

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE HIGH COURT, MTHATHA)

CASE NO.152/08

In the matter between:

THE STATE

versus

**SIMTHEMBILE ZIBI
SAKHUMZI MVOKO
ODWA SITHOLE
BONGANI SAME
MTHUTHUZELI SISILANA**

**Accused No.1
Accused No.2
Accused No.3
Accused No.4
Accused No.5**

JUDGMENT

WHITE J.

Although this judgment sets out correctly the findings of the court, it may, due to the limited time the court has had to prepare it, reflect certain aesthetic and grammatical deficiencies.

As it will take a considerable time to deliver the judgment, the court will, so as to avoid unnecessary suspense for the accused, at the outset state which accused have been convicted on which counts, and thereafter give the reasons for its findings. Another reason for doing so is that if anything happens to me after today, I would have passed judgment and another judge can then sentence you. All the accused were acquitted at the close of the State case on counts 1 and 6. The accused are convicted, on the following counts:

Accused 1 (Simthembile Zibi)

- Count 2 : Armed Robbery with aggravating circumstances.
- Count 3 : Armed Robbery with aggravating circumstances.
- Count 4 : Armed Robbery with aggravating circumstances.
- Count 5 : Armed Robbery with aggravating circumstances.
- Counts 9-11 : Three counts of attempted murder.
- Count 12 : Armed Robbery with aggravating circumstances.
- Count 13 : Armed Robbery with aggravating circumstances.
- Count 14 : Conspiracy to commit armed robbery.
- Count 15 : Theft.
- Counts 16 and 18: Two counts of armed robbery with aggravating circumstances.
- Count 17 : Attempted robbery with aggravating circumstances.
- Count 20 : Possession of unlicensed firearms.
- Count 21 : Unlawful possession of ammunition.

Accused 2 (Sakhumzi Mvoko)

- Counts 2 and 3 : Two counts of Armed Robbery with aggravating circumstances.
- Counts 4 and 5 : Two counts of Armed Robbery with aggravating circumstances.
- Count 9 to 11 : Three counts of Attempted Murder
- Counts 12 and 13 : Two counts of Armed Robbery with aggravating circumstances.
- Count 14 : Conspiracy to commit robbery
- Count 15 : Theft
- Counts 16 and 18 : Two counts of Armed Robbery with aggravating circumstances.
- Count 17 : Attempted robbery with aggravating circumstances.
- Counts 20 and 21 : Unlawful possession of firearms and ammunition.

Accused 3 (Odwa Sithole)

- Counts 2 and 3 : Two counts of Armed Robbery with aggravating

circumstances.
 Counts 4 and 5 : Two counts of Armed Robbery with aggravating circumstances.
 Counts 9 to 11 : Three counts of Attempted Murder.
 Counts 12 and 13 : Two counts of Armed Robbery with aggravating circumstances.
 Count 14 : Conspiracy to commit robbery.
 Count 15 : Theft.
 Counts 16 and 18 : Three counts of Armed Robbery with aggravating circumstances.
 Count 17 : Attempted Robbery with aggravating circumstances.
 Counts 20 and 21 : Unlawful possession of firearms and ammunition.

Accused 4 (Bongani Same)

Count 2 : Armed Robbery with aggravating circumstances.
 Count 3 : Armed Robbery. do
 Counts 20 and 21: Possession of firearms and ammunition.

Accused 5 (Mthuthuzeli Sisilana)

Counts 9 to 11 : Three counts of Attempted Murder.
 Counts 12 and 13 : Two counts of Armed Robbery with aggravating circumstances.
 Count 14 : Conspiracy to commit Robbery.
 Counts 16 and 18 : Two counts of Armed Robbery with aggravating circumstances.
 Count 17 : Attempted Robbery with aggravating circumstances.
 Count 20 : Possession of unlicensed pistols.
 Count 21 : Unlawful possession of ammunition.

In this case nine accused were originally charged.

They were-

Simthembile Zibi

Sibusiso Jejane

Sakhumzi Mvoko
Odwa Sithole
Bongani Same
Mthuthuzeli Sisilane
Siyabonga Bhekisisa Dike
Mazwi Shabalala
Fuzile Gcina

When the trial commenced the court was informed that for various reasons four of the abovementioned persons were no longer being charged. **Sibusiso Jejane** and **Siyabonga Bhekisisa Dike** had died, and the case against **Mazwi Shabalala** and **Fuzile Gcina** had been withdrawn.

Only the following five persons were arraigned when the trial commenced on 26 July 2011. The nick-name of each accused and the name of his legal representative, are mentioned in parenthesis.

Simthembele Zibi (Boyce)	Accused No.1 (Advocate Gabavana)
Sakhumzi Mvoko (Saki)	Accused No.2 (do)
Odwa Sithole (Oros)	Accused No.3 (Attorney Mankanku)
Bongani Same(Madubula)	Accused No.4 (do)
Mthuthuzeli Sisilana	Accused No.5 (Attorney Bahle)

Advocate Poswa appeared for the State.

At the outset of this judgment the court wishes to compliment Messrs Poswa, Gabavana, Mankanku and Bahle on the manner and thoroughness with which they carried out their duties in the case. It is indeed surprising that Advocate Poswa was expected to conduct on his own, without any assistance, a long and involved case, which has run for 86 court days, during which 84 witnesses were called. He carried out his task well.

So too can Messrs Gabavana, Mankanku and Bahle be congratulated on the way they fought in the interests of the accused. They left no stone unturned in their efforts to have the accused acquitted, and the court is satisfied that no one else could have done more for the accused than they did. They could, however, not overcome the overwhelming amount of evidence that connects the accused to the various counts.

At the commencement of the trial Advocate Poswa addressed the court in terms of **Section 150** of the **Criminal Procedure Act, 51 of 1977**, in which he referred to the summary of substantial facts which he had previously furnished to the court and to the accused's legal representatives.

A summary of the charges on which the accused were arraigned is set out hereunder. The date, place, offence committed, and allegedly by which

accused, is given in respect of each count. In the counts of robbery the averred aggravating circumstances are that before, during and after the robbery, firearms were used.

Count 1

Robbery with aggravating circumstances. On 23 April 2007, at Ikwezi Township, Mthatha, all five accused unlawfully assaulted and with force robbed Loyiso Metu of a Hyundai mini truck, registration number DNP 375 EC.

Count 2

Robbery with aggravating circumstances. On 24 April 2007, at Msengeni Supermarket, Willowvale, all five accused unlawfully assaulted and with force robbed Desire Helen Manthe and Nonjongo Mbeleki of R171 000 in cash, and a Motorola V360 cellular phone.

Count 3

Robbery with aggravating circumstances. On 24 April 2007 at Msengeni Supermarket, Willowvalle, all five accused unlawfully and with force robbed Mveleli Mdutyana and Mzwandile Mtekwana of two 9 mm pistols.

Count 4

Robbery with aggravating circumstances. On 25 May 2007 at Excelsior

Complex (Just Right), Mthatha, accused 1, 2, 3 and 4 unlawfully assaulted Wahmeed Mohammed and with force robbed him of R5000.00 in cash, and airtime vouchers to the value of R302 585.57.

Count 5

Robbery with aggravating circumstances. On 25 May 2007 at Excelsior Complex, Mthatha, accused 1, 2, 3 and 4 unlawfully assaulted Mbuyiselo Xishibana and with force robbed him of a Nissan Hardbody vehicle, registration number DTD 570 EC, and a Nokia 1112 cellular phone.

Count 6

Theft. On 4 June 2007 at Mthatha Plaza, Mthatha, accused 1, 2, 3 and 4 unlawfully stole a Nissan van motor vehicle, registration number DDH 201 EC, from Monjur Rahman Sakar.

Count 7

Attempted robbery with aggravating circumstances. On 6 June 2007 accused 1, 2 and 3 at Ntsika Locality, Tsolo, unlawfully assaulted Zola Tshayingca, Mxolisi Siyephu, Mzukisi Kawe and Zamekile Mdudu and with force attempted to rob them of their money.

Count 8

Robbery with aggravating circumstances. On 6 June 2007, at Ntsika Locality, Tsolo, accused 1, 2 and 3 unlawfully assaulted Lusizo Yalezo and with force robbed him of an Opel Corsa van, registration number NCW 9175.

Counts 9, 10 and 11

Attempted murder. On 25 June 2007, on the road between Port St Johns and Mthatha, accused 1, 2, 3 and 5 unlawfully assaulted and attempted to kill Kusasa Yantolo, Mxolisi Siyephu and Maliviwe Mnxakwe, respectively, by firing shots at them.

Count 12

Robbery with aggravating circumstances. On 25 June 2007, on the road between Port St Johns and Mthatha, accused 1, 2, 3 and 5 unlawfully assaulted Kusasa Yantolo, Maliviwe Mnxakwe and Mxolisi Siyephu, and with force robbed them of R250 540.96 in cash, a LM5 rifle, a 9 mm Norinko pistol and a Nokia 6111 cellular phone.

Count 13

Robbery with aggravating circumstances. On 25 June 2007, on the road between Port St Johns and Mthatha, accused 1, 2, 3 and 5 unlawfully assaulted Linda Mbhalo and with force robbed her of a Toyota Hilux double cab,

registration number BDX 312 EC.

Count 14

Conspiracy to commit robbery. During July 2007, at Vuyani Hotel, Libode, all five accused unlawfully conspired to rob a Fidelity Cash Management Services motor vehicle on the road between Engcobo and Mthatha.

Count 15

Theft. On 9 July 2007, at Mbuqe Extension, Mthatha, accused 1, 2, 3 and 5 unlawfully stole from Ethel Nozizwe Gazi, a Mazda motor vehicle, registration number CYY 548 EC.

Count 16

Robbery with aggravating circumstances. On 13 July 2007, at Ngqeleni Locality, Tsolo, accused 1, 2, 3 and 5 unlawfully assaulted Lwandile Cengimbo and Andile Somkhebe and with force robbed them of two 9 mm pistols.

Count 17

Attempted robbery with aggravating circumstances. On 13 July 2007, at Ngqeleni Locality, Tsolo, accused 1, 2, 3 and 5 unlawfully assaulted Lwandile Cengimbo and Andile Somkhebe and with force attempted to rob them of their

money.

Count 18

Robbery with aggravating circumstances. On 13 July 2007, at Ngqeleni Locality, Tsolo, accused 1, 2, 3 and 5 unlawfully assaulted Lungisa Madikwane and with force robbed him of an Isuzu van, registration number CPS 331 EC, and a Nokia cellular phone.

Count 19

Possession of prohibited firearms. During April to July 2007 all the accused unlawfully had in their possession fully automatic rifles, to wit an R1, R5, LM5 machine rifles, and a BXP sub-machine gun, without holding licences to possess those firearms in terms of the Firearms Control Act, 60 of 2000.

Count 20

Unlawful possession of firearms. During April to July 2007 all the accused unlawfully possessed 9 mm pistols, without holding licences to do so.

Count 21

Unlawful possession of ammunition. During April to July 2007 all the accused unlawfully had in their possession ammunition, without holding a licence of a firearm capable of firing the said ammunition.

The court will hereunder summarize the major events to which the charges relate. The accused do not dispute that the various crimes were committed, but dispute their alleged participation therein.

The charges cover ten major events. They are the following:

Count 1 : The robbery on 23 April 2007 of a Hyundai mini-truck at Ikwezi, Mthatha.

Counts 2 and 3: The robbery on 24 April 2007 at Msengeni Supermarket of R171000.00 and cellphones from those working in the Supermarket, and of two 9 m.m. pistols from two guards of the cash-in-transit vehicle.

Counts 4 and 5: The robbery on 25 May 2007 at Just Right, Excelsior Complex, Mthatha, of R5000.00 in cash and R309585.57 in airtime vouchers from the Manager of Just Right, Waheed Mohammed, and of a Nissan Hardbody vehicle from Mbuyiselo Xishibana.

Count 6 : The theft of a Nissan van, the property of Monjur Salmar,

on 4 June 2007 at Mthatha Plaza, Mthatha.

Counts 7 and 8: The attempted robbery on 6 June 2007 at Ntsika Locality, Tsolo, of money from a cash-in-transit vehicle, and the robbery of an Opel Corsa.

Counts 9 to 13: On 25 June 2007 and on the road between Port St Johns and Mthatha a vehicle drove behind a cash-in-transit vehicle, occupied by Kusasa Yandolo, Mxolisi Siyephu and Maliviwe Maxakwe, and shots were fired at it. The money in it, namely R250540.96, a LM5 rifle, 9 m.m. Norinko pistol, and a cell phone were taken. Linda Mbhalo was then robbed of a Toyota Hilux double cab.

Count 14 : During July 2007, at the Vuyani Hotel, the accused conspired to rob a cash-in-transit vehicle between Engcobo and Mthatha.

Count 15 : On or about 9 July 2007, at or near Mbuqe Extension, Mthatha, a motor vehicle was stolen from Ethel Nozizwe Gazi.

Counts 16-18: On 13 July 2007, near Ngqeleni locality, in the district of and near Tsolo, Lwandile Cengimbo and Andile Somkhebe were robbed of two 9 mm pistols, and Lungisa Madikane was robbed of an Isuzu van motor vehicle.

Counts 19-21: These counts relate to the accused possessing firearms and ammunition in contravention of the Firearms Control Act, 60 of 2000.

All the accused pleaded not guilty to all the charges, and their legal representatives informed the court that they would not be making any explanatory statements with the pleas.

The defence of each accused is similar – a bare denial of any involvement in any of the committed crimes. They contend that they are innocent and that anything they did, or are alleged to have done, whilst in custody, was done under duress due to the assaults perpetrated on them by members of the police force. They aver that all the State witnesses, for various reasons, told untruths in the witness box; especially the policemen who testified.

According to the accused, even the senior police officers, and those who

had nothing to do with the investigation of the case, have told a pack of lies. They aver that the police, young and old, senior and junior officers, those from Mthatha and those from other districts, whether they had anything to do with the investigation of this case, or not, have all entered into a conspiracy to give false evidence so that the accused can be convicted.

The only evidence that the defence did not contest was that given by the victims of the attacks, of how the attacks occurred. The majority of the victims could, however, not identify the attackers.

The court realizes that although this defence of a so-called conspiracy by the police, and the other witnesses, is improbable, it is not impossible. The court has therefore not prejudged the case on that basis, but has instead considered the evidence of each and every witness, and decided whether he or she has been truthful, and, if so, whether the individual accused have been implicated in any of the charges against them.

When considering the credibility of the witnesses in this case there are two issues that strike the court forcibly. The first is that the witnesses have had to testify about issues that occurred four years ago. It will therefore, due to the length of time that has lapsed since the events occurred, not be surprising if there are discrepancies in the evidence of the witnesses, especially on

irrelevant or insignificant issues.

The second issue is that if a cross-examiner wishes to test a witness' credibility by putting to him a statement he previously made on the issue, especially if it was made soon after the events occurred, that can be a double edged sword to the cross-examiner. If there are blatant contradictions on the main issues in the witness evidence and his statement, that will naturally discredit the witness. If, however, there are no major contradictions on the main issues, but only contradictions on insignificant or collateral issues, the fact that the witness made an identical statement on the main issue a long time before testifying will surely both rebut an allegation that he is not being truthful, and support his credibility.

The law on this issue is quite clear. Although a witness may not in evidence-in-chief refer to similar previous statements made by him, there is nothing that prevents a cross-examiner putting such statements to a witness, as stated above, at his own peril. Such statements may also be led to rebut an allegation of recent fabrication of evidence – see **The Law of Evidence in South Africa by Zeffert, Paizes and Skeen, p.408**

During the course of the trial the court gave judgments in two trials-within-a-trial – see Annexures 1 and 2 hereto. In the first the court ruled that

statements made by accused 1 and 2 to a Justice of the Peace are admissible.

In the second the court ruled that a certain pointing-out by accused 3 is admissible as evidence, but that statements made by accused 4 and 5 are not, due to a lack of proof that they were made freely and voluntarily. Although the court wished to reserve judgment in these enquiries until all the evidence in the case had been led, the representatives of the various parties requested that the court deliver its judgments at the conclusion of the enquiries.

The first witness for the State was **Luyanda Mabhongo**, who was warned by the Court in terms of **Section 204** of the **Criminal Procedure Act, 51 of 1977**. He testified that he is thirty years old and resides at Slovo Park, Mthatha and that he was previously an accused in this case. Whilst being arrested he was shot by the police and his leg was amputated. He has been to school up to Standard 5. He cannot read English. Mabhongo continued that he knows accused 1, whose nickname is Boysee. He also knows accused 2 and accused 3 (whose nickname is Oros), and accused 4 and 5. His evidence on the various counts is set out hereunder.

Count 1: (Robbery with aggravating circumstances – Ikwezi)

Mabhongo testified that he received a telephone call on 23 April 2007 from either Zuko Mabhongo, or accused 2, or accused 3. The person told him that they were to commit a robbery on the next morning and that he, the witness,

was to come to Payne location, which he reached at 6 pm. There, in the room of a shebeen, he found accused 3, accused 4, Zuko Mabhongo and Prince. Accused 4 left the room and returned with a young man called KG. Accused 2 then arrived. The witness was told that the robbery would take place at Willowvale. They all agreed that they should go out and look for a vehicle which could be used in the robbery.

They all then boarded a Microbus, driven by accused 2, and proceeded to Ikwezi Extension in Mthatha, where there was a double cab parked next to a house. All were armed – the witness with a .38 revolver, for which accused 4 gave him ammunition. The witness, Zuko, KG, accused 3 and accused 4 entered the house. The witness heard a gunshot and then Zuko came out. Accused 4 followed carrying keys. They then boarded the double cab. He does not recall its colour or make as it was dark at the time. Accused 3 drove the vehicle.

Accused 3 then said the vehicle was not fit for the journey to Willowvale, and it was dumped near Ikwezi.

Soon after doing so and whilst they were all again together in the Microbus, they again saw a vehicle next to a homestead. Accused 3, Zuko and KG alighted whilst the others remained in the Microbus. A short while later those

that had left the vehicle telephoned those who were still in it and informed them that they had found a vehicle and that they were at Zimbane. The Microbus then drove to Zimbane, where the witness and accused 4 remained in it. Later the others returned and they all went to Slovo Park to fetch a rifle from Gary Dike. They then returned to Zimbane where they waited for a man who was to wash them with muti. They all slept there.

The next morning, whilst it was still dark, accused 1 and 2 and Sibusiso Jejane, who had a R1 rifle in his possession, arrived there.

Counts 2 and 3 (Robbery with aggravating circumstances – Msengeni Supermarket , Willowvale)

Accused 1, 2, 3 and 4, Sibusiso Jejane, Prince, Zuko, KG and the witness boarded the mini-truck, which had been taken the previous day at Ikwezi. All were armed. Jejane had an R1 and R4 rifle in his possession. Others had handguns on their waists. Accused 2 drove the mini-truck to Willowvale. They stopped at Mbashe River, as the cash vehicle was to arrive only at 12 midday. It was just after sunrise when they stopped. They then proceeded and they stopped just outside Willowvale. There they waited for a telephone call from Nofinish Kobo, who would inform them when the cash vehicle was coming towards Msengeni, which is a supermarket and wholesale business in

Willowvale. They were going to rob the cash there when the Fidelity cash vehicle arrived.

The plan was that Zuko and accused 3 would follow the Fidelity guards into Msengeni Supermarket. The witness and accused 1 would take all the money from the tills.

When Nofinish telephoned and informed them that the cash vehicle was on its way, they went to the supermarket. Jejane and Prince remained in the vehicle. Jejane was going to drive their vehicle in front of the cash vehicle, so that it could not follow them when they fled. When this robbery took place all the participants were armed; accused 2 with a R4 rifle; Prince with a R1 rifle; accused 4 and the witness with .38 revolvers. The witness is not sure about the arms of the other participants.

The witness and accused 1 entered the supermarket and stood near the tills. Zuko and accused 3 (Oros) also entered and stood near the door of the cash office, which the Fidelity guards would enter.

Two Fidelity guards entered the cash office of the supermarket. As they did so accused 3 and Zuko followed them and then came out of the cash office with money. The witness and accused 1 collected the money in the tills. The

witness then heard a gunshot outside. It was not a handgun. When the witness went outside accused 3 handed the money he had taken in the cash office to the witness, who placed all the money in their vehicle. When he went outside he saw a Fidelity guard lying on the ground. Then the witness heard another sound. Jejane had collided with the Fidelity vehicle. They all boarded their vehicle and left.

After driving the vehicle for sometime, they dumped it at the side of the road and proceeded further on foot. They entered a forest, where they counted the money and shared it in equal portions amongst them. The witness received 'twenty thousand something' rands. They left the forest at different times. They then wanted to hijack a vehicle, but it drove away. Shots were fired at it. The witness does not know who fired the shots. Zuko was shot by accident in his leg. They then hijacked a private car and after taking Zuko's firearm and money away from him, placed him in the car. Jejane drove off with him, but after driving a short distance, the car stopped. Jejane said that possibly the radiator had been damaged when they shot at it. They then left Zuko and Prince behind, and left to find help. The others left too. Ultimately Nofinish arrived and picked them up, but his vehicle ran out of petrol and they had to siphon petrol from another vehicle. All then returned to Mthatha.

