

IN THE HIGH COURT OF SOUTH AFRICA**(Circuit Court Vereeniging)**

Case Number: C40/2020

THE STATE

versus

MFUNELENI LANGA	Accused 1
THULANI MKHUBA SITHOLE	Accused 2
MUZIKHONA MATHEBULA	Accused 3
SANELE PHILANE SITHOLE	Accused 4
SENZO MZIWAMANDLA ZULU	Accused 5
NKOSENHLE NXUMALO	Accused 6
KHANYISANI SIMO KHANYILE	Accused 7
NJABULO NCANANA	Accused 8
BONGUMUSA MENGAMELI MBATHA	Accused 9

**JUDGMENT IN THE APPLICATION FOR SECTION 174 OF THE CRIMINAL
PROCEDURE ACT, ACT 51 OF 1977 IN RESPECT OF ACCUSED 1 TO 9**

VAN WYK, AJ

INTRODUCTION:

[1] On 04 March 2025 accused 1 to 9 applied for discharge in terms of *section 174* of Act 51 of 1977.

[2] It was conceded during argument by all counsel, that the case against all of the accused mainly rests on the identification of the accused; that is whether the identification of each accused is sufficient to put them on their defence. The Court will proceed to deal firstly with the relevant legal issues as well as the relevant caselaw.

SECTION 174 OF THE CPA:

[3] *Section 174* of the CPA provides as follow:

“If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.” [my underlining]

[4] The following was held in *S v Lubaxa* 2001(2) SACR 703 (SCA):

“There is no doubt that an accused person (whether or not he is represented) is entitled to be discharged at the close of the case for the prosecution if there is no possibility of a conviction other than if he enters the witness box and incriminates himself.”

[5] In *R v Shein* 1925 AD 6 it was held that the words ‘*no evidence*’ have been interpreted to mean no evidence upon which a reasonable man acting carefully may convict.

ARGUMENTS BY COUNSEL ARE SUMMARISED AS FOLLOW:

[6] The arguments by all counsel revolves around the following issues:

1. The victims did not provide a description of the suspects in their witness statements;
2. The identification parade was not fairly conducted and ought to carry no weight;
3. The dock identifications by the victims are based, not on their own recollection, but in all probability from either having viewed the video recordings of the robberies, or studying the photos derived from the video recordings, or having seen photographs that were taken from the accused during the course of the investigation;
4. The reliability of the identification of the accused were questioned due to incorrect identifications during the identification parade or the dock identifications, while relying on poor quality photos of suspects with which to identify the accused by;
5. The authenticity of the video recordings was not proved by the prosecution;
6. The Facial Image Analyses Report was not positive in respect of any of the accused.

ISSUE NOT IN DISPUTE:

[7] It is not in dispute that three business robberies took place on 12 and 20 July 2018, at Shoprite, Ratanda, and 27 September 2018, at U-Save, Heidelberg, respectively. It is not in dispute that the crimes, as set out in the indictment, were committed. What is in dispute

is the identity of the perpetrators. The *onus* therefore rested on the prosecution to prove the identity of the perpetrators.

In general, the identity of a perpetrator may be proved by way of an eye witness to the event, including evidence of a dock identification, as well as evidence relating to an identification parade, and video footage. Presence of a perpetrator on a scene, may also be inferred based on circumstantial evidence, such as fingerprints, DNA, GSR, and ballistic evidence in respect of cartridges and firearms. Such evidence may serve as corroboration for the say-so of a single witness in respect of identification. The Court therefore has to consider various issues in determining whether the accused should be placed on their defence.

FACIAL COMPARISON:

[8] **Warrant Officer Dirk van Eeden** compiled a Facial Image Analysis Report, in which he was requested to compare photos, derived from CCTV footage, against control photos. He stated that there are four main facial comparison methodologies used in such comparisons. The method which he used was a morphological assessment of persons; image-to-image. Due to the images being of poor quality and poor camera angles, no sufficient morphological facial landmarks were identified. As a result, no facial comparison was done. Counsel conceded that this report did not exclude any accused, as no comparison was done. Exhibit FF is thus of no assistance to the Court.

IDENTITY PARADES:

[9] *Du Toit and Commentary* refer to 18 Rules of Practice with regards to identification parades. These are not rules of law, but are rules of Police practice to ensure a fair identification parade, and rules gleaned from reported cases.¹ In *R v Kola* 1949(1) PH H100 (A) the Court cautioned as to regards the value of an improper identification parade:

“But an identification parade, though it ought to be a most important aid to the administration of justice, may become a grave source of danger if it creates an impression which is false as to the capacity of the witness to identify the accused without the aid of his compromising position in the dock. Unsatisfactory as it may be to rely upon the evidence of identification given by a witness not well acquainted with the accused, if that witness has not been tested by means of a parade, it is worse to rely upon a witness whose evidence carries with it the hall-mark of such a test if in fact the hall-mark is spurious. Of course, an identification parade is not necessarily useless because it is imperfect. In some respects, the quality of the parade must necessarily be a question of degree.”

