REPORTABLE
CASE NO.: SA 03/2009

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

HYACINTH JAMES NINGISA	**1ST APPELLANT**
MACDONALD KAMBONDE	**2ND APPELLANT**
HENDRICKS HENNY TSIBANDE	**3RD APPELLANT**
BRENDON DAVID OMSWA SIMILO	**4TH APPELLANT**
ISMAEL OAEB	**5TH APPELLANT**
VINCENT NDABULA MABUZA	**6TH APPELLANT**
MIKE SANDILE MABENA APANI	**7TH APPELLANT**

and

THE STATE	**RESPONDENT**

Coram: Shivute CJ, Maritz JA *et* Mainga JA

Heard on: 07 - 08/10/2010

Delivered on: 13/08/2012

APPEAL JUDGMENT

MAINGA JA: [1] The seven appellants, together with four other accused persons, were indicted before Silungwe, AJ in the High Court of Namibia on two counts of robbery with aggravating circumstances alternatively theft on each count, one count of possession of machine gun and one count of possession of an unknown number of rounds of ammunition. It was alleged in respect of count 1 that the appellants had forced Harald Schutt into submission by threatening to shoot him with firearm(s) and that they only then stole from him at gunpoint a cellular phone, a Nissan pick-up motor vehicle with a canopy and a toolbox all valued at N$75 426,20. The allegation in relation to count 2 was that the appellants had forced security guard Kapira Gerhard Thihuro into submission, fired and shot in his direction thereby wounding him with a shot fired from an R5 automatic machine gun or machine rifle and stole from him N$5.3 million cash, the property of City Savings Investment Bank (CSIB). The alternative counts on the two main counts alleged theft of the property in both counts valued as in the main counts. Counts 3 and 4 concerned the possession of a machine gun and an unknown number of ammunition in contravention of s 29(1)(a) and 1(e) respectively read with sections 1 and 38(2)(a) of the Arms and Ammunition Act, 1996 (Act No. 7 of 1996). After a trial which continued intermittently for three years and on 22 February 2006, the appellants were convicted as follows:

> Appellants 1, 3 and 7 on all four counts as the main perpetrators.
> Appellant 2 on the second count.
> Appellants 4 and 5 as accessory after the fact and accomplice respectively on count 2.
> Appellant 6 on the alternative of theft to the second count.

[2] On 27 March 2006 appellants were sentenced to terms of imprisonment as follows:

> First, third and seventh appellants: 15 years imprisonment on count 1 each.
> 20 years imprisonment on count 2.
> 3 years imprisonment on counts 3 and 4, both taken together for purposes of sentence which was ordered to run concurrently with the sentences of 20 years in count 2.
> Second appellant: 20 years imprisonment.
> Fourth appellant: 10 years imprisonment of which 3 years were conditionally suspended for five years.
> Fifth appellant: 15 years imprisonment of which 3 years were conditionally suspended for five years.
> Sixth appellant: 8 years imprisonment of which 3 years were conditionally suspended for 5 years.

[3] The Court *a quo* further made orders disposing of exhibits.

[4] On 12 November 2008 the Court *a quo* granted the appellants leave to appeal to this Court against their convictions and sentences on the grounds which the trial Judge described as follows:

> "In considering an application for leave to appeal, such as the present one, the proper test is whether another court may reasonably come to a different conclusion. It follows that, although I remain satisfied that the applicants were, to all intents and purposes, properly convicted and sentenced, in view of the complexity of the case in terms of the multifarious issues that arise, coupled with the sheer enormity of the matter, the Supreme Court might come to a different conclusion."

[5] In determining whether or not to grant a convicted person leave to appeal, the dominant criterion is whether or not the applicant will have a reasonable prospect of success on appeal (*Rex v Baloi* 1949 (1) SA 523 (AD)). From the very nature of things, it is always somewhat invidious for a Judge to have to determine whether a judgment which he/she has himself/herself given maybe considered by a higher court to be wrong, but that is a duty imposed by the legislature upon Judges in both civil and criminal matters. As regards the latter, difficult though it may be for a trial Judge to disabuse his/her mind of the fact that he/she has himself/herself found the State case to be proved beyond reasonable doubt, he/she must, both in relation to questions of fact and of law, direct himself/herself specifically to the enquiry of "whether there is a reasonable prospect that the Judges of Appeal will take a different view. … In borderline cases the gravity of the crime and the consequences to the applicant are doubtless elements to be taken into account, the primary consideration for decision is whether or not there is a reasonable prospect of success". (Per Ogilvie Thompson AJA in *R v Muller* 1957 (4) SA 642 (AD) at 645 D-H. See also *Rex v Kuzwayo* 1949 (3) SA 761 (AD) at 765; *R v Shaffee* 1952 (2) SA 484 (AD)*; S v Shabalala* 1966 (2) SA 297 (AD) at 299 A-E and *Rex v Ngubane and Others* 1945 (AD) 185 at 186).

[6] After stating that he was satisfied that the appellants were, to all intent and purposes properly convicted and sentenced and that the test in applications for leave to appeal was whether another court may reasonably come to a different conclusion, the learned trial Judge nevertheless granted leave to appeal on the grounds of "the

multifarious issues that arose during the trial and the enormity of the matter". Save for mentioning the test, the Judge failed to objectively discharge his duty to consider whether the appellants had a reasonable prospect of success on appeal. The issues on which he granted leave to appeal could well be elements which he could have taken into consideration, but the ultimate consideration, given the issues on which he granted leave was whether the appellants had reasonable prospects of success.

> "A reasonable prospects of success means that the Judge who has to deal with an application for leave to appeal must be satisfied that on the findings of fact or conclusions of law involved, the court of appeal may well take a different view from that arrived at by jury or by himself and arrive at a different conclusion."

(*S v Ackerman en 'n Ander* 1973 (1) SA 765 (AD) at 766H). See also *R v Boya* 1952 (3) SA 574(C) at 577B-C.

Where prospects of success are absent leave should be refused but where prospects exist after a well considered conclusion on the facts, leave to appeal ought to be granted. It should always be remembered that even if leave to appeal is refused, in terms of s 316 of the Criminal Procedure Act, 1977 it is still open to the appellant to petition the Chief Justice for leave to appeal.

[7] The appellants were respectively Accused No's. 1, 2, 3, 7, 9, 10 and 11 at the trial. I shall for the sake of convenience refer to the appellants individually as accused in that order. Accused No. 7 withdrew his appeal in this Court on 21 June 2010. Accused No. 10 abandoned his appeal after he was released from prison; he has

since returned to his home country, South Africa. The other four accused who were charged with the appellants, Accused No's. 4 (Immanuel Handjamba Kaukungua) and 5 (Heinrich Joseph), the prosecution was discontinued against them as the trial progressed. Accused No. 6 (Bertha Nanduda) was discharged at the close of the State's case and Accused No. 8 (Arvo Tsheeli Natangwe Haipinge) was acquitted.

[8] All five accused appeared in person. Save for two joint issues on the convictions; the contentions on which their appeals are based lack uniformity, they vary according to the degrees of their participation. The joint contentions are: (i) the refusal by the trial Judge to recuse himself when the accused so applied (Accused No's. 1, 2 and 3) and (ii) whether MTC printouts ought to have been received in evidence (Accused No's. 2, 3 and 11).

[9] I deal first with the factual background and circumstances which led to the arrest of the accused persons before I proceed to tackle the appeals of the individual accused.

9.1 On Thursday 16 November 2000, the Bank of Namibia (BoN) issued to the Windhoek Branch of City Savings and Investment Bank (CSIB) a sum of N$7 360 000,00. This amount consisted of N$3 000 000,00 in new N$50 notes within a specific range of serial numbers, N$4 000 000,00 in used N$50 notes and N$360 000,00 in used N$10 notes.

9.2 Accused No. 2 and Kapira Gerhard Thihuro were security officers employed by Professional Security Services CC (PSS). In the morning of 16 November 2000, they collected, in their official capacity, the amount of N$7 360 000.00 from BoN and transported it to the offices of CSIB in Windhoek. That money was earmarked for transportation to CSIB Branches at Ondangwa and Katima Mulilo.

9.3 CSIB requested PSS to transport N$5 300 000,00 (out of the total amount received from the BoN) to its Ondangwa Branch. Consequently, in the afternoon of 16 November 2000, Accused No. 2 and Kapira fetched the said sum of money from CSIB and took it to the offices of PSS in readiness for its transportation to Ondangwa.

9.4 At about 22h45 on 16 November 2000, one Harald Schutt, (Schutt) arrived at his residence No 7 Schweringburg Street, Klein-Windhoek, driving a Nissan pick-up with registration No. N12701SH. While he was opening the gate three unknown persons approached him and demanded, at gunpoint, keys to the pick-up as well as his cell-phone. The persons took the Nissan pick-up with a canopy, with tools in it and the cell-phone, threatening to kill Schutt as they drove off. This was the first robbery which is the subject matter of the first count.

9.5 At about 01h00 on Friday, 17 November 2000, Accused No. 2 (as driver) and Kapira Gerhard Thihuro (as crewman) set-off for Ondangwa,

transporting the N$5 300 000,00 in a PSS company vehicle, to wit: an armoured Toyota pick-up with registration no. N43572W (the Toyota). The money was kept in a locked safe located at the loading box of the pick-up.

9.6 They left their offices and drove along Mandume Ndemufayo Road and then into Hosea Kutako. At the bridge they turned to join the Highway leading to the north when they saw a white vehicle parked, which after the robbery and when found turned out to be Schutt's Nissan pick-up. As they joined the highway the vehicle they saw parked, bumped into their vehicle.

9.7 Kapira attempted to call Johannes Henning Kruger Senior (Kruger Snr.), a co-proprietor of PSS, on Accused No. 2's cell-phone. Kruger Snr. also endeavoured to telephonically contact Kapira in response. These calls were registered on the Mobile Telecommunications Ltd (MTC) system on Friday, 17 November 2000 between 01:29:20 and 01:32:11.

9.8 Accused No. 2 pulled over the Toyota he was driving and stopped.

9.9 The assailants in the Nissan pick-up fired shots at the Toyota and demanded money and a key to the safe. They obtained the safe key,

and emptied the safe of its contents. This was the second robbery which is the subject matter of the second count.

9.10 During the second robbery, Kapira was shot in the abdomen whereupon he returned fire and thereby shot one of the robbers with a PSS company 9mm calibre pistol. The robber who was shot must have dropped an R5 machine-gun which was found at the scene. That R5 machine-gun and the ammunition fired therefrom form the subject matter of the third and fourth counts. The fire-arm was in a good working condition; it could fire single and automatic shots. That type of fire-arm was previously used by the South African Defence Force and it was still being used by the Namibian Police Force but it was not registered on the police computer.

9.11 The robbers drove away in the Nissan pick-up, taking with them the money (from the Toyota pick-up), and Accused No. 2's cell-phone.

9.12 At approximately 07h45 on 17 November 2000, the Namibian Police recovered Schutt's Nissan pick-up which had been abandoned near Daan Viljoen Road, Windhoek. The canopy, registration plates, toolbox and tools were missing from the vehicle and a registration plate with the number N63013W was affixed thereto. Detective Sergeant Stefanus Shikufa lifted fingerprints from the vehicle (dash board and roll bar)

which were compared with the fingerprints taken from Accused No. 3 and was found to be identical. There was also blood on the steering wheel of the Nissan pick-up. A blood sample was collected therefrom. Dr. Agnew drew blood specimen from Accused No. 1. The two specimens were sent for a DNA analysis to South Africa. Sharlene Otto, a Chief Forensic Analyst with the rank of Superintendent in the South African Police Service (SAPS) found that the blood scrapped from the steering wheel originated from two male persons, which she said was a mixture of DNA or a complete mixture. She further found that Accused No. 1 was included as donor of the DNA in the mixture of blood from the steering wheel. Sergeant Shikufa further picked up stones that had blood on the scene, where the armoured vehicle was forced off the highway. The analysis of that blood by superintendent Otto turned out to be that of Kapira Gerhard Thihuro. Sergeant Shikufa further removed rubber paints from both the Nissan and the Toyota pick-ups at the parts where collision marks were visible for forensic analysis. Dr. Ludik, the Director of the National Forensic Science Institute (Namibia), found a positive mark and he inferred that there was a physical contact between the two vehicles. This follows necessarily that the Nissan pick-up was a conduit to commit the second robbery. In exhibit “B” a bundle of the photographs of the two vehicles depict damage to both vehicles, the Toyota on the right hand side and the Nissan on the left.

9.13 On 17 November 2000, Accused No. 7 requested Dr. L. Nghalipoh to accord medical attention to Accused No. 1 who had sustained a gunshot wound in the abdomen at house No. 1709 Agnes Street, Khomasdal. That address was the house Accused No. 9 had rented from Ms. Heller Bezuidenhout from 1 November 2000 to the end of that month.

9.14 As a result, Dr. Nghalipoh in the company of his secretary, Ms. Maria Ndjodhi, visited house No. 1709, Agnes Street in Khomasdal and there attended to Accused No. 1. As his condition required surgery, he was referred to the Roman Catholic Hospital in Windhoek where he was admitted and received treatment.

9.15 While he was receiving treatment in the Roman Catholic Hospital, he was arrested by the Namibian Police on the same day of his admission, namely, 17 November 2000. A blood sample was obtained from him by Dr. Nadine Louise Agnew who was a state pathologist at the police mortuary in Windhoek at the time.

9.16 After Kapira Gerhard Thihuro was interrogated, Accused No. 2 was arrested in Windhoek on 17 November 2000 by the Namibian Police. Accused No. 3 was arrested a month thereafter at Oshivelo on 20

December 2000. He was taken to Tsumeb, wherefrom the members of the Serious Crime Unit of the police force brought him to Windhoek.

9.17 During Accused No. 1's treatment and operation at the Roman Catholic Hospital, X-rays taken of him on 20 November 2000, showed that a bullet was still lodged in his body. The projectile had not been removed by the date of his conviction and sentence. On the X-rays taken of the projectile, William Onesmus Nambahu concluded that the dimension came closer to a 9 millimetre projectile.

9.18 None of the accused was at all material times in lawful possession of an R5 automatic machine gun or machine rifle or ammunition to be fired therefrom.

9.19 On Sunday, 19 November 2000, Accused No. 10 took a flight from Windhoek to Cape Town, South Africa. On the same day, Accused No's. 7, 8 and 9 travelling in Accused No. 9's Volkswagen Golf car (the Golf) with registration number N11322W, and Accused No. 11, travelling in his BMW car with registration number FH2377GP, left Windhoek on their way to South Africa.

9.20 On Monday, 20 November 2000, at 00h08, Accused No's. 11 and 9 arrived at Vioolsdrift border post in South Africa in the Golf, Accused

No. 11 driving the car. On the same date at 00h10, Accused No's. 7 and 8 arrived at Vioolsdrift border post in Accused No. 11's BMW car, Accused No. 8 driving.

