



Reportable:	YES / <u>NO</u>
Circulate to Judges:	<u>YES</u> / NO
Circulate to Magistrates:	YES / <u>NO</u>
Circulate to Regional Magistrates:	YES / <u>NO</u>

**IN THE HIGH COURT OF SOUTH AFRICA
(Gariep Local Circuit Division, Upington)**

CASE NO: **CA&R 16/2018**
DATE HEARD: **30/07/2018 – 08/08/2018**
DATE DELIVERED: **30 OCTOBER 2018**

In the matter between:

THE STATE

and

DE KLERK, ROMEO RICARDO	1 st Accused
ROOI, VICKUS LAURENCE	2 nd Accused
DE KLERK, HENDRIK HERMANUS	3 rd Accused

Coram: Olivier ADJP

JUDGMENT

Olivier ADJP:

INTRODUCTION

[1.] The three accused are Mr Romeo Ricardo De Klerk, Mr Vickus Laurence Rooi and Mr Hendrik Hermanus De Klerk. They are all adult males, according to the indictment respectively aged 30, 29 and 55 years old. They will in what follows respectively be referred to as accused 1, accused 2 and accused 3.

[2.] The original indictment, which contained three charges, was substituted with an indictment with five counts, and annexure “A” of the amended indictment, which

is a list of stolen property, now includes a 19th item, namely a .22 revolver valued at R2 500.00.

- [3.] The events that led to the charges against the accused took place on 21 July 2017 on a farm situated approximately 20 km outside Upington, in the district of Gordonia and therefore within the area of jurisdiction of this Court. The farm belongs to the male complainant identified in count 1 of the indictment, and he lived there with his wife, the female complainant, identified in counts 1, 2 and 3. To avoid disclosing the identity of the female complainant to the general public, the two complainants will in this judgment be referred to as, respectively, Mr L and Mrs L.
- [4.] It appears to be either common cause or not seriously disputed that on that day the following events transpired. At about 15:30 Mr L left the house on the farm to tend to his stock. He returned to the house at around 18:30. After he had entered the house, by going through a gauze door leading to a veranda, crossing the veranda, and then going through a steel trellis gate and across a small portal and eventually going through the kitchen door, he heard their dogs barking outside.
- [5.] He went back the same way to investigate and, as he exited through the veranda door, he was accosted by accused 1 and accused 2. Both of them had stockings over their faces, with holes in it for their eyes and mouths.
- [6.] Accused 1 hit Mr L on the head with an iron pipe or rod. Accused 2 hit him with a wooden pole. When Mr L used his left forearm to fend off a blow by the wooden pole, it broke his left forearm. In the process Mr L sustained open wounds to his head and his face; wounds that later needed stitches. His left forearm was fractured and he spent about two months with it in plaster.

- [7.] Mr L was then taken to the kitchen by accused 1 and accused 2. Accused 3 was at that stage also at the house, but not inside it.
- [8.] Mr L was forced to sit in a chair and his arms were bound to the armrests with tape. It was demanded that he tell them where his money was. He told them that he had paid his workers' wages, that there was only about R200.00 in the house and that they could take that. They took this money.
- [9.] In the process Mr L's eyes and mouth were also covered with tape. He was kicked and hit on his chest and stomach. His feet were trampled upon. It was never denied in cross-examination that this is in fact what happened. What was placed in dispute is which of the accused had done what to Mr L.
- [10.] Accused 1 and 2 demanded to know where Mr L's money was, and he was told that if he did not tell them, he would be killed. It was also threatened that Mr L's private parts would be cut off.
- [11.] In demanding that Mr L tell them where in the house they could find money, reference was specifically made, according to Mr L by accused 2, to money made from manufacturing tombstones and from the sale of goats. It appeared that tombstones were made on the farm, and sold through orders received in Upington. It was also undisputed that Mr L had sold all his goats, a total of 125, shortly before these events. It was clear that one or more of the accused had knowledge of these facts. It was in fact undisputed that accused 3 knew about the sale of the goats, and I will revert to this in due course.
- [12.] Mr L's bloodstained hat was pulled over his eyes, and the plastic bag was also pulled over his face. He had difficulty breathing.
- [13.] During that time Mr L also sustained a deep cut to one of his fingers, which almost severed part of it.

- [14.] Shortly after 19:00 that evening Mrs L arrived at the house in her vehicle. She got out and as she was opening the gate outside the house, a male person grabbed her from behind, held a knife to her throat and forced her back to her vehicle, in which her handbag was. At his demand she took out the money that was in her purse, according to her about R300.00, and gave it to him, as well as her Samsung cell phone, which had also been in her handbag. As will in due course appear, that person was accused 3.
- [15.] Mrs L was then forced to the house, and into the kitchen.
- [16.] In the kitchen she found Mr L sitting in a chair, bound and with a plastic bag and tape over his face, eyes and mouth. There were two other men in the kitchen, a tall one and a shorter one. It is common cause that the tall one was accused 1 and the other accused 2.
- [17.] Mrs L was forced to sit in a chair and she too was bound to the chair with what was referred to as masking or sellotape. Her head was also covered with a plastic bag, with an opening for her nose, and masking tape or sellotape was also put over the plastic bag to cover her eyes and mouth, just like in the case of Mr L.
- [18.] It was repeatedly demanded that Mr and Mrs L should say where the money was kept in the house.
- [19.] At their demand Mrs L told accused 1 and accused 2 where the key to the safe, and the safe itself, were. Two revolvers, one .22 calibre and one .38 special calibre Rossi, and a .22 rifle, were taken from the safe, as well as a magazine of the .22 rifle and two laptop computers.

- [20.] When no money was found in the safe, further demands were made that the accused be told where the money was kept in the house. Mr and Mrs L were asked what had become of the money from the sale of the goats.
- [21.] Mr L testified that he had more than once felt a firearm being held against his head and heard a clicking noise as the trigger was pulled, but no shot went off. It was not in dispute that accused 1 had pulled the trigger of one of the firearms, although it was put to Mr L that accused 1 could not remember whether he had done so more than once.
- [22.] Mrs L told the two accused that her bankcards were in her handbag and she also told them what the pin numbers were, so that they could withdraw money from her account by means of the cards. By that time her handbag, which she had earlier left in her vehicle, had been brought into the house.
- [23.] Accused 1 inflicted a stab wound to the inner thigh of Mrs L. Her evidence was that this happened when she protested against him looking inside her trousers and panty for another cell phone. I will get to what the version of accused 1 was about this wound. The wound was closed with stitches the next day.
- [24.] Accused 1 then proceeded to put his hand inside Mrs L's panty and he touched her private parts.
- [25.] Just before accused 2 left to withdraw money from Mrs L's bank accounts, he made the statement, in rather coarse terms, that accused 1, who was going to stay behind with Mr and Mrs L, was going to have intercourse with Mrs L.
- [26.] Accused 2 then left the kitchen and Mr and Mrs L could hear her vehicle leaving.