[10] See also *S v Mohlathe* 2000(2) SACR 530 (SCA) at 541a-d where the following was held:

“Common sense dictates that the non-suspects participating in an identification parade should be similar to the suspect in general appearance. Indeed, as appears from the identification parade form which was used on this occasion, it is a matter of police practice that the non-suspects be ‘of about the same height, build age and appearance’ as the suspect and that they be similarly dressed. Where the parade includes several suspects, whose general appearance is markedly different, whether on account of height, build, age or otherwise, care should be taken to ensure that there are sufficient non-suspects whose general appearance approximates that of each of the suspects. In such circumstances it may be advisable to hold more than one parade, particularly if the number of non-suspects that would be required would result in the parade being unduly large and cumbersome. If the number of non-suspects whose general appearance approximated that of each suspect is too few or if there were other features of the parade which may materially influence an identifying witness, the probative value of the identification will be greatly reduced. The danger

¹ See *R v Masemang* 1950(2) SA 488 (A) 493-4

in such a case is, of course, that, because the identification is made at a parade, it carries with it an assurance of reliability which is unjustified."

[11] The Prosecution conceded that the identification parade held in respect of Ratanda CAS 85/07/2018 relating to the robbery committed on 20 July 2018 was not conducted fairly. As a result, the Court will not further deal with this issue, as no weight can be attached to the identification of any accused during this identification parade.

The Prosecution argued that the identification parade held for the robbery committed on 27 September 2018 on Heidelberg CAS 180/09/2019 was fairly conducted. It was argued that there was 24 people in the line-up which included only one suspect to wit accused 6, therefore the identification parade was conducted fairly.

The biggest hurdle for the Prosecution in respect of this identification parade is that the Police Officer in charge of the parade, Sergeant Mogashoa, testified that accused 6 had a peculiar face and there was not any other person in the line-up that looked similar to accused 6. In the premise, it is the view of this Court that this identification parade was also not fair in respect of accused 6, and can no weight be attached to the second identification parade.

[12] Throughout the trial it was put to witnesses and suggested that they had viewed the CCTV footage, that they had seen the posters of the suspects prior to the identification

parade and before testifying, or that they had seen photos that were taken of the suspects after their arrest. There is however no evidence to support these allegations. If this was true, then one would have expected that all of the witnesses would make a better dock identification, give better descriptions of the suspects, and so forth. In fact, some witnesses conceded that due to the lapse of time, they were no longer able to identify the suspects.

CCTV AND VIDEO RECORDINGS:

[13] The video footage on the USB sticks and photos derived from said CCTV footage are real evidence.² In *S v M* 2002(2) SACR 411 (SCA) it was held that:

“Real evidence is an object which, upon proper identification, becomes, of itself, evidence (such as a knife, photograph, voice recording, letter or even the appearance of a witness in the witness-box.

Once a witness has properly identified the material object, such real evidence is relevant and received as an exhibit. Such a witness will provide an explanation in respect of the real evidence.

[14] In *S v Ramgobin and Others* 1986(4) SA 117 (N) the Court held that for audio and video tape recordings to be admissible in evidence in a criminal trial, it must be proved that the exhibits sought to be put in, are the original recordings, and that, on the evidence

² See Principles of Evidence, 5th edition, 2023, Singh & Schwikkard

as a whole, there exists no reasonable possibility of '*some interference*' with the recordings. The court referred to a plethora of other requirements to be met by the prosecution.

[15] It was held in *S v Baleka and Others* 1986(4) SA 192 (T) that sound and video recordings are real evidence to which the rules relating to documentary evidence are not applicable.

[16] In *S v Baleka and Others* 1986(4) 1005 (T) Van Dijkhorst J disagreed with the stringent test for admissibility laid down in *S v Ramgobin and Others (supra)*. It was held that it was absurd to exclude evidence because it is potentially dangerous. Reliability is established only later. All that is needed to establish admissibility is that *prima facie* the recordings had some probative value.

[17] In *S v Mdlongwa* 2010(2) SACR 419 (SCA) the accused was linked by way of a dock identification, CCTV video footage as well as the evidence regarding facial comparison. In this case, cameras were installed in a bank which was connected to a video machine. After the robbery, the video footage and video cassette remained under lock and key until it was handed over to a witness employed as the regional security manager of Nedcor H Group. The manager confirmed that digital recorders were installed at the bank which recorded all footage on a hard drive and transmitted it onto a computer. The computer was stored in the treasury area of the bank. No member of the staff had access to download any information or to tamper with the information stored on the hard drive. The

manager viewed the footage, downloaded the information to which he was the sole authorized person to do so, in order for Police to print video stills of what had transpired during the bank robbery.

The manager testified that each branch had its own hard drive from which video footage images were downloaded. There can therefore be no question that the video footage was original and therefore constituted real evidence. The court held that the appellant's counsel's argument, that the evidence was not original, was therefore without substance. The court held that what emerged from the video still was unmistakably the identification of the appellant participating in the bank robbery.

[18] The CCTV footage downloaded onto the USB sticks by Ms Mametse is real evidence. If it is relevant, the recordings are admissible. In any event, she testified that she is a camera room operator for Corporate Investigating and Veracity Assessment (Pty) Ltd, in short CIVA. Her duties entailed dealing with footage from Shoprite. When an incident occurred at a Shoprite, it was her duty to download footage. She received training in her field of expertise, and have been a camera room operator for 18 years. She confirmed that CIVA is in charge of footage recorded at Shoprite stores.

