

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

CASE NUMBER:

SS11/2014

5 DATE:

19 NOVEMBER 2015

In the matter between:

THE STATE

and

CHUMA SIYEKA

Accused

10

J U D G M E N T

BOQWANA, J:

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Introduction

The accused was arraigned for trial before this Court on an indictment consisting of altogether 16 counts, namely, two counts of theft (counts 1 and 8); two counts of robbery with aggravating circumstances (counts 2 and 9); six counts of attempted murder (counts 3, 4, 11, 12, 13 and 14); one count of murder (count 10); one count of possession of unlicensed firearm (count 5); two counts of possession of prohibited firearms fully automatic firearm (count 6 and 15); and two

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counts of possession of ammunition (counts 7 and 16). Counts 2,6, 9, 10 and 15 are read with the provisions of section 51 of the Criminal Law Amendment Act 105 of 1977 ('The Criminal Law Amendment Act'). Counts 6 and 15 are also read with the relevant provisions of the Firearms Control Act, 60 of 2000 and Schedule 4 of that Act.

Counts 1 to 7 related to incidents that allegedly occurred in October 2007 in the district of Bellville. In respect of count 1, it was alleged that on 5 October 2007, the accused stole a white Mercedes Benz motor vehicle from one, Daniel Brinkhuis at Boston Bellville. Charges 2, 3, 4, 5, 6 and 7 related to incident that allegedly took place on 8 October 2007, when a Coin Security van was ambushed by a group of robbers at Bellville.

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In regard to count 8, it is alleged that the accused stole a Mazda bakkie belonging to one, Andreas Coulbanis ('Coulbanis') at Mowbray on 20 September 2013. Counts 9, 10, 11, 12, 13, 14, 15 and 16 relate to an incident that occurred on 25 October 2013 near or at Monte Vista Boulevard, in the district of Bellville, when a group of armed robbers used a stolen vehicle during a cash-in-transit robbery. In that instance shots were allegedly fired at Johannes Hloi ('Hloi'); Isaac Witbooi ('Witbooi') and Gareth Jones ('the deceased') who were occupants of the Coin Security truck transporting an unknown

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sum of money. During the incident the driver of the Coin Security van, the deceased was killed. Shots were also fired at Bryan Butler ('Butler') and Werner Kotze ('Kotze') from the District Watch who were travelling in a patrol vehicle.

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The accused was represented by Mr Van der Berg and he pleaded not guilty to all charges. The State was represented by Mr Wolmarans.

10 Mr Van der Berg informed the Court that the accused denied any participation, or that he was present during the commission of any of the offences. The accused's defence was about his identity. He further submitted, that the accused did not place in dispute that any of the offences contained in the indictment
15 were in fact committed. Aspects such as crime scene ballistics found on the scene were also not placed in dispute.

Admissions were handed in in terms of section 220 of the Criminal Procedure Act 51 of 1977 ('Criminal Procedure Act')
20 and marked as Exhibit "L". The most significant of the admissions were the following:

1. The correctness of the statements regarding the ballistic reports handed in as Exhibits "N" and "O" respectively;

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2. That seven 62 x 39 millimetre calibre cartridges fired during the incident were ejected from an AK47 rifle during firing of a fully automatic firearm;
- 5 3. That the deceased's death was caused by gunshot wound to the chest. A bullet was collected from his clothing and sealed for forensic testing as depicted in the post-mortem report Exhibit "M";
- 10 4. The correctness of the photo album, sketch plan and key to photos as well as the sketch plan marked as Exhibit "A";
- 15 5. That the identity parade proceedings were accurately recorded and that the accused was pointed out by the witness Butler as the person in the line-up holding card number 7.

The State called eight witnesses in respect of the incidents which took place on 20 September 2013 and 25 October 2013 respectively. Those were in regard to counts 8 to 16. As regards counts 1 to 7 which related to the offences committed on 5 and 8 October 2007, no evidence was led.

After the close of the state's case, the defence brought an application in terms of the section 174 of the Criminal Procedure Act for discharge of the accused on all charges. The

Court acquitted the accused in respect of counts 1 to 7, but refused discharged on counts 8 to 16. The defence called the accused to testify.

5 Issue To Be Decided

The facts of the case are largely common cause and the only issue placed in dispute is the involvement of the accused in the commission of the offences. Thus, this case falls to be
10 determined on a narrow aspect which is the identity of the accused as the member of the gang of robbers who attempted to rob the Coin Security van and in the process committing various other offences.

15 State's Evidence

The state called Mornay Daniel Le Roux ('Le Roux'); Werner Kotze ('Kotze'); Huwett Faulmann ('Faulmann'); Andreas Coulbanis ('Coulbanis'); Brian Butler ('Butler'); Isaac Witbooi
20 ('Witbooi'); Johannes Hloi ('Hloi') and Theresa Wernich ('Wernich').

Le Roux testified that he was employed by ABSA Bank as an administration clerk. During October 2013, his function as an
25 ATM custodian was to load ATM machines with money and to
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ensure that it was up and available for clients. He was assigned a geographical area with 30 to 35 ATM machines under his supervision. He explained the procedure of collecting money at the cash centre and the function of Coin cash in transit services and securing of the area. On 25 October 2013, he was on duty and at approximately past 2:00 in the afternoon he was inside an ATM cubicle at Monte Vista. He was driving his own vehicle. The Coin van followed him from ATM to ATM. Each Coin van was assigned three guards. On that day the members of the Coin van were the driver (Jones), the crewman who carried the money (Hloi), and a third person who secured the site (Witbooi).

On 25 October 2013 after 2:00 in the afternoon, whilst in the cubicle, he observed through the peephole, which was about head height in the door, the crewman Hloi coming closer towards the cubicle with the money bag. He unbolted the door to let him. Hloi handed the money bag over to him, and he signed for it. Hloi then left the cubicle to go back to the Coin van. He proceeded to load the money into the ATM canisters and activated the machine.

Whilst he was still inside the cubicle, he heard a bang sound. After that he heard a shout, and a second and third bang. He looked through the peephole and saw about 3 or 4 people

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running around the Coin security truck. These people were not known to him and he could not identify them. When he looked the second time he saw Witbooi running from the left-hand side of the truck followed by a robber. Witbooi jumped into the back
5 of the truck and one of the robbers grabbed the edge of the door with his left hand in order to pull the door open. He then pointed the firearm into the vehicle with the right hand and proceeded to fire a shot into the van at Witbooi. Witbooi or Hloi managed to close the back door of the van.

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The robber shouted "*maak oop*" three times. They did not open the door. The robber then ran away from the truck and jumped onto the back of a white bakkie and the bakkie then left the scene. There were also two other males on the back of the
15 bakkie standing directly behind the cab. He only saw the one robber with the firearm and no other firearms. When he first saw the bakkie it was moving very slowly on the right hand side in front of the Coin truck. He observed a male person inside the bakkie in the driver's seat. The robber who chased Witbooi had
20 on a white t-shirt and a white '*material*' sunhat with a rim right around it.

He heard further rapid shots which sounded like machine gun bangs coming from the direction that the bakkie went into. He
25 initially thought the white bakkie was a Ford Courier bakkie

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without a canopy. He later found out that it was a Mazda bakkie.

He then phoned 10111 after the shooting stopped. He exited the ATM cubicle, and found Witbooi and Hloi outside the Coin
5 van. Witbooi was standing at the rear end of the van. He noticed a bullet wound to Witbooi's left shoulder and that he was bleeding. Hloi exited the rear of the van and he had no injuries. Le Roux phoned the ambulance services. As he walked around the van he noticed Jones lying on the ground
10 next to the van with his eyes closed and he was not moving.

He further testified that at the time of the robbery it was not raining, but a little later in the day it started to rain.

Kotze testified that during October 2013 he was employed for
15 about seven months as an armed response officer for District Watch. As part of his duties he had to attend to any panic or alarm activations. On 25 October 2013 he together with Butler, his co-worker, were patrolling the streets in District Watch marked Chevrolet bakkie ('Chev bakkie'). After 2 p.m. he and
20 Butler turned up in a northerly direction in Diaz Road, when they received a radio call and panic activations from the chemist in Monte Vista Boulevard. He was unarmed at that stage.

He spotted a Coin Security vehicle and told Butler that it
25 seemed that there was an armed robbery in progress. This was

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at Monte Vista Boulevard. Monte Vista Boulevard is not a one way road. As they came up Diaz Road he saw a Mazda bakkie travelling at a slow speed towards the stop street. He then noticed a person running towards the bakkie and this person
5 climbed onto the back of the bakkie. Altogether there were five people in and on the bakkie. Three of these people were on the back and two in the cab, or in front of the bakkie. On the back of the bakkie, two people were standing in front of each other. The third person who ran towards the bakkie joined those on the
10 back. When they were all on the back of the bakkie, he noticed that one was sitting, one standing and the third one who climbed on later also stood.