When the cash vehicle arrived at the supermarket the witness saw two Fidelity

guards go into the supermarket and one remained outside. He did not see if they were armed. However, later in the forest he saw two handguns that had been taken from the guards. One was given to Jejane, and the other to KG.

Counts 4 and 5 (Robbery with aggravating circumstance – Just Right)

Before 25 May 2007 accused 3 telephoned the witness and told him to go to Just Right in Mthatha and to observe the situation. He did so, and then discussed the matter with accused 3.

On 25 May 2007 the witness met accused 1, 2 and 3, Jejane and another young man at Just Right. They parked their vehicle outside the yard of the premises. Accused 2 and 3 entered the premises, where they chased a person. The witness and accused 1 then also entered the premises and held those people up. They demanded money and airtime vouchers. They then took money and airtime vouchers, and left. They each received less than R100. When they committed the robbery they were all armed with handguns. Accused 2 and 3 went to hijack another vehicle on the premises.

Count 6-8 (Theft and Robbery – Mthatha Plaza)

The witness does not know about these offences.

Counts 9-13: (9, 10, 11 Attempted murder; and 12 and 13 Robbery with aggravating circumstances – Port St Johns road)

The next robbery the witness committed occurred on 25 June 2007 on the road between Mthatha and Port St Johns. The witness, accused 1, 2, 3 and 5, Jejane and Gary Dike went to Bizana to rob a Spar shop. When they abandoned that robbery, Dike suggested that they go to Port St Johns and look for a garage so that they 'did not sleep without money in their pockets'. They then went to Port St Johns. They were travelling in a double cab driven by Jejane; the witness thinks it was a Toyota. As they entered the town they saw a cash-in-transit vehicle of Fidelity. They all agreed to rob it. They drove to an intersection and waited for the cash vehicle to arrive. When it did they followed it in their vehicle, which accused 2 was driving. Dike, who was seated on the front seat, was carrying a rifle. In their vehicle was the witness, accused 1, 2, 3 and 5, Dike and Jejane. Dike and Jejane started firing shots at the cash vehicle, which then 'ran away'. Accused 2 followed it and rammed it from behind. It overturned. Accused 2 then rammed it a second time to open the safe that contained the money. The safe did not open and they did not get the money. The witness, with the assistance of his colleagues and passers-by, turned the cash vehicle onto its wheels. They then took a double cab that had stopped on the side of the road, and left in it. They travelled to Qumbu, but when they saw a police road block, they abandoned the vehicle.

Count 14 (Conspiracy to commit robbery – Tsolo)

The witness testified that in July 2007, at Vuyani Hotel, Tsolo, they conspired

to commit a robbery, which was not successful. Accused 2 suggested they go to a place near Ntywenka, which was near Tsolo, where there was a cash-in-transit vehicle, and rob it. They all agreed to rob the vehicle. Accused 1, 2, 3 and 5, and the witness were present. Fuzile Gcina was not present during the conspiracy stage, nor were accused 4, Dike or Jejane.

Count 15 (Theft – motor vehicle – Mbuqe Extension)

On 13 July 2007 the witness and accused 1, 2, 3 and 5, Sibusiso Jejane and Gary Dike were together at Vuyani Hotel during July 2007. They all agreed that a motor vehicle should be stolen. They all then went to look for a motor vehicle and found a double cab in a yard in Ikwezi or Mbuqe, which they stole. They were all arrested on the following day – 14 July 2007.

Count 16 to 18 (Robbery with aggravating circumstances – Tsolo)

On 13 July 2007 the witness and accused 1, 2, 3 and 5 were travelling from Zimbane to Tsolo in a double cab stolen at Ikwezi or Mbuqe. When they realized they were short of one person, accused 3 telephoned Fuzile Gcina and they picked him up near Vuyani Hotel. At the hotel they all bathed in muti that was brought by accused 2. They then proceeded and on the way accused 2 telephoned a man by the name of Madoda and requested him to observe the movements of the cash vehicle they planned to rob. When Madoda telephoned accused 2 and told him that the cash vehicle was on its way, accused 2 drove

their vehicle behind it. Accused 1 fired a shot with an R1 at the vehicle. Accused 2 followed it and rammed it from behind. It capsized. Accused 2 then rammed it again. This time to open the safe that contained the money. The witness, with the assistance of his colleagues and passers-by, turned the cash vehicle onto its wheels. They then took a double cab that had stopped on the side of the road and left in it. They travelled towards Qumbu, but when they saw the police they abandoned the vehicle and split up. The witness and accused 1 reached Qumbu the next day. This robbery was unsuccessful – the safe did not open and they obtained no money.

The evidence of the witness Luyanda Mabhongo can therefore be summarised as is set out hereunder:

Count 1 : Robbery with aggravating circumstances – Ikwezi – On 23 April 2007 the witness, accused 2, 3 and 4, Zuko Mabhongo, Prince and KG went to Ikwezi, where, in an armed robbery, they stole a double cab vehicle. This vehicle, which is not mentioned in the charge sheet, they then abandoned. Accused 3, Zuko and KG then left the other accused and evidently stole the vehicle mentioned in the charge sheet. There is no evidence of where, or how, this was done.

Counts 2 and 3: Robbery with aggravating circumstances – Msengeni

Supermarket, Willowvale: On 24 April 2007 the witness, accused 1, 2, 3 and 4, Zuko Mabhongo, Jejane, Prince and KG went to Msengeni Supermarket, Willowvale, where, in an armed robbery, they took cash from the store and two firearms from the Fidelity guards.

Counts 4 and 5: Robbery with aggravating circumstances – Just Right: On 25 May 2007 the witness and accused 1, 2 and 3, Jejane and another young man committed an armed robbery at Just Right, Mthatha, in which they took money and airtime vouchers. Accused 2 and 3 hijacked a vehicle.

Counts 9-13: Attempted murder and Robbery with aggravating circumstances – Port St Johns Road: On 25 June 2007 the witness and accused 1, 2, 3, 5, Jejane and Gary Dike followed a cash-in-transit vehicle on the Port St Johns road. Gary Dike and Jejane fired shots at the vehicle. They then rammed and overturned it. The robbery was unsuccessful and they did not gain any money.

Count 14: Conspiracy to commit robbery with aggravating circumstances – Tsolo: During July 2007 the witness and accused 1, 2, 3 and 5 conspired to commit an armed robbery, which was unsuccessful, at Ntywenka, near Tsolo.

Count 15: Theft – motor vehicle – Ikwezi

During July 2007 Mabhongo and accused 1, 2, 3 and 5 stole a double cab

vehicle from a yard in Ikwezi or Mbuqe.

Count 16 to 18: Robbery with aggravating circumstances – Tsolo: On 13 July 2007 the witness and accused 1, 2, 3 and 5 committed an armed robbery on a cash-in-transit vehicle. The robbery was unsuccessful and they gained no money.

It was put to the witness in cross-examination that he was being untruthful because when he was in jail with the other accused he demanded that they buy him a motor vehicle. When they refused to do so, he decided to harm them by giving false evidence against them. The witness denied this allegation.

In cross-examination a confession that the witness had made to a Magistrate in Mthatha on 31 July 2007 was also put to him and handed in as Exhibit B. The confession reads as follows:

“Sometime before the month of June this 2007 at Willowvale we went to commit armed robbery at Msengeni Wholesale.

We were about (9) nine in all. It was myself, Odwa Sithole; Sakhi Mvoko; Sibusiso; Zuko Mabhongo; Bongani, KG’s; Prince; Boyce; Nofinish.

It was during noon about lunch time.

When we got there Nofinish was on guard watching the Fidelity guard vehicle when it got there. He phoned when the M/V was coming. We were gathered near the town outside. We were travelling in M/V that had been hijacked at Ikwezi Township on a previous day. Nofinish having phoned to tell us that the Fidelity guard m/v was there we quickly got inside the shop we

got inside the shop before Fidelity guard m/v got inside shop.

Odwa and Zuko stood next to office door with firearms i.e. pistols in their possession

When they grabbed the security we also jumped over and took the money from the till while they took money from the office.

Sbu who was the driver was waiting in the car outside. Prince was standing outside shop carrying an R1 rifle.

Sakhi i.e. Sakhumzi Mvoko was also carrying a rifle also standing outside. Sbusiso blocked the Fidelity guard motor vehicle outside shop.

We took money and we all got into the motor vehicle and we drove away and ran towards the forest where we left the car that we hijacked at Ikwezi on the previous day.

In the forest we walked on our feet and we divided the money. I got a sum of R25,300-00 as my share as we were sharing the spoils.

We remained in the forest until at dark.

From the forest we proceeded to the public road where we tried to hijack another car and it is then that Zuko got shot accidentally by Prince.

We then lifted him and put him in the forest and we left him there being injured but could not walk. We left Zuko in company of Prince.

On the way we phoned Nofinish where there was a network to come to fetch us and we drove to Mthatha leaving Zuko and Prince in the forest at

Willowvale.

Prince came on the following day saying he had left Zuko still in the forest.

When Prince arrived Zuko also phoned me to say he was on the way to hospital in an ambulance.

That is how the story regarding Willowvale comes to an end.

With regard to Port St Johns we did not plan Port St Johns. We had gone to Bizana to rob Spar Wholesale but that did not materialize because one guy from Bizana who was also in our company ran away.

We left Bizana and on our way back we went via Port St Johns on Gary's suggestion where we saw Fidelity guard m/v. We went up and waylaid it, and we followed it.

Sakhumzi Mvoko who was the driver of our car bumped the Fidelity guard car with our car and we start shooting at it. When Sakhumzi collided with the Fidelity guard vehicle it capsized.

We then approached and robbed it of the money and firearms that were there

We then hijacked another car that was on the public road, and we drove away towards the forest in Port St Johns.

I got a sum of +-R23 000-00 as my share.

It was then in the evening and we left on foot proceeding towards Ntlaza

Hospital, Libode at night.

We phoned a taxi driver to come and fetch us and he came and picked up at night. I alighted at Misty Mount to visit my paternal uncle's homestead. My friends, Odwa, Sakhumzi Mvoko, Sbusiso, Gary, Boyce and Mthura all proceeding towards Mthatha.

That brings us to an end in a story regarding Bizana and Port St Johns.

On 12 July 2007 we went to Tsolo to commit another armed robbery.

I was with Fuzile, Sakhumzi Mvoko, Odwa Sithole, Mthura, I do not recall the others.

We were looking out for Fidelity guard m/v that was coming down towards us before it got to Tsolo from Maclear cuttings.

Madoda was also there, he called us to say the m/vehicle was on the way and when it drove past we followed it and we fired some shot-gun shots. We were armed with guns and others were armed with rifles. We fired some shots at it and Sakhumzi Mvoko collided with it and it stopped on the road.

We tried to open it but could not and we lifted it up and felled it on its side and Sakhumzi bumped it with the m/v on its top and it got open but did not get money as we were unable to open the safe inside the vehicle

We then hijacked another car that stopped on the scene and left with it leaving our m/vehicle there.

We drove travelling in a direction towards Qumbu in a gravel road.

On the way we came across a police vehicle and police shot at us and we abandoned the car and ran on foot.

When we were far from public road Sakhumzi fired three shots from the rifle. We then ran towards the forest.

Police came to search for us but could not find us as we were hiding. Police fired some shots but did not find us.

We came out of the forest at dark and we walked on foot towards Qumbu on a route to Sulenkama.

We left our firearms in the forest before we hitch hiked in the morning.

We left the rifles in another forest and we parted ways and we all hitch hiked to Qumbu where we hitch hiked to Mthatha.

I am through with Qumbu and Tsolo issue.

Sometime after Good Friday during this year, I went on foot to a place known as Hock Mine and a car driven by Sbusiso came to find me already there.

It was myself, Sbusiso, Sakhi, Odwa, Boyce and Loli Pop.

We went to a shop opposite Hock Mine where airtime is being sold to find staff as it was about to close the shop. We ordered them back into the shop there we robbed money and airtime.

Sbusiso, Loli Pop and Boyce hijacked a bakkie from that shop and got away with it and then abandoned it at Zimbane.

We all used car that was driven by Sbusiso and travelled towards a certain homestead at Zimbane where we shared the spoils i.e. divided money and airtime.

We then parted ways and we went towards our respective places.

That is all”.

A statement the witness made on 22 June 2008, when he turned State witness, was also put to him in cross-examination (Exhibit A). It reads as follows:

“Luyanda Mabhongo States in terms of Section 204 of the Criminal Procedure Act as follows:

1.

I am an adult black South African male aged 27 years old residing at Mhaga Location, Upper Xhongora A/A/, Mthatha but I am presently detained at Maximum Prison, Mthatha. Prior my arrest and detention I was not schooling or working.

2.

I know my co-accused that I am presently detained with in prison. They are my friends and our friendship started before we could even get arrested. Before we got arrested we used to commit crimes together. Some of my friends that were with me during the commission of the crimes that I am arrested for had not yet been arrested. I may also mention that we normally call each other by alias names.

3.

During April 2007 I was phoned by Sakhumzi Mvoko, commonly known as Sakhi. He told that we were to go to Willowvale to commit robbery on the following day. He went on to tell me that we were to be joined by other friends of ours at Payne and Sibangweni. During the time I received the said call from Sakhi I was at Payne Location, Mthatha.

4.

On the following day in the morning at about 05:00 Sakhi arrived at Payne Location, Mthatha. He was a passenger in a maroon Micro-Bus which was being driven by another young man unknown to me. Inside the bus there was Sibusiso Jejane commonly known as "Sbu", Simthembile Zibi, commonly known as Boyce. As I got inside other friends of mine, Odwa Sithole, commonly known as Oros, Zuko Mabongo, commonly known as Madubula, Prince and KG's real names and surnames unknown to me. The driver of the bus then drove off and dropped us at Zimbane where he made a U-turn.

5.

At Zimbane we walked in the darkness until we boarded a mini truck white in colour which was hijacked at Ikwezi Township the previous day. We got inside it. Sakhi, Same and Prince got to the front seat and the rest of us got to the back of the truck. Sakhi drove taking Willowvale direction and the truck had no canopy. We arrived at Willowvale during lunch time.

6.

At Willowvale we waited for one of our friends known as Nofinish to phone and tell when the Fidelity guards vehicle was coming to Msengeni Wholesale to collect money so that we may get ready because we were to rob the wholesale and the guards. After some minutes Oros got a phone call from Nofinish that the guards were coming. We then took position and we were all armed with pistols except Prince who was armed with a rifle. Zuko and Odwa stood next to the office inside the wholesale, Sbu was at the driver's seat of our truck so that we may block the Fidelity vehicle, Prince was standing outside, Same was on the doorway of the wholesale. Odwa and Zuko grabbed them, the rest of us jumped over and took the money at gun-point from the tills and the office. The pistols from the guards were also taken.

7.

After that we ran to our truck and drove off towards the forest where we left the truck and walked into the forest. Inside the forest we shared the money and my share was +- R25 300-00. We remained there until it was dark. In the dark we went to the gravel road and waited for a vehicle to hijack. Whilst still there Zuko was accidentally shot by Prince on the leg. We then took him back to the forest and Prince looked after him. We left them there and moved away on foot until we again phoned Nofinish who took us to Mthatha. Prince came back on the following day but before I could ask him about Zuko, I got a phone call from Zuko reporting that he was being taken to the hospital.

8.

During the month of June 2007 we myself, Sakhumzi Mvoko, Odwa Sithole, Boyce, Sbu, Garry Dike, Mthuthuzeli Sisilana commonly known as Mthura

were at Vuyani Hotel, Sibangweni A/A, Libode. I came up with an idea that we must go to rob at Spar Supermarket, Bizana. Indeed we boarded into a white double cab which was being driven by Sakhi. It was a stolen vehicle but I did have no knowledge as to where it was stolen since, we at times part ways. On our arrival in Bizana we could not find a certain friend of ours who stays in that area who was going to assist us during robbery and we drove taking Port St Johns direction.

9.

Garry suggested that we must look for Fidelity guards as they normally collect money in Port St Johns businesses and thereafter took it to Mthatha for banking. Indeed we saw it in Port St Johns and waylaid it on the road to Mthatha. After sometime the Fidelity guards vehicle appeared and we followed it. Sakhi bumped it on its back and we started shooting at it as we were all armed. Although I cannot remember now as to what each of us was armed with but I was carrying a pistol and the rest of us were armed with BXP Semi Automatic Rifle, R1 Rifle, .38 Revolver, R4 and pistols

10.

Sakhi collided with Fidelity vehicle and it capsized. We then approached the guards and robbed them money and firearms, a rifle and pistol. Having robbed the guards we then robbed another blue double cab vehicle which was driving past the crime scene. We drove it until we got into a certain forest in Port St Johns where we left the robbed double cab there. I received +- R23 000-00 share. We then walked until we reached Ntlaza Hospital in Libode and it was at night. The firearms that we utilized during robbery and those that we robbed were contained in one big black bag. Odwa phoned a certain

taxi driver to come and fetch us there. Indeed a certain taxi arrived and took us back to Mthatha but I alighted at Misty Mount visiting a relative of mine there.

11.

On the 12 July 2007 we myself, Sbu, Oros, Sakhi, Mthura, Boyce, Fuzile Gcina commonly known as Fura or Zola, Madoda commonly known as Dopler were in Sibangweni planning to go and rob Fidelity vehicle that transport money from Maclear to Mthatha for banking. This idea that there was a robbery to be committed was from Bongani Same who was not with us then. We were to use a stolen white Nissan van. I do not know as to who between Mthura, Boyce and Sakhi stole the van in question.

12.

Dopler was to check when the Fidelity vehicle leaves Maclear driving towards Tsolo and phone us. We then proceeded to Tsolo and after some time Dopler phoned reporting that the Fidelity vehicle was coming and we drove the stolen van until we saw it. I was armed with a pistol and rest of us were armed with R4, R1, .38, pistols, BXP. We drove behind it until Sakhumzi collided with it. Some shots were fired by us to the guards at gun point and robbed them two pistols. We tried to open it's safes but failed. We then hijacked another vehicle a double cab and drove away leaving the stolen van at the crime scene. Sakhi drove towards Qumbu and on the way we met with police and then drove until we got inside the forest. During the night we came out of the forest and hitch hiked to Mthatha.

13.

Also during 2007 after Good Friday it was myself, Sakhi, Oros, Boyce, Bongani Same, Sbu and another friend of mine whose real name and surname are unknown to me but he is commonly known as “Loli Pops”, we planned to rob airtime shop at Excelsior Complex, Mthatha town. On that date there was a Honda Ballade brown in colour which was being driven by Sbu. We then proceeded to the said place. I still recall that I went there on foot and re-joined my friends in the crime scene. We arrived whilst the shop was about to close and held up at gun point the workers. We then robbed money and airtime. Whilst leaving the scene myself, Loli Pops boarded in the Honda Ballade being driven by Sbu whilst Odwa, Sakhi, Boyce and Bongani hijacked another vehicle (a van) also in the same complex. They then abandoned it at Zimbane. Since we had a small amount of money, I do not remember as to how much was my share but I got R10, R15 air time vouchers from MTN and Vodacom.

14.

Also during July 2007 I was myself, Boyce, Oros, Garry, Sbu, Dopler and Sisilana. We planned to rob Fidelity vehicle that was to carry money from Engcobo to Mthatha for banking. I did our planning at Sibangweni and it was on a Sunday. Few days after we planned we indeed proceeded to the Mthatha-Engcobo Road. Dopler as usual was to look for the Fidelity vehicle in Engcobo Town and report or phone when it is leaving Engcobo to Mthatha and it that time we were at Baziya, Mthatha. After some time Dopler phoned Sakhi reporting that the Fidelity vehicle was coming but before we could position ourselves properly it drove past at a high speed and we missed it. Even on the day I was armed with a pistol and the rest of us were armed with pistols, rifles, BXP and R4. During July and August police arrested us on

different spots and I was shot at by the police during arrest and lost my leg.

15.

All the people that have mentioned above were with me in the incidents that I have just mentioned. I do not have any reason to lie or falsely implicate them in the incidents.”

After giving evidence-in-chief and being cross-examined in this court on 26 August 2011, the witness was, at the request of the defence, recalled for further cross-examination on 25 October 2011.

Luyanda Mabhongo has therefore made the following statements and given evidence on the following dates:

Confession : 31.7.2007.

Statement on becoming a State witness : 22.6.2008

Evidence in court : 26.8.2011.

Further evidence : 25 October 2011.

Counsel for the accused have submitted that due to the contradictions between the evidence that Mabhongo gave in court, and the facts mentioned in the statements he made, Exhibits “A” and “B”, his evidence must be rejected by the court as being untruthful.

The court is fully aware of the possible dangers lurking in the acceptance of the evidence of Mabhongo, who is an erstwhile accused who has turned State witness. The court is aware that it must be extremely careful about accepting his evidence as he may be testifying just to save his own skin.