- [27.] Accused 1 then indeed untied Mrs L and took her to the laundry. There he had sexual intercourse with her, by penetrating her vagina with his penis, without her consent, and therefore raped her. He did not use a condom.
- [28.] Accused 1 then took Mrs L back to the kitchen. There Mrs L noticed that Mr L was not doing well. His head was hanging on his chest and the part of his face that was visible below the plastic bag had a grey appearance. It appeared as if Mr L was struggling to breathe.
- [29.] Mrs L then took scissors from a drawer in the kitchen and cut off the plastic bag and the tape from the face of Mr L.
- [30.] It is not in dispute that, in the meantime, the amounts of R 2 500.00 and R 1 800.00 had been withdrawn from, respectively, the Standard Bank and Absa Bank accounts of Mrs L. The withdrawals were made at an ATM in Upington. The vehicle was driven there by accused 3.
- [31.] When accused 2 and accused 3 returned accused 2 said that they had brought women with them. Mr L was once again blindfolded with a plastic bag and with masking tape over his eyes and mouth. Mrs L's hands were bound together, but not again to the chair. At some stage during the events thereafter Mr and Mrs L heard the voice of a woman.
- [32.] Accused 1 had, in the meantime, started to drink brandy from a full bottle on the kitchen table.
- [33.] Further demands were made that the accused be told where they could find money in the house. Mr and Mrs L were also asked whether there was money hidden in the ceiling of the house.

- [34.] Mr L was forced from the kitchen to one of the bedrooms, referred to as the spare room.
- [35.] In the spare room, and while he sat bound to a chair, a duvet or blanket was draped over his head and spirits and medical alcohol was poured over it. It was not disputed in cross-examination on behalf of accused 1 and accused 3 that this happened, and that threats were made to set Mr L alight should it not be disclosed where money could be found in the house. I will at a later stage deal with the version of accused 2 in this regard.
- [36.] A finger of Mr L was also at that stage burned, according to him with a match or a lighter, and he was asked how it felt.
- [37.] The house was ransacked. A double bed in the spare room was overturned in search of money. During the course of the evening cupboards were opened, and the contents thereof were thrown on the floors. Several items were also put on the kitchen table.
- [38.] A ladder was placed underneath a trapdoor in the ceiling.
- [39.] A severe blow was inflicted to the head of Mr L.
- [40.] Mrs L had in the meantime been taken from the kitchen to a bathroom. There she was made to sit on a piano stool and bound to it by her legs.
- [41.] Accused 1 approached Mrs L there and threatened to rape her again.
- [42.] Mrs L told the accused that, if they went back to the ATM with her bankcards after midnight, it would be possible to withdraw further amounts of money, as a new limit would then be in operation for the next day.

- [43.] It was Mrs L's evidence that the person who had initially brought her from the vehicle to the kitchen, had on two occasions approached her in the bathroom to find out how to turn off the headlights of her vehicle. It was disputed that accused 3 had done so, and it was put to Mrs L, on behalf of accused 2, that it was in fact accused 2 who had done so. Mrs L was adamant that it was the third attacker, and she added that he had also come there a third time, when he told her that he had never intended anybody to get hurt.
- [44.] At around approximately 23:30 the accused left in the vehicle of Mrs L. It was threatened that, if more money could not be withdrawn, the accused would return and kill Mr and Ms L.
- [45.] Mrs L managed to untie herself and she found Mr L, where he was still sitting in the spare room, bound to a chair and with the spirits and alcohol soaked duvet over his head.
- [46.] Mrs L phoned the police and reported the incident. She furnished them with a description of her vehicle.
- [47.] The items listed in annexure "A" to the amended indictment were stolen during the incident. Both Mr and Mrs L confirmed the values set out in annexure "A". It appeared that other items, which are not listed in annexure "A", had also been taken from the house. These include a box of ragdolls, a magazine for a .22 rifle and a camera lens.
- [48.] The police arrived at the house about 30 minutes after Mrs L's phone call.
- [49.] In the meantime, however, Mrs L's vehicle had been stopped by police in Upington.

- [50.] Accused 3 was the driver. Both accused 1 and accused 2 were passengers, as well as a lady by the name of Dochelle Januarie.
- [51.] A revolver was found in the possession of accused 3, as well as R750.00, an empty firearm magazine and the keys of the vehicle.
- [52.] In the possession of accused 1 the police found R 1 077.30 and the MobiWise cell phone of Mr L, and on his head there was what was described as stockings.
- [53.] The evidence presented by the prosecution was that accused 2 was found to be in possession of R1 685.40, a safe key with a green key holder, a cut-off part of a pair of stockings and what was described by Capt Visagie as several rounds of ammunition of different calibres. In cross-examination on behalf of accused 2 it was denied that he had been found in possession of ammunition, and it was put to Capt. Visagie that accused 2 only had R600.00 in his possession.
- [54.] Cash in the amount of R330.50 was found in the possession of Ms Januarie.
- [55.] With the exception of the .22 revolver, which is item 19 in annexure "A", all the other stolen property was recovered.
- [56.] At one stage, after the vehicle had been stopped by the police, accused 2 fled, but he was apprehended shortly thereafter.
- [57.] The .38 special revolver, item 9 in annexure "A" to the amended indictment, was photographed there, at the scene where the vehicle had been stopped and where the accused were arrested, and a ballistic examination later revealed that both this revolver and the .22 rifle, that was found inside the vehicle, were firearms as defined in the **Firearms Control Act**, 60 of 2000, and that both were in working condition.

CHARGES**COUNT 1**

[58.] In count 1 all three accused are charged with having unlawfully and intentionally broken into the house of Mr L on the farm with the intent to rob, and of having unlawfully and intentionally then committed a robbery with aggravating circumstances in taking with force from the possession of Mr and Mrs L the property listed in annexure "A" to the amended indictment. The allegation in count 1 is that the aggravating circumstances consisted of the accused having wielded firearms and /or dangerous weapons and having inflicted grievous bodily harm to Mr and Mrs L during the commission of those offences. All three accused pleaded not guilty to count 1.

Plea-Explanations:

[59.] Accused 1 offered no explanation of this plea.

