THE HIGH COURT OF SWAZILAND

Case No. 46/2000

REX

VS

CELANI MAPONI NGUBANE

JABULANI BHEMBE

MBONGENI SANDILE BHEMBE

NHLANHLA VILAKATI

CORAM: MASUKU J.

For the Crown: Mr. N.M. Maseko

For Accused 1 and 4: : Mr. T.A. Dlamini

For Accused 2 and 3: Mr. S. Bhembe

JUDGMENT
20'" April, 2006

Preface

This is a trial which was not only long drawn out in terms of the number of witnesses called by both the Crown and the accused persons, but there were several twists and turns to it which served to prolong its completion and further necessitated the writing of a number of interlocutory Rulings in the process. Before the evidence could be closed, I was appointed to serve in the Judiciary of the Republic of Botswana. In view of the advanced stage I had reached in the case and the numerous witnesses who had testified at the time of my appointment, it was agreed that I should sit to hear this matter to completion in the interests of justice and to avoid further waste of time which could be incurred by or ordering the trial to commence *de novo* before a different Judge.

A corollary of this, was that I had to find time, during vacation, in Botswana, to finalize this trial. The trial, including closing submission was completed in March 2005. Due to the heavy load of work

in Botswana and the copious amount of notes in this matter, given the number of witnesses (39 in all) and the multiplicity of the Counts on which the accused were indicted, it became impossible for me to write and finalize this judgment sooner. This predicament was brought to the attention of all the parties through their representatives. It is for the foregoing reasons that I hand down this judgment much later than would have been the case all things being equal. I record my appreciation to the parties for their understanding and patience, appreciating, as they did my unusually difficult circumstances and position.

Introduction and indictment

Terror reigned in two locations of this country around December 2001 to April, 2002. The said locations were the city of Manzini and the town of Nhlangano. Armed men held various persons *in terrorem*, in the two locations, particularly in the early hours of the morning and as a result of which the armed men literally reaped where they had not sown, taking the property and personal effects of their victims, including clothing, jewellery, mobile telephones, linen, food, electric equipment and motor vehicles. All the above and related paraphernalia was violently taken under the barrel of firearms. In one such encounter, an adult male was shot by one of the armed men and he later succumbed to death.

The Crown alleges that the accused persons above were the ones responsible for this reign of terror. As a result, some or all of them were indicted in this Court on the following numerous counts:

Count 1.

Accused No.l and 2 are guilty of the crime of **MURDER**

IN THAT upon or about the 2ml February, 2002 and at or near Nhlangano town in the district of Shisclwcni, the said accused persons, acting jointly and in furtherance of a common purpose did intentionally and unlawfully kill **MACK MORDAUNT**

Count 2.

Accused No.3 and 4 are guilty of the crime of **ROBBERY.**

IN THAT upon or about the 20 November 2001 and at or near Ngwane Park Township in the district of Manzini, the said accused persons each or all of them, acting together in furtherance or a common purpose, did unlawfully assault **PATRICK P. MOTSA** and by intentionally using force and violence to induce submission by the said **PATRICK P. MOTSA** did take and steal from him certain property, to wit, an ISUZU BAKKIE SD 289 JG and other household items all valued at E 128,000.00, his property or in his lawful possession, and did rob him of same.

Count 3.

Accused No. 1 and 3 are guilty of the crime of **ROBBERY.**

IN THAT upon or about the 1st December 2001 and at or near Fairview suburb in the district of Manzini, the said accused persons, acting jointly in furtherance of a common purpose, did unlawfully assault **THEMBA MAGEBA MAZIBUKO** did take and steal from him certain property, to wit, an OPEL CORSE Motor Vehicle SD 743 MG and various personal items all valued at E36,745.00, his property or in his lawful possession, and did rob him of same.

Count 4.

Accused No.l and 3 are guilty of the crime of **ROBBERY**

IN THAT upon or about the 1st December 2001 and at or near Fairview suburb in the district of Manzini, the said accused persons, each or all of them acting jointly in furtherance of a common purpose, did unlawfully assault **SINDISIWE KUNENE,** and by intentionally using force and violence to induce submission by said **SINDISIWE KUNENE** did take and steal from her certain property, to wit, NOKIA Cell Phone, Hi Fi set, Food stuffs all valued at El8,650.00, her property or in her lawful possession, and did rob her of same.

Count 5.

Accused No.l is guilty of the crime of **ROBBERY**

IN THAT upon or about the 17th April, 2001 and at or near Matsapha Industrial Motors in the district of Manzini, the said accused person did unlawfully assault **THEMBA BHEMBE,** and by intentionally using force and violence to induce submission by the said **THEMBA BHEMBE,** did take and steal certain property, to wit. E70,000.00 cash and E30,000.00 Cheques, and a Motor vehicle MAZDA MAGNUM V6 SD 813 EN valued at E20,000.00 his property or in his lawful possession, and did rob him of same.

Count 6.

Accused No.l and 2 are guilty of the crime of **ROBBERY**

IN THAT upon or about the 3rd February 2002 and at or near Mathendele location, Nhlangano area in the district of Shiselweni, the said accused persons, each or all of them acting jointly in

furtherance of a common purpose, did unlawfully assault **BUSISIWE GUMEDZE,** and by intentionally using force and violence to induce submission by the said **BUSISIWE GUMEDZE** did take and steal from her certain property, to wit, various household items, namely El,200.00 cash, JVC car sterio E500, food stuff El00.00, gold wrist watch El50.00 silver watch El00.00, school bag E60.00, leather bag E60.00, Medium pot El00.00, sun glasses E370.00, black handbag E60.00, total value E3,810.00, per property or in her lawful possession, and did rob her of same.

Count 7.

Accused No. 1, 2 and 5 are guilty of the crime of **ROBBERY.**

IN THAT upon or about the 13th March, 2002 and at or near Ngwane Park Manzini in the district of Manzini, the said accused persons each or all of them, acting together in furtherance of common purpose, did unlawfully assault **DAVID GAMA,** and by intentionally using force and violence to induce submission by the said **DAVID GAMA** did take and steal from him certain property, to wit, COLOUR TV SET 51 CM E4,000.00, TELEFUNDEN VCR E 1,000.00 SUNGLASSES E600.00, SIEMENS CELL PHONE E600.00, FACET WATCH GOLD E399.00,

GOLD CHAIN E200.00 total value E6,799.00, his property or in his lawfully possession, and did rob him of same.

Count 8.

Accused No.l, and 3 are guilty of the crime of **ROBBERY.**

IN THAT upon or about the 2nd December 2001 and at or near Mashayekhatsi area in the district of Shiselweni, the said accused persons each of all of them, acting together in furtherance of a common purpose, did unlawfully assault **NOKULUNGA DLAMINI,** and by intentionally using force and violence to induce submission by the said **NOKULUNGA DLAMINI** did take and steal from her certain property, to wit, E28,000.00 cash and E3,608.13 Cheque, her property or in her lawful possession, and did rob her of same.

Count 9.

Accused No.l and 2 are guilty of the crime of **ROBBERY.**

IN THAT upon or about the 3rd February, 2002 and at or near Mathendcle location, Nhlangano area in the district of Shiselweni, the said accused persons, each or all of them acting jointly in furtherance of a common purpose, did unlawfully assault **MANGALISO GAMEDZE,** and by

intentionally using force and violence to induce submission by the said **MANGALISO GAMEDZE,** did take and steal from him certain property, to wit, CELL PHONE NOKIA 6250 E2,000.00 CLOTHING ITEMS TOTAL VALUE E2,120.00 his property or in his lawful possession, and did rob him of same.

Count 10.

Accused No. **I** and 5 are guilty of **Contravening Section 14 (1) of the Arms and Ammunition Act No.24 of 1964 as amended.**

IN THAT upon or about the 28 February 2002 and at or near Madonsa area, in the district of Manzini, the said accused persons, each or all of them acting jointly in furtherance of a common purpose, did intentionally and unlawfully possess an A.K. 47 Arm of War (without Serial Number) without a valid licence or permit to possess and did thereby contravene the said Act.

Count 11.

Accused No.l and 5 are guilty of **Contravening Section 11 (3) read together with Section 11 (8) of the Arms and Ammunition Act No.24 of 1964 as amended.**

IN THAT upon or about the 28th February 2002 and at or near Madonsa area, in the district of Manzini, the said accused persons, each or all of them acting jointly in furtherance of a common purpose, did intentionally and unlawfully possess an A.K. 47 Arm of War Magazine - an essential component thereof without a valid licence or permit to possess and did thereby contravene the said Act.

Count 12.

Accused No.l and 5 arc guilty of **Contravening Section 11 (2) read together with Section 11 (8) of the Arms and Ammunition Act No.24 of 1964 as amended.**

IN THAT upon or about the 28th February 2002 and at or near Madonsa area, in the district of Manzini, the said accused persons, each or ail of them acting jointly in furtherance of a common purpose, did intentionally and unlawfully possess three **(3)** live rounds of ammunition for an A.K. 47 Arm of War Magazine - an essential component thereof without a valid licence and or permit to possess and did thereby contravene the said Act.

Count 13.

Accused No.l and 5 are guilty of **Contravening Section 11 (1) read together with**

Section 11 (8) of the Arms and Ammunition Act No.24 of 1964 as amended.

IN THAT upon or about the 28th February 2002 and at or near Mhobodleni area, in the district of Manzini, the said accused persons, acting jointly in furtherance of a common purpose, did intentionally and unlawfully possess a 9 mm 7.65 Pistol Serial No.307008 without a valid licence and/or permit to possess and did thereby contravene the said Act.

Count 14.

Accused No.l and 2 are guilt of **Contravening Section 11 (2) read together with Section 11 (8) of the Arms and Ammunition Act No.24 of 1964 as amended.**

IN THAT upon or about the 24th March 2002 and at or near Mhobodleni, area, in the district of Manzini, the said accused persons acting jointly in furtherance of a common purpose, did intentionally and unlawfully possess seven (7) live rounds of 9mm Calibre ammunition without a valid licence and/or permit to possess and did thereby contravene the said Act.

Count 15.

Accused No.3 and 6 are guilty of **Contravening Section 11 (1) read together with Section 11 (8) of the Arms and Ammunition Act No.24 of 1964 as amended.**

IN THAT upon or about the 6lh December 2002 and at or near Mbikwakhe, area, in the district of Manzini, the said accused persons acting jointly in furtherance of a common purpose, did intentionally and unlawfully possess a PUMP ACTION SHOTGUN without a valid licence and/or permit to possess and did thereby contravene the said Act.

Number of Accused persons

At the commencement of the trial, the Court was informed by the Crown that one Lindiwc Gina, who had earlier been indicted with the above Accused persons, as Accused 5, had died in the period before trial. Mr. Maseko, further informed the Court that the Crown was withdrawing charges against

Accused 6, one Philile Fortunate Mkhonta and that she would thenceforth serve as a witness for the Crown. It is for that reason that the number of the accused has, unlike in the indictment, been reduced from six to four.

Accused persons' pleas

The accused persons, when called upon to plead to the various counts, pleaded not guilty to all the counts in respect of which each one of them had been indicted, save Accused 3, who pleaded guilty to Count 15 i.e. one of possession of a pump action shotgun in contravention of the provisions of Section 11 (1) read together with Section 11 (8) of Act 24 of 1964, as amended. The respective representatives of the accused persons, it must be stated, confirmed the respective pleas of their clients, including that of guilty to the aforesaid Count.

Withdrawal of Accused l's Attorney

An issue that also cries for mention at this stage, is that the Attorney for Accused 1, Mr. B.S. Dlamini, was ordered by this Court to excuse himself from the trial due to ethical improprieties in which he was engaged before and during the course of the trial. The nature of the improprieties, their effect on the trial and the full reasons for Mr. Dlamini's withdrawal, are recorded in my judgement dated 15lh July, 2004. It is unnecessary to revisit the contents of that judgement, suffice it to mention that Mr. B.S. Dlamini's place was taken by Mr. T.A. Dlamini, who was involved in the trial from inception and he, in addition to Accused 4, thenceforth represented Accused 1 as well.

Structure of the judgement

I will adopt the following *modus operandi* in dealing with the various counts in this matter. 1 will recount the salient portions of the evidence led in respect of each count, analyse and assess that evidence, in terms of the credibility thereof, consider the evidence of the accused or his witnesses, if any, and thereafter return a verdict on the guilt or otherwise of the relevant accused person(s) on each count in respect of which he has been indicted.

Chronicle of the evidence and the assessment thereof

Close of the case for the Crown

At the close of the case for the prosecution, defence counsel intimated that they would move an application in terms of Section 174 (4) of the Criminal Procedure & Evidence Act, 67/1938 for the acquittal and discharge of the various accused persons and on the grounds and for reasons which were advanced. In certain instances, the Crown, correctly did not oppose the acquittal and discharge. Having listened to the arguments for and against the said applications, including the concessions as aforesaid, I issued the following Orders: -

Count I - Accused 1 and 2 were called to their defence.

Count 2 -Accused 3 and 4 were called to their defence

Count 3 and 4 -Accused I and 3 were called to their defence

Count 5 -Accused 1 's Counsel conceded that there was a case to answer. Accused I was accordingly called to his defence. Count 6 -Accused 1 and 2 were called to their defence. Count 7 -Accused 1 and 2 were called to their defence Count 8 -The Crown conceded that there was no case to answer. Accused 1 and 2 were therefor acquitted and discharged. Count 9 - Accused 1 was called to his defence, whereas Accused 2 was acquitted and discharged. In any event, the Crown conceded there was no case for him to answer. Count 10,1 1 and 12 -Accused 1 was called to his defence. Count 13 and 14 -Accused 1 and 2 were called to their defence.

From the foregoing, the Counts in respect of which the evidence will be chronicled, assessed and a verdict handed down, will be Counts 1,2,3,4,5,6,7,9 (only in respect of Accused 1), 10,1 1,12,13 and 14. As indicated earlier, Accused 3, pleaded guilty to Count 15. I will however, consider the submissions made for his acquittal at the close of the entire case, notwithstanding his earlier pica of guilty. I consider it prudent, however, to first deal with Count 2 against Accused 4, as I acquitted and discharged him at the close of the defence case.

Evidence of Identification

One golden thread fact, which runs through this entire case, particularly the murder and robbery counts, is the question of the identification of the perpetrators. It is common cause that no identification parade was held in respect of any of the accused persons in this case. For that reason, the defence team, in cross-examination and during submissions, has harped upon the point that in the absence of a properly conducted identification parade, the identification of the accused persons must be regarded as dock identification and be therefor dismissed as being insufficient and unreliable for finding the accused persons guilty of having committed such serious offences.

It is common cause that the police, in this matter, particularly from the evidence of PW 28 Detective Mavuso, that the reason for the identification parade not being mounted was that the accused persons' pictures had been published by the police in the police gazette, the print and electronic media, warning members of the public that the said persons were wanted by the police in respect of some serious offences and were considered dangerous. The police, in view of the publication of the photographs, took the view that it would have been unfair on the accused persons to have mounted and identification parade

and to have called the complainants to identify them, in the face of the wide publication of the accused persons' photographs as aforesaid.

The attitude adopted by the police, in this regard, is in my view commendable and fair in the circumstances because it could hardly be said the identification would be reliable and fair when the accused person's photographs, which reveal crucial features of their appearances, had been splashed widely in the media.