The Mazda bakkie was moving in a westerly direction whilst he
15 and Butler were moving in a northerly direction. He confirmed when a question was put to him that the two vehicles were destined to cross paths. Butler took his firearm and pointed it through the driver's side window to the direction of the white Mazda bakkie. Butler shouted "*stop*" to the Mazda bakkie. He
20 then fired off his pistol. Their Chev bakkie also came to a stop. He exited from the bakkie and hid behind the door frame of the bakkie. Butler then fired seven rounds and thereafter the Mazda bakkie also came to a stop. He then saw the driver of the Mazda bakkie taking out something from the middle next to
25 the steering wheel. He noticed the back wooden part of an
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AK47 rifle.

The driver of the Mazda bakkie then placed the rifle over the roof of the bakkie and started shooting at their vehicle. Kotze
5 demonstrated the action of the driver by using his right hand going up in an arch and in an overhead position, pointing towards the left hand side of the vehicle.

Kotze testified further that some of the rounds hit their Chev
10 bakkie. When he saw the back part of the AK47 he exited the armed response vehicle completely and he went to the left hand side of their vehicle. He could hear gunshots and a few rounds hitting the Chev bakkie. He then laid flat on the ground behind the bakkie and one of the rounds hit the ground next to his
15 shoulder and ricocheted into the bakkie. He then got up and ran towards the dentist surgery.

During his run there was still gunfire. He could hear a few shots and their Chev bakkie reversing. After a while in the
20 surgery the gunfire stopped and he exited the surgery and met up with Butler. He did not see the white Mazda bakkie again.

In cross-examination he confirmed that he made a statement to the police on the same day of the incident at 17:40. He gave to
25 the police as accurate information as he could. He read and /NY /...

signed the statement. He further confirmed meeting up with Butler after he emerged from the 'surgery' and they asked each other if they would be able to identify their attackers. It was put to him that the answer that he gave to Butler would have been
5 the same as that which he gave to the police in his statement, which was: *"I am unable to give a description of the suspects nor will I identify them if seen again."* To which he answered 'yes'.

10 It was further put to him that Butler gave a similar answer as to his ability to identify their attackers and he said "yes". He confirmed that Butler's statement to the police which was, inter alia, that:

15 *"I am not able to give a description of the suspects besides that the driver was a big built African male. I will not be able to identify them if seen again"* was in essence what Butler told him as well.

20 He stated that the reason why he was not able to give a description of the people was because he was stressed and it was his first incident with cross fire or shooting with firearms and his life was in danger.

25 He confirmed that he did not attend an identity parade and was
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never informed by Butler that Butler had attended such a parade.

He further testified during cross-examination that during the shooting the front end of the Chev bakkie was facing the left hand side of the Mazda bakkie. He could not see anyone on the back of the Mazda bakkie with firearms and shooting. He also did not see the front passenger drawing a firearm from around his chest area or shooting. He could not see what the passenger was doing as his focus was only on the front of the bakkie and shooting next to him. The head of the front seat passenger in the Mazda bakkie was between him and the driver of that bakkie all the time. He also gave a description of how Butler was shooting his pistol from their Chev bakkie, and that his hand and head were outside the window of the bakkie.

According to him it was a cloudy day, and it later started to rain. The duration of the shooting felt like it lasted for a day, but in reality it was over in a few seconds.

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The next witness was Faulmann, who testified that on 25 October 2013 just after lunch (past two), he was at Jack Hammers Hardware Store that was where he was working. He had just finished serving a client when he heard shooting. It could have been 15 shots that he heard. He pressed the panic

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button inside the store and also phoned the District Watch Security. He observed this from the window of the store and could see directly onto the Coin cash in transit vehicle and according to him the shots came from the right hand side of the
5 Coin vehicle.

The robbers were chasing one of the security guards, and he was running around the Coin vehicle. Plus/minus five male robbers, most of whom were wearing black tops were chasing
10 this security guard. This security guard was running to escape the shots and he fired back. He was shot in the shoulder. The guard then moved from the right to the left hand side of the vehicle and he could not see him anymore. The robbers then jumped onto the white Mazda pick-up vehicle, which did not
15 have a canopy and drove off. Faulmann was able to get the registration number of the bakkie, which he confirmed to be CA 717 289 and gave it to the police. The Mazda bakkie departed from the scene in the direction it was facing, which is depicted on the sketch plan as the westerly direction in Monte Vista
20 Boulevard North.

Coulbanis testified that on 20 September 2013 he was driving a white Mazda bakkie registered in his father's name. He parked the bakkie outside a friend's house in Rondebosch. The vehicle
25 was stolen and he reported it to the police. The insurance paid /NY /...

the value of approximately R150 000,00 for the stolen bakkie.

When he parked the vehicle everything was in good order. The doors were locked, windows were closed and the bakkie had a canopy. The photographs taken on the scene in Monte Vista Boulevard showed the bakkie without a canopy.

On 1 November 2013 Coulbanis was contacted by the police and went to Stikland and identified the bakkie as depicted in photographs 213 and 214 of Exhibit "A". He made a statement to the police pertaining to the registration number of the vehicle. The police statement reflected the registration number as CJ 22062 while the registration number depicted in photograph 214 was CA 717 289 which is clearly different.

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Butler testified that he is 41 years of age and has been in the employ of District Watch for 5 years. He has a competency accreditation as well as a business competency accreditation pertaining to the use of a handgun.

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On 25 October 2013 he was on duty dressed in uniform and had in his possession a weapon known as a, CZ75 semi-automatic pistol issued to him with 2 magazines containing 15 rounds each. On that particular day he was the driver of a patrol Chev bakkie marked ROMEO 7 which was a District Watch vehicle

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and Kotze was his passenger.

They were patrolling and travelling along McCarthy Road. Just after half past two in the afternoon they received a call out from
5 the control room regarding a panic alarm at Kemtique Pharmacy. A panic alarm signal is classified as a priority signal.

He saw four people running towards a white Mazda bakkie from
10 the direction of the ATM at Monte Vista Boulevard. One person jumped in front and three people jumped on the back. On the back of the bakkie, one person was standing directly behind the driver's side with his back against the driver's cab. Another person was sitting on the passenger side on the wheel arch and
15 a third person was also standing 'sort of' just behind where the one person was standing.

Butler stopped his Chev bakkie in the centre of Monte Vista Boulevard (south) facing in a northerly direction. The Mazda
20 bakkie travelled not fast down Monte Vista Boulevard (north) from east to west and came to a stop halfway over the stop street.

He took out his firearm from the holster and cocked it. He then
25 noticed one of the suspects on the bakkie standing behind the

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driver turning around towards him and this suspect was carrying an AK47. He has been in the industry almost 20 years and has seen a number of firearms, one of them being an AK47.

5 He also saw the driver of the Mazda bakkie pulling out an AK47 and the said driver put his right arm out of the window over the roof. He then realised that a shootout was about to ensue. Butler then pointed his firearm out of his vehicle's driver's window and started shooting in the direction of the people
10 pointing firearms at him.

All three persons on the back of the Mazda bakkie ducked into the well of the bakkie. The driver of that bakkie started returning fire. Kotze then jumped out of the vehicle and he saw
15 Kotze moving towards the back of the vehicle. The suspects carried on shooting at him. He then moved his body over the driver's seat. The person at the back of the Mazda bakkie who was behind the driver was also shooting at him with an AK47 and this person was slightly elevated. He could not recall
20 anyone else shooting at him. He had sight of the Mazda bakkie most of the times. He saw Kotze running towards the dentist practice. When he saw Kotze running he knew that it was time to get out of that situation. He then put his vehicle in reverse and put his foot on the accelerator.

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The Mazda bakkie came directly towards his vehicle as he was reversing in a southerly direction. He was slightly elevated and he could see over the top of the dash board. His vehicle swung around and mounted the pavement in an easterly direction and
5 carried on reversing in a northerly direction and came to a standstill under a tree.

When the two vehicles crossed each other's paths they were probably five metres apart. The occupants of the Mazda bakkie
10 were still shooting at him. He observed the suspects again as his vehicle was moving north and their vehicle going south as they crossed paths. Their vehicles were side by side and his side door was facing theirs as they passed him. They were still shooting when they drove passed his vehicle.

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He sustained no injuries. His attention was mostly focused on the driver and the person behind the driver during this episode.