[60.] In his plea-explanation accused 2 admitted only having been on the scene at the time of the incident, and stated that he had been forced by accused 3 to be present. He placed all other allegations regarding the housebreaking and robbery in dispute.

[61.] In his plea-explanation accused 3 also admitted having been present at the house at the time of the incident, but according to him he had waited outside the house while accused 1 and accused 2 were inside, and had distanced himself from the robbery. His explanation for his presence at the house was that he had been employed by Mr L and that he had asked accused 1 and accused 2 to accompany him to the house to get his salary from Mr L. It was stated that it had been unsafe to walk there or from there alone, as people were robbed in that vicinity.

Cross-examination for accused 1:

- [62.] In cross-examination it emerged that the version of accused 1 is actually that he and accused 2 accompanied accused 3 to the house of Mr and Mrs L because, according to what accused 3 had said, Mr L owed accused 3 money that he wanted to collect. Mr L was not at home when they got there. It was only when accused 3 put an iron rod in the hands of accused 1 and a wooden pole in the hands of accused 2, that accused 1 realised that the purpose of the visit was to rob.
- [63.] It was admitted that accused 1 had struck Mr L with the iron rod, but according to what was put to Mr L only after he had in fact first hit accused 1, or had attempted to do so.
- [64.] It was furthermore admitted, in cross-examination, that accused 1 had been the cause of a stab wound to Mrs L. His version appeared to be that it was inflicted by accident. It was stated in cross-examination that accused 1 had stumbled and had in the process grabbed a knife on a table and that he had then, as he fell, accidentally stabbed Mrs L with the knife.
- [65.] It was admitted explicitly that accused 1 took Mr L's cell phone, which had been lying on a table in the kitchen. The theft of the other items listed in annexure "A" to the amended indictment was not disputed in cross-examination on behalf of accused 1.
- [66.] According to what was stated in cross-examination on behalf of accused 1 he had been under the influence of liquor, after having consumed sweet wine and approximately seven beers before leaving for the farm. It was put to Mr L that accused 1 had also earlier that day smoked dagga and mandrax.

Cross-examination for accused 2:

- [67.] On behalf of accused 2 it was put to Mr and Mrs L in cross-examination that he and accused 1 accompanied accused 3 to the farm while accused 2 was under the impression that the purpose of their visit was to collect money that Mr L owed to accused 3.
- [68.] It was denied that any of the accused had access to the house before Mr L's arrival.
- [69.] It was put to Mr L that, once they had arrived at the farm, the plan changed when accused 3 decided that Mr L was to be robbed, and forced accused 1 and accused 2 to take part in the robbery. It was put to Mr L that accused 3 had threatened to kill accused 1 and accused 2 if they refused, and that he was known to accused 2 as a dangerous man. It was put to Mr L that accused 3 also accused him of being unable to support his wife, who is the daughter of accused 3.
- [70.] It appeared to also be the version of accused 2 that accused 3 placed an iron rod in the hands of accused 1 and a wooden pole in the hands of accused 2. It was admitted that accused 2 had struck Mr L with the wooden pole. It was denied, however, that he had struck Mr L on his head or in his face.
- [71.] It was also admitted in cross-examination that accused 2 had tied Mr L's hands, had demanded money from him, had searched the house for the safe and that he had removed the contents of the safe and had taken it to the kitchen, but it was put to Mr L that accused 2 had done so on the instructions of accused 3.

Accused 3:

- [72.] I will deal later with the version of accused 3 regarding this count, as he was the only one of the three accused who took the stand.

COUNTS 2 AND 3

- [73.] Counts 2 and 3 are only against accused 1. Count 2 is that he had unlawfully and intentionally sexually violated Mrs L by touching her private parts without her consent, in contravention of section 5(1) of **Act 32 of 2007**, in other words sexual assault.
- [74.] Count 3 is that accused 1 had unlawfully and intentionally sexually penetrated Mrs L without her consent by inserting his penis into her vagina.
- [75.] Accused 1 pleaded not guilty to count 2 and gave no explanation of that plea, but during the course of the evidence for the prosecution, and more specifically that of Mrs L, accused 1 changed his plea of not guilty to count 2 to one of guilty. Through his counsel all of the allegations in that count were then admitted.
- [76.] He pleaded guilty to count 3 from the outset and in explanation of that plea and through his counsel, Ms Steytler, he admitted all the allegations in count 3.

COUNT 4

- [77.] Count 4 is only against accused 2. It is alleged that, on the same date and at or near Upington, and therefore still within the area of jurisdiction of this Court, accused 2 had unlawfully and intentionally been in possession of ammunition without having a license, permit or authorisation in terms of the **Firearms Control Act** in respect of a firearm capable of discharging that ammunition, and that accused 2 had thereby contravened section 90 of the Act.
- [78.] Accused 2 pleaded not guilty to this count and simply denied having been in possession of such ammunition, also specifically at the time of his arrest.

COUNT 5

- [79.] Count 5 is only against accused 3. It is alleged that, on the same date and also at or near Upington, accused 3 unlawfully and intentionally had in his possession a firearm, described in the indictment as a .38 "*revolver pistol*" with serial number W189104, without holding a licence, permit or authorisation in terms of the **Firearms Control Act** for that firearm, thereby contravening the provisions of section 3 of that Act.
- [80.] Accused 3 pleaded not guilty to this charge. In his plea-explanation he admitted that the police had found a firearm in his possession, but alleged that he never had the intention of possessing it. It was stated that it ended up in his possession after he had taken it away from accused 1, who had been wielding it at people, posing a danger to them.

EVIDENCE

- [81.] The prosecution presented the evidence of Mr and Mrs L, Capt. Visagie, Sgt. Britz, Const. Olifant, Const. Modisaotsile and Mr Mongale. Ms Januarie was a state witness, but her evidence was not presented and when the state's case was closed she was made available to the defence as a witness.
- [82.] Photos and a sketch plan were handed in as exhibits "A" and "B", a medical report in respect of Mrs L as exhibit "C", Standard Bank and ABSA Bank statements as respectively exhibits "D" and "E" and an affidavit regarding the ballistic examination of the .38 special revolver and the .22 rifle as exhibit "F".
- [83.] The cases of both accused 1 and accused 2 were closed without any evidence having been presented by them or on their behalf. In the case of accused 3 only his own evidence was presented in his defence.
- [84.] All of the state witnesses made good impressions as witnesses, and more particularly so Mr and Mrs L. It has not been argued, by any of the counsel for

the accused, that the version of Mr and Mrs L about the events of that night, and more specifically as far as the robbery is concerned, should be disbelieved.