9.21 At approximately 04h30 on Wednesday, 22 November 2000, upon information received from Chief Inspector Becker of the Namibian Police, the South African police officers conducted a search at 75 Teresa Street, Camps Bay, Cape Town. In the room where Accused No. 10 and 11 were sleeping they found a sum of N$909 250,00 in N$50 notes. The bulk of the money was allegedly in a bag in a wardrobe. Accused No. 11 provided the keys to unlock the bag and some money was in a black suitcase which Accused No. 10 identified as his. Accused No's. 7, 8 and 9 were also in the same house, but in other rooms. The five accused persons together with two other male persons were arrested. The two other persons were later released. The five accused claimed to have had no knowledge of the money in the house.

9.22 It is undisputed that the money found in the room where Accused No's. 10 and 11 were sleeping was part of the money that constitutes count 2. In Cape Town, Accused No's. 7, 8, 9, 10 and 11 launched bail applications but Accused No. 11 withdrew his after the application of Accused No. 9 was heard. Subsequently, all five accused were returned

> to Windhoek (as regards Accused No's. 10 and 11 following their extradition proceedings). In Windhoek, Accused No's. 7, 8, and 9 launched further bail applications. The bail proceedings in Cape Town and Windhoek were received in evidence. Among the items of evidence for and against the accused is the cellphone or telephone contacts made among some of the accused. Of particular interest are the calls which emanated from Accused No's. 1, 3 and 11 to Accused No. 2 against the backdrop of claims by Accused No. 2 that he did not know the co-accused before the robbery and that they did not know him. Accused No's. 2, 3 and 11 have challenged the admissibility of the MTC print-outs and this court *mero-motu* raised the issue with Mr. Small, counsel for the respondent who was directed to file further heads of argument in that regard, which he did. The accused also filed additional heads of argument in this regard.

[10] I now turn to consider the appeal of Accused No. 1. The Court below accepted the evidence of Superintendent Sharlene Otto that Accused No. 1 was connected to the scrapings of the blood sample taken from the steering wheel of Schutt's Nissan pick-up; that he was the person who shot Kapira Thihuro; that he was the person Kapira Thihuro shot, linking him to the first robbery of Schutt's Nissan pick-up and the second robbery of the money from the armoured Toyota. That Court further found that the projectile lodged in the body of Accused No. 1 was a 9 mm projectile. Kapira used a 9 mm pistol to shoot at his assailant. The Court below also accepted the evidence

of Dr. Nghalipoh that Accused No. 7 insisted that Accused No. 1 be treated at home for the reason that Accused No. 1 was not in possession of immigration papers; which was not correct because the entry visa of Accused No. 1 was expiring at the end of January 2001. This, the Court found, was an attempt to conceal the circumstances in which Accused No. 1 sustained his injury.

[11] Accused No. 1 argued that the Court below erred when it found that the projectile still lodged in his body was a 9 mm; when it accepted the evidence of Dr. Nghalipoh that the accused told him that he was in pain for eight hours; (he testified that the doctor misunderstood him, he told the Doctor that he was shot at about eight o'clock in the morning); when it accepted Sergeant Nangolo's evidence of his presence at Nandos restaurant the evening of 16 November 2000; when it accepted the evidence of the mixture of the DNA. (Accused, maintained that since he has no mixed blood, the scrapings of the blood sample came from two persons and was thus tampered with to incriminate the accused); when it accepted the evidence of Shadrack Dube (also known as Falazo) that he heard from Accused No. 10 that Accused No. 11 had reported to him (Accused No. 10) that accused was shot when Accused No. 11 denied making such a report; when it accepted that Kapira shot the accused when there was no evidence of that nature led by the State, (for Kapira testified, that he did not know the accused and that that finding was an irregularity). The Court was prejudicial and biased towards the accused and thus he did not receive a fair trial; a failure of justice had allegedly occurred. He further argued that the Eros Park Tower registered his cellphone number at 01h25 which is indicative

that he was not on the scene of the second robbery and the Court's finding to the contrary was wrong. In actual fact Accused No. 1 does not challenge the admissibility of the MTC print-outs; he relies on the 01h25 call and admits that he made that call to Accused No. 11. The time of 01h25 has been accepted as the time more or less the second robbery was committed given the evidence of Kapira on the attempts he made to call Kruger Senior, the co-owner of PSS, the evidence of Kruger Senior and Junior. On the sentence he argued that the Court erred when it failed to take into consideration the period of five years accused was in custody; that the sentence is bound to break the accused in that it is not rehabilitative or reformatory, thus ignoring the personal circumstances of the accused. Save for dismissal of the recusal application, which is a joint attack on the judgment below with Accused No's. 3 and 11 which I will advert to *infra*, the above submissions are more or less the issues Accused No. 1 raised.

[12] Accused No. 1 like all his co-accused pleaded not guilty to all the charges and his plea was a total denial of all the charges. Accused No. 1's version is that he arrived in Namibia on 29 October 2000 to visit his aunt Laetitia Makayi. He stayed with her for a week and he secured accommodation at Shadrack Dube's (Falazo's) house where Accused No's. 10 and 11 who had arrived earlier than him in Namibia on 13 October 2000, were also staying. He did not own a cellphone when he arrived in Namibia. He used to receive calls on the cellphones of Accused No's. 10 and 11, cellphones 0812464427 and 0812457929 respectively. He later in November acquired his own cellphone. On 16 November 2000 he was invited to a party by one

Cheeks at House No. 1709 Agnes Street, Khomasdal, where he stayed from 18h00 till 21h00. At 21h00 he, his cousin Ashley and their girlfriends went to Kalahari Sands Hotel and later to the Country Club. They left the Country Club at 01h00. They went to Accused No. 1's girlfriend's parent's house in Eros where they remained until 02h30 when Ashley and his girlfriend took him back to 1709 Agnes Street, Khomasdal, the house where Cheeks was staying. They arrived at 02h45. He could not sleep at the girlfriend's house because he had Cheeks' room keys and Ashley had to return the vehicle they were using to the person he had borrowed it from. At this house he listened to music and made calls to South Africa and then fell asleep. Cheeks returned at 06h00. While accused was preparing breakfast, he saw Cheeks polishing his gun. He brought him tea and as he turned around and was about to sit down he heard a loud bang. Accused was shot and was bleeding. Cheeks took accused's cellphone and made calls to summon help for the accused to be taken to hospital. He informed accused that he could not find the people he was looking for. He left and when he returned he came with Accused No. 7. Accused stood up and told Cheeks that they must go to hospital. Cheeks told him that the gun he had shot him with was unlicensed and that Accused No. 7 was sent by a doctor to come and ascertain if someone was shot. Cheeks begged the Accused not to go to hospital as he, Cheeks, would be apprehended for the unlicensed firearm. Cheeks informed him that a doctor would come to treat him at home. Cheeks and Accused No. 7 left and returned with a doctor who administered two injections. The doctor informed the accused to go to hospital otherwise he would die. The doctor informed them that he was making arrangements for the accused to be operated on at a government

hospital. Cheeks intervened and said accused should be taken to a private hospital and he would pay the expenses. The doctor called the Roman Catholic Hospital. Accused wanted to leave with the doctor but Cheeks said accused should wait first as he was going to fetch the money to pay at the hospital and he, Cheeks, would take him to hospital. Cheeks left and returned with another person, a taxi driver. He gave accused N$8 000,00 and told accused that the taxi driver would drop him at the hospital. He was dropped at the Roman Catholic Hospital. He walked in the hospital on his own and the nurse he reported to in the hospital asked him a lot of questions and he told her that Cheeks shot him. He was admitted and taken to the theatre for an operation. When he gained consciousness, he found himself surrounded by many police officers who confronted him with the offences in question, which he denied. He was arrested. After a day or two the police officers approached him and confronted him with the identity of Accused No. 2. When he denied knowing Accused No. 2 they asked him to switch on his cellphone which he had left with the nurse who received him when he was admitted. Accused No. 2's name was not saved in his cellphone but he could see that a call was made to his phone at 21h00 on 16 November 2000. A female doctor arrived and drew blood from him. He was transferred to a government hospital and later to prison and was charged with the crimes in question.

[13] Accused No. 1's aunt, Makayi, confirmed the visit and the short period he stayed with her. Accused's cousin, Ashley, also corroborated accused's version regarding the whereabouts of accused that evening of 16 November 2000. He was

with the accused from 18h00 on the 16th up to 02h30 on the 17th when he dropped him in Khomasdal at the house Accused No. 9 was renting at the time.

[14] The trial Court rejected this version finding that accused was one of the main perpetrators. The trial Court's finding is founded on the positive DNA result of the scrapings of the blood sample from the steering wheel of the Nissan pick-up of Mr. Schutt, which pick-up and as already mentioned was a conduit by which the robbery of the money was made possible. The DNA result placed the accused on both the first and second robbery, so found the trial Court. On that evidence and the evidence of Kapira that he shot one of their assailants on the scene of the robbery, the Court reasoning by inference, found that accused was the person who was shot on the scene. That finding, with respect, is correct. Accused's argument to the contrary and denial is without substance. So are the suggestions that because the blood was mixed, it must have been tampered with to implicate him or that the investigation was fraught with irregularities. To the contrary, crucial in my opinion, is the fact that accused is a donor of that mixed blood. DNA "fingerprinting" is a far more precise method of identification. The chance of error is very remote and when the test properly conducted is proof of identity beyond a doubt. See Schwikkard *et al*, *Principles of Evidence*, 1997 at 259. The reason is that each person has a unique genetic code and the 46 chromosomes which hold the code are made up of the chemical DNA (deoxyribonucleic acid). See Schwikkard, *supra.* There is no evidence that the sample of blood scrapings from Schutt's Nissan pick-up or blood drawn from the accused by Dr. Agnew was tampered with. In the absence of evidence to the

contrary, the finding of Superintendent Otto that accused was a donor of the blood scrapings from the Nissan pick-up is proof of identity beyond doubt. Superintendent Otto testified that there were two male donors linked to the blood sample. One of the persons who must have been at the scene with Accused No. 1 could possibly have been the other donor. Accused in his oral argument suggested that Cheeks who was allegedly taking care of him after he was shot, could have had blood on his hands from accused's wound and touched the steering wheel of the Nissan pick-up. This suggestion has no merit. It is unlikely on the version of accused that Cheeks would have gone back to the vehicle and touched the inside of the vehicle. Secondly, given the times accused says he was shot, that is 07h00 or 08h00, it is possible that by that time, the vehicle had already been recovered by the police. Sergeant Shikufa testified that he was called at ± 07h45 to attend to the Nissan vehicle after it was found. Thirdly, Cheeks is a fictitious person the evidence of the calls made between Dr. Nghalipoh and Accused No. 11 tends to show that Cheeks or Petro is Accused No. 11, which corroborates Accused No. 10 on that point. Accused 9 also, in his bail application in South Africa testified that he was introduced to Cheeks (Accused No. 11) by Accused No. 7 at a service station in Namibia. Superintendent Otto testified to a number of possibilities that could bring about a mixed blood result. An argument suggesting that the blood sample from the Nissan pick-up was tampered with is without substance and pure speculation. The evidence of Accused No. 10 that he had received a call at night from Accused No. 11 that Accused No. 1 had been shot is consistent with the trial Court's finding that Accused No. 1 was not shot by Cheeks at the time he alleges he was shot. Accused No. 10 is corroborated by the MTC print-out

which records a call at 04h25 from Accused No. 11's cellphone to Accused No. 10's cellphone. Accused No. 11 does not deny that the call was made; neither does he deny that it was made from his phone. What he denies is that it was not him who made the call. Shadrack Dube confirmed that on Thursday which was the night of 16 November 2000 he arrived at home drunk. He only saw Accused No. 10 in the morning. He greeted him and asked him what was wrong. Accused No. 10 reported to him that there was trouble as one of their friends (Accused No. 1) had been shot, "and they took the money with them and they are gone". Accused No. 10 indicated to Shadrack Dube that there was no reason for him to remain in Namibia; he would rather go back home to South Africa. Mr. Christians who appeared for Accused No. 1 did not challenge that version of Dube's evidence in cross-examination. There is no explanation why Accused No. 1's blood would be in Schutt's vehicle, the vehicle which was robbed from its owner two hours before the second robbery. It is undisputed that the Nissan pick-up was used to commit the second robbery. That evidence alone places him on the scenes of the first and second robberies and the possession of the machine gun which was found on the scene as well as the use of ammunition that was fired therefrom. Accused No. 1 argued that the report Accused No. 11 must have made to Accused No. 10 that Accused No. 1 was shot is hearsay as Accused No. 11 did not confirm making such a report. I do not agree. The mere fact that Accused No. 11 did not confirm or denied making such a report would not make the evidence of Accused No. 10 or that of Shadrack Dube regarding the report hearsay and inadmissible. Much would depend on the weight to be attached to the report. The surrounding circumstances under which the report was made suggests

that indeed Accused No. 11 made the report. The injury on the accused, the telephone call at 04h25 from Accused No. 11 to that of Accused No. 10, the disappearance of the bulk of the money stolen and the fact that Accused No. 10 terminated his stay in Namibia and departed for South Africa have a strong inferential probative value to the fact that Accused No. 11 made that report. This evidence is corroborated by the DNA result of the blood scrapings from the Nissan pick-up which is proof of identity of Accused No. 1 beyond doubt. Accused No. 11 vouchsafed no explanation as to who made that call at 04h25 and why it was made at such unholy hour, he merely sought refuge in falsely denying the call. Taking all these facts, I am left in no reasonable doubt that the Court *a quo* was correct to accept the evidence as admissible.

