] He is acquitted on counts 2, 8 and 14.

Accused 8:

[437] Accused 8 is found guilty on counts 10, 11, 12, 15, 16 and 17.
[438] He is acquitted on counts 2, 4, 5, 6, 8, 9, 13 and 14.

Accused 11:

[439] On counts 4 and 10 accused 11 is found guilty of theft. He is also found guilty on count 2 and counts 23 and 24, in the latter two instances in terms of the main charge.
[440] He is found not guilty on counts 15, 18 and 25.

LJ BOZALEK, J