- [85.] The evidence of Mr L about when the built-in lock of the steel gate had been tampered with was not above criticism. His initial evidence that he noticed signs of tampering when he arrived at the house, created the impression that the lock must have been tampered with that day, and while he was away, and he in fact later confirmed this upon a question by me. He later conceded that the lock may have been tampered with during a previous unrelated attempted burglary. Mr L contradicted himself about whether he had unlocked the built-in lock upon his return to the house.
- [86.] The same could be said about his evidence regarding the broken wooden kitchen door. Again his initial evidence left one with the impression that the door had been broken during his absence, and on that day, but he later explained that the damage had actually been caused during an earlier unrelated incident.
- [87.] These unsatisfactory aspects of Mr L's evidence pertain only to the allegation of housebreaking. His evidence about the events inside the house was in any event corroborated in all material respects by that of Ms L, and even by what was put to him and Ms L in cross-examination.
- [88.] There was also an inconsistency in Mr L's evidence as regards the chair to which he had been tied and on which he had sat in, respectively, the kitchen and the spare room. On his version it was one and the same chair and it remained tied to him as he was forced from the kitchen to the spare room. However, the chair that is described in the key to exhibit "A" as point 'C' in the kitchen and as point 'D' in the spare room, is clearly not the same chair. This is, however, completely immaterial for purposes of what eventually appeared to be in dispute. In the end it appeared to be undisputed that Mr L was bound to a chair in the kitchen, and also that he later sat in the spare room, also tied to a chair. That Mr L was taken to the spare room was in fact also the evidence of accused 3.

[89.] In his evidence in chief Mr L said that he had not kept any ammunition in the safe. He testified that the objects in the plastic bag that was handed in as exhibit 2 had “*apparently*” been in the pocket of an army overall, next to the safe. When I tried to clear this up with Mr L at a later stage, he said that he did not know whether they had been found in the pocket of what was clearly the same garment that he had referred to in his evidence in chief. Later yet, and in further cross-examination for accused 2, Mr L was adamant that the objects had been locked inside the safe prior to the attack. In the light of the conclusion to which I have come as regards count 4 this aspect is not really of any further concern.

COUNT 1: HOUSEBREAKING

[90.] It is in dispute that the accused, or any one of them, had broken into the house of Mr and Mrs L.

[91.] Mr Makhaga, counsel for the prosecution, conceded right from the outset that it has not been proved beyond reasonable doubt that any of the three accused had on that day broken into the house. In my view this concession was correct and I am therefore not going to deal with the evidence in this regard in any detail.

[92.] I have already alluded to the unsatisfactory aspects of Mr L’s evidence in this regard.

[93.] A further problem is that Mr L’s evidence was that, when he entered the kitchen upon returning to the house, he had found everything there to be in order. When regard is had to the state of the kitchen and of the rest of the house at the end of that evening, there was therefore not initially any indication that anybody had accessed the kitchen in Mr L’s absence. On the evidence the reasonable possibility that the accused had not entered the house prior to Mr L’s arrival has not been excluded.

[94.] It was never argued that any of the actions of the accused after the arrival of Mr L constituted the crime of housebreaking.

COUNT 1: ROBBERY

Accused 1:

[95.] As already mentioned it is not really in dispute that the complainants were robbed of, *inter alia*, the items listed in annexure "A" to the amended indictment.

[96.] It is also not in dispute that all three accused were on the scene of the robbery, as well as in the vehicle of Mrs L when it was pulled over by the police with all the stolen property in it, with the possible exception of the .22 revolver, item 19.

[97.] That accused 1 only hit Mr L with the steel rod after Mr L had hit him or attempted to hit him, is patently false. It is clear that Mr L was taken completely by surprise when he was accosted by his two attackers. Even if Mr L had in the process hit accused 1, he would clearly have done so in self-defence.

[98.] In any event, Mr L's evidence that, after having been hit by, *inter alia*, accused 1, he was physically forced into the kitchen, tied to a chair and then further assaulted there, was not disputed in cross-examination. Counsel for accused 1 went no further in cross-examination than to put it to Mr L that accused 1 had not assaulted Mr L inside the kitchen. It was not denied that an assault had in fact taken place in the kitchen while Mr L was tied to the chair. The same applies to Mr L's evidence about the injury to his little finger.

[99.] The explanation of accused 1 for his presence at the house of Mr and Mrs L, namely that he and accused 2 had accompanied accused 3 there so that he could

collect money from Mr L, is clearly false. I will deal with this explanation in greater detail when I get to the position of accused 3.

[100.] This version does not explain the presence of the stockings over the faces of accused 1 and accused 2 when Mr L was confronted, and which was still on the head of accused 1 when he was arrested.

[101.] In my view it is clear that all three accused went there as a group, with the plan to violently deprive Mr and Mrs L of their money and other property. Even on the version of accused 1, as put in cross-examination, he and accused 2 had right from the beginning been armed, as they were waiting for Mr L to come out of the house and while hiding behind a wall, the one with an iron rod and the other with a wooden pole. It is completely far-fetched, and not reasonably possible, that both accused 1 and 2, after having walked all the way to the farm with only good intentions, would have been so intimidated by accused 3 that they would not only have allowed him to put the rod and the pole in their hands, but would also have proceeded to attack Mr L, while accused 3 stood aside.

[102.] The actions of accused 1 inside the house were not, even on his own version, the actions of an unwilling participant or of a person overcome by the effects of alcohol or drugs.

[103.] On his own version he had no problem to take Mr L's cell phone, which was lying on the kitchen table. On his own version he had no problem to take one of the firearms that had been removed from the safe, and to pull its trigger. He walked around the house with a knife that he had on his own initiative found inside the drawer of a desk in the kitchen.

[104.] It was also entirely accused 1's own initiative to sexually assault Mrs L, and thereafter to untie her, take her to the laundry and to rape her there.