The alleged contradictions raised by Counsel for accused 1 and 2, Advocate Gabavana, are set out hereunder:

- 1) Whereas in his evidence Luyanda told the court he resided at Slovo, in Exhibit “A” he stated that he resides at Mhaga Location, upper Xhongora, Mthatha. The witness answered the allegation by stating that although he resides at Slovo, his home is at Mhaga. It is common knowledge that a Xhosa will often, when asked where he resides or comes from, give the address of his tribal home. The court therefore finds no substance in this so-called contradiction.
- 2) Mr Gabavana then contended that there was a contradiction as to when the witness and the accused became friends. Mr Gabavana, however, abandoned this alleged contradiction.
- 3) The next alleged contradiction is that whereas in his evidence the witness had said that he was not sure about his age, in his statement he said he was 27 years of age. Mr Gabavana conceded that in his evidence the witness gave his date of birth. There does therefore not appear to be any contradiction in this respect and Mr Gabavana seems to have withdrawn also this alleged contradiction.
- 4) The next alleged contradiction is that whereas the witness stated in his evidence-in-chief that prior to the first robbery at Ikwezi he received a telephone call from either accused 2 or 3, or Zuko, in paragraph 3 of Exhibit “A” he stated that it was accused 2 who telephoned him. In his evidence the witness explained the contradiction by stating that because these events occurred a long time ago - in 2007 - he is now not sure of the person who

telephoned him. Furthermore, the fact that all three persons he mentioned had his cellphone numbers, added to his present uncertainty. The witness' explanation seems not only to clarify the reason for the contradiction, but also to confirm his honesty. Because he was unsure of who telephoned him, he testified to that effect as he was not prepared to name one person as he might then have been misleading the court. The witness can therefore not be condemned for this contradiction.

- 5) Whereas in Exhibit A he stated that he received a telephone call from accused 2 at Payne, in evidence he testified that he received it at Slovo. This appears to be a totally inconsequential contradiction.
- 6) In Exhibit A the witness stated that he arrived at Payne at 5 am, but in his evidence he testified that he arrived at Zimbane at 4 am. The witness stated that he was not sure of the boundaries of Payne and Zimbane. Once again, the contradiction appears to be totally inconsequential.
- 7) The next alleged contradiction is that whereas the witness in his evidence stated that he did not call Luzuko Mabhongo by his nickname (Zuks), he in Exhibit "A" stated as follows:

“As I got inside other friends of mine Odwa Sitole, accused No.3, commonly known as Oros, Zuko Mabhongo, commonly known as Zuks, Bongani Same, commonly known as Madubula, Prince and KG’s real name and surnames unknown to me”

The court finds no contradiction in these statements.

- 8) The witness stated that he does not know where Luzuko Mabhongo is at present. He knows that he was arrested and he expected him to be one of the accused. It was then put to him that Luzuko and Fezile Gcina are presently facing similar charges to those that the accused are facing, in the Regional Court, Butterworth. The witness stated that he has no knowledge of that development.
- 9) The next alleged contradiction is that whereas the witness said in Exhibit “A” that he was dropped off at Zimbane Location, he later said he was dropped off at Payne. If there is such a contradiction, which Counsel for the State, Advocate Poswa, disputes, the witness clarified it by answering that he does not know where Zimbane or Payne commence, or end.
- 10) The next alleged contradiction was that whereas he had stated in Exhibit A “. . . . we were all armed with pistols, except Prince”, in his evidence he testified that accused 2 was armed with a R4 rifle (261 et seq). This is a disturbing contradiction, but the witness maintained it was due to Mdepha not having recorded the witness’ statement correctly.
- 11) In his evidence the witness stated that at Willowvale accused 2 fired a shot at the security guard, but there is no mention of that incident in Exhibit A. The witness states that he was not questioned about this aspect when he made Exhibit A.
- 12) Whereas Exhibit A reads ‘whilst still there (in the forest at

Willowvale) Zuko was accidentally shot by Prince', the witness testified that he does not know who shot Zuko. This is a clear contradiction. The witness, however, states that he did not tell Mdepha that Zuko had been shot by Prince.

- 13) The witness testified that he did tell Mdepha the date of the robbery at Just Right, although there is no mention of it in Exhibit A.

Counsel for accused 3 and 4, Attorney Mankanku, also put various alleged contradictions between the witness' evidence and the exhibits to Mabhongo. They are set out hereunder. For the sake of continuity and easy reference the Court will continue to number the alleged contradictions numerically.

- 14) Whereas the witness stated in his evidence that he was arrested on 14 July 2009, he stated in Exhibit B that he was arrested on 13 July 2009. The witness contends that he told the Magistrate that he was arrested on 14 July 2009. Even if this contradiction did occur, it is totally inconsequential.
- 15) Mr Mankanku then repeated the contradiction referred to by Mr Gabavana in (4) above. The witness explained that his uncertainty in the witness box on this issue was due to the lapse of time since these events occurred. It is interesting to note that later in cross-examination (p362) Mr Mankanku put to the witness this exact possibility, namely, that due the lapse of time the witness could not remember exactly what had happened.
- 16) Mr Mankanku then repeated the contradiction referred to in (7) above,

for which the witness gave an acceptable explanation.

- 17) Mr Mankanku put to the witness - for example on p.347 of the record - that certain matters that he mentioned in his evidence are not mentioned in exhibits A and B. This is not surprising as the examination of the witness in court must have been more searching than that of the persons who recorded his statements.
- 18) In the statements the witness stated that he did not know who shot Zuko, but in his evidence he stated that it was Prince who shot him. The witness does not know why there is this contradiction, but he believes he told Mdepha the same as he said in Court.

The court has considered what the defence has referred to as contradictions, that are set out above, and has made the following findings concerning them:

- (i) The court finds no substance in the alleged contradictions in paragraphs 1 to 9 and 14 to 17 above, either because there is no contradiction or, if there is, it is totally inconsequential;
- (ii) The contradictions in paragraphs 10 to 13 and 18 could well be due to the lapse of time, or that Mdepha did not question the witness on these issues, or did not record properly what Mabhongo had said.

When deciding whether the Court can accept, or must reject, Mabhongo's evidence it must be borne in mind that he has over a long period made two written statements and given evidence on two separate occasions. The first statement was made in Mthatha on 31 July 2007, Exhibit B, and the second to

Mdepha on 22 June 2008, Exhibit A. Then he testified before this court on 26 August 2011, and was re-called for further cross-examination on 25 October 2011. The statements were therefore made, and the evidence given, over a period of four years, and they describe in detail the events that occurred in six separate robberies throughout Transkei, and a conspiracy. Those at Ikwezi (count 1), Msengeni Supermarket (counts 2 and 3), Just Right, Mthatha (counts 4 and 5), Port St Johns road (counts 9 to 13), Vuyani Hotel (count 14), Mbuqe Extension (count 15) and Ngqeleni Locality, Tsolo (counts 16 and 18). In both his statements and his evidence Mabhongo's description and detail of these robberies is identical and, more importantly, so too is the naming of the persons who took part therein. There are indeed no major discrepancies. Considering the lapse of time between some of the statements, and the vast number of facts the witness had to describe, it would be strange if there were no discrepancies. It is amazing that in all these statements the witness repeated accurately the main events, and those who committed them.

It is difficult to understand why the defence had Mabhongo re-called for further cross-examination on 25 October 2011. He was then once again cross-examined at length by both Messrs Gabavana and Mankanku. He handled their questions with ease, and this appearance simply confirmed the *prima facie* opinion the court had formed when he testified previously. It seems that the cross-examiners believed that he would deny that when he was arrested, he was shot at twice – once when he was in a motor vehicle and once when he was injured. When, however, Mabhongo readily admitted that this had happened, it seemed to take the wind out of the cross-examiners' sails.

It must also be borne in mind that the robberies and other crimes described by Mabhongo in his evidence have been proved, by the evidence of the victims of those crimes, to have occurred. The main issue for the court to decide is

therefore whether the witness has correctly identified the various accused who he alleges took part in the offences, and whether they did in fact do so. This in turn will depend on whether the court finds that he is a truthful, or untruthful witness.

The Court has considered the following factors when deciding whether Mabhongo was a truthful witness, and whether it can accept his evidence.

- a) Mabhongo made a good impression when testifying. He was quiet and reserved in the witness box, and was never hostile or intent on making an impression on anyone. He was at times verbose, but this seems to be a common fault of rural people when testifying. He also on occasions did not answer directly the question asked, which could possibly be attributed to his speaking through an interpreter. These occasional faults did certainly not appear to the court to be due to his wanting to mislead the court. On the contrary, he appeared to be an honest witness who was simply describing what he knew.
- b) He did not implicate all the accused under a blanket allegation of involvement, and therefore guilt, on all the counts. This one would have expected if he were being untruthful, as the defence has contended, and was intent on implicating the accused. He rather stated which accused specifically were involved in each offence, and openly stated that certain of the accused were not present when certain of the offences were committed.
- c) He did also not testify on all the counts, and readily stated that he knows nothing about counts 6 – 8. If he were being dishonest, and was manufacturing evidence to implicate the accused because they did

not give him a vehicle, as the defence has contended, he would surely have implicated all the accused on all the counts.

- d) His evidence that the robberies, etc, occurred has been corroborated by the evidence of the victims who have testified how and when the crimes were committed.
- e) His evidence has also been corroborated, especially concerning the identity of the accused, by the statements, Exhibit A and B, that were put to him in cross-examination. The court has checked the contents of the statements and the evidence that Mabhongo gave, against one another, and has found no major contradictions in them concerning either the commission of the various offences, or the identity of the accused persons who committed the offences.
- f) The evidence of the undermentioned witnesses has also confirmed that the accused persons that Mabhongo has mentioned in his evidence were in fact involved in the commission of various of the crimes.

Counts 2 and 3

The evidence of Kobo and the confessions of accused 1 and 2, and the pointing out by accused 3, corroborates the evidence of Luyanda Mabhongo on these two counts.

Accused 4 and 5

Warrant Officer Mdepha testified that he found in the room where he arrested accused 1 and 2 the airtime vouchers that had been stolen

from Waheed Mohammed of Just Right, Mthatha.

When Mbuyiselo Xhishibana testified he identified accused 3 as one of the persons who robbed him of his Nissan Hardbody vehicle at Just Right, Mthatha.

So too do the confessions by accused 1 and 2, and the pointing out by accused 3, corroborate his evidence on these counts.

Counts 9-13

Maliviwe Ngqukumbana stated that on the night of the robbery he received a telephone request from accused 3 to fetch him and his vehicle, which had broken down. When he went to the scene he found accused 2 and 3, and five others there.

Inspector Mjacu lifted the fingerprint of accused 3 from a Coca-Cola bottle in the robbers' vehicle.

Olwethu Feke testified that accused 1 came to his home carrying a bag containing, *inter alia*, 3 firearms. The confessions and pointing out by the accused also corroborate Mabhongo's evidence on these counts.

Count 14

Madoda Madikiza confirmed that accused 2, 3 and 5 met at Vuyani Hotel in July 2007. The following day they again met there and then accused 1, 2 and 3 were present.

Counts 16-18

Andile Somkhebe testified that on 13 July 2007 the robbers had taken his 9 mm pistol, Exhibit 11, which was later found in a motor car in which accused 5 and others were travelling.

- g) The record is replete with examples of the witness' honesty – see, for example, pages 184, 202 and 271. Another example hereof is that when testifying about the robbery at Msengeni Supermarket, he stated that he did not see anyone robbing the victims of two firearms, but only saw the firearms in the forest.
- h) The witness is not educated – he attended school to standard 5 – and he cannot read English. The court is satisfied that he could not have related the same story, with its detail, in exhibit B, then in Exhibit A, and lastly in his evidence in this court, with the degree of exactitude he has shown, unless he was testifying to events in which he was personally involved. There would otherwise have been major contradictions in his statements relating to both the events and the identity of those participating in them. There were no such major contradictions in the statements he made and the evidence he gave.
- i) Due to the long lapse of time between the statements, it would be surprising if there were no contradictions, especially on minor or insignificant issues.
- j) The court also had to consider the so-called contradictions between the witness' evidence and the statements he made. The court made the following findings in respect of the 16 alleged contradictions specified above:

- i) The court finds no substance in the alleged contradictions in paragraphs 1 to 9 and 14 to 17 above.
- ii) The contradictions in paragraphs 10 to 13 and 18 could well be due to the lapse of time, or that Mdepha did either not question the witness on these issues, or did not record correctly what Mabhongo had said.
- k) As is stated above, the court has considered the co-called contradictions in Mabhongo's evidence and found them to be either non-existent, or insignificant.

The court has, after viewing Mabhongo in the witness box, and considering all the above factors, come to the conclusion that he was an excellent and truthful witness, and that the court has no doubt that it can accept his evidence. He has correctly identified the persons who took part in the robberies. Furthermore, that he has not done so simply to save his own skin.

Xolile Mdepha testified that he is a Warrant Officer in the South African Police Services and a member of the Organised Crime Prevention Unit, Mthatha. He is the Investigating Officer in this case.

On 25 June 2007 he proceeded to the scene of robbery on the Mthatha/Port St Johns road (counts 9-13), where he met the three security guards who had been involved in the robbery. He requested Warrant Officer Mjacu to take photographs of the scene. The latter did so (Exhibits E1-24), and also lifted finger prints from the double cab and from a Coca-cola bottle that was found in that vehicle. The vehicles were towed from the scene, but the witness does not

know what happened to the Coca-Cola bottle after the finger prints were lifted from it.

The witness testified that he found that the *modus operandi* of two cases of robbery at Tsolo were similar to the first one he investigated on the Mthatha/Port St Johns road.

On 14 July 2007 the witness went to a room in Mahaku Township, Kokstad, where he found accused 4 and his girlfriend on a bed. He then, after having given him the required warning, arrested accused 4. He found, under the pillow on which the accused was sleeping, a .38 revolver (Exhibit 7), which contained six rounds of ammunition. In cross-examination, however, the witness conceded that whereas he had stated in examination-in-chief that there were only the accused and his girlfriend in the room, there were in fact three people in the room. He denied that he found Exhibit 7 under the bed.

On 17 July 2007 the witness arrested accused 1 and 2 in Margate. In the room where they were arrested he found a large cardboard box containing airtime vouchers. He also found a 9 mm Norinco pistol and 9 mm berretta pistol in the BMW motor vehicle of accused 2 (Exhibits 8 and 9). One firearm had 5 rounds of ammunition in it, and the other 8 rounds. He later handed the airtime vouchers to Waheed Mahommed, who claimed the vouchers to be those that had been robbed from him on 25 May 2007 (count 4).

On 18 July 2007 the witness was taken by accused 1 to the home of Olwethu Feke where he found the firearms and magazines, Exhibits 1, 2, 3, 4, 5 and 6, and the ammunition, Exhibit 13. Constable Solomons arrived and took photographs (Exhibits J1-16) of where the firearms were found.

On 7 August 2007 the witness arrested accused 5. He was a passenger, with three others, in a motor vehicle. The witness searched the vehicle and in it he found three firearms. Exhibits 11 and 12, and one that has since then been mislaid. They contained 11 and 3 rounds of ammunition, respectively. As Andile Somkhebe testified that Exhibit 11 was taken from

him in the robbery referred to in count 16, this evidence connects accused 5 to that robbery. In his evidence the witness stated that he had been unable to trace the complainants in counts 1 and 6, Loyiso Metu and Mr Sakar, respectively.

In cross-examination it was put to witness that he had “heavily assaulted” accused 2. Also that accused 2 was granted a court order interdicting the witness from doing so (Exhibit S). It was also put to the witness that he again assaulted accused 2 after the interdict was granted, and that he took the accused’s clothes and a grinder. The witness denied these allegations, save that he admitted that he had taken the grinder. He did so because the accused was using it to grind the serial numbers off firearms.

It was put to the witness that accused 1 was not present when Feke pointed out the firearms. The witness denied this allegation.

The witness testified that of the original nine accused two – Sibusiso Jejane and Gary Dike - had died, and that charges were withdrawn against two of the other accused.

He testified that the serial number of Exhibit 8 is 49204424, that of Exhibit 11 is 49204451, and that of Exhibit 12 is J67390.

In cross-examination it was put to the witness that he had given a different registration number of the vehicle of accused 2. The witness agreed that that was possible, but stated that it was easy for persons to change their number plates.

It was also put to the witness that he did not make Samke, the accused's girlfriend, a witness because he had heavily assaulted the accused when he was arrested. The witness denied this allegation.

The witness admitted that an interdict, not to assault those in their custody, was issued against all the policemen at Mthatha Central Police Station.

The witness denied that he had taken, and worn, the leather jacket of accused 2, and that he assaulted him after he arrested him. He admitted that he had confiscated a grinder from the homestead of accused 2, as it was being used to grind serial numbers from firearms.

It was also put to the witness in cross-examination that accused 1 and 2 deny that they were involved in any offence. Also that the accused 1 did not point out the home of Olwethu Feke to the witness, and that he, accused 1 was not present when the firearms were found at Feke's home. The witness denied these allegations and stated that it was accused 1 who pointed out Feke's home to him. He did so freely and voluntarily.

In cross-examination it was also put to the witness that accused 3 and 4 had nothing to do with the offences the witness has referred to. Also that the witness found the firearm, Exhibit 7, under a bed. The witness denied this allegation.

The witness stated that accused 1 pointed out Feke's home to the police. He did so freely and voluntarily and without undue influence, and was not induced to do so.

Mkhululi Kobo, whose nickname is Nofinish, was warned by the court in terms

of section 204 of the Criminal Procedure Act, 51 of 1977. He testified that he knows accused 1, 2 and 3, but not accused 4 and 5. The nickname of accused 1 is 'Boyse'; that of accused 2 is 'Sakhi', and that of accused 3 is 'Oros'.

In 2007 he conducted a taxi business at the Golden Egg, Mthatha.

On the morning of 23 April 2007 the witness received a telephone call from accused 3, who asked the witness to come and see him. The witness went to see accused 3 at Zimbane. There accused 3 informed him that he would like to see a traditional healer in Willowvale, and enquired how much the witness would charge to take him there. The witness agreed to do so.

When the witness and accused 3 left for Willowvale, the latter instructed him to pick up a young man, which he did. He then drove to Ultra City, where he filled up with petrol. After leaving Ultra City he picked up another young man. They were then four in the motor vehicle and they drove to Msengeni Wholesale in Willowvale. The three entered the wholesale shop and the witness followed them to buy a cool drink.

They all then left the wholesale store and drove to a butcher shop, where they had a braai. Accused 3 then asked the witness how much he makes per day, and he replied "R300". Accused 3 told the witness to relax as they would pay him the R300.

On the accused's instruction they then left the butchery and went to a taxi rank in Willowvale, where the three passengers left the vehicle. They returned an hour later and told the witness to go home.

On the way, before they had left Willowvale, they saw a Fidelity kombi

approaching them. Accused 3 told the witness to follow the kombi because they wanted to see where the kombi would stop to pick up money. Accused 3 said they wanted to take the money from it, but were not going to do it there and then. The witness then followed the kombi. It stopped at four spots and the fifth one was at Msengeni Wholesalers. The three passengers then alighted and entered Msengeni Wholesalers. When they came back they said he must go home.

On the way home accused 3 asked the witness if he would be busy the next day. He then told the witness that he wanted him to keep watch on the Fidelity vehicle the next day and to tell him by telephone when it came. If the witness was prepared to do so, he would give him R10 000.00. He agreed to do so.

The following morning accused 3 telephoned the witness and reminded him to go and keep a look-out for the Fidelity cash-in-transit vehicle. The witness told him that he did not have fuel for his vehicle, and accused told him to go to a certain address in Zimbane where he would be given money for that purpose. The witness went there and was given R150.00 by a lady for petrol. The witness then drove to Willowvale where he waited for the kombi. It arrived at about 2 pm. He then telephoned accused 3 and told him the kombi had just passed him. He was then about 5 kilometres from Willowvale.

Later accused 3 telephoned the witness and said he must pick them up. The witness borrowed a vehicle and, on the instructions of accused 3, went in the direction of Elliotdale where he picked him, accused 1 and 2, and others up. Those seated at the back were carrying bags and those on the front seat ordered the witness to move the seat forward and they placed a rifle behind the seat. Odwa then gave him the money he had promised him. The witness' vehicle then ran out of fuel and they had to siphon fuel from another vehicle. When the

witness counted the money he had been given it was only R8 000 rand. The witness drove to Mthatha where he filled up with petrol. He then dropped off all those in the vehicle in Mthatha. When he dropped off accused 2, he took his bag and the rifle he had placed behind the front seat.

On the following day accused 3 telephoned the witness and asked him to come and pick him up. The witness did so and also picked up accused 2. From there they went to accused 1. The witness heard them discussing the man who had been shot and left behind on the previous day. They then asked the witness to go and fetch that man, but he refused to do so.

In cross-examination the witness admitted that he had made a statement, Exhibit C, to the police during July 2007 about the events that occurred on 23 and 24 April 2007.

When cross-examining the witness, Advocate Gabavana, who appears for accused 1 and 2, did not put to him the alleged alibi of where accused 1 was on 23 and 24 April 2007. One would have imagined that that would have been the first thing he would have put to Kobo in cross-examination, if it had been true.

Gabavana did, however, put the following question (p.681) to the witness:

“I put it to you that after the sale of a motor vehicle, Ford Laser, between you and accused 1, there was a problem because you ran away without having paid for that motor vehicle”

This is contrary to the evidence that accused 1 subsequently gave. Accused 1 testified that he had sold the vehicle to Kobo, who, when he could not pay the full amount, returned the vehicle to the accused. Because accused 1 had not yet

refunded the full amount that Kobo had paid to him, Kobo testified against all the accused. There was never any mention of Kobo having run away. On the contrary, he was demanding payment of his money from accused 1.