[15] Accused No. 1 relies on a telephone call from his cellphone made to Accused No. 11 at 01h25, the time accepted as the commission of the second robbery. The trial Court found that Accused No. 1 had been at the scene of the second robbery and further found that it was possible that Accused No. 11 had not physically been on the scene of the second robbery, for the reason that if they were together, “no such calls could necessarily have been made.” The Court *a quo* did not take into consideration the fact that in the conversation between Chief Inspector Becker and Accused No. 10 (Exh “KK1”), Accused No. 10 stated that Sipho or Tsipo had Accused No. 1’s cellphone. He stated that Sipho or Tsipo was in the Police Force. Inspector Becker also testified that Sipho or Tsipo was a suspect but the police did not have enough evidence to charge him. Inasmuch as Accused No. 10 was an accomplice to count 2

or the alternative thereto and whose evidence should be therefore approached with caution, there is no reason why some of his evidence should not be accepted where it is consistent with evidence found to have been proven. As the Court below correctly observed, given the circumstances of the case, the two robberies were orchestrated with a great deal of care and ingenuity with the purpose of leaving no trace of evidence. It is possible that Accused No. 1's cellphone was with somebody at the time the second robbery was committed to monitor the movements and whereabouts of the persons who were executing the crimes, more so, given the place where the Nissan pick-up was abandoned, the occupants must have been assisted to get away from that place. That was possible if they were in contact with someone else. Thus, the call made from Accused No. 1's cellphone at 01h25 or at the time of the commission of the second robbery does not exclude him from having been at the scene of the second robbery. In actual fact his version of where, when and how he was shot is fraught with inconsistencies. He maintains that he did not tell Dr. Nghalipoh that he was in pain for eight hours, but told him that he was shot at about 08h00 and yet in his evidence-in-chief he said that he was shot at about 07h00. In his version he details everything he did since Cheeks arrived at the house at 06h00 the morning of 17 November 2000. From that version it is not possible that he could have been shot one hour or two hours after Cheeks had arrived. In the bail application in South Africa, Accused No. 7 who arranged for Dr. Nghalipoh to treat the accused testified that Cheeks woke him up at about 06h00; meaning Accused No. 1 was already shot by then. In the Court *a quo* Accused No. 7 testified that he woke him up at about 7 or while he was still in bed, meaning Accused No. 1 was again already

been shot. Dr. Nghalipoh was adamant that accused told him that he was in pain for eight hours. That evidence is consistent with the evidence of the second robbery being committed at about 01h25, the time accused was shot by Kapira. Notwithstanding the seriousness of accused's injury, on his version accused was prepared to be treated at the house in Khomasdal, than going to hospital because Cheeks had requested him not to go to hospital for fear of being arrested for allegedly shooting accused with an unlicensed firearm. Accused No. 7 insisted on Accused No. 1 being treated at home and eventually convinced Dr. Nghalipoh to do so. It was only after Dr. Nghalipoh had examined him and had informed him that he would die if he was not operated on that he agreed to go to hospital. On accused's version, Cheeks would not allow him to go to a government hospital (and accused ended up going to a private hospital, - the Roman Catholic Hospital). Accused No. 7 informed Dr. Nghalipoh's secretary, Ndjodhi, not to talk about Accused No. 1, the reason being that his immigration papers were not in order, which was false because the accused's entry permit was expiring only towards the end of January 2001. The insistence of Accused No. 7 that Accused No. 1 be treated at home, the Court *a quo* found, as previously stated, that it was an attempt to conceal the circumstances in which he had sustained his injury. I agree. That Court was also correct when it found that Cheeks was a fictitious person. Accused testified that after Cheeks had shot him, Cheeks took accused's cellphone to make calls and yet there are no calls recorded made from that cellphone. The calls made to request the doctor to treat accused at home were made from Accused No. 11's cellphone. The number given to Dr. Nghalipoh to call back should he wish to do so, was that of Accused No. 11. Accused No. 10 testified that

there was no such person as Cheeks and explained how the name Cheeks was invented. Cheeks being a fictitious person, in all likelihood Accused No.1 ended up at House No. 1709 Agnes Street, Khomasdal, because of his acquaintances with Accused No. 9 in whose company he was seen by Sergeant Nangolo at about 20h00 at Nandos Restaurant in Independence Avenue. Sergeant Nangolo testified that he was called by the owner of a business known as Tote of Namibia who made a report to him and showed him a white Volkswagen Golf which was parked opposite Shoprite in Independence Avenue. He kept an eye on this Golf. It made a U-turn in Independence Avenue, drove in the northerly direction and parked in front of Nandos Restaurant. Nangolo parked his vehicle and walked past the Golf to Joshua Doore outlet when he made a turn and walked towards the Golf vehicle. As he was approaching, two men alighted from the Golf Volkswagen and entered the Nandos Restaurant. He recognised Accused No. 7 in the left rear seat. The two persons who disembarked were Accused No. 9 and a person he came to know as Accused No. 1. As he passed by, he compared the registration number he was given by the owner of Tote of Namibia. The registration number was N113228W. When accused No's. 7, 8, 9, 10 and 11 were arrested in Cape Town, Sergeant Nangolo was one of the police officers who went to Cape Town. When he saw the Golf in Cape Town he immediately recognised the vehicle by its registration number which he still had in his pocket book and the tinted windows.

[16] It must be remembered that Sergeant Nangolo was called by the owner of Tote of Namibia as a result of this vehicle and its occupants. He was observing this vehicle

with its occupants at all relevant times. The Court *a quo* was correct to accept his evidence. Accused No's. 7 and 9 admitted that they were at Nandos Restaurant on 16 November 2000 at about the time testified to by Sergeant Nangolo. They only disputed that it was Accused No. 1 that he saw in the company of Accused No. 9. According to Sergeant Nangolo, he saw Accused No. 1 on the 16th but he was unknown to him at the time. When Accused No. 1 was arrested on the 17th at the hospital, he recognised him as the person he saw the previous evening. When he saw him on the 16th at about 20h00, he came to see him again at 15h00 the next day, a question of about nineteen hours in between. That being the case, the evidence of Accused No. 1 that he arrived at house No. 1709 Agnes Street at 18h00 and remained there until 21h00 is in conflict with that of Sergeant Nangolo and was correctly rejected.

[17] The evidence and the overall probabilities militate against the version of Accused No. 1. There are numerous other pieces of evidence that tend to link Accused No. 1 to the offences, namely, the fact that Dr. Nghalipoh was paid in N$50 notes although it was not proved that it was part of the stolen money; the fact that after Accused No. 1 was arrested, Accused No. 7, angrily called the doctor accusing him of having betrayed and reported them to the police; and the calls Accused No. 1 made at their house in South Africa between 02h00 and 03h00 on the 17th. He admitted in cross-examination that he would report the injury of the nature he sustained to his family and yet there were no calls made to his family after the time he

alleges he was shot. It is possible that he reported his injury during the calls he made in the early hours of the 17th.

[18] I am not persuaded that the trial Court erred in convicting Accused No. 1 on all four charges. The appeal against the conviction of Accused No. 1 must fail.

[19] I deal now with the position of Accused No. 2 (Macdonald Kambonde). Accused No. 2, like Kapira, was a security employee of PSS. It is common cause that on 17 November 2000 Accused No. 2 and Kapira commenced a journey from Windhoek to Ondangwa in the Toyota for the purpose of transporting N$5.3 million. It is also common cause that Accused No. 2 was the driver and Kapira a crew member. Before they left the headquarters of PSS each one of them had received a 9mm pistol from Kruger Senior; Kapira received a shotgun as well.

[20] The Court below convicted Accused No. 2 on the evidence of Kapira and Accused No. 2's cellphone print-outs which the Court held had connected him to the commission of the second robbery.

[21] Accused argued that the Court below erred when:

(a) It found that the planning of the robbery was hatched in October 2000, when accused was not yet employed as the driver of the PSS;

(b) It found that accused had a common purpose with his co-accused in executing the second robbery;

(c) It failed to consider that accused was a victim of the robbery, for Detective P. Martin testified that a bullet was found in the driver's seat;

(d) It considered evidence of a single witness Kapira without applying the cautionary rule;

(e) It failed to take into consideration the fact that Kapira was shot from the front position, leaving the only possibility that he opened the doors at the crucial moment of the robbery, resulting in the assailants taking the keys and accused's cellphone, and

(f) It admitted the MTC documents without authentification.

On the sentence accused argued that the court erred when:

> It failed to take into consideration the sentence of 10 years accused was serving, therefore the sentence is not rehabilitative or reformatory, thus ignoring the personal circumstances of the accused.

[22] There is a factual basis for finding that accused had a common purpose in the commission of the robbery of the N$5.3 million. Accused testified that he did not know any of the accused persons but could not explain why calls emanating from Accused No. 1's cellphone were made to his cellphone. He accepted Exhibits "ZI.1" – "ZI.4" as print-outs of his cellphone. Three fixed line numbers 271266, 215749 and 262340

made to his cellphone were also made to the cellphone numbers of Accused No's. 3 and 11. The calls made from Accused No. 1's cellphone were all made after 22h00 on 16 November 2000. The fixed line calls were registered in accused's cellphone print-out from 12 - 16 November 2000. Both accused and Kapira in their testimonies are *ad idem* that the occupants of the Nissan pick-up which was used to rob them were waiting in the street they used to join the highway to Okahandja leading to the north. The Toyota pick-up which transported the N$5.3 million is not marked as a cash in transit vehicle but Kapira testified that as soon as they joined the highway, the Nissan pick-up pursued them bumping their vehicle from behind. Accused No. 2 testified that he and Kapira were only informed at 16h00 on 16 November 2000 that they would be transporting money to Ondangwa, but Kapira testified that after they had collected the money from City Savings and Investment Bank, they parked the vehicle with money in the safe at the PSS premises. They knocked-off at 16h00 but before they knocked-off, Accused No. 2 asked Kruger Senior as to what time they would depart. He informed them that they would depart at about 01h00. The evidence led shows calls made from Accused No. 1's cellphone to that of Accused No. 2 on 16 November 2000, all made after 22h00. Missed-calls are also registered from the three land-line numbers, two made after 17h00 and 18h00. Accused No. 1 denied making calls from his cellphone to that of Accused No. 2. All that he could say was that it could have been the people he was with that evening, i.e. his girlfriend, his cousin Ashley or Ashley's girlfriend who might have made the calls. Ashley denied making calls from Accused No. 1's cellphone to that of Accused No. 2. There is no evidence that either Ashley's girlfriend or Accused No. 1's girlfriend knew Accused No. 2.

Accused No. 2 testified that he was asleep and his cellphone was on the charger when calls from Accused No. 1's cellphone were made to his cellphone. The assailants of Accused No. 2 and Kapira could only have known the route they would use from the PSS premises, the time they would leave and the description of the vehicle from sources within PSS. More so, in cross-examination of Accused No. 2, it turned out that the safe had two locks which were hidden on the corners/sides of the safe. The robbers managed with ease to find the locks, open the safe and remove the money. The evidence shows that Accused No. 2 must have communicated with some persons who executed the robbery and the trial Court was correct in finding that he had common cause in planning the robbery of the N$5.3 million. There is evidence by Kapira that at the first impact, Accused No. 2 said "those guys or people are going to rob us." When Kapira asked him as to how he knew that they were going to rob them, he remained silent. Kapira took accused's cellphone to call Kruger Senior. As he was attempting to call, he informed Accused No. 2 to make a U-turn and drive back, accused again did not respond, he just pulled the vehicle from the road and stopped. The assailants were demanding the keys and the money. One was on the roof of the vehicle and shooting on the side of Kapira. Kapira tried to shoot with his pistol and shotgun but both firearms jammed. When he cocked the shotgun, bullets simply fell out of the chamber. Kapira asked accused why he was not driving and accused replied that the keys had been taken. Kapira asked him how that had happened. Accused remained silent. He asked him for the cellphone, accused replied that the cellphone had been taken as well. Since he could not fire from his pistol and the shotgun, he asked for accused's pistol. Accused did not respond. He searched for the

weapon and found it under the accused's seat. At that stage he realised he was injured. When he wanted to shoot, accused stopped him and said he should not shoot as he would recognise the persons. He saw a person coming with a rifle, he fired in his direction and he heard the person crying. When it became quiet Kapira asked accused to go to Coca-Cola where some of their colleagues were stationed to look for help.

[23] Accused's version is to the contrary, Kapira opened the door that is why he was shot. After the door was opened, the door keys and the cellphone were taken. He argued that the trial Court failed to take that possibility into consideration. In his evidence-in-chief he testified that Kapira demanded the keys and he gave them to him which Kapira denied. He further testified that he gave his pistol to Kapira to shoot. The question is why the accused could not shoot as the vehicle was already stationary, the keys were probably already taken and Kapira was already shot at that stage? While accused states for a fact that Kapira opened the door and handed the keys to their assailants, in the same breath he argued that it is the only possibility which the trial Court should have considered because according to him it was impossible to be shot while seated in that vehicle with the door shut. But when he was pressed in cross-examination as to whether Kapira opened the door, he changed his version to say "I was in the state of shock and cannot say exactly" but Mr. Small, counsel for the respondent, further asked him whether he was in shock as he was being cross-examined. His reply was: "No but it is 3 years ago I cannot say everything exactly". It was further put to him as follows: "I'm putting it to you Mr. Kambonde why

your evidence now changes from him opening the door just before he is shot because you realise on your evidence there is no way in which he could actually hand the keys and perhaps the cellphone to the robbers on your evidence do you understand". His reply was: "I'm the one who experience (*sic*) this and how could you not believe me?" Accused was asked: "Before handing the keys to your colleague did you have the keys in your hand or was it still in the ignition?" His reply was: "If I can recall vaguely it was still in the ignition".

The cross-examination further proceeded as follows:

> "MR. SMALL: …what prevented you from driving off? --- I no more had the keys how would I have driven away? I handed over the keys to Kapira.
>
> The question is what prevented you while the keys were in the *(sic)* rather than taking them out and handing them to Kapira at that stage when you touch the keys again what prevented you from driving away? --- First of all I was in the state of shock and I just did as my colleague requested me he was hysterical and he was shouting.
>
> So are you saying your shock prevented you from driving away? --- Any bumping or any accident will bring shock to a person.
>
> Wouldn't your first reaction be an attempt to get away? --- I've tried at the stage when I was bumped and when I was tried to driven off.
>
> Mr. Kambonde the other people or apparently the driver or let us call them the robbers were next to your vehicle of the vehicle that they were driving? They were off their vehicle? --- Off the vehicle.
>
> Yes they were surrounding your vehicle? --- I saw movements but I cannot say how because there were many.

COURT: Movements of people? Movements? --- Visions or shadows.
But these were human shadows? --- That is correct. Yes?

MR. SMALL: And you say you were too shocked to drive away? --- I was in the state of shock.
But not too shocked to take out the key from the key hole is that correct? --- Yes I cannot say exactly or I cannot say precisely everything but I've tried my best to safe *(sic)* our lives and I've tried to save our lives by giving my firearm to him so that I could be here and tell the court as to what happened.
What I do not understand Mr. Kambonde is this person next to you is wounded according to you but you yourself do not fire a shot you give your firearm to him? --- Yes I told him to use the other weapon and he said he couldn't so I then took my firearm and give him because his door was open.

Wasn't your reluctance to shoot back at the person outside the vehicle because they were in fact your friends with whom this was arranged? --- No that's why I hand him my firearm to fire. Handing your firearm to a person said who told you I was shot I'm dying is that the case? --- I told him to fire or to shoot back and he said his weapon was not working anymore or jam and then I hand him my firearm in order to fire because his door was open and I even couldn't see where he was shot at and could not even see at that stage where he was wounded (*sic*)."

Accused admitted in cross-examination that there was an opening between the cabin and canopy but he would not agree with a proposition that it was possible to hand out the keys and cellphone through that opening. When asked whether he saw Kapira handing over the keys to the robbers, his reply was, "no I cannot say".