In dealing with the identification of the accused by the various witnesses, it is my view that I cannot throw out the identification as testified by the Crown witnesses out of hand merely because no identification parade was held, as the defence contended. That would, in my view be a highly fastidious approach, which would have no regard for the peculiar circumstances of this case, as described above. The reasons advanced by the police, for not mounting the parade in appropriate cases are, as I have said formidable because they redound to the quality of fairness that must be seen to exude every criminal trial.

In dealing with the particular incidences in which the accused persons were identified, I will not place much emphasis on the recognition that the particular witness would have summoned at the trial when the accused is in the dock. The guiding remarks, which shall serve as a beacon, are the timeless and lapidary remarks of **HOLMES J.A. in S V MTHETHWA 1972 (3) SA 766 (A.D.) at** .... The learned Judge of Appeal said: -

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

Another important feature, in considering the evidence of identification, are the cautionary remarks, which fell from the lips of **WILLIAMSON J.A. in S V MEHLAPE 1963 (2) SA (A.D.),** where the learned Judge of Appeal said: -

> *"The often patent honesty, sincerity and conviction of an identifying witness remain, however, ever snares to the judicial officer who does not constantly remind himself of the necessity of dissipating any danger of error in such evidence. "*

I interpolate to observe, that whereas an identification parade is one of the most reliable methods of testing the witnesses' power of observation and which should, whenever possible and feasible be resorted to, it is clear, from the **MTHETHWA** case *{op cit),* that it is but one of the factors, together with numerous others, that the Court must take into account in deciding on the often vexing question of identification. It is in my view clear, therefore, that it cannot be correct that in the absence of an identification parade, where the witness identifies the accused in Court, that must perforce be regarded, without more, as dock identification. It is in those circumstances, that the other factors or such of them as are applicable, and which obtained during the identification, must be considered.

Also of critical importance, on this crucial element of the judgment, is the statement by the learned authors, Hoffman and Zeffert," The South African Law of Evidence", 4th Ed, Butterworths, 1988 who say the following at page 614:

> *"The accuracy of a witness's observation depends first, of course, upon his eyesight. Secondly, it will be affected by the circumstances in which he saw the person in question; the state of the light, how far away he was, whether he was able to see him from an advantageous position, how long he had him under observation. Thirdly, impressions of appearance may be distorted by the witness 'prejudices and preconceptions. "*

Finally, I will, in considering the evidence in this case, also pay regard to the judgment of **THE KING V ELIAS PHINDOKWAKHO S. DLAMINI CRIMINAL CASE NO.35/90** (per Hannah C.J.). where the learned Chief Justice said at page 6: -

> *"It is well known that by far the greatest cause of actual or possible wrong conviction is mistaken identification and it is essential that Courts guard against this very real danger. One of the difficulties is that a mistaken witness can be a convincing witness and a number of such witnesses can all be mistaken. "*

In now turn to consider the evidence led in the trial, to assess it and to return a verdict in respect of each Count. I will commence with Count 2.

Count 2

In this count, Accused 4, together with No.3, were charged with the crime of robbery, it being alleged that on the 20th November, 2001 at Ngwane Park Manzini, they, in furtherance of a common purpose, unlawfully assaulted on Patrick P. Motsa and by intentionally using force and violence, to induce submission, by the said Motsa, did take and steal certain items, which appear more fully in the indictment above.

Testifying in respect of this Count was the complainant himself, PW1. He testified that he is a Member of

Parliament and that on the 20th November 2001, he arrived at his home in Ngwane Park around midnight from Parliament. He went to sleep. Later, he heard someone breaking the burglar door and he woke up and met some people in the kitchen where they had turned on the lights. Two of these men pointed at him with firearms and they assaulted him using the firearms. He fell down as a result of the assaults. He was thereafter tied with bed sheets and was ordered to return to the bedroom.

It was his evidence that since the lights were turned on, even in the kitchen, he managed to see them and he begged them not to shoot him. He described his assailants as young boys, one of whom had dread-locked hair. The other one was light in complexion. The dread-locked one was coffee-coloured in complexion. It was his evidence that he could not recall what they were wearing. He pointed out, when asked if he could identify his assailants that he could but was afraid for his security. He later pointed out Accused 4 as one of the assailants.

Narrating his evidence further, PW 1 testified that having been tied with the bed sheets, he was asked to point out items he had including money, car keys and a mobile telephone. These were near the bed. They took E 1,000.00 from his jacket, which he had been wearing and which they also took. They also took his trousers, mobile telephone and his car keys. From the kitchen, they took all the foodstuff from the refrigerator. They then took his blankets and wrapped up the loot therein and loaded them into PW 1 's car. They failed to get it started and ordered PW 1 to get it started and he complied.

PW 1 further testified that he was later called to the Manzini Police Station where he identified the motor vehicle, the mobile telephone, a multi-coloured duvet cover, a telephone box Exhibit 4 and a few items of clothing, including a grey pair of trousers and a navy blue jacket. The rest were not recovered. He managed to identify those items in Court as his. Regarding the recovery of his motor vehicle, it was his evidence that he found it parked around Mhlaleni/Logoba around 9h00 the following morning. PW1. however, testified that due to the pain and trauma associated with the motor vehicle, he decided to sell it after if was officially released to him. Lastly, he testified that he had given nobody any right to take the items referred to above.

Nothing turned on the cross-examination PW1 on Accused l's behalf. In cross-examination on behalf of Accused 4, PW 1 testified that it was his first time that fateful day, to be pointed at with a firearm and that he was traumatized, by being threatened with shooting, ft was his evidence that he could nonetheless identify the assailants. He testified further that he was called to an identification parade and that he saw the young light skinned assailant there. I interpolate that this was not an identification parade *strictu sensu.* It appears to have been a meeting set up for PW 1 to identify his items in the presence of the suspects.

Finally, it was put to PW 1, that Accused 4 did not accost him as on that night, as he was drinking

alcohol with one Steve. PW 1 said, he did not know if that was the case. In his evidence, adduced under oath, Accused 4 testified that on the 20[11]' November 2001, he was at home in Mhlaleni. Later that afternoon, he went to Moyamunye Bar in his parents' vehicle with his friend Linda Steve Mamba. On arrival, there, they indulged in alcohol consumption until midnight when they then decided to go to Why Not Night Club, returning at 03h00. Thereafter, they went and slept with Linda at A4's parents house.

Accused 4, vehemently denied being at PW l's home on the 20[lh] November and denied ever setting foot at Ngwane Park that day. Accused 4 proceeded to testify about his arrest which though significant is not crucial regarding the question of his guilt. I will not therefor advert thereto, save aspects which I consider to be relevant. Accused 4 testified further.that the police seized his mobile telephone, a 5 1 10 Nokia, alleging that it was part of the property he had gained from robberies. They also took a chain saw and a brush cutter alleging that these had also been stolen. He further testified that he was beaten, suffocated and insulted by the police.

It was his further evidence that he told the police that on the day in question, he was with Thami Xaba and they asked him not to mention that name because they knew Xaba. He mentioned that he was also with Linda and he was ordered to direct them to Linda's home which he did. They proceeded to Fairview where Linda lived and knocked on the door. Linda's girlfriend opened the door. They tripped and dragged her asking for Linda. Linda was woken up and they assaulted both Linda and his girlfriend, alleging that she was wearing stolen jewellery. Linda was also arrested and taken to the Matsapha police station.

In cross-examination, Accused 4 stuck to his story that he never went to PW l's house like a postage stamp to a letter. Linda was eventually called as a witness. Flis evidence by and large corroborated that of Accused 4 in material terms. He stated that they drank at New Village and they proceeded to Why Not Disco around 21 hOO, where they drank until morning hours. It was his evidence, that he decided to sleep at Accused 4's home on their return as he lived with his girlfriend. He also narrated his arrest in graphic terms. He confirmed that he was assaulted by the police and driven to Mhlaleni, where there was a shoot out, leading to a person being killed and one police officer being shot.

Linda further testified that he recorded a statement with the police, which was inconsistent with his evidence. He attributed this to the fact that he was assaulted and was told what to write by the police. Nothing much turned on his cross-examination.

The question to be answered, is whether it can be said beyond a reasonable doubt that the Crown has indubitably proved that Accused 4 participated in the commission of this offence. As it is clear above, the only evidence, creating a nexus between him and this offence was PW l's, who stated that he saw him at the scene of the crime.

It is now well settled, that trial Courts should approach the evidence of identification with caution for the reason that witnesses often make mistakes in identifying people even when they genuinely believe they are telling the truth. This can also be true regarding persons whom they know. See Hoffman and Zeffert, "The South African Law of Evidence" 4th Edition page 614 (supra): -

Factors that immediately fall into the equation, in this case are the following:- the attack occurred after midnight when PW1 was already asleep. He was alone inside the house and was assaulted until he fell down. With two firearms pointing at him, he requested not to be shot and was rendered a sitting duck as it were. He was afraid and severely traumatized, considering also that he was tied with his own bed sheets over and above the assaults and threats. Admittedly, the lights were switched on according to his evidence. He does not however state the time of observation he had under these stressful conditions. Can the Court, taking the aggregate of all the foregoing circumstances, be safe in relying on PW l's identification? I think not. According to him, he was unable to see how they were dressed and it is clear on the evidence that he was seeing his assailants for the first time under the barrel of the gun. It cannot be said that he had a good view of his assailants.

It is also well to consider in this regard that the accused raised an alibi, which was confirmed in material respects by another witness. In the case of **UKPABI V THE STATE (2004) 6-7 S.C.,** Uwaifo J.S.C. stated the following: -

> *"// is true that whenever the case against an accused person depends wholly or substantially on the correctness of the identification of the accused, and the defence alleges that the identification was mistaken, the court must closely examine the evidence. In acting on it, it must view it with caution, so that any real weakness discovered about it must lead to giving the accused the benefit of the doubt. "*

Some real weaknesses have, in this case, been exposed in the paragraph immediately before the above quotation. In any event, the accused is not duty bound to prove his innocence, nor to show that his evidence is true. *In casu,* however, I cannot say that his story is beyond a reasonable doubt false, viewed from his evidence as corroborated by Linda's and the doubt that precariously hangs over my mind regarding PW l'$_s$ correct identification. In **S V KUBEKA 1982 (1) SA 534 (T) at 537 F-G,** Slomowitz A.J, said: -

> *" ...whether I subjectively believe him is, however, not the test. I need not even reject the State case in order to acquit him.....I am bound to acquit him if there exists a reasonable possibility that his evidence may be true. Such is the nature of the onus on the State."*

The above quotation, in my view aptly sums up the position in this matter. The foregoing constitute the

reasons why I acquitted Accused 4 at the close of the defence case. I should, however, mention that this accused person was, however, pointed out by PW 3 Sindisiwe Mazibuko (nee Kunene) as being present when Counts 3 and 4 were committed. I could observe that Accused 4 was visibly shaken by this. What is however important, is that he was not charged for committing either offence in Count 3 or 4. This may have been an oversight on the part of the prosecution. For present purposes, however, it is water under the bridge.

I now proceed to consider the evidence in this Count in relation to Accused 3, who was co-charged with Accused 4. It will be abundantly obvious by now, that the evidence of PW 1 did not in anyway link Accused 3 with the offence in question. He was linked by his girlfriend, Philile Fortunate Mkhonta (PW 19). It is worth recalling that PW [9 had earlier been indicted but charges against her were subsequently dropped. She was not introduced as an accomplice witness either.

It was her evidence that she was arrested on the 6lh December 2001 by the Police at Mbikwakhe in a room that Accused 3 was renting. She had visited him having arrived the previous day. It was her evidence that whilst asleep on a sponge mattress, some people knocked on the door and A3 opened. He realized it was the police, who immediately proceeded to conduct a search in the house. They lifted up the sponge mattress, under which they found a firearm, which PW 19 estimated at +/-750cm. A3 is on record as pleading guilty to possession of that firearm. I will deal with that Count shortly. PW 19 said the firearm was rusty and brown in colour and she identified the firearm positively in Court.

The other witness was PW 22, 3797 Constable Malungisa Mahlalela, who was then based at Matsapha Police Station. He testified that on the 6lh December, 2001, he was detailed to action a robbery case at Mbikwakhe together with 4198 W/Constable Lindiwe Dlamini. On arrival at
Ekuphumuleni General Dealer in that area, they were approached by four (4) men who were resident in that area. They complained of some young men who resided at a certain homestead about a hundred metres from the shop. It was alleged that they left at night, around 20h00, returning in the early hours of the morning and that their business was unknown.

The men asked PW 22 to proceed to the homestead where the young men lived and to ask the landlord if she was aware of their nocturnal business. PW 22 obliged and he proceeded to the home accompanied by Nkhukhu Dlamini and Samson Nkambule. They found the landlord busy in the fields ploughing. PW 22 asked her after introduction, which of her rooms were let to middle aged men and she took him to the door of that room. PW 22 asked the landlord to knock and a young man, Accused 3 responded and spoke to her. As they talked A3 realised the presence of a police officer and began to retreat into the house trying to close the door. PW 22 intervened and kept the door open.

He said, to Accused 3, "My friend, I believe you own this house and I believe you are a Swazi Citizen. I would like to find what is in the house and whatever I find I will take to Court as evidence and you will explain how you come to be in possession." A3 did not answer but began to shiver. PW 22 instructed A3 to sit on a chair near some kitchen utensils but was soon on his feet. He called one of the men accompanying him to help with the accused. He saw PW 19 lying on a sponge and instructed her to rise up. It is under the mattress that he found a shotgun i.e. a black pump action 12 bore with three rounds of ammunition- Exhibit 23. It bore serial No.9511219.

He asked who owned the fireann, but no one claimed ownership. He notified both that he was arresting them for possession of the firearm as they failed to produce a permit when required to do so. He indicated that he would lock the house as he suspected that the items therein were stolen. A3 called himself Sandile Mbongiscni Simelane, whereas his surname later turned out to be Bhembe.

PW 22 also testified that he saw a floral blanket and a round portable radio and seven different cell phone chargers. PW 22 testified that when he asked who the owner of the balance of the items was, A3 and PW 19 did not respond. In cross-examination, it was denied that a permit for the firearm was requested and it was further denied that the owner of the balance the property was asked to identify him or herself.

It is worth pointing out that the so called floral blanket/duvet cover is the one that PW 1 identified as his. In cross-examination of PW 22, it was not put to him that the items did not belong to the said accused person. It was only put to PW 19 that the firearm and other items, which were not identified, belonged to Mfanasibili "Msayi" Dlamini.

In his evidence adduced under oath, A3, testified that due to undisclosed problems at home, he went to reside at Mbikwakhe as recounted above. It was his evidence that on the 4lh December 2001, on the way from the market, he met Mfanasibili Dlamini carrying a bag containing a radio, blanket and a firearm. He was requested by Dlamini to keep the said items in his room because he had a dispute with his female companion he lived with. He had even assaulted her and she went to report to the police. Dlamini further told him that when he went to his room, he found his girlfriend removing items from the house and only found a bed and the items he handed over to A 3. Dlamini said he was going to spend the night with one of his other girlfriends.