When considering Kob's evidence there are four things that must be borne in mind. They are-

- (a) A statement, Exhibit C, made by the witness in July 2007 i.e. soon after the events occurred, is identical on the main issues to the evidence the witness gave in court. They are that he accompanied accused 3 to Willowvale on 23 April 2007; that on 24 April 2007 he telephoned accused 3 and told him that the cash vehicle was on its way; that accused 3 telephoned him and asked him to fetch them that night and that he borrowed a bakkie and did so. Lastly, that the next day they asked him to fetch an injured member and he refused to do so.
- (b) Luyanda Mabhongo corroborated a great deal of this witness' evidence.
- (c) Kobo had no axe to grind with the accused and he appears to have been an honest witness – see, for instance p.580, where he admits that he knew that he was conveying people who were going to rob.
- (d) He was consistent in his evidence e.g. when he met the

accused and when he saw them after he picked them up

Whereas Advocate Gabavana launched a vehement attack on the evidence of Luyanda Mabhongo, he hardly mentioned Kobo in his address. All that he submitted was that the court cannot accept the evidence of a witness who testified that he had travelled with accused 2 (Sakhi), whom he had previously seen in the company of accused 3, from where petrol had been drained from another vehicle into his, to the garage, without recognising him. The court was at first also alarmed at this evidence of the witness. On closer consideration, however, the court realized that it could be true. It must be borne in mind that the witness himself gave this evidence in examination-in-chief; he knew accused 2 only by having seen him in the company of accused 3; it was after 8 pm, and must therefore have been dark, when they travelled in the vehicle; and as soon as he recognised accused 2 at the garage he asked him if it was he.

When the court weighed up this one possible blemish against the positive aspects of Kobo's evidence, it came to the conclusion that it could accept it as being the truth. The positive aspects are numerous: he gave his evidence well, he had no axe to grind with the accused and he appears to be an independent witness; his evidence is corroborated by that of Luyanda Mabhongo and his own previous statement, Exhibit C. Kobo did also not stand to gain anything by the statement. Kobo's evidence has such a ring of truth about it that it would be difficult to reject it as untruthful.

The court therefore disagrees with Gabavana's submission that Kobo's evidence be rejected as being untruthful.

The court is satisfied that it can, after hearing the witness in the witness box,

and due to the abovementioned corroborating factors, accept his evidence.

Olwethu Feke testified that he is 30 years old and that his home is at Sibangweni Locality, in the district of Libode. He knows only accused 1, whose nickname is Boy-boy. The witness knows accused 1 because he had a relationship with the witness' sister, from which a child was born.

Accused 1 arrived at the witness' home on a Sunday during July 2007, carrying a big black bag. He said the bag contained firearms and that he wished to leave the bag with the witness until he fetched it again. The witness and accused 1 then went to a shack on the witness' premises, where they both took the firearms out of the bag. There were three firearms in the bag – two big and one middle-sized. The latter firearm was wrapped in a cloth and placed in the shack on the premises. They then went into the garden where accused 1 dug two holes with a piece of wood, into which he placed each of the remaining firearms, after having wrapped them separately in pieces of plastic.

On 18 July 2007 accused 1 returned with Warrant Officer Mdepha of the South African Police. Accused 1 then pointed out Olwethu to Mdepha as the person who was hiding the firearms. The witness then showed Mdepha where the three firearms, Exhibits 1, 2 and 3, and the magazines, Exhibits 4, 5 and 6 were hidden. When he did so, accused 1 was next to him and photographs were taken by the police, who then took the firearms. The witness saw ammunition only when it and the firearms were taken away by the police.

In cross-examination it was put to Feke that he was falsely incriminating accused 1, who never brought firearms to his home, because the latter disputed paternity of the child born to his sister. The witness denied this allegation and stated that he allowed accused 1 to leave the firearms at his home because

accused 1 was in love with his sister, and had at one stage stayed with him. He did not report the matter to the police because if he had done so he would be placing himself at risk because accused 1 was then still at large. The suggested animosity of the witness to the accused is refuted by the fact that he not only assisted him to hide the firearms, but also that he visited him in jail after he was arrested, and took him food and tobacco.

Feke testified that he was never charged because accused 1 confirmed that the firearms were his.

The photographs that the police took are Exhibits J1-16.

The witness made a good impression on the court. He was forthright in his answers to the questions put to him. He also appeared to be honest. So, for instance, he did not think that accused 1 had permission to be in possession of the firearms, and he knew that accused 1 was in unlawful possession of them. Also that he visited accused 1 in jail after the police informed him that he would have to testify. Furthermore, that he, the witness, helped accused 1 hide the firearms.

The witness' evidence was corroborated to a great extent by that of Warrant Officer Mdepha, who testified that it was accused 1 who took him to the witness' home. How else would he, Mdepha, have known to seek firearms there? Feke's evidence is also supported by that of Maliviwe Ngqukumba, who testified that on 25 June 2007 accused 2 and 3, and five other men, were in possession of a bag in which he saw two rifles.

Penrose Mzenzi testified that he is a Warrant Officer attached to the Organised Crime Unit, Mthatha.

On 18 July 2007 he arrived on the scene in Margate after accused 1 and 2 had already been arrested. The accused were standing next to a BMW motor car. The police then searched the vehicle and found two firearms in it. All the police then returned, with the two accused, to Mthatha.

When they arrived in Mthatha, the witness saw that Warrant Officer Mdepha was in possession of three firearms – two R5 rifles, Exhibits 2 and 3, and a BXP rifle, Exhibit 1.

A flight was then arranged to fly accused 2 to Cape Town, to show the police the whereabouts of accused 3. The witness and other policemen then flew with accused 2 to Cape Town.

In Cape Town accused 2 led them to a house at 20964 Bloekombos Street, Pambela Location, Kraaifontein. When they there opened the door, accused 3, who was in the room, tried to jump out of the window, but was prevented from doing so, and arrested. The witness, after identifying himself, informed accused 3 of the charge on which he was being arrested, and of his legal rights. They were all then directed by accused 3 to 48 Ngqangqolo Street, Litho Park, where he stated he was living with his elder brother. There they searched the belongings of accused 3 and found a 9 mm pistol, Exhibit 10, which was marked 'CZ'. They also found many Vodacom and MTN airtime vouchers there.

In cross examination it was put to the witness that accused 3 could not have pointed out his brother's room to the police as he was at the time blindfolded with sellotape. It was also put to the witness that when accused 3 was returned to Mthatha, he was assaulted by Mdepha, Maqhubela and the witness by

stamping on his head and body, and striking him with a metallic number plate. The witness denied these allegations.

A statement made by the witness on 20 July 2007, Exhibit JJ, was put to him in cross-examination. In it the witness stated that when they went to the brother's house, they asked him if there was anything he possessed unlawfully. The brother then stated that accused 3 had asked him to keep his firearm in the cupboard drawer, where the police found it, and confirmed that the firearm and the airtime vouchers belonged to him.

David Pieterse testified that he is a Lieutenant Colonel in the South African Police Services stationed at the Ballistic Unit Forensic Science Laboratory in Pretoria.

On 30 August 2007 he received five firearms on which he carried out tests and then completed a report, Exhibit KK. The witness then identified the firearms before the court.

Exhibit 1 is a 9 mm Tressito model BXP hand carbine. It is often referred to wrongly as an Uzi.

Exhibit 2 is a 5.56 X 45 mm semi-automatic rifle – serial number RSA 420019.

Exhibit 3 is a 5.56 X 45 semi-automatic rifle – serial number removed. Exhibits 2 and 3 were wrongly referred to as R5 rifles. This because they look exactly the same.

Exhibit 4 is a 5.56 X 45 mm magazine.

Exhibit 5 is also a 5.56 X 45 mm magazine.

Exhibit 6 is a 7.62 C 51 mm magazine.

Exhibit 7 is a .38 mm Torres revolver.

Exhibit 8 is a 9 mm Norinko, pistol, which was referred to wrongly as a 9 mm Star, which is a common mistake.

Exhibit 9 is a 9 mm Torres semi-automatic pistol, often wrongly referred to as a Beretta pistol as they look the same.

Exhibit 10 is a 9 mm semi-automatic pistol - possible a Star.

Exhibit 11 is a 9 mm Norinko semi-automatic pistol.

Exhibit 12 is a 7.65 mm caliber CZ model semi-automatic pistol.

In cross-examination the witness stated that he was satisfied that he received the correct firearms because he checked the number of the seal bag in which they came, with the number given in the covering letter, Exhibit “LL”, and they were the same.

The court will now set out the evidence of the witnesses who referred to single events.

Count 1

As there is no direct evidence of how or when the Hyundai mini-truck referred

to in this count was stolen, all the accused were acquitted on this count at the close of the State case.

Counts 2 and 3

Mzwandile Mtekwane testified that on 24 April he was employed by Fidelity Services. On that day he was in a Kombi which was driven from Butterworth to Willowvale to collect money at, amongst other places, Msengeni Supermarket. Mzukisi Madaka was driving the vehicle and the witness and Mveleli Mdutyana were his crew. They were in uniform. At the supermarket Mzukisi Madaka, the witness and Mdutyana entered the business. The witness was carrying a box in which the money would be placed. The witness was armed with a Norinko 9 mm pistol, serial number 49204424, and Mdutyana with a revolver. Mdutyana entered the cash office in the store, followed by the witness, who then felt someone pushing a firearm into the back of his neck. The two robbers, who were armed with handguns, then ordered them to lie down. They all lay down. The robbers then took the firearms of the witness and Mdutyana, and demanded the money from the personnel in the cash office, who handed it over to them. The robbers left the store with the money and the firearms.

Mrs Desiree Manthe testified that on the day of the robbery she, a co-owner and manager of Msengeni Supermarket, was working in the cash office. Two robbers, who were carrying handguns, entered and ordered everyone to lie down. They then demanded money and the witness opened a safe and gave them R171 000. They took the money and left the store, but came back a short while later and demanded more money. The witness then gave them the cash float of approximately R40 000, which they took. They also took airtime vouchers to the value of approximately R1000. The robbers therefore stole R211 000 in cash, airtime worth R1000, and the money from the tills. One of the managers who was in the office, Greg Blakemore was hit on the head with a

firearm. He was the only one to suffer an injury.

Mrs Nonjongo Mbeleki, a till operator at Msengeni Supermarket, testified that on 24 April 2007 two young men, armed with handguns entered the supermarket. One struck her on her back with a handgun and told her to take the money out of the tills and to place it in one of the plastic bags that are usually used for customers. When she had done so, he took the bag and her Motorola cell phone, which was valued at R899, and the two men left. She crawled under the till and started crying. This was due to shock. She then ran to the cash office where everyone was lying on the floor. She got her cell phone back and she cannot identify the robbers. She heard one gunshot.

Station Commander Zolile Mshumpela testified that on 24 April 2007 he was a detective at the Willowvale Police Station. On that day they received a report that there had been a robbery at Msengeni Supermarket. The police conducted a search and found a white Hyundai mini-truck, registration number DNP 375 EC, in the Mevana Forest in the Ciko Locality, in the district of Willowvale. They called the finger print experts, but because the mini-truck was locked, they could only examine the outside. The mini-truck was then towed to the police station.

Counts 4 and 5

Waheed Mahommed testified that he was employed as the manager of Just Right at the Excelsior Complex, Mthatha, which sells airtime. On 25 May 2007 he closed his shop and went out through the back door to his car. He then saw three young men entering through the gate of the premises carrying pistols. Another man, who works in a shop next to Just Right, was driving a Nissan vehicle. When he wanted to go out of the gate the three young men came to

him and forced him to get out of his vehicle. They then came to the witness and told him to open his shop. The witness opened the shop and was forced to open the safe. They had firearms and they struck the witness on his head with one of them. He had to have 8 or 10 stitches. After he opened the safe they took plus minus R5000 in cash, also airtime vouchers to the value of more than R300 000. They then took the Nissan vehicle and left. In August 2007 Inspector Mdepha of the police telephoned the witness to say they had recovered the airtime vouchers. The witness went and identified them as those that had been stolen on 25 May 2007. The recovered vouchers were valued at R77 000.

As has already been stated above, the investigating officer, **Warrant Officer Mdepha**, testified that on the night of 17/18 July 2007 he and other policemen went to a room in Margate where they found accused 1 and 2 sleeping. They arrested them and next to their bed they found a cardboard box containing airtime vouchers. Mdepha took the vouchers back with him to Mthatha, where he showed them to the manager of Just Right, **Waheed Mahommed**. The latter testified that those were the airtime vouchers that were stolen from Just Right in the robbery on 25 May 2007.

This evidence connects accused 1 and 2 to the robbery at Just Right on that day, and confirms the evidence of Mabhongo that accused 1 and 2 were members of the robbing party.

Mbuyiselo Xishibana testified that on 25 May 2007 he was employed by Community City Glass at Excelsior Complex, Mthatha. After he had finished work at 5 p.m. on that day, he went to his motor vehicle, a twin cab Nissan Hardbody van, registration number DTD 570 EC, which was parked in the back yard of the store. After he had turned his vehicle, four young men came to it and knocked on the witness' window, and also on the other side of the vehicle. He was told to get out of the vehicle and to stand against the wall. The robbers

then took the keys of the witness' vehicle and a Nokia 1112 cell phone of the witness. One of the robbers who came out of Just Right Communications carrying papers, asked the other robbers where he must place the airtime, and he was told to place it in the motor vehicle.

They then drove off in the witness' vehicle and the Honda that was parked at the gate.

That same evening the police told the witness that they had recovered his vehicle. It had a dent on the left bumper. The vehicle was worth R100 000 plus, and it cost R3000 to repair the dent. He did not recover the cell phone, which was valued at R700.

When testifying the witness identified accused 3 as the robber who took his vehicle and drove it away.

He did not tell the police that he could identify one of the robbers because he was shocked when he made his statement to the police on the same day as the robbery occurred.

Count 6

As no evidence was led on this count, all the accused were found not guilty on it at the close of the State case.

Counts 7 and 8

Zola Tshayingca (count 7) testified that during 2007 he was employed by Fidelity as a driver. On 6 June 2007 he drove to Maclear. He was armed with a

BXP rifle. Mnxakwe, Siyephu and Kani, who were also armed with firearms, accompanied him. There they picked up money and then proceeded to Mount Fletcher, where they picked up more money. As they left Maclear for Mthatha, on their return journey, the witness saw a bakkie approaching them from behind. When the bakkie drew level with their vehicle the witness heard two shots being fired from it. The bakkie then stopped in front of the witness' vehicle, but he drove past it. The bakkie then followed the witness' vehicle and attempted to overtake it, but he prevented it doing so. The robbers were still firing shots at the witness' vehicle. They rammed his vehicle from behind, but he continued until he reached a police road block and reported to them what had happened.

In the attack the rear left wheel of the witness' vehicle was damaged and it was travelling on its rim. The vehicle also had gunshot holes in it. The witness suffered deafness after the attack, and can still not hear properly.

The witness was not cross examined.

Mxolisi Siyephu testified that he was a crew member in the vehicle driven by Zola Tshayinga on 6 June 2007, and he corroborated the evidence of Zola of the attack on their vehicle on that day. A vehicle drew level with their's and then shots were fired from it at the window of their vehicle. The window became "hazy". They drove past the robbers and reported to a police road block.

The witness was not cross-examined.

Luzuko Yalezo (count 8) testified that he is a teacher in Qumbu. He and another man left Ugie for Qumbu at 15h30 on 6 June 2007 in his white Opel Corsa, registration number NCW 9175. The witness was driving. On the way

between Maclear and Tsolo a young man carrying a half-meter long firearm, and others, stopped the vehicle the witness was in and searched it. Those in the vehicle were told to alight and go behind a certain shelter. The young men then drove the Opel Corsa to a forest and from there onto the road towards Maclear. When it passed the witness saw the occupants in the back of the vehicle.

The witness reported the robbery to the police on the same day and on the following day they found his vehicle near Mthatha Airport. It had some dents in it.

The value of the Opel Corsa was R80 000, and it cost R8000 to repair it. The witness cannot identify those who robbed him of his vehicle.

There was no cross-examination of the witness.

Counts 9 to 13

Kusasa Yantolo testified that on 25 June 2007 he drove one of the cash-in-transit vehicles of Fidelity Cash Management. They collected money at Port St Johns and drove back to Mthatha. Messrs Mxolisi, Siyephu and Mnxakwe were crew on the vehicle. All three were armed with handguns. On the way he saw a Toyota 4X4 double cab following them. The men on the back of the following vehicle then fired many shots at them. He fired a shot at them to scare them. They then bumped his vehicle from behind and it overturned. They were armed with a BXP machine gun and another with a R1 rifle. After they had taken the money from the vehicle, and the firearms of the witness and his colleagues, they stopped a double cab, boarded it and left. They abandoned their vehicle on the side of the road. The Fidelity cash-in-transit vehicle was damaged at its back and on its roof. In court Yantolo identified accused 2 as one of the robbers.

When their vehicle overturned Siyephu lost consciousness and only came to in Aurora Hospital, East London, where he remained till 8 August 2008. His spinal cord was damaged during the incident and he cannot now use the right side of his body properly.

Andile Nceka, who is employed by Fidelity, testified that on 25 June 2007 he went to the scene of the robbery on the Port St Johns road. There he found the Fidelity cash-in-transit vehicle lying on its side. The driver was Mr Yantolo.

Mr Siyephu was injured. Their firearms had been taken. The money that was stolen was R177 871.86. It was not recovered. The vehicle had special armoured plating to protect it. The damage to it cost R125 000 to repair.

Maliviwe Ngqukumba testified that he is a taxi owner. On 25 June 2007 accused 3 telephoned him and told him that his motor vehicle had broken down at Ntlaza Locality and that he wanted the witness to tow it back. The witness went to where accused 3's vehicle was. When he got there accused 2 and 3 and five other men got into his vehicle. They were carrying a bag. Accused 3 then told the witness to drive off. When they got to Misty Mount garage one of the men alighted there. They continued and stopped near Vuyani Hotel. There the young men alighted with the bag. The witness then saw that there were two rifles, or 'long guns', in the bag. The witness asked the accused why he did not let him tow his vehicle. Accused 3 then gave him R700. The witness then dropped accused 3 at Zimbane.

Inspector Soyiso Mjacu testified that on 25 June 2007 he went to the scene of a robbery on the Mthatha/Port St Johns road. There he took photographs of two vehicles – the overturned Fidelity cash-in-transit vehicle and a Toyota 4X4

vehicle – and also drew a map of the scene – Exhibits E1-24.

The witness then lifted finger prints from an empty Coca-Cola bottle that he found on the seat of the Toyota 4X4 vehicle – see Exhibit E14. He then checked the finger prints with the police file of finger prints and found one to be identical to Odwa Sithole, accused 3, and another to be identical to that of Luyanda Mabhongo. The witness eventually handed in his comparison of the finger print he had lifted from the bottle and that of accused 3 (Exhibit H), on which he had found 11 points of similarity – 7 being sufficient for proof of similarity. On being questioned by the court the witness could not state when or by whom the finger print on Exhibit H, which is alleged to be that of accused 3, was lifted or placed on the police data file.

The witness was subsequently recalled as a witness and he then handed in, as Exhibit L, a comparison of the finger print he had lifted from the bottle and that of accused 3 that the investigating officer had taken. On comparison he found 11 points of similarity.

As is stated above, Olwethu Feke testified that during July 2007 accused 1 arrived at his home carrying a bag which contained, *inter alia*, three firearms.

Count 14

The witness Madoda Mdikiza was warned in terms of section 204 of the Criminal Procedure Act, 51 of 1977. He testified that he knows accused 1, 2, 3 and 5. In July 2007 accused 2 telephoned the witness and said they must meet at Vuyani Hotel. When the witness went to the hotel he there met accused 2, 3 and 5 and three others – Sibusiso, Gary and Luja (Luyanda Mabhongo). There was a R1 rifle on the floor. Accused 4 was not there. They then conspired to

rob a Fidelity cash motor vehicle that had come from Mthatha. The witness' task was to look out for the vehicle when it left Engcobo and then to telephone accused 3.

The witness left the hotel and went to Ngcobo. When he saw the cash-in-transit vehicle leave Ngcobo, he telephoned accused 3, but because they were not in position to commit the robbery, it failed. The following day they again met at Vuyani Hotel. The witness, accused 1, 2 and 3 and Luja and Gary were present. Accused 2 then instructed the witness to fetch accused 3 at Payne Location. He then fetched accused 2 and 5 from Ikwezi. They were then planning to rob a vehicle on its way to Maclear.

They (the witness and accused 2, 3 and 5) then went to the witness' home to fetch a bag containing firearms. The witness then hitchhiked to Maclear to assist in that robbery. The next day the police came looking for him. On 14 August 2007 he handed himself over to the police.

In cross-examination it was put to the witness that in 2000 he and accused both attended Zwelethemba Technical College, King William's Town. The witness denied that he ever saw accused there. He also denied that he stole R10000 from the college.

Count 15

Nozizwe Gazi testified that on 9 July 2007 she parked her Mazda twin cab vehicle, registration number CXY 548 EC, in the yard of her home at 38 Maqhubela Street, Mbuqe Extension, and locked it with a gear lock. When she awoke the next morning the vehicle was gone. A week later she was informed that the vehicle had been found. She recovered it from the police. The gear

lock had been removed and the left front of the vehicle had been seriously damaged. She bought the vehicle, second hand, in 2003 for R68000 and it cost R3000 to repair the damage to it.