[24] Accused's oral evidence that it was Kapira who opened the door and handed over the keys and the cellphone to their assailants is contrary to what accused told

the police in his statement marked Exhibit “PP3”. In the statement he said the robbers shot at them and demanded the safe keys. He denied saying that to the police and said he vaguely remembered that it was Kapira who demanded the keys. He went on to say that the robbers damaged a bulletproof small window with a firearm. When asked whether he said that to the police, he replied that he saw the damaged window at the police station. When asked why it was in his statement, his reply was variously that he did not write the statement down and that he was told that Kapira had said so and he should also say so, or he did not know as he was under shock. The statement further states that the robbers managed to open the door; they injured Kapira. To this sentence he also said he did not write the statement down; he was in a state of shock; he did not know, and he was not given an interpreter to interpret for him. The statement goes on to say that after the robbers had shot Kapira, they managed to get hold of the safe keys. He saw four guys and the driver. They started removing the money from the safe. When they demanded for the firearms, Kapira took his firearm and shot one of them who had a rifle with him. When he was asked whether he said that, he said he was told by Kapira. When further pressed, he said he could not say whether he put it in his statement as it was long time back since the statement was made and yet he confirmed that he read through his statement before he testified. The statement goes on to say that when this person was shot he fell down, his colleagues picked him up and placed him in the vehicle and drove away. When asked whether he said so in the statement, his response was that Kapira and Kruger spoke about it. The statement continued that the driver of the vehicle which robbed accused and Kapira was a white man, well built and accused would be able to identify the

culprit. One of the members of the gang was wearing a balaclava on his face. Since it was dark he only saw shadows; he could not say the person who wore the balaclava was the one who grabbed the cellphone, car and safe keys. The robbers spoke English. He suspects that the culprits were maybe South African citizens given their accents. When asked whether that was what he said in his statement, he denied having said so.

[25] With respect, the trial Court was correct in convicting accused on the second count. The argument that it convicted on the evidence of a single witness without regard to the cautionary rule is without merit. Kapira was found to be a credible witness whose evidence the Court found to be true. See *S v Sauls and Others* 1981(3) SA 172 (AD) at 179E – 180 A-F. Accused was asked why he could not shoot at the robbers. He evaded the question to say he gave his firearm to Kapira to shoot. Kapira was already injured at that stage. That conduct on the part of accused in my opinion corroborates Kapira's evidence that he searched for accused's pistol and found it under the accused's seat and fired at one of the assailants. Kapira testified that accused forbade him to shoot as he, the accused, would identify the persons. This the accused also said in his statement to the police only to deny it during cross-examination. Accused, from the record was so evasive and the Court below correctly rejected his version. He handed the keys and the cellphone to their assailants. There is no evidence that the robbers had also demanded the cellphone but this was nevertheless handed over to the robbers. There was no reason why Kapira who sought help immediately when harm came their way would have handed the

cellphone to their assailants. The possibility is that it was accused who handed the cellphone as well, with the purpose of cutting off Kapira from seeking help and give the assailants enough time to execute the robbery. Accused on his own version testified that the Nissan pick-up stopped next to them but gives no reason why he could not drive away especially when some of the assailants had alighted from their vehicle. When asked why he did not drive off, his reply was that the keys had already been taken. Exhibit “E” photos 1 and 2 indicate that accused stopped at an open space and point “C” indicates where the assailants’ vehicle had stopped, next to the vehicle driven by accused. Accused made no attempts to flee from his assailants. His version that he was a victim of the robbery is false. The bullet found in the driver seat makes him no victim when the probability is that he had made common cause with the assailants.

I am accordingly not persuaded that the Court below should have rejected the evidence given by Kapira. Accused was rightly convicted and his appeal should fail.

[26] I deal now with the position of Accused No. 3. Accused No. 3’s attack on the trial Court’s judgment is directed at the convictions only. He argued that the court below erred when:

(a) It failed to recuse itself, after the court had found the accused guilty at the s 174 Act 51 of 1977 application. It had at that stage found that the fingerprint

on the sticker was that of accused, a breach of Art 12(d) of the Constitution of Namibia;

(b) It adopted a hostile attitude towards the defence, when it obstructed the cross-examination of Mr. Christians who appeared for the accused;

(c) It failed to make the sticker in Schutt's vehicle available, depriving the applicant an opportunity to prove his innocence, and

(d) It failed to consider the evidence of the defence on the fingerprints.

[27] Accused was convicted on his fingerprint which was allegedly uplifted from a sticker on the dashboard of Schutt's Nissan pick-up. He was also convicted on the basis of the evidence of the MTC print-outs of his cellphone. I will make my observations on the alleged failure of the trial Judge to recuse himself after consideration of evidence implicating individual accused persons. The point of refusal to recuse is also raised by Accused No's. 1 and 11.

[28] That brings me to the argument of the alleged hostility of the trial Judge towards the defence. Accused No. 3 refers to pages 586, 596, 598, 614, 630, 641, 648 and 654 of the record to make the point. With all due respect to the accused, cross-examination has limits and a presiding officer has a discretion to disallow cross-examination in the form of leading questions and tedious questions, which can have no purpose except to exhaust a witness, questions which are merely oppressive and cannot be relevant either to the issue or credit. *The South African Law of Evidence* by the learned authors D.T. Zeffert, A.P. Paizes and A.St. Q Skeen at 754. See also

R v De Bruyn 1957 (4) SA 408 (C) at 412; *S v Moggaza* 1984 (3) SA 377 (C) at 385F-H. In *Bagley v Cole Ltd. and Another* 1915 (2) CPD 776 where applicant contended that his counsel was prevented from putting questions relevant to the claim in convention, at 780 Kotze J said the following:

> "I quite concede that in cross-examination a latitude and even a wide latitude is allowed counsel, but everything has its limits. If in the opinion of the presiding Judge or Magistrate those limits are being exceeded and the time of the court is unduly taken up to the inconvenience and expense of suitors and the public business before the court, it becomes the duty of the Judge or Magistrate to put a stop to it."

In the same case, at 782 Gardiner J said:

> "It would be intolerable if any court had to resign itself, its time, and the time of suitors, into the hands of a legal practitioner, and were to be forced to listen to any question in cross examination, however apparently irrelevant, and however often repeated, upon the allegation that these questions might elicit something afflicting credibility … in the interests of the court, the practitioners and the public, he must have a discretion to stop cross-examination. It is true that the discretion to interfere with the conduct by a legal practitioner of his case should be sparingly exercised, but occasions may arise when such interference may be necessary.' See *S v Nisani* 1987 (2) SA 671 at 676H – 677A-I."

[29] Take for example page 598, one of the pages accused refers to, to make his point. Mr. Christians wanted to know how long it took Sergeant Shikufa to find Accused No.1's fingerprint in the Nissan pick-up. The cross-examination continued as follows:

"…More or less I know he won't probably be able to give the exact time but more or less how long did it take you? --- Oh I cannot tell the Court My Lord.
Did it take you half a day?

COURT: Sorry?

MR. CHRISTIANS: I asked him whether it took him half a day? --- No, I cannot remember how long I had been there My Lord.
So it could have been half a day? --- No.
Could it have been a whole day?

COURT: He said no.

MR. CHRISTIANS: Could it have been 2 hours?

COURT: He says he can't tell.

MR. CHRISTIANS: My Lord this is an expert witness!

COURT: An expert witness about time? I mean how long have you been asking questions?

MR. CHRISTIANS: My Lord he should have been, he should be able to estimate time (intervention)

COURT: Not exactly. Not exactly

MR. CHRISTIANS: No, yes, that is what I mean. I am not asking the exact time.

COURT: But if he says he does not know or he can't tell, you can't question him further.

MR. CHRISTIANS: My Lord at least he must be able to (intervention)

COURT: Sorry?

MR. CHRISTIANS: He must be able, he must be possible (intervention)

COURT: Well he has answered that question. Can we move on?

MR. CHRISTIANS: Okay, well I will leave it there. Yes".

On page 614, another page accused relies on, the following transpired.

"…what would your reaction be if you would find the print where you could clearly see the call? --- My Lord, (intervention)
COURT: Has he not explained, he says at the (inaudible) it's not usual to get this call and the delta?

> MR. CHRISTIANS: That's not closely giving the answer to the question that I asked really that's a general answer that he gave it doesn't answer what I am asking.
> COURT: Yes okay repeat the question."

[30] In the first extract above, with all due respect, the trial Judge had to put a stop to the cross-examination. I do not see the relevance of the precise time it took to find the fingerprint. In any case the witness categorically answered that he could not remember, to continue cross-examination whether it was half day, full-day, half of an hour, was flogging a dead horse and impermissible.

[31] In the second extract, accused possibly did not read that part of the proceedings properly. Notwithstanding observing that the witness had answered or explained the question, the Court continued its patience and forbearance for a longer period when it allowed counsel to repeat the question. In that instance the Court had a discretion to put a stop to the cross-examination. Counsel could not repeatedly put the same question until the witness gave the answer counsel desired, that attitude in my opinion is a negation of the object and purpose of cross-examination. When Accused No. 11 terminated the services of Mr. Christians in his letter dated 4 August 2003 (Exh "MM1") to the Registrar of the High Court, he gave one of the reasons as follows:

> "His (attorney) ineffective defence because essential questions – as instructed were never asked in cross-examination of witnesses."

[32] On reading the record I get the impression that, the record of the proceedings is blotted with irrelevant *ad nauseum* cross-examination. When Chief Inspector Becker ended his evidence-in-chief, the Court reassured all the accused that their legal practitioners were doing their very best. The record is silent as to what prompted the Court to make that remark. It can only be that it was a reaction from the accused, especially as it is apparent from Accused No. 11's letter terminating Mr. Christian's services that he had instructed him to oppose receipt of Exhibit "K2" (the transcript of the video recording of Accused No. 10) into evidence, but Mr. Christians did not do so. Accused was asked during cross-examination why his legal representative did not put questions about the cellphone to Sergeant Nangolo. His reply was to the effect that Mr. Christians was not asking the questions he was instructed to ask. It is not necessary to belabour the point by referring to all the pages accused relies on. I perused those pages as well; they by far fall short of an obstruction as contended for by the accused. I cannot say that the trial Judge exercised his discretion wrongly in disallowing the cross-examination where it was necessary to do so. To the contrary he held his patience; allowed witnesses to be recalled without any basis laid for so doing and cross-examined even longer than the first time. The contention has no merit and should fail.

[33] I now turn to consider the contention of the failure to make the sticker available. This I will consider together with the contention of the alleged failure to take into account the evidence of the defence on the fingerprint as the two are interlinked. It was not in dispute that the alleged right thumbprint lifted from a sticker on the

dashboard of Schutt's Nissan pick-up was that of Accused No. 3. Mr. Cloete, the expert witness of Accused No. 3, confirmed the fingerprint as that of the accused. The contentious issue was when was the result of the fingerprint on folien, linked to the accused, received. Sergeant Shikufa testified that he received the form containing the fingerprints of Accused No. 3 on 1 February 2001 from Sergeant Katjikua. He made a comparison of those fingerprints and the ones he lifted from the scene and found that the right thumbprint was identical to the print lifted from the scene. Chief Inspector Becker, on the other hand, testified that he knew before 29 January 2001 that Accused No. 3 was linked to the crimes by his fingerprints between 20 December 2000 and 29 January 2001 as Nangolo had taken his fingerprints on 28 January 2001. He could not recall who informed him, but he strongly believed that Sergeant Shikufa was mistaken, as when he asked his officers, Sergeant Shikufa among them, to do a thorough check, they found a Pol 16 of Accused No. 3 which was signed by Sergeant Nangolo on 20 December 2000 as well as the signature of the person who sent the fingerprints of Accused No. 3 to the Unit Commander. On a further search they found the Pol 31 as well with the name of the investigating officer and the signature of Sergeant Nangolo dated 20 December 2000. Both documents did not bear a date stamp. He further testified that once he had acquired knowledge that Accused No. 3 was linked to the crimes by his fingerprints, he on 29 January 2001 instructed Sergeant Katjikua to prepare or obtain the Court chart and statement.

[34] What is clear from the evidence of the police officers who testified about the fingerprints of Accused No. 3 is that the procedures prescribed from when the

fingerprints are uplifted up to when a comparison is done were followed. The only contentious issue is whether the outcome was made known before 1 February 2001 or only on 1 February. The confusion, in my opinion, could be attributed to human error.

[35] Crucial, in my view, is whether the fingerprint uplifted from the Nissan pick-up matched that of Accused No. 3 and whether it was uplifted from the sticker on the dashboard. That was the evidence presented by the prosecution. Accused testified and denied the charges. His version on the presence of his fingerprints in Schutt's Nissan pick-up was that he did not know Schutt or where he lived. All he could remember was that he was given a lift from a bar in Wanaheda. He could not say whether it was the day of the robbery or not, neither could he recall the month but it was in the year 2000. The vehicle was a Nissan pick-up, the person who gave him a lift was Stelma Temba. Accused then went on to say he himself is well-known to members of the Serious Crime Unit and that the Unit had his fingerprints. He testified that given the fact that Chief Inspector Becker knew before 1 February 2001 that the fingerprints of accused matched, when all the police officers who had to do with his fingerprints denied informing Inspector Becker of the outcome, he was suspicious that Becker could have planted that print in the vehicle. He testified that when the police took his fingerprints three times, that action created a suspicion that something was wrong. Accused called an expert in questioned documents, handwriting, typewriting and fingerprints, one Gerhardus Martinus Cloete. He testified that he was contacted during 2003 but he received documents he had to work on during 2004. These

documents comprised 700 or 720 pages of the Court record which included the evidence of the fingerprint experts in Namibia, a photo plan drawn by Shikufa, photocopies of Exhibits “A1” – “A13” i.e. copies of affidavits of Sergeant Shikufa, the Court chart with regard to identification of fingerprints, fingerprint forms and a copy of the folien of a fingerprint that was lifted. Some of his observations were as follows:

(a) On photo 10 which depicts the point where the fingerprint was lifted, he could not see any marking that the fingerprint was indeed lifted.

(b) When he studied the folien, the folien covered the parts of a sticker, it was cut off, it was uneven – he expected to see a straight line.

(c) He studied the findings of Shikufa and on the folien he found another very clear fingerprint but there was no evidence led of that fingerprint or nothing was said about it.

(d) The fingerprint identified was definitely that of Accused No. 3.

(e) He questioned how accused could have got his fingerprint on the sticker in the vehicle but added that although it was not impossible, it was very unusual.

(f) Perhaps the crux of his finding is that only some letters in the words “thank you” that appeared on the sticker were on the folien, namely, the last part of the letter “n” and letter “k” in the word “thank” and “y” and “o” in the word “you.” He further found differences in these letters which he marked in 1-6 points which he demonstrated to the Court in a Court chart which he had prepared in photographs and enlargements of fingerprints and folien

(Exhibits "ØØ1" and "ØØ2") and Exhibit "ØØ3" and a short description of photographs. He also could not understand why the words "not smoking" which were also on the sticker did not appear on the folien.