Ms Mametse explained that in each Shoprite, there are recording devices which capture all movement, and she is the one who will download the recordings. She testified that recordings are only erased after a period of 30 days, depending on the capacity of the hard drive.

She confirmed that she had produced exhibits A1, A2 and A3 after she had downloaded the recordings from the hard drives, after having personally visited the three robbery scenes. At each of the scenes she would inquire from the manager the time of the robbery, then proceed to download the recordings from the device onto a USB. She only downloaded recordings that related to the robberies, and not the recordings of all of the cameras.

After downloading the recordings, she would return to her office in Centurion. There, she would transfer the footage from the USB via her laptop, onto a DVD and produce the photos before Court. The DVD and photos were then handed to the Investigating Officer. She kept the original USB's in a safe in her possession.

The original three USB's were handed in as Exhibits 1, 2 and 3, which were viewed in court and identified by Ms Mametse. She testified that the three USB's were still in their original form and that she did not tamper with them. A4, A5 and A6 were notes that the witness compiled of her observations after viewing the footage. The Court had noted on the record, that while the witness was reading from her notes, she would indicate with a cursor in the footage playing in court, what she was referring to in her notes.

Ms Mametse testified during cross examination that she did not herself operate the video system, but her company CIVA did. Her duties were to only download recordings. A technician must explain how a recording occurs, and where cameras were installed, as she cannot.

When she arrived at a robbery seen, she would obtain the estimated time of a robbery and then proceed to go through the footage. She testified that a Shoprite store can have more than 32 cameras. It was put to her that the selection of footage did not disclose what had really happened at Shoprite Ratanda. It is not clear why counsel disputed that what the witness showed in court was not what had in fact occurred, as the versions of the accused are that they were not at any of the shops. The witness conceded that she did not download everything that had occurred in Shoprite from all 32 cameras, as her focus was directed to what had occurred with regards to the robbery. Other recordings would not have been of any assistance to the Court. Such recordings would in any case have been irrelevant, as they carried no probative value.

Ms Mametse testified that the robbery on 12 July 2018 occurred around 18h00 and she arrived at around 20h00. She conceded that she would not know whether there was any interference with the recording before she had arrived. There is in any event no evidence to suggest that there was any tampering. Further, authentication is not necessary, as video recordings are not documentary evidence. Much was made of the camera number that differs from A5 cash office and camera number one noted in Exhibit C regarding the cash office. Exhibit C was compiled by Warrant Office Tupper. There is no evidence regarding how many cameras were directed at the cash office, or was in the cash office. Further, Ms Mametse did not testify that she had summarized the recorded activities from all of the cameras which she had downloaded.

During cross-examination it was pointed out to Ms Mametse that her statement reads that there can be tampered with the data, but the whole sentence reads that the CCTV does not allow any editing on the data. The recording devices are located inside the cash offices. She determined who the suspects were based on the areas they went into, that is the Money Market and Cash Office. She testified that she did not give copies of the DVD's to the shops.

WITNESS STATEMENTS TAKEN BY POLICE:

[19] In *S v Mahlangu & another* (unreported, GSJ case no CC70/2010, 22 May 2012) the court held that it should be remembered that statements from witnesses by the Police, were notoriously lacking detail, and was often inaccurate and incomplete.³ The Court further held that:

“A witness statement is in the main required to enable the prosecuting authority to determine whether a prosecution is called for, on what charge and to consider which witnesses to call on which issues. It would be absurd to expect a witness to say exactly in his statement what he will eventually say in court. There will have to be indications other than a mere lack of detail in the witness’ statement to conclude that what the witness said in court was unsatisfactory or untruthful.

There is no law that compels a witness what to say and what not to say in his statement. The witness tells it as he sees it. He is not expected to relate in his statement what he saw in the minute detail. Should a witness through lapse of memory or any other valid reason omit some detail which later could become important, he should not as a matter of course be branded as being untruthful. Moreover, the mere fact that a witness deviates in a material respect from what he said in his statement does not necessarily render all his evidence defective. The court will in the final analysis consider the evidence as a whole in order to determine in what respects the witness’ evidence may be accepted and in what respects it should be rejected.”

³ See also *S v Mafaladiso en andere* 2003(1) SACR 583 (SCA)

IDENTIFICATION:

[20] With regards to identification, the following was held in *S v Mthetwa* 1972(3) SA 766 (A):

“Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest. The reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused’s face, voice, build, gait and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in light of the totality of the evidence, and the probabilities.”

CAUTIONARY RULE IN RESPECT OF A SINGLE WITNESS:

[21] A Court must also caution itself in accepting the evidence of a single witness. Section 208 of the CPA provides that:

“An accused may be convicted of any offence on the single evidence of any competent witness.”

[22] The following was held in *S v Miggel* 2007(1) SACR 675 (C) regarding the evidence of a single witness:

“That it was settled law that the evidence of a single witness had to be approached with caution. In the normal course of events, the evidence of a single witness would only be accepted if it were in every important respect satisfactory or if there were corroboration for that evidence. The corroboration that was required was confirmatory evidential material outside the evidence that was being corroborated. The corroboration did not necessarily need to link the accused with the crime.