Counts 16 and 17

Andile Somkhebe (count 16) testified that in 2007 he was employed by Fidelity Cash Management as a driver. On 13 July he drove one of the company's green cash-in-transit vehicles from Mthatha to Tsolo. Lwandile Cengimbo was his crew member. Both of them were armed with 9 mm handguns. They collected money from the company's clients at Tsolo, and then proceeded to Maclear, where they banked the money at First National Bank and Standard Bank. From there they proceeded to Mount Fletcher where they collected more money, which they banked in Maclear. They then returned to Tsolo.

On the way the witness felt something bump his vehicle twice from behind. He then saw a white Mazda double cab. The witness's vehicle stopped and seven people alighted from the Mazda and fired shots at the witness' vehicle. They were armed with rifles and handguns. The witness then begged them to stop shooting. They then took the witness' and his crew's firearms and ordered them to lie down.

The robbers then stopped other vehicles and pushed the Fidelity vehicle, and tore open its top. They then demanded money from the witness, but found none. The robbers then stopped a bakkie, in which a male and a female were travelling. They forced them to get out of it and they drove away in that vehicle.

The witness lost a tooth and suffered a cut on his mouth in the attack, and he

was treated at St. Mary's Hospital, Mthatha.

The vehicle had bullet holes in its back door.

Somkhebe was subsequently recalled to the witness box and shown all the firearms that have been recovered. He identified Exhibit 11, a 9 mm Norinko pistol as his stolen firearm.

Ayanda Majeke testified that on 7 August 2007 accused 5 offered to sell the pistol, Exhibit 11, to him. He said that he had obtained it in a robbery and that he needed money to get away as his fellow robbers had been arrested. Later that day the police searched the motor vehicle in which he and accused 5 were passengers, and they found Exhibit 11 and another firearm in it. They were then arrested. In cross-examination it was put to Majeke that he was falsely implicating accused 5 because the latter had had a relationship with his girlfriend. This Majeke denied.

Attorney Bahle, who appears for accused 5, has submitted that it will be dangerous to place any reliance on Majeke's evidence. This is so because he is presently charged with similar counts to those that the accused was facing in this case. He intends turning State witness and is presently in the Police Protection Unit.

Furthermore, when Majeke was arrested he made a statement, Exhibit WW, he stated as follows:

“I admit the allegations against me, that’s page 10 M’Lord, of the statement. On the date, time, place in question, I got arrested by the police. During the search of the motor vehicle, one small

black bag, was opened by the police, and inside it, were two firearms. One belonging to me, and the other one belonged to Mthuthuzeli Sisilana, who was also arrested. my hand grenade, which was in my red bag – in my red handbag was also taken possession of by the police. We were later arrested. We were later detained at Central Police Station, Mthatha”.

In his evidence before this court Majeke maintained that the statement, Exhibit WW, was false and that he had made it to protect himself. Whilst testifying he also examined the two similar firearms, Exhibits 8 and 11, and stated that it was Exhibit 11 that accused 5 had offered him for sale. He identified it by certain scratch marks on it. Mr Bahle correctly contended that this was proof that Majeke had been in possession of Exhibit 11.

As there is a strong suspicion that Majeke is testifying to protect himself, and also due to improbabilities in his evidence, the court agrees with Mr Bahle that no reliance can be placed on his evidence.

Count 18

Ntombizodwa Jezile testified that on 13 July 2007 she was travelling from Mthatha to Ugie with Inspector Lungisa Madakwane of the South African Police Services, Ugie, in his Isuzu double cab, registration number CPS 331 EC. As they approached a large collection of people, a man approached them and pointed a rifle at them. He told them to alight from the vehicle. After they had done so Inspector Madakwane ran away. When he ran away the witness heard gun shots. A man then came and drove off in Inspector Madakwane's vehicle. It was subsequently recovered on the road between Qumbu and Tsolo.

There was a vehicle of Fidelity near to where this happened. People were pushing it.

Since this incident happened, Inspector Madakwane has been involved in a motor vehicle accident and he is now mentally disturbed.

There was no cross-examination of this witness.

19 to 21

The evidence proves that various accused were, during various of the offences, in possession of firearms.

Before Counsel for the State, Advocate Poswa, closed the case for the State, it was agreed between the parties that the evidence given by the following witnesses, who testified during the trials-within-a-trial, would be incorporated in, and form part of the evidence in the main case:

Lieutenant Colonel J.K. Tsoaranyane.

Captain L.S. Mahobe.

Captain N.S. Ndzendevu.

Captain L. Sigcu.

Captain B.A. Hanise.

Warrant Officer V. Maqubela.

Warrant Officer D. Qokoyi.

Warrant Officer M. Fose.

Warrant Officer Mancobe.

Warrant Officer B. Busakwe.

Ms J. Mboyana.

Copies of the court's judgments in the trials-within-a-trial in respect of the admissibility of confessions made by accused 1 and 2 (Annexure 1), and the pointing out and statements by accused 3, 4 and 5, respectively (Annexure 2), are attached hereto. When the court admitted the confessions and admissions by accused 1, 2 and 3 it did not realise how important that evidence would be in the final decision of the case. The confessions negate the alleged alibis that the accused raised in their evidence. A person who knows that he has an alibi that will exonerate him from blame, will not make a confession. The confessions therefore prove that the so-called alibis are simply another false fabrication by the accused.

In both trials-with-in-a-trial the evidence of the person who took the confession, or presided over the pointing out, has been considered in great detail. As is reflected in Annexure 1, the evidence of Lieutenant Colonel Tsoaranyane and Captain Mahobe were weighed in great detail against that of the accused, 1 and 2, respectively. The court came to the conclusion that the two police officers were being truthful when they testified that the accused had made their statements freely and voluntarily, and that the accused were untruthful when they said they had not made the confessions. Although the accused again in the main trial denied that they made the confessions, no new evidence has been led to induce the court to change the findings it made in Annexure 1. The court hereby confirms those findings. The confessions, which were naturally only admitted after the court had given judgment on their admissibility, both go into such detail, and reflect such personal knowledge of the offences, that it is obvious that they could only have been made by the participants in the actions they describe i.e. the accused persons. The contents of the confessions therefore support the court's findings that it was the accused who made the confessions.

The confession made by accused 1, Exhibit CCC, to Lieutenant Colonel Tsoaranyane on 20 July 2008, reads as follows:

“I do not remember the date and month when we committed an armed robbery in Willowvale. The people who were involved in it were K.K. Kgs, Sbu, Sakie, Zuks, Bongani, Prince Ors and myself. I know the nicknames of my friends only. On that particular day we left Mthatha with a mini truck to Willowvale with the intention to commit armed robbery at about 04.00. We arrived at Willowvale at about 07.00 not in town and parked the truck. We waited for the m/vehicle which was used by the Fidelity guards. No so long it appeared from another direction. We followed on foot and the mini truck followed driven by Sibusiso. Zuks and Oros entered the wholesale and waited for the security guards. The other group including myself waited outside. Security guards entered the wholesale. Sibusiso blocked the Fidelity guards m/vehicle by parking in front of it.

Kgs and I stood in front of the entrance observing. During that time Ors and Zuks came out with a plastic containing money. We ran into our mini truck and Sibusiso drove it. I am not familiar with Willowvale so I do not know even the place where we dropped the mini truck and ran into the forest.

We hide ourselves in the forest. We divided the money amongst ourselves. At about 16:00 we finished dividing the money. Each one of use received a sum of twenty one or twenty two thousand rand cash (R21000-00/R22000-00). We left the forest on foot. On our way we saw another m/vehicle coming. Prince was behind us. He tried to stop that m/vehicle and fired some shots and unfortunately he hit Zuks on the leg and fell down. I rushed to him and discovered that his leg was broken. Zuks and Prince stayed at the scene because he could not walk and we left them to organize transport.

We walked for a long distance looking for the main road using short cuts. We found the main road. Kgs had already phoned his friend unknown to me to come with a car to pick us. That guy arrived with a Toyota Hi-lux. I did not recognize the number plate.

He told us that he had no petrol and was not sure whether it will take us to Mthatha.

We were forced not to go back to pick up Zuks and Prince then we proceeded to Mthatha. We arrived in Mthatha and disperse in town.

The second armed robbery which I was involved took place in Tsolo. I do not remember the month and date but this year. Martin, Bongani, Sibusiso, Sakie, Geary and I went to Tsolo with a bakkie with the intention to rob Fedelity guards. We arrived at Tsolo but I do not know the name of locality. We waited for the Fedelity m/vehicle. I appeared and we followed it and we bumped it at the back. Sibusiso was the driver. Martin and I fell down during the collision. We followed on foot as they were still chasing the said m/vehicle.

On our way we met them coming back with another bakkie. We jumped into that bakkie and run away. We took a road which lead us to Qumbu. We went to Mthatha and they dropped at Sibangweni. No money was taken from Fedelity.

The third armed robbery took place in Port St Johns. I do not remember the date and month but this year. Geary, K.K., Sibusiso, Mtura, Oros, Sakie and I went to Port St Johns with the intention to rob Fedelity guards. We were using a Nissan bakkie.

We arrived in Port St Johns iu the afternoon but not in town. I do not know the name of the locality where we waited for the Fedelity guards. The Fedelity m/vehicle appeared and we chased it and Sakie bumped it at back and it rolled. We took the money in the combi and two fire arms from the security. During armed robbery other robbers were blocking the traffic. They hijacked one bakkie and run away with it to the forest. We dumped it in the forest. We divided the money in the forest. Each one of us received a sum of nineteen thousand (R19 000-00)

We footed up to Ntlaza Hospital where we hitch hiked. When we arrived at Mthatha we dispersed.

The fourth armed robbery took place in Tsolo. I do not remember the date during July this year we proceeded to Tsolo with the intention to rob the Fedelity guards. Sakie, K.K., Oros, Zola, Mtura and I went to Tsolo with a bakkie. We left the town towards Maclear where we waited for the Fedelity guards.

It appeared and we chased it and bumped at. They reduced speed and we fired some shots on the wheels and it stopped. We tried to rolled it and it did not capsized. We pushed it and it capsized. We tried to open it and all attempts were fruitless. Sakie bumped it and its door opened. When we checked inside there was a drop safe. We did not get money. Other robbers were blocking the road. They hijacked one bakkie and we jumped into it and run away. On the way we met police vehicle and they stopped us we managed to escape and run into the forest. They chased us but we managed to hide ourselves in the forest.

During the night we got out of the forest and walk until we find ourselves in the area of Qumbu. We hitchhiked one by one to Mthatha. Then the following Sunday the police arrived at my homestead. They went to my neighbour's premises where I was sleeping. I managed to escape.

I phoned Sakie informing him that the police were looking for me and I have managed to escape. I then went to Sakie who was in town at that time and we left for Port Shepstone

We stayed at Port Shepstone in Sakie's girlfriend. Police arrived at about 02:00 on the 18/07/2007 and arrested both of use. They also recovered two 9mm pistol.

The police questioned me about other firearms and I told them that they are at Mthatha. We proceeded to Mthatha and showed them the room where I hide them. The room belongs to my friend Olwetu. Two rifles and Uzi were recovered by the police. That is all I wish to say."

In this confession accused 1 admits that he was involved in counts 2 and 3, 7, 9 to 13 and 16 to 18. The confession corroborates the State witnesses who testified on those counts.

The confession made by accused 2 on 20 July 2007 to Captain Mahobe, Exhibit

DDD, reads as follows:

“During this year 2007 but I do not remember the date and month, we planned to rob money in Willowvale. We were nine in our number. It was myself, Odwa Sithole, K.K, who is also known as Luja, Cages - I do not know his real name, Sibusiso Jejane and Bongani Same. On this day of the robbery we used a KIA mini truck and we were all using that mini truck. The said truck was robbed at Kwezi Township on the day before this robbery. On this day in question we left Umtata at about 03h00 in the morning rushing to the pay station in Willowvale. We were all in possession of fire-arms.

(2)

We arrived in Willowvale at about 10h00 during the morning. The name of this place is called Emsengeni. On our arrival we waited for few minutes and the car from Fidelity which is transporting money arrived.

(3)

We then positioned ourselves and some of us entered the wholesale whilst others were standing outside. The group that entered the shop took the money from the security guards. I was among the group that was inside. After that we all ran away with our minitruck. We ran until we reached certain forest and that is where we shared the money. I do not know how much was that that amount but each person got a share of R24,000-00 as we were (nine) 9 in our number. After that we went to Umtata leaving the mini truck in the forest and we were fetched by one young man called Nofinish and he was driving a white Mazda bakkie. On our arrival we parted each other. That is all for the Willowvale case and now I am starting with one in Tsolo.

(4)

Again during July 2007 we planned another robbery. This robbery was to be done in Tsolo. We met at Esibangweni near Vuyani Hotel at a tavern. It was myself, Zola, Simthembile Zibi, K.K. who is also called Luja and Odwa Sithole. We agreed that we

must go and rob Fidelity security in Tsolo. We used a Mazda twin cab which was stolen at Mbuqe Extension by Sibusiso. It was on the 12/07/2007.

(5)

On 12/07/2007 at about 13h00 we left Umtata for Tsolo. We drove until we reached a certain locality but I do not know its name in Tsolo. On arrival in this locality we stopped and waited for the Fidelity guards car as we were aware that it was in that area. Within no time it appeared. We chased it and I hit it at the back as I was driving. After I hit it, it fell down on its side. We quickly went out with firearms. There were (3) three security guards in that Fidelity car. We pointed them and they fell down on their stomachs. We tried to open and after it opened we found that there was no money inside. Fire-arms were used and shots were fired but nobody got injured. After we did not get the money we left them there. I do not know what happened to them. That is all about Tsolo incident and I am now starting the last one which occurred in Port St Johns. It was also this year but I do not remember the date, but I am sure it was in June.

(6)

It was myself, Odwa Sithole, Simthembele Zibi, Sibusiso Jejane and Garry. We were using Toyota twin cab which was stolen from Grahamstown. We departed from Umtata at about 06h00 and we were going to Bizana for robbery which did not succeed because of visibility of police in that area at Bizana. Since we do not like to fight with police we decided to call off that Bizana robbery. On our way back we decided that we must rob Fidelity security in Port St Johns.

(7)

We drove past Port St Johns and on our way to Umtata before we reached Ntlaza Hospital we met the combi of Fidelity. We chased it and later collided with it and it fell on its side. There were three (3) security guards inside and we pointed them with firearms and started taking money. We took all the money that was there and left leaving the guards there not injured. We entered a certain farm known by Gary and we started

sharing money. Each person received R23,000-00 and we were six in our number. After we have shared the money we went back to Umtata. The above are only robberies that I know and that I was present when being committed. That is all I wish to say.”

So too, as can be seen in annexure 2, the court weighed up the evidence of Captain N.S. Ndzendevu against that of the accused 3, who denied the pointing out, and also that any statements had been made. The court found that the pointing out had been made freely and voluntarily, and was admissible. As there was, however, no proof that the statements by accused 4 and 5 had been made freely and voluntarily, they were held inadmissible as evidence.

Captain N.S. Ndzendevu, in whose presence accused 3 made the pointing out, testified that he and accused 3 boarded a vehicle driven by Constable M. Williams. He, Captain Ndzendevu, then recorded in a statement, Exhibit TT, what happened on 21 July 2007. In his evidence he confirmed that the content of Exhibit TT is correct.

Exhibit TT reads as follows

“At the office Constable Moosa from LCRC took photos of the suspect.

At 10h50 in the vehicle KM 87895 Constable Moosa took photo of the speedometer reading.

“We should drive to Willowvale. I am not in a position to direct you from here. It was my first time to go to that place. We drove in a gravel road. I do not know which gravel road was it. It was at night when we were driving in it. Just drive to Willowvale I will see the place we robbed.:

At 11h45 km reading 87981 stopped at Idutywa waiting for Constable Moosa putting petrol in the vehicle he is driving.

At 1153 left Idutywa.

At 12h15 km 88013 at Willowvale in the main street “Stop here: This is a wholesale

where myself, Sibusiso Jejane, Boyzit, Luyanda Mabhongo, Zuko Mabhongo, Kages, Bongani Same, Sakhumzi Saki Mvoko and Prince from Elliotdale robbed money from the security guards from Fidelity Guard Security Company. I can see this wholesale by its name Emsengeni.” Photo taken. At 12h20 “This is the spot where I was standing carrying an R4 rifle watching while my colleagues got into the Wholesale and robbed money. Zuko and Kages came out of the Wholesale carrying bags with money. We came here with a KIA mini truck white in colour that we robbed on the previous night at Kwezi Township in Umtata. After we finished the robbery we drove in the same truck to a certain gravel road until we abandoned the truck in that forest. We then shared the money in that forest – Each of us got about R24000-00. We stayed in that forest until it got dark. We then phoned an Nofinish who came to fetch us in Ford Courier van. We all drove to Umtata. Let us now drive to Port St Johns. I want to show you another place”. Photo taken.

At 12h35 left Willowvale.

At 13h45 km reading 88131 at Umtata Total Fuel Centre Constable (F) Williams buying food. I gave her money. I gave Odwa Sithole a take away of rice and been. I ate samp and beef. Const (F) Williams and the photographer bought themselves burgers. We ate in vehicle.

At 14h20 Finished eating. I informed the suspect Odwa Sithole of his right as they are contained in section 35 of the Constitution of the Republic of South Africa, Act 108 of 1996.

“I understand the right. I am still willing to show you some points. Let us go.”

At 14h27 left Total Fuel Centre.

“Drive to the direction of Port St Johns now”

At 14h57 km reading 88189 at the junction to Mantusini Clinic “Stop here. This is the junction where myself and my colleagues, Sakhumzi Saki Mvoko, Sibusiso Jejane, Luyanda Mabhongo, Gary from Port St Johns, Mthura or Mthuthuzeli and Boyzit were waiting for the vehicle from Fidelity Security Guard. The vehicle was to come from the direction of Port St Johns.

We waited there until it came at about 17h00. I cannot remember the date. It drove past us towards Umtata. We then followed it. We were driving in a Toyota double cab white in colour. The said vehicle was brought by Saki Mvoko and Sibusiso Jejane. They stolen it from Grahamstown. Let us drive back to the direction Umtata.” Photo taken

At 15h20 On the road to Umtata. “We were still following the Security Guard’s vehicle here”

At 15h35 km reading 88197

“Stop here. This is the spot where the vehicle of the security guards from Fidelity was bumped by the vehicle we were driving. The guards’ vehicle lost control and it lied on its side. I was armed with a a pistol. Mthura and Sbu took the money which was in plastic bags. We then robbed a Toyota van navy in colour from the people who stopped next to the scene. We drove in that Toyota to a certain gravel road. I was not in a position to show that junction. We drove until we dumped the vehicle in a forest. Each got about R26 000. When it was dark I phoned Nofinish to come and fetch us. Nofinish referred me to Maliviwe who came in a combi. We were then taken to Umtata. Let us drive to the direction of Maclear. I want to show you the third place.”

Photo was taken.

At 15h55 left the spot

At 16h20 km reading at Tsolo bought 4 cans of Coca Cola and serve all of us and we drank. I gave the suspect one can. No photo taken.

At 16h24 left Tsolo.

At 16h43 km 88322 at the National Road between Maclear and Tsolo near Ngcele Location.

“Stop. This is the spot where we hit the vehicle from Fidelity Security Company. It was myself, Mthura, Luyanda, Boyzit, Fuzile and Saki. We were driving in a Mazda Magnum van double cab which wed stolen from Kwezi Township few days before that day. We used it to bump the security vehicle until it fell on its side. We could not get money since two guards said they had no keys for the safe. We robbed an Isuzu double

cab from the man who stopped at the scene. We all drove in it until we dropped it at a certain gravel road. I do not know the gravel road. We walked to Qumbu the whole night. We then returned to Umtata per hikes. Let us go back to Umtata. I am going to show you the place where we robbed airtime cards at MTN at Umtata at Chattam Street.”

Photo taken

At 1659 left the spot back to Umtata

At 17h53 It is dark. We cannot proceed with the pointing out.

At 18h00 km reading 88398 back at the office. Const Moosa took photos of the naked body of the suspect.”

The abovementioned pointing out connects accused 3 to counts 2, 3, 4, 5, 9 to 13 and 16 to 18, and it corroborates the witnesses who testified on those counts.

The abovementioned evidence proves that all the offences specified in the charge sheet, save those mentioned in counts 1 and 6, have been committed, and all that remains for the court to do is to decide who committed the offences.

Count 1 refers to the robbery of a Hyundai mini-truck, registration number DNP375EC, from Loyiso Metu, who has not testified. Luyanda Mabhongo testified that he, accused 2, 3, 4, KG, Zuko Mabhongo and Prince went to Ikwezi. All were armed. When they saw a double cab motor vehicle parked next to a house, they entered the house, obtained the keys of the vehicle and left in it. When accused 3 said that the vehicle was not fit for the journey to Willowvale, they abandoned it near Ikwezi. Accused 3, Zuko and KG then alighted from their vehicle and a short while later telephoned those who stayed behind and told them that they had found a vehicle. This was evidently the mini-truck in which they travelled to Willowvale the next morning. There is no

direct evidence to whom the mini-truck belongs, nor how, or where, it was taken. The court could therefore make no findings on these issues, and all the accused were found not guilty and discharged on count 1 at the close of the State case.