(g) As a result of the differences he found in the letters, he could not match the folien to the sticker.

[36] He found it "unfortunate" that he could not examine the original sticker since it was not available. He did not explain why he could not secure the sticker. One would have expected at that point for counsel to inform the Court the difficulties the defence had in securing the original sticker and perhaps seek the assistance of the Court. What is apparent from the record is that the witness was in a haste to testify and return to South Africa due to financial constraints. After re-examining the witness, Mr. Christians said the following:

> "My Lord if there is no further questions for the witness if I may request Your Lordship and for my Learned Colleagues whether the witness may be excused he will be leaving for South Africa tomorrow. … I would also at this stage express my gratefulness for the indulgence shown by my Learned Colleagues and also Your Lordship and the personnel to be present to assist us in seeing of this witness it was of a great help financially (*sic*)."

[37] The evidence-in-chief of Accused No. 10 was interrupted to accommodate this witness. In actual fact in re-examination Mr. Christians endeavoured to get the witness to say the copies were sufficient. He asked him whether in his experience he used copies of exhibits a lot; whether in the absence of original documents the copies

were permissible; what the reason for the witness wanting to have the original sticker was and whether he had any doubts with his findings. To the question why the witness needed the original sticker, he replied that he could then determine exactly what the dimensions between the top upper words and the lower words would be and he could determine whether the sticker could have been fixed at another stage in the Nissan pick-up. On the question whether he doubted his findings, he replied that he had no doubts but he could not make a 100% conclusion because he did not have the original sticker. Some of the questions put to him in cross-examination were as follows:

> "But surely Mr. Cloete you would agree with me that your belief of you cannot bring them together, that isn't really a conclusion (*sic*)?"

He replied:

> "I am not prepared to give a 100% definite conclusion in this regard."

He was further asked why not, to which he replied:

> "because of the fact my Lord that I did not have the original sticker available for examination. I had to work from an enlarged photograph."

He further said:

> "If I am correct Mr. Christians contacted Mr. Small and asked him whether it will be possible for me to have it (sticker) available. But unfortunately I could not get it for examination my Lord so I had to complete my comparison and examination on the face of the photographic enlargement of the sticker, but even, in that there are those points that I have marked out."

It was put to him that when experts use improper methods to arrive at conclusions it damages their reputations to which he positively answered. It was also put to him that in the science of his job he has to have original documents, original writing to compare, to which again he answered in the affirmative, and added he always asks "for the original documents or original exhibits …". A proposition was put to him that without him having the true dimensions of the original sticker he could not tell what the actual distance was between the types of writing, his reply was, "that's correct. I cannot tell that definitely." When questioned on his mandate he stated that he had been asked to determine whether the fingerprints were lifted at the scene of the crime, whether they were that of accused and whether they were tampered with. He stated that it was not his evidence that the fingerprint was planted on the sticker, but he believed that the fingerprint did not come from the sticker. While holding to his belief, he stated, "there is no complete definite conclusion which I (indistinct) because I refrain from giving a 100% conclusion because I did not have the original sticker available".

[38] With respect, the witness in my view, made no reliable conclusion. It is clear from the evidence that for the witness to have made an acceptable conclusion, it was vital to have examined the original sticker, which he conceded on the question of Mr.

Small. He testified that after he had looked at the documents and exhibits sent to him, he prepared a short provisional report for Mr. Christians, which he faxed to him with a request that he needed to examine the original folien, the original sticker and the vehicle where it was possible. Eventually he received instructions to be in Windhoek from the beginning of the week. As I have indicated above, he was made to testify in haste and placed on the plane back to South Africa. With respect, that he failed to have access to the original documents or the vehicle cannot be faulted on Mr. Small or the trial Court. That blame should be laid squarely at the door of Mr. Christians and the accused. That is how they chose to conduct accused's defence. The trial Court was correct to reject the evidence of the defence on the fingerprints and Accused's argument in that regard must fail.

[39] The presence of accused's fingerprints in the Nissan pick-up without an acceptable explanation places him on the scenes of the two robberies. His explanation of the presence of his fingerprint in the Nissan pick-up is that he had an innocent lift from one Temba. Sergeant Katjikua and Nangolo testified that during the bail application, accused gave an explanation how his fingerprints could have got in the Nissan pick-up. When the Court adjourned they took accused to take them to this Temba. He made them drive to the Katutura suburb but failed to take them to Temba. Accused denies this evidence; his version is that they did him a favour to take him to his house. Crucial as the question of fingerprints is, accused failed to make an effort to find Temba. He was asked in cross-examination whether, he was going to call him as a witness, and his reply was "no". Even if I could accept that Temba had the

vehicle, given the time it was removed from Schutt (10h45) and the time of the second robbery (01h25) when regard is also had to the facts that the canopy had to be removed, false number plates had to be fitted, and the further consideration that the robbers must have suspected that the robbery would have been reported and the police would be looking for the vehicle, the safe option would have been to hide the vehicle until about the time they were informed Accused No. 2 and Kapira would depart. It is unlikely that this Temba would have given lifts to people who would likely identify him.

[40] There is evidence of cellphone number 0812443351. The starter pack was retrieved by Sergeant Nangolo from the wardrobe of accused but accused denied that the cellphone number was his. His explanation is that it could have belonged to any of his friends or his customers. It is unlikely. The sim card of that number was used in the cellphone of Accused No. 11 in the morning and at 19h00 on 17 November 2000. The calls from three fixed numbers which registered on the cellphone of Accused Nos. 2 and 11 also registered on this number. Accused could not remember where he was on the evening of 16 November and the morning of 17 November 2000. The possibility is that that was his cellphone number.

[41] The money found within the homestead of Nandunda could be linked to the accused. Accused No. 10 testified that the stolen money was with the girlfriends of the accused persons. Accused admitted that Bertha Nandunda was his girlfriend and the two had a child together. Bertha Nandunda was a suspect and the witness who

was to link her to that money that was found buried in the field of Bertha Nandunda's parents turned hostile although not so declared by the Court *a quo*. Ndjodhi testified that when she and Dr. Nghalipoh entered the house where the doctor was called to treat Accused No. 1, a lady walked out of the house and she wondered why she would leave Accused No. 1 in that condition. Nothing was heard of that lady in the proceedings. Accused No. 1 testified that the money he was given when he went to hospital was collected by Cheeks (who in all probability is accused No. 11) from Cheek's girlfriend.

[42] The evidence of the fingerprints alone was sufficient to convict the accused on all the charges. With respect the trial Court was correct in convicting the accused on all the charges. Accused's appeal should also fail.

[43] What follows next is a consideration of Accused No. 9's (Ismael Oaeb) position. On 22 November 2000, accused with Accused No's. 7, 8, 10, 11 and two other male persons were arrested in a house at 75 Teresa Street, Camps Bay, Cape Town where a sum of N$909 250,00 in N$50 notes was found in a room where Accused No's. 10 and 11 were sleeping. The money was placed in a bag which was in a cupboard and in a black suitcase which Accused No. 10 identified as his. The money is the subject matter of the second count. Accused was convicted as an accomplice on the second count. Accused attacks that conviction and argued that the Court below erred when it incorrectly applied the doctrine of common purpose since he had no knowledge of the robbery; when it found that he had rented the house for

criminal purposes, and that the accused had played a criminal role in the scheme of things. He further argued that the Court below failed to approach the evidence of a single witness, Sergeant Nangolo, with caution; it failed to consider accused's evidence properly, and that it erred in finding that his evidence was replete with lies.

[44] Accused and his Co-Accused No's. 7, 8, 10 and 11 deny knowledge of the money found in the house where they were arrested. The money, as already stated, is the subject matter of the second count, the robbery which took place in Windhoek on 17 November 2000. Four days later some of the money, the N$905 205,00, is found in the house where accused and his co-accused were. They were the only persons who travelled from Namibia after the robbery who were found in the house where the money was recovered.

[45] The Court below convicted accused on the individual items of evidence, linking him to the robbery or showing that accused actively associated himself in common purpose in a joint unlawful activity. The trial Court accepted the evidence of Sergeant Nangolo who saw accused in the company of Accused No's. 1 and 7 and one other person he could not identify on the evening of 16 November 2000. In the morning of 17 November, Accused No. 1 was found seriously injured in the house accused was renting, which the Court below found was rented for criminal activities. On 19 November accused in the company of Accused No's. 7 and 8 left Windhoek for Cape Town in accused's Golf. Accused No. 11 on the same day also left for Cape Town in his BMW vehicle. They crossed the Namibian and South African borders with

Accused No. 11 driving the Golf, accused being a passenger and Accused No.8 driving Accused No. 11's BMW while Accused No. 7 was a passenger therein. As stated before, they were found in a house in Cape Town where part of the money the subject matter of the second robbery is also found. In a bail application in Cape Town accused testified that he met Accused No. 11 in Cape Town which the Court below found to be false. The Court below also accepted the telephone contacts between accused and Accused No. 11 who Accused No. 9 testified he did not know before they met at a service station at Noordoewer.

[46] In his testimony, accused denied having been with Accused No. 1 on 16 November 2000. He saw Accused No. 1 for the first time in prison when they returned to Namibia after his arrest in South Africa. He testified furthermore that at the end of October 2000, he entered into an oral agreement to rent the house at 1709 Agnes Street, Khomasdal, for the month of November 2000. His neighbours were noisy, and since he was preparing for examinations, he moved to his girlfriend's place. After writing his first paper, he met Pedro or Petro an old friend of his who had asked him for accommodation. He offered him a place at 1709 Agnes Street. There is some confusion as to when Petro moved in as accused testified that he moved in the first Sunday in November and also that he met him after he had written his first paper, which was on 9 November. The 9th November or a date thereafter falls outside the first week of a month. If accused met him on 9 November, he could only have moved in on Sunday 12 November. Be it as it may, the accused continued with his testimony that the weekend Petro moved in the accused returned to the house on Monday to

visit Petro and he switched-off his cellphone and left it on a charger at 1709 Agnes Street. He left the cellphone because his clients used to phone him and he would go to the office to phone if necessary. He returned to the house on Tuesday again and Petro asked him to switch on the phone as he had given that number to his friends. He did not use the phone that week starting Monday, 13 November, because he did not have time. He only picked up the cellphone on Sunday, 19 November, when he left for Cape Town. The reason for going to Cape Town was to buy rims from a lady whom he was referred to by someone at Tiger Wheels, Windhoek. He asked Accused No's. 7 and 8 to accompany him, Accused No. 7 to assist him to arrange for accommodation in Cape Town as he knew people there and Accused No. 8 to assist in driving. He was in the middle of examinations and his aim was to return "maybe Tuesday evening or so".

[47] They left on Sunday between 14h00 and 15h00. Before Noordoewer the Golf developed a clutch problem; it was pulling very slowly. They stopped at a service station. While at the service station a green BMW stopped at the same service station. Accused No. 7 approached the driver (who happened to be Accused No. 11), spoke to him and Accused No. 11 wanted to test drive the Golf. He drove the Golf around the service station and then suggested to drive the Golf up to the border. Accused No. 11 drove the Golf while accused was a passenger and Accused No. 8 drove the BMW while Accused No. 7 occupied the passenger seat thereof. They arrived at the Namibian border where they enquired whether by swapping vehicles would not cause them problems. They were told it could cause them no difficulty.

They proceeded to the South African border where they were thoroughly searched. They left the South African border, Accused No. 11 still driving the Golf for a short distance. He stopped and informed them that the clutch had developed a problem and that he knew someone in Springbok who could help them repair it. In Springbok they stopped at a certain house where Accused No. 11 wanted to seek help but the lights in the house were off. Accused No. 11 left. They went to a service station where they filled up and proceeded with their journey. They stopped outside Springbok to rest. They proceeded from there for a distance when the vehicle showed some serious problem with the clutch; a smell exuded therefrom. They stopped an old man who agreed to tow the vehicle up to Cape Town where they arrived on Tuesday. Accused No. 7 contacted the person who should have offered them accommodation. When he could not find him he contacted Accused No. 11 who agreed to come to the service station where they were. He took them to another service station where the Golf was booked in for repairs. Accused No. 11 offered them accommodation for the night and also gave them a lift to the house where they were arrested the next morning on 22 November 2000. He testified furthermore that Accused No. 7 did not inform him of the presence of Accused No. 1 at his house.

[48] In my judgment, with respect, the Court below was correct to convict the accused as an accomplice to the robbery on the second count. Although he did not participate in the actual robbery as testified to by Accused No. 10, he nevertheless assisted in the commission of the crime, therefore participating in common purpose with the actual perpetrators. In my opinion, accused's version exposes the conspiracy

between the accused persons to cover up for each other. It is incongruous to suggest that Accused No. 7 would have known about the presence of Accused No. 1 at the house accused was renting; the injury of Accused No. 1 and all the drama about Dr. Nghalipoh allegedly betraying them and the fact that by the time they left for Cape Town Accused No. 7 knew about the arrest of Accused No. 1, yet according to accused, Accused No. 7 did not inform him of all these. It is surreal. In actual fact when he left for Cape Town on Sunday, 19 November, the accused was in the middle of the year-end examinations. According to his examination time table, Exhibit “EE”, he was still left with three papers to write, which were to be written from 22 – 24, a day after another and yet in his evidence-in-chief he testified that he had already prepared for the papers and his intention was to go to Cape Town and return, “maybe on Tuesday evening or so”. In the bail application he misled the Prosecutor and the Court when he said he was writing on Friday only. On Friday he was going to write Marketing Paper 2. Exhibit “EE” speaks for itself. Given his occupation as an insurance broker, the courses he still had to write (advertising and sales promotion and marketing) were his majors. Even if I were to accept on his own version, that if he had travelled without any incidences leaving on Sunday (the time he says they left Windhoek for Cape Town), it would have meant arriving on Monday, do business that Monday and leave very early on Tuesday to be in Windhoek by Tuesday evening and write examination at 09h00 the next day. The reason for such a strain: to buy rims and other accessories. It is far-fetched. What about Accused No. 7’s version that from Cape Town accused should have dropped him in Upington? It is unlikely under the circumstances that he would have been back in Windhoek by Tuesday evening. That

is not all; he left without informing his girlfriend, the owner of the Golf and who was also in the middle of examinations. She was most probably depended on her vehicle to take her to and from the examination centre. When he was asked why he did not at least inform the owner of the vehicle that he was taking the vehicle outside the country, his reply was that they were in love; he wanted to surprise her with the rims. As already observed, the vehicle allegedly developed a clutch problem before it reached the border. He knew the vehicle had a clutch problem. Why did he want Accused No. 11 to test drive the vehicle and for that matter test drive across the borders? After the South African border Accused No. 11 confirmed that the vehicle had a clutch problem. He took them to Springbok and showed them a house where they could obtain help. He left them there but after sometime they also decided to leave notwithstanding the condition of the vehicle. Common sense dictates that he should have realised at that stage that he would not be back by Tuesday, nevertheless he still drove on until the problem developed much bigger. They were eventually towed from outside Springbok to Cape Town. There they could not find the person who should have offered them accommodation. Accused No. 11 again features, he takes them to a garage where the Golf was taken in and offers them accommodation. With regard to the accused's version relating to the cellphone and at the pain of being repetitive, when the accused went back to the house he was renting the day after Petro had moved in, the accused switched-off the phone because calls from his clients were disturbing him and he left the cellphone on a charger. When he returned to the house the following day, he switched it on at Petro's request since the latter had allegedly given the accused's cellphone number to his friends and he had

expected calls from them. The simplest way to cut-off incoming calls is to switch-off the phone and it does not require abandoning it elsewhere.