Held, further, that the court had to be satisfied that the witness making the identification was not only honest, but also reliable. Honesty by itself was no guarantee of reliability. Consequently, a witnesses' honesty and own conviction as to the correctness of his or her identification could never be allowed to take the place of an independent inquiry into the reliability of the identification itself."

CORROBORATION:

[23] When considering the evidence of a single witness, a Court will seek some form of corroboration, which is a safeguard against relying on the evidence of a single witness.

In *S v Gentle* 2005(1) SACR 420 (SCA) the court held that:

"that by corroboration was meant other evidence which supported the evidence of the complainant, and which rendered the evidence of the accused less probable, on the issues in dispute.

When such corroboration is found, it has been held, however small, one is no longer dealing with a single witness.⁴

DOCK IDENTIFICATIONS:

[24] In *S v Matwa* 2002(2) SACR 350 (E) 355i – 356a–b and 356f-g, the court held as follow in respect of dock identifications:

'My conclusion is that in a case such as the present, the question in issue is not the admissibility of the dock identification but the evidential value to be placed thereon. Where a witness identifies an accused in the dock, it forms part of the evidential matter upon which the case must be decided and I see no reason in principle to exclude it solely due to it having been done in court. In many, if

⁴ See *S v Letsedi* 1963(2) SA 471 (A) 473; *S v Snyman* 1968(2) SA 582 (A) 586-7; *S v Khoza* (unreported, KZP case no AR 278/18, 22 November 2019) at [20]

not the majority, of cases coming before our courts, the first occasion a witness has to identify the offender is when he or she gives evidence. The admissibility or otherwise of evidence cannot be determined by having regard to the degree of seriousness of the offence upon which an accused is tried, and it is wholly impractical to suggest that the police should, for example, be obliged to hold an identification parade for the material witnesses to attend in each and every minor case of disputed identity in order to render their identification of the accused admissible at a subsequent trial. . . . No fixed rules can be laid down. In each and every case the judicial officer must decide upon what weight, if any, is to be afforded to the dock identification, regard being had to all the material circumstances—including those prevailing when the initial observation took place as well as those under which the identification in court is made. But to exclude evidence of identity as inadmissible purely on the basis of it being tendered in the presence of the accused in the dock, is, in my respectful view, incorrect.'

EVALUATION OF THE EVIDENCE:

[25] In considering whether the accused should be put on their defence, the Court will not normally consider the credibility of a witness, and so too will the Court not in this case. The reliability of an identification however, will be considered. Should an accused be expected to testify in circumstances where his identification is not reliable, it would lead to exactly what *Lubaxa (supra)* warns against; that is when at the close of the prosecution's case there is no possibility of a conviction other than if the accused enters the witness box and incriminate himself.

[26] The Court will further consider the fact that the prosecution is relying on the doctrine of common purpose, as well as joint possession. The doctrine of recent possession will also be considered.

The Court will now first deal with the robbery that occurred on 12 July 2018

Counts 1 and 2 in respect of accused 1, 3, 4 and 6

Accused 1

[27] **Ms Mashinini** is a single witness in respect of identification. In her statement (Exhibit P1), she states that she would be able to point out one suspect. He was dark in complexion, was an older person and had a limp. He was wearing a hat and carried a firearm. She testified on 06 November 2023, 5 years after the robbery. During her evidence, she pointed out accused 1 to 7 in the dock.

She described the clothing that accused 1 was wearing, to wit a floral T-shirt, a hat and a leather jacket, and pointed him out in photo 1970 Exhibit A2. Accused 1 had entered the cash office in possession of a firearm, and demanded money. He left the cash office and returned with a Shoprite bag in which to put the money. No identification parade was held in respect of this robbery.

Ms Mashinini, was also a victim of the robbery on 20 July 2018. She testified that accused 1 was involved and described his clothing as a blue T-shirt, leather jacket and a hat. She testified that accused 1 is depicted in photo 1949 Exhibit A1.

[28] **Sergeant Sithole** has been the investigating officer since 20 July 2018 and testified that she was present at all court appearances in respect of the accused before court. She

had the opportunity to peruse Exhibits A1, A2 and A3, and had viewed the video footage in respect of the three robberies. She testified that she is able to identify the accused in the photos derived from the CCTV video footage. Sgt Sithole identified accused 1 in photo 1949 Exhibit A1.

Regarding the evidence of Sergeant Sithole, the defence is both relying on her evidence to exclude certain of the accused as the robbers, while at the same time arguing that her evidence should not be accepted in respect of identification. It is possible that, after having worked with the accused for such a long time, she may identify certain of the accused in the photos in A1, A2 and A3, even though they are of poor quality. This Court however has to be satisfied that the person depicted in a particular photo is the accused that Sergeant Sithole was referring to.

[29] **Ms Mametse** had made a summary of what she had observed when she viewed the robberies. She described that the male depicted in photo 1949 was wearing a blue garment, grey sun hat, black pants and black leather jacket. He was carrying what seemed to be a gun. This male entered the cash office. He was in possession of a transparent plastic bag, and all the plastic bags with, what seemed to be money, was placed in a black Shoprite money bag. He then left the cash office.