He was asked about the description of the two individuals. He
20 stated that the driver was a quite a big person. When asked about the person who wielded the AK47 on the back of the bakkie he answered that he was initially standing, he knew that this person was not a very tall person, he was fairly stocky in build and had a bit of a roundish face. Only the windscreen
25 separated him and the driver of the Mazda bakkie. The person

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on the back of the bakkie was not obstructed and he had nothing over his face. He could clearly see and only needed to use spectacles at night when he was driving.

- 5 He made his statement to the police at 16:40, which he confirmed was just after two hours after the incident. He did not give the police any type of description of the suspects at the time. His reason for that was:

10 *"I had just been through quite an intense incident and your adrenalin is still pumping and mind racing away with you and you are pretty much thankful to be alive after facing what you did."*

- 15 On 23 November 2013 he attended an identity parade at Mannenberg Police Station. He identified a person as the one who was shooting at him. This person was the one standing behind the driver on the back of the Mazda bakkie.

- 20 There were three points during the whole incident where he was able to have a good look at the suspects and those were firstly, when they stopped at the corner of Monte Vista Boulevard and Diaz Road, the second time was when the attackers were shooting at him, and the third time was when the Mazda bakkie
25 came passed him when he was reversing. During these key

moments, he noted that the person on the back of the bakkie was not a very tall person, he was quite stocky built, had a very short neck and had smallish ears. He was 100% certain of the identification.

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In cross-examination, he confirmed that he made a statement to the police on 25 October 2013. This was not the first time he made a police statement and he was familiar with the routine. As far as he could recall he read the statement himself after it
10 was taken. He was satisfied that the content of the statement was accurate and complete. He was not rushed when the statement was taken and the effects of the incident were still fresh in his mind. This was the most overwhelming incident that he had experienced and it played quite a lot in his mind. When
15 he made the statement he was not at ease because his life had been threatened during the incident and a bullet had missed him by 30 cm.

Warrant Officer Streicher of SAPS Bothasig arrived on the
20 scene and he gave to him a description of the vehicle that had gone down towards Barrow Road. A lot of police vehicles, emergency services and traffic officials arrived in approximately 5 minutes. Warrant Officer Swan spoke to him. The statement he made to the police was taken in the dentist's office at Monte
25 Vista. During this time he probably got up five or six times to
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go outside and smoked.

He confirmed that he was an experienced person in the law enforcement field. He realised that he was going to be asked
5 for a description of the people but he did not really apply his mind to the appearance of the attackers because in his mind he was thinking about too many things all at once, and could not process everything straight away.

10 His recollection was that he did give a description to the police of the driver and that the one person on the back of the bakkie had a blue overall top on and also that somebody had a green overall top on. He could not recall what else he had said, although in his statement he mentioned that the driver was quite
15 a big guy. He seemed to recall that the man standing on the back of the bakkie did not have hair but was not sure. He also could not recall seeing him wearing a cap.

He was further asked as to how it is possible that he was able
20 to give a description two years later in court, and whether he had given a description before. He testified that he recalled speaking to Swan and giving him a description a day or a week after the incident although he could not give any exact time frame.

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He described to Swan that the person that was on the back of the vehicle who was shooting at him was not a tall guy, he was stocky built and clean-shaven or appeared to be clean-shaven. Although he could not remember his exact words, he thought he also made a comment that the man had pretty small ears (but was not sure). Those were things that just caught his eye. Swan informed him that no-one had been apprehended at that stage. He did not give the description in writing by making another statement or complete a description form.

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He was asked why in his first description to the court he had left out the ears and neck and in his description to Swan he had left out the neck altogether and possibly did not mention the ears. He stated that he could not answer that, but mentioned that he noticed the ears when the Mazda bakkie came past him whilst he was reversing. Until the point where his vehicle spun around he had sight of what was coming in front of him and once his vehicle spun around and hit the pavement, it carried on moving backwards.

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When he first saw the Mazda bakkie at the intersection his vehicle was about 50 to 60 metres away from it. When his vehicle was stationary in Diaz Avenue, the Mazda bakkie was stationary at an angle of about 10 metres away to his vehicle.

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5 *“at the time that this statement was taken it was just over two hours after the incident had occurred, so the mind is racing, you are thinking of things, you are not going to remember everything straight away. I do not have a photographic memory so I won’t remember everything - it is something that takes time.”*

He testified that he was under incredible pressure and it played a role on his stress levels. He also had an unarmed colleague to protect. He fired seven shots at their attackers.

15 He conceded that one of those on the back of the bakkie had a
pistol and one possibly had an assault rifle (as reflected in his
police statement). The person with the pistol possibly fired. He
further confirmed that more than one of those on the back of the
bakkie possibly fired shots but he could not say why he did not
20 tell that to the Court in his evidence in chief.

In his estimation the whole shooting incident took about 20 to 30 seconds.

25 The beginning of his manoeuvre to reverse, until the last shot
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was fired at him took about 12 seconds. After the Mazda bakkie drove past his vehicle it turned into Barrow and Barnard Street. There was no direct threat to his life anymore. That is when he called for police assistance. He took a tape out of his bakkie
5 and started closing off the entire area where the incident had taken place. He preserved the scene by means of the crime scene tape. He agreed that after the incident he acted in a rational and logical way.

10 He confirmed that the man on the back with an AK47 swung around in his direction holding the AK47 at midriff. He did not see the person put the butt against his shoulders. He further stated that he has handled an AK47 rifle before and it is a fairly light firearm.

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He conceded that during the 20 to 30 seconds his attention was divided. It was pointed out to him that in his statement he mentioned that two of the African males on the back of the bakkie pointed firearms towards his direction, they had an AK47
20 rifle and others had a pistol.

Mr Van der Berg put to him the danger of identification and the possibility of him having pointed out [during the identity parade] a person most resembling the man he saw. His response was
25 that there could be a possibility, but he was 100% right and was
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not mistaken. He confirmed in re-examination that he pointed out the one particular person with card number 7 because he was the person he saw as the 'AK man' on the back of the bakkie. He also mentioned that the person he pointed out at the
5 identity parade had a '*bokbaard*', that is, hair growth around his mouth and chin. Despite this difference from the person he saw on the day of the incident (who was clean shaven), he was still convinced that he pointed out the right person.

10 The next witness was Witbooi who testified that on 25 October 2013, he was working at Coin Security as a security officer. On this day he was driving with his colleagues in a Coin Security van and he was the 'third man' and his duty was to secure the area. The 'crewman' was Hloi and his function was to carry the
15 money. Jones was the driver of the van. They were following Le Roux from ABSA with the Coin Security van visiting different ATM's to deliver money for the loading of machines.

Just after 2 o'clock in the afternoon they arrived at the ATM at
20 Monte Vista Boulevard. Le Roux was already there. He alighted from the vehicle in order to ascertain if everything was safe. He then gave a sign to Le Roux to indicate that it was safe for him to enter the ATM cubicle. Hloi followed with the money. Le Roux and Hloi were safely inside the cubicle. It was
25 his task to keep customers away from the ATM whilst the money
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was loaded.

He was dressed in a uniform and at that stage standing in front of the ATM. He also carried a 9mm Norinco weapon. He gave a
5 sign as an indication that it was safe. Hloi exited the cubicle and climbed back into the back of the van. Hloi also carried a pistol. The driver (Jones) was unarmed. Witbooi and Hloi were normally seated at the back of the truck. The only way to communicate with the driver was through a microphone
10 (intercom).

Hloi was safely back in the back of the truck and he (Witbooi) was still outside waiting for Le Roux to finish at the ATM machine.

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Whilst he was waiting he noticed three male persons, one came from the OK MiniMarket and the other two came out of the pharmacy next to the ATM and they joined each other. These men approached his direction. Before they reached him he
20 asked them to go towards the front of the van and not come towards him and they did so. The reason for this was to keep the customers as far away from the ATM. When these men moved to the front of the truck he lost sight of them.

25 Close to the ATM there is a shrub as depicted on photo 1 of /NY /...

Exhibit "A". One of the three men surprised him when he quickly appeared from behind the shrub. He noticed a firearm in this man's hand which he pointed towards his direction. They were 2 to 3 paces away from each other. This man shouted at
5 him in English that if he was going to run he would shoot him.

Witbooi then took cover on the left-hand side of the truck and he then pulled his firearm. Two shots were fired at him by the attacker. He later, after the ordeal was over, discovered that he
10 was shot in the right shoulder. He shot back at the attacker by firing two rounds.