Testifying about the arrival of the police, A3 stated that he was reluctant to let the police in because they wanted to flock in wearing shoes yet he used to clean the house very well. He later said if he knew they were police officers, he would have allowed them to come in with their shoes on. He asked them to leave their shoes at the door but they did not take him seriously. They entered the house.

There are a few issues that present difficulties for me in this matter. Firstly, in my assessment, the Crown witnesses involved were clear and straightforward and they did not tergiversate in their evidence. In particular, I was impressed with the evidence of PW 22 and how he stumbled upon A3. He was clear that when he asked the accused about the ownership of the property, he was silent as a sheep brought before its shearers. If indeed the items in question, belonged to Mfanasibili, as alleged that should have been put to him directly. Furthermore, the reasons for Mfanasibili asking A3 to keep the items were not only unconvincing but also contradictory.

It was put on A^'s behalf to PW 28 Constable Mavuso, that the items were kept by the said Mfanasibili because he knew that the police were hot on his trails. In his evidence, however, A3 testified that he was asked to keep the items because Mfanasibili had had some misunderstandings with his girlfriend.! There is an element of the Accused's story not being put to some witnesses on the one hand and a disparity between what the attorney put to the Crown's witnesses on behalf of A3 and what A3 himself testified to under oath. Only an adverse inference can be drawn from the foregoing.

In **R V DOMINIC MNGOMEZULU AND OTHERS CRIM. CASE NO. 94/1990,** Hannah C.J. (as he then was) s^id the following trenchant remarks in his cyclostyled judgment at page 17: -

> *"It is, I think clear from the foregoing that failure by counsel to cross-examine on important aspects of a prosecution witness' testimony may place the defence at risk of adverse comments being made and adverse inferences being drawn. If he does not challenge a particular item of evidence, then an inference may be made that at the time of cross-examination his instructions were that the unchallenged item was not disputed by the accused. And if the accused subsequently goes into the witness box and denies the evidence in question the Court may infer that he has changed his story in the intervening period of time, ft is also important that counsel should put the defence accurately. If he does not, and the accused subsequently gives evidence at variance with what was put, the Court may again infer that there has been a change in \he accused's story. "*

A more fundamehtal observation against the accused which mainly relates to the firearm, is that he pleaded guilty toi possession thereof. In cross-examination of PW 19, for the first time, he then brought the namci of Mfanasibili and attributed ownership of the items to him. This Mfanasibili, is incidentally the sa|mc person to whom ownership of the duvet and radio was attributed, knowing that he was already dejad and unable to defend himself. Even the explanations for A3 keeping the items, besides being contradictory, leave a lot to be desired. The reasons are in my view spurious. Who, in his senses, would agree to keep such items, including a firearm, knowing full well that those are stolen as it was put to PW 28 that the police would find them. In my view, no one could. I come to the conclusion th^t the accused's explanation is undoubtedly false. I accordingly find him guilty on

Count 2, since his explanation of possession of the duvet is in my view false beyond reasonable doubt. The item was stolen on 20th November and found in his possession on the 6Ih December. The doctrine of

recent possession, as dealt with in Counts 4 and 5, provide the basis for him being found guilty on this score.

Verdict: Accused 3 found guilty on Count 2. Accused 4 is hereby acquitted and discharged on Count 2.

Count 15

It would be convenient at this juncture to also deal with the evidence against A3 relating to possession of the pump action shot gun i.e. Exhibit 23. I have, in my chronicle of evidence, relating to A3 in Count 2, alluded at length to the evidence relating to Count 15. As indicated above, the accused pleaded guilty to this Count, but went ahead in cross-examination to attribute ownership thereof to a third party, thereby bringing into question the unequivocal nature of the guilty plea.

It is also clear that when the said firearm was tested, it was adjudged not to be functioning by the Force Armourer 1882. Inspector Jeremiah Nxumalo, PW 27. PW 27 testified that when corking the firearm, the parts could not move. Furthermore, the said firearm did not have a hand guard nor a butt on the rear. It was his evidence that since it could not be cocked, no bullet could be lodged in it. He accordingly declared it unserviceable. The demonstration of the non-functioning of the firearm was conducted in open Court.

Should the accused person, notwithstanding his plea of guilty be found guilty, particularly in view of the unserviccability of the firearm in question? Mr Bhembe, in his submissions argued that the fact that Exhibit 23 proved not be serviceable is fatal to the Crown's case. The Court was, in this connection, referred to **DUMISA MAHLALELA** V **THE KING APP. NO.16/88** (per Hannah C.J.) at pages 2 to 3, of the said judgment, the learned Chief Justice said:

> *"In every criminal case the Crown must prove all the essential elements of the offence charged and when the charge is one of unlawful possession of a firearm,*
>
> *it must prove that the article possessed was indeed a firearm as defined in the Act. Not all pistols are capable of firing bullets and many replicas of pistols are to be found on the market. In my judgment the failure by the Crown to prove that the pistol found in the possession of the Appellant was capable offiring a bullet was a fatal flaw in the Crown's case which could not be cured by making assumptions. "*

I wholeheartedly endorse the remarks of the learned Chief Justice as accurately reflective of the proper approach. Whereas in that case before him, the question whether the firearm was serviceable or not was left to surmise, *in casu,* the evidence adduced by the very Crown shows that the "firearm" was not

serviceable. It cannot, therefor, in my view, be said to fall within the definition of Section 2 of Arms and Ammunition Act, 1962, which provides as follows: -

"firearm" means -

(a) a pistol, revolver, rifle, shotgun or other lethal barreled weapon of any description -

(0 (ii) from which a shot bullet or other missile can be discharged; or which can be adapted for the discharge of a shot, bullet or other missile; or

The firearm in question failed to meet the rigours of Section 2 (a) (i) above. It follows therefor that notwithstanding his plea of guilty, which was probably made subject to the assumption that the firearm was serviceable, cannot stand. I acquit and discharge accused 3 on Count 15. It must be clear, however, that the acquittal is not based on the story he presented after his plea, being found reasonably possibly true. To the contrary, but for the provisions of Section 2, I would have found the accused guilty as his story was, in my view undoubtedly false, as confirmed by his earlier plea.

Verdict - Accused 3 acquitted and discharged on Count 15.

Counts 3 and 4

My immediate impression with regards to these two offences, was that there was an unnecessary splitting of charges. This is a view that Mr Maseko fairly conceded as correct. This is because the complainants in these counts are husband and wife. In Count 3, the husband was attacked outside the matrimonial home and beaten whereafter they perpetrators immediately proceeded with the husband into the house. Count 4 is in relation to items taken from the wife inside the house. This is therefore a clear case where it would have been fair and appropriate to charge the accused with one offence. I will, therefor consider these two counts as one.

The indictment alleges that on the 1st December, 2001, at Fairview, Accused persons 1 and 3, acting jointly, and in furtherance of a common purpose, used force and violence to induce submission by Themba Mageba Mazibuko and did take from him an Opel Corsa, bearing registration number SD 743 MG. They, on the same date, using force and violence, took and stole from Sindisiwe Mazibuko (Nee Kunene) a Nokia Mobile telephone, a Hifi set, foodstuffs, a Phillips CD. player, wedding and dressing rings, a Samsung Video Recorder, cash and other household items.

PW 2 was Themba Mageba Mazibuko, who testified that on the day in question, he was driving the aforementioned vehicle into his yard. He stopped at the gate, alighted and opened the gate, drove in and locked the gate. He parked the vehicle under a mango tree as usual. As he was about to alight from the vehicle, he saw three men jumping from a tree and they approached him and opened the vehicle's door on the driver's side. They dragged him out of the vehicle and began to assault him. He was ordered not to make any noise whilst they ransacked him, took his mobile telephone and wallet.

The men dragged him to the house and tried to open the door forcefully. It was in that process that they saw a ring on his finger and they removed it forcefully. As their efforts to force the door to PW 2's house proved futile, they asked PW 2 for the keys and he informed them that the keys were in the motor vehicle. One drove the vehicle around to ensure that it was drivable and returned with the keys.

They opened the padlock with one of the keys and gained entry. PW 2's wife, PW 3, was inside the bedroom where she had locked herself and their 17 day-old-baby. They ordered her to open but she refused. She only relented after PW 2 told her to open because they were threatening to shoot him. After PW 3 opened the door, they pushed PW 2 inside, pointed the firearm at the baby and said it should not make any noise, failing which they would shoot at it. PW 3 was then ordered to give them everything, whilst PW 2 was ordered to go into another bedroom and was further instructed to lie on the bed facing downwards. He was also ordered not to look at them.

PW 2 testified that he was able to see some of the accused persons although he was under strict instructions not to look at them as aforesaid. He testified that he was also bleeding on the forehead as they were assaulting him with an iron rod. He described one of his assailants as tall and slender, dark in complexion and had either extensions or dreadlocks on his head. His face was long and rectangular in shape. He described the other as short and light in complexion but was wearing a woolen hat. He could not describe the last one.

He indicated that it would be difficult to identify the persons if he came across them owing to the fact that the incident had occurred some time ago. He went to the dock and there identified Accused 1 and 4 as being those persons he had described. He testified further that all the lights outside his house were switched on. Before they left, he heard one of them say, "Shoot him", but nobody did. These men left with his motor vehicle and its radio, his wallet, ring, mobile telephone, and his wristwatch.

The following Monday, he was called to the police station to identify some items and he positively identified them as his. The motor vehicle was one such item, a hifi set (Technics), and a video recorder. Lastly, he testified that he called the police on the night of the attack and saw a bag loaded with foodstuffs on the way to the kitchen.

In cross-examination, PW 2 testified that he got an opportunity to see some of his assailants when they pulled him out of the motor vehicle and also next to the door of the house where there was ample light. When asked if he was certain that the persons he identified in Court were his assailants, PW 2 said that they looked familiar. He testified further that after the motor vehicle was recovered, he made a successful application to Court for its release back to him.

PW 3, on the other hand testified that around midnight on the day in question, she was alone with her two-week old son. Her daughter had gone visiting and her maid was away for the weekend, it being a month end. Around midnight, she heard the vehicle parking next to the bedroom window. Soon thereafter, she heard some noise and then heard the vehicle driving away. Her husband began screaming and she went to the window to investigate. She then saw the vehicle there much against the impression she had got that it had driven away. She proceeded to the kitchen window and there saw a man carrying an iron rod.

It was her evidence that she had not bolted the door in anticipation of her husband returning home. In view of the atmosphere prevailing outside, she decided to bolt the door and to run back to the bedroom, where she locked herself in. Later, she heard a knock on the bedroom door and she realized that they had entered the house. One of the men knocked and said twice, "Open mother-in-law". Her husband then told her to open as he was dying. She complied. She met a man, carrying a firearm. He was with two others who were with her husband, who was bleeding.

The one carrying the firearm ordered her not to shout or make noise lest they shoot her. The other promised to assault her as she was calling the police, a claim that she denied. Two men took PW 2, her husband and put him in her daughter's bedroom, leaving her with one, who demanded her cell phone, she obliged. He further told her that he wanted some money and she handed to him her wallet with its entire contents. PW 2 testified that she then took her child in her lap and pleaded with this man not to hurt her as she had a small baby. He instead asked if what he had given her was the only amount of money in her possession and she confirmed that. He suddenly clapped her saying he had instructed her not to look at him, whereupon she faced down.

The one with a firearm came back into the bedroom and demanded some money. PW 2 told him that she had already given it to his companion. He asked for her mobile telephone and she advised him it had also been handed over. They cheeked and found it had 10c credit. The one carrying the firearm paced up and down, opening the drawers in the bedroom, telling her that she was mad as she did not have more money. He pointed at the child with the firearm and warned her not to make noise, else he would shoot. He took a bag containing her jewellery'. He also took her wedding rings on the dressing table. It was her evidence that his pacing up and down appeared strange.

As the one paced, the one who was in the bedroom was disconnecting the Samsung V.C.R., Hifi technics set, and Philips CD player radio. It was PW 3's further evidence that they were called by the police and they positively identified certain items which were found in their vehicle, namely, wedding rings, two small bands, one of which had a diamond on top and dressing rings. She identified these items in Court.

On the identity of the assailants, PW 3 testified that she was unable to identify them all. She testified that she saw one outside carrying an iron rod and his face was not concealed. He was short and light in complexion and was wearing a black leather jacket. The one who was in the bedroom with her most of the time, was described as tall and dark in complexion and had a long face. He had dreadlocks on his head and had them pushed back. He was wearing a black leather jacket and a pair of black or navy canvass shoes pejoratively referred to as "emafuseki".

PW 3 testified that she could be in a position to identify them, especially because there was a street light outside and all the lights in their house, both outside and inside were switched on as she had a baby. With regard to the one who was with her, she pointed out Accused 1 as that person. He had slapped her and demanded things from her and had a long face, dreadlocks and wore a leather jacket. She testified that she had every opportunity to see him because she was with him in the room for some time. Furthermore, PW 3 tendered certain documents in respect of the purchase of the CD. player.

In cross-examination, PW 3 was asked as to why she was unable to identify the third man as she had testified that there was more than sufficient light inside the house. It was her evidence that she had seen him briefly, as he went in and out whereas the other two were in the bedroom for a longer time compared to the third. She conceded that the whole ordeal shocked her extremely but she was nonetheless able to identify Al because he demanded things from her, a wallet, mobile telephone and even slapped her. It was her evidence that as he was busy searching for other things in the room, she was looking at him as she also wanted to sec the items he was taking from the house.

When put to her that she had seen the pictures of the person who robbed her from the newspapers, PW 2 replied that it is difficult to see people in pictures because they often change and some people like her are described as photogenic and are very beautiful in pictures than in real life. She testified that she did see the pictures but was unable to recognize Al from those pictures. It was her further evidence in cross-examination that she had been with Al for about seven (7) minutes or more. It was her testimony that she looked at him at every little opportunity she got. When put to her that she did not see Al, especially in the circumstances so as to describe him as she did, PW 3 maintained her story.

Under cross-examination by Mr Bhembe, PW 3 testified that at the time they identified their items at the police station, the items were in three different loads and they were asked to open these. It was her evidence that she first identified one ring in one load and found more as she searched further. The CD.

player was found in another load.

The next witness, who testified in relation to this Count was PW 23, 3470 Constable Mpendulo Dlamini based at Dabede police post. He testified that in December 2001, he was based at Dumako police post. On the 1SI December 2001, whilst on patrol in a 4 x 4 Toyota Police van, with 2554 Constable Petros Mamba, at around 20h00, they got information on police radio that a vehicle had been taken at gun point by armed men. It was described as a blue Corsa van. As they continued, they saw a vehicle answering to the description and it was parked at Mooihoek. This raised suspicion that that might be the stolen vehicle. They stopped behind it and found a man sitting behind the steering wheel.

It bore the following registration number i.e. HGY 205 G.P. PW 23 alighted from the police vehicle, introduced himself and asked the person in the vehicle what he was doing there, where he was from and where he was heading. His answer was that he was from Manzini with some other people he had brought to that area. Dissatisfied with the quality of the answer proffered, coupled with the vehicle answering the description of the stolen vehicle, he ordered the person to drive the vehicle to Dumako police post and indicated that they would follow him from behind.