- [105.] Accused 1 did not, when he was left alone with Mr and Mrs L, in any way distance himself from the robbery. He could, at that stage, have taken the opportunity to leave. He did not. He stayed, kept watch over the complainants and awaited the return of the other accused.
- [106.] He accompanied them when they eventually left the farm, in the stolen vehicle containing the stolen property, and when he was arrested he was clearly in possession of, *inter alia*, a part of the money that had been withdrawn from the bank accounts of Mrs L and of the stolen cell phone.
- [107.] In my view there can be no doubt that accused 1 had not only never distanced himself from the actions of his co-accused, but had in fact associated himself with it.
- [108.] I have absolutely no hesitation to reject as false the version that accused 1 had been forced into participating in the robbery and that even then he had done so because of the liquor that he had earlier consumed and the drugs that he had earlier used.
- [109.] Accused 1 did not take the stand to have his version tested in cross-examination.
- [110.] It was the evidence of both Mr and Ms L that accused 1 only began to show signs of intoxication at a late stage of the events, and after he had consumed brandy that he had found in the kitchen. It must in any event be remembered that, whatever alcohol he may have consumed or drugs he may have taken in Upington, he had on his own version thereafter walked from Upington to the farm of Mr L, a distance of about 20 km.
- [111.] Similarly I have no hesitation to reject as false the version that the stab wound to the leg of Mrs L had been inflicted by accident. When this version was put to Mrs L she explained, in clear terms, why this was not true. It was clear from her

evidence that accused 1 had not stumbled and that he had in fact been standing right next to her when he inflicted the stab wound, and that he had done so when she would not agree to him putting his hand inside her pants.

Accused 2:

[112.] This brings me to the version of accused 2 as far as the count of robbery is concerned.

[113.] Once again, the actions of accused 2 during the events of that night were clearly not that of an innocent man being forced to take part in an attack that he had not planned or anticipated.

[114.] He too was masked when he attacked Mr L. His version does not account for this.

[115.] The evidence of both Mr and Mrs L was to the effect that accused 2 played a leading part in the robbery. They corroborated one another on this in many respects. Accused 2 was, on their evidence, the one who had made the repeated demands that they disclose where money could be found, and that suggested the transfer of money into his own bank account, and significantly not into the bank account of accused 3. When accused 3 brought Ms L into the kitchen, accused 2 needed no instructions before tying Ms L to a chair. When accused 2 returned after having withdrawn money from Ms L's bank accounts, he was the one who boasted about having brought women and who was dissatisfied about the fact that Ms L had been untied and that Mr L's face had been opened. Both Mr and Mrs L testified about indeed hearing the voice of a woman after the return of accused 2.

[116.] Accused 2 was clearly the one that threatened to set Mr L alight if they were not told where they could find money. The cross-examination on behalf of accused 2 went no further than to deny knowledge of the spirits and alcohol soaked duvet

over Mr L's head, and of his involvement therein. This denial of knowledge is difficult to reconcile with a later statement on behalf of accused 2, also during the cross-examination of Mr L, that accused 2 had been concerned about the blanket over Mr L's head and that he had taken it off and placed it behind Mr L's back. The evidence of Mrs L about the half empty bottle of spirits which accused 2 placed on the side of the bath, about his threat that Mr L would be set alight if they were not told where the money was and about how she eventually found Mr L with the duvet over his head, corroborated Mr L's version in this regard. Even accused 3 said that Mr L had been covered.

[117.] Accused 2 had many opportunities to escape from accused 3, if the latter had really posed a threat to him. He did not. He accompanied accused 3 from the farm to the ATM in Upington and back to the farm.

[118.] He too eventually left the farm as a passenger in the stolen vehicle.

[119.] When the vehicle was stopped by the police he did not tell them that he was in the vehicle because of threats made by accused 3. Instead he ran away. His version that he fled because the police assaulted them, is clearly false. The witnesses called to testify about that part of the events were unified in their denial of such assaults. There would have been no reason for any of the members of the police on that scene to assault accused 2, or any of the other occupants of the stolen vehicle. The vehicle was brought to a standstill when pulled over by the police and there is no suggestion that any of the occupants had, for example, offered resistance.

[120.] Like accused 1, accused 2 also did not have the conviction to take the stand.

[121.] The version of accused 2 as regards the count of robbery is therefore also rejected insofar as it is inconsistent with the evidence of Mr and Mrs L, and in as much as it is alleged that accused 2 had been coerced into taking part in the

robbery. It is clear that all three accused acted with the common purpose of violently stealing whatever money and property they could lay their hands on.

[122.] In cross-examination of Mr L it was put to him that accused 2 had been under the influence of drugs. Mr L's response was that all the accused, and therefore also accused 2, acted like people who knew exactly what they were doing. This fits in perfectly with the evidence of Mrs L about the role of accused 2 inside the house, and his behaviour there. In any event, no further detail was disclosed as regards what drugs accused 2 had used, and when, and he never took the stand to explain what role the drugs eventually played. The cross-examination of his counsel, Mr Pretorius, in any event never went as far as to claim that he had not known what was happening, or that he could not be held accountable. In fact, the other statements made on his behalf in cross-examination about the events in the house were quite detailed in nature.

Accused 3:

[123.] This brings me to accused 3, and the count of robbery against him.

[124.] Unlike the other two accused, accused 3 did testify. Suffice to say that accused 3 was an exceptionally poor witness. There were long silences when he found it difficult to answer simple and straightforward questions. He frequently avoided answering such questions by repeating other evidence that was completely irrelevant to the questions. He became obviously irritated and even agitated by the questions posed to him. Apart from this there were many contradictions and inconsistencies in his evidence, to only a few of which I will refer.

[125.] Whereas it had been put on record by his attorney that accused 3 had never himself entered the house of Mr L that night, it eventually appeared in cross-examination of accused 3 that he had in fact more than once done so.

[126.] That he had gone to the farm that day to collect R15 000.00 which Mr L had promised him to build himself a house with, is clearly a lie:

126.1 In his plea-explanation it was stated that accused 3 had gone to Mr L to collect his "*salary*". A promised gift of R15 000.00 could certainly not be described as a "*salary*".

126.2 Why would Mr L have made such a promise? This was never explained by accused 3, who on his own evidence had left from his own house that day to go to the farm of Mr L, which means that he already had a house.

126.3 Accused 3 in any event later testified that the arrangement had actually been that Mr L would give him either the amount of R15 000.00 or corrugated iron with which to erect a house. If this was so, why would he have gone to the farm with the expectation to receive the money in cash? What would he have done if Mr L chose the option of giving him the corrugated iron? Was he going to carry it all the way back to Upington?

126.4 His attorney put it to Mr L that accused 3 would not have had any reason to think that Mr L had money in the house. If this is so, why would he have gone there expecting to receive the promised amount of R15 000.00?

126.5 Accused 3 testified, in cross-examination only, that Mr L was a person who liked to argue and who could be expected to deny his liabilities, because he had in the past dismissed workers without paying them. Why then would accused 3 have had reason to expect Mr L to honour his promise to him that day, when on his own version he went there without any prior arrangement with Mr L?

126.6 It was only in cross-examination that accused 3 came with a slightly different version when he said that, in addition to going to the farm to collect the promised R15 000.00, he also anticipated that Mr L could request him to finish work that he had not finished when he had last worked there. This was never put to Mr L, who testified that he had fully paid accused 3 when he had worked there the last time. Would accused 3 really have gone there to work on a Friday evening?