There is no evidence on count 6 and all the accused were also found not guilty and discharged on that count at the close of the State case.

The court will now consider the evidence given by the five accused and their witnesses.

Case for Accused 1:

When accused 1 testified he reiterated his plea of not guilt and denied his involvement in any of the counts. He stated that he was in standard 9 when he left school in 2005. He then worked in a Chinese shop in Mthatha, till around May 2006. He knows all his co-accused.

He maintained that the first witness that wrongly inculpated him was Luyanda Mabhongo, who was a total stranger to him. He testified that the reason for Mabhongo doing so was that when all the accused were in prison, Mabhongo insisted that he and the other accused give him money to pay for his attorney, and also the Golf motor vehicle of accused 2. When they refused to do so, he decided to falsely inculpate them. Mabhongo had denied this allegation, which is highly improbable. Why would he, who had committed various crimes with his colleagues, suddenly turn against them. Far more reasonable is Mabhongo's evidence that he turned State witness because his conscience was worrying him. The fact that he lost a leg when being arrested must surely have had something to do with this decision. The evidence of accused 1 that Mabhongo

was a total stranger to him, whom he met for the first time in prison, makes the alleged reason for Mabhongo testifying against him even more improbable.

Accused 1, when cross-examining Nofinish Kobo, also maintained that Kobo had testified falsely against him because he had sold a vehicle to Kobo, who 'ran away' and did not pay for it. In his evidence, however, accused 1 stated that Kobo, after having made certain payments on the vehicle, could not make further payments on it and then returned it to the accused. Because accused 1 was slow in refunding to Kobo the payments he had already made, he testified against him. This Kobo denied.

This is such a flimsy so-called reason to have involved accused 1 in such serious crimes, that the court has no hesitation in rejecting it as false.

The next witness who accused 1 testified had testified false against him was Olwethu Feke, who testified that accused 1 brought a bag containing three firearms and magazines to his, Feke's, home and asked him to keep them. He and accused 1 then buried the firearms. Later the accused returned with Warrant Officer Mdepha, to whom he showed where the firearms were hidden.

Accused 1 stated that he knows Olwethu because he, the accused, had a relationship with his sister, from which a child was born. He denies that he took firearms to Olwethu, and also that he ever returned with Mdepha, or pointed out to Mdepha where to find the firearms. The latter testified that accused 1 had taken him to Olwethu's home and had shown him where the firearms were. Accused 1 does not know where Olwethu could have obtained the firearms, nor does he know how the police would have known about the firearms if he had not told them about them.

Accused 1 alleged that Olwethu had given false evidence against him because

he had denied paternity of his sister's child. The accused, however, admitted that there was no ill-feeling between him and Olwethu, and that Olwethu had come to see him in prison after he was arrested. This lack of animosity was confirmed by Feke's sister. Accused 1, however, alleged that Feke came to see him in prison: "To make sure that I (accused 1) am arrested." This alleged reason is simply ridiculous.

Olwethu made a good impression on the court when he testified. He told the court exactly what had happened and he at no stage tried to hide what he had done concerning the firearms that accused 1 brought to him. The court gained the impression that he was a young, unsophisticated man who was speaking the truth. His evidence is corroborated by that of Warrant Officer Mdepha, who testified that it was accused 1 who directed him to Feke's home, where the firearms were, and that he, accused 1, was present when they were found.

The court is therefore satisfied that Olwethu's evidence is the truth, and that the allegation by accused 1 that there was animosity between them is false. Olwethu's evidence must therefore be accepted and that of accused 1 rejected.

Accused 1 testified that the fourth witness who had testified falsely against him was Madoda Madikiza, who told the court that accused 1 was one of the conspirators in count 14. Accused 1 testified that Madikiza was a complete stranger to him and he does not know why he testified against him. He maintained that Madikiza's evidence is not true. Madikiza's evidence is corroborated by that of Luyanda Mbhongo.

The court is satisfied that accused 1 has been untruthful in his denial of the evidence of Luyanda Mbhongo, Olwethu Feke and Madoda Madikiza, and that the alleged reasons for them testifying against him, are clearly fabricated

untruths. This is simply another example of the accused in this case alleging that all the State witnesses who testified against them have purposely and wrongfully fabricated their false evidence. The untruthfulness of accused 1 in this respect is one of the main reasons why the court can place no reliance on his evidence and must reject it as false.

Accused 1 has also raised alibis to the various counts. He maintains that on 23 April 2007 (the day on which count 1 was committed), he proceeded to the High Court, Mthatha, in the morning. He then went to his workplace at a Chinese shop. On the next day, 24 April 2007 (the day on which counts 2 and 3 were committed) he went to his workplace and there requested to be allowed to visit a doctor as he was not feeling well. His supervisor suggested that because he was absent on the previous day, he obtain a medical certificate that confirmed that he had been to see a doctor. As he did not have enough money to see a doctor, he went to his sister who gave him the money. He then went to consult Dr Thutha in Sprigg Street, Mthatha, who, according to him, examined him and gave him a medical certificate, Exhibit JJJ, which laid him off sick for 24 April 2007. He did therefore not take part in the robbery at Msengeni Supermarket on that day; he was then at Dr Thutha's surgery. The evidence by Luyanda Mabhongo and Nofinish Kobo that he had taken part in the robbery is therefore false. So too is the confession, Exhibit CCC, in which he is alleged to have admitted that he was one of the persons who committed the robberies. He never made a confession and he was simply forced to sign Exhibit CCC after it had been written out.

The whole issue of the medical certificate, Exhibit JJJ, is shrouded in uncertainty and suspicion. Although the accused testified that he was examined by Dr Thutha, it was Dr Ntikinca who saw the patient and gave him the medical certificate. The court will expand later on the evidence of Dr Ntikinca.

What is, however, clear is that accused 1 has wrongly stated that Dr Thutha, and not Dr Ntकिनca, examined him. Is this because Dr Thutha's name is on the medical report? The court wonders if the accused ever went for an examination. Advocate Gabavana had to point out the accused to Dr Ntकिनca. It appears therefore that anyone could have gone for the examination and simply have said that he was accused 1.

Furthermore, the certificate that was obtained for the accused's employer was never handed to, or kept by him. Instead it has, since 2007, been kept in safe-keeping either in a file or bag by the accused's mother. The only reason one can find for this strange behaviour is that the certificate was being kept to be used at some future date for some specific purpose. Possibly to prove an alibi.

Accused 1 denied that he was a party to the robberies at Just Right, Mthatha (counts 4 and 5). He also testified that he did not see the box containing airtime vouchers that the police found in the room in which he was arrested in Margate. He did also not see the two firearms that were recovered there, one of which is connected to count 16.

On 25 June 2007, the day of the robbery on the Port St Johns road (counts 9-13), he was shopping in Mthatha for a birthday present for his younger brother, and he was not involved in the robbery at Just Right. It seems strange that the mother and the sister of the younger brother (who had just turned six years old), both of whom lived in Mthatha, did not buy the present for him and that the elder brother, the accused, had to do so.

He denied he was present when the conspiracy in count 14 was committed, and also when count 15 was committed

In respect of count 16 he testified that on the day of that offence he was assisting a person who was working on a motor car. In the afternoon his mother telephoned him and told him that his girlfriend was in labour. He then borrowed a vehicle and took her to hospital. This also seems strange in view of his evidence that he maintained that it was not his child.

As stated above, accused 1 denied that he made the confession, Exhibit CCC, in which he admitted in detail his involvement in counts 2, 3, 9 to 13, 14 and 16 to 18. He also averred that all the State witnesses who had implicated him in these counts, had been untruthful.

Accused 1 testified that the first time he told his Counsel about the medical certificate, which is surely a vital part of his alibis, was just before he gave evidence.

In cross-examination accused 1 repeated the alibis he had raised in his evidence-in-chief. When he was pressed on why the alibis were not put to Luyanda Mabhongo, Nofinish Kobo, or the police witnesses when they testified, some of whom testified twice, he alleged that he had not had sufficient opportunity to consult with his Counsel. This allegation by the accused is obviously false as the court record is replete with entries of how and when the court, at the request of the accused's Counsel, Advocate Gabavana, granted him adjournments to consult with his client. After every State witness had given his evidence-in-chief, the court adjourned the sitting to enable Counsel to consult with their clients. When an accused put up his hand, the court would stop the proceedings so that Counsel could consult with him. The court also arranged for Counsel and the accused to consult with one another in the courtroom during adjournments. And, lastly, the court arranged for such consultations at

Wellington Prison, Mthatha, before the accused testified.

Furthermore, if there had been the so-called alibi, that would surely have been the first thing the accused would have told his Counsel, Advocate Gabavana. He is an able and conscientious Counsel, who would then have put it to the State witnesses in cross-examination. As this was not done the court can only conclude that the whole question of the alibi was a false afterthought by the accused.

Accused 1 is an intelligent young man who has passed standard 9 at school. His evidence that he did not have sufficient opportunity to consult with his Counsel is not only false, but is also an example of his ability to fabricate an answer that he believes will meet the needs of the moment.

This so-called reason for the alibi not having been put to the accused is clearly false, and is simply further proof that no reliance whatsoever can be placed on the evidence of accused 1.

The court is also satisfied that he has fabricated the so-called reasons for the witnesses testifying against him. If he had told the court that he did not know why they testified against him, the court would have had to seriously consider that evidence. Instead, on each occasion he provides a highly improbable explanation for the witness' actions. As stated above, the court has not the slightest hesitation in rejecting those explanations as improbable and false.

The court therefore accepts that accused 1 was being untruthful in his evidence when he gave the reasons why Luyanda Mabhongo, Nofinish Kobo, Olwethu Feke and Madoda Madikiza testified against him. When his evidence is weighed against that of those witnesses, the court has no hesitation in accepting

their evidence as being truthful and rejecting his as false.

In his evidence accused 1 also denied that he made the confession, Exhibit CCC, to Lieutenant Colonel Tsoaranyane. The court has dealt with this aspect in detail in its judgment in the trial-within-a-trial, Annexure 1 hereto, and it does not intend repeating here its reasons for rejecting this denial by the accused. Nothing new has transpired in this respect during the trial proper, and the court here simply confirms and repeats the findings it made in Annexure 1, namely, that accused 1 made the confession and that he did so freely and voluntarily.

As set out above, there are four alibis that the court must consider. They relate to the whereabouts of accused 1 on :

- 1) 23 and 24 April 2007 (counts 1, 2 and 3 – Ikwezi and Willowvale);
- 2) 25 May 2007 (counts 4 and 5 – Just Right);
- 3) 24 June 2007 (counts 9 to 13 – Port St Johns road); and on
- 4) 13 July 2007 (counts 16 to 18 – Tsolo).

The witnesses who testified on these alibis for the defence were accused 1, the mother of accused 1, Mrs Z.P. Zibi, his sister, Ms B. Zibi, the doctor who issued the medical certificate Exhibit JJJ, Dr M. Ntकिनca, and Yoqa Qokweni, a panel beater.

When considering the alibis of accused 1 the court can mention the

undermentioned general facts

- 1) Seldom in its experience has the court heard so many falsehoods and untruths in a case as have been raised by the accused in this case.
- 2) It is indeed surprising that accused 1, who has told the court so many untruths in respect of the State witnesses, now wishes the court to accept that he is speaking the truth concerning his alleged alibis. Accused 1 has been untruthful about Lieutenant Colonel Tsoaranyane, who recorded his confession, and about Luyanda Mabhongo, Olwethu Feke and Madoda Madikiza, who testified against him. Although this might in itself be grounds to reject the alibis, the court will not do so, but will rather consider objectively all the evidence on the alibis.
- 3) Counsel for the State, Advocate Poswa, has submitted that the alibis are clearly a false afterthought that have only been raised very late in the trial, and were not put to the State witnesses. Accused 1 maintains that the reason for them being raised so late in the trial was because he could not consult sufficiently with his advocate, which statement the court has found to be a blatant untruth. If the alibis were true, the first thing the accused would have said to his Counsel would have been: "But I was not there on that day. I was at so and so." The court must therefore agree with this submission by Advocate Poswa that the alibis are an afterthought.
- 4) A further factor that substantiates the submission in (3) above, is that no mention was made of the alibis during the trial-within-a-trial. If they were then known they would surely have been raised as they would have been a powerful factor to prove that the accused did not

make the confession.

- 5) If the alibis were the truth, accused 1 would not have made the confession, Exhibit CCC. The two can simply not co-exist; if there was an alibi, he would not have made the confession. The court found in the trial-within-a-trial, Annexure 1, that not only did accused 1 make the confession, but also that he did so freely and voluntarily. The evidence of the alibis must therefore be false.
- 6) The Court has found that the State witnesses, Luyanda Mabhongo, Nofinish Kobo, Olwethu Feke and Madoda Madikiza were sound and truthful witnesses and that their evidence negates the alibis. The so-called alibis were never put to these witnesses in cross-examination. All that was put to Luyanda Mabhongo was, at p.259: “Accused No.1 will testify that he was sick on 24 April 2007”.
- 7) The court has found that accused 1 has been an untruthful witness and his evidence in respect of alibis must be rejected as false.
- 8) In addition to being poor witnesses, both the mother and sister of accused 1 are naturally intent on keeping him out of prison. Their evidence must therefore be viewed with suspicion,

The court will now consider the evidence of the witnesses who testified about the alibis, other than that of accused 1, which has already been dealt with above.

Mrs Z.P. Zibi, the mother of accused 1, testified that she is very concerned about the future of her son, accused 1.

She also testified that after accused 1 awoke on the morning of 23 April 2007 (count 1 – Ikwezi), he told the witness that he was going to attend a case he had in the High Court, Mthatha. When he returned, he said he was not feeling well and he slept. The witness does not know where accused 1 was on that day.

On the following day, 24 April 2007, (count 2 and 3 – Msengeni Supermarket, Willowvale) the witness advised accused 1 to see a doctor. She requested his sister to give him money so that he could do so. He left in the morning and came back in the afternoon, with the medical certificate, Exhibit JJJ. The witness believes, due to the medical certificate, that he went to see a doctor on 24 April 2007.

She testified that the medical certificate was not handed to her son's employer, but instead kept by her on her person since 2007. This latter statement seems palpably false and is in fact contradicted by the evidence of her daughter, who testified that the certificate was kept in a file at their home. It is noteworthy that the employer was not called to testify on this issue.

The witness does not know where accused 1 was on 25 May 2007 (counts 4 and 5 – Just Right, Mthatha),

On 24 June 2007, (counts 9-13 – Port St Johns road) the witness had a mini-party for her youngest son, Sive Zibi, who was born on 25 June 2001. On the following day she sent accused 1 to buy a birthday present for Sive. He did so and when she came back from work on that day the present was there. She does not know when accused 1 left home on that day, nor when he came back. None of those at the party was called to testify.

When cross-examined this witness told blatant untruths. In the first instance she

testified that when she was told to come to court, she was not told what she would testify about. She never consulted with accused 1's legal representative, Advocate Gabavana, before she testified. She met him at court, but they only greeted one another. It came as a surprise to her when she heard in the witness box what she had to testify about. The court knows that Advocate Gabavana is a conscientious practitioner, who, before every witness he called, requested time to consult with that witness. The evidence that he called this witness to testify without first having precognised her, and that she was never told what she would testify about, is so improbable that it is rejected out of hand.

The next improbable evidence the witness gave was that since the police told her that her son was wanted for murder, although she visited him often in prison, she never asked him why he was detained. Once again, this is so improbable as to be totally unacceptable.

Then she testified that despite her son having been in custody for four years, she does not know if he is facing serious charges.

Her evidence about why accused 1 was sent to buy a birthday present for a six-year-old boy, is also unimpressive. When asked why she, the mother, did not buy the present, she replied that she did not have enough money to do so. She did, however, have enough money to hold a party, and her son enough to buy the present. Her daughter also had money. Not only does it appear that the witness is being untruthful in this respect, but the whole question of a single man having to buy a birthday present for a six-year-old boy, whose mother and adult sister are available to do so, seems fraught with improbabilities. So too is the fact that the birthday present was only bought on the day after the birthday party was held.

The most glaring defect in the witness' evidence, however, is that she was not told to bring the medical certificate, Exhibit JJJ, when she came to testify at court. She testified that she has always, since 2007, carried the certificate with her. Wherever she went, she carried it with her; even when she went to work or to do shopping. Not only is this evidence ridiculous, but it is also contrary to that of accused 1, who testified that the witness kept the certificate in her file. Her evidence in this respect is totally unacceptable.

The unsatisfactory nature of this witness' evidence, coupled with her obvious desire to protect accused 1, leaves the court no option but to reject her evidence.

Ms Babalwa Zibi, the sister of accused 1, is 26 years old.

She testified that on 23 April 2007 accused 1 attended a court case in the High Court, Mthatha.

On the following day, 24 April 2007 (counts 2 and 3), she gave accused 1 money to go to a doctor. He returned and showed her a medical certificate and the medication he had been given. This is rather surprising because Dr Ntikinca testified that he did not give the patient any medication. She later saw the certificate in a file at their home.

On 24 June 2007 they had a birthday braai for Sive, and on the following day 25 June 2007 (counts 9 to 13) accused 1 was sent to buy a birthday present for Sive. The witness was at work during the day, but when she returned she saw that accused 1 had bought the birthday present.

The witness testified that she has on many occasions attended this court to listen to this case. She never told the police that accused 1 was not in Willowvale on 24 April 2007.

The witness does not know about the robberies on 25 June 2007 or 13 July 2007.

Dr Mawethu Ntकिनca is a medical doctor practising in partnership with Dr Thutha at 45 Sprigg Street, Mthatha. He testified that because the medical certificate, Exhibit JJJ is written in his handwriting, he must have issued it. It reads as follows:

Dr. M.L. Thutha & Dr. M. Ntकिनca

Medical Certificate

I, the undersigned, hereby certify that

Zibi Simthembile

was examined by me on

#24-04-07

and according to my knowledge I was informed he was unfit to work

from 24-04-07 to 24-04-07

due to illness/operation/injury

#Backache

He will resume duty on -----

Dr. M.L. Thutha

Signed Dr. M. Ntकिनca

Signature

24-04-07

Date

Dr Ntकिनca was a poor witness as he would simply not answer the questions put to him. When asked what happened when he examined the patient mentioned in the medical certificate, he would invariable answer by saying what normally happens. He does not remember what time he saw the patient, for how long he examined the patient, what treatment he gave the patient, or where he handed the medical certificate to the patient. It is obvious, although not surprising, that the witness does not remember anything about how, when, or to whom he issued the certificate. He testified that he saw the patient for the first time on that day. One wonders how he remembers that. The next time he saw him was when the Counsel of accused 1 pointed him out to him at court. If that had not been done, it is obvious that the witness would not have recognized him.

It is clear that the witness does not remember anything that happened on that day, and that he cannot recognize the person he examined. He could have examined anyone who gave his name as Simthembile Zibi.

The most disturbing factor, however, is that the witness signed the certificate under a stamp that gives the name of his partner only. If the witness sees nothing wrong issuing a certificate with this blatant falsehood, could he not also have issued a certificate with a false date on it?

There are also certain disconcerting aspects about the evidence of Dr Ntकिनca, who was called to the witness box on two occasions. When the witness testified on the first occasion it appeared from his evidence that he had neither examined, nor treated the patient for specifically back ache, and that he granted the medical certificate simply on what the patient had told him. He then booked him off for a day. He also gave him no medication. The witness could not explain certain aspects of the certificate, especially what the hash on it

represented.

As the court was concerned how a medical practitioner could issue a medical certificate without having examined the patient, it at a latter stage recalled Dr Ntकिनca to the witness box. The court also wished to inform the doctor that it would send a copy of his evidence and judgment to the Board for Professional and Dental Practitioners, and that he could add whatever evidence he wished before it did so.

On being recalled to the witness box Dr Ntकिनca did a volte-face on his previous evidence. He stated that he had examined the patient before he gave him the medical certificate.

When the court weighs up the evidence of Dr Ntकिनca against that of Luyanda Mabhongo, Nofinish Kobo and the confession of accused 1, it comes to the conclusion that the doctor must be mistaken. If he examined accused 1 and gave him a medical certificate, that did not occur on 24 April 2007; if he examined someone on that day, it was not accused 1.

The court has therefore concluded that due the evasiveness of Dr Ntकिनca in the witness box, the contradictions and general uncertainty of his evidence, and the evidence that contradicts it, no reliance can be placed on his evidence. As is stated above, his evidence is rejected and that of the witness and accused, who have stated that the accused was partaking in a robbery on that day, is accepted.

Yaga Qokweni is a panel beater with a workshop at Esibangweni. He testified that in July 2007 accused 1 came to him and requested to assist him in his work. On a certain day, at about 17h00, accused 1 received a telephone call from his mother saying that his girlfriend was in labour and that he must take

her to hospital. Accused 1 then took the witness' motor vehicle and drove away. He returned with the vehicle the next morning and later told the witness that his girlfriend had given birth.

In cross-examination the witness contradicted himself. He told the court that when accused 1 returned he did not tell him about his girlfriend. Later he stated that when accused 1 returned, he did tell him about her. Then he testified that when he went to visit accused 1 in prison, he did not tell him why he was arrested. Later he testified that accused 1 told him that he was arrested for robbery.