As they did so, this man drove away at great speed and they flicked their headlamps to indicate that he should slow down but to no avail. This served to confirm their suspicion that the said vehicle was stolen. As they were about to reach the junction to Dumako, the man stopped the vehicle and they stopped behind him with their headlights turned on. The man alighted from the vehicle and came to PW 23's side, as he was driving the police vehicle.

It was his evidence that he saw this person clearly as they spoke. It was PW 23 's evidence that he alighted with a view of apprehending this man and placing him under arrest but he overpowered them and ran away, leaving the vehicle behind. He then drove the Corsa to the police station and got somebody to drive the police vehicle ran back as Mamba could not drive. It was his further evidence that using his torch, he looked at the disc and saw that it bore the registration number SD 743 MG, which confirmed to him that it was indeed the vehicle referred to on police radio. He then informed the iVlanzini Serious Crimes Unit of what had occurred.

Asked to describe this man, PW 23 testified that he was tall, had a gap in the front teeth and had dreadlocks on his head. He described him as having been hostile. He pointed to Al as being that man. In cross-examination, he was asked how many teeth were missing from this man and he testified that he was unable to see but there was a gap. When put to him that it was not Al as he kept no gap then, PW 23 insisted that it was Al and that he had seen the gap and recognized him after suspecting him. He had apparently seen the accused's picture in the Police Gazette.

PW 23 denied that A 1 did not have dreadlocks and further denied that the person he had seen was not Al, as Al was in iVlanzini. He emphatically stated that he saw Al who had dreadlocks then. It was further put to him that in the pictures of Al published by the police, he did not have dreadlocks but big hair and that the gap was not shown in any of the pictures. PW 23 did not agree with these issues. In answer to questions from the Court, PW 23 testified that there were some blankets inside the motor vehicle and jewellery.

According to PW 28, 3234 Detective Constable Solomon Mavuso, after getting a report of the recovery of the vehicle by PW 23, he went to fetch the vehicle. In it, he found blankets, PW 2's travel document, a jewellery box and a ladies hand bag. PW 28 further testified that PW 3 identified the items as belonging to her and the vehicle was released to PW 2 as the suspects had not been apprehended.

In his evidence in chief, Al made a denial in relation to the counts. He denied being at PW 2's home on the 1st December 2001 and denied having committed the offence. When reminded that the witnesses had identified him, it was Al's evidence that he did not have dreadlocks in the year 2001 and had normal hair. That was all.

I am of the view that these offences which as I said, will be treated as one, were indubitably proved by the Crown. I am satisfied that the identification of the witnesses, particularly PW 3 is reliable. The lights were switched on and although she was understandably afraid, she was not being assaulted save being clapped once by Accused 1. She had the time and opportunity to see him as he was busy searching for valuables from her house. She was able to describe his face and the clothes he wore. Her evidence was corroborated by PW 2's which was, however, less tranquil as he was being assaulted. His description of Al, particularly his facial features, was in consonance with PW 3's. No suggestion was put to them that they had concocted the evidence. In point of fact, I was satisfied with the evidence of PW 2 and PW 3. They were forthright and never wavered. One feature that I found quite significant was that it was never denied to both PW 2 and PW 3 that their identification was mistaken. It was also not put to them at all that A I was not at Fairview. Furthermore, PW 2 and PW 3, were clear in their evidence that Al had dreadlocks and also said he had a gap. This was also not denied.

It is clear that important aspects of the accused's defence were not put to the Crown's witnesses. I have outlined some of these above. I will refer to the remarks of Hannah C.J. (as he then was) in **R VS DOMINIC MNGOMEZULU AND OTHERS** (supra).

I am fortified, in view of the foregoing to find that the accused's belated denials are to be declared an afterthought since the evidence of PW 2, particularly PW 3 was clear and irresistibly placed Al on the scene, not only at Fairview, generally, but at PW 2's house and in PW 3's bedroom, where he spent a

considerable length of time in a place awash with lights, both outside and inside. PW 3's description of Al was devastatingly precise and was totally left unhinged by cross-examination. It follows that Accused 1 is one of the persons who participated in the robbery at PW 2's home.

PW 23, also had an opportunity to see him at close range. Although it was at night, the motor vehicle's lights were switched on and Al came to him. He also struggled to hold Al at close range. It is significant that PW 23 was not under any pressure of fear or such other force operating on his mind. It was the accused who panicked seeing the police officers. According to PW 23, when he ordered the accused to drive, he had already recognized him as the person depicted in the police photographs as wanted. I am satisfied that his evidence further connects Al to this offence. I also find for a fact regard had to the foregoing, particularly the failure to challenge PW 3 and PW 2 about the dreadlocks and PW 3 about the gap, that when he committed the offence, Al had dreadlocks on his head and had a gap in his front teeth. The belated attempt to question these when PW 23 testified, in my view, is an afterthought. If this was the accused's position at the outset, these crucial features would have been put to them. There is a long time and a lot occurred between the time when PW 2 and 3 testified and the time when PW 23 did.

In view of my conclusion, Al is guilty of this offence and so is Accused 3, who is connected by the CD. Player found in his possession as more fully covered when I dealt with Count 15. In his case, although he was not identified at the scene, he was connected by the item found in his possession and which he failed to satisfactorily explain. It is significant to consider that A3 was found with this item, some five days after the robbery at PW 2's Fairview home. In the premises, the doctrine of recent possession would be a sound basis for finding A3 guilty on this Count.

The learned author, Phipson, On Evidence, 14^{lh} Edition at paragraph 17.04 says of the doctrine:-

> *"// a person is found in possession oj goods soon after they have been stolen and he either gives no explanation or he gives an explanation which the court is satisfied is untrue, the inference may be justifiable that he was either a thief or else guilty oj' dishonesty handling goods knowing or believing than to be stolen. Whether the inference is justified will depend not only on the lapse of time but on the nature oj property and other surrounding circumstances. If the theft was by burglary or robbery the inference*
> *may equally apply. However, an inference that the person was the thief rather than a handler will be in general difficult draw unless the lapse of time is small and for some other reason the facts point irresistibly to the person being the thief. "*

In **SIMON NCUBE V THE STATE CRIMINAL APPEAL F220/03** Chinhengo J. said the following at page 18 paragraph 14, in this regard.

"While therefore proximity of the possession to the time of theft is an important consideration, it is not by itself decisive. The quantity of the stolen goods, their nature and whether they circulate freely are other consideration which may tilt the scales."

In this case, as pointed out above, the proximity of the possession to the robbery was not such that the stolen goods would have been spirited to the possession of third parties, considering in particular that a radio may not be easily disposed of. Furthermore, his explanation of his possession was rejected as false. It is for the foregoing reason that I find that an inference of guilt on the main charge must be drawn against the accused on this count.

Verdict: Accused I and 3 guilty as charged on Counts 4 and 5.

Count 5

In this count, Al is charged with the robbery of Themba Bhembe at or near Industria Motors in Matsapha, on the 17lh April 2001. It was alleged that E70.000 cash and cheques in the amount of E30.000 were stolen, together with a Mazda Magnum V6, bearing registration number SD 813 EN. In respect of this Count, PW 10, Dudu Mkhabcla, testified that she was employed by Industria Motors as the supervisor and cashier of the petrol service station. It was her evidence that on the date in question, around 13h00, she was preparing to go to the bank and had six moneybags which were placed in the aforesaid motor vehicle. There was E89,000 in cash and E90,000 cheques. She requested Themba Bhembe to drive her to the bank, seeing she was carrying a substantial amount of money and that she would take some time at the bank.

She went into the vehicle and sat down in the passenger seat, locking the door in the process. Bhembe also entered the motor vehicle. As Bhembe did so, Al pulled him around his waist and he fell down. A 1 got into the driver's seat, pulled PW 10 close to him and drove the vehicle away as he found it already idling. He drove the vehicle in the Magevini direction and stopped next of Pick'n Pay supermarket. He told PW 10 that he wanted the police to lose track of him. He waited for about 15 minutes and handed a firearm to PW 10, instructing her to be on the lookout for the police. He drove along the Phocweni road, saw two police motor vehicles, allowed them to pass and followed them. He then turned into a dirt road leading to a bush and drove up to a hill and stopped the vehicle in the bush.

He ordered PW 10 to alight from the vehicle and she obliged. He told PW 10 that he was informed that after getting the money, he should kill her but his conscience was against that course of action. He then told PW 10 to pack the money in a black plastic container and she complied. He ordered her to pray and caused her to pray four times. After the fourth prayer, he ordered her to lift up her skin so that he could

shoot her on the leg such that people will say she was escaping. She complied. He ordered her to pray once more in order to bid her child and parents farewell. As she was praying, he pushed her with a firearm at the back and she fell down.

He took El0.00, gave it to PW 10 and ordered her to board a bus so that she could go and breastfeed her child. He ordered her to kneel down and thank him, which she did. She reported that she did not know the way back and he showed her. He got into the vehicle and drove further up the hill. PW 10 then saw a white van and hid from it and followed its tracks on foot. After that, she was offered a lift by an old man who was driving a grey motor vehicle. This man took her to Manzini police station, where she reported her ordeal.

PW 10 described the robber as one who had braided his hair in the cornrow fashion going backwards. He wore a woolen maroon hat, a black over coat going down to the heels and a black pair of trousers. I lis features included a gap in the upper set of his teeth and sideburns, and a fair complexion. She pointed to A1 as being the man. She also identified a cab of the vehicle which A 1 drove away.

In cross-examination, PW 10 revealed that Al's face was not concealed as the hat was placed just above the eyes. It was her evidence that she was seeing him for the first time that day. She informed the Court that the incident involving throwing Bhembe took about 10 to 15 minutes, during which time the other people hid behind the petrol pumps. When asked if she raised an alarm, PW 10 testified that she did not because she had been instructed no to. It was her further evidence that she was shocked and traumatized.

It was put to PW 10 by Counsel for Al that she could not identify the assailant because she was shocked and traumatized. PW 10, however, stated that she saw him and took note of all the features she had described. She denied when put to her that the accused did not have any gap at the time in question. When asked how she could see the cornrows in his head since he was wearing a woolen hat. PW 10 testified that she saw the cornrows at the back of his head at Magevini whilst waiting. She was also questioned about her identification of the motor vehicle outside the Court building. Finally, it was put to her, that Al was no where near Industria Motors on the day in question and that hers was a case of mistaken identity. This PW 10 vehemently denied. She told the Court that Al had come to the filling station earlier, around lOhOO and he spoke to Mandla Ndlangamandla. He bought some apples and then waited for her to come out of the office. It was her evidence, when asked by the Court, that she was with Al until around 17h00 when she left the bush and arrived at the police station at 18h00.

PW 9 was Andreas Mfanzile Sigudla a resident of Matsapha. It was his evidence that on the 17lh April, 2001. he was unemployed and proceeded to Matsapha to seek employment opportunities. As he was tired, he went to sit next to Industria Motors, carrying a newspaper which he was reading. He found Al, whom he knew very well seated there and greeted him. PW 9 sat in front of Al and concentrated on reading the newspaper he was carrying. They had lived together at kaKhoza before around the year 1990.

After a short while, he heard the people at the garage screaming as if they were under attack. When he looked up, he saw A I pulling a firearm from under his overcoat. He went to the motor vehicle and the driver resisted moving out but when seeing the firearm, he relented. Al got into the motor vehicle and drove it away together with an employee of Industria Motors who was inside.

In cross-examination. PW 9 confirmed that he and Al were neighbours. Al was sitting about 5 metres away from him. It was put to him that he was mistaken about having seen Al at Matsapha but PW 9 vehemently denied this, stating that he was definitely sure it was Al as he knew him very well and even greeted him. He testified that the people screamed after seeing the firearm which was visible under Al's overcoat and was next to his chest. He denied when put to him that Al was at his home at kaKhoza on the day in question. He insisted that he saw the accused person at Industria Motors.

PW 13, Edgar Edwards was the proprietor and employer of PW 10. His main task was to identify the motor vehicle stolen during the robbery and he produced its registration book. He produced spare keys for the vehicle and testified that the insurance company paid for the vehicle. He confirmed having seen the motor vehicle outside in the Courtyard.

In his evidence in chief on this count Al, testified that PW 9 was lying when he said he saw him at Industria Motors as he was not there. He told the Court that on that day, he went to Mkhitsini on Sunday 15lh April and that the following day it was his son Mongezi's birthday, which was celebrated there. He only returned to kaKhoza the following Wednesday. Al also testified that PW 9 was lying and the reason for him to do so, was that there is a dispute over land between his and Sigudla's family at kaKhoza.

It will be recalled that what was put to PW 9 by the accused 1 counsel was that the accused was not at Matsapha but at kaKhoza in Manzini when the robbery occurred. In his evidence in chief, however, the accused changed his story and now claimed that he was at Mkhitsini, celebrating his son's birthday. This was never put to PW 9 at all. Furthermore, neither story i.e. the accused being at kaKhoza or Mkhitsini was ever put to PW 10 who was, according to her evidence, with the accused for more than four hours in very close proximity at times and in broad day light.

The child's mother, Tholakele Shabangu came to testify confirming the accused's alibi. She failed to produce the documents confirming the child's birthday. Those produced by State show that the child was

not born on the day or month alleged but in November. I therefor reject the accused's story as beyond doubt false.

PW 9 clearly knew him Al and saw him at Industria Motors. It was never put to him at any stage, during his evidence, that he was lying that he saw Al because of a land dispute. This was just a belated smokescreen attempting to discredit PW 9 *ex post facto.* PW 10 was with the accused in the same vehicle and I believe her evidence which was not shaken during cross-examination. The accused's *volte face,* his alibis are an afterthought and have to be rejected. Only an adverse inference can be drawn from the failure to put these issues to the relevant witnesses and then raising them in evidence in chief. A similar conclusion should in my view follow, where one alibi is put in cross-examination and another is testified to by the accused in his evidence in chief. See **R V DOMINIC MNGOMEZULU** (supra).

In view of the foregoing, I am perfectly satisfied and find for a fact that the accused is the person who committed this offence and was seen and properly identified in broad day light by two largely credible and truthful witnesses who had no reason to fabricate the evidence against the accused. In this regard, the accused in my view lied and brought his girlfriend as an accomplice in the web of deception.

In **NDLOVU V THE STATE 2000 (2) [B.L.R.]** page 158 at 161, on circumstantial evidence, Korsah J.A. made the following remarks which arc apposite in this case:-,

> *" Proof of guilt beyond a reasonable doubt does not necessitate proof of guilt beyond all doubt. Where the facts are staring you in the face, to indulge in extravagant excuses for their occurrence is to take an excursion in futile mental exercise. "*

In the same judgment, the learned Judge of Appeal said:-

> *"Lies told by an accused person in order to distance himself from an offence may, in such circumstances, be taken as a male - weight to strengthen the case for the prosecution. "*

Thus in **BROADHURST V R 1964 A.C. 441 at 457;** cited with approval in **GOFHAMODIMO V THE STATE 1984 B.L.R. 119;** Lord Devlin said:

> *"In suitable cases the Court may take into account as a factor that the accused has given false evidence - his untruthfulness is a factor which a trier offact can properly take into account as strengthening the inference of guilt. "*

This count, in my view constitutes a proper case for holding that the accused's lies serve to strengthen the inference of guilt. The facts and strong evidence precariously stared the accused in the face and the option he took was to give false evidence, and to invite his girlfriend to partake of that dirty pudding. I accordingly find him guilty.

