IN THE HIGH COURT OF ESWATINI

Held at Mbabane Criminal Case No.28/2013

In the matter between:

REX

And

MFANUKHONA JOHANNES DLAMINI 1ST ACCUSED

SIZA SIBEKO 2ND ACCUSED

Neutral citation: *Rex vs Mfanukhona Johannes Dlamini and Siza Sibeko (Criminal Trial Case no. 28/2013) [2018] SZHC 229 (16 October 2018)*

Coram: Hlophe J

For the Crown: Mr I.S. Magagula, Mr.T. Dlamini & Miss E. Matsebula

For the Accused: **Adv.** M. Mabila,

Mr L. Dlamini & Miss N.Ndlangamandla

D**ates Heard:…….** 142 Days (from August 2015-October 2018

Dates Handed Down: …… 16 October 2018

Summary

Criminal Law – Theft of Motor Vehicles Act ,1991- Whether same applicable in the case of motor vehicles allegedly stolen in the Republic of South Africa, but found in Swaziland – Meaning and effect of the principle of theft as a continuing offence – Whilst accused has no duty to prove his innocence, he does have a duty to give a reasonable and probably true explanation where a prima facie case has been made against him – Whether explanation given by the first accused amounts to a reasonable and probably true explanation - Whether a prima facie case made against second accused who gives no explanation – Effect of failure by an accused to give an explanation where a prima facie case was made against him – Whether the accused has a duty to explain himself in such a case – Where an accused fails to give an explanation at all in a situation where he is obliged to, it is open to the court hearing the matter to draw an adverse inference against him.

JUDGEMENT

INTRODUCTION.

[1] The accused persons were charged with ten counts of theft of motor vehicles they being alleged to have contravened section 3(1) as read with section 4 of the Theft of Motor Vehicles Act of 1991.They are also charged with twenty counts of failure to report to the police their receipt of several motor vehicle components whose identity marks, such as chassis numbers, engine numbers and in others job numbers, had been removed or obliterated or tampered with in contravention of section 6(1) as read with section 6(2) of the Theft of Motor Vehicles Act of 1991. Both accused are further charged with twenty-seven counts of contravening section 7(2) as read with section 7(3) of the Theft of Motor Vehicles Act of 1991 on the grounds that they allegedly failed to demand a declaration effecting the purchase of certain motor vehicle components from the person who allegedly sold them same. It is otherwise not in dispute that on the overall, the accused persons initially faced a total of 72 counts. As it shall be seen later nine of the 72 counts were abandoned by the crown after the accused had already pleaded to them.

BACKGROUND AND OVERVIEW.

[2] The background to the matter is that the first accused has two homesteads around Manzini one at Ngwane Park whilst the other one is at Nhlambeni

area. It would appear that the two homesteads are apparently a few kilometers from each other.

[3] On or around the 25th September, 2010 police officers from the Manzini police station raided the accused's Ngwane park homestead. From the evidence they were in two groups. One group went there allegedly led by a tracker signal said to have been emitted from a certain motor vehicle or its remnants found at the said accused's homestead. It was to later transpire that that motor vehicle had been stolen from a certain Mr Hugo Maree of Sulphur Springs, in the Republic of South of Africa on the 23rd September 2010. A chassis frame which was later marked D2 by the police was amongst the ten or so chassis frames found at the said accused's homestead. It was upon examination by experts confirmed to belong to the said motor vehicle. Otherwise the other group of police officers who were there led by Superintendent Methula, were there on their own to conduct a planned raid on the said premises. I shall mention at this point that all these ten or so chassis frames had had their identity marks, in the form of chassis numbers, either ground off or obliterated or tampered with.

[4] The 10 or so chassis frames were not the only items seized from that raid by the Manzini police as others including some engine blocks with no

identity numbers and cabs were also seized. The evidence indicates that these seized items were taken to the Lobamba security yard where they were kept pending investigations.The first accused was charged with offences relating to some of the items found and seized from his place. On the other hand, a close friend or relative of the first accused who stayed with him at his Ngwane park homestead, one Botsotso Phumlani Jele, in the company of certain police officers from the Lobamba police station is said to have broken into the Lobamba security yard and thereat stole some of the items that had been seized by the police and kept there. The current status of the criminal case that ensued from this is unclear.

[5] Although the first accused had been charged with some offences emanating from that raid, it is common cause those charges could not be pursued after the dockets went missing at the Manzini Magistrates court which prompted some of the current charges against the accused given that the matter had not commenced when the glitches which prevented its trial there arose.

[6] It is common cause that further police raids at the first accused's two homesteads mentioned above were carried out on the 22nd and 23rd November 2012, as well as on the 23rd and 24th January 2013. From these raids further items were seized. The first accused and his co-

accused were subsequently charged with various offences emanating from these raids and the items seized therefrom. Given that the charges from the 2010 raid had not been pursued at the Manzini Magistrates Court, they were subsequently incorporated into the charges emanating from the raids of between 22nd November 2012 and January 2013. All these charges formed the basis of the 72 or so counts faced by the accused persons in this matter.

[7] Otherwise the items found and seized during the said raids including several cabs of motor vehicles with ground off or removed identity numbers, bakkies, several cattle immobilizer or rails, several chassis frames, motor vehicle engine blocks ,Toyota bumpers, chopped motor vehicle firewalls, a matric certificate belonging to Peter Robinson, motor vehicle engines with tempered engine numbers, canopies, motor vehicle registration plate DXC 203 MP, motor vehicle engine bar code number 7461030, a floor portion and roof top of a certain Toyota quantum, various motor vehicle components such as doors, fenders steppers, grills, motor vehicle wiring systems, fire walls with removed chassis tags and job numbers, Toyota bonnets ,Toyota tailgates ,propeller shafts, disc grinders, chopped Toyota double cabs roof tops , motor vehicle roofs, two seater quantum seats,11 Toyota quantum seats, a blue tool box with

various tools in it, black and green grinders, a grill machine and a nartjie welding machine.

[8] It shall be noted that I have decided to mention these items on their group types so as to avoid mentioning them individually in this overview because they were so many they would possibly take several pages in enumeration.

[9] Motor vehicle experts, especially those from the Republic of South Africa Were able to determine that some of the items seized were components of certain motor vehicles reported stolen in various parts of South Africa. There were on the overall ten such instances as are captured in counts 1, 2,3,4,5,6,8,9,18 and 33. I will deal with the details of each count later on in this judgement, which shall include how each case of the theft of a particular motor vehicle was uncovered including how and where it had been carried out.

[10] Otherwise three accused persons were initially charged with counts one to seventy-two of the indictment. These were accused one Mfanukhona Johannes Dlamini; accused two, Siza Sibeko and accused three, Vincent Souza Mwambo. At the commencement of the trial, the crown informed the court that it was withdrawing charges against accused number three. It is to be recalled that owing to the number of charges, the process of pleading to the charges took the whole day.

[11] It was later clarified by Mr. Magagula for the crown that the whole purpose of withdrawing the charges against the said Vincent Mwamba was to turn him into an accomplice witness. As he could not testify on that day, the crown was apparently placed in a dilemma on how to secure his attendance for the subsequent hearing date given that the pleas were taken on a Thursday which was to be followed by the day when the court was to deal with motion court.

[12] Mr. Magagula for the Crown clarified that the said Mr. Mwambo was then held for an immigration charge in which he was however produced before the Manzini Magistrates' court. He was there convicted and given a sentence that afforded him a fine which had not yet been paid. It is now history that whilst he was held at the Mbabane Police station awaiting a possible payment of his fine as well as to enable him testify after that weekend, he was allegedly anonymously released from police custody. This defeated the plans of the crown to use him as an accomplice witness. He has today never appeared in court and nobody seems to know what happened to him, which might be a blatant exercise of defeating the ends of justice as this court was deprived of ever knowing what he would have said in giving an insight into the matter as an accomplice witness. It suffices for me to point out that this was but one of the many strange

occurrences in this matter, such as the alleged theft of exhibits at the security yard and the loss of dockets for the first accused's matter pending at the Manzini Magistrates court after the 2010 raid.

[13] The trial eventually commenced with the two current accused persons. The crown led 48 witnesses in the matter which has spanned over some four or so years in court. I must mention that the number of witnesses could perhaps have been more with the addition of one George James Maluleka, had his testimony in the matter not been frustrated.

[15] The court learnt through an application by the crown that the said person, again an accomplice in the matter, had, whilst incarcerated in Namibia at Katimo Mulilo, expressed a desire to testify against the accused persons in court and had to that extent signed a statement which was annexed to the application. The statement allegedly recorded by the police, highly implicated the accused persons in the theft, chopping off of motor vehicles, grinding off of the VIN and job numbers and tempering with engine numbers of the stolen vehicles.