[30] It is clear from the evidence that Ms Mashinini, who was a victim in both robberies at Ratanda, swapped the clothing description of accused 1 with regards to these two

robberies. This does not make her an unreliable witness. One has to consider that she only testified 5 years after the robberies had occurred.

Photos 1949 and 1970 clearly depicts the same person. The two photos are clear and the person depicted in the photos can easily be identified. It is further clear to the Court that the person depicted in both of these photos is indeed accused 1. The evidence of Ms Mashinini in respect of the identification of accused 3 is corroborated by the evidence of Ms Mametse and Sergeant Sithole.

Accused 3

[31] **Ms Mashinini** testified that accused 3 was also present during the first robbery, but she was unable to provide a clothing description. **Sergeant Sithole** did not identify accused 3 in Exhibit A1. The Court is of the view that Ms Mashinini's identification of accused 3 is unreliable.

Accused 4

[32] **Ms Mashinini** testified that accused 4 was also present during the first robbery, but was unable to provide a clothing description. **Sergeant Sithole** conceded that she did not have video footage or photos in respect of accused 4. The Court is of the view that the identification by Ms Mashinini is unreliable.

Accused 6:

[33] **Ms Mashinini** testified that accused 6 was also present during the first robbery. She identified accused 6 in photo 1947 Exhibit A1. During her evidence in chief, Ms Mashinini had to be encouraged to look at the accused in the dock as she seemed to be afraid to look at them. She testified that the one robber who had entered with the robber who had the limp, assaulted her on her back, and had sworn at her. He told her that he kills and does not play. He demanded money and told her that the money was 'too little.' He wanted a bag in which to put the money. This male was wearing a hat.

[34] **Ms Mametse** described in A4 the actions of the male depicted in photo 1950. He was wearing a big grey sun hat with a blue camouflage top. He entered the cash office. This male opened the safe and removed what seemed to be money and placed it in his hat and some of the money was placed in the yellow Shoprite bag.

[35] **Sergeant Sithole** testified that accused 6 is depicted in photo 1950 Exhibit A1. Photo 1950 is a clear picture in which the male suspect can easily be identified. It is quite clear that the male depicted in photo 1950 is accused 6.

[36] No firearm was seized, and therefore no ballistic report was presented. The State failed to present evidence in respect of count 2 and the alternative count.

The robbery that occurred on 20 July 2018

Counts 3, 4, 5, 6, 7 and 8 in respect of accused 1, 2, 3, 4, 5, 6, 7 and 8

Accused 1

[37] **Ms Mashinini's** evidence in respect of the photos was already dealt with. She testified that accused 1 was in the front of the store near the tills during this robbery.

[38] **Ms Mkhwanazi** made a dock identification in respect of accused 1. She was at the Money Market when she observed the struggle between the security guard and accused 5. She saw when accused 1 exited the shop in possession of a red Shoprite bag. He was wearing a leather jacket with a floral T-shirt. Accused 1 was identified as the person depicted in Exhibit A2 photo number 1970.

[39] **Ms Mametse** described the actions of the male depicted in photo 1970 as follow: A male wearing black pants, black jacket, grey sun hat and white shoes went towards the cash office. It seemed like he was carrying a gun in his possession. He passed in front of the Money Market. The male went to a female cashier at the till who was struggling to open the till, and he then removed what seemed to be money from the cash drawer and concealed it in his pants.

[40] **Cst Mokagane** testified that shots were fired at him and his crew Cst Mahlaba and Erasmus. A group of perpetrators exiting Shoprite were firing shots at them. He saw a couple of bullet holes in the fender of the BMW that he was driving.

[41] **Sgt Chauke** testified that the perpetrator who had fired shots at them, was dressed in a floral T-shirt with various colors, referred to as a DMD brand shirt. This is shirt worn in the township by Skhothanes. He was unable to describe the perpetrator, but testified that he was limping or was physically challenged, and had a beard. Their Police vehicle was damaged as a result of the shooting.

[42] **Sgt Matumane** corroborated the evidence of Sgt Chauke. He added that the initial shooter was limping and dressed in a DMD '*Skhothane*' T-shirt with various colors. This man was wearing something else, like a jacket, over the T-shirt, but he was not able to say what it was, as this clothing item was billowing in the wind as the man was running.

[43] **W/O Mabotha** corroborated the evidence of Sgt Chauke and Sgt Matumane. He elaborated in respect of the clothing description of the perpetrator. The perpetrator was wearing a black jacket, and he was in possession of a bag. Beneath the jacket, he was wearing a floral T-shirt with red and black colors. They were able to see this shooter in the headlights of their vehicle.

[44] **Mr Matiwane** identified accused 1 in the dock as the person who had entered his church on 20 July 2018 at around 18h50. The church is approximately 250 meters from Shoprite. Before accused 1 had entered the church, he heard gunfire outside, and the sirens of Police vehicles. Accused 1 was wearing a grey hat, black leather jacket, a jean and a T-shirt with some red floral colors on it. After they exited the church, he saw that accused 1 was in possession of a firearm when he took off his leather jacket. He testified that accused 1 may have left his hat on the ground. He made a report to Police Officer Maluleke, who in turn flagged down the Flying Squad vehicle. He ultimately saw that accused 1 was apprehended by the Police at the tuck shop. He confirmed that accused 1 is the person depicted in photo 1970 Exhibit A2.