In respect of Tholakele Shabangu, I issue an order for the Director of Public Prosecutions to consider charging her for the offence of perjury.

Verdict: Accused 1 found guilty as charged on Count 5

Count 6

This Count relates to the robbery of Busisiwc Gumedzc at Mathendcle Location in Nhlangano. It was alleged that various items, including cash El,200 and J.V.C. car stereo, foodstuff, a gold wristwatch and other household and personal items were stolen. Accused 1 and 2, are alleged to have committed this offence.

This offence occurred at the worst of times for PW 6. She testified that on the 3rd February, 2002, she was at her home with mourners and relatives including her mother as her husband had just passed on the previous week. Between 12 midnight and OlhOO, she was lying in pain in the dining room and nor quite asleep, when suddenly she heard some people talking outside. Shortly thereafter, the kitchen was opened and when she asked who the people were, she saw a tall dark man, wearing a camouflage. She was assisted by a light from the toilet in seeing this man. There was one other behind him who went to switch the dining room lights on.

All the persons sleeping in the dining room woke up and PW 6's mother enquired from them what they wanted. The reply was that they wanted money and cell phones. The man who entered first stood next to the bedroom doors on the passage, carrying a big firearm. A third man came, carrying a blue iron rod and he, like the second one, was wearing a cooper hat. The first man wore a woolen hat bearing Rastafarian colours. The ones who wore cooper hats had covered their faces and only their noses and eyes were visible. The one with a woolen hat had not covered his face.

PW 6 described the first man as dark in complexion but not very dark. He had a gap on his upper front teeth and his face was long and not very handsome to behold. He was not very tall or short but of medium height. According to PW 6, the second man, who turned the lights on was carrying a small firearm. The first man was pointing the firearm at them whilst the third went to switch the lights in the kitchen and the bedrooms on. The whole house was now lit. According to her, the dining room had a number of lights.

This was indeed confirmed during the *inspectio in loco.*

The first man went to cut the telephone cords. The second asked where the money was but PW 6 did not respond and they proceeded to the bedrooms, i.e. the first and second man. They asked the children where their mother kept the money and Nondumiso Gumedze's response was that it was kept at the bank and that no one in the house owned a mobile telephone. They went into the bedroom, turned things upside down and came back to the dining room. No.3 took a school bag and emptied it and took it to the kitchen. At that stage No.l, who stood at the centre, saw some envelops containing money offered as condolences to PW 6 at the corner of the room. It amounted to about E200.00. He picked up some money placed in a dish and took it. It amounted to around E50.00.

No.2 realised that PW 6 was in charge and he approached her, took her handbag and emptied it. He also took her wristwatch i.e. Justine make together with her husband's a Citizen wrist watch. No.l lifted the sponge where PW 6 had been sleeping and found more envelopes containing some money, approximately E950.00 in total. On the dressing table, they took a J.V.C. car stereo front loader which had just been purchased second hand and was to be installed in one the family mini buses. Thereafter, the men went out of the house.

They remained outside for a long time talking. At that juncture, PW 6 switched the lights on and off and the men ran back into the house and No. 1 asked what she was up to and her answer was that she was switching off the lights. PW 6's evidence is that she feared that they would attack her son who slept in an out building close to the main house. No.2 dissuaded No. 1 from shooting PW 6 as he had threatened he would shoot her. They then left with groceries, cooked food and removed all the meat from the refrigerator. She testified that they took her husband's jacket, a handbag in the children's bedroom and the children's watches. According to PW 6, the men spent about an hour in the house.

When asked whether she could identify any of the accused in the dock as amongst person she saw that morning, PW 6 went next to the dock, looked at them and on return to the witness box, she broke down and cried. After regaining her composure, she identified Al. PW 6 also produced documents by which she purchased the J.V.C. radio and it contained the radio's serial number. PW 6 further testified that after reporting to the police, they were later called by the police and were able to identify the J.V.C. radio only as no other items stolen from her house were recovered. She identified the J.V.C. radio amongst the exhibits and its serial number was the same as that recorded in the document PW 6 produced.

PW 6 further testified that after the men had left, she confirmed that they had broken the kitchen door in order to gain entry. The Court went to PW 6's home and carried out an *inspectio in loco,* with PW 6 pointing out the various places and objects referred to in her evidence. These were aptly shown to the

Court by PW 6.

In cross-examination, PW 6 was taken to task as to why she did not ask Al to open his mouth to confirm that he indeed had a gap in his mouth and also to confirm his height. PW 6 told the Court that she was in Court for the first time and did not know that she was entitled to do that. It was put to her that she was not honest because she failed to describe the other two men, a suggestion she denied. She further denied being told of A l's description. It was also put to her that there could be many people who look like Al and PW 6 agreed, pointing out though that she saw A I definitely.

It is worth pointing, in this regard that PW 26, 3186 Constable Sipho Selbourne Dlamini testified that on the 28th February, 2002, they went to Madonsa to try and arrest the accused persons but they were not successful. They saw Al and A2 at Johnson's home. Al was carrying yellow speaker and a car radio whilst A2 was carrying the battery. When they saw the police, they said accused ran away, leaving those items behind. PW 26's evidence was that the radio carried by Al is the J.V.C. radio identified by PW 6. This was also confirmed by PW 28. It was put to the officers that the radio carried by Al was not a J.V.C. make but a Tedelex and this they vehemently denied.

In assessing PW 6's evidence, I am fortified that by and large, that she was a credible witness, who adduced her evidence matter of factly. Any imperfections in her evidence were minor. She testified that she saw A 1 at her home and she described his facial features and other features commendably. She also describes the clothes he was then wearing. The lights were turned on by him and his companions and she had ample time, more that an hour to see him. There was no actual violence on PW 6 that could have inhibited her in seeing the accused. Having been to PW 6's house and seen the lights, the various positions in the house, I am well satisfied that she could have been able to see Al and been able to recognize him.

It is significant that it was never put to her that the accused was not at her house. As a matter of fact, as will become apparent in his evidence later, PW 8 Aubrey Sifiso Dlamini testified that he transported Al to Nhlangano with A2 a few days earlier and he must have been in Nhlangano at the material time. I will revert to this evidence later. Furthermore, I observed PW 6 when she eventually pointed out the accused in Court. She asked to leave the witness box so that she could look at the accused persons in the dock closely. She did not readily point at A I. After seeing and recognising him, she was overcome by emotion and broke down. 1 reject the suggestion that she was told AI's description by the police and I say so in view of her detailed account of his features and what he was wearing. She, in my view had both the time opportunity and sufficient-lighting to identify him. In mv view, PW 6's evidence conformed to the requirements set out by Dowling J. in **R V** SHEKELELE **1953 (1)** SA **636 at 638.**

In his evidence on this Count, **Al** testified that he was not in Nhlangano on that day but was attending an annual memorial for his mother. He testified that he was at home and they held the memorial service

from 07h00 until the following morning. If there are many people, they hold it for two days. His story, in this regard was totally unconvincing, not only to the Court but to himself. I therefor reject it as untrue.

It is significant that this story was never put to PW 6 in particular, when she testified that **Al** was at her house. It was never suggested or even hinted to her that Al was not there, let alone that he was attending his mother's memorial service in Manzini. This falls to be regarded as an afterthought and is accordingly rejected. See **REX V DOMINIC MNGOMEZULU** (supra). I find for a fact that A1 was at PW 6's house and he was properly identified by her. His belated attempt to extricate himself has failed. I accordingly find him guilty of this Count and his possession of the J.V.C. radio has, in my view been established by the Crown. There was no reason, in my view for the police to lie or manufacture the presence of the radio in question, particularly as here, where PW 6's evidence puts Al squarely on the spot.

There is, however, no evidence, that in my view serves to connect A2 with this offence. PW 6 did not see the other two men properly and she failed to identify them. In relation to the possession of the J.V.C. radio, according to the evidence, it was Al who was carrying the radio. A2 was only carrying the battery. That would, in my view not constitute sufficient evidence to warrant a guilty verdict against him. He is accordingly acquitted and discharged on Count 6.

Verdict: Accused 1 guilty as charged. A2 not guilty and is acquitted and discharged.

Count 7

This count relates to the robbery of one David Gama of Ngwane Park, Manzini. Accused 1 and 2 are alleged to have robbed the said Gama of various items, including a colour television set - Telefunken; Telefunkcn V.C.R, sunglasses, a Siemens mobile telephone, a Facet golden watch and a golden chain. This robbery is alleged to have been perpetrated by the said accused persons in furtherance of a common purpose on the 13th March, 2002.

The complainant on this count, PW 15 David Mliba Gama, a soldier in the employ of the Umbutfo Swaziland Defence Force, testified that on the day in question, he came from church at around 20h00 and forgot to lock the burglar door as he entered. He proceeded to sleep after locking the door, only to be woken up at night when some people entered the house. They started in the lounge and there took a television set, Hi Sense 52 cm, a telefunken V.C.R., a mobile telephone (Siemens) and a set of spectacles.

They then entered his room and switched on the lights. PW 15 asked who they were and one of the robbers immediately placed a pistol on his head. When he tried to resist, the person carrying the pistol struck him with it on the head in order to demonstrate that it was a real firearm. PW 15 then realized that

the firearm was cocked and his assailant's hand was placed on the trigger. He then complied to their demands. First, they demanded money, searched for it to no avail. They then took his golden chain, a ring on his finger and a portable radio he kept in his bedroom.

Others proceeded to the kitchen, while the one with the pistol continued placing the firearm on PW 15's head. There was a navy bag from Table Charm in the kitchen and in which they loaded all the food that was in the kitchen. The one with the pistol then moved out, facing PW 15 and they ran away. PW 15 testified that on inspection later, he discovered that they used a crow bar to force the door open and the door was damaged but remained locked. It is his evidence that he went outside and called his landlord and later called the police on the telephone.

PW 15's further testimony was to the effect that he recovered the television set, the V.C.R., the bag and the small radio. He identified these items in Court as belonging to him. He also identified a blue crow bar which was apparently found by the police together with the other items. The latter aspect of his evidence is, however, inadmissible because it is hearsay, unless this was confirmed by the police which was not the case so far as my note's show. PW 15 further produced documents he was furnished with when he purchased the television set and the V.C.R. Apparently, PW 15 read the serial numbers of these items from the related manuals.

In cross-examination from Mr Bhembe, PW 15 testified that he was invited by the police on the following day to go and identify his property at the Manzini Regional Headquarters. In answer to questions from the Court, PW 15 testified that he was with his wife in the house and the time when the incident occurred was around 24h30. He only saw two of the men.

It is clear from the foregoing that PW 15 was unable to identify the men who robbed him and his evidence connects neither accused to the offence. The evidence that links them is that of PW 28 and I will only confine his lengthy evidence to this count for present purposes.

PW 28's evidence was that after the series of robberies, a massive hunt for the suspects ensued. On the 13th March, 2002, the police received information that the suspects were seen near Mahlabatsini, behind Nazarene Mission. The late Superintendent Aaron Thabo Mavuso then contacted the U.S.D.F. to assist with the use of a helicopter to try and identify and hopefully arrest the suspects. Indeed the helicopter was secured and members from the Operational Support Unit (OSSU) were also called. Supt. Mavuso was in the helicopter whilst PW 28 was on the ground and Supt. Mavuso was communicating by radio with those on the ground as to where the then suspects were. They failed to arrest Al and A2 but managed to arrest Lindiwc Gina who was found with PW 15's items recorded above. PW 15 was invited to identify the items in the presence of Lindiwe Gina who passed on and who it is common cause, was A1 's girlfriend.

PW 28 was not cross-examined on behalf of Al on this aspect. It would also appear, from my notes, that PW 28 was not cross-examined on this aspect on A2's behalf either. The question is whether it can be said that the Crown's evidence beyond a reasonable doubt proves that the Accused persons were in the forest with Lindiwe Gina and therefor were in possession of the items in question?

It is clear from PW 28's evidence that the person who was allegedly seeing the accused persons was the late Superintendent Mavuso and was conveying instructions from the helicopter as to where he was seeing them. PW 28 does not in his evidence say he saw them, save being told by Mr Mavuso. Unfortunately for the Crown, Mr Mavuso was tragically killed in the line of duty before he could adduce his evidence. We cannot surmise as to what his evidence was going to be. If he was to testify that he saw the accused persons from the helicopter, a different picture may well have been created.

In the absence of his positive evidence in this regard, the doubt, should, in my view enure to the benefit of both accused persons. The Crown has in my view failed, largely because of the death of Supt. Mavuso, as aforesaid, to prove beyond a reasonable doubt that Al and A2 were in the forest with Lindiwe Gina.

In saying so, the probabilities favour the Crown's case for the reason that it is a fact that Gina was Al's girlfriend and it is unlikely that she would be alone in a thick forest unaccompanied. Furthermore, it appears inconceivable that she would have been able to carry those items alone and this would point to the accused persons as the likely persons. Unfortunately for the Crown again, Lindiwe Gina died before the trial and could not say items these were. I however stress that in criminal cases, probabilities are not the accepted test. It must be proof beyond a reasonable doubt and where a doubt persists it must fall to the accused's benefit.

For the foregoing reasons, Al and A2 are hereby acquitted on Count 7.

Verdict: Count 7 - Accused 1 and 2 be and are hereby acquitted and discharged. The items are ordered to be restored to PW 15.

Count 9

In this Count, Accused 1 and 2 were indicted with the robbery of Patrick Mangaliso Gamcdzc at Mathendele Location, Nhlangano on the 3rd February, 2002. It was alleged that acting in furtherance of a common purpose, they stole E2,000 cash, a Nokia 6250 mobile telephone, and various items of clothing. At the close of the Crown's case, I acquitted and discharged A2 as there was no evidence whatsoever, linking him to this offence and the Crown correctly conceded this. I will therefore proceed with the evidence in relation only to AI whom on consideration of the evidence, I found he did have a case to

answer.

Gamcdzc, the complainant testified as PW 7. He testified that he is a resident of Mathendele Location in Nhlangano and is unemployed. On the I·! February, 2002, he was sleeping with his wife when he suddenly saw three men, all carrying firearms inside the bedroom, his wife already conversing with them. When he asked how they had entered, they told him not to be afraid because that is how they always enter as that is their profession.

He was thereafter ordered to lie in bed with his wife and to cover themselves with the blankets and never to look at intruders. If they attempted to look at them, they would shoot PW 7, they threatened. It is PW 7's evidence that he told them to shoot because when a person's hour of death has come, it has come. His wife pleaded with him to comply and he did. As a result, PW 7 was unable to identify them.

They lifted the bed in order to see if there was any weapon but they did not find any. They searched the house looking for money and found E2,000.00 together with 6250 Nokia mobile telephone referred to earlier. It was his further evidence that they took his green jacket and some pair of his trousers, i.e. denim jeans, a brown and a black pair of trousers. He testified that he was severely traumatized by this incident together with his wife, who as a result was thenceforth afraid of being left alone.