[16] As he had given the police this statement whilst incarcerated in Namibia, the crown had sought an order that his evidence be taken on commission

in the said country's prison as envisaged in section 108 of the Criminal Procedure and Evidence Act.

[17] I can only comment that for all intents and purposes, and in normal court practice, that was an interlocutory order which is not appealable as of right and without leave of court, no such leave was sought when the matter was filed as an ordinary appeal. In the nature of things and the Supreme Court having the busy schedule it has, it meant that the appeal sitting could only be secured after sometime. It was indeed only after some three months that the appeal was heard. The Supreme Court dismissed the appeal and allowed the taking of evidence on commission from the said James George Maluleka.

[18] As fate would have it, the crown was only to clarify through its last witness that it could no longer proceed with the exercise to record the evidence on commission because the said Mr. Maluleka had disappeared from Namibia after being released on bail whilst the appeal date was awaited. I can only mention that for the second time the court was denied a chance of hearing from an accomplice witness what had allegedly happened with regards the motor vehicles or their components found at the first accused person's homesteads.

[19] Although the crown witnesses had presented the evidence aimed at proving the crown's case against the accused persons the first accused tried to give his defence. In the same manner I have sought at this stage to highlight the case for the crown so shall I here highlight that by the defence in this overview.It should otherwise be mentioned that the details in each one of the cases shall be given in due course particularly as each count shall be dealt with.

20. The case by the defence is that as regards the first accused, he had nothing to do with the items seized by the police in September 2010, from his Ngwane park homestead, because he had been away from it for some three months owing to a quarrel he had had with his wife Zodwa Ginindza. He was at the time allegedly staying at his Nhlambeni homestead. He attributed those items to Botsotso Phumlani Jele and also to his said wife.

[21] As concerns the items for the 2012 to 2013 raids in both homesteads, all those items he claimed belonged to George Maluleka. He therefore did not dispute that those items were stolen as he said he was still in the process of buying the said items from James Maluleka who had brought them there in two trucks from his own spares shop which was closing down in Doornfontein Johannesburg.

[22] Only two vehicles forming part of the cases against the accused remained outside the two broad defences set out above with the 2010 seized items and the 2012-2013 seized items. These were the Toyota quantum that formed the basis of count 2 and the Toyota Hilux that formed the basis of count 5. Otherwise the effect of such defences should be dealt with as I deal with each such count.

[23] It is however common cause between the parties that it is illegal for anyone to possess a motor vehicle that has no vin number, job number or engine number as all these go to the identity of a motor vehicle. It is also an offence for any motor vehicle to have such identity number removed or tampered with. It should be understood that the tampering with or removal of the identity numbers of each one of the items seized by the police during their raids referred to above was the basis for such seizures by the police.

[24] It is important, for a better understanding of each one of the police raids, to capture briefly what the evidence says happened during each such raid. I have to start with the 2010 raids. The witnesses who testified on what happened during this raid are Justice Mziyako and assistant superintendent Methula. This raid occurred on the 25th September 2010 and was carried out at the accused's Ngwane park homestead. It is important to appreciate that although Detective Constable Mziyako and

assistant superintendent Methula attended the 2010 police raids at the first accused's Ngwane Park homestead, they went there for different reasons. Whereas Detective Constable Mziyako said he went there following an impromptu tracker signal that had activated in their car fitted with a tracker device, Methula and his team went there in answer to a search and seizure warrant granted by the Manzini Magistrate court.

[25] According to Constable Mziyako, he and the team of officers he was with, were called to the Manzini Regional Police Head Quarters where they were shown a tracker signal that was indicating that a certain car that had been stolen was in the vicinity of Manzini. They were then directed to use the car showing the tracker signal and follow its directions. The tracker led them directly to the gate at the first accused's home at Ngwane Park. As the gate was closed when they arrived, they asked for permission to enter same from the first accused who was found there in the company of one Botsotso Phumlani Jele who testified as PW45.

[26] The tracker signal led them to a place where they could not go beyond as they were blocked by the walls of a house. Having alighted from the car they went to the other side of the house where there was a garage. In that area they found about 10 chassis frames. They established that the device

that activated the car tracker was on one such chassis frames marked D2 by the police.

[27] All the chassis frames in question had the part where there would have been the VIN numbers otherwise known as chassis numbers, ground off using possibly a grinder. This made it difficult to easily identify from which car those chassis frames had been extracted. The evidence was to later establish, with the involvement of South African motor vehicle experts that that particular chassis frame belonged to a D4D Toyota Hilux van stolen from one Hugo Maree, on the 23rd September 2010.The South African police experts discovered this through the application of the etching process which is capable of bringing up the numbers supposedly ground off, if the person who did so did not completely wipe off that VIN number during his removal of the original number.

[28] Assistant Superintendent Methula on the other hand informed the court on how the police raid he was a part of was constituted including how it carried out its job. He said that they were under the command of Superintended Josefa Bhembe. They were at the first accused's' homestead at Ngwane Park to conduct a police raid. Their raid was a sequel to a warrant of search and seizure issued by the Manzini magistrate, authorizing them to raid the first accused's' homestead at Ngwane Park to carry out a search and seizure. They arrived there early

in the morning. As the first accused was not home when they arrived at his homestead they called him on his cell phone to report there which he did. From this raid they seized the following items;

Seven chassis frames labelled as D1,D2,D3,D4,D5,D6 and D7; a chassis frame with a loading bin attached to it, bearing tempered with VIN numbers and a cab of a Toyota Hilux with tempered VIN numbers on its fire wall which was given the mark D9; A VW vehicle engine bearing tempered engine numbers unmarked; an engine with tempered engine numbers marked as D10; two engine blocks with erased engine numbers that was unmarked as well as a motor vehicle engine with engine number 1J9015682IN. The engine referred to were not given police numbers because according to Mr. Mziyako they were interfered with by one Botsotso Phumlani Jele when he broke into to the security yard whilst in the company of some police officers where they interfered with the said exhibits.

[29] The evidence of Detective Constable Mziyako with regards to what had happened during the September 2010 police raid at the first accused's Ngwane park home, was corroborated by that of Assistant Superintended Methula. The latter further testified that arising from the said raid, the first accused was charged with the theft of two motor vehicles. Those two charges were however never handled in a convincing manner according

to this witness, because the docket was reported to have disappeared just as did the record of proceedings.

[30] Four other raids occurred between November 2012 and January 2013. These raids were carried out on the 22nd November 2012, 23rd November 2012 and 23rd and 24th January 2013. On each one of these days the raids were carried out at the Nhlambeni and Ngwane park homesteads of the first accused person. On each one of the raids and at each homestead, save for the raid of the 23RD November 2012 at the Ngwane park homestead of the first accused, there was a seizure of several items found there by the police. These items were given different and special identifying marks or numbers by the police.

[31] The significance in the allocation of the different and special identifying marks or numbers to the items seized by the police was explained later on by the investigating officer Inspector Bhekani Shiba. As there were two homesteads of the first accused from where the police raids and seizure of items occurred, those items would always be represented by the two letters 'A' and 'B' respectively signifying the Nhlambeni or Ngwane Park homesteads. Otherwise the first number before the letter signified the sequence number of the raid out of the four carried out. The letter that followed the first number signified the homestead from which the item was seized (with 'A' standing for Nhlambeni

whilst ‘B’ stood for Ngwane Park). The last number signifies the item number among those seized on that day. For example, 1A2 means the second item seized from Nhlambeni on the first raid. 1B2 means the second item among those seized from Ngwane Park during the first raid.]

On the 22nd November 2012, the raids started off at the Nhlambeni homestead of the accused where the items listed hereinbelow were seized;

(a) A silver motor vehicle cab, with a cut off chassis tag from its fire wall.it was marked IA1 by the police

(b) A white Toyota cab with a tempered chassis tag. It was marked IA2 by the police.

(c) A navy-blue Toyota bakkie marked item IA3;

(d) A blue Canopy marked as item IA4;

(e) Two cattle immobilizers or rails collectively marked item IA5;

(f) A black chassis frame with chassis number AHTCS12G207508777 marked as item IA6.

(g) A navy-blue cab of a Toyota double cab 3.0 litre D4D marked as item IA7.

(h) An engine block of a motor vehicle with tampered with engine numbers marked IA8.

(i) A front bumper of a Toyota Hilux marked as item IA9.

(j) A firewall cut in half attached to a fender; blue in colour with a tempered with job number on the firewall.

(k) A matric certificate belonging to one Peter Robinson which was not given a label number by the police.

Other items were left for the next day after the abovementioned were seized and taken away by the police.