126.7 Accused 3 had, the day before the attack, not arrived for work on the farm when he was supposed to be there. He could have gone then and asked Mr L about the R15 000.00.

126.8 Finally accused 3 did not, on his own version, at any stage of the events of that night say anything to Mr L about the alleged promise, or ask him for that money.

[127.] That accused 3 took accused 1 and accused 2 with him so that he would not have to return from the farm alone, is also clearly false:

127.1 If it was indeed so that it was dangerous to walk alone at night in that area, he could have gone there earlier, during daytime, and not on a Friday evening.

127.2 In any event, it was his own evidence, in the end, that he had left his house alone when he started his walk to the farm, and that even after he had along the way again come across accused 1 and 2, he had again proceeded alone, on his way to the farm. According to him he arrived at the farm alone, and it was only while he was waiting there that the other two accused arrived there.

127.3 He contradicted himself about the circumstances of his alleged meeting with accused 1 and accused 2, while on his way to the farm. His first version was that he came across them somewhere along the road, in the bushes, but later he said that he actually found them drinking at their friend's place.

127.4 Why did accused 3, on his version, wait for Mr L some 500m away from the house?

[128.] It was only in cross-examination that accused 3 denied that the faces of accused 1 and accused 2 had been masked. This was never put to Mr or Mrs L on his behalf and, in the absence of any other explanation, accused 3 must be assumed not to have given this version to his attorney.

[129.] In trying to create the picture that he had distanced himself from whatever accused 1 and accused 2 were doing inside the house, and to Mr L, accused 3 contradicted himself about whether or not he had fallen asleep while according to him sitting somewhere near a store during that time.

[130.] How would accused 1 and accused 2 have known about the sale of the goats, and even about the tombstone business? We know that accused 3 definitely knew about the sale of the goats, and because he worked on the farm he would possibly also have been aware of the tombstone manufacturing. In my view accused 3 in all likelihood informed the other two accused of the possibility of money from one or both of these sources, and to avoid being recognised by Mr L then left it to the other two accused to raise this with Mr L, while he remained outside the house. The fact that accused 3 grabbed Mrs L from behind and that he remained behind her when forcing her from the vehicle to the kitchen, is in my view also a strong indication that accused 3 was worried about being recognised.

- [131.] Under pressure in cross-examination, accused 3 at one stage admitted to having been part of a “gang” that went to the farm to rob, only to once again deny it later.
- [132.] He also at one stage in cross-examination said that he was guilty of everything that had been said in Court and that he wanted to change his plea of not guilty to the robbery count to one of guilty, but then only in respect of the complainant Mrs L. He then admitted that he was in fact the person who had overpowered Mrs L, who had held a knife to her throat and who had taken from her according to him approximately R400.00 and her cell phone. This plea was not accepted by the prosecution. This change of heart came after accused 3 had earlier in his evidence said that, when Mrs L arrived, he greeted her and talked to her. This was of course completely irreconcilable with Mrs L’s evidence that she was attacked from behind, without warning, and this previous version of accused 3 had in any event never been put to Ms L in cross-examination.
- [133.] Mr Buthelezi, attorney for accused 3, argued that the actions of accused 3 before the arrival of Mrs L should be viewed as distinct from his actions thereafter, and towards Mrs L. He argued that it should be found that the fact that accused 3 was outside the house before Mrs L arrived, is an indication that he had not been part of the attack on Mr L and that he had in fact distanced himself from that. On Mr Buthelezi’s argument accused 3 would therefore be guilty of robbing Mrs L of her money, cell phone and vehicle, but not guilty of robbing Mr L of the items taken from the house. Mr Buthelezi argued that, as far as Mr L is concerned, accused 3 can only be convicted as an accessory after the fact of that part of the events, and on the basis that he had assisted accused 1 and 2 to escape by driving the vehicle with them as passengers in it.
- [134.] There is absolutely no merit in this argument. A person who is standing outside because he wants nothing to do with the violence inside the house, would not himself then inflict violence on an unsuspecting and defenceless woman, and

would not take that woman to the two perpetrators of the behaviour that he finds so unacceptable and is distancing himself from.

[135.] Accused 3's version that accused 1 and accused 2 had been on a frolic of their own when they attacked Mr L and robbed him and Mrs L, is rejected as false. His actions that night, even on his own version, contradict this.

[136.] If that had been the position, accused 3 had numerous opportunities of, at the very least, leaving the farm and distancing himself from the actions of accused 1 and accused 2. He clearly did not, and he could not explain this in cross-examination.

[137.] Instead accused 3 ended up, on his own version, assisting by driving Mrs L's vehicle to the ATM to enable accused 2 to withdraw money from Mrs L's bank accounts, and by later loading stolen property into the vehicle, and also by in the end driving the stolen vehicle away from the farm.

[138.] I have no reason to doubt the evidence of Capt. Visagie that, when he asked accused 3 to explain whose vehicle it was that he was driving when they were pulled over, he initially lied and said that it was his uncle's vehicle. Why, if he had innocently been implicated by accused 1 and accused 2, did he not immediately tell Capt. Visagie that?

[139.] The version of accused 3 does also not explain the presence of several of the stolen items in his possession, which included property that he had not taken from Mrs L outside the house, like the empty magazine, as well as more money than he had taken from her. That the cash found in his possession was his own, was never put to Capt. Visagie and appears to be an afterthought. In any event, on his later admissions as regards the events outside the house at least part of the money in his possession would have had to have been the money of Mrs L.

- [140.] The version of accused 3 that he had ended up being in possession of a firearm after he had taken it away from accused 1 in the kitchen because he was worried that somebody could get hurt, is also highly improbable. On his own evidence that firearm was empty. Why then would he have thought that it posed a risk in the hands of accused 1? He never explained what he meant by saying that accused 1 was playing around with the firearm.
- [141.] I am satisfied, beyond reasonable doubt, that accused 3 was an active and participating member of the group of attackers and robbers. There is no doubt at all, in my view and as already said, that the three accused had acted with the common purpose to commit the robbery. They went there to take money and other possessions and when violence was applied not one of them distanced himself from those actions. To the contrary, they acted in concert in overpowering Mr L, and in what was done inside the house and when Mrs L arrived, they worked together, in that accused 3 overpowered her and took her to his two co-robbers, who promptly tied her to a chair and made the same demands to her as to Mr L. In fact, there are, as already said, strong indications that they went there with the premeditated plan to commit the robbery. The clearly false explanations for them going there, over a distance of about 20 km and at that time of day, is an indication of this, as is the convenient presence of stockings with which to mask their faces.
- [142.] There is no merit in Mr Buthelezi's argument that the fact that the accused had arrived at the farm unarmed militated against them having gone there with the intention to rob. On the evidence of accused 3 himself he had known of the presence and availability of objects like the iron rod and the wooden pole, which were eventually used as weapons, because they had been lying there when he left the farm after work shortly before then.
- [143.] At the very least, though, I am satisfied that the common intention to rob already existed when Mr L went outside to find out why the dogs were barking.