[49] I have no doubt that accused was economical with the truth, the trial Court was correct again, with respect, to find that his version was replete with lies. Evidence from accused's bail application in South Africa was presented to him in his evidence-in-chief to explain some of his evidence and that record of proceedings was received in evidence in the Court below as an exhibit. In that bail application accused was asked whether he had seen Accused No. 11, his reply was that he saw him for the first time in South Africa. It was put to him that he travelled with Accused No. 11 on 20 November 2000 to South Africa, accused replied that that was not so. In his evidence-in-chief he explained that he thought the Prosecutor meant travelling with Accused No. 11 from Namibia all the way to South Africa. That explanation makes no sense because he had already said he saw Accused No. 11 for the first time in South Africa. He was further asked whether he knew Cheeks Accused No. 7 referred to, his reply was that he did not know him personally. He was asked how he knew him. He responded that he knew him simply by seeing him once and after being introduced to him. He was asked as to who introduced them. His reply was that it was Accused No. 7. He was asked on what occasion the two were introduced to each other and when. His response was that it was at a service station in Namibia.

[50] At this point in his evidence-in-chief, accused realised that he had exposed Accused No. 11 as Cheeks. He then proceeded to explain that at the service station at Noordoewer, Accused No. 7 introduced him to Accused No. 11. He said:

> "I, by then, was under the impression that Accused No. 4 who now is Accused no 11, was Cheeks …because by then I did not know who Cheeks was."

His legal representative asked him whether when Accused No. 7 introduced him he mentioned the name Cheeks. His reply was:

> "My Lord I didn't know anything about that name but only when during the bail application when this name was mentioned I was under the impression that Accused No. 4 who is now Accused no. 11 must be Cheeks but I didn't know."

The question was repeated, accused replied:

> "My Lord there was a name mentioned at that stage but I cannot recall whether it was Cheeks. I can only recall during the course of the bail application that Cheeks was a person called Petro."

The next question that followed from his legal representative he changed knowing Cheeks from during the course of the bail application to after the bail application had been concluded when he tried to find out who this Cheeks was. The real question is how could he assume that Cheeks was Accused No. 11? His legal representative brought to his attention that in the bail application he refused to answer a question pertaining to calls between him and Accused No. 11. His explanation was that he did

not know who Mabena was. The question during the bail application was very specific:

> "Now there is information at this at our disposal that there were calls made between yourself and Mr. Mabena, Accused No. 4."

Accused No. 11 who was Accused No. 4 in the bail application was at the time in the dock with accused.

[51] The record shows that at the end of accused's evidence-in-chief before the cross-examination commenced, the Court took a short adjournment. When the Court resumed, Mr. Murorua who had taken over the representation of Accused No. 11 from the previous counsel, made reference to the meeting of accused and Accused No. 11 at the service station at Noordoewer. He asked accused by what name Accused No. 11 was introduced to him. Accused replied that Accused No. 11 was introduced to him by his name "Skumbuza". A short while before the Court adjourned, in his evidence-in-chief; he informed the Court that when he was introduced to Accused No. 11, a name was mentioned but he could not recall whether it was Cheeks. After the adjournment all of a sudden he responds that Accused No. 11 was introduced by the name Skumbuza. In his evidence-in-chief he testified that he had contacted a lady in South Africa who was selling the rims accused was looking for. That is why he had left for Cape Town in the middle of examinations. He could, however, not provide the telephone number of that lady in South Africa. His explanation was that a long period had gone by. The prosecutor in the bail application in South Africa cross-examined

him extensively on his purpose of going to Cape Town. No mention was made of the lady he had allegedly already contacted; his intention was to go to South Africa to shop for rims. On the question of rims the cross-examination proceeded as follows:

> "And did you know exactly where you would have to go to find these mag rims? --- No
>
> So how were you going to find these mag rims?
> Pardon?
>
> [Question repeated]
> --- I was going to ask the person which we were supposed to meet here and he, would maybe, have directed us to the right place (*sic*)."

[52] Further, while under cross-examination in the bail application he told that Court that he had an arrangement with the owner of the house at 1709 Agnes Street, Khomasdal, to rent the house for a month. He told the Court below and the Court in South Africa that he had rented the house because he had personal problems with his girlfriend. In the bail application in South Africa, he went on to say that when the owner of the house told him that he could rent for only one month, he approached his girlfriend and told her that he was moving back with her, because they had resolved their differences. He had rented the house where he hardly stayed, because he had moved back in with his girl-friend.

[53] On the totality of the evidence I find that the Court below was correct to find that accused rented the house for criminal activities. Accused testified that he only learnt during or after the bail application in South Africa that Petro or Cheeks was one

and the same person. In the bail application he told that Court in this regard that he had an Angolan friend named Petro who needed a place to sleep for a week. He told Petro that he could sleep at the rented house since the accused was sleeping at his girlfriend's house and that he would come in the morning to shower and change. He added that most of the times he did not find Petro at the house. In his evidence-in-chief he said he only went back to the house on Monday (13 November) when he switched-off the cellphone and left it on a charger. He went back on Tuesday (14 November) when Petro asked him to switch on the cellphone as he had given the number to his friends. Both the two days on his version he found Petro at the house. On his testimony he returned to the house to collect the cellphone on 19 November and then left for South Africa. That day Petro was not present, apparently he had just disappeared without saying a word to the person who was so generous to him. The owner of the house, Bezuidenhout, testified that when she went to her house at the end of November, she did not find anybody. She was compelled to break-in her own house to gain entrance. In his evidence-in-chief accused never testified that he used to go back to the rented house to shower and change. What comes out very clearly from his evidence is that he distanced himself from the house and his cellphone during the period 12 November until 18 November, which includes the period the robberies were committed. During the period 16 - 19 November the MTC print-outs showed over twenty calls between accused and Accused No. 11. As the Court *a quo* correctly found, the person Petro and/or Cheeks is fictious and the Court below was correct to accept the evidence of Sergeant Nangolo that he saw accused in the company of Accused No. 1 on 16 November 2000. There is a reasonable possibility

that accused knew the presence of Accused No. 1 at the house he had rented and he knew about the robbery of the money that was going to be undertaken. That evidence strengthens the evidence of Accused No. 10 that the money that was found in the room where Accused No's. 10 and 11 were sleeping was removed from the Golf. The accused's version cannot reasonably possibly be true. The Court below was correct in convicting him on the second count as an accomplice who made common cause with the robbery of the money or actively associated himself with the robbery of the N$5.3 million. It follows that his appeal should also fail.

[54] I turn, finally, to the case of Accused No. 11. The evidence against him consisted of testimonies of members of the South African Police Service who conducted a search at 75 Teresa Street, Camps Bay, Cape Town on the morning of 22 November 2000; the evidence of his co-accused Accused No. 10, and the MTC print-outs testified to by State witnesses Riedel and Beukes. It is common cause that at about 04h30 on 22 November 2000, approximately 12 to 14 police officers raided the house at 75 Teresa Street, Camps Bay and Accused No. 11, Accused No's. 7, 8, 9, 10 and two other male persons were arrested at that address. Also found at that house but not arrested were the female owner of the house and two girls. In the room where accused and Accused No. 10 were sleeping, police officers found cash amounting to N$909 250,00 in notes of N$50,00 which was contained in an Adidas bag and in a plastic bag. The Adidas bag was placed in a cupboard while the plastic bag was in turn placed in a black suitcase. The bag retrieved from the cupboard was locked with a padlock and when asked where the key to the padlock was, accused

produced the keys after Accused No. 10 had spoken to him. Accused No. 10 identified the black suitcase wherein the plastic bag containing the money, was placed. There is no dispute that the money found at the address in Cape Town was part of the money robbed on 17 November 2000 when the Toyota was attacked on the highway to Okahandja. There is also evidence that accused was found hiding behind a curtain in that room he shared with Accused No. 10.

[55] The evidence of the MTC print-outs shows that while in Namibia accused used a Motorola cellphone with sim card number 0812457929 to make several calls to Accused No. 3's cellphone. On 13 November 2000, one call was made. On 16 November five calls were made, two of which were made close to midnight. On 17 and 18 November seven calls were made. Between 16 and 18 November, accused made 22 calls to Accused No. 9's cellphone. On 17 November at 08h04 Accused No. 3 using the sim card of his cellphone number 0812443351 in Accused No. 11's Motorola made two calls. On 13 and 16 November missed-calls from a fixed line telephone number 215749 registered on accused's cellphone. This fixed line number and two other fixed line numbers also registered on Accused Nos. 2 and 3's cellphones. On 17 November at 12h39 the sim card of accused's cellphone number 0812457929 is used in the cellphone Nokia 8210 of Accused No. 1 to call, *inter alia,* the cellphone number of Accused No. 9. It must be remembered that at 12h39 Accused No. 1 was still at 1709 Agnes Street; he had not yet been taken to the hospital. As already mentioned, Accused No. 9 claims that his cellphone was on the charger at the same address. On 17 November at 07h20 accused's cellphone

number 0812457929 calls Dr. Nghalipoh's cellphone number 0811280468. It can only be the time the doctor was summoned by Accused No. 7 to treat Accused No. 1 at 1709 Agnes Street. At 07h55 accused's cellphone registers a call from Dr. Nghalipoh's cellphone. At 08h23 accused's number registers a missed-call from Dr. Nghalipoh. At 11h53 Dr. Nghalipoh called accused again. At 13h00 and 13h41 accused's cellphone registers missed-calls from the doctor.

[56] Accused No.10 testified that at 04h25 on 17 November accused called him to inform him that Accused No. 1 had been shot. He testified that in Cape Town Accused No. 11 told them that they should deny any knowledge of the money to which he agreed because he was afraid. He saw Accused No. 11 and one of the two male persons who were arrested with the accused persons in this matter at 75 Teresa Street, Cape Town, removing money from the door panels of the Golf. The money was taken into the house placed in the Adidas bag which used to be in the boot of accused's BMW vehicle. He later observed accused counting the money in the room he shared with Accused No. 10. He confirmed the evidence of accused hiding behind the curtain, the bunch of keys which accused asked him to remove under the pillow when asked by the police where the keys were and accused indicating to the police the exact key which opened the bag. He further said accused invented the name "Cheeks" when they were held in prison in Cape Town. Accused No. 11 said they should think of a name they could use as the person who was involved in arranging treatment for Accused No. 1. Accused pulled the blanket from "Shoes" and said "Cheeks" and everyone laughed, the name was agreed upon. He refuted the

evidence of Accused No's. 7, 8 and 9 that they arrived on Tuesday in Cape Town. Accused and Accused No's. 7, 8 and 9 arrived together at 75 Teresa Bay, Camps Bay on Monday.

[57] Accused denies all this evidence against him, particularly he denies knowledge of the money. He describes at length how he ended up in Namibia and why he brought Accused No. 10 with him; the problems he had with the fixing of his vehicle; why he bought tickets to return to South Africa, and why he drove by road. His journey to South Africa has been covered when dealing with the case of Accused No. 9. What needs to be added is that he says he left Windhoek at about 18h00. He left Accused No's. 9, 7 and 8 in Springbok and arrived in Cape Town on Monday, 20 November, and Accused No's. 9, 7 and 8 arrived on Tuesday 21 November.

[58] He attacks the judgment from various angles, namely his conviction on common purpose and on this score he relies on the decision of *S v Mgedezi and Others* 1989 (1) SA 687 (AD) and refers to the five prerequisites justifying a conviction on the basis of common purpose, as set out in that decision; the refusal of the trial Judge to recuse himself; the finding that he, Accused No's. 1 and 10 entered Namibia with the purpose of committing robbery (when Accused No. 2 commenced as a driver at PSS on 1 November 2000) that the Court accepted the evidence of the padlock and keys to the bag that contained the money (when the police officers who testified on the issue contradicted themselves on the said issue); that the trial Court erroneously relied on incorrect evidence, for example, that Accused No. 9 called

accused twenty times; the Court *a quo* received inadmissible MTC print-outs which were not authenticated by Wenk who compiled the print-outs and who was in any event not called to testify, they had no logo nor stamp and therefore secondary information and the print-outs were full of flounders; that the trial Court accepted the evidence of Accused No. 10; that accused removed the money from a panel of the Golf even though the prosecution submitted that his evidence should not be accepted; that the evidence of Shadrack Dube confirming that Accused No. 10 informed him that Accused No. 1 had been shot is hearsay; that Dube was an unreliable witness when he failed to answer simple questions put to him; the failure of the Court to order the production of the Court proceedings in Cape Town, (possession of stolen property charge) making him "to be tried twice on the same offence"; the Court failed to draw a negative inference of Dr. Nghalipoh's evidence who should have identified accused by his limping features as the person who was with Accused No. 7 at 1709 Agnes Street; the searching of the house where accused and others were arrested was illegal; failure to call Shabalala, the owner of the house where accused was arrested, who could have testified as to when the Golf of Accused No. 9 arrived at her house; the Court committed "a gross irregularity" when it allowed the witnesses from South Africa to testify while their statements were in Afrikaans; the trial Court received in evidence the video recording of Accused No. 10, which accused describes as a confession, taken by Chief Inspector Becker who was an investigating officer in the case against the accused. Accused concluded his grounds of appeal by stating that the cumulative effect of all the alleged irregularities and misdirection were of such a magnitude that the conclusion was inevitable that a

failure of justice occurred and his conviction and the sentences that followed should be set aside.

[59] I will consider the issues of the failure by the trial Judge to recuse himself and the MTC print-outs *infra*, as they are also raised by some of the co-accused. From the outset, I would say accused misses the boat when he argues around the real issues that led to his conviction. Secondly most of accused's contentions above are relied on out of ignorance; they do not amount in my opinion to irregularities that would vitiate the proceedings. I deal with those contentions first.