[33] Still on the same date; the 22rd November 2012, the raid proceeded to the Ngwane Park homestead of the first accused. The following items were seized from there on that day:

(a) A motor vehicle engine with tampered with engine numbers marked as item IB1.

(b) A motor vehicle engine with tampered with engine numbers marked as item IB2.

(c) A silver canopy that was marked as item IB3.

(d) A motor vehicle registration number plate which read DXC 203 MP.

(e) A motor vehicle engine with tampered with engine number marked as item IB5.

(f) A motor vehicle bar code with numbers 7461030.

(g) A blue book for a motor vehicle with registration number SD 287 ZL, which was not given a mark by the police.

[34] On the 23rd November 2012, the police carried out a or continued with another raid at the Nhlambeni homestead of the first accused. The following items were seized from there.

(a) A floor portion of a Toyota quantum kombi with tempered identity numbers. It was given the mark 2A1 by the police.

(b) Two white Hilux doors that were collectively marked as item 2A2.

(c) A Toyota Hilux step bumper which was marked as item 2A3 by the police.

(d) A white Toyota Hilux bonnet that was marked as item 2A4 by the police.

(e) A navy-blue Toyota Hilux fender marked as item 2A5.

(f) Five white Toyota fenders that were collectively marked as item 2A6.

(g) Two blue Toyota Hilux doors marked as one item 2A7.

(h) A Toyota front bumper marked as item 2A8.

(i) A Toyota Hilux bull bar marked as item 2A9.

(j) Two navy blue doors of a Toyota Hilux double cab collectively marked as item 2A10.

(k) A white door of a Toyota marked as item 2A11.

(l) A grey interior cover of a Toyota door that was marked as item 2A12.

(m) Four silver side step bumpers of a motor vehicle that were marked as item 2A13.

(n) A cab of a Toyota that was marked as item 2A14.

[35] Although the police raid moved to the first accused's Ngwane Park homestead on the same day; the evidence is that nothing was seized from there on that day (that is the 23rd November 2012)

[36] The third raids were carried out by the police on the 23rd of January 2013. These were again carried out at both the Nhlambeni and Ngwane Park homesteads of

the first accused. At the Nhlambeni homestead, which was again the first one to be raided, there was seized the following items:

(a) A white Toyota bonnet that was marked as item 3A1.

(b) A white Toyota tailgate marked as item 3A2.

(c) Five motor vehicle fuel tanks that were collectively marked as item 3A3.

(d) Three motor vehicle propeller shafts that were collectively marked as item 3A4.

(e) Three motor vehicle exhaust pipes that were collectively marked as item 3A5.

(f) A white roof top of a Toyota quantum marked as item 3A6.

(g) A navy-blue floor portion of a Toyota double cab that was marked as item 3A7.

(h) Two disk grinders that were collectively marked as item 3A10.

(i) A white roof top of a Toyota D4D that was marked as item 3A11.

(j) A white motor vehicle bonnet that was marked 3A12.

(k) Two grey door interior covers that were collectively marked as item 3A14.

(l) A white motor vehicle roof lining that was marked as item 3A15.

(m) A silver grill of a motor vehicle that was marked as item 3A16.

(n) A black grill of a motor vehicle that was marked as item 3A17.

(o) A navy-blue roof top of a Toyota that was marked as item 3A18.

(p) Six two-seater seats of a Toyota quantum that were collectively marked as item 3A19.

(q) Eleven one-seater seats of a Toyota quantum that were collectively marked as item 3A20.

[37] On the same date (23rd January 2013) there was carried out another raid at the Ngwane Park homestead of the first respondent where the following items were seized: -

(a) A motor vehicle wiring system which was subsequently marked 3B1.

(b) A motor vehicle engine block with tampered with numbers, marked item 3B2 by the police.

(c) A white rear door of a Toyota D4D marked item 3B3 by the police.

(d) A white firewall with a removed chassis number that was marked as item 3B4.

(e) Four motor vehicle fuel tanks that were collectively marked as item 3B5.

(f) Two motor vehicle exhaust pipes that were collectively marked 3B6.

(g) A grey Toyota Hilux D4D that was marked 3B7.

(h) A cab of a Toyota that was marked 3B8.

(i) A grey motor vehicle firewall with tempered chassis number marked as item 3B9.

(j) A chassis frame of a Toyota Hilux that had an attached petrol tank and exhaust pipe. The chassis number of this frame was tampered with and it was marked 3B10.

[38] On the 24th January 2013 the police officers carried out another raid at the first accused's Nhlambeni homestead where they seized a laptop and two cellphone gadgets. These did not feature much in this case as even the issue of the laptop initially raised by the accused, was agreed was going to be an issue of engagement between the two parties.

[39] It is important to mention that when the 22 November 2012 raid of the first accused's Nhlambeni and Ngwane Park homesteads was carried out, the evidence reveals that the local police who carried out the said raid, were assisted by their South African counter parts who are experts in motor vehicle identification who were accompanied by experts from the Durban Toyota plant as well as certain data-dot technology experts. It was for instance through these experts that some numbers revealed through the process known as the etching process were picked up from certain chassis frames and linked with certain stolen motor vehicles in the Republic of South Africa.

[40] Similarly, it was through some of these experts that the matric certificate found lying idle at the first accused's Nhlambeni homestead, revealed as belonging to Peter Robinson, was used to link a motor vehicle stolen from Durban North in the Republic of South Africa with some of the components found at accused 1's said homestead. The same thing applies to the use of a bar code, numbered 7461030 and found lying idle at the first accused's Ngwane Park homestead, to

link the car stolen at Durban North's suburb with some of the components as found idle at the first accused's homestead aforesaid.

In the same way, a Toyota quantum kombi stolen from Zempi Nkosi at Badplaas mine, was resolved through the use of the Data-Dot expertise to link it up with the items found at accused 1's Nhlambeni homestead.

The same thing applied as well to the use of the combination method applied on the remnants of the engine number for the motor vehicle stolen from Raymond Rikki Hales at Marikana, which was used to identify its owner whilst at the same time linking the accused person to the theft of the said motor vehicle. Of course the details on how each one of these experts resolved the mysteries relating to each particular car shall be dealt with in detail as I deal with each particular count.

[41] It suffices for now to point out that the scenes of crime officer in the Eswatini police, Inspector Magagula testified that he attended the police raids on the 25th September 2010, the 22nd November 2012, 23rd November 2012, the 23rd and 24th January 2013 at the first accused's aforesaid premises where he managed to capture photographs of all the items seized by the police. The photographing went on even after the seized items were kept at the security yard in Lobamba and after they were marked by the investigating officers.

THE VARIOUS COUNTS AND THEIR EVIDENTIAL ANALYSIS

[42] Having laid down the background on how and where the items forming the basis of this matter were seized; I now have to turn to the various counts faced by the accused persons.

Count 1:

[43] (a) In count 1 the accused persons, namely the first and second accused, were charged with contravening sections 3 (1) as read with section 4 of the Theft of Motor Vehicles Act of 1991 in that on or about the 9th November 2012, and at or near the Nedbank parking lot at Lengsington Drive, Durban North, Republic of South Africa, the said accused persons, whilst acting in furtherance of a common purpose, had unlawfully and intentionally stolen a motor vehicle belonging to one Gordon James Wiseman fully described as a Toyota Hilux double cab, silver grey in colour, Registration No. ND 632813; chassis No. AHT FZ 299309021662, engine No. 1KD 7461030, valued at E 300 000-00. Although the theft had occurred in the Republic of South Africa, in view of the principle of Theft being a continuing offence, it was as though it was stolen within the jurisdiction of this court. There was also the alternative count which alleged the same charge and its particulars against the accused persons except that it was based on the common law.

[44] On this count the crown led the evidence of four witnesses, they being PW 6 Simiso Mamba, PW 27 Lieutenant William Khazamula Mokatse, PW 45 Gordon James Wiseman and PW 47 Detective Inspector Bhekani Shiba. According to the evidence of PW6 4412 Detective Constable Simiso Mamba,

during the police raid at the first accused person's Ngwane Park homestead on the 23rd November 2012, he found a white sticker or a bar code lying idle among the other items inside the garage. The sticker or bar code bore the number 7461030. As it was consistent with a bar code that is normally extracted from inside a motor vehicle's engine, he took it as part of his evidence. When handed into court, this bar code or sticker was marked exhibit C. He said that he handed the sticker or barcode to PW27 William Khazamula Mokatse, a colonel in the South African Police Services, who was brought to court as a motor vehicle identification expert.

[45] In his testimony, Colonel William Mokatse told the court, in relation to this particular count, that he fitted the number appearing on the barcode or sticker in question, into the South African Police Service motor vehicle identification network system. His findings were that the sticker in question was a unique number belonging to the engine of a motor vehicle stolen in the Republic of South Africa, at the Nedbank Parking Lot, Lengsington Drive, Durban North on the 9th November 2012. Otherwise the description of the motor vehicle concerned matched that of the motor vehicle particularized in the charge referred to above.