After the robbers went away, it is his evidence that he shouted for help because they were locked in the room and the robbers left with the keys. PW 7's mother eventually responded as she was staying in an out building. He finally testified that he was invited to Manzini Regional Headquarters, where he was able to identify his green jacket by it being burnt at the bottom edge next to the seams. It had two zips. He pointed out the same in Court amongst the numerous exhibits as his.

ii is clear from the foregoing evidence that PW 7 did not have an opportunity and did not identify the culprits, a position that obtains even in respect of his wife, who was in any event not called as a witness. The evidence that links Al to this count is that of PW 28, to which I shall refer below. It is however, appropriate to mention that PW 8 Aubrey Sifiso Dlamini testified, and this was not contested, that he knew Al very well. It was his evidence that Al approached him and asked him to help Al find a place to stay at PW 8's brother-in-law home, one Thomas Johnson.

PW X testified that he indeed spoke to his brother-in-law and Johnson offered Al and A2 different rooms to occupy at his large estate in Madonsa. Al came to stay there with his girlfriend Lindiwe
Gina. This evidence was confirmed by Johnson, including that Al and A2 rented rooms under disguised surnames. I will deal with PW 8 and PW l's evidence in greater detail in relation to some counts to be considered later in this judgment. Johnson testified further that during the time when Al and A2 resided

at his house, he saw a group of police officers coming from the corners of his house armed. This was on the 28th February, 2002.

The police called PW 8 and told him who they were looking for i.e. Al and A2. The two appeared immediately thereafter, Al carrying a radio and a speaker, while A2 carried the battery. One police man fired a shot and Al and A2, who were about 100 metres away, dropped the items they were carrying and took to their heels and disappeared into a farm with forests. The police were unable to arrest them. The police, on return from chasing Al and A2, proceeded to search A l's room in the presence of Johnson and they found some items there. One of the items found in A l's room was the green jacket identified by PW 7 as his. It is that evidence that connects him to this offence. This evidence was adduced by PW 28.

In his evidence in chief, Al denied ever robbing PW 7. He did not contest the fact that PW 7 identified the green jacket as his and did not deny that it was Gamedze's. He, however, testified that he had never seen that jacket in his room and was Lindiwe Gina's because it was retrieved from her suitcase. He testified that Lindiwe Gina started living with him at Madonsa on the 25th February, 2002.

The legal burden that lies on the Crown in criminal matters, was stated as follows by Lord Sankcy L.C. in the oft-quoted case of **WOOLIYIINGTON V DIRECTOR OF PUBLIC PROSECUTIONS [1935| A.C. 462 ALL ER. Rep. 1** as follows:-

> *"Throughout the web of English Criminal Law, one golden thread is always to be, seen, that is the duty of the prosecution to prove the prisoner's guilt (subject to the qualijication involving the defence of insanity and to any statutory exceptions). If at end of and on the whole of the case, there is a reasonable doubt created by the evidence given either bv prosecution or the prisoner, as to whether (the offence was committed by him), the prosecution has not made out their case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial the principle that the prosecution must prove the guilt of the prisoner is part of the Common Law of England and no attempt to whittle it down can be entertained. "*

It is abundantly clear that that salutary principle of law holds good even in this jurisdiction.

It is obvious that the Crown's evidence on this Count stared the accused person in the face i.e. PW 7's jacket was found in the room rented out and occupied by the accused. This required an explanation from him. The question is whether the explanation he tendered, as narrated above, can be said to be reasonably possibly true.

In answering this question, there are, in my view, some issues to be taken into consideration. Firstly, it is an uncontroverted fact that PW 7 testified that his robbers were three and that they were all males.

Secondly, the jacket, which was stolen during the course of the robbery, PW 7 having been threatened with being shot if he did not comply, was found in the accused's room by the police. This was not challenged by the accused. This item, together with other items which are the subject of other counts, was found in the accused's house about a month after robbery perpetrated on PW 7. I may well mention, in this regard, that according to the evidence of PW 8 and which was not challenged on this score, the accused was in Nhlangano during the days when the robbery in question was executed. This crime was allegedly committed on the very night as that in Count 6 and which I have found that the accused was properly identified. If the accused's version, that the jacket which is a male's jacket belonged to his girlfriend Lindiwe, it would mean that she was related to one male person who was part of the robbery and therefor received it from such person. It is a fact that Lindiwe died and cannot testify regarding this jacket. The question, in view of the foregoing is whether the accused's explanation is reasonably possibly true? My answer is in the negative, considering the facts 1 have enumerated above. If there was evidence or an intimation that she was related or used to some other male person who was not accused, it is my view that in that event it could be said that the accused's explanation is reasonably possibly true. To merely allege that he did not know it and that it must have belonged to Lindiwe, is in my view not reasonably possibly true in the circumstances. In this case, the only known male person, to whom she was related was Al, who was positively identified in relation to another offence which was committed in the same location that night.

In **STATE V MAPHORISA [1995] B.L.R. 568 at 574H - 575 A,** Gyeke - Dako J. stated the following remarks, which I consider to be pertinent in this case :-

> *"But I have time and again stated, it seems to me that proof beyond reasonable doubt does not mean that there is an obligation upon the State or prosecution to close every avenue of escape which may be said to be open to an accused. In my view, it is sufficient for the State to produce evidence, by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. This must be so, since the accused's claim to the benefit of a doubt when it may be said to exist, must not be derived from speculation, but must rest upon a reasonable and solid foundation created by either positive evidence or gathered from reasonable and irresistible inferences which are not in conflict with or outweighed by proved facts of the case. "*

In **MILLER V MINISTER OF PENSIONS [1947] 1 ALL E.R. 372 at p373,** in referring to the standard of proof in criminal cases, **LORD DENNING** said:-

> *"That degree of proof is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law*

would jail to protect the community ij it admitted fanciful possibilities to deflect the course of justice. "

I am of the view, regard had to the evidence above and the probabilities, that the accused's version is so improbable that it cannot be supposed to be the truth. It is in my view false and is liable to be rejected, as I hereby do.

Verdict: Accused 1 is convicted as charued on Count 9.

Counts 10,11 and 12

The evidence in the above Counts is virtually the same. It is for that reason, and to avoid repetition that I will lump the Counts together.

PW 28, testified that on the 28th February, 2002, the late Superintendent Mavuso carried out an operation and proceeded to Madonsa Location. The police were fully armed and included police from the C.I.D. in Manzini and those from the Regional Headquarters. He divided them into three groups which approached Johnson's home from three different directions for the purpose of arresting Al and A2, who were residing there.

As the police approached, Al and A2 emerged. Al was carrying a black speaker fitted into a yellow box and also had a small radio. A2, on the other hand, was carrying a car battery. When the police told them to stop, they never did but instead, ran away, dropping those items on the ground. The poiice fired in the air in a bid to stop them but to no avail. PW 28 testified that they were unable to shoot in their direction because the area was heavily populated as a result of which innocent by standers would have probably been killed or injured. The police gave chase to them but to no avail.

On return from the abortive chase, the policemen went to Johnson's house and Supt. Mavuso requested that Johnson directs them to A l's house. He did so and walked with PW 28 and the late Superintendent into the room. In Johnson's presence, the room was searched and an A.K. 47 rifle was found hidden under a mattress. Because of its rusty state, the serial number could not be ascertained. As the police suspected that it may have been used to commit crime, it was not interfered with. It was later referred for forensic examination. Pictures of the firearm and where it was found, together with three rounds of ammunition and a magazine for the firearm were captured and tendered as evidence and marked Exhibits "G 3", "G 4" and "G 5", respectively. This firearm was also produced in Court, together with the magazine and three rounds of ammunition. These were collectively marked Exhibit 11.

In cross-examination, it was put to PW 28 that because A l's house was not locked during the chase, anybody could have gone into the room occupied by A 1. This PW 28 denied and said no one could have

entered the room of a person who was being chased by the police. It was put to him by reference to Exhibit "G3" that there was no sponge but PW 28 insisted that it was there in the picture but had been covered by blankets. He testified that he personally saw the sponge on the day in question and he was ordered by the late Mavuso to lift it up and he did so.

PW 11, Johnson largely corroborated PW 28's evidence in material respects regarding the accused persons' encounter with the police. It is his evidence that the police fired three times and that the accused persons ran away and the police failed to arrest them. He also showed them A l's room and confirmed the search in his presence and the firearm being found under a sponge where Al slept. He also confirmed that the firearm had a strap and three rounds of ammunition.

The only disparity between the evidence of the two witnesses was that PW 28 said that Supt. Mavuso tried to open the door to A l's room but it would not open because the lock had some problems. It was however not locked. It was eventually opened. According to PW11 however, Supt. Mavuso tried to open the door and it opened. The disparity, if it indeed is, is in my view not material as according to both, the door was not locked and was eventually opened by the said Mavuso.

The above evidence was also confirmed by PW 26 3 186 Constable Sipho Selborne Dlamini, who was among the police officers during the aforesaid operation. He testified that he was carrying R4 rifle and that when he saw Al and A2, he shouted telling them to stop as they wanted to arrest the accused. Instead, they fled, dropping the items in their possession in the process. PW 26 then fired warning shots in the process but to no avail. He also confirmed that the A.K. 47 and the magazine and ammunition were found in A l's room. PW 25 3004 Detective Sergeant Sikhumbuzo Fakudze's evidence also confirms this event.

In his evidence, A I denied that there was the A.K. 47 rifle in his room when he left it before the police attempted to arrest them. He also denied knowledge of the three rounds of ammunition. He testified further that he had never seen the firearm in that room before. According to him, he did not know if Lindiwe, his girlfriend owned a firearm and that if she did, he had never seen one in that room.

It is clear, in my view that with the evidence pointing to him as the occupant of the room in question, the accused recorded a bare denial and this time did not attribute ownership of the firearm to Gina because any suggestion that it was Gina's would have been liable to be rejected. The only consideration is that suggested in cross-examination of PW 28 that the place was open and anyone could have walked into the house. It was never put to him, PW 11 or PW 26 that the police or somebody else may have placed the firearm during the chase. That is therefor not an issue.

Even if it were, it would be difficult to imagine who would have that dangerous rifle and why he would

choose to hide it in Al's room under the mattress? It is clear in my view that the evidence *in casu* points to the accused directly. He was the occupant of the room in question. The firearm was not attributed to Lindiwe and it would be difficult to conceive of her owning and carrying one.

It is worth recalling in this regard that PW 8 testified that the same day of the chase, Al called him and told him that the police had harassed and chased them and that he wanted PW 8 to offer them transport which he did not have. He then asked PW 8 to get a taxi driver, one Msibi to come and fetch them. He found Msibi who promised to fetch Al and his property during the night. Indeed, PW 8 went with Msibi to collect Al next to St. Michaels school. He was with A2. It was there that Al told PW 8 that the police had taken his firearm away and he went on to say that it was an A.K, 47 rifle.

It is very significant that this aspect of PW 8's evidence was not challenged in the cross-examination of the Crown's witnesses. It was only in cross-examination when taxed on it by Mr Maseko that Al denied talking to PW 8 about it. This version must be rejected as false. PW 8 had no reason to concoct this story as his version of the events finds corroboration in Al's own evidence. PW 12, Thembinkosi Msibi, also confirmed this trip, although he never said anything about the firearm since he was never asked about it during his sojourn in the witness box.

PW 24 2182 Detective Sipho Magagula is the one who captured the photographs referred to earlier. According to him, A l's house was locked. He confirmed seeing the firearm under mattress and capturing the photographs of the firearm and the other items inside the room and the environs of the place. I would, however, accept PW 11 and PW 28 evidence that the house was not locked and PW 24 may have been mistaken, as according to PW 28, the door had problems opening.

PW 16 was David Stefanus Pieterse. of the South African Police Services, Forensic Laboratory. He confirmed receiving the firearm, examining it and found it serviceable.

In the light of the foregoing evidence, I am of the view that the accused was the one in possession of all the items listed in Count 10, 11 and 12. He is accordingly found guilty as charged on all those three counts.

Verdict: Accused 1 found guilty of Counts 10, 11 and 12.

Counts 13 and 14

I will again deal with the evidence in relation to this count simultaneously because of the connectedness of the counts. The relevant evidence in this regard is that of PW 28, who narrated the events leading to and including the arrest of Accused I and 2. PW 28's rendition of the evidence follows below.

According to PW 28, the police arrested Mondi Shongwc on the 24th March, 2002 at Mhlalcni. It was from him that information was obtained regarding the whereabouts of Al and A2. Mondi had been cautioned in terms of the Judges' Rules before he led the police to an abandoned homestead at Mhobodleni. He told them of a spot where the said accused persons were.

The police proceeded there in large numbers and on arrival, Supt. Mavuso shouted saying, "Maponi and Jabulani come out. We arc police officers and we have come to arrest you." There was no response. It was PW 28's evidence that the house they were hiding in had many doors and the police did not know which exit point they would use. Mavuso continued calling out for them but to no avail. The police then fired a hand stern grenade and tear gas which suffocates the victim and causes a skin rash.

Thereafter, somebody shouted saying both Al and A2 were in a room in that location. Supt. Mavuso then ordered them to leave the room and to come out naked with nothing in their hands in order to ensure that they were not armed. They came out indeed with their hands in the air and they were handcuffed. They were taken back to the house where they were and then dressed up. It was in that room that a 7.65mm pistol, bearing serial number 307008 was found. It had nine (9) live rounds of ammunition in the magazine. Six bullets were in the magazine while one was in the chamber, ready to fire.

The accused persons were thereafter taken to the Manzini Regional Headquarters for interrogation. The details of the interrogation are in my view not material to this present charges. PW 28 identified the said pistol in Court. Of the ammunition, there were only four rounds. PW 28's evidence was that there should have been seven (7) rounds as PW 27 Inspector Nxumalo had fired one.

In cross-examination, on behalf of Al, it was put to PW 28 that the house where they were arrested was Mondi Shongwe's. This PW 28 denied, stating that he knew Mondi's home and the house where he resided. It was his evidence that the place where the accused persons were found in was abandoned and there was tall grass around it. It was put to him that when Mondi Shongwe was arrested, he had left Al and A2 and had gone to the shops. This, PW 28, could not deny, reasoning that they were working in tandem and the police were searching for all three of them. It was denied on the accused's behalf that they were aware of the pistol but PW 28 denied this, saying that from their investigations, they had established that the accused persons possessed a pistol. It was his evidence that the pistol had been covered with their accused persons" clothes.

On behalf of A2, it was put to PW 28 that the room in which they were arrested had been rented by

Mondi Shongwe and hence the police took all the items therein i.e. bedding e.t.c. This was denied. PW 28's evidence was that there were no items in that room, save the accused's persons' clothes. According to him, the said house was abandoned, filthy and not fit for human habitation. It was also put to him that when he was arrested, A2 had gone to visit Mondi on the morning of the 24th and he was later joined by Mondi and Al where after Mondi went to the shops at Mhlalcni and they waited for him until the police came to arrest them. This was denied by PW 28. It was also put to PW 28 that A2 was unaware of the pistol and never possessed one. This was again denied by PW 28. It was his evidence that in their warning directed to the police, they had mentioned that the accused persons possessed a 765mm pistol.

In his sworn evidence, Al testified that on that day i.e. 24th March, he left his home at around 14h00 and he went to buy some cigarettes for some men who were building a house at his home. He went to a certain house where they sold cigarettes. The door was slightly ajar and in there, he found A2. He asked for Mondi Shongwe from the cigarette vendor and he was told by A2 that Mondi had gone to the shops and would be back. They waited for Mondi.