[60] Accused argued that the trial Court caused him to be tried twice for the same offence. When accused and his co-accused were arrested in South Africa, they were apparently charged with the offence of possession of stolen property which was later withdrawn. He was not required to plead, no evidence was led and no verdict was pronounced. Whether the case was withdrawn because the police did not take a statement from the owner of the house where accused was arrested, there were no proceedings on the same offences in South Africa. If the case was withdrawn for whatever reason accused could still be recharged for the same offence. The possession of stolen property charges was withdrawn in South Africa and he was brought back to Namibia to be prosecuted on the charges detailed in paragraph [1] of this judgment. Accused could have pleaded *autrefois* acquit or convict if he was tried for the same offence in South Africa. This did not occur and the contention has no basis.

[61] Accused contended that the search of the house at 75 Teresa Bay was illegal. Superintendant Jooste, the police officer who was in charge of that operation, explained that in that jurisdiction a police officer is authorised by law to search any premises without a search warrant where weapons are suspected to be involved. There was no evidence to the contrary and there was no reason for the trial Court not to accept evidence of all the police officers. He further argues that the court committed a gross irregularity when it admitted the evidence of the South African police officers whose statements were in the Afrikaans language. Firstly, the statements were not received in evidence to form part of the proceedings. The statements in my opinion are not the documents contemplated in Rules 60 and 63 of the Rules of the High Court, that is, translation of documents and authentification of documents executed outside Namibia for use within Namibia respectively. Secondly it was never raised by the defence that there was prejudice on the part of accused or his co-accused as a result of the statements being in the Afrikaans language. Counsel representing the accused was Afrikaans speaking; he did not raise the issue during the trial; relied on the statements in cross-examination and he cross-examined at length and effectively. Therefore no prejudice was suffered.

[62] It was argued that Chief Inspector Becker recorded a confession from Accused No. 10 while he was an investigating officer in the case. A confession means “an unequivocal acknowledgement of guilt, the equivalent of a plea of guilty before a court of law”. See *Rex v Becker* 1929 (AD) at 171. A confession therefore is an extracurial admission of all the elements of the offence charged. See Du Toit *et al, Commentary*

on the Criminal Procedure Act, Service 42, 2009, 24-51. In *Rex v Hans Veren & Others* 1918 (TPD) 218 at 221, Wessels J put it as follows:

> "The accused must in effect have said, 'I am the man who committed the crime.'"

[63] Accused No. 10's video recorded statement is not such a statement nor is it an admission. Accused No. 10's intention was to inform Chief Inspector Becker that he was not involved in the crimes and informed Chief Inspector Becker of what he knew about the crimes. In the letter terminating the services of Mr. Christians accused stated as one of the reasons that Mr. Christians failed to oppose that statement to be admitted in evidence. Counsel had no reason to oppose the admission of the statement. When he crossed-examined Accused No. 10 on the statement, Counsel asked him as to what was new in his video statement that was not already before Court. Accused No. 10 never admitted guilt in that statement. He explained that he had approached Chief Inspector Becker because his legal representative did not want to listen to his version. Indeed when Accused No. 10 testified, his legal representative was forced to withdraw as a clear conflict of interest became apparent. This contention too has no basis.

[64] When it suits the accused the MTC print-outs are admissible. He claims that the Court *a quo* erred when it stated in its judgment that Accused No. 9 called accused twenty times. He says that that was a misdirection "by getting everything so wrong". He states that not a single call emanated from Accused No. 9's cellphone to his. Accused is correct in that regard. All the calls emanated from accused's

cellphone to that of Accused No. 9. However, that contention is not of his own recollection but founded on the strength of the print-outs. Accused should have chosen to condemn the print-outs or accept them. "…[T]he choice of one necessarily involves the abandonment of the other. He cannot both approbate and reprobate". (*Bowditch v Peel & Magill* 1921 (AD) 561 at 572-73; *Van Schalkwyk v Griesel* 1948 (1) SA 460 (AD) at 473*; Moyce v Estate Taylor,* 1948 (3) SA 822 (AD) at 829, *and Dettman v Goldfain and Another* 1975 (3) SA 385 (AD) at 401.*)* Accused misses the boat again. Granted, the trial Court put the facts incorrectly on that point but, in my opinion, the point is whether the incorrect stating of the facts on that point alone influenced the Court to convict the accused? The answer is "No". Accused No. 9 testified that he did not know the accused until when they met on the way to South Africa, but why twenty or twenty one calls between the two before that meeting. None of the two offers a convincing explanation. It will be recalled that Accused No. 9 testified that his cellphone was on the charger at 1709 Agnes Street where he was not residing during the period of the calls while accused's evidence was that the cellphone that made those calls was with someone who had died in the meantime and called a person who was in custody who had allegedly killed that person. But as I have already indicated, at 12h39 accused used his sim card in Accused No. 1's cellphone, who was at the same address where Accused No. 9's cellphone was allegedly on the charger to call Accused No. 9. The contention has no merit and it fails.

[65] This brings me to the issue of the money found at Shabalala's house in South Africa. I have difficulties understanding what accused's defence in this regard is. If I understand him correctly, he contends that the police officers who conducted the operation at that house contradicted themselves in many instances, suggesting that the money was planted in that house in the room accused and Accused No. 10 shared. He further argued that the money was not shown to him and that if there was a lock to the bag, the keys that opened the bag should have been produced as exhibits in Court. He denies having hidden behind the curtain or having produced or identified the key that opened the bag. That the money was found in the room shared by accused and Accused No. 10 is undisputed. So is the fact that that money was part of the money robbed from the PSS vehicle on 17 November 2000. The question that remained was for the Court *a quo* to reason by inference as to who was in possession of the money. There was no evidence that the two other men and the three women who were found together with the accused persons who were in the house where the money was recovered were in Namibia between 17 and 22 November. There was no evidence that the money could have been left in the house by any other person who was not in the house when it was found. The money could only have been brought in that house by accused and the four other accused persons (7, 8, 9 and 10). They were the only persons in that house at that time who had travelled from Namibia to South Africa after the robbery. The Court below found that accused was possibly the mastermind of the crimes but possibly not at the scene of the second robbery given the call made between Accused No. 1 and accused at the time of the robbery and in view of the finding that Accused No. 1 was the person who

was shot on the scene. It went on to find that “but it does not mean he was not involved in the planning of the commission of the robbery of the money in all the circumstances of the case”. That Court took into consideration the production of the keys and the identification of the exact key that opened the bag containing the money from a bunch of keys. The Court also found that “Cheeks” was fictitious and accused was the person who arranged for the treatment of Accused No. 1, he is the person who made the calls to Accused No. 9 who rented the house where Accused No. 1 was found injured. The Court also accepted the evidence of Accused No. 10 that he had seen accused and one of the male persons arrested with the accused persons removing the money from the Golf and that he had seen accused counting the money in the room they shared. Accused No. 10 went on to say that the money was accused’s money and it was actually N$1 million. I agree with the Court *a quo’*s finding that the money was transported in the Golf given the evidence of Accused No. 10 on that point and the false version of Accused No. 9. It is unlikely that Accused No. 10 would have carried the money on him on the plane. Shadrack Dube confirmed that on the day of the robbery Accused No. 10 was at Dube’s house. Accused No. 10 had heard from accused that Accused No. 1 was shot. In the absence of an explanation how the money came into his possession, the Court *a quo* placed accused on the two scenes of the robberies, at the very least, in the planning of the robberies in full knowledge where and how they were to be executed. With respect, the Court below was correct in that regard. That participation meets the prerequisites of common purpose expounded in the *Mgedezi* matter above referred to by accused. On the totality of the evidence, there can be no other conclusion except that accused was

involved in the commission of the crimes and possibly the mastermind as the Court *a quo* found given his post robbery activities, that is, contacting Accused No. 7 to find the doctor for Accused No. 1; the calls between him and Dr. Nghalipoh; the calls made from his cellphone to Accused Nos. 9 and 3. Between accused and Accused No. 1, accused was more familiar with Windhoek than Accused No. 1. When he and Accused No. 10 arrived in Namibia on 13 October 2000 it was his second visit to Namibia. Accused No. 1 was slightly over two weeks in Namibia when the crimes were committed. Given that short period he stayed in Namibia before the crimes were committed, I agree with the Court *a quo* that it was correct to find that accused and Accused No. 1 entered Namibia with the intention to commit crime. The fact that Accused No. 2 commenced as a driver at PSS on 1 November is irrelevant. Inside information would have been sufficient to execute the crime. That Accused No. 2 was also the driver when the robbery was committed was a bonus; the crime was committed with much ease.

[66] I now turn to the issues Accused No's. 1, 2, 3 and 11 have in common, namely, the refusal by the trial Judge to recuse himself upon the application brought by Accused Nos. 1 and 3 and the MTC print-outs.

[67] The objection of Accused No's. 1 and 3 to the Judge *a quo* continuing with the trial appears to stem from the statement the Judge made in his ruling in the application for discharge pursuant to s 174 of the Criminal Procedure Act, 1977 when he stated that Accused No. 1 was shot on the scene of the second robbery by Kapira

after Accused No. 1 had opened fire and shot Kapira thereby wounding him and that Accused No. 3's fingerprints were lifted from the vehicle of Schutt. Accused No. 11 joined Accused No's. 1 and 3 in the contention that the Judge should have recused himself for allegedly pre-judging the case during the application for a discharge. Accused No. 3 puts it very bluntly that the Judge convicted them at the s 174 discharge application.

[68] It appears from the record that Accused No's. 1 and 3 were aggrieved by the manner in which the Judge expressed himself on the two statements referred to above. Mr. Christians who appeared for Accused No's. 1 and 3 had argued as follows:

> "Why I'm saying this is because of the manner in which Your Lordship stated that part ...but it's just about the manner in which Your Lordship stated those two points in respect of Accused No.1 and Accused No. 3 and as I have indicated in my written submission my Lord, it is not a matter that one would say that Your Lordship is prejudiced or Your Lordship in fact has made up Your Lordship's mind in this regard in respect of these two accused persons regarding that those specific points in evidence, but a I've indicated to Your Lordship it's the manner in which the (inaudible) the person from outside is looking at what was said by Your Lordship. How does that person interpret what Your Lordship said."

[69] I will do no better than to refer at length to the South African case of *S v Herbst* 1980 (3) SA 1026 (ECD) at 1029G – 1030A – H where the following is said in respect of an application for recusal:

"The approach of our Courts to an application for recusal has been set out in a number of cases and the principle which they seek to enshrine is that no reasonable man should, by reason of the situation or action of a judicial officer, have grounds for suspecting that justice will not be administered in an impartial and unbiased manner. The Roman-Dutch authorities on which this principle is founded are dealt with by Joubert J in *South African Motor Acceptance Corporation (Edms) Bpk v Oberholzer 1974 (4) SA 808 (T)*. In the English law the same principle was clearly stated in the oft-quoted *dictum* by Hewart CJ in *The King v Sussex Justices (1924) 1 KB 256 at 259* to the effect that:

> 'A long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done…Nothing is to be done which creates a suspicion that there has been an improper interference with the course of justice,'

and in *The King v Essex Justice (1927) 2 KB 475 SWIFT J* says at 490:

> 'It is essential that justice should be so administered as to satisfy reasonable persons that the tribunal is impartial and unbiased.'

These principles have been applied in our Courts over the years in cases such as *Slade v The Pretoria Rent Board 1943 TPD 246; Appel v Leo and Another 1947 (4) SA 766 (W); S v Bam 1972 (4) SA 41 (E); S v Radebe 1973 (1) SA 796 (A).*
In *Liebenberg and Others v Brakpan Liquor Licensing and Another 1944 WLD 52 SOLOMON J* says at 55 that*:*

> 'Bias must not either actually or probably be within the mind of the Judge when he undertakes his judicial work, nor during the course of it must he be placed in a situation reasonably calculated to infect him with bias or to lead to the reasonable fear that he may have been so infected. The impartiality after which the Courts strain may often in practice be unrealized without detection, but the ideal cannot be abandoned without irreparable injury to the standard

> hitherto applied in the administration of justice. The absence of impartiality and the presence of bias may often be hard to prove, but the Courts disqualify for judicial work not only persons who in fact are biased and not impartial, but those who are probably so.'

On the other hand, as was stressed by Henochsberg J in *Danisa v British and Overseas Insurance Co Ltd 1960 (1) SA 800 (D) at 801,* although the question as to whether a reasonable fear exists that the trial will not be impartial must be looked at from the point of view of a reasonable lay litigant, the test is nevertheless an objective one. The mere possibility of bias, apparent to a layman, on the part of a judicial officer, will not be sufficient to warrant his recusation (Cf also *S v Radebe (supra at 812)* and *SA Motor Acceptance Corporation (Edms) Bpk v Oberholzer (supra at 812)).*
The ideal which these *dicta* seek to uphold seems to me to be that the administration of justice should at all times be beyond reproach to the mind of a reasonable onlooker, and this is reflected in the remark by "Karoo" in his article "Recusation" in 1924 SALJ at 37 that:

> 'No matter how conscientious a magistrate or Judge may be, it is better to avoid even a semblance of suspicion and to keep the fount of justice pure and in-defiled. When, therefore, a *bona fide* objection is taken by either of the litigants to the person of the Judge or magistrate on reasonable grounds such judicial officer should not lightly overrule the objection.'

In conclusion I would quote with respectful approval certain *dicta* by Lord Denning MR in *Metropolitan Properties Co (FGC) Ltd v Lannon and Others (1969) 1 QB 577 at 599* where the learned Judge says:

> 'In considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or to the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if

> right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit…
> There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking:
>
> 'The Judge was biased'."

[70] In *S v Dawid* 1990 NR 2006 (HC), O'Linn J made reference to some authorities quoted in the *Herbst* case above and at 212I he stated:

> "But when alleging actual bias, the least that a Court can expect is good reason, based on clear facts for such an allegation, particularly in view of the fact that there is a presumption of integrity and competence in favour of Judges."

See also *Sikunda v Government of the Republic of Namibia* (1) 2001 NR 67 (HC), at 83I – 84A.

[71] In *Law Society v Steyn [*1923] SWA 59 at 60 - 61, Gutsche J said:-

> "When in any case a judge finds upon the law or evidence he is discharging a duty and there can never be a suggestion that merely because such a finding is adverse to one of the parties the court is biased or hostile to that party. The fact that the findings are made in judicial proceedings, published *ex cathedra* in the discharge of a duty, rebuts any presumption of malice or ill feeling."

See also *Schonken v Assistant Resident Magistrate Pretoria* 1916 TPD 256 at 259, Erasmus H J *et al, Superior Courts, 1994, A1-13 – 14F."*

[72] The trial Court, before summarising the evidence against each accused, stated:

> "That the crimes charged were committed is not an issue. What is an issue at this stage of the proceedings is whether there is a *prima facie* evidence to link the accused with the commission of the said crimes."