Aggravating circumstances:

- [144.] It is clear on the evidence that the robbery was committed in aggravating circumstances. Mr L was subjected by blows with an iron rod and a wooden pole. In the process he sustained open wounds to his head and a fractured forearm. His little finger was almost severed with a sharp object, quite clearly to make him disclose where the accused would find money. His undisputed evidence was that he is still suffering the consequences of his injuries. He cannot close the hand of the fractured arm properly and he has spells of headaches and even unconsciousness. There is no doubt that these injuries constitute "*grievous bodily harm*" for purposes of the definition of aggravating circumstances in section 1 of the **Criminal Procedure Act**.
- [145.] A knife was held to the throat of Mrs L. There is no exact description of the knife, but its blade caused a cut to Ms L's finger when she held on to it out of fear that her throat was going to be cut with it. Even if it could be argued that it has not been proven to have been a "*dangerous weapon*" for purposes of the definition of aggravating circumstances, which I find unnecessary to decide, holding it against the throat of Ms L was clearly understood by her as "*a threat to inflict grievous bodily harm*".
- [146.] The knife that was wielded by accused 1 was clearly a "*dangerous weapon*", when regard is had to photos 135 and 136 of Exhibit A, which depict the knife that accused 1 had.
- [147.] I will assume, in favour of the accused, that the stab wound to Mrs L's leg was not inflicted as part of the robbery, but rather as part of allowing accused 1 to get his hand inside the pants of Mrs L, and to touch her private parts.
- [148.] As regards the allegation in count 1 of firearms having been wielded, it is common cause that during the commission of the offence accused 1 had in his possession what was described by, *inter alia*, Mr L as a firearm and that he pulled

its trigger at least once. There is also the evidence of Mr L that a firearm was held to his head and that accused 1 wanted to know where he could find ammunition. This was not disputed. The evidence of Mrs L that it was her husband's .22 calibre revolver that accused 1 had in his possession, was also not disputed.

[149.] This firearm was not subjected to ballistic examination and there was accordingly no expert evidence that it actually was a functioning firearm, as envisaged in the definition of aggravating circumstances in the **Criminal Procedure Act**. In my view, and on an objective approach (Compare **R v Jacobs** 1961 (1) SA 475 (A)), the fact that accused 1 pulled its trigger and enquired about ammunition for it excludes the reasonable possibility that it could have been a toy (Compare **S v Anthony** 2002 (2) SACR 453 (C)). Whether or not it was in the circumstances necessary for the prosecution, for a finding of aggravating circumstances on the basis of the actions of accused 1 with it, to prove that it was in working order, is not necessary to decide, because the actions of accused 1 with it in any event objectively constituted "*a threat to inflict grievous bodily harm*" (Compare **S v Mbele** 1963 (1) SA 257 (N)).

[150.] The finding of aggravating circumstances means that the robbery was one as envisaged in section 51(2), read with Part II of Schedule 2, of the **Criminal Law Amendment Act**, 105 of 1997. The robbery in any event also involved "*the taking of a motor vehicle*", as envisaged in paragraph (b) of the description of robbery in Part II of Schedule 2.

COUNT 3: RAPE

[151.] Mr Makhaga responsibly and in the best traditions of his profession conceded that, because it has not been proved that the stab wound to the thigh of Mrs L was inflicted as part of the rape, the rape did not constitute one as intended in section 51(1), read with Part I of Schedule 2 of the **Criminal Law Amendment Act**

and it would accordingly for purposes of that Act then be a rape as envisaged in section 51(2), read with Part III of Schedule 2 to the Act.

COUNT 4: POSSESSION OF AMMUNITION

[152.] Exhibit “2” consisted of six objects. Capt. Visagie testified that he found the six objects in two pockets of the trousers of accused 2, and he described them as rounds of different calibres.

[153.] Count 4, which is only against accused 2 and is a charge of the unlawful possession of ammunition, is based on accused 2’s alleged possession of these objects.

[154.] It was put to Capt. Visagie, on behalf of accused 2, that he had not found these objects in the possession of accused 2. Capt. Visagie insisted that he had. Accused 2, as already mentioned, never took the stand, which leaves the Court with only the evidence of Capt. Visagie in this regard. Capt. Visagie was a credible witness and he made a good impression as a witness. No reason has been advanced for why the evidence of Capt. Visagie that the objects were found in the possession of accused 2, should be disbelieved. It was not, for example, suggested that they had actually been found in the possession of one of the other accused.

[155.] The question is, however, whether it has been proved that the objects were “*ammunition*” as envisaged in section 90 of the **Firearms Control Act**, which criminalises the possession of ammunition in circumstances where the possessor is not the holder of a licence for a firearm capable of discharging such ammunition, does not have a permit or licence entitling him or her to possess it and is not otherwise authorised to possess such ammunition.

- [156.] The word "*ammunition*" is defined in section 1 of the Act as meaning "*a primer or complete cartridge*". The word "*primer*" is not defined in section 1. The word "*cartridge*" is defined as meaning "*a complete object consisting of a cartridge case, primer, propellant and bullet*". The word "*bullet*" is also not defined. It is assumed, for present purposes, that the Legislature used the word to refer to the point or projectile.
- [157.] Mr L initially described the objects as .308 calibre bullets that had come into his possession when he was a member of the Commando, some 20 years ago.
- [158.] Close inspection revealed, however, that the six objects are not similar. One has no bullet or point and was then described by Mr L as a so-called blank. One is darker in colour and appeared to differ from the others. One is shorter or smaller than the others. The remaining three appears to be the same size, but two of them have sharp points and the other a rounded point. The six objects can be seen in, *inter alia*, photo 109 of exhibit "A".
- [159.] When confronted with this in cross-examination, Mr L conceded that he did not recognize the darker or smaller ones. He said that the remaining four objects were similar to the ones that had been in the safe, one being a blank, two being sharp point ammunition for an army issue .308 calibre R1 rifle and the remaining one, with the blunt lead point, a .308 calibre "*hunting bullet*".
- [160.] I think it can safely be said that, with the exception of the object without a point or projectile, in other words the blank, the objects appear to be what is in layman's terms known as ammunition.
- [161.] It can also be said that, with the exception of the blank, all of the objects appear to consist of cartridge cases with bullets.