Al testified that he did not know A2's home as they had last met at Madonsa during the shooting incident with police. They introduced each other. As they sat waiting for Mondi, they were listening to a football game broadcast on radio where Al's favourite team Manzini Wanderers was playing. It was at that time that they heard shots being fired, followed by their arrest. He testified that the police shot at their house numerous times and they were insulted and assaulted by the police. He testified that there was a bed, chairs and a small table in the house together with some blankets. A2's account was largely in consonance with Al's in respect of the arrest.

I must point out, however, that there arc certain aspects of Al's evidence that appear to be false. Firstly, from the evidence of PW 28 which was not challenged, Al and A2 went together to Nhlangano. It was never put to PW 28 or to Johnson that Al and A2 were strangers when they were chased by the police at Madonsa. The story about Al going to buy cigarettes for the people who were building was not put to PW 28 either.

That, notwithstanding, the question is whether it can be said, beyond a reasonable doubt that they are the owners or possessors of the firearm in question and that their explanation that it was in Mondi's house is beyond all doubt false? In this regard, it is worth recalling that Mondi escaped and there is no evidence to contradict the accused's that although Mondi had a home, he however rented the room in question. Furthermore, PW 28 could not deny, when put to him that when Mondi was arrested, they were waiting for him in that house. ' venture to mention that although the police investigations may have indicated that one of three possessed a pistol, it is not clear who among them. It may be, as the accused persons testified, that Mondi was the one in possession of the firearm and had left it in the house when he was

arrested.

In **BOGOSI V THE STATE [1996] B.L.R. 702,** the Court of Appeal said the following regarding the accused's version at page 707:-

> *"In deciding whether the version of the events may be reasonably be possibly true, it is, of course permissible to look at the probabilities of the case and if on all the probabilities the version of the appellant is so improbable that it cannot be supposed to be the truth then it is inherently false and should be rejected. "*

I am of the view, on the whole, that the accused's version, cannot be said, viewing the probabilities, to be inherently false. There is a possibility that their version may be correct. For the foregoing reasons the accused be and are hereby acquitted on Counts 13 and 14.

Verdict: Accused 1 and 2 be and are hereby acquitted on Counts 13 and 14.

Count 1

In this Count, Accused 1 and 2 are charged with the murder of Mack Mordaunt on the 2nd February, 2002, at or Nhlangano town. It was alleged by the Crown that the said Mordaunt, (herein after called "the deceased"), was killed by the said accused persons in furtherance of a common purpose. Both accused persons pleaded not guilty.

It is common cause that the deceased was killed on the date alleged. According to an autopsy report, dated 6th February, 2002, compiled by Dr Rcddy, he conducted a post-mortem examination the deceased's cadaver on even date. He observed the following ante-mortem injuries; (a) an oval shaped entry wound of 2.5 x 1 cm on the left shoulder over the left scapula, 17cm from the midline and 144 cms from the left heel. There was no evidence of an exit wound. He observed that the bullet had entered the deceased's body from the back, through the left shoulder, left scapula, mediastinum, heart right lung, axilla and was lodged in the right upper arm. The learned Doctor removed the said bullet from the deceased's cadaver and he handed it to a police officer 2328 from Nhlangano Police Station. It is clear from the record that this was 2328 Detective Constable Johannes Mahlalela. He opined that the deceased had died as a result of a firearm injury. This is also common cause.

There are two questions that need to be answered. The first is whether the Crown proved beyond a reasonable doubt that it was the accused persons who discharged the firearm and secondly, that if it was the accused persons, or one of them, whether in so doing, they acted in furtherance of a common purpose.

It is common cause that a firearm, an A.K. 47 was found by the Police in the room rented by Al and the Crown's case was that that was the firearm by which the deceased's life was brought to an end. In this regard, it is common cause that the bullet extracted from the deceased's cadaver was taken for ballistics examination, in order to come to a finding on whether or not the bullet extracted could, through analysis and examination, be said to have been fired from the said A.K. 47 rifle, found in A 1 's room.

In this regard, Detective Constable Mahlalela PW 18, testified that on receipt of the bullet, after the autopsy, he sealed, packaged and transferred it to the Manzini Scenes of Crimes unit in or about the 15'h October 2002. This was received by PW 21 2193 Sergeant Eshmond Shongwe on the 10th June 2004. He conveyed it to the Republic of South Africa for analysis on the 11th June 2004.

PW 16 David Stetanus Pieterse, is the officer who analysed the rifle in question, together with the spent bullet retrieved from the deceased's cadaver. He compiled an affidavit marked Exhibit "A2". which was handed in by consent. He testified that he tested the firearm and found it to be functional by firing cartridges from it. He testified further, that he compared the tests of the bullet he fired from the rifle with the one transmitted to him by the RSP and found that there was some agreement of individual and class characteristics, but insufficient individualization. As a result, he was unable to conclusively say that the bullet retrieved from the deceased's cadaver was fired from the rifle in question.

He attributed his inability to come to a firm conclusion on this question, to the fact that the rifle was severely rusted and dirty. He testified that the rust itself makes some marks. It is only when the rifle is cleaned that the marks can be clearly seen and positively matched. He testified that though he fired four shots from the rifle before it was cleaned, he could not tell that these were fired from the same firearm.

It is clear that this evidence did not advance the Crown's case against the accused persons. I should, note, however, that there appears to have been some confusion regarding the dates when action regarding the exhibits was done e.g. the transfer of the firearm and the time spent from one police station to the other, until it reached Pretoria. In view of the inconclusive result in this regard, the apparent confusion regarding the dates is therefor unimportant.

The next evidence, to be considered in possibly linking the accused persons to the offence, is one of identification. In this regard, I will revert to the approach on how I will deal with such evidence as aforestated earlier in this judgment. The first witness, whose evidence I will consider is PW 4 Rudolph Diamond, a resident and businessmen of Nhlangano. It was his evidence that he runs a grocery shop at the T-junction on the Nhlangano, Hlatikulu and Mahamba roads. He testified that on the 2nd February, 2002, at 20h00, he was about close to his shop marking the end of business for the day. He decided to go in to purchase himself a soft drink, which he poured into a glass and as he turned around to walk away, he found a man behind him with a pistol pointed at him. That man ordered everyone in the shop to lie

down i.e. PW 4's son Lucky and Sanele Nkonyane his friend.

PW 4 told him not to play games with them and took the glass with his drink and poured it on that man's face, held him and wrestled with. As the wrestling went on, PW 4 heard the sound of gunfire and realized that the assailant was accompanied by two other men, who emerged on the scene. Before struggling with the one who had a firearm, it is his evidence that one jumped over the counter and demanded some more money. Another man walked away and stood on the side. The latter had a rifle inside his jacket. He testified that after the wrestling session, the man with a rifle shouted "Scngiyishayile lenja" i.e. 1 have hit the dog. They then walked away.

Anxious to find out who this "dog" referred to was, he discovered that Mack Mordaunt had been shot and was lying next to a wooden building about 5 metres from the shop entrance. Mack had been roasting meat before the shooting. He testified further that his son Lucky was the shop assistant assisted by Sanele Nkonyane. PW 4 testified further that the men took about E300.00 during this incident. The deceased, who was still alive at the time, was thereafter conveyed to the hospital, but died on arrival at the hospital. The R.S.P. were also telephoned and advised of the incident. Nothing turned on PW 4's cross-examination.

PW 5, was Lucky Diamond, PW 4's son. In his narration of the events of the evening in question, he more or less adduced evidence similar to that of PW 4. He testified that he was behind the counter in the shop when PW 4 sent him to put a bottle into the refrigerator i.e. the big refrigerators with two glass doors. As he did so, on the reflection from the glass door, he saw a person pointing a firearm at PW 4 and he decided to turn around.

The person was on the other side of the counter. Suddenly, another person came, jumped over the counter and demanded money from him. It was his evidence that he gave that man amount in the excess of E200. A third man emerged on the scene, donning a long jacket and carrying a firearm. He declared, "We arc not playing games here: Everybody should lie down", and walked out. This man spent about 5 - 1 0 minutes inside the shop. He was carrying a "big" firearm with an army green sling. It was his evidence that he saw this firearm when that man opened his jacket and produced the firearm. He put it back and then walked out.

PW 5 testified that the shop had electric lights inside and visibility was good. The man with the "big" firearm was about 2 metres away from him and he was able to sec this man clearly. It was his evidence that this man was wearing a hat which covered his head but his face was not concealed. PW 5 described the man as coffee coloured in colour and had a long face. As he spoke, a gap was visible on his upper set of teeth. It was his further evidence that this man was facing him as he spoke, and also, when he produced the firearm. Regarding that person's height, PW 5 testified that they were almost of the same

height.

PW 5 further testified that if he were to meet that man, he could be able to recognize him. On invitation and on being sanctioned by the Court, he stepped down from the witness stand and pointed at A 1 as the man he saw carrying the "big" firearm. He described the firearm as about ½ metre long, with a barrel and between black and grey in colour. In Court, he identified the AK 47, Exhibit 11 which was brown in colour, which looked rusty and which has a green strap and between ½ and 1 metre as the firearm carried by the said man. He further confirmed that his father, PW 4, struggled with the one who had pointed a firearm at him.

It was his further evidence that as his father wrestled with that man, he heard a gun shot. Later, he heard the noise ofpeople talking and realized that the assailants were leaving. He proceeded outside and found that the deceased had been shot and later succumbed to death.

In cross-examination from A l's attorney, PW 5 stated that he was more than 2 metres from PW 4 when the incident occurred. Sanele was besides him behind the counter, whereas Thwala and Vusi Dlamini were outside with the deceased. He. testified that he could not accurately describe the position of the first man *vis-a-vis* PW 4, because he was at that stage disturbed by the second man who jumped over the counter. He testified that he did not pay attention to the second man but just threw the money at him and remained focused on the one at the door. He could not describe the first or the second person although according to him, they were in the shop for a shorter period than the third. In answer to questions from the Court, PW 5 testified that the third man appeared when he had already given the money to the second person. The latter was giving attention to Sanele.

Another witness who adduced relevant evidence relating to diis Count was PW 17 Magazini Thwala. He testified that he was employed as a security guard by PW 4. He reported for duty at 17h00 and was instructed to make a fire and roast meat with the deceased. Around 20h00, PW 4 left them and went to the shop, leaving PW 17 with the deceased. After PW 4 had gone, he heard some noise inside the shop as if some people were fighting. Mack suggested that they should go and investigate what was happening.

Mark was walking briskly ahead of PW 17. As the deceased was about to enter the shop, he turned back and said, "Thwala, there are some robbers, run away." As they turned back, running back for cover, a firearm was discharged. PW 17 went to hide in the river, still reeling from shock. PW 4 later called him return as the robbers had left.

PW 17 also testified that they tried to find the spent cartridge that night without any success. The police ordered him not to allow anyone to interfere with the scene. He testified that the following day around 06h00, he found the spent cartridge (having had the policemen describe how it looked to him). He

identified one in Court as the one he had found. Nothing turned on the cross-examination. He confirmed, in re-examination, that when the deceased was shot, he was running away.

PW 14, Sanele Mbutho Nkonyane's evidence was that during the evening in question, he was at PW 4's shop assisting PW 4, his half-brother. He testified that his mother was PW 4's paramour. He testified that as they were getting ready to close the shop at around 20h00, a man entered the shop. He was tall, neither dark nor light in complexion. He had a slanting long face with a protruding nose. He was carrying a firearm and wore a hat with Rastafarian colours. He went to where PW 4 was.

He and PW 5 were behind the counter. PW 4 faced PW 5 whilst pouring his drink. PW 14 was on PW 5's right side. That man fought with PW 4 and two other men entered thereafter, following each other. One wore a jacket, which he opened and displayed a firearm, with a declaration that, "We are not playing here. A clever person will be fixed up." The third man jumped over the counter, carrying a crow bar with him which he placed on PW 5's neck, demanding some money. The man with a long coat then went out and after a long time, they heard a gunshot emanating from outside.

PW 14 testified that there was ample light as there was electricity in the shop. It was his evidence that he could not identify the man with a crow bar as he was terrified due to the man with a long coat ordering them to lie down. He was unable to identify that man either. It was his first time to see the long firearm in real life, having only seen it on television. He pointed at A2 as the man who fought with PW 4 and testified that that man was inside the shop for some time.

Nothing turned on the cross-examination on AI's behalf, save that he was called for an identification parade at Mankayane. On behalf of A2, it was put to PW 14 that he had seen the accused persons when they came to Court to attend their trial for some weeks and this, he confirmed. Asked about the content of the conversation between PW 4 and the man he struggled with, it was PW 14's evidence that the man demanded money from PW 4, who told the man that he knew him. The man told PW 4 that he was not playing but wanted money. He testified that PW 4 and the man were about 1.5 metres from where he was.

Asked to further describe the man who wrestled with PW 4, PW 14 told the Court that he was wearing a jacket like the others but he could not recall its colour as the incident had occurred a long time ago. It was put to him that A2 denies ever pointing a firearm to PW 4 on that day. PW 14 insisted that he saw A2 and that he was lying in his claim to have been elsewhere. When put to him that A 2 was at Mthombe area to visit his girlfriend Ntombikayise Mkhonta, PW 14 remained steadfast in his evidence, that he saw A2 at shop at the time related in his evidence. He denied pointing out A2 only because he saw him outside the Courtroom and in the dock. PW 14 again insisted that he saw A2 and had ample time on that day, talking to PW 4 as the latter was delaying him, talking for some time. It was his evidence that he was not seeing A2 for the first time. In PW 14's estimation, the entire incident took about 2 to 7 minutes.

Another witness, who testified, was PW 8 Sifiso Aubrey Dlamini, who was introduced by the Crown as an accomplice. He was therefore duly cautioned. It was his evidence that he was in the employ of the Ministry of Agriculture and Co-operatives as a Marketing Reporter in the Early Warning Unit. He testified that he knew Al and A2. This was not denied and is common cause.

It was his evidence that Al, who became unemployed, consulted him for prayer as a result of losing his job at Fridge master. A I also constructed PW 8's house. I will only confine his evidence to that relevant to the count at hand. On the P' December 2002, PW 8 testified that he was driving a vehicle issued to him by his employers registered SD 017 UN. He was due to attend a cleansing ceremony for his grandmother. When Al learnt of that trip, he requested a lift for himself and two other friends, being A2 and Njini Shongwe. They asked to be dropped at Nhlangano. PW 8 agreed.

He advised that he would leave around 22h()0 and would pick them up at the junction of the Manzini-Nhlangano road at Mhlaleni, next to New Village. 11c found them at the agreed place. They were carrying a big heavy bag and assisted each other in carrying it. A I wore a knee-long jacket but no hat, so did A2, who however, wore a cap on his head. He could not recall what Njini was wearing. He dropped them at the junction next to Nhlangano Sun and Casino, without telling him of their destination.

PW 8 testified further that on the way, they had indicated that they may need PW 8 to offer them transport back to Manzini and that if that eventuated, they would call him. They further advised him that they were likely to be at Nhlangano for the entire week and would put up at the home of A2's girlfriend. It was PW 8's evidence that he returned to Gundvwini on Sunday 3rd February. It was his evidence that on arrival in Manzini, Al called him on the telephone, requesting that PW 8 should fetch them from Nhlangano for the reason that they had had an accident which had resulted in a loss of life. PW 8 indicated that he would be unable to fetch them due to the insufficiency of fuel.