[46] PW45 Gordon James Wiseman testified that he was the owner of the motor vehicle described in the foregoing paragraph. His said motor vehicle was stolen on the above stated date whilst parked at the Nedbank Parking Lot, Lengsington Drive, Durban North, Republic of South Africa. He had reported

its theft to the Durban North Police Station. He had otherwise parked his motor vehicle at the Parking Lot and went into a certain restaurant. When he came back it was no longer there; it having been obviously stolen. He was eventually settled by the Insurance Company as the car was insured. The description of his car he gave matched that set out above with regards its colour, registration number, the chassis number and the engine number. He also identified a deregistration certificate of his motor vehicle whose particulars matched those particulars of the motor vehicle referred to above. The deregistration certificate was marked ZM 27-1 by the court.

[47] PW 45 further testified that he was later called by the Eswatini Police to come through and identify the remnants of his car. He indeed managed to do so. His main features were that the canopy, exhibit 24A, had a dent caused at the time he reversed his vehicle into a tree, which left the dent, whilst the cab he could identify by means of bent Ariel caused at the time it entered his garage. Otherwise the cab was exhibit 24. He identified exhibits 24 and 24A in court by means of photographs ZM 24:1-9 and ZM 24: 3, which were part of the photographs taken from the scene by inspector Magagula as recorded above.

[48] According to PW46, Inspector Bhekani Shiba, the item described as exhibit 24, that is the cab of the motor vehicle concerned in this count, initially given the identification mark or label as item 1A1 by the Police, was seized from the accused's Ngwane Park homestead on the 23rd November 2012. The other item

identified as belonging to the Gordon James Wiseman's car, is the canopy, marked exhibit 24 A by this court which was initially item 1B3.

[49] What is crucial to note is that there is no disputing that the components of the motor vehicle referred to above, including the bar code number 7461030, found at the first accused's homestead, all belonged to Gordon James Wiseman. The first accused, who was the only one who sought to give an explanation, told the court that, all the items seized by the police at either his Nhlambeni homestead or Ngwane Park homestead, of which the components of the car belonging to Gordon James Wiseman formed a part of, belonged to one James George Maluleka, who was allegedly found at his home when the police carried out the raids on the 22nd and 23rd November 2012.

The first accused could not say when James Maluleka delivered the said items there. He would not explain what the sticker was doing there if the items were from Johannesburg. He also could not explain why there was no document confirming the entry of the goods into the country if his version is to be believed. When taken together with the items mentioned in other counts said to have also been delivered by James Maluleka when it is clear such items were now fused with those sold to the first accused it becomes clear the first accused's defence is founded on falsity. I am referring to items like the George Velibanti Gamedze motor vehicle sold to the first accused whose components were found fitted to the motor vehicle stolen from David Bransma forming the

subject of count 18 to mention but a few. All this means that I should reject the explanation by the first accused on account of it being palpably false and also not being reasonably probably true.

The second accused chose to give no explanation notwithstanding evidence having been led showing that he was employed by the first accused to work on the cars as was confirmed by at least three witnesses in PW3, PW5 and PW38.He had otherwise been charged on the basis of common purpose with the first accused.

I shall revert later to this aspect of the matter after I shall have dealt with all the counts given the general nature of the accused's defence. That is when I shall draw the inferences I have to draw just as I will be required to pronounce on my findings.

COUNT 2:

[50] Count 2 relates to a charge of contravening section 3(1) as read with section 4 of the theft of motor vehicles Act of 1991, preferred against the first and second accused, It being contended that, they whilst acting in furtherance of a common purpose, on the 15th February 2012, stole a certain Toyota quantum kombi from one Zempi Nkosi, an employee of the Badplaas mine. The descriptions of the Toyota quantum allegedly stolen by the accused are that it is

white in colour with a yellow stripe on both sides, bearing registration number XDW354 GP, VIN number JFTSS23p300048655 engine number 2KD1790900.It was said to be valued at E250, 000. Although the said quantum kombi was said to have been stolen in the Republic of South Africa it was, because of the principle that theft is a continuing offence, as good as one that was stolen in Eswatini.

[51] The alternative charge is merely the theft of the same Toyota quantum being now based on the common law. It is contended that the theft was by the same accused persons who were still allegedly acting in pursuance of a common purpose. Otherwise the place from where the said Toyota quantum was stolen, the date on which it was stolen and by who, are allegations similar to those of the main charge. It is also contended that because of the principle of theft being a continuing offence, the said offence is as if it was stolen in the Kingdom of Eswatini.

[52] In an attempt to prove the charges, the crown led the evidence of at least four witnesses in this count who testified on the Toyota quantum concerned. These were inspector Bhekani Shiba PW46, Colonel William Khazamula Mokatse PW27, Zempi Elias Nkosi PW2 and Darlene Van Rensberg PW37. To try and place the evidence in a chronological manner, I will capture it in the manner that follows;

Zempi Elias Nkosi testified that he was the driver of a certain Toyota quantum Kombi which used to transport staff from the Badplaas mine. Whilst on duty on the 15th February 2012, there was amongst his passengers, a certain person who happened to remain alone with him in the kombi, this person later robbed him of the Toyota quantum. Having been made to stop by the road side, they were joined by another car. He was blind folded and thrown into a certain forest far away from where the quantum was taken from him. He eventually reported the matter to the Badplaas police. The quantum stolen from him bore the registration and chassis numbers referred to above. In fact, the descriptions he had given to the police were all those mentioned in the charge sheet and later captured above.

[53] According to PW47 Bhekani Shiba, in the police raid of 23 November 2012, the police seized a Toyota quantum floor portion amongst the items seized there. Its top part had been clearly cut off. This portion was marked or labelled 2A1. It was found at the first accused's Nhlambeni home. In the raid of the 23rd January 2013, there was seized still at Nhlambeni, the top of a Toyota quantum. Its cutting matched that of the floor portion seized on the 23rd November 2012, labelled item 2A1. It was marked item 3A6 by the Police. According to Mr. Shiba's testimony, the floor portion of the quantum was attended to by two expert witnesses; namely Colonel William Khazamula Mokatse, who was to conduct a data-dot analysis. The data-dot was described as a mechanism through which the identity of a motor vehicle can be determined through

extraction of very small circular chips from the body of the car, which when put or fed into a microscope, is capable of revealing the identity numbers of the vehicle, which include its VIN number. This exercise was further carried out by Darlene Van Rensburg, PW37.

[53] Colonel Mokatse, PW27, informed this court that through the use of the data-dot method he was able to establish that the Toyota quantum floor portion in question was for the motor vehicle reported stolen at Badplaas on the 1st February 2012. The data-dot revealed the chassis frame of the Toyota quantum floor portion to be JTFSS 23P3OOO48655. This matched the reported chassis frame of the Toyota quantum vehicle referred to above. Mr. Mokatse said he then prepared a written report on his findings on the data-dot.

[54] Colonel Mokatse's findings on the data-dot were confirmed by another expert, who was introduced as PW37, Darlene Van Rensburg. She corroborated Colonel William Mokatse on what a data-dot was including what the benefits of its application were herein. She referred to it as a device for determining the identity of a motor vehicle. She described it as very small circular disks which would be scientifically fitted with the VIN number of a particular motor vehicle. It would be factory fitted. In fact, a car would have about 10, 000 such small disks fitted around its body during its painting. On the motor vehicle concerned she uplifted some such data-dots from the item marked 2A1 by the

police, which has been described as a floor portion of a Toyota quantum kombi.

[55] After putting the data-dot into the microscope it revealed that item 2A1 was a floor portion of a certain Toyota quantum stolen from Badplaas on the 1st February 2012, with chassis number JTFSS23P300048655.

[56] The defence officially raised by the first accused in this particular count was that the Toyota quantum was brought to his homestead by a certain kombi owner who had a deal with his panel beaters, who needed to have a kombi of his that had been involved in an accident repaired. He said he was otherwise not involved in that deal as it was a private deal between his employees and the customer concerned.

[57] It is worthy of note that the defence only came by from the accused himself when he gave his evidence in chief and maintained it during cross examination. He had otherwise not put it to the crown witnesses who testified on that particular count, such as Zempi Nkosi, William Mokatse, Bhekani Shiva and Darlene Van Rensburg.

[58] The fate of such a testimony is well known in our law as it is called an afterthought. An afterthought is no evidence and any, if raised, falls to be rejected by this court. The case of ***Dominique Mngomezulu and Others vs Rex,*** (**case 94/1996)**, is well known in this jurisdiction on this principle.