- [162.] What cannot be said from looking at the objects, however, is whether they also consist of primers and propellants, as required by the definition of the word “*cartridge*”. No evidence was presented in this regard and the objects were never subjected to expert examination.
- [163.] It is tempting to say that the army would not have issued Mr L with objects that were not capable of being discharged by a firearm, and that did not include primers and propellants, and that the objects therefore also have to contain or include primers and propellant. The same reasoning could be applied to the so-called hunting bullet.
- [164.] Mr L did not, however, testify that he had ever actually fired shots with other ammunition that had at the same time come into his possession as a member of the Commando, or in fact that he ever had a .308 calibre rifle with which he had fired shots with that ammunition, or with ammunition similar to the so-called hunting bullet.
- [165.] In **S v Filani** 2012 (1) SACR 508 (B) the Court referred to the technical nature of the definitions in the **Firearms Control Act** and the general need for expert evidence in this regard.
- [166.] In **S v Fumo** [2005] JOL 13422 (T) the accused had pleaded guilty and admitted illegal possession of ammunition. On review it was held, however, that the accused could not, as a layman, have had “*specific knowledge*” of whether the objects in his possession actually fell within the statutory definition of the word “*ammunition*”. The conviction was set aside on this basis.
- [167.] In the present matter the police did, as already mentioned, send a .22 rifle and a .38 special revolver for expert examination, with a view to proving that they are indeed “*firearms*” within the definition of that word in the Act. For some reason

they chose not to follow the same route with these objects found in the possession of accused 2.

[168.] The facts of the present matter are distinguishable from those in **S v Sehoole** 2015 (2) SACR 196 (SCA) and **S v Jordaan and Others** 2018 (1) SACR 522 (WCC). The objects in this matter were not found in the magazine of a firearm. In fact, it appears as if Mr L does not even possess a .308 calibre rifle. There is also no evidence that these objects were part of a bigger batch of similar objects and of which some had earlier been discharged from a firearm and had therefore appeared to have been ammunition.

[169.] In the circumstances accused 2 must be given the benefit of the doubt about whether any of the objects found in his possession was in fact ammunition as envisaged and defined in the **Firearms Control Act**.

COUNT 5: POSSESSION OF FIREARM

[170.] This leaves count 5 to be considered. That is the charge that accused 3 was found to be in possession of a firearm, more specifically and as described in the indictment a *“.38 Revolver pistol with serial number W189104”*, while he held no licence, permit or authorisation in terms of the Act to possess that firearm.

[171.] The defence of accused 3 is that the weapon found in his possession, by Capt. Visagie, was not the .38 special revolver referred to in count 5, and that was subsequently subjected to forensic or ballistic examination. According to him it was the weapon that he had taken from accused 1, but which was not the .38 special revolver. As already mentioned, it was the undisputed evidence of Mrs L that the firearm that accused 1 had in his possession was in fact the .22 calibre revolver.

- [172.] On the other hand there is the evidence that accused 3 told Capt Visagie, when he was asked where he got the revolver that was found in his possession, that he got it from accused 2, and not therefore from accused 1.
- [173.] Also of importance is the fact that accused 3 testified that the firearm that was found in his possession was indeed placed on the bonnet of the police vehicle, and it is undisputed that the .38 special calibre revolver was indeed photographed lying on top of the bonnet of the police vehicle. However, in view of what follows the reasonable possibility that the .22 calibre revolver had also at some stage been lying on the bonnet, cannot be excluded.
- [174.] Capt. Visagie's evidence was that it was indeed the .38 special calibre revolver that he had found in the possession of accused 3 when the vehicle of Mrs L was stopped, and he said that Const. Louw, who was with him at the time, would be able to verify this. Mr Makhaga later placed on record that, in a consultation with Const. Louw, the latter claimed not to have an independent recollection of this.
- [175.] Mr Mongale, who had at the time been a police official and who had been responsible for the sealing and packaging of the .38 special calibre revolver, was unsure who he had received it from, and his evidence therefore also lends no substantiation to the evidence of Capt. Visagie about the nature of the firearm that he had found in the possession of accused 3.
- [176.] I have already made clear my view of the credibility of accused 3, but his defence on this count would nevertheless mean that the prosecution would have had to exclude the reasonable possibility that what was found in his possession was not the .38 special revolver that is referred to in count 5 and which, as already mentioned, was indeed subjected to ballistic examination and found to be a firearm within the definition of the word "*firearm*" in the Act.

- [177.] What is of some concern in this regard is the fact that the .22 calibre revolver was also stolen during the incident, but has not been accounted for. There is no evidence that it was or was not among the stolen property found inside the vehicle of Mrs L. On the evidence presented by the prosecution it was also not found in the possession of either accused 1 or accused 2, or of Ms Januarie.
- [178.] In the absence of evidence that the .22 revolver was discarded somewhere between the farm and the scene where the vehicle was stopped, that would leave only accused 3 as a possible person who may have had the .22 revolver with him at the time of their arrest.
- [179.] In the end there is only the single and uncorroborated evidence of Capt. Visagie about what exactly was found in the possession of accused 3 a year earlier and, when regard is had to the unaccounted for .22 revolver, the reasonable possibility that it may have been the one found in the possession of accused 3, has not in my view been excluded.
- [180.] That everybody referred to the .22 revolver as a firearm, is of no assistance to the prosecution. There is no expert evidence that the .22 revolver was indeed, like the .38 special revolver, a firearm as defined in the **Firearms Control Act**. In this regard I refer again to the cases I have mentioned regarding the definitions in the Act, and the need for expert evidence.

CONCLUSION

- [181.] In the light of all of this the following findings are made:

- 181.1 On count 1 all three accused are convicted of robbery with aggravating circumstances.
- 181.2 Accused 1 is convicted on both counts 2 and 3.
- 181.3 Accused 2 is acquitted on count 4.

181.4 Accused 3 is acquitted on count 5.

C J OLIVIER

ACTING DEPUTY JUDGE PRESIDENT
NORTHERN CAPE DIVISION

For the State:	ADV. R R MAKHAGA (Office of the Director of Public Prosecutions)
For the 1st Accused:	ADV. M M STEYTLER (On Judicare instruction)
For the 2nd Accused:	ADV. K PRETORIUS (On Judicare instruction)
For the 3rd Accused:	MR A BUTHELEZI (On Judicare instruction)