When the court enquired why he was making these contradictory statements, he stated that it was because he did not recall what had happened.

He does not recall the date on which he gave accused 1 the vehicle to fetch his girlfriend. In fact, in cross-examination the witness became totally confused as to when accused 1 came to him and when he took the motor vehicle.

This witness' evidence is so contradictory, vague and uncertain that it would be dangerous to place any reliance on it.

Sinayo Y. Feke testified that she is the sister of Olwethu Feke. She had a relationship with accused 1 from which a child, Siphosethu Feke, was born on 13 July 2007.

Accused 1 is the father of the child, but before the child was born he denied paternity. She never asked him why he denied paternity. All he said was that he was not the father. She did have a relationship with another man before the child was born.

On 13 July 2007 accused 1 took her to a clinic at Ngangelizwe. At first she testified that he took her to a hospital, but then she changed that to a clinic.

Accused 1 remained with her all night at the clinic, and returned home with her next morning. All this evidence is highly improbable if, as the witness contends, accused 1 denied that he was the father of the child.

She testified that Olwethu had lied when he said accused 1 had never denied paternity of the child.

There are many strange aspects about this witness' evidence. Why would accused 1 have taken her to hospital and stayed there with her all night if it were not his child? Why would she not have asked him why he denied paternity? Why would she then have testified for him? Far more realistic and probable is Olwethu's evidence that accused never denied paternity.

The court returns to the question: If this evidence is true, why would accused 1 have confessed to his involvement in the crime (counts 16 to 18) on that day? His confession simply destroys the veracity of the alibi.

The next witness that accused 1 called was M. Phuza, who repairs vehicles at his home. He knows accused 1 and Nofinish Kobo. Accused told him that he had sold a vehicle to Nofinish and that Nofinish was not paying him. He does not know if accused 1 got the vehicle back from Nofinish. He knows that Nofinish had a Mazda 323. It does not appear that this witness' evidence takes the case any further.

The court has come to the conclusion that the evidence of the witnesses who

testified to the alibis cannot be accepted because they were either poor witnesses or so closely related to accused 1 that they are clearly biased in his favour. The court therefore finds that the evidence itself does not prove or substantiate that there is a reasonable possibility that the alibis occurred.

As the court may have erred in rejecting out of hand the evidence about the alibis, it will weigh up that evidence against the evidence which connects accused 1 to the various offences, and decide which is the truth.

The evidence that must be considered when deciding the truth of the alibis raised by accused 1 is the following:

- a) The evidence of Luyanda Mabhongo, whom the court has found to be an excellent witness, that implicated accused 1 in counts 2 to 5 and 9 to 19.
- b) The evidence of Nofinish Kobo, which corroborated that of Luyanda Mabhongo on counts 2 and 3.
- c) The evidence of Olwethu Feke, which proves that accused 1 was in possession of firearms and magazines.
- d) The confession, Exhibit CCC, made by accused 1 in which he confirms his participation in counts 2, 3, 9, 10, 11, 12, 13, 16, 17, 18, and possession of firearms and ammunition (19-21).
- e) The late stage at which the alibis were raised.
- f) The airtime vouchers that were found in the room where accused 1

was arrested, which connect him to counts 4 and 5.

- g) The firearms that were found in the vehicle at Margate, which connect accused 1 to count 16.

When the abovementioned evidence is weighed against that of the alibis, the court is satisfied that the latter is false and that there is no reasonable possibility of it being true. Especially the confession made by accused 1 negates totally the existence of any alibi.

The court therefore rejects the evidence of the so-called alibis as being untruthful and false.

Another witness called by accused 1 was Zuko Mabhongo, whose nickname is Zuks, who is a clan brother of the State witness Luyanda Mabhongo – their grandfathers were brothers.

He was arrested on 14 July 2007 and he is appearing in the Regional Court, Butterworth on similar charges to those in this court.

Zuko was a shockingly poor witness. He not only contradicted himself on numerous aspects, but also repeatedly failed to answer the questions that were put to him. Under cross-examination his Counsel, Advocate Gabavana, repeatedly objected to simple and straight forward questions that were being put to him. It was obvious that Gabavana was attempting to assist the witness. These unnecessary interjections became so frequent that the court had to reprimand Advocate Gabavana.

The witness testified that Luyanda said he would exclude the witness from his

evidence if he paid him R3000. This was the second or third reason that the court had heard for the alleged payment of the R3000. At first the witness made no mention of any other reason for the payment of the R3000. Later his evidence became so confused and contradictory that the court does not know what his evidence boils down to. It does not know what the threat, according to the witness, was and whether it was made to him or to anyone else.

He knows that Luyanda will testify in the case against him.

During the evening of 24 April 2007 he was in the vicinity of Elliotdale (Xhora), which is near Willowvale. When driving home his vehicle was stopped and he was then shot in the leg by robbers. He was then taken by ambulance to Butterworth Hospital, and then later to Frere Hospital, East London. Still later he was taken by Luyanda to Kokstad Hospital.

He testified that there is no animosity between him and Luyanda. This is supported by the fact that it was Luyanda who took him to Kokstad Hospital.

The witness contends that when Luyanda testified that he, the witness, was one of the robbers who robbed Msengeni Supermarket on 24 April 2007, and that he was there accidentally shot, he was being untruthful. It was sheer coincidence that he was shot in the same area on the same night.

It is not surprising that Zuko disputes the evidence that Luyanda has given in this court, because it not only implicates him in the robberies, but will also be repeated when Luyanda testifies against him in Butterworth. The witness' evidence was simply a precursor to protect himself in his own trial.

This witness was the antithesis of Luyanda in the witness box. Whereas

Luyanda was an excellent witness, Zuko was a shockingly poor witness. Due to this fact, and the contradictions and improbabilities in his evidence, the court has no hesitation in accepting that of Luyanda, and rejecting his as false.

The court therefore accepts as true the evidence of the State witnesses who testified against accused 1, and rejects as false the evidence of accused 1 and his witnesses.

Case of accused 2:

When accused 2, Sakhumzi Mvoko, testified he came across as a very confident young man who appeared to believe that he could handle with ease not only all the questions he was asked, but also those who were questioning him. He at times appeared arrogant. He was, in fact, a poor witness. He would not give straight-forward answers to simple questions, but invariably went into a long and unnecessary explanation. The court will, however, due to the serious charges against the accused, not hold his poor showing as a witness against him, but rather consider the content of his evidence, and on that decide its veracity.

Accused 2 testified that he was not present when the robberies were committed at Msengeni Supermarket in Willowvale on 24 April 2007 (counts 2 and 3). He had gone to visit his father in Lady Frere on 19 April 2007, and returned to Mthatha, where he lived, on 24 April 2007.,

He does not know where he was on 25 May 2007; the day on which the robberies were committed at Just Right in Mthatha (counts 4 and 5), but denies that he was present at, or involved in, those robberies. He also denies that Warrant Officer Mdepha found a box containing air time vouchers in the room

in Margate where he and accused 1 were arrested.

The accused does not know where he was on 25 June 2007, but denies any involvement in the assaults and robberies that were committed on that day (counts 9 to 13). He also denies that he was a party to the conspiracy to rob a Fidelity Cash Vehicle, which was concluded at Vuyani Hotel during July 2007 (count 14). So too does he deny involvement in the robberies on 9 July 2007 (count 15) and those on 13 July 2007 (counts 16 to 18). He was never in possession of any firearms (counts 19 to 21).

The accused's defence on counts 2 and 3 is an alibi, and on the remaining counts that the witnesses who implicated him have all, for this or that reason, told falsehood against him. Those witnesses are Luyanda Mabhongo (counts 2 to 5, 9 to 18 and 19, 20 or 21); Nofinish Kobo (counts 2 and 3); Kusasa Yantolo and Maliviwe Ngqukumba (counts 9 to 13) and Madoda Madikiza (count 14).

The court will deal with each of the abovementioned counts; the witnesses who implicated accused 2 in them, and the reason the accused gives for them having testified falsely against him.

The evidence of the accused and his witnesses of an alibi in respect of counts 2 and 3 is, for the following reasons, clearly false:

- (1) During July 2007 accused 2 made the confession, Exhibit DDD, in which he set out in detail his involvement in, inter alia, counts 2 and 3. The court has found that the confession was made freely and voluntarily, and without any undue influence – see Annexure I hereto. Once the confession was handed in as evidence the detail therein clearly vindicated the court's finding on it. No person who was not personally involved in

the events could have repeated such detail.

- 2) The confession and an alibi cannot co-exist. If there had been an alibi, the accused would not have made the confession.
- 3) Luyanda Mabhongo, whom the court found to be a good witness, testified that accused 2 was one of the robbers.
- 4) Nofinish Kobo testified that he picked up accused 1, 2 and 3 after the robbery.
- 5) The accused's father, who was a poor witness, was clearly being untruthful and attempting to assist his son when he testified about the so-called alibi.
- 6) The so-called alibi was not put in cross-examination to any of the State witnesses, nor was it mentioned in the trial-within-a-trial. It was obviously an afterthought.
- 7) The court therefore has no hesitation in rejecting the evidence of the so-called alibi, and accepting the evidence of the abovementioned State witnesses, who implicated accused 2 on counts 2 and 3.

Luyanda Mabhongo testified that accused 2 took part in the robberies on 25 May 2007 at Just Right, Mthatha (counts 4 and 5). Warrant Officer Mdepha testified that he found the stolen airtime vouchers, which were later identified by Mahommed Waheed, in the room in Margate where he arrested accused 1 and 2.

Accused 2 testified that Luyanda Mabhongo was a total stranger to him, and that the first time he met him was in prison. There, according to the accused, Mabhongo demanded a motor vehicle from him. When the accused refused to give him a motor vehicle, he decided to implicate the accused on the various counts. The accused could give no explanation for this strange behaviour by Mabhongo.

This evidence of accused 2 borders on the farcical, and it is rejected out of hand. Why would Mabhongo, a total stranger, demand a motor vehicle from him and then implicate him in the robberies? Furthermore, if Mabhongo was intent on doing so, why did he implicate the accused on only certain of the counts, and not on all the counts?

The court therefore has no hesitation in rejecting the accused's evidence on counts 4 and 5, and accepting that of Mabhongo and Mdepha.

Accused 2 testified that he did not know Kusasa Yantolo, who identified him as being one of the robbers in counts 9 to 13. The accused testified that on the day that Yantolo testified, when he and the other accused went to the toilet, the prosecutor, Advocate Poswa, and Warrant Officer Mdepha were standing with Yantolo outside the waiting-room for witnesses. Poswa and Mdepha then pointed out accused 2 to Yantolo.

Yantolo denied that he ever left the courtroom on that day.

What makes this evidence by accused 2 improbable is that Poswa never asked the witness, whilst he was in the witness box, if he could identify any of the robbers. It was the court that asked him if he could do so, and he then pointed out accused 2. The court therefore has no hesitation in rejecting the

accused's version of the alleged pointing out, and rather accepting Yantolo's identification of accused 2 as one of the robbers as being genuine.

Accused 2 also testified that he did not know Maliviwe Ngukumbana, an independent witness who fetched accused 2 and 3 on the night that counts 9 to 13 were committed.

The court has no hesitation in rejecting the accused's evidence on the these counts, and accepting the evidence of Mabhongo and Yantolo, who identified accused 2 as one of the robbers, and that of Ngqukumana, who fetched him after the robbery.

The accused could also give no reason why the witness Madoda Madikiza testified that he was one of the conspirators in count 14.

Luyanda Mabhongo has proved that accused 2 was in possession of firearms and ammunition (counts 20 or 21), and he has not produced licences to possess those items.

It is indeed startling to suggest that Luyanda Mabhongo, Nofinish Kobo, Kusasa Yantolo, Maliviwe Ngqukumana and Madoda Madikiza, all of whom were strangers to accused 2, had for no reason, or the alleged flimsiest of reasons, testified against him. The court finds these allegations so improbable that it has no hesitation in rejecting the evidence of accused 2 and his witnesses, and accepting that of the aforesaid State witness.

It therefore finds that the evidence proves that accused 2 committed, with others, also the offences set out in counts 4 and 5, and he is convicted also on those two counts.

The court wishes to stress at this stage that it is not incumbent on an accused person to satisfy the court why a State witness has testified falsely. If, however, an accused person does not know of any reasons why a witness gave false evidence, and there appears to the court to be no reason why he should have done so, then it becomes highly improbable that his evidence is false, and the court can find that it is indeed not false

Evidence of accused 3

When accused 3, Odwa Sithole, testified he confirmed his plea of not guilty on all the counts and stated that all the witnesses who had testified against him had given false evidence. He then gave reasons why each witness had done so. As has been stated above, it is not necessary that an accused person furnish reasons why a State witness has given false evidence, but if he does so, the court is entitled to consider the validity of such reasons.

In the case of accused 3 the court has, due to the futility of his denial of the obvious, e.g. denial of his finger prints discovered by an expert, and the improbability of the reasons he has given for the various witnesses testifying against him, come to the conclusion that he is being untruthful and simply manufacturing evidence in an attempt to save his own skin. The court has therefore decided to reject in toto the evidence of accused 3.

The first witness that accused 3 contended had given false evidence against him was Luyanda Mabhongo, who testified that the accused had taken part in the offences set out in counts 9 to 18, and 20 and 21.

Accused 3 testified that whilst he and Luyanda Mabhongo were in the police cells the latter said to him that if did not want to be implicated in the offences he

should pay Mabhongo money, so that he could obtain an attorney. The accused refused to do so and that is why, according to him, Mabhongo gave false evidence against him. This so-called reason for Mabhongo giving false evidence is so improbable as to be rejected out of hand. What further negates this so-called reason is that Mabhongo had already made a confession in which he had implicated accused 3 and others in the offences. Furthermore, Mabhongo did not implicate accused 3 on all, but only on certain of the counts.

The next witness whose evidence accused 3 maintained was false, was Nofinish Kobo, who testified on counts 2 and 3. He testified that on 23 April 2007 accused 3 telephoned him and requested that he take accused 3 and others on an inspection to Willowvale. This Kobo did, and on the next day, at the request of the accused, he went to Willowvale and informed accused 3 by telephone when the cash-in-transit vehicle approached.

Accused 3 stated that Kobo was a complete stranger to him and he presumes that he gave false evidence against because he believes that people in the taxi industry do that kind of thing. He knows of no other reasons why Kobo should have testified falsely against him.

This so-called reason for Kobo giving false evidence is ridiculous, and it is rejected.

Mbuyiselo Xishibana corroborated the evidence of Luyanda Mabhongo that accused 3 was one of the robbers on counts 4 and 5. He identified accused 3 as one of the persons who had robbed him. Accused 3 denied that the witness had seen him at the robbery.

These witnesses evidence is also corroborated by the police evidence that

airtime vouchers were found in the possession of accused 3 in Cape Town. Accused 3 contends that Mbuyiselo identified him because he heard about him in the media.

Luyanda testified that accused 3 was one of the perpetrators of counts 9 to 13. This evidence was substantiated by the finger-print expert, Captain Mjacu, who lifted the finger-print of accused 3 from an empty Coca-Cola bottle that was in the robbers' vehicle. All that accused 3 could say to this evidence was that his finger-print was not found on the bottle. This contention, in view of the overwhelming and scientific evidence that it was found on the bottle, is simply ridiculous.

Accused 3 also denied the truth of the evidence of Maliviwe Ngqukumba, a complete stranger to him, who testified that on the night of the offences in counts 9 to 13, accused 3 telephoned him to pick him and accused 2 up from the vicinity of the crimes.

The accused does not know why Maliviwe testified falsely against him, but once again presumes that he did so because "members of the taxi rank do this kind of thing."

Accused 3 testified that he saw Madoda Madikiza, who corroborated Mabhongo's evidence that accused 3 was one of the conspirators on count 14, for the first time when he testified in court. The accused does not know why he, a complete stranger, testified against him.

Accused 3 knows nothing about counts 15, or 16 to 18. He also denies his guilt on counts 19 to 21.

The accused also denied that he pointed out anything to Captain Ndzendevu and Constable Williams, and that their evidence that he did is so false.

The abovementioned State witnesses, Luyanda Mabhongo, Nofinish Kobo, Mbulelo Xishimbana, Captain Mjacu, Maliviwe Ngqukumba, and Captain Ndzendevu, all made a good impression on the court when they testified, and there is no reason to reject their evidence. The court therefore, for that reason and because it rejects the so-called reasons given by accused 3 why the witnesses testified against him, accepts the evidence of the State witnesses and rejects the denial of that evidence by accused 3.

Accused 3 will therefore be convicted on counts 2-5, 9-18, and 20-21.

Evidence of accused 4

Accused 4, Bongani Same, testified that on 2 June 2007, whilst working on a Kombi motor vehicle, it fell on and fractured his leg. He was taken to various hospitals.

He added that on 14 July 2007 he was sleeping with his girl friend, Unathi Madyibi, in a bed in his room at Bhongweni Township in Kokstad. Gcobani Mabhongani was sleeping on the floor next to the accused's bed.

At about 12 p.m. Warrant Officer Mdepha and other policemen came to the room and questioned the three occupants. In his evidence Mdepha at first stated that only the accused and his girl friend were in the room, but later he corrected his evidence and stated that there was also a third person in the room.

Mdepha stated that he found a .38 pistol under the accused's pillow. It was put

to Mdepha that he had found the pistol under the bed.

Accused 4 denied that the pistol belonged to him. He testified that it was found under the bed and that it could have been the property of Gcobani. As this is a reasonably possibility the court must give the accused the benefit of the doubt and find that it has not been proved beyond reasonable doubt that accused 4 was in possession of the firearm.

Accused 4 denies the evidence of Luyanda Mabhongo, who testified that accused 4 was involved in only the robberies referred to in counts 1 to 3. As all the accused have been acquitted on count 1, the court need deal, in respect of accused 4, only with counts 2, 3, 20 and 21.

Mabhongo testified that on 24 April 2007 he and accused 1, 2, 3 and 4, and others, went to the Msengeni Supermarket and robbed it and the security guards who were there. Accused 4 was armed with a .38 pistol and he gave Mabhongo .38 bullets. Mabhongo stated specifically that accused 4 was not present at any of the other robberies.

Luyanda Mabhongo was a total stranger to accused 4, who met him for the first time when they were incarcerated in the cells.

Accused 4 testified that in the cells Mabhongo told him that the police said that he should admit his guilt and then ‘incriminate’ the other accused. He also told accused 4 that if he and the other accused did not each pay him R3000, he would implicate them in the offences. He, accused 4, refused to do so and he believes that is why Mabhongo gave false evidence against him.

This evidence by accused 4 is not only highly improbable, but there is also the

following evidence that refutes it. It was not put to Mabhongo in his cross-examination. Why would a total stranger make demands of this nature? If it were true, why would Mabhongo have implicated accused 4 in only some, and not all the offences? Furthermore, Mabhongo had already made a confession to the police in which he had implicated accused 4 in counts 2 and 3?

It seems that all the accused have together concocted this so-called reason for Mabhongo's testimony against them. The version has grown as the trial has proceeded. At one stage only a motor vehicle was demanded, then a motor vehicle and R3000 was demanded; then R3000 was demanded from each of the accused. The latest edition to the so-called threat is that the police told Mabhongo to incriminate the other accused, and that R3000 was demanded from each of the accused.

The court therefore finds that the so-called reason given by accused 4 for Mabhongo testifying against him is false and it is rejected.

Luyanda Mabhongo was an impressive witness and his evidence is accepted and that of accused 4 is rejected. He will therefore be convicted on counts 2, 3, 20 and 21.

Evidence of accused 5

Accused 5, Mthuthuzeli Sisilana, testified that Luyanda Mabhongo gave false evidence when he testified that accused 5 had taken part in the offences set out in counts 9 to 18 and 20 and 21. Mabhongo was a total stranger to accused 5, who met him for the first time after they both had been arrested and were in prison. It was then that Mabhongo demanded R3000 from the accused, failing which he would implicate him in the various offences. The accused did not pay

Mabhongo any money, and he believes that is why Mabhongo gave false evidence against him.

As has been stated above, this so-called reason for giving false evidence is so improbable that the court has rejected it. Why would a total stranger make such demands and then give false evidence? If the threat were true, why did Mabhongo implicate accused 5 on only certain, and not all the counts? The fact that Mabhongo had already made a confession that involved accused 5 also makes the so-called threat highly improbable.

Luyanda Mabhongo's evidence is corroborated by the evidence of Warrant Officer Mdepha, who testified that he found the firearm, Exhibit 11, in a motor vehicle in which accused 5 was a passenger. As is stated above, Andile Somkhebe has testified that Exhibit 11 was taken from him in the robbery referred to in count 16.

The court has already found that no reliance can be placed on the evidence of Ayanda Majeke, who testified that accused 5 was in possession of Exhibit 11, and that he offered it to him sale.

Accused 5 has testified that he believes that Ayanda Majeke, whose evidence he maintains is false, testified against him because he had an affair with Ayanda's girlfriend, Pamela. He does not know her surname.

Madoda Madikiza testified that accused 5 was one of the participants in the conspiracy referred to in count 14. Madoda was a total stranger to accused 5, who does not know why Madoda testified against him. Madoda also testified that accused 5 was not present when the conspirators met again on the following day. The court has no reason for not accepting Madoda's evidence as being the

truth.