[59] I can only add that in fact at the time the crown witnesses testified on this motor vehicle; that is the quantum referred to hereinabove, the defence put to them was generally that all the items recovered at the first accused's homesteads belonged to James George Maluleka as was allegedly the case with all the items recovered from the first accused's two homes during the 2012-2013 raids.

[60] There otherwise was no denying that item 3A6 was the roof top of the same quantum which according to Inspector Bhekani Shiba matched the floor portion of the same quantum kombi as could be seen in item 2A1. I accordingly find therefore that item 3A6 was indeed the roof portion of item 2A1 which as stated was the floor portion of the Toyota quantum stolen at Badplaas. Owing to the number of counts involved in this matter, I shall later revert to this count for purposes of declaring my conclusion on the guilt or otherwise of the accused with regards thereto.

[61] I must not leave out mentioning that the second accused made no explanation at all in this count as he did in all the others. I mention in passing that at least three witnesses have mentioned him as a worker of the first accused. Although in his submissions Mr. Mabila wants to say that he was not staying at the first accused's homestead and that he was not shown to have specifically played any role in this particular count. According to Mr. Mabila, this necessitates that he be acquitted as he had no duty to prove his innocence. This submission ignores the fact that the evidence of PW6 Thandayena Gamedze, PW5 Bongani

Christopher Shabangu and Thulani Sydney Xaba, PW42 who all testified of having known the second accused as a worker of the first accused. They said he was employed to work on the cars as he would be found on the first accused's yard fixing cars there. Of course, I note that the testimony of Thandayena Gamedze went a step further because he told the court that he had started knowing the first accused around 2002/2003 with the second accused being his worker. This was not disputed.

[62] I point out that there was a duty in this and the other similar counts for the accused to have explained his role in all these counts particularly because he was not just an ordinary worker but one who worked on the cars at the first accused's homestead where the evidence establishing a prima facie case is that the cars were being chopped. This is confirmed by the fact that numerous car components were found there to have been chopped resulting in several scrap materials and those whose identities were being altered.

Count 3:

[63] This count relates to the motor vehicle said to have been stolen at Marikana from one Raymond Rikki Hales. The allegations in this count are that the accused are charged with the contravention of section 3(1) read with section 4 of the Theft of Motor Vehicles Act, 1991, in that on or about the 9th October 2012, they whilst acting in furtherance of a common purpose stole a motor vehicle fully described as a White Toyota Hilux, registration number HVZ 543 NW, chassis or VIN number AHTFZ 29G809019728, engine number IKD

7451023, valued at E 280 000-00 and belonging to one Riki Raymond Hales, whilst it was parked at Safari Spar Parking, Marikana, Rusternburg, and conveyed it to Ngwane Park, Manzini. It was contended by virtue of the fact that theft was a continuing offence, it was as though the motor vehicle concerned was stolen within this court's jurisdiction.

[64] An alternative to this charge was that of the accused persons being charged with the theft of the same motor vehicle at common law. The particulars were the same ones as those in the main count save for the common law allegations. I for this reason find it unnecessary to repeat such allegations here.

[65] The evidence seeking to prove the theft was given by Raymond Rikki Hales, the complainant, who told the court that on the day preceding the theft of his motor vehicle at Marikana Safari Spar, he had spent the previous night at a hotel in Pongola whilst in the company of his fiancée. They were from a tour in Maputo and were on their way to Marikana where he worked. They had upon arrival at the Safari Spar Parking Lot in Rustenburg decided to enter a supermarket to buy items they needed. Although they had not spent a long time therein, they had discovered upon return that the motor vehicle they had left there had been stolen. The theft was reported to the Rustenburg police. He handed to court the photographs of the motor vehicle he had taken before it was stolen. These were marked exhibits "N2", "N3" and "N4".

[66] The complainant was later called by the Eswatini Police who informed him that the engine belonging to his motor vehicle had been found at the first accused's homestead at Ngwane Park. Over and above the photographs, Rikki Hales handed into court a licence disk certificate depicting the particulars of his said motor vehicle. This document was marked as exhibit "N". He also produced in court a letter of delivery of the said motor vehicle to him after its purchase from ABSA Bank. It was marked Exhibit "N1".

[67] According to PW47, Inspector Bhekani Shiba, among the items found at the first accused's Ngwane Park homestead on the 22nd September 2012 was an engine which they gave an identification mark as 1B2. The engine number of this motor vehicle, he testified, was tampered with. Some of its numbers were visible whilst others were not. Clearly those removed were ground off. This engine was seized and taken to the Lobamba Police Security yard where it was kept together with the other seized items.

[68] PW27 Colonel William Khazamula Mokatse testified in connection with the said engine and stated that he attended to it at the Lobamba Police security yard and examined it. He found some of its numbers, including its first few digits and the last digits visible whilst the other numbers in between had been removed. As an expert in motor vehicle identity determination, he applied his expertise, particularly a method called combination, on the computer of the South African police motor vehicle identification system which helped produce

the engine number IKD 7457023. The system revealed that the motor vehicle with those numbers was stolen at Rustenberg whilst parked outside the safari spar. It was reported to the Rustenburg police. Indeed, documents bearing the same particulars as those revealed by the system were brought to court by Raymond Rikki Hales and they are as referred to above. Colonel William Mokatse produced a report in that regard which he handed into court. It was marked as exhibit p_.

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[69] The evidence having identified the engine concerned through the application of expertise as a component of the motor vehicle stolen from Raymond Rikki Hales in Rustenberg, the accused persons were in law required to explain their being found in possession of such an item. Further, the explanation required in law was supposed to be a reasonable and probably true explanation.

[70] As indicated above, the first accused gave a general explanation namely that the engine found at his homestead was one of the items brought to his homestead by one George James Maluleka who intended selling him same if they were to agree on the price except that he had already paid him about E9000-00 as a compensation for fuel expenses. The second accused on the other hand gave no explanation,most likely being content with the fact that it was found in accused 1's homestead and not his.

[71] It is however not in dispute that there was evidence by at least three witnesses who said accused 2 was working on cars at accused 1's homesteads. As for accused 1, it is not in dispute that he did not say when exactly the items were allegedly delivered at his said homestead by George Maluleka, who he says was using a truck and also testifying he delivered the items in question on two occassions. He did not give these particulars even when it was put to him that according to Police investigations, George Maluleka had entered Eswatini driving a certain motor vehicle as confirmed by his passport found then together with an SRA receipt given to people who entered the country driving a certain motor vehicle with his bearing an NP registration number, which upon investigation was found to be a false registration number as such a number belonged to a different motor vehicle type from the one he had entered Eswatini driving.Further still he could not explain what value an engine with tampered numbers would be to him particularly as a motor vehicle dealer who knew it was illegal to buy such an item. I will mention in passing that the other reasons for rejecting his explanation in count1 apply with equal force here, and are not being mentioned to avoid repetition.

[72] I am of the view I should reject the explanation by the first accused for the reasons given whilst I conclude that the second accused had a duty to explain himself. I will otherwise revert to this aspect of the matter as I

record the conclusion I have reached together with the findings I would have made.

Count 4:

[73] Count 4 relates to what became known as the Sulphur Springs motor vehicle, stolen from one Hugo Maree. The particulars in this count were that on or about the 23rd September 2010, the accused persons had, whilst acting in furtherance of a common purpose by contravening section 3 (1) as read with section 4 of the Theft of Motor Vehicles Act, 1991,stolen a motor vehicle fully described as a white Toyota Hilux, registration number CWY 810 MP, chassis numberAHT31LNK908010884, engine number 5L9136282, whilst it was parked at Sulphur Springs, Republic of South Africa, in the lawful possession of Rian Marce. Given that the said motor vehicle was conveyed to Eswatini, and in view of the principle that theft was a continuous offence, it was as though same had been stolen from the jurisdiction of this court.

[74] The evidence on this count was given by the complainant therein, one Hugo Maree, PW4, who said that his motor vehicle fully described above was stolen whilst parked at his home at Sulphur Springs. His house had

been broken into where the car keys were stolen. The matter was reported to the PietRetief police. This had happened on the 23rd September 2010.

[75] Testifying further on this count; Detective Constable Justice Mziyako told the court that they were called to the Regional Police Head Quarters in Manzini where they were shown an activated vehicle tracker signal apparently reporting on a stolen motor vehicle. They followed the directions as given by the tracker device until they got to the first accused's Ngwane Park homestead. It led them into the yard and were it not because of the house wall which blocked their further movement, it was calling them to go beyond this point. After they had alighted and gone to where the tracker device was leading to, they came across about 9 chassis frames which were tied together through the use of a chain. They noted that the tracker device was leading them to one of the chassis frames tied together with the others there. The chassis frames tied together there had their VIN numbers removed or ground off through the apparent use of a grinder.