[45] **Cst Rampearie** was stopped by Cst Maluleka. He received information from him. As a result, he arrested accused 1 whom he saw wearing a full black leather jacket, with a floral shirt underneath. Accused 1 took a firearm from his belt and threw it on the floor in the tuck shop. Accused 1 did not provide an explanation for the firearm of which the serial number had been filed off. He was arrested for possession of an unlicensed firearm. Accused 1 was pointed out in the dock. Cst Rampearie confirmed that the person depicted in photo 120 of Exhibit E was accused 1 whom he had arrested for possession of unlicensed firearm. He further confirmed that the person depicted in photo 1970 Exhibit A2 is the same person wearing the same shirt with flowers on it.

[46] The evidence of **Capt van Rooyen** is that this firearm is a firearm in terms of Act 60 of 2000. Several cartridges were fired from this firearm. The evidence shows that some of the cartridges were found near the security guard and some at the entrance to the shop.

[47] **Sgt Sithole** identified accused 1 in photo 1970 Exhibit A2. Accused 1 was wearing the same clothing when she saw him at the tuck shop on 20 July 2018 that he had been wearing in photo 1970. The evidence of all of these witnesses corroborate the identification by Ms Mashinini and that of Ms Mkhwanazi.

Accused 2:

[48] **Ms Mashinini** identified accused 2 in the dock, as he had been roaming around at the tills. **Ms Mkhwanazi** did not point out accused 2 in the dock. Neither of them pointed out accused 2 in Exhibit A2.

[49] **Sgt Sithole** identified accused 2 in photo 1965 Exhibit A2. **Ms Mashinini** testified that accused 2 was dressed in a red lumber jacket. Photo 1965, which Sergeant Sithole referred to, depicts a male wearing a black sweater with the writing 'UZZI' on it. In view of the Court, the evidence in respect of identification is not reliable.

Accused 3

[50] **Ms Mashinini** testified that accused 3 was present during the second robbery, and was all over the front of the store. **Ms Mkhwanazi** made a dock identification of accused 3. She saw accused 3 at the cash office demanding airtime. **Sergeant Sithole** identified accused 3 in photo 1968 Exhibit A2. Neither of the two victims were requested to point him out in the photo album Exhibit A2. The Court is therefore not convinced that the dock identification of accused 3 is reliable.

Accused 4

[51] **Ms Mkhwanazi** made a dock identification of accused 4. **Sergeant Sithole** conceded that she did not have video footage or photos in respect of accused 4. The Court is not convinced that the identification of accused 4 is reliable.

Accused 5

[52] **Ms Mashinini** pointed out accused 5 in the dock as the robber who was wearing light blue shorts.

[53] **Ms Mkhwanazi** made a dock identification of accused 5. The clothing description given by Ms Mkhwanazi in respect of accused 5 and his actions are corroborated by the video footage that was summarized by Ms Mametse. Ms Mkhwanazi testified that it was accused 5 who had fought with the security guard. Accused 5 was dressed in a short

green Bermuda trouser, and a brown jacket. The witness identified accused 5 as the robber depicted in Exhibit A2 photo number 1966.

[54] **Ms Mametse** described the actions of the male depicted in photo 1966 as follow: A male wearing black shoes, white socks, blue short pants, brown jacket and a black and white cap went out of the store, and ensued, with what seemed like an argument, with the security guard. It seemed like this male was holding a firearm. The male and security guard were fighting and both went out of the store, where the security guard fell on the ground outside the store. This male remained at the entrance and kept on giving signals while standing at the entrance.

[55] **Sergeant Sithole** identified accused 5 as depicted in photo 1966 Exhibit A2. It is the view of the Court that this photo is of sufficient quality to make an identification.

Accused 6

[56] **Ms Mashinini** pointed out accused 6 as being present, and who had been demanding money from the cashiers. On behalf of accused 6 it was put to the witness that it was not accused 6 depicted in photo 1947 Exhibit A1 wearing the red jacket. **Sergeant Sithole** conceded that she did not see accused 6 in the photos from the video footage in respect of CAS 85/07/2018. It is the view of the Court that the identification of accused 6 is not reliable.

Accused 7

[57] **Ms Mashinini** pointed out that accused 7 was '*present in the commotion in front*'. **Ms Mkhwanazi** made a dock identification of accused 7. He was one of the males who were demanding airtime at the money market, and came into the money market, slapping them and saying '*You are busy playing here.*' She described the clothing of accused 7. He was wearing a navy blue or green jacket, or a green and black jacket. She pointed out accused 7 as the person depicted in Exhibit A2 photo number 1969. **Sergeant Sithole** conceded that she did not have video footage or photos in respect of accused 7 in this robbery. It is the view of this Court that the quality of photo 1969 is of such poor quality that no facial features can be seen. It is the view of the Court that the identification is not reliable.