He waited to see what was going to happen because the attacker wanted to get hold of him so that he could open the
15 door. He then ran to the front of the Coin truck and he noticed the other two attackers standing in the road waiting for him. He fired one shot at them and they returned fire. Both of them had hand held weapons. He moved back to the left hand side of the Coin truck. After he fired the shot his firearm jammed. The
20 Coin van back door can only be opened from the inside. He ran to the back of the Coin van and asked Hloi to give his gun to him. Hloi opened the door slightly and gave his firearm to him through the lower side of the door. He again ran to the front side of the truck and noticed that Jones was lying down on the
25 ground and was still moving. He ran to the back of the truck

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and asked Hloi to open the door so that he could enter because he did not know how many attackers were still there. When he got out again he could hear machine gun shots at a distance. He confirmed that he saw three persons each had a hand held
5 weapon.

Hloi testified that on 25 October 2013 he worked for Coin Security and on that day he was on duty with his colleagues, Witbooi and Jones. His job was to carry the money from the
10 truck to the ATM for loading.

On the day in question he and his colleagues, Witbooi and Jones, arrived at the ABSA ATM at Monte Vista Boulevard just after two in the afternoon. On their arrival, 'the third man',
15 Witbooi, got out of the truck to secure the environment. Witbooi informed him *via* the radio that it was safe and he may proceed to take the money in his CPC moneybox to the ATM to handover to the custodian, Le Roux, from ABSA for loading.

20 Le Roux was already inside by then and the outside door was locked. Le Roux opened the door, Hloi entered with the money box and unloaded the money. He gave it to Le Roux for loading. Hloi closed his moneybox and walked back to the Coin Security truck.

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On his way to the truck he spotted a gentleman who was not far away from the ATM busy on his cell phone. Thereafter two other gentlemen came from the direction of the Mini Market. He, at that stage opened the truck door at the back and went
5 inside to drop his CPC box into the sleeve.

He then heard a gunshot outside and he looked through the rear window of the van and saw someone outside exchanging fire with Witbooi, who was running to the back of the van for cover.
10 One shot hit the window of the truck. He remained in the back of the truck. He confirmed that the attacker that was chasing Witbooi saw him and shot back at the window that he was looking through. The bullet did not go through the window due to the fact that it was bulletproof. It just made a mark. He was
15 scared and just sat down inside the truck.

Witbooi knocked on the window of the Coin van and screamed at him telling him that his firearm had jammed. He opened the door slightly and gave Witbooi his firearm. At the later stage,
20 Witbooi once again knocked on the door. He opened and Witbooi also got into the truck where they remained.

They have an intercom system in the truck and one could hear any movement in front of the vehicle. He heard a scream from
25 Jones and a gunshot and thereafter it was quiet.

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The attacker he first noticed was standing next to the ATM talking on his cell phone just before he entered the cubicle. He did not see the two gentlemen again who came from the
5 direction of the Mini Market.

He described the two gentlemen as both tall, slender and light in complexion. He had three sightings of the man who was talking on his cell phone and described him as "*a big muscled*
10 *guy, he was like fat.*" He could not remember these men's clothing. They all looked to be middle-aged or young between the ages of 28 to 30 years. The big muscled person was a grown man of over 30 years.

15 Wernich testified that she was employed by the South African Police Services attached to the Local Criminal Record Centre at the Provincial Crimes Investigation Unit of the Western Cape as a criminalist expert. She has 13 years experience. She successfully completed several courses relating to her work.

20

At the courses she was trained by experienced and trained experts in the detection, comparison and identification of fingerprints, as well as the collection of forensic evidence. In 2007 she completed the AFIS operator's course which is the
25 Automated Fingerprint Identification System. She obtained
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expert status in March 2010. In 2012 she did an AFIS expert operators course. She also completed a B-Tech degree in policing *cum laude* at UNISA.

5 On 25 October 2013, she went to the scene of the crime at Monte Vista Boulevard. She took photographs of the scene focusing on fingerprint investigation [from the Mazda bakkie] which was submitted as Exhibit "D". Due to the weather the vehicle in question was towed to Stikland. On 26 October 2013
10 (which is the day after the incident) she investigated a white Mazda bakkie with registration number CA 717 289 for fingerprints, palm prints and forensic evidence.

During her testimony she gave a power point presentation
15 regarding specific photographs she took during her investigation of the white Mazda bakkie. A photo album and a power point presentation disc were handed in as Exhibit "E" and Exhibit "2" respectively.

20 Photograph 2 of Exhibit "E" shows a print found on the roof of the bakkie and marked point 11. Finger lifter no.7 in Exhibit "F" also depicted as lifter no.7 in Exhibit "F" depicts fingerprints lifted from the vehicle with reference number 2040/10/2013.

25 On 30 July 2015, she received a set of fingerprints from the /NY /...

investigating officer on which the name Chuma Siyeka appeared. Those were handed in as Exhibit "G". She compared the marked prints on Exhibit "F", which is the scotch tape, with the marked print on Exhibit "G" (SAP 192) and found it to be
5 corresponding. She then prepared a court chart which was handed in as Exhibit "J". A description of the marked out ridge features points is contained in court chart SAPS 333. Points 1 to 9 are marked out on the court chart, Exhibit "H".

10 She explained that photograph 1 on Exhibit "H" was a photographic enlargement of the crime scene print which was lifted from the roof of the bakkie that was found on Exhibit "F". Photograph 2 on Exhibit "H" was a photographic enlargement of the marked printout Exhibit "G" which is the set of fingerprints
15 received from the investigating officer. She marked out nine point ridge features and these ridge features corresponded with regards to type, direction, place, position and in relation to one another of which, according to her, only seven ridge features are sufficient to prove a person's identity beyond all doubt. She
20 further testified that on the day that she came to court to testify and before the start of the court proceedings she took the fingerprints of the accused which were handed in as Exhibit "K". She compared those to the print lifter, Exhibit "F", the court chart SAPS 333, Exhibit H and the set of fingerprints taken by
25 the Investigating Officer, Exhibit "G" and found them to be
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corresponding.

She testified further, that no two persons have the same finger, palm or footprints and that is why she had no doubt that the prints she found on the white Mazda bakkie belonged to nobody other than the accused before Court.

The bakkie was taken to SAPS at Stikland where it was kept under cover for examination because it was overcast and they were of the opinion that it might rain.

Verification of fingerprints lifted was always done by other experts, and if an agreement was not reached on an identification, a statement in the form of Section 212 of the Criminal Procedure Act would not be issued. The print in photo 1 of Exhibit "H" was made in uncontrolled and unfavourable circumstances whilst photograph 2 of Exhibit "H" was taken in control circumstances. According to her, the little dots on photograph 1 in Exhibit "H" could be attributed to dust particles.

20

In cross-examination various articles, such as those of Professors Meintjies Van Der Walt and De Villiers were put to her which espoused the view that two people may have the same fingerprint. She stated that she kept up to date with literature on the subject of fingerprints but she did not read the

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articles of Prof Meintjies Van Der Walt or Prof De Villiers. Further, her practical training was done by police experts. She however was aware of people saying errors do occur but she made no errors and her work is verified by experienced experts
5 who are police officials. She mentioned that the South African courts require the seven points corresponding ridge characteristics.

According to her, research has been done by SA Criminal
10 Record Centre on more than 1 million cases on the 7 points corresponding ridge features and not once was it found to be inadequate.

It was further put to her that blotches on photograph 1 could
15 have been as a result of a skin condition or sandblasting. She stated that according to her expert opinion the blotches were caused by dust. She was certain that the fingerprint lifted from the roof of the white Mazda bakkie was the fingerprint of the accused. That concludes the state's case.

20

Defence Case

The accused testified that he was 48 years old at the time of the incidents and resided in Khayelitsha. He is married with six
25 children, five boys and a girl. The youngest boy was 2 years

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old in October 2013, and he attended pre-school from 8 o'clock in the morning until 4 o'clock in the afternoon, 5 times a week. The pre-school is situated in the same street as their home. The child's mother or he would take the child to school and
5 fetch him. His wife worked for an NGO known as Umthawelanga.

He owned two kombis which he used as taxis under the name Siyeka Taxis and one sedan Ford Focus vehicle. He employed
10 two drivers for the taxis. He used the income generated from his taxi business to support his family.

He testified that he was neither present at the scene of the robbery and a shootout that took place at the ATM in Monte
15 Vista Boulevard in Goodwood nor was he present at the shootout that occurred near or at the intersection of Monte Vista Boulevard and Diaz Road on 25 October 2013. He further denied that he was the man standing behind the driver of the Mazda bakkie armed with an AK47 rifle.

20

He did not work out in a gym or lifted weights, and was not very athletic, nor was he a big muscled man. He was requested by his counsel to remove his jacket and pull up the sleeve of his shirt, right up to his shoulder, and to show that his arm was not
25 bulging with muscles and that he did not have a 'six-pack'.

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He was asked whether he knew persons by the names of Spencer, Wilberforce, Zuki, Dama and Xolani (all going with the surname Siyeka). He testified that he knew the name Xolani.