[76] Detective Constable Mziyako further testified that when they arrived at the first accused's homestead, they found another team of police officers already there in an apparent raid following a search and seizure warrant that had apparently been obtained from the Manzini Magistrates Court.

The first accused was also there. The chassis frames seized at the first accused's homestead included one that was given the police mark "D2". This raid was just two days after the theft of Hugo Maree's motor vehicle referred to above.

[77] Among the various South African Police who had been engaged as experts in theft of motor vehicles to determine the identity of the chassis frames, was one Detective Constable Sambo. He was at the time based at Komati Poort in South Africa. He was given item D2, the chassis frame referred to, to examine. Officer Sambo informed this court that his examination of the said chassis frame revealed that the original chassis number had been removed or ground off the chassis frame "D2".

[78] He testified that one of the methods used by the Police in identifying chassis numbers that had purportedly been removed or ground off was the etching process. He explained this method as using a certain acid on the space where the ground VIN number had been. The idea was that if the erasing of the VIN number was not thorough, then the numbers supposedly removed would be brought up. After having embarked on the etching process by applying the acid solution to the spot where the chassis number had apparently been ground off, a certain number which read AHT 31 LNK 908010884 was revealed. After checking the

originality of the number from the South African Police Service National Security System, it was discovered that the chassis number in question was that of the motor vehicle stolen on the 23rd September 2010 from Hugo Maree, PW4, at Sulphur Springs.

[79] The findings of Detective Constable Sambo were confirmed by Hamel Naidoo, PW 39, who after examining the same item "D2", confirmed that it was a chassis frame of a Toyota Hilux motor vehicle. Hamel Naidoo was an expert on the identification of Toyota motor vehicles. He told the court that he had a vast experience in the field. He was otherwise employed by the Toyota plant situated in Durban South Africa.

[80] The defence raised by the first accused with regards this count was the general one as raised in the other counts which related to items found at his Ngwane Park homestead during the 2010 raid. This general defence was to the effect that all those items seized during the raid were not known to him. This he said was because he was not staying there at that time. He said he had quarreled with his wife referred to as Zodwa Ginindza at the time. This he said, had forced him to leave his Ngwane Park homestead to reside at the Nhlambeni homestead. Up until the crown called PW43, Botsotso Phumlani Jele as a witness, this version by the defence to crown witnesses had been that those items belonged to

Botsotso Jele and the first accused's wife, who was Botsotso Jele's cousin.

[81] Of course that position changed after Jele had given evidence on behalf of the crown to say that the items belonged to one Jerry Dlamini who was now late. Botsotso only mentioned that the first accused was not staying at Ngwane Park at the time because of a quarrel he had with his wife who was a cousin to him. He surprisingly did not express any claim of ownership of the items seized contenting himself with saying the items belonged to Jerry Dlamini, who was late. I noted that even defence counsel this time around never put it to Botsotso Jele as had been the case earlier, that the items seized from the first accused's Ngwane Park homestead in 2010 belonged to him as initially put to the other witnesses.

[82] I must now add that there is a lot to say about the evidence of Botsotso Jele. There is very little, if any weight to attach to the testimony of this witness in favour of either party herein. This is because before he was called as a crown witness, he had been present in court on numerous occasions when the testimony of other witnesses was led and cross examined upon. He had been in court as a visible friend or relative or supporter of the first accused in whose company he was always in.When he was eventually called in the midst of all that, I noted that he showed

open reluctance to testify against the first accused forcing this court to compel him by, at one point issuing a warrant of his arrest. It is very difficult for the court to accept his evidence which tended to support the first accused who was a close friend, relative or acquaintance of his. To this extent I will therefore attach no weight at all to the testimony of this witness.

It is obvious I cannot accept the explanation given by the first accused. It is not reasonably probably true. It is not real he would have left his homestead to strangers to do as they pleased particularly taking into account the depth of his relationship with Botsotso Jele which remains to this day. Furthermore the method of dealing with the items found at his Ngwane Park in 2010 is manifestly similar to that of dealing with those found at his two homes mentioned above from 2012 November to January 2013.I must therefore reject his explanation regarding the items found at his homestead in September 2010 which include the theft of the motor vehicle forming the basis of this count. The first accused's explanation is not reasonably probably true. For the same reasons as above the second accused failed to explain in circumstances where he had a duty to explain and can therefore not avoid the drawing of an adverse inference against him. I shall revert later in this judgment to this aspect of

the matter including the pronouncement of the conclusion I have arrived at taken together with the findings I will be required to make.

Count 5:

[83] This count relates to what came to be known as either the Malkerns or the Paul Petersburg motor vehicle during the trial. It drew these appellations because,it was alleged to have been stolen from one Erald Rabe of Paul Pietersburg and also because it was eventually found at the Malkerns Police station where it had been parked after a dispute had arisen surrounding the payment of the purchase price between its buyer and its seller as shall be seen herein below.

[84] The particulars of the charges faced by the accused persons in this count are that they are guilty of contravening section 3 (1) as read with section 4 of the Theft of Motor Vehicles Act, 1991 in that on or about the 19th February 2012, and whilst acting in furtherance of a common purpose, at or near Lachkraal farm,Luneberg,PaulPietersburg, Republic of South Africa, they unlawfully and intentionally stole a motor vehicle; namely a White Toyota Hilux LDV, registration number NPP1230, engine number IKZ0913991, chassis number AHT31GN008008022, valued at E 110,000-00 being the property of or in the lawful possession of Erald Rabe. It was clarified that given that theft was a continuous offence in

law, it was as though the theft had been committed in Eswatini or under the jurisdiction of this court.

[85] The alternative charge to the foregoing one was that of theft at common law,which only emphasizes that they had not violated a particular statute as opposed to their having allegedly acted contrary to the common law.Otherwise all the other particulars of the count are similar to those of the main count which I do not need to repeat here so as to avoid being prolix.

[86] PW1, Erald Rabe testified under oath how he and his wife were, on the fateful night of the 19th February 2012, attacked by a group of three men who knocked at their house around 2200 hours and pretended to be looking for the maid who worked there. When he went to meet them by the door, explaining that the maid was not there at that time of the night, he was dragged outside the house, grabbed on either arm by two of the men whilst the third one entered his house and there attacked his wife. As for him he said he was dragged to where the garage was situated. As they entered the garage he was hit around the temple or behind the ear or thereabout with a hard object which caused him to lose consciousness after several other serious assaults all over the body.

[87] He can only remember coming to it when he discovered that he and his wife were being dragged on the ground by their feet away from their home after which he lost consciousness again. He later recovered when he found that his wife was no longer there. He was left there with a male person in his mid-ages who was apparently keeping guard over him. This person threatened to shoot him if he did not co-operate. Whilst lying down there he saw his car which was loaded with several of his movables including what he referred to as a big industrial welding machine he had bought whilst working for a company called Barlows being driven off.

[88] This witness testified that to the day of his testimony in court, which was approximately 4-5 years later, he still felt the effects of the assault on his person from that day because he now suffered half blindness which he had been told was permanent. This he said had led to him looking old and frail on his body, which meant that some permanent danger was done to his person as a whole. He in fact had had to give up farming which was before then his source of livelihood.

[89] He described his stolen motor vehicle as a 2002 model White Toyota Hilux bakkie with registration number NPP 1230. On its bakkie it had a roll bar. The loading bin was rubberized. It also had a chrome bull bar in front. Its back bar was bent a little bit. It had a cable tie in its grill. Its front bull bar had a stay or iron strip welded on to support it. This

rewelding on the front bull bar was painted silver in colour to match that of the bull bar. The roll bar on its bakkie, particularly next to the edge of its righthand side, had a hole which had been custom drilled to enable him fit an ariel.

[90] Lastly Mr. Rabe informed the court that his motor vehicle was eventually recovered because he was called by the police to go to the Malkerns Police Station where he found it parked. It now had several changes done to it which however could not defeat his ability to identify it. His engine had been changed.Its battery clamp was broken. His radio was in a bad state. The cattle rails on its bakkie were removed. It now bore a Swazi registration number.

[91] He was able to identify the motor vehicle with the cable tie on its grill, the welded bulbar mounting brackets or stays, the hole he had had drilled on the roll bar fixed on the loading bin to allow for aerial fitting. He also noted the other features of it mentioned above except for the alluminium strap at the back which had been removed. As he had been settled by the insurance company, through paying him for its value, he did not take the car away but had left that to the insurance company to do.