Accused 8:

[58] **Ms Mkhwanazi** made a dock identification of accused 8. She described the clothing of accused 8. He was wearing a red jacket. Exhibit A2 photo 1967 was identified as being accused 8. **Sgt Mokoena** arrested accused 8 on 20 May 2019 after he was pointed out by an informer, based on a description that Sgt Mokoena provided to the informer. Sgt Mokoena testified that he would not have been able to identify accused 8 without the assistance of the informer. **Sergeant Sithole** identified accused 8 depicted in photo 1967 Exhibit A2. It is however the view of this Court that the photo is of such a poor quality that no facial features can be seen, and as a result the identification is not reliable.

The robbery that occurred on 27 September 2018

Counts 8, 9 and 10 in respect of accused 2, 3, 4, 6 and 9

Accused 2

[59] **Sergeant Sithole** testified that she was unable to find a picture of accused 2 in Exhibit A3. She conceded that accused 3 could not have been on this scene if he was arrested on 26 July 2018. Exhibit GG indicates that his rights were explained to him via a Notice of Rights issued on 29 July 2018.

Accused 3

[60] **Ms Lukhele** testified that the male who was dressed in a tracksuit was in possession of a firearm. **Ms Mametse** described the actions of the male depicted in photo 4037 as follow: A male wearing a black and white top with black pants entered the store and stood next to the female security guard, who immediately knelt down, and then standing up again. It seemed like this male was in possession of what seemed like a gun. This male seemed to remove what seemed like money from the till drawer at the money market. A female staff member handed a yellow shopping bag to this male after having seemingly placing money inside. The male left the store in possession of the yellow plastic bag.

[61] **Kenneth Bonga Tshabalala** pointed out accused 3 in court as the person whom he and his colleagues had apprehended on 27 September 2018. At the time, accused 3 was dressed in a two-piece black tracksuit, and blue and white Adidas sandals. The tracksuit

had a hoody. They confiscated a plastic U-Save bag from accused 3 which contained notes and coins. He knows accused 3 as Muzikhona Mathebula. Accused 3 was arrested 200 to 300 meters from U-Save. Mr Tshabalala testified that accused 3 was one of four males who had initially jumped over the wall of Corrections when chased by the Police.

[62] **Cst MR Mathebula** received accused 3 from a Correctional Officer approximately 60 meters from U-Save. Accused 3 was wearing a black and white jersey. Cst Mathebula inquired from accused 3 where the money was, to which he responded that he had handed it to the Correctional Officer. No objection was raised in respect of this admission by accused 3 during evidence in chief. At that stage, Sgt Nonyane arrived who reported to him that he had been fighting with accused 3 earlier. Accused 3 was pointed out in court and identified as Muzikhona Mathebula.

[63] **Sgt Nonyana**, after chasing after accused 3, retrieving the firearm that was dropped by accused 3, and explaining to Correctional Officers what had transpired, eventually found that accused 3 had been apprehended, and was under the control of Cst Mathebula. The firearm that he had seized, was proved to be a semi-automatic pistol in terms of the definition in the Firearms Control Act, as testified to by **Capt Mthembu**.

[64] **Sergeant Sithole** identified accused 3 in photo 4037 Exhibit A3.

Accused 4

[65] **Mr Ngobeni** testified that he was a security guard at U-Save and standing at the entrance on 27 September 2018. Two males entered the shop. One asked where the Pampers were. When this male eventually wanted to exit the shop, he was in possession of a crate that was not for sale, filled with milk and nappies. The Police had already arrived, and this male placed the crate on the floor and left the shop. Mr Ngobeni testified that the male who had inquired about the Pampers arrived in a black BMW which he parked in front of the store. The male was wearing traditional headgear.

When the two males initially entered the shop, he heard the sound of a firearm. He saw that indeed one of these males were in possession of a firearm. This man made a phone call to others inquiring where they were, as they had already started. Three more men entered the shop.

[66] **Mr Hadebe** testified that he saw three males. The one male, who had hit him in the chest, had marks/scars in his face. He demanded money from Mr Hadebe, and threatened to kill him. He had to put money into a plastic U-save/Shoprite bag. He pointed at accused 9 in the dock. The second male who opened the last till, was wearing a brown hat. He pointed accused 6 in the dock. He described the third male, who had in his possession a crate of Pampers, wearing a crown on his head.

[67] **Ms Mametse** described the actions of the male depicted in photo 4039 as follow: The male was wearing a multi-colored T-shirt, jeans, Zulu head band and hand band. He entered the shop. He came out of the store carrying baby nappies, a camp chair and some unknown items. He left them at the door at the entrance and went out.

[68] Accused 4 was arrested by **Cst Rampearie** at a taxi rank. They had earlier viewed video footage and received a description of a possible suspect who was at the taxi rank. Accused 4 was pointed out in the dock as the suspect who had been wearing traditional headgear and a short sleeve colorful shirt, having a dark complexion. After his arrest, he was taken back to U-Save where a lady started to cry upon seeing accused 4. Cst Rampearie identified accused 4 in Exhibit A3 photo 4039, as the suspect whom he had arrested.