It is PW 8's evidence that the following day, he read an article in a local newspaper reporting that a

business person had died in Nhlangano. This report raised suspicion that the deceased might be the same person in respect of which Al had advised and this suspicion was caused by Al's description of the incident.

On the following Wednesday, whilst at Mahamba/Zombodzc R.D.A., A1 called him again, requesting him to fetch them. He was to find them at Salem and fortuitously, PW 8 was in that area. He was driving a vehicle registered SG 556 AG, an Isuzu van. He found them as promised, with Njini standing next to the road, whilst A l and A2, appeared from the right side of the road towards Mhlalcni. They were carrying a big heavy bag.

It was PW 8's evidence that Al and Njini were wearing hats whereas A2 was wearing a cap. They boarded the vehicle and placed the bag at the back of the van. A l sat in front whilst the two were at the back. On the way, AI gave him El 50.00. PW 8 testified further that AI told him they went to a certain shop. A2 and Njini went inside, whilst A I was outside. As the robbery was in progress, a man emerged and on seeing what was going on, he retreated and looked like he had a firearm and appeared he was about to use it to shoot at the people in the shop. Fearing that this person might kill his colleagues, he did not hesitate but shot that person.

PW 8 testified that he then dropped the threesome at Nkomeni after Moyamunye before New Village. He drove to Mbabane to park the vehicle and returned to his house at Mahlabatsini. A few days later, Al requested him to look for a place which he Al could rent. This evidence was adverted to in relation to Counts 10,11 and 12. I will therefor, not repeat it here.

In cross-examination, on behalf of A1, it was denied that he ever called PW 8 to inform him that he had killed a person. This PW 8 denied, insisting that Al did call him. He denied that he was told by the police to say Al had called him. It was also put to him that the police had, during the interrogations assaulted him. He appeared reluctant to testify about that aspect.

On behalf of A2, PW8 was asked if he committed any offence and he responded in the negative, testifying that all that he did was to offer transport to the accused persons, in complete oblivion of their activities and mission to Nhlangano. It was put to PW 8 that on the night of the departure, A2 was not wearing a knee-long jacket but one going as far as the waist. PW 8 maintained his evidence in this regard. He testified that he did not know whether A2 visited his girlfriend. He agreed that he was unaware of A2's activities in Nhlangano after he dropped them.

It was further put to PW 8 that he offered a lift to A2 and Njini on the Monday following the 1st February. This was denied by PW 8. He further denied that A 1 was not there as put to him, insisting that all three were present. Under further cross-examination by Mr Bhembe, PW 8 stated that he also saw a

small firearm on A2's person. This was vehemently denied on A2's behalf.

PW 8 confirmed further that he was assaulted by the police and was reluctant to testify about the assault for personal reasons, hence he was hesitant regarding that issue. He was asked about the identity of the officers who assaulted him, when they did so and where. He testified that he was assaulted in the process of being asked of A l's and A2's whereabouts and he was not co-operative. The police believed that he was harbouring them and he was therefor charged with that offence and was admitted to bail. After A l and A2 were arrested, PW 8 testified that he was then assaulted and told to give Njini's whereabouts to the police.

In his evidence, adduced under oath, Al denied having committed this offence. It was his evidence that on the 2nd Febraury, the day it is alleged he committed the offence, he was at his home at kaKhoza. He denied PW 8's evidence that he had called the latter on mobile phone number 611 9354 informing him that a person had accidentally died in his hands. It was Al's evidence that on that day, he did not have a mobile telephone as his mobile phone had a flat battery and he removed his sim card and left the hand set with his brother who was coordinating his mother's memorial service.

Asked as to how his brother used the said handset as it had a flat battery, Al testified that his brother used a spare handset but used Al's sim card and was called by people who were to attend the memorial service. Al's brother was to fetch them. He testified that the people who were to attend the memorial service knew his mobile telephone number. Al further denied going to PW 4's shop. He therefor denied that PW 5 had correctly identified him as one of the robbers and who participated in the deceased's death.

In my view, the Crown's witnesses' evidence, in relation to this Count was clear. PW 5 identified Al by his looks and the clothes he was wearing. He also described the firearm that Al was carrying during the robbery. It is clear on the evidence that a firearm answering PW 5's description was found by the Police in Al's house. I am satisfied, on the evidence, that PW 5's identification of the accused was honest and considering the lighting, visibility, proximity of the accused, that PW 4 had the time and opportunity to see Al. Having been to the scene and from the positions pointed out by PW 5, it was possible, given the visibility and the fact that PW 5 was not being assaulted, to see Al. He was even able to give A1 's height, which having seen both PW 5 and A1, appears correct.

It was argued by Counsel for Al that PW 5's identification must be considered as dock identification and therefor ruled as inadmissible. Reliance in this regard, was placed on **S V MA RADII 1994 (2) SACR 410.** It is worth pointing out that from my reading of that case, the evidence was different in the sense that the witness in the said case could not give specific features by which he could identify the alleged culprits. Because they were in the dock, the witness concluded that they "could be guilty of something".

In **JOSIAH TUESDAY DLAMINI AND FOUR OTHERS V THE KING CRIM. APP. NO.17** of **1995,**

Shreiner J. A., as he then was, stated the following regarding evidence of identification at page 7:-

> *"It is vital that a Court in a case as the present should be satisfied beyond reasonable doubt that witnesses who purported to identify one or more of the accused did so not only* ***bona fide*** *but accurately. "*

I am satisfied that the imperatives set out above were satisfied by the Crown. Questions relating to the description, features, clothes worn by the assailants were asked in my view, and were satisfactorily answered by the relevant Crown witnesses. The possibility of mistaken identity was therefor dissipated in my view.

The circumstances in this case are different. It is worth considering in this regard that PW 8's evidence, which was clear, and to a large extent not denied, was that on the day in question, he offered Al, A2 and Njini a lift. The following day, he was called by Al advising him that a person had died in his hands. According to PW 8, Al repeated this on the Wednesday when he offered them a lift back to Manzini. According to PW 8, what AI told him, caused him to suspect that he was involved in a story published by the newspaper regarding a death in Nhlangano.

An issue may be raised about PW 6 having been tortured. It is clear from the evidence in my judgment that he was tortured by the police and he was reluctant to speak about this. As I have said, his evidence regarding the trip to Nhlangano is corroborated by the evidence of the accused, although they later attempted to deny certain aspects of it. Furthermore, PW 8 was clear that the torture was with regard to him being called upon to give the police information regarding the accused persons" whereabouts. It was in this connection that he was eventually charged with the offence of harbouring. PW 8's demeanour in the witness box was impressive and he struck me as witness of truth generally. It was in relation to the questions relating to the assaults that he was ill at ease. He explained that he wanted to sue in respect of the assaults and did not want to prejudice his case by testifying. 1 venture to add that even if PW 8 had been correctly introduced as an accomplice witness. I would have believed his evidence as it was corroborated in material terms, even by the accused persons evidence. At some stage, his attorney, Mr Mabila sat in Court in watching brief. It is however, clear that PW 8, was not an accomplice for he failed to satisfy the criteria eloquently set out in **S V KELLER 1963 (2) SA 439 at 445.**

The accused's (i.e. Al) evidence on the other hand, had some disconcerting aspects to it. In the first place, he never denied that he went with A2 and Njini to Nhlangano at night. When he took the witness stand, however, for the first time, he alleged that he was at home at kaKhoza on the fateful day. This was never put to PW 8 and had up to that point been correctly regarded as being the true version. To that extent, his assertion that he was at kaKhoza, has to be regarded as an after thought and is accordingly rejected.

He also denied having introduced A2 to PW 8 on the trip to Nhlangano. This is also liable to be rejected as it was never denied when PW 8, testified matter of factly about it. In his quest to distance himself from the murder, the accused then created the fanciful story of his mother's memorial service, which was again not put to PW 8 or any of the Crown's witnesses for that matter. Al's evidence about the mobile telephone being given to his brother and him retaining the sim card, but his brother using the sim card later on the spare hand set was confusing to everyone. His own attorney was visibly confused.

1 believe that PW 8 told the Court the truth regarding the trip because firstly, it is clear on the evidence that A l had PW 8's number and they frequently communicated by mobile phones. PW 8 testified that A l told him that they would spend the week in Nhlangano and would call him to ask for transport. The fact that he called long before the time promised was an *inducium* that the plan had gone horribly wrong. So desperate was A l to get transport back that he called PW 8 again on the Wednesday. PW 8 could not, in my view have concocted this story when it is clear that the story of the trip had not until the accused testified been denied. Interestingly, the only telephone conversation denied between A l and PW 8 is that relating to the report of the death and the first request for transport. The other telephonic conversations, including when and where the accused persons would be collected on the trip back to Manzini from Nhlangano was not denied.' With regard to A2, it is also clear, according to PW 8, that they traveled together to Nhlangano. Furthermore, he was present when PW 8 offered them a lift back to Manzini, although A2 denied that it was a Wednesday, insisting it was on a Monday. More importantly, PW 14, Sanele Nkonyane, testified that he saw A2 at the scene, in a situation where he could have identified him. He was not being assaulted. He described the man's face, height, complexion and also described some of the clothes he was wearing. His cannot be said to have been dock identification as argued by the defence. In this regard, I reiterate the comments I made above in relation to the **MARADU** case (supra). The imperatives set out in **R V SHEKELELE** (supra) and **JOSIAH TUESDAY DLAMINI** (supra), were in my view met.

In his evidence, A2 testified that he did not participate in the robbery and murder at PW 4's home. It was his evidence that after being dropped by PW 8 with Al, he proceeded to the home of his girlfriend, Ntombikayise (PW 29). PW 29 testified that the accused had last been at her home in 1998 and that the love relationship between them ended in 1999. She testified that she did visit A2 in prison as a father to her child and not because they were still lovers.

Whatever the case may be regarding the status of the love relationship between A2 and PW 29, she was clear that the accused did not visit her home on the night when the murder of the deceased took place. She denied that A2 put up at her home between 1st and 3rd February, 2002, insisting that he last visited her home in 1998. It is also unusual that one could visit his in-laws at such a late hour because according to PW 8, he left Manzini around 22h00 and would have reached Nhlangano around 23h30 at the earliest.

This would mean that after being dropped, A2 walked at night for a considerable distance. 1 therefor reject his story as untrue. He was identified by PW 14 at PW 4's home. I therefor find for a fact that A2 did not spend the night at PW 29's home and that his evidence in this regard is rejected as false. Even if he did spend the night there, which I have rejected, in view of PW 29's evidence, that could not have precluded him from committing the offence.

Another issue that deserves mention, in my view, relates to the shooting of the deceased. Though the ballistics evidence could not conclusively prove that the deceased was shot by the A.K.47 (Exhibit 1 I), there is evidence, however, that PW 5 saw and described the firearm in question. After the shooting, A I entered the shop and declared that he had shot "the dog". On coming out, PW 4, PW 5, Sanele and Magazini Thwala. (bund the deceased dead. I t is also in evidence that the bullet extracted from the firearm was that of an A.K. 47 rifle. Al was outside the shop with the said rifle, which bore the description testified to by PW 5 and which was found in Al's room. This evidence, in my view, proves that it is A1 who shot and killed the deceased. This, in my view is the position regardless of the inconclusive of scientific evidence. The events, as described above, are too much to be regarded as a co-incidence. They prove Al's guilt beyond a reasonable doubt in my opinion.

Common purpose.

I am of the view that in the instant case, common purpose was established by the evidence. The accused persons agreed to go on a robbery and they were armed. Both Al and A2 were, according to the evidence, carrying firearms, which are lethal weapons. By so doing, it is clear that they were ready to deal violently with any interference in their planned design. The fact that one shot cannot serve-to absolve the others of the crime of murder in circumstances such as the one under scrutiny.

1 am fortified in this conclusion by the remarks of Holmes J.A. in **S V MADLALA 1969 (2) SA 673 (A) at 640 F-H,** where the learned Judge of Appeal said:-

> *"// is sometimes difficult to decide, when two accused are tried jointly on a charge of murder, whether the crime was committed by one or the other or both of them, or by neither. Generally, and leaving aside the position of an accessory after the fact an accused may be convicted of murder if the killing was unlawful and there is proof-fa) that he individually killed the deceased, with the required* ***dolus*** *e.g. by shooting him; or*
>
> b)*that he was a party to a common purpose to murder, and one or both of them did the deed;*
>
> c)*that he was a party to a common purpose to commit some other crime, and he foresaw the possibility*

of one or both of them causing death to someone in the execution of the plan, yet he persisted, reckless of such fatal consequence, and it occurred; see ***S V MAUNGA AND OTHERS 1963 (I) SA 692 (A) at 694 F-H*** *and*

(d) that the accused must fall within (a) or (b) or (c) - it does not matter which, for in each event he would be guilty of murder. "

It would appear from the evidence, that the one who fired the fatal shot was Al and at the material time, A2 was inside the shop. The facts of this matter would therefor bring A2 under (c) above. It is clear, from the foregoing, that he, like Al, must be found guilty of murder.

In **MATTHYS AND ANOTHER V THE STATE, [2005] 1 B.L.R. 69** at **76H-77A,** Korsah J**.A.** said:-

"It seems to me, that whenever a group of persons agree to embark on a criminal enterprise, and they are all aware that a firearm is to be used in the commission, or to facilitate the commission, of the crime, each and every member of the group must be regarded as foreseeing the possibility that in the event of their attempted apprehension the firearm may be used to facilitate their escape or to prevent their apprehension. "

In that same appeal, Zietsman J.A. had this to say about the foregoing excerpt at page 85 B-D:-

"/ am, with respect, of the opinion that the statement I have just quoted above goes too jar. In my opinion it does not necessarily follow that because the other persons are aware of the fact that the firearm is to be used in the commission of their offence they must also be held to have foreseen the possibility that thejirearm may also be used to facilitate their escape. It depends upon the facts of the matter. Where a murder or an armed robbery is planned the implication probably would apply. "

It is therefor clear that although Zietsman J.A. did not agree with the wide terms in which Korsah J.A. had couched the statement in issue, he did appear to agree, however, that in a case of armed robbery or murder, the statement could hold good. In the instant case, it is a case of armed robbery and I would hold that Korsah J.A.'s formulation would hold good. In the premises, I am of the view that the doctrine of common purpose has been proved and on that basis, 1 am of the opinion that both A l and A2 must be found guilty of the murder of Mack Mordaunt as charged and I do order.

Verdict: Accused 1 and 2 are found guilty of the murder of Mack Mordaunt in Count 1.

In closing, I must mention the disconcerting aspect that seems to have permeated some of the aspects of the investigations in this matter. It would appear, and I have no reason to doubt this, that some torture was employed by the police on some of the witnesses. The accused persons also alleged torture by the police. No matter how difficult, unyielding and dangerous the crimes being investigated are or how

violent the suspects may be perceived to be, the route of torture is most unwelcome and uncivilized. It is my hope that the human rights ethos encapsulated in the Constitution will take root in our police force and that allegations of torture in order to extract information will be rendered an outmoded tool and will become fossil of an old dispensation.

T.S. MASUKU
JUDGE