[92] According to the evidence, the motor vehicle identified by PW1, Erald Rabe at Malkerns came to be placed there following a dispute between the person who had purchased it from the first accused, known as Bongani Christopher Shabangu, PW5. According to this witness, he had purchased the motor vehicle concerned from the first accused in March 2012. During the negotiation of the sale of the car to him he saw accused 2, Siza Sibeko, who was busy working on it fixing something thereon. The agreed price was the sum of E 70,000-00. He was to pay E50,000-00 as a down payment with the balance being due at the end of that month. The registration number borne by this car was PSD 546 BM.

[93] After a mere three weeks, PW5 informed the court that the first accused called him reminding him that the agreed period had lapsed and that he now insisted on the balance of the purchase price being paid. The first accused allegedly sent one Botsotso Jele and another person to repossess the car from Mr Shabangu, apparently without a court order, I can add. It was eventually agreed that the vehicle be kept at a neutral venue namely the Malkerns Police Station. It was whilst kept there that some police officers, particularly one described as Poison Motsa allegedly decided to examine the car and later informed Mr Shabangu it was suspected stolen. When he called the first accused enquiring about the car in light of what

the police had just revealed to him, the former told him not to be worried as the car belonged to him (first accused).

[94] PW6 Detective Constable Simiso Mamba told the court that he was a member of the serious crimes unit of the Eswatini Police force known as Lukhozi. He was based at the Manzini Regional Police Head Quarters. His duties entailed the investigation of suspected stolen motor vehicles. He was detailed to investigate a motor vehicle said to be parked at the Malkerns police station by Bongani Christopher Shabangu. He discovered the chassis number on the firewall of the motor vehicle to read AHT31UNG 908007556. Upon further investigation he discovered another secret chassis number pasted by means of a sticker at the edge of the loading bin. It read AHT31GNK 008008022. This he said raised suspicions as it was not normal for a car to have two different chassis numbers. Further investigations were carried out and they revealed that the chassis number found on the firewall which ended with the digits 556 was for a motor vehicle registered in the name of Thandayena Gamedze who is PW3 in the matter. Such car was allegedly the one whose scrap had been purchased at the CTA government garage by the first accused using PW3'S credit card. On the other hand the chassis number ending with the digits 022 was for a motor vehicle found to have been stolen at Paul Petersburg on the 19th February 2012.

1. [95] In his testimony in court, PW3, Thandayena Gamedze told the court that sometime in September 2011, he attended an auction sale of government's second hand cars at the CTA garage in Mbabane. Given that he had acquired a credit card that allowed him to buy items on sale for up to E 30, 000-00, he was asked by the first accused as a friend of his to buy a certain second hand or scrap car on his behalf for the sum of E5000-00 which he did. This car had been a former army car. It had neither a bonnet nor a gear box. It was however a 2.7 Toyota VVT model. It was a 2007 Toyota Hilux model. As far as he knew the car had not been registered in his name even though he knew that such cars had to be registered firstly in the name of the person in whose name they had been purchased from the CTA garage. Otherwise the car needed a lot of fixing for it to be serviceable as it was more of an empty shell when purchased. The chassis number of the motor vehicle in question was AHT31UNG908007556, being the same number found in the Malkerns Motor vehicle identified by Erald Rabe as the one stolen from him.

[96] Of importance is that this witness said that he had known the first accused from around 2002/2003. He had also known the second accused as the first accused person's employee who he would always see at the said

accused's homestead. He worked on the cars there parked. He took him to be a motor mechanic because he would find him repairing or fixing the cars there.

[97] In an attempt to explain the riddle how a car identified by PW1 as having been stolen from him at Paul Petersburg in South Africa happened to bear a chassis number of a motor vehicle purchased from the CTA as a scrap material, the crown led the evidence of PW13, Warrant Officer Joseph Sipho Jele. He introduced himself as a South African Police Services member, who holds qualifications in the identification of stolen motor vehicles. He, in the performance of his duties in Eswatini, examined a certain motor vehicle found parked at the Malkerns Police station. This motor vehicle bore the registration number PSD 546 BM which confirms it is the so called Malkerns vehicle.

[98] During the examination of the motor vehicle concerned he said he found that although its engine number looked authentic it had two different chassis or vin numbers. One of these vin numbers particularly that on the firewall tag, was supported by the other vin number on the chassis frame. The vin number that differed from these two numbers was that found pasted on the edge of the loading bin. This secret vin number read AHT 31 GNK008008022;whilst the one found on the chassis frame and on the

firewall tag read AHT31UNG908007006. Upon a closer look at the vin number found on the chassis frame he discovered that those chassis numbers there were tampered with. Upon a closer scrutiny, he noted that there were numbers that had been scratched off or ground off on the chassis frame. He applied the electro acid in an endeavor to come up with the proper numbers. He was now applying the etching process. The number revealed thereon was the same one as that found concealed at the edge of the bakkie which meant that that was the original chassis number.

[99] Upon feeding the secret number found at the edge of the motor vehicle's loading bin, which was similar to that revealed by the etching process on the chassis frame, into the SAPS's national computer system of South Africa, he discovered that the motor vehicle in question was stolen from PWI Erald Rabe of Lachkraal Farm, Luneberg, PaulPietersburg. The computer system also revealed the particulars of the complainant including his telephone numbers. This enabled Mr Jele to call Mr Rabe and enquire from him if he had ever lost a car which the latter answered in the affirmative.

[100] He thereafter directed that he makes arrangements to go to the Malkerns police station to identify the car. He said before Mr Rabe could go to see the car he inquired from him what identification marks he could use

outside of the chassis number to identify it. His answer was to list all the indicators Mr Rabe mentioned earlier in his own evidence. This witness then prepared a report which he handed into court as part of his testimony. It was marked exhibit '02'. It is also not in dispute that during his identification of the motor vehicle at the Malkerns police station the complainant brought with him the documents bearing the same particulars of the car as those revealed in Joseph Sipho Jele's investigations. These included the delivery documents by ABSA bank and the registration ones.

[101] Following its identification at the Malkerns police by the complainant, Erald Rabe, Warrant Officer Joseph Sipho Jele informed the court that he advised the insurance company that had settled the complainant about fetching it from Eswatini through the necessary court processes. PW7William De Wet Pienaar testified in court and informed it that he was an agent of the insurance company that had settled the owner of the car and he was authorised to reposses it.

[102] He told the court that the insurance company instituted proceedings at the Manzini Magistrate Court claiming the release of the m/v in question to it. The application was not opposed by the First accused although it had been on him.It is in fact not in dispute that by means of exhibit13 a

statement recorded from the first accused, he confirmed that the motor vehicle in question had to be released to its owner thereby confirming that he was not such an owner. I also note that the first accused did not put it to the crown witnesses that the motor vehicle forming the basis of count5 was not a motor vehicle stolen from Erald Rabe.

[103] PW7 De Wet William Pienaar, confirmed that after the motor vehicle was released to the insurance company it was taken to Ermelo in the Republic of South Africa from where the insurance company sold it to one Bennedict Nyembezi Masina PW48, a member of the South African police based at the Oshoek border gate. Willem Pienaar further confirmed that the chassis numbers found on the motor vehicle were tempered with and that because of this anomaly the motor vehicle was issued vin numbers sanctioned by the South African police services, commonly known as SAPS vin numbers.

[104] Bennedict Masina PW48 testified in court and said that he was a member of the South African police services based at the Oshoek boarder gate. He was there attached to the motor vehicle identification section of the South African police. He said he was trained as an expert in the identification of stolen motor vehicles. He however came to court not in that capacity, but in that of being the person who purchased the motor vehicle forming the

subject of this count from the insurance company's agent William Pienaar. He confirmed that the motor vehicle in question was presently using SAPS vin numbers because the original ones were tampered with. The motor vehicle was produced on an inspection *In loco* outside the High Court building. He clarified that the car had been produced at the High Court of Eswatini from Nhlazatje where he was based following an agreement that it was to be viewed and returned to the Republic of South Africa the same day.

[105] This court had the opportunity to view the Motor vehicle concerned. In particular, it saw the remnants of the sticker at the righthand side edge of the loading bin said to have borne the chassis number of the motor vehicle stolen from Lachkraal Farm, PaulPietersburg. As indicated by Benedict Masina that chassis number had been destroyed. This he said was done after he had already purchased the motor vehicle.

[106] I otherwise confirm having seen the arrows drawn by the police indicating the rough foreign welding's (as opposed to the manufacturer's welding's) which were used to replace those components which bore the original identity marks of the motor vehicle, namely the fire wall and the chassis frame. These rough welding's can be seen joining the fire wall to the motor vehicle as well as the door pillar. The court observed as well the

car keys with a leather holder bearing the inscription PaulPietersberg Toyota. Mr Masina described the motor vehicle as a 3.0 litre Toyota Hilux ,2002 model confirming the description accorded it by warrant officer Jele.