The court therefore accepts the evidenced of Luyanda Mabhongo, Warrant, Officer Mdepha and Madoda Madikiza, and rejects that of accused 5. He will therefore be convicted on counts 9 to 18 and 20, and 21.

The prosecutor, Advocate Poswa, has submitted that the State witnesses were good witnesses and that their evidence should be accepted; that their evidence is supported by the confessions the accused made; that the defence witness were poor witnesses; and that the alibis were manifestly untruthful afterthoughts that were never put to the State witnesses. He submitted that the accused should be convicted on the counts set out hereunder.

When counsel for accused 1 and 2, Advocate Gabavana, addressed the court, made the following general submissions:

- 1) Section 208 of the Criminal Procedure Act, 51 of 1977 and the cautionary rule relating to single witnesses, are applicable to this case.
- 2) The court has to consider the possibility of an error of identification by a single witness – R v T, 1958 (2) SA 676(A).
- 3) An accused person is entitled to remain silent.
- 4) There is no duty on an accused person to prove the truth of an alibi. If on all the evidence there is a reasonable possibility that the alibi evidence is true, it must be accepted – R v Biya 1952(4) SA 514(A).
- 5) When the police arrest an accused person they must enquire whether

he has an alibi.

- 6) The accused did not tell the police that they had alibis because they were not given an opportunity to do so.
- 7) The prosecutor 'harassed' the defence because he did not tell them who the next witness would be .
- 8) Due to (7) above, the alibis were not put to the witnesses.
- 9) The police should have shown the accused the airtime vouchers and two firearms they found in Margate when they arrested accused 1 and 2.
- 10) The police should have taken the said vouchers to the Margate police station

The court will refer to the abovementioned submissions by Mr Gabavana under the same numbers as above.

- 1) The court is fully aware of the cautionary rule relating to single witnesses, and it has applied it to all single witnesses in this case. Although the main witness for the State, Luyanda Mabhongo, was at times a single witness on identification, his evidence has in general been confirmed by numerous other witnesses, and by the confessions of the accused. The court therefore has no hesitation in also accepting his evidence on the few occasions that it, or his identification, is that of a single witness.

- 2) The court applied this principle and is satisfied that Mabhongo did not err in his identification. He had ample time and opportunity in which to identify the accused persons.
- 3) This principle is trite law. It is, however, also trite that if an accused person wishes to rely on an alibi, he must disclose the alibi as soon as possible. He must also put his alibi to the witnesses. The accused in this case did neither.
- 4) The court applied this principle and came to the conclusion that on all the evidence – especially the contradictory evidence of the defence witnesses; the fact that they were never put to the State witnesses; and the confessions made by the accused – that there is no reasonable possibility of the so-called alibis being true.
- 5) This is required neither by law, nor by logic. The converse seems to apply. If an accused has an alibi, that is surely the first thing he should tell the police when he is arrested. The accused in this case did not only fail to do so, but instead, when arrested, made confessions.
- 6) When one realises that the accused had time to make confessions, this submission becomes farcical.
- 7) The court fails to understand how the Prosecutor “harassed the defence. The prosecution timeously gave the defence copies of the statements of all the State witnesses; long before they were called to the witness box. Furthermore, the court granted Counsel an adjournment after each State witness had testified in chief in chief, to enable them to consult with their clients before commencing their cross-examination.

- 8) This submission is, with respect, also farcical.
- 9) The police could possibly have shown the accused the airtime vouchers, but there is nothing sinister in the fact that they did not. The vouchers were returned to the owner, Waheed Mohammed, who identified them as the stolen vouchers. The accused were not prejudiced by not being shown the vouchers, and they could at any time have requested to see them. The firearms were exhibited as exhibits in court. If the defence wished to carry out tests on them, they could have applied to the court to do so.
- 10) As the offences were committed with these items in the jurisdiction of this court, it does not agree with this submission. If the court is wrong in this finding the accused were not prejudiced in any way.

Counsel for accused 3 and 4, Attorney Mankanku, referred to the statement made by Luyanda Mabhongo on 22 June 2008, Exhibit A, when he turned State witness. In it he stated that that accused 4 was present at the robberies in counts 4 and 5. In his evidence in court, however, he denied that accused 4 was present at those robberies.

This appears to have been the only contradictions the witness made in his two statements and his evidence in respect of the identity of those present at all the robberies.

It is noteworthy that in Exhibit B, his confession, which was made on 31 July 2007 i.e. before Exhibit "A" was made, he does not mention accused 4 having been one of those present at that robbery.

It would therefore appear that his including accused 4 in Exhibit “A” was a human error on his part, which he was quick to rectify in his evidence. The fact that he did so, proves his honesty. The court is satisfied that the witness was not purposely dishonest when he made this error. There is also the possibility that Exhibit “A” had been wrongly recorded.

Mr Mankanku also submitted that because Luyanda Mabhongo was the only witness who testified that accused 4 was at the Msengeni Supermarket robbery, he should be acquitted. The court agrees that Nofinish Kobo did not identify accused 4. This was possibly because Nofinish did not know accused 4. For the reasons set out above, the court will, however, accept the identification of accused 4 by Mabhongo, despite his being the only witness to do so. As stated above, there is ample evidence that corroborates and proves him to be a truthful witness.

Mr Mankanku also submitted that because accused 3 was on the back of the vehicle in which the Coca-Cola bottle was found, his finger prints could not have been found on it. Therefore that evidence must be false.

The court disagrees with this submission. The bottle could have been passed from person to person, furthermore, the identification was a scientific finding.

Mr Mankanku also submitted that as Mbuyiselo Xishibana, who identified accused 3 as one of the robbers on counts 4 and 5, never told the police that he could do so, his evidence must be rejected as false. How was he to know that he could do so, and when was he to tell the police? Furthermore, if he was being untruthful, why would he identify only one accused?

Lastly, Mr Mankanku submitted that because the Counsel of accused 3 and 4 had changed before the trial began, they did not know what they had told their counsel. This is the version of the accused, all adult men, and it is simply not worthy of serious consideration.

The court has accepted the submission by the Counsel for accused 5, Mr Bahle, that the evidence of Luyanda Majeke must be rejected.

All the counsel for the accused have contended that there are certain discrepancies between the evidence of Mabhongo and Madoda Madikiza. Mr Poswa has disputed that there are any. The main issue is that both witnesses state that accused 1, 2, 3 and 5 were present when the conspiracy in count 14 was formed, and that accused 4 was not present.

Counsel Bahle has submitted written argument which the court received only yesterday, in which he seems to submit that Luyanda Mabhongo and Madoda Madikiza contradicted one another.

Madikiza testified that after he left accused 2, 3 and 5 at Sidwadweni, he returned home so as to leave his vehicle there. He then hitch-hiked to Maclear, where he saw the Fidelity cash vehicle leaving. He then telephoned accused 3.

Luyanda Mabhongo testified that there were six in the vehicle that went to Tsolo – himself, accused 1, 2, 3, 6 and Gcina. He disputed they were ever at Sidwadweni.

The court fails to understand how this can be termed a contradiction. Mabhongo and his group were acting totally independently from Madikiza. They went to Maclear and Tsolo in different ways and never seemed to have

joined up with one another. They were therefore testifying about different events.

Mr Bahle's submission is therefore rejected.

The court will now consider on which counts, if any, each accused must be convicted.

Count 1

The Prosecutor has submitted that the evidence proves the guilt of accused 1 on counts 2 to 5, 7 to 18, and 20 and 21. The court agrees with this submission, save that it doubts whether the evidence proves counts 7 and 8 against accused 1, beyond reasonable doubt.

The evidence of Luyanda Mabhongo has proved that accused 1 was one of the perpetrators of the offences specified in counts 2 to 5, 9 to 18, and 20 and 21. Luyanda, however, admitted that he was not present, and knows nothing about the offences referred to in counts 7 and 8.

Although the court is quite prepared to accept, without any corroboration, Luyanda's identification of accused 1 on any of the various counts, his evidence is confirmed by the evidence of the victims who proved that the various offences were committed, and also by the evidence of the following witnesses, which connects accused 1 to the various counts.

Counts 2 and 3

Nofinish Kobo, who picked up accused 1, 2 and 3 after the robbery, and

Olwethu Feke, to whom accused 1 took firearms.

Counts 4 and 5

Warrant Officer Xolile Mdepha, who found the stolen airtime vouchers in the room where accused 1 and 2 were sleeping in Margate.

Counts 7 and 8

These counts refer to two armed robberies at Ntsika Locality, Tsolo on 6 June 2007, in which Zola Tshayingca, Mxolisi Siyephu, Mzukisi Kawe and Zamekile Mdudu were attacked in their cash-in-transit vehicle in an attempt to rob them of their money. Count 8 alleges that after the first attempted robbery accused 1, 2 and 3 assaulted Lusizo Yalezo and robbed him of his Opel Corsa van.

In their evidence the aforesaid victims proved that the two offences were committed. They testified that on the day in question a bakkie approached their vehicle from behind and fired shots at it. After attempting to pass their vehicle, the bakkie rammed it from behind. Their vehicle continued until it reached a police road block.

Luzuko Yalezo testified that on the same day and at the same place their vehicle was stopped by armed men who then robbed them of the vehicle.

Luyanda Mabhongo was not present when these two robberies took place.

In his confession, Exhibit CCC, accused 1 has stated as follows:

“The second armed robbery in which I was involved took place in Tsolo. I do

not remember the month and the date, but this year. Martin, Bongani, Sibusiso, Sakie, Gary and I went to Tsolo with the intention to rob Fidelity guards. We arrived at Tsolo but I do not know the name of the locality. We waited for the Fidelity vehicle. It appeared and we followed it and we bumped it at the back. Sibusiso was the driver. Martin and I fell down during the collision. We followed on foot as they were chasing the said vehicle.

On our way we met them coming back with another bakkie. We jumped into that bakkie and ran away. We took a road that leads us to Qumbu. We went to Mthatha and they dropped us at Sibangweni. No money was taken from Fidelity.

Advocate Poswa has submitted that despite Luyanda Mabhongo having testified that he was not present, and knows nothing about this robbery, there is sufficient evidence to convict accused in these counts. He maintains that the proof that the offences were committed, coupled with the accused's confession, is sufficient evidence on which to convict him. As the law provides that proof of the commission of the offence, plus a confession in which guilt is admitted, is sufficient for conviction, Mr Poswa's submission would be correct if the court is satisfied that those requirements have been met.

The court is, however, not satisfied that the confession of accused 1 refers to the offences mentioned in counts 7 and 8.

In the confession there is nothing to fix the time or place of the robberies mentioned by accused 1. There is also nothing in it about the shots that were fired at the cash-in-transit vehicle.

In view of the numerous of similar attacks that were taking place at that time,

the court would, if it were to find that was the same robbery, simply be making an assumption, without any definite proof of that fact.

As the court can therefore not find that accused 1 was referring to the same robbery, there is no evidence on which accused 1 can be convicted on counts 7 and 8 and he must be acquitted on those counts.

Counts 9 to 13

Olwethu Feke, to whom accused 1 took firearms and ammunition.

Count 14

Madoda Madikiza, who testified that accused 1, 2, 3 and 5 were present when they entered into the conspiracy.

Counts 15 to 18

The evidence of the victims of the attacks.

Count 20 and 21

Luyanda Mabhongo has proved that accused 1 was in possession of pistols and ammunition, and he has not produced licences to possess those firearms.

Mabhongo's identification of accused 1 at the various counts is also confirmed by the confession of accused 1, Exhibit CCC

Accused 1 is therefore convicted on the following counts:

- Count 2 : Armed Robbery with aggravating circumstances.
- Count 3 : Armed Robbery with aggravating circumstances.
- Count 4 : Armed Robbery with aggravating circumstances.
- Count 5 : Armed Robbery with aggravating circumstances.
- Count 9-11 : Three counts of Attempted Murder.
- Count 12 : Armed Robbery with aggravating circumstances.
- Count 13 : Armed Robbery with aggravating circumstances.
- Count 14 : Conspiracy to commit armed robbery.
- Count 15 : Theft.
- Counts 16 and 18: Two counts of Armed Robbery with aggravating circumstances.
- Count 17 : Attempted robbery with aggravating circumstances.
- Count 20 : Possession of unlicensed firearms.
- Count 21 : Unlawful possession of ammunition.

Accused 1 is found not guilty and discharged on the following counts:

- Count 1 : Armed Robbery with aggravating circumstances (at the close of the State case).
- Count 6 : Theft (at the close of the State case).
- Count 7 : Attempted Armed Robbery with aggravating circumstances.
- Count 8 : Attempted Armed Robbery with aggravating circumstances
- Count 19 : Unlawful possession of specific firearms.

Accused 2

The Prosecutor has submitted that accused 2 must be convicted on counts 2 to 5, 9 to 18, and 20 and 21.

The evidence of Luyanda Mabhongo proves that accused 2 was one of the perpetrators of the offences specified in counts 2 to 5, 9 to 18, and 20 and 21. Luyanda's identification of accused 2's involvement in these counts is corroborated by the evidence of the undermentioned witnesses.

Counts 2 and 3

Mkhululi Kobo, who picked up accused 1, 2 and 3 after the robbery.

Mzwandile Mtekwane testified that his firearm, Exhibit 8, was stolen from him in count 2. It was found by Warrant Officer Mdepha, and other policemen, in the motor vehicle of accused 2 after his arrest.

Counts 4 and 5

Warrant Officer Mdepha, who found a large box containing the airtime vouchers that were stolen from Just Right, in the room in Margate where accused 1 and 2 were arrested.

Counts 9 to 13

Kusasa Yantolo, who identified accused 2 as one of the robbers. Maliviwe Ngqukumba, who fetched accused 2 and 3, and others, on the night of the robbery.

Count 14

Madoda Madikiza, who testified that accused 1, 2, 3 and 5 were present when the conspiracy was concluded.

Counts 20 and 21

Luyanda Mabhongo has proved that accused 2 was in possession of hand arms (pistols) and ammunition, and he has not produced licences to possess those firearms.

So too is Luyanda's evidence confirmed by the confession of accused 2, Exhibit DDD.

The court therefore agrees with the submission by the prosecutor and it convicts accused 2 on the following counts:

- Counts 2 and 3 : Two counts of Armed Robbery with aggravating circumstances.
 - Counts 4 and 5 : Two counts of Armed Robbery with aggravating circumstances.
 - Counts 9 to 11 : Three counts of Attempted Murder
 - Counts 12 and 13 : Two counts of Armed Robbery with aggravating circumstances.
 - Count 14 : Conspiracy to commit Robbery
 - Count 15 : Theft
 - Counts 16 and 18 : Two counts of Armed Robbery with aggravating circumstances.
 - Count 17 : Attempted robbery with aggravating circumstances.
 - Counts 20 and 21 : Unlawful possession of firearms and ammunition
- Accused 2 is found not guilty and discharged on the following counts:
- Count 1 : Armed Robbery (at the close of the State case).
 - Count 6 : Theft (at the close of the State case).

Count 7 : Attempted Armed Robbery
Count 8 : Armed Robbery.
Count 19 : Unlawful possession of specific firearms.

Accused 3

The Prosecutor has submitted accused 3 must be convicted on counts 2 to 5, 9 to 18 and 20 and 21.

The evidence of Luyanda Mabhongo proves that accused 3 was one of the perpetrators of the offences specified in counts 2 to 5, 9 to 18, and 20 and 21. His identification of accused 3 in the various offences is corroborated by the undermentioned witnesses.

Counts 2 and 3

Mkhululi Kobo, who fetched accused 1, 2 and 3 after the robbery.

Counts 4 and 5

Mbuyiselo Xishibana, who, when testifying on these counts, identified accused 3 as one of the robbers. Warrant Officer Penrose Mzenzi, who found many airtime vouchers in the belongings of accused 3 in Cape Town.

Counts 9 to 13

Inspector Mjacu, who found the fingerprint of accused 3 on a Coca-Cola bottle in the robbers' motor vehicle. Maliviwe Ngqukumba, who picked up accused 1, 2, 3, and others, on the night of the robbery.

Count 14

Madoda Madikiza, who testified that accused 1, 2, 3 and 5 were present when the conspiracy was concluded.

Counts 20 and 21

The evidence proves that accused 3 was in possession of hand guns (pistols), and ammunition, and he has not produced licences to possess those firearms.

Luyanda Mabhongo's evidence has also been confirmed by accused 3 pointing out certain places where the offences in counts 2, 3, 9 to 13, 16, 17, and 18 were committed (Exhibit TT).

Accused 3 is therefore convicted on the following counts:

- | | | |
|------------------|---|---|
| Counts 2 and 3 | : | Two counts of Armed Robbery with aggravating circumstances. |
| Counts 4 and 5 | : | Two counts of Armed Robbery with aggravating circumstances. |
| Counts 9 to 11 | : | Three counts of Attempted Murder |
| Counts 12 and 13 | : | Two counts of Armed Robbery with aggravating circumstances |
| Count 14 | : | Conspiracy to commit Robbery. |
| Count 15 | : | Theft |
| Counts 16 and 18 | : | Two counts of Armed Robbery |
| Count 17 | : | Attempted robbery with aggravating circumstances |
| Counts 20 and 21 | : | Unlawful possession of firearms and ammunition |

Accused 3 is found not guilty and discharged on the following counts:

Count 1 : Armed Robbery (at close of State case).
Count 6 : Armed Robbery (at close of State case)
Counts 7 : Attempted Armed Robbery.
Count 8 : Armed Robbery.
Count 19 : Unlawful possession of specific firearms.

Accused 4

Mabhongo has testified that accused 4 was one of the robbers who committed the robberies set out in counts 2 and 3. The court will extend to the accused the benefit of doubt in respect of the firearm Exhibit 7, which was found in the room where he was arrested.

Mabhongo testified that accused 4 had a handgun in his possession and gave him ammunition.

Accused 4 is therefore convicted of the following offences:

Count 2 : Armed Robbery with aggravating circumstances.
Count 3 : Armed Robbery with aggravating circumstances.
Count 20 and 21 : Possession of firearm and ammunition.

Accused 4 is found not guilty and discharged on the following counts:

Count 1 : Armed Robbery (at close of State case).
Count 4 and 5 : Two counts of Armed Robbery.
Count 6 : Armed Robbery (at close of State case).
Count 7 : Attempted Armed Robbery.
Count 8 : Armed Robbery.

Counts 9-11 : Three counts of Attempted Murder.
Counts 12 and 13 : Two counts of Armed Robbery.
Count 14 : Conspiracy to commit Armed Robber.
Counts 15 : Theft.
Counts 16 to 18 : Three counts of Armed Robbery.
Count 19 : Possession of specific unlicensed firearms.

Accused 5

Mr Poswa has submitted that accused 5 must be convicted on counts 9 to 18.

Luyanda Mabhongo has testified that accused 5 was one of the perpetrators of the offences specified in counts 9 to 14 and 16 to 18. He testified that although accused 5 was present at the deliberations of count 15, he was not present when that crime was committed. He will therefore be given the benefit of doubt and discharged on count 15. Luyanda's identification of accused 5 as one of the participants is corroborated by the evidence of the undermentioned witnesses.

Count 14

Madoda Madikiza testified that accused 5 was one of the conspirators.

Counts 16 to 18

Andile Somkhebe testified that in the robbery referred to in count 16, the robbers took his 9 mm pistol, Exhibit 11. When Warrant Officer Mdepha arrested accused 5 he found Exhibit 11 in the car in which the accused was at that time. In view of the fact that Ayanda Majeke's evidence cannot be relied

on in respect of counts 16 to 18, the evidence of Luyanda Mabhongo becomes that of a single witness. The court has no hesitation in accepting his evidence and his identification of accused 5.

Accused 5 is therefore convicted on the following counts:

Counts 9 to 11	:	Three counts of Attempted Murder
Counts 12 and 13	:	Two counts of Armed Robbery with aggravating circumstances.
Count 14	:	Conspiracy to commit Robbery
Counts 16 and 18	:	Two counts of armed Robbery with aggravating circumstances.
Count 17	:	Attempted Robbery with aggravating circumstances.
Count 20	:	Possession of unlicensed pistols.
Count 21	:	Unlawful possession of ammunition.

Accused 5 is found not guilty and discharged on the following counts:

Count 1	:	Armed Robbery (at close of the State case).
Counts 2 and 3	:	Two counts of Armed Robbery.
Counts 4 and 5	:	Two counts of Armed Robbery.
Count 6	:	Armed Robbery (at close of State case).
Count 7	:	Attempted Armed Robbery.
Count 8	:	Armed Robbery.
Count 15	:	Theft.
Count 19	:	Unlawful possession of specified firearms.

During the trial three witnesses, Luyanda Mabhongo, Mkhululi Kobo and Madoda Madikiza, were each warned in terms of Section 204 of the Criminal Procedure Act, 51 of 1977, before they testified. The court is satisfied that they testified in a satisfactory manner, and that they were truthful when they did so. They are therefore granted absolution from prosecution on the charges specified in the indictment.

As stated during the trial, the court orders that a copy of the evidence of Dr Ntकिनca, and of this judgment, be sent to the Medical and Dental Professions Board for any steps it wishes to take in the matter.

In conclusion the court wishes to extend its congratulations to Warrant Officer Xolile Mdepha who, through his thorough investigations, uncovered and stopped a long series of vicious attacks by a gang in Transkei on cash-in-transit vehicles and their operators.