5 He did not at any time go by any of those names.

In 2013 he ran an unlicensed shebeen business. He bought liquor for his business at the surrounding bars or liquor outlets in Nyanga. He did not own a bakkie in 2013, and transported
10 the liquor he purchased by means of non-specific bakkies that he would hire randomly. He explained that he would, for instance, see a bakkie moving along the road and stop it, or approach a bakkie that was stationary where he would request the “owner” of the bakkie to take him to the relevant bar or
15 outlet to buy liquor. This happened at the most three times and at the least two times a week. This is the routine that he followed during the period of September and October 2013. He did not have cause to take any notice in the particular make, model or colour of the bakkies concerned nor did he have any
20 interest in the actual ownership of the vehicle.

He did not drive the hired bakkies himself but gave directions to the driver. He would sometimes sit in front with the driver and at times would stand at the back of such bakkie where he would
25 direct the driver through the driver’s window or the sliding
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window of the cab. During September and October 2013 he normally participated in the actual loading of liquor onto such a bakkie.

5 The volume varied between 20 cases to a pallet of 77 cases. He also assisted with the offloading of the cases. In this process he would be on the back of the bakkie picking up a case and passing it onto the receiver who would carry it into the house.

10

He denied that he stole a Mazda bakkie as mentioned in the charge sheet. When asked by his counsel whether to his knowledge he has ever been on the Mazda bakkie that was discussed and shown [on the photographs] in court he testified
15 that he could not recall but he might have been.

He testified that he was arrested on 1 November 2013, at his house. During the arrest he was informed that the arrest was for armed robbery that occurred in Goodwood. The group of
20 police officials who arrested him did not inform him when the incident took place. They asked permission to search his house, which he gave. They also searched his car, a Ford Focus. No firearms or ammunition were found during this search and no clothing interested them.

25

He was then taken to Bellville where he interacted with various police officials. His warning statement was taken by Detective Swan who informed him of the charges and the date upon which those charges were committed namely, (25 October 2013). He
5 could not recall whether Swan informed him of the time the crimes were committed. He told Detective Swan that he had no knowledge of the crimes. Swan took a set of his fingerprints. He did not suffer from any skin condition during the period of September and October 2013. He had no warts or blisters, no
10 itching hands or fingers and his hands did not require ointment. He also did not work or participate in sandblasting operations.

When he was at the Bellville Police Station he tried to think back where he was or might have been on 25 October 2013. He
15 testified that during the last two weeks in October 2013 there was a taxi war. At the time, he belonged to a taxi association called CODETA. CODETA was interested in defusing the tensions that prevailed in the taxi industry. They had meetings at all times, at the taxi rank and sometimes at the community
20 hall, pertaining to what was happening. The taxi owners were obliged to attend these meetings in the morning at different offices almost every day from Monday to Friday. A member of the committee would inform them about a meeting but the times on which the meetings were held were not the same. They
25 usually started after peak hours [in the morning] and continued
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to after lunch. Sometimes meetings would be held in the afternoon. When he thought back about where he was on 25 October 2013 he concluded that he was forced to attend the meetings in the morning and that he was at the rank on that
5 specific day. They had to be at the rank between five and half past five in the morning. If he failed to arrive at the rank his vehicles would not be permitted to work.

He confirmed that he was pointed out by Butler at the identify
10 parade as the person holding card number 7. He however stated that Butler was mistaken as he was not present at either of the two scenes of violence on 25 October 2013. He further testified that he would probably touch a bakkie that he randomly hired all over in the process of loading or off-loading the liquor.

15

He explained that perhaps when he was directing the driver, he would hold onto the roof of the bakkie with his hand. He demonstrated how he would do so by making gestures with both his hands holding onto the witness box. He testified that he
20 would kneel a bit down to talk to the driver through the sliding glass at the back or through his window.

In cross-examination, he testified that his shebeen business is in Zwelitsha in Nyanga at a house belonging to his wife's
25 paternal uncle. He gave some unspecified amount of money to

his uncle when he needed it. The uncle would also make money from recycling empty bottles.

The accused ran his shebeen for three or four years before
5 October 2013. He was unable to say how much he made per month because he did not count how much money he accumulated. He made a profit but did not know how much he made per month or per year.

It was put to him that he did not run a shebeen business at all
10 and that he fabricated the running of a shebeen business in order to explain his fingerprint on the bakkie which he denied.

When pressed in cross-examination he testified that he estimated his weekly profit in 2013 was between R700,00 and
15 R1 200,00 per week and that was the money that he would put away. Further, that in 2013, a case of beer was priced at R95,00 to R105,00. He stated that he made a mistake when he first testified that he paid R20,00 or R30,00 per case (which was calculated by Mr Wolmarans to equate to R1,60 per bottle on a
20 figure of R20,00 figure or R2,50 per bottle on a R30,00 figure). He agreed that such prices are nonsensical and stated that he made a mistake.

He testified further that he purchased the alcohol from bars in
25 Nyanga. One bar was in the vicinity of the police station, one in /NY /...

Crossroads at a place known as Emtshinini and another one behind the market in Hazeldene at Philippi. According to him these bars were legitimate wholesalers of liquor because they were selling liquor in bulk and had business names. The outlet
5 in Crossroads was known as Masakhane and the one in Hazeldene was called Dali; another outlet was called Layni and another one known as Zongezile. All these liquor outlets were in Nyanga. He would obtain a receipt for purchases and there is nothing he signed. From the start of October 2013 all the way
10 to his arrest as per routine he went to purchase alcohol during the day and any time before close of business. Layni wholesalers were open on Sundays and after hours. The 25October 2013 fell on a Friday. On that day there were problems at the rank and he could not just leave during the day.
15 He went to purchase alcohol after rank hours which were between 6 and 7 p.m. at Layni because Layni closed at 10 o'clock in the evening.

His family members assisted him in the shebeen and he had no
20 record of the hours they worked. He also had no financial records and no documentation to show the existence of this (shebeen) business he was running.

On Friday 25 October 2013 before he went to purchase liquor he
25 was kept busy at the meeting and after the meeting adjourned

he remained waiting and sat around at the rank. At past 2 o'clock in the afternoon he would have been at the rank. He never signed an attendance register at any meeting. He just arrived there and went to the place where they convened the
5 meeting.

He never observed that a record was kept. They were forced to attend meetings and if they did not attend their taxis would be grounded. At the meetings in the community hall they would
10 give their names to a member of the committee and that person would write the name down. His name could be on a list pertaining to a meeting held by CODETA on 25 October 2013 if it was written down and if 2013 documents were still kept. These meetings would sometimes continue in the afternoon. If
15 a meeting ended at 2 o'clock one would remain there because one would not be aware whether another meeting was to be called.

He requested permission to fetch his child at pre-school at 5
20 p.m. The pre-school was near the rank. When he was arrested he did not make any statement to the police. He told them he would speak to his lawyer.

In regard to this case he was arrested in the early hours of the
25 morning on Friday, 1 November 2013. He conceded that whilst
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he was incarcerated from the date of arrest in November 2013 until the bail application was heard on 26 November 2013, he had time to think where he was on 25 October 2013. He did not try to get a document or ask anyone or his lawyer to do that, in
5 order to show that he actually attended a meeting on that day. He did not testify at the bail application but his lawyer handed up an affidavit that he had signed. He did not mention to anyone that he was at a taxi meeting on 25 October 2013. He remained silent for two years. The reason was that he saved his
10 explanation for when he was asked. He denied that he fabricated his version and maintained that Butler was mistaken by pointing him as a perpetrator. He stated that he did not enquire from CODETA or anyone regarding the records kept for a meeting on 25 October 2013.

15

He recalled the identity parade and that a lawyer (representing him) Mr Slabbert, was present. There were nine persons in the line-up during the parade. He had requested one of the participants to get people from the rank to be part of the line-
20 up. He conceded that the people in the line-up were organised by the defence. He did so at the instruction of the detective and his lawyer. The people in the line-up were all black males. He was satisfied with the people that they brought because they were of his colour and others had the same height and physique
25 as him. He could not say with certainty whether he was clean-

shaven on 25 October 2013 because it was some time ago.

He was not aware of the ownership of the vehicle in which his prints were allegedly found.

5

He confirmed that he was arrested for contravening liquor laws in January 2013 as indicated in a docket handed in as Exhibit “R”. He also confirmed that when the police took a photograph of him on 1 November 2013 as depicted in Exhibit “S”, he was
10 bearded and that was a week after the crimes were conducted and that concludes the summary of the evidence.