[69] **Mr Masuku** testified that, after an interview on the crime scene with Muzukana Mathebula, he arrested accused 4 at a taxi rank. The clothing description they were given matched accused 4 and he is depicted in Exhibit A3 photo number 4039.

[70] **W/O Malan** testified that the left thumb print of accused 4 was lifted from inside the black BMW parked at U-Save on 27 September 2018. In addition, **Sergeant Sithole** identified accused 4 in photo 4039 Exhibit A3. In the view of the Court there is a case for accused 4 to answer to.

Accused 6

[71] **Mr Hadebe** testified that accused 6 was the male who opened the last till, and was wearing a brown hat. He pointed accused 6 in the dock. His statement was handed in as Exhibit T. In his statement he states that the last till did not contain any money. **Ms Mametse** described the actions of the male depicted in photo 4040 as follow: He was wearing a blue shirt, dark Capri pants and a big dark sun hat. He went to a till, took a yellow Shoprite plastic bag and left it and went out of the store. **Sgt Sithole** identified accused 6 in photo 4040 Exhibit A3. In view of this Court, the quality of this photo is sufficiently clear to identify accused 6.

Accused 9

[72] **Mr Jane** identified accused 9 in the dock as one of the perpetrators whom had hijacked his BMW from him, kidnapped him, his wife and child, and had pointed them with a firearm. He testified that they were hi-jacked at 8 pm and he only reached the Police Station at 12 pm. They had spent a considerable length of time with accused 9 in a vehicle. It was however the first time that he had seen accused 9 on the day of the hijacking.

[73] **Mr Hadebe** pointed out accused 9 in the dock as the robber who came to him with a plastic bag in U-Save. During cross examination it was put to Mr Hadebe that the description in his statement referred to the first suspect wearing a black T-shirt and had

cultural marks on his face and that he was light black in complexion. He testified that this was accused 9.

[74] **Ms Mametse** described the actions of the male in photo 4038 as follow: A male wearing a white, maroon and dark/black T-shirt. He went to the till and instructed the male cashier to open the till. He went out of the shop carrying a yellow Shoprite bag. **Sgt Mngomuzulu** apprehended accused 9 after he was pointed out as a robber on the scene at U-Save. **Sgt Sithole** identified accused 9 in photo 4038 Exhibit A3. In view of the Court, this photo is of sufficient quality in order to make an identification.

ORDER:

[75] The Court makes the following order in respect of the application in terms of *section 174 of Act 51 of 1977*:

Count 1:

1. Refused in respect of accused 1 and 6.
2. Granted in respect of accused 3 and 4.

Count 2:

Granted in respect of accused 1, 3, 4 and 6 as the prosecution tendered no proof that the firearm used during the robbery was a firearm in terms of *Act 60 of 2000*.

Count 3:

1. Refused in respect of accused 1 and 5.
2. Granted in respect of accused 2, 3, 4, 6, 7 and 8.

Count 4:

1. Refused in respect of accused 1.
2. Granted in respect of accused 2, 3, 4, 5, 6, 7 and 8. The application in respect of accused 4 is granted as the prosecution did not present evidence that the firearm in possession of accused 5 was found and complied with the definitional requirements in terms of Act 60 of 2000. The prosecution further failed to present evidence of joint possession in respect of accused 5.

Count 5:

1. Refused in respect of accused 1.
2. Granted in respect of accused 2, 3, 4, 5, 6, 7 and 8.

Count 6:

1. Refused in respect of accused 1 and 5.
2. Granted in respect of accused 2, 3, 4, 6, 7 and 8.

Count 7:

1. Refused in respect of accused 1 and 5.
2. Granted in respect of accused 2, 3, 4, 6, 7, and 8.

Count 8:

1. Refused in respect of accused 1 and 5.
2. Granted in respect of accused 2, 3, 4, 6, 7 and 8.

Count 9:

1. Refused in respect of accused 3, 4, 6 and 9.
2. Granted in respect of accused 2.

Count 10:

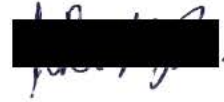
1. Refused in respect of accused 3.
2. Granted in respect of accused 2, 4, 6 and 9. The prosecution did not present evidence to prove joint possession in respect of accused 4, 6 and 9 of the firearm.

Count 11:

1. Refused in respect of accused 4 and 9.
2. Granted in respect of accused 2, 3 and 6. The prosecution failed to prove that accused 3 and 6 had knowledge that the BMW was a stolen vehicle or that they were involved in the theft thereof, or any evidence to place them inside the BMW.

[76] Accused 2, 7 and 8 is found not guilty and discharged in terms of section 174 of Act 51 of 1977, and can stand down.

[77] Accused 1, 3, 4, 5, 6 and 9 has a case to answer to.



VAN WYK, AJ

Acting Judge of the High Court of South Africa

Gauteng Division, Pretoria

Appearances:

For accused 1 and 3:	Adv Bosiki
For accused 2:	Adv Qwabe
For accused 4, 5, & 6	Adv Mogale
For accused 7 & 9	Adv Mtsjali
For Accused 8	Mr Kgagara
For the State:	Adv L More, DPP Pretoria
Date of delivery:	07 March 2025