[73] The Court proceeded to summarise the evidence against the accused and in the process made the statement which triggered the application for recusal. At the end of the summary of the evidence the Court stated:

> "In the light of the outline given above, I am persuaded to find that there is a *prima facie* evidence…"

[74] In *S v Mnyamana and Another* 1990 (1) SACR 137 (A) at 141F - H Friedman AJA said:

> "Irregularities in a criminal trial fall into two categories: those which are of so gross a nature as *per se* to vitiate the trial and those of a less serious or fundamental nature which do not *per se* have that effect. In regard to the latter category the Court will, on appeal, itself assess the evidence and 'decide for itself whether, on the evidence and the findings of credibility unaffected by the irregularity or defect, there is proof of guilt

beyond reasonable doubt' *per* Holmes JA in *S v Tuge 1966(4) SA 565 (A)* at 568B. See also *S v Naidoo 1962 (4) SA 348 (A) at 354D-F* and *S v Mkhise and Others 1988 (2) SA 868 (A)* where it was stated with reference to the categorisation of irregularities at 872F-G:

> 'As the decisions in our law on the nature of an irregularity bear out, the enquiry in each case is whether it is of so fundamental and serious a nature that the proper administration of justice and the dictates of public policy require it to be regarded as fatal to the proceedings in which it occurred.'"

[75] I do not consider that the statements complained of were irregularities. Even if they were, they fall in the second category which is of a less serious nature especially that accused testified and called witnesses. Nothing in the judgment of the trial Court suggests that the remarks it made in the s 174 application clouded its mind. Consequently this contention also fails.

[76] Finally on the accused's joint contention, namely, the issue of the MTC print-outs, Accused No's. 2, 3 and 11 contended that they should not have been admitted in evidence. When the matter was argued, this Court *mero motu* raised with Mr. Small, counsel for the Respondent, the issue of whether the evidence led by the State on the computer print-outs complied with the Computer Evidence Act, 1985 (Act No. 32 of 1985). Mr. Small was asked to submit further heads of argument on the point raised by the Court which were to be served on the accused. The accused were also asked to file further heads of argument, except for Accused No. 1 who indicated that he was not challenging the admissibility of the print-outs. He submitted that he was relying on the calls especially the one he allegedly made at 01h25 to Accused No. 11

which was registered by the Eros Tower as he claimed that he was in Erospark at the time of the second robbery. Mr. Small was further asked, in the event that the evidence on the computer print-outs is disregarded, what impact the absence of that evidence would have on the convictions.

[77] I must mention, as Mr. Small correctly points out in his additional heads of argument, that the point raised by the Court was not an issue in the Court *a quo.* The print-outs were admitted without an objection. The fundamental ground upon which Mr. Murorua representing Accused No's. 2, 7 and 9 in the Court *a quo*, joined by Accused No.11 objected to the admissibility of the computer print-outs was that they were unreliable, that Messrs Riedel and Beukes were not the authors and preparer of the said print-outs but MTC Information Technology Department, and therefore the print-outs constituted hearsay evidence and that they could have been manipulated, a contention repeated in Accused No. 11's heads of argument in this Court.

[78] The Court *a quo* considered the objections and stated as follows:

> "*In casu,* it is noteworthy to mention that there was, in reality, no resistance to the admissibility of the computer print-outs. The admissibility of computer print-outs evidence in criminal case falls within the purview of Section 221(1) of the Act 51 of 1977."

[79] The Court below referred to the case of *S v Harper & Another* 1981 (1) SA 88 D & (CLD) at 95E – H, 96D - E and 97C - H which Mr. Murorua brought to the

attention of the Court where Milne J considered the question whether or not computer print-outs are admissible documents. Milne J found that when the word "document" is interpreted in its ordinary grammatical sense, the computer print-outs fall in that purview and are admissible in terms of section 221. The relevant parts read as follows:

> "The extended definition of document is clearly not wide enough to cover a computer, at any rate where the operations carried out by it are more than the mere storage or recording of information…
>
> The wording of the section … is entirely appropriate to the production of microfilm as evidence since the microfilm itself can be produced. Furthermore, microfilm is a means by which information is stored, and recorded … The computer print-outs consist of typed words and figures and would, *prima facie,* clearly fall within the ordinary meaning of the word 'document'.
>
> It seems to me, therefore, that it is correct to interpret the word 'document' in its ordinary grammatical sense, and that once one does so the computer print-outs themselves are admissible in terms of section 221. Once that situation had been achieved, then it seems to me that the main thrust of the attack upon the admissibility of those documents disappears."

[80] Consequently the Court *a quo* found that the print-outs objected to were admissible.

[81] The argument of the inadmissibility of the computer print-outs was pursued in this Court by Accused No's. 2, 3 and 11 with vigour. They filed further heads of argument on the point raised by this Court. Mr. Small concedes that no authenticating

affidavit as required by the Computer Evidence Act, 32 of 1985, was filed but submits that the print-outs were properly authenticated by Riedel and Beukes of MTC in their *viva voce* evidence. He argues that the print-outs were handed through the MTC witness, Beukes, without objection, and that he testified that the print-outs are a report of data stored. He further submits that, as I remarked above, none of the legal representatives of the accused ever raised an objection against the admission of the print-outs as not complying with the provisions of the Computer Evidence Act, 1985 neither was it raised by counsel for accused persons in cross-examination. He argues that in essence the print-outs were placed before the Court *a quo* by agreement, cross-examination by counsel for the accused was done extensively on the print-outs. I may add that Beukes was called at the instance of the defence team when Riedel could not explain some things on the print-outs. Riedel was also recalled at the instance of the defence. Mr. Small further points out that Accused No's. 1, 2 and 7 relied partly on the information contained in the print-outs. I would add Accused No. 11 as well. As I have already indicated above, he attacks the judgment of the Court *a quo,* where the Court said Accused No. 9 called Accused No. 11 twenty times, (when it is the other way round), on the strength of the print-outs. Accused No's. 2 and 9 who denied being in possession of their cellphones at the crucial periods of the planning and execution of the robbery, do not dispute the print-outs, so argued Mr. Small. He finally submits that the print-outs were properly admitted by the Court *a quo.*

[82] I agree, with respect, that the Court *a quo* was correct to hold that computer print-outs in criminal matters are regulated by s 221 of the Criminal Procedure Act, 1977 which effectively disposes of the question raised by this Court. The Computer Evidence Act, 1985 which is a replica of the then South African Computer Evidence Act, 1983 (Act No. 57 of 1983) applies only to civil proceedings. The purpose of the Act is "to provide for the admissibility in civil proceedings of evidence generated by computers; and for matters connected therewith". See generally, Hoffmann and Zeffert, *The South African Law of Evidence*, 4th ed, at 142; Schwikkard *et al*, *Principles of Evidence*, 1997, 267 - 276.

[83] Section 221 of the Criminal Procedure Act, 1977 provides:

> "221. Admissibility of certain trade or business records.
>
> (1) In criminal proceedings in which direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, upon production of the documents, be admissible as evidence of that fact if-
>
> (a) the document is or forms part of a record relating to any trade or business and has been compiled in the course of that trade or business, from information supplied, directly or indirectly, by persons who have or may reasonably be supposed to have personal knowledge of the matters dealt with in the information they supply; and
>
> (b) the person who supplied the information recorded in the statement in question is dead or is outside the Republic or is unfit by reason of his physical or mental condition to attend as a witness or cannot with reasonable diligence be identified or found or cannot reasonably be expected, having regard to the time which has elapsed since he

supplied the information as well as all the circumstances, to have any recollection of the matters dealt with in the information he supplied.

(2) For the purpose of deciding whether or not a statement is admissible as evidence under this section, the court may draw any reasonable inference from the form or content of the document in which the statement is contained, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be a certificate of a registered medical practitioner.

(3) In estimating the weight to be attached to a statement admissible as evidence under this section, regard shall be had to all the circumstances from which any inference may reasonably be drawn as to the accuracy or otherwise of the statement, and, in particular, to the question whether or not the person who supplied the information recorded in the statement, did so contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not that person or any person concerned with making or keeping the record containing the statement, had any incentive to conceal or misrepresent the facts.

(4) No provision of this section shall prejudice the admissibility of any evidence which would be admissible apart from the provisions of this section.

(5) In this section-

"business" includes any public transport, public utility or similar undertaking carried on by a local authority, and the activities of the Post Office and the Railways Administration;

"document" includes any device by means of which information is recorded or stored; and

"statement" includes any representation of fact, whether made in words or otherwise."

[84] The authors Du Toit *et al*, comment that s 221 creates an exception to the rule against hearsay and proceed to give the history behind the exception. The authors Schwikkard *et al*, 1997, *supra,* at page 273 states that "it seems that once the conditions set in terms of s 221(1) of the CPA have been satisfied the document will become admissible and the Court will have no discretion to exclude it".

[85] In *S v Harper and Another, supra*, after stating that there are a number of processes involved which precede the production of the print-out, at 966, Milne J proceeded to say*:*

> "No evidence has been adduced before me as to whether or not the computer that was used here was operating correctly, nor was there any testimony as to the precise nature of the processes involved. It seems to me, however, that the legislature envisaged this very state of affairs when it enacted s 221 of Act 51 of 1977."

[86] As Mr. Small correctly points out, the parties handed up the print-outs by agreement. The defence counsel cross-examined Riedel and Beukes at length on the documents they allege should not have been admitted in that case eliciting inadmissible evidence and cannot now complain that it was an irregularity to have admitted such evidence (*Rex v Bosch* 1949 (1) SA 548 (AD) at 555). Accused used some print-outs in their arguments, approbating when it suits their arguments.

[87] Consequently I am not persuaded that the Court *a quo* erred when it admitted the print-outs. In the result this contention also fails.

[88] It was necessary to attempt to cover almost every contention raised by the accused, in the process rendering the judgment, long as it is.

[89] It would have been necessary in the case of this nature to make observations on the State's burden of proof and how a court should approach circumstantial evidence, but the Court *a quo* sufficiently did so and I find it unnecessary to be repetitive. Suffice it to say that when one applies the principles of circumstantial evidence, the conclusion is inevitable that the denials of the accused of any involvement in the crimes they were convicted of, is false and were correctly rejected and the accused properly convicted. The network of facts cast around the accused persons left no gaps and rents through which the accused were entitled to pass in safety (Cf. *S v Reddy and Others* 1996 (2) SACR 1(A) at 9B - E).

[90] I deal now with the sentences imposed on the accused persons and I intend to do so briefly. It is argued without any basis that the Court *a quo* failed to take the accused's personal circumstances into consideration and that the sentences are neither rehabilitative nor reformatory.

[91] When it comes to sentence this Court is guided by the well-known principles articulated in *S v Rabie* 1975(4) SA 855 (AD) at 857 where the following is said:

> "1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal –

(a) should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial Court'; and

(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised".

2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate."

See, as to all of the foregoing, *R. v. Freeman,* 1921 AD 603 at p. 604 *in fine.; S v Narker and Another,* 1975 (1) SA 583 (AD) at p. 585C."

[92] There are no suggestions made that the Court *a quo* erred or over emphasized one of the factors to be taken into account when considering sentence.

[93] The argument that the Court *a quo* failed to take accused's personal circumstances into account and that the sentences are neither rehabilitative nor reformatory were say so without any basis and nothing more need to be said about that argument.

[94] In my opinion the sentences fit the crimes and perhaps slightly lenient compared to other sentences on similar crimes. The learned trial Judge referred to various other cases on robbery charges and went on to say.

"(51) In the interests of consistency, I bear in mind the sentences passed by Maritz, J (as he then was) in *S v Willem Swartz and Others* …, although that case is distinguishable in certain respects, for instance, the N$4.5 million which had been the

subject of the robbery, was recovered whereas, in *casu*, only the sum of just over a million Namibian dollars was recovered."

[95] The Judge continued to say:

"In my sentencing the accused, I am mindful of their respective blameworthiness, their personal circumstances as well as the time they have spent in custody awaiting the disposal of this case."

[96] Some of the accused rely on the *Swartz* matter above, but the learned Judge articulated the distinction in that case and this case and he is on point. In this case the amount of the money robbed and the amount not recovered are much bigger, Kapira Gerhard Thihuro was injured and the two vehicles suffered severe damage. The tools, the canopy and number plates of the Nissan pick-up were never recovered. In actual fact in the *Swartz* matter, Maritz J (as he then was) made the point that had any of the victims been shot, killed or wounded, the sentences would have been much heavier. Perhaps it is necessary to make reference to the relevant part of that judgment on sentence, which reads as follows:

"Considering the crimes themselves: it is clear from my findings on the merits that the commission of the robbery was carefully planned over a period of time; a number of preparatory steps were taken prior to the robbery; the conspirators acted as a group to achieve the fulfilment of their illegal objective; Accused No. 1 assisted in the robbery notwithstanding the duty of trust owed by him to his employer; Accused Nos. 2, 6 and 8 came from South Africa with the intent to commit the robbery here; Accused No.2 was a police officer, albeit in the South African Police, when he committed the crimes; the conspirators armed themselves with handguns and a machine gun to subject and subdue their victims; notwithstanding their victims submitting to their threats, they

> assaulted the pilot with the assault rifle without any apparent cause; they robbed N$4, 5 million and in addition a handgun and certain radios. These are mostly aggravating circumstances. An important mitigating factor, which has weighed heavily with me, was that no person was shot at, killed or wounded during the robbery. Had any of the accused exhibited conduct of that nature, the sentence imposed would have been a much heavier one. Another mitigating factor is that all the money and other stolen items were recovered-mainly as a result of the speedy action taken by the police and the extensive search conducted by its members."

[97] As the trial Judge correctly pointed out this case has many similarities to the *Swartz* matter. Given the short periods that Accused No's. 1, 10 and 11 resided in Namibia before the crimes in question were committed, it is difficult not to conclude that Accused No's. 1 and 11 left South Africa with the intention to commit a robbery or any other crime financially beneficial in Namibia. That fact alone is far too aggravating, a stranger who abuses the hospitality of the people of this country by committing crimes after being granted entry to stay would, depending on the seriousness of the crime he or she has been convicted of, be punished severely. Accused No. 2 cut the hand that fed him by, as is apparent from the circumstances of this case, supplying the inside information and facilitating the execution of the second robbery. That alone is far too aggravating. Accused No's. 3 and 9 are Namibians who facilitated the execution of the crimes. Accused No. 3 whose fingerprints were lifted from the Nissan pick-up, in common purpose, participated in robbing the Nissan pick-up to be used as a conduit to effect the second robbery. Accused No. 9 turned the house he was renting for criminal activities and participated in transporting part of the loot to South Africa.

[98] In the particular circumstances, I cannot say that the sentences meted out were not tempered with mercy but regrettably though, without any misdirections identified, I am constrained to find that the appeals should be dismissed.

[99] Therefore it is ordered that the appeals against convictions and sentences are dismissed.

_____
MAINGA JA

I agree.

_____
SHIVUTE CJ

I also agree.

_____
MARITZ JA

BEHALF OF THE APPELLANTS: In Person

COUNSEL ON BEHALF OF THE RESPONDENT: Mr. D.F. Small

Instructed by: Prosecutor-General