Analysis

15 Turning to the analysis. The manner in which the Court should assess evidence is trite. The holistic approach has been followed in decisions such as S v Van Tellingan 1992(2) SACR 104 (C) and S v Van Der Meyden 1999(2) SA 79 (WLD) where the court stressed at 82 A–C that the decision whether to acquit
20 or convict should not be based only part of the evidence. The conclusion which the court reaches must account for all the evidence. In that decision Nugent J held at 82(D) that some of the evidence, in a matter might be found to be false; some of it might be found to be unreliable; and some of it might be found
25 to be only possibly false or unreliable; but none of it may simply
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be ignored. This approach has been echoed in many cases such as S v Trainor 2003(1) All SA 435 (SCA) and S v Stevens 2005(1) All SA 1 (SCA) where the courts warned against dealing with the evidence in a compartmentalised fashion but rather for
5 a court to base its conclusion on a conspectus of all the evidential material placed before it.

The issue in dispute in this case is identification. The key witness for the State on this aspect is Butler. He is the only
10 witness who alleged to have identified the accused as one of the men on the back of the white Mazda bakkie. Strictly speaking Butler is a single witness on this aspect. It is well established that the Court should exercise caution when dealing with such evidence. However, such exercise of caution should
15 not displace common sense.

The second key role player in the State's case is Wernich, the fingerprint expert, we will deal with her evidence later on in the judgment.

20

Butler's evidence was criticised by the defence counsel on various grounds. Mr Van der Berg pointed out that the issue is not whether Butler lied or fabricated his evidence or erred or was confused. The persuasive relevance of his evidence, rested
25 on the reliability of his evidence rather than on his credibility.

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The ultimate question, he argued was whether the Court could rely on what he said. The point sought to be highlighted by Mr Van der Berg was that the witness's own conviction must not cloud the separate enquiry which is the reliability of his evidence.

We have no quarrel with Mr Van Der Berg's submissions and the literature he referred to which in the main suggests that honesty is no guarantee to reliability. According to the Justice Project Eyewitness Identification – A Policy Review at page 5; “a witness’ self-reported degree of certainty in an identification was considered a good indicator of accuracy. Unfortunately a great deal of research in recent decades has proven this intuitive assumption false.”

15

We are alive to and do take heed of the warnings that have been sounded to the trial courts on numerous occasions of the danger of wrong convictions owing to ‘honest’ but mistaken identification of accused persons. In that connection, it is worth repeating the words of Holmes JA in the seminal decision of S v Mthethwa 1972(3) SA 766 (A) where he said the following at 768A-C

“Because of the fallibility of human observation, evidence of identification is approached by the courts with some

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caution. It is not enough for the identifying witness to be honest: The reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his
5 opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and of course, the evidence
10 by or on behalf of the accused. The list is not exhaustive. These factors or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities. See such cases as R
15 v Masemang 1950(2) SA 488 (A.D.)..."

Butler testified that he noticed the white bakkie for the first time when it was pulling away next to the Coin Security van that was parked in Monte Vista Boulevard. He then noticed four men
20 running towards the bakkie, three jumped onto the back of the bakkie and one got in front. Witnesses that testified about what took place at the intersection of Monte Vista Boulevard and Diaz Road are consistent about the fact that five men were in an on the white Mazda bakkie.

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Le Roux observed that there were three persons on the back of the bakkie when he was looking through the peephole from the ATM cubicle at Diaz Road. Kotze also testified of seeing three persons on the back of the bakkie. According to both, Butler
5 and Kotze two other men were in front being the driver and the passenger. Kotze and Butler's evidence is also consistent on the fact that one of the perpetrators was standing behind the cab on the driver's side.

10 Butler testified that his focus was on the actions of the driver and the man standing behind the cab on the driver's side. He noticed the driver of the bakkie who held an AK47 rifle over the roof of the bakkie and the man behind the driver who also held an AK47 because they posed a threat to him and were shooting
15 at him.

According to Mr Van der Berg, Butler's reliability is fatally compromised in that during the duration of the incident which took about 20 to 30 seconds there were at least nine
20 distractions which diverted his attention from the man standing behind the driver. For the substantial part, he was forced to take cover, sliding below the dashboard in order to duck from the shots; the man who stood behind the driver was the furthest from him of all the occupants of the bakkie; for the most part he
25 was in a defensive position hiding inside the vehicle; he
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reversed his vehicle for a distance; a split-second of the observation was unlikely to be conducive in these circumstances, therefore, his claim that he observed the perpetrator behind the driver at this juncture and even gave a
5 description of a frontal facial view, including the “smallish ears” of the perpetrator was ‘ludicrous’.

Butler’s inability to give a description barely two hours after the incident, as depicted in his statement to the police when he was no longer under any pressure, was criticised. This was
10 exacerbated by his assertion that he would not be able to identify the suspects if seen again. Butler’s evidence is indeed not without flaws. His positive assertion [in his statement to the police] that he could not give a description except that the driver was a big man and that he would not be able to identify
15 the suspects if seen again does raise questions. However, Butler out of his own volition called Swan not very long after the incident (i.e. according to him a day or a week after the incident) to give a physical description of the attackers particularly of the person who was standing behind the driver
20 and shooting at him. He described this man to Swan as a short guy, stocky built, clean-shaven and perhaps mentioned smallish ears. It must be borne in mind that the accused was arrested on 1 November 2013. Butler’s testimony was that when he called Swan, Swan confirmed that no arrest was yet made.

25

Mr Van der Berg correctly conceded that one could not speculate as to what gave rise to this “sudden recollection of the description” or even get suspicious that there was a sudden fabrication regarding the appearance of the perpetrators. The
5 explanation given by the witness that he did not apply his mind to the description of the attackers because his mind was thinking about too many things and he could not process everything “straight away” at the time, as he put it, cannot be discarded.

10

A month later, at an identity parade, Butler identified the accused as the man that stood behind the cab on the driver’s side holding an AK47 rifle and shooting at him. Mr Van der Berg argued that despite his professed 100% certainty that his
15 identification in the line-up was correct, Butler conceded to the possibility that he had committed an error of pointing out the person in the line-up who most resembled the man who stood on the back of the bakkie.

20 In the Court’s view, Butler’s concession was a general one regarding a possibility of pointing a person most resembling a shooter. He did not admit to the possibility of error on his part by pointing number 7, the accused, as a person most resembling the attacker.

25

Whilst the pointing out took place a month after the incident, a description was given to Swan a day, or a week after the incident, according to Butler. In the Court's view, Butler's ability to point out a person who had facial hair or a 'small beard',
5 during the identity parade, whilst his description of the attacker to Swan was that he was clean-shaven is evidence of his powers of observation rather than his lack thereof.

Butler's evidence was that both the driver and the man on the
10 back of the bakkie had AK47 rifles, and were shooting at him. His evidence suggested that two AK47s were used for the shooting. The ballistic evidence has however revealed that only one AK47 was used.

15 Based on this, the defence argues that it must be accepted that only the driver and not the man behind the driver on the back of the bakkie held and used the AK47 to shoot. This proposition according to the defence is bolstered by Kotze's evidence who described in some detail how he saw the driver producing an
20 AK47 firing at them from the roof of the bakkie. Kotze did not see the man behind the bakkie firing, or holding a firearm. He mentioned that after Butler fired at the Mazda bakkie, the driver of the Mazda bakkie returned fire.

25 This position according to the defence, weakens the state's
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case in respect of Butler's identification ability. Mr Van der Berg argued that the significance of this is that, if it is found that the driver was the only person who held and fired an AK47 the reason given by Butler as to why he focused on the man on the back of the bakkie behind the driver (which is that he also fired at him with an AK47) would disappear.

Mr Wolmarans on the other hand submits that both Kotze and Butler must have erred when they thought that the driver fired shots. He however, also suggests that the driver could have initially fired a shot or two. He further submits that Butler made a mistake when he mentioned two AK47s. According to him, a closer look at the ballistic evidence suggests that firing must have come from two persons on the back of the bakkie, one behind the driver's cab with an AK47 and another one with a pistol.

He suggested that the positions of where the cartridges landed are in support of the view that the shots would not have come from the driver who was in an awkward position over the roof of the bakkie and who also at the same time had to drive the vehicle. The people better placed to fire and land those shots were the men on the back of the Mazda bakkie. It is therefore, reasonable to conclude, according to him, that Butler made an honest mistake when he thought that there were two AK47s. Furthermore, evidence shows that shots were fired from a pistol

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as well. Although Butler did not focus on the man firing the pistol, he did mention in his statement and confirmed when asked during his evidence that one of the men behind the bakkie had a pistol. The ballistic evidence also confirmed that
5 pistols were used.

The conclusion that the Court must draw must be based on the evidence. The inconsistencies that became apparent between the ballistic evidence (that only one AK47 was used) and
10 Butler's evidence that two AK47s were used was not put to him for comment. Numerous possibilities may be surmised as to why Butler testified that he saw both the driver and the man with an AK47 firing shots.

15 Both Butler and Kotze demonstrated how the driver fired over the roof. Butler conceded that the position of the driver was unusual but stated that he was not surprised. He even mentioned that he was experienced with firearms and an AK47 is a light weapon.

20

It is possible, in the Court's view that one weapon was used by both the driver and the man behind the driver at different times. The incident happened so swiftly that the witness could have perceived shots being fired from two AK47s whereas only one
25 AK47 and a pistol were used.

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The argument brought by the State that two cartridges which emanated from an AK47 that were found at the lower end of Diaz Road would have most likely come from a man who was
5 using an AK47 on the back of the bakkie, because at that stage the driver of the vehicle would possibly have been driving the vehicle whilst Butler was reversing, is more convincing.

It may be so that the driver of the Mazda bakkie did fire a few
10 shots initially when the bakkie came to a stop even though he was in an unusual position. However when the bakkie began to move again the focus of the driver would have been on the driving of the vehicle. Furthermore, the driver of the Mazda bakkie would have been in an even more awkward position at
15 that time to fire any shots over the roof of the bakkie.

It must be borne in mind that the attackers were in the process of escaping from the crime scene after having come from a failed robbery. They met Butler and Kotze who interfered with
20 their process of fleeing and were obstacles. In those circumstances they had to fend them off. The men on the back of the bakkie were clearly in a much better position to do that, whilst the driver had to concentrate on getting away. Butler's evidence was that the men on the back of the bakkie behind the
25 driver swung around in his direction and shot at him from an

elevated position at midriff. This was clearly not an aimless shooting; it was intended to hit the target.

The weaknesses that have been shown regarding Butler's
5 evidence as to the number of AK47s used do not detract from
the fact that he was able to identify a man who stood behind the
cab on the driver's side, and that was the direction from where
the shots from an AK47 were fired. Whilst there would have
been the various distractions, such as ducking for cover, hiding
10 below the dashboard, and reversing, the focus of attention was
the direction from which the shots came.

It is unlikely that Butler made up the testimony about the man
behind the driver firing at him. It may be that he confused
15 certain issues such as the number of AK47s used but he was
steadfast during his evidence that he managed to 'identify'
certain features from a person he focused on, which were that
he had a roundish face, was stocky in build and big. There is
not much of a difference between the description he gave to
20 Swan and that which he gave during his evidence in chief.
Butler did not only testify about the features of the perpetrators
he focused on. He also gave other details such as the presence
of the AK47, the standing, or sitting positions of the suspects in
and on the bakkie, and what they were doing. His attention was
25 directly drawn to specific incidences.

It must be accepted that the description given by Butler was that of an average person in that there were no striking features such as a scar or a tattoo. Butler mentioned however towards
5 the end of his cross-examination that sometimes one may not remember certain particulars about the event or even the clothing of the person involved but “*some faces you never forget*”.

10 It is so that the man behind the driver was a stranger to Butler. In fact the attackers were all strangers and that Butler felt threatened and feared for his life. There is however no reason not to accept that, in daylight, where it was not raining, where he could see clearly and where the faces of the perpetrators
15 were not covered, Butler would not in 20 to 30 seconds, at a distance between 5 to 10 metres, be able to look at the face or, faces of the perpetrators and remember a specific face of one of them, even with a lot of activity taking place in between.

20 Whilst there may be concerns regarding the assertion that Butler made to the police in his statement he did give an explanation which in the Court’s view is not unreasonable.

As regards, the identity parade, the defence had no quarrel with
25 the process followed during the parade. Mr Van der Berg
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submitted, that there was a possibility that Butler pointed out a person who most resembled his attacker. The pointing out of the accused at the identity parade however must be viewed together with the fingerprints expert's evidence and other
5 relevant evidence.

It is perhaps apposite at this point to refer to the remarks made in the judgment of Mosheshi and Others v R (1980-1984) LAC 57 at 59 F-H that has been quoted with approval in some of the
10 SCA judgments including the most recent one of Modiga v The State (2015) All SA 13 (SCA) at para 24, where it was effectively found that a court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt nor does it look at the
15 exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true. The Court held, inter alia, as follows:

20 *“...the breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual parts of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence*
25 *led in a trial may arise when that aspect is viewed in*

isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees.”

The evidence regarding the individual whom Butler alleges was standing behind the driver's cab is consistent with the location of a fingerprint which was lifted from the roof of the bakkie by Wernich.

Mr Van der Berg submitted that the print was more to the left side of the roof, which is not in line with the position of where the man standing behind the driver of the bakkie was.

20

We are not persuaded by this argument, it is possible that the person standing would gain balance by holding onto the roof of the bakkie with his hands and in that process he could leave a fingerprint with whichever side of his hands. The accused himself in fact demonstrated by spreading both his hands in the

witness box as to how he would stand on a random bakkie he hired. It is not clear from which hand (i.e. whether right or left) the print lifted from the crime scene came. There would evidently be a lot of movement with the shooting taking place.

- 5 The bottom line, however, according to Wernich's evidence, is that a fingerprint was lifted from the roof of the bakkie and the person whose print that was, would have been standing with his hand touching the roof of the bakkie with his fingers pointed forward.

10

Mr Van der Berg referred to a number of articles and more particularly to Prof De Villiers' article published in the Oxford University Common Wealth Law Journal (2012) Issue 2 page 317) where he states, inter alia, as follows: *"Still there is no objective peer reviewed study supportive of the uniqueness of the fingerprint."* He further submits that: *"Until the uniqueness claim can be backed up by fundamental research it would not be appropriate to make such a claim."*

15

- 20 Prof De Villiers however in the same passage states that fingerprint examiners, being the ones who do the comparisons: *"Have been in agreement across the world for approximately a hundred years that complete and partial fingerprints are unique."* He goes on to state that: *"The individuals that question whether fingerprints are unique have never lifted or*
- 25 /NY /...

compared prints neither are they qualified to do so.”

Mr Van der Berg also referred to an article by Dr Sangero and Halpert, “Why a Conviction should not be based on a Single Piece of Evidence: a Proposal for Reform” 48 Jurimetrics J 43-94 (2007) 64 who state that no scientific proof exists that it is impossible that two people can share the same points of comparison in a fingerprint examined by an expert. These two writers are said to be a lawyer, and a physicist.

10

Mr Van der Berg invites this Court to find that there is substance in the contention that individualisation in fingerprints has not been scientifically proven. He would also like the Court to find that there is a possibility that two people can have the same fingerprint.

15

Whilst Wernich did not provide literature regarding studies done in respect of the uniqueness of a fingerprint, she testified that in all her time she has been working at the fingerprint department she has not found two people with the same fingerprint.

20

Whilst there seems to be a number of those raising doubts about the uniqueness of the fingerprint, it is not possible in the absence of expert evidence that the same fingerprint can be

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ascribed to two people, for the Court to make a positive finding that indeed there is substance in those views or even a slight possibility.

5 The views expressed on the ‘possibility of such a scenario’ are noted but they cannot be elevated into a scientific conclusion warranting deviation from the position that has admittedly been held by fingerprint examiners for over hundred years that fingerprints are unique. That however does not mean that, if
10 tested evidence comes to the fore to support those views, a different approach may not be taken. For now, however, those views are simply views. They do not go as far as placing an alternative fact proven beyond dispute that two people can have the same fingerprint.

15

This Court cannot take the argument and the noises any further without more (which is, expert evidence presented before the Court). To support the possibility of two people having the same print, Mr Van der Berg referred to Exhibit “D” which made
20 mention to a name Dama Siyaka. Wernich was not asked about this different name and a possibility that it belonged to someone else. We do not know whether this can be ascribed to a spelling mistake or not. Certainly the names are strikingly similar, so the name could be a possible spelling mistake. What
25 seems to be the case though, is that the print found on the

database belonging to 'Dama Siyaka' was compared with that which was lifted on the crime scene, a match was found which led to the accused's arrest.

5 Mr Van der Berg argued that the print from the crime scene was disfigured by the various white and grey blotches. Some of the blotches according to him are sufficiently large, such that they obscure the ridge path and mask the actual property of the ridge where it disappears under the blotch. Wernich testified that
10 whilst one would not know what the blotched ridge would have done, the ridge continues. The points she marked were however not affected by the blotches. She further testified that the fingerprint lifted from the crime scene was a good enough print for the purposes of examination and conclusions.

15

With regards to the possibilities that were put to her as to what the causes of the blotches could be, including a skin condition and working with sandblast, she testified that she was of the opinion that the blotches were caused by dust particles and not
20 a skin condition. According to her, the print was located on the outside of the vehicle and on the top of the roof of the vehicle which was exposed to natural elements such as the sun, rain and wind. Fingerprints according to her are delicate.

25 Furthermore, the quality of the fingerprint would not be as good

as the one taken in favourable circumstances where those circumstances were not present. The surface on which a fingerprint was deposited may be clean or dirty. The person may be perspiring at the time and may also apply pressure when touching the object which means the ridges might appear to be broader.

Wernich gave a clear and logical explanation of how the fingerprints were compared and the conclusions she came to were properly explained. She found nine corresponding points between the fingerprint lifted on the crime scene and that of the accused. She was thoroughly cross-examined on the doubts raised by the various authors regarding individualisation of fingerprints. After due consideration of her evidence, the Court finds no basis to reject it. The Court accepts her evidence, as conclusive of the fact that the print found on the crime scene is that of the accused.

Turning to the accused's version, it can be accepted that the accused ran a shebeen business. The accused testified that it was possible that fingerprints might be on the white Mazda bakkie because he hired bakkies randomly to purchase liquor from the liquor outlets in Nyanga and that he did not keep names of owners, models, make and colours of the bakkies that he hired. He often stood on the back of such a bakkie whilst

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giving directions to the driver and would hold onto the roof of the bakkie with his hands. He would be on the back of the bakkie at times to load or off load the liquor, and it should be expected that his prints would be anywhere in or on such a
5 bakkie.

Viewed in isolation the accused's explanation regarding the presence of his fingerprints on the white Mazda bakkie might be very well be plausible. But, viewed in context of the entire case
10 it is not.

It could not just be a coincidence as the accused would like the Court to accept that a print that was found on this specific Mazda bakkie which was used in an attempted robbery was
15 linked to the accused who happened to be identified at an identity parade as one of the perpetrators.

The accused's version, when considered with the other evidence becomes so farfetched and untenable and not only that, it
20 cannot be reasonably possibly true in light of all the evidence. It must therefore be rejected.

Furthermore, his explanation about his whereabouts on the day of the incident was weak. He explained that his routine during
25 the last two weeks of October 2013 would normally be to go to /NY /...

the taxi rank for meetings relating to taxi wars and remain there for the day until after peak hours.

It is clear from the evidence that the accused vacillated from a
5 general position about a routine he normally followed during the
period of taxi wars, he then conceded that he had freedom of
movement and could go and get liquor during the day, and
would not be constrained by the meetings. He later in his cross-
examination seemed to be certain that he was at the rank
10 attending a meeting on 25 October 2013 and remained there
until after peak hours which were between 6 and 7 p.m. which
was the only time he could go and purchase alcohol at Layni
liquor outlet. This was all of a sudden the only outlet that was
seemingly open during that time which also contradicts his
15 earlier testimony that he purchased alcohol from three or four
other liquor stores or bars in Nyanga during that time. His
testimony that he was forced to stay at the rank for the whole
day was challenged in cross-examination on the basis that he
had testified that he was responsible for fetching his two year
20 old son from pre-school, to which he testified that he was given
permission to fetch his son. There are more examples of such
contradictions.

Mr Van der Berg conceded that the accused's version has
25 somewhat changed. He submitted that the accused's real
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defence was not an alibi but what he termed a “quasi- alibi” which in effect would be a general picture of his activities that he recalled during the period of the alleged incident.

5 In other words, the accused may or may not have been at the meeting at the taxi rank on the day of the incident. He was not sure of his whereabouts but the evidence he gave was in respect of what he would normally do based on his recollection. In the Court’s view this version, makes it possible for the
10 accused to have been on the crime scene on the afternoon of 25 October 2013.

It seems that on every possible version the accused has had difficulty explaining his whereabouts on the day in question. The accused’s changed version was not a matter of him refining
15 his evidence: he appeared to be making up versions as he went along. This did not create a good and a convincing impression.

In view of the totality of the evidence, the version of the accused cannot be reasonably possibly true. It lacks credibility
20 and coherence and falls to be rejected.

Turning to the offences, it is common cause that a group of armed individuals approached the Coin Security vehicle with a mission to rob such vehicle. The accused and his cohorts were
25 armed with loaded firearms. It is clear from the facts of this

case that the robbers acted with common purpose. As stated by Prof Snyman in CR Snyman Criminal Law Fifth Edition at 201 our courts have held accused persons criminally liable on the basis of *dolus eventualis* for the expected deaths in wild
5 shootouts such as in this case.

The evidence reveals that the attackers sought to eliminate any form of resistance or obstructions along the way. They would have foreseen the likelihood of resistance and a shootout. They
10 also would have known that they would encounter crew members or security officers who were armed hence the need to arm themselves. It was undoubtedly foreseeable that a shootout was bound to occur.

15 The evidence shows that these individuals acted in concert. They all actively took part in the commission of the robbery. The accused was identified as one of the men that were standing on the back of the bakkie. He carried and used a firearm.

20

In respect of the theft charge, the principle is well established that theft is a continuous offence. The question is, whether the accused knew that the Mazda bakkie was stolen. Mr Wolmarans argued that the perpetrators' collective use of the stolen vehicle
25 constituted a continuation of the original theft. The Court is of
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the same view.

It was clear that the bakkie was stolen for the purposes of committing the crime. The number plates were changed, and
5 the canopy was removed. The perpetrators very well knew that a stolen vehicle was needed in the commission of the robbery so as to avoid detection and to ensure that the stolen vehicle could not be easily traced. The accused together with others availed themselves for the usefulness of the bakkie for the
10 purposes of the robbery and later abandoned it. The Court notes that the indictment stated that the Mazda bakkie was stolen in Mowbray whereas the evidence by Coulbanis was that the bakkie was parked in Rondebosch. This aspect was not raised by the parties as an issue.

15

On the charge of murder, it is clear that the deceased was killed in the process of perpetrating the robbery. It is irrelevant that he was killed with a pistol, and that the man who fired the shot that killed him was unidentified. He was killed by one of the
20 members of the group during the attempted robbery acting with common purpose. Cachalia AJA as he then was held in S v Molimi and Another 2006(2) SACR 8 (SCA) at para 35 and 36:
*“Once all the participants in the common purpose foresaw the possibility that anybody in the immediate vicinity of the scene
25 could be killed by cross-fire, whether from a law enforcement*
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official or a private citizen, which in the circumstances of this case they must have done, dolus eventualis was proved.”... He held further that: “The common purpose doctrine does not require each participant to know or foresee every detail of the
5 *way in which the unlawful result is brought about.”*

In this instance it cannot be held that the person who killed the deceased embarked on a frolic of his own. The deceased was killed during the commission of the robbery. In this instance
10 *dolus eventualis* would be applicable. The accused and his fellow robbers subjectively foresaw the possibility that their firing of shots during the gunfire at the members of the Coin Security vehicle would lead to the death of any of those members. They must have reconciled themselves with that fact
15 and possibility.

The same principle applies on the counts of attempted murder and attempted robbery. The picture does not change in respect of the shootout at the intersection of Monte Vista Boulevard and
20 Diaz Road as this event flowed from the attempted robbery. What followed there was part of the continued excursion; the robbers were fleeing from the scene of an attempted robbery. They would reasonably foresee pursuit or confrontation or dangerous resistance which could lead to a shootout.

25

In regard to the charge of attempted murder in respect of Hloi, the fact that the Coin Security van was bullet-proofed makes no difference. The robbers had their requisite criminal intent even if they were attempting the impossible. In this regard see
5 Ngcamu v The State (665/09) [2010] ZACSA 70 (26 May 2010) at para 19. As regards possession of prohibited firearm and ammunition charges, the accused held an AK47 which was loaded with ammunition and he used it.

10 The state has therefore proved its case beyond reasonable doubt in respect of all the charges.

IN THE RESULT IS THE ACCUSED IS FOUND GUILTY OF:

15

1. COUNT 8 OF THEFT.

**2. COUNT 9 OF ATTEMPTED ROBBERY WITH
AGGRAVATING CIRCUMSTANCES.**

20

3. COUNT 10 OF MURDER.

4. COUNT 11 OF ATTEMPTED MURDER.

25 **5. COUNT 12 OF ATTEMPTED MURDER.**

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6. COUNT 13 OF ATTEMPTED MURDER.

7. COUNT 14 OF ATTEMPTED MURDER.

5

8. COUNT 15 OF UNLAWFUL POSSESSION OF
PROHIBITED FIREARM

9. COUNT 16 OF UNLAWFUL POSSESSION OF
AMMUNITION.

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BOQWANA, J