[107] A case put to some of the crown witnesses such as PW1 Erald Rabe by the first accused persons' Counsel Mr Mabila, was that a certain person who ended up being acquitted in court in South Africa had been arrested for the robbery or theft of the complainant's vehicle in Paul Pietersburg .It was contended that the name of that person was Msandi Nkosi.That person it was put further to the complainant was the one who sold to the accused the bakkie or loading bin of the motor vehicle inspected at Malkerns by the complainant. It was contended that otherwise all the other parts found in the said car belonged to the motor vehicle bought from the CTA by the accused using the card he had obtained from Thandayena Gamedze.

[108] I observed that this had not dampened the complainant in his case as he had maintained that the car he had seen at the Malkerns police station was the one that had been stolen from him when he was attacked at his Paul Pietersburg farm, called Lachkraal farm. He emphasized the marks he had used to identify his motor vehicle which were found situated in various

parts of the car. These include the dented and bent bar at the back of the car; the rubberised loading bin; the roll bar pitched on the loading bin; the custom made aerial hole on the roll bar fitted on the right hand side edge of the bakkie; the front bull bar with its unique stays or brackets specially welded to support it as well as the cable tier on the grill of the car.

[109] I must say I note that in his words the motor vehicle purchased by PW3 Thandayena Gamedze from the CTA garage on behalf of the first accused was a 2.7Litre Toyota Hilux VVTI (petrol) model yet that stolen from the complainant or PW1, was without dispute, a 3.0 litre Toyota Hilux KZTE(Diesel). Further the vehicle inspected at Malkerns was also without a dispute testified to have been a 3.0 litre Toyota Hilux KZTE and a 2002 model.

[110] I note as well that it was not disputed through the cross-examination of Warrant Officer PW13, Sipho Jele that the motor vehicle he inspected or examined at Malkerns, had the chassis number displayed thereon not being original on it. The original chassis number on the frame, he had found had been cut off and replaced with the one he later found attached to it. PW1 had in any event positively identified the car parked at Malkerns police station as the one stolen from him as can be seen in the foregoing paragraphs. Mr Jele was further not challenged as an expert, when he

revealed that he had applied the etching process on a scratched part of the chassis frame which resulted on the revelation of the original chassis number.

[111] I note further that if the accused had not put a case to warrant officer Jele challenging him on his having found a removed chassis number which was revealed by etching, it cannot avail them to argue later when the vehicle was inspected upon by the Court that they were not shown such. Mr. Jele could have only been availed because it would have been disputed that there was such a scratched or removed or ground off part of the chassis frame. If the chassis frame allegedly revealed through the etching process had not been placed in issue through the cross examination of the witness as he was on the stand it cannot be made an issue during the inspection in loco.

(112) In his evidence in chief in relation to this count, the accused who was the only witness for the defence, testified that the motor vehicle forming the subject of this Count was actually his own car and was the one purchased at the CTA garage and rebuilt. He contended it had not been shown to be the one stolen from the Lachkraal Farm in PaulPietersburg because the VIN number said to have been found on the edge of the loading bin was not there as only remnants of a sticker could be seen and not the numbers themselves. He argued further the identity marks by the complainant were general and there was nothing special about them. Further still, he

argued there was no etched VIN number on the chassis framework shown to the Court.

(113) Like I said these contentions by the defence witness, the first accused, cannot avail him, because he had not put a case to PW13 warrant officer Jele, challenging this testimony on the identity of the chassis number he claimed to have unraveled, which would have made it necessary for him to have been recalled for the inspection in loco of the motor vehicle. The way he had raised his evidence in chief was tantamount to one making an afterthought. This is also fueled by the fact that when he(first accused) came to give his evidence, he would not confirm the case he had put to the Crown Witness, but came up with a new defence which now claimed that the car belonged to him and not that he was supplied parts for rebuilding it by Msandi Nkosi.

(114) I also need to react to an aspect raised by the Defence Counsel, that they were refused an opportunity to cross examine on the car that had been brought by the Crown for inspection. Nothing can be further from the truth. The reality is that after the car was inspected and after cross examination had been done, Mr. Mabila insisted that the car he kept in the country and not be allowed to return to South Africa contrary to the agreement reached with its owner before it was released to be brought here as clarified by the witness himself. No specific reason was given on

why cross examination could not be finalized then as it appeared they were still going to think about the reasons for that.

(115) I meanwhile noted that the vociferous objection by the Crown on why the motor vehicle had to be released in line with the the conditions on which it was released to come to Eswatini now that the motor vehicle was outside the jurisdiction of this court and its control. It was obviously opportunistic of the first accused to make it look like he suffered any prejudice through the release of the motor vehicle to its new owner in the Republic of South Africa. My attention was drawn to the fact that certain unusual scenarios had occurred in the matter which I needed to consider in deciding whether or not I was allowing the release of the motor vehicle in line with the agreements reached between the state and its owner.These scenarios included considerations such as the theft of some exhibits at the Lobamba Police security yard where some police officers were corrupted to collude with some of the first accused's acquaintences. The other consideration was the incident where an accomplice was allegedly released anonymously from the Mbabane police custody. It was argued that whereas certain agreements had been reached with regards the release of the motor vehicle to this jurisdiction, it could not be guaranteed it would be safe. Noting that no sound reasons on what it is that was sought to be asked later on about the vehicle which could not be asked then, I directed that it be released to its owner and that it would be

brought back if an application would be made to Court justifying an order for its recall. I was convinced, the safety of the car in question could not be guaranteed. Other than defence counsel's contention that the car was never kept to allow them to cross examine on it, no application has ever been made in line with my directive that a proper application justifying such should have been made.

(116) An issue to mention here again is that of the second accused having allegedly not been mentioned in the evidence linking him with this particular Count and it also being contented that he was actually not staying at the first accused's homesteads. It is not entirely true that the second accused was not mentioned in connection with this Count. Whilst the evidence of PW3 Thandayena Gamedze and PW 38 Thulani Sidney Xaba proved, without it being disputed, that the said accused person worked at the First Accused's homestead and that he was always found there. Of course, according to PW3, Thandayena Gamedze, he was found actually working on the very car forming the basis of this count and had previously been found working there carrying out mechanical works. This witness further suggested that this had been the case from around 2002/2003 when he grew his friendship with the first accused person.

(117) The status of the 2nd Accused was further clarified by PW5, Bongani Christopher Shabangu when he testified in Court that the second accused worked for the first accused as he had actually found him working mechanically on the car he had purchased from the First Accused which later became known as the Malkerns vehicle or as Exhibit Crown 6.

(118) This evidence in my view required that the Second Accused not only explained himself with regard the vehicle in question, that is Exhibit "Crown 6" but that he also explained himself in relation to all the motor vehicles alleged to have been stolen there or those components found to be possessed by the accused persons when considering the allegations he was working and residing at that place where motor vehicles were allegedly stripped by those working there particularly also taking into account the allegations that the alleged offences were committed in furtherance of a Common purpose.

(119) In view of the numerous Counts levelled against the accused persons, it is important that I revert to this Count later on the conclusion I come to in relation thereto. It suffices that the first accused has failed to give an explanation that is reasonably probably true. The second accused on the other hand, cannot avoid the drawing of an adverse inference against him

given that he failed to give an explanation in circumstances where there had been made a prima facie case against him.

Count 6

[120] This Count relates to the alleged theft of a motor vehicle said to have occurred at the Fire and Ice Hotel basement at Melrose Arch, Norwood Johannesburg on the 24th August 2010. The motor vehicle concerned is described as a Toyota Hilux, Dark Grey in colour, Registration No. DRM 075 FS and VIN No. AHTEZ39G907014602 and engine Number 1KD 7788113. This theft was in the main count said to have been in contravention of Section 3 (1) as read with Section 4 of the Theft of Motor Vehicle Act, 1991. The charge contends that the accused persons acted in furtherance of a common purpose. Since the accused were said to have brought the motor vehicle into Swaziland, it was contended that the offence had occurred in Swaziland or Eswatini given that theft was in law a continuing offence.

[121] The alternative charge against the accused persons has the same particulars as the main count except that it is not based on the contravention of any section of the Act but on the violation of the common law. I therefore do not need to repeat these particulars herein.

[122]. The evidence on this Count was given inter alia by Alexander Cameroon, PW 31, who introduced himself as the owner of the motor vehicle alleged to have been stolen at Melrose Arch, Norwood Johannesburg, Republic of South Africa. He had gone there to attend a meeting of the organization he worked for. He had reported the theft to the South African Police. According to PW 10 Detective Constable Justice Maziyako, during the raid at the First Accused's Ngwane Park homestead on the 25th September 2010, among the items seized from the First Accused's homestead was a chassis frame which ended up being marked as item D1 by the Police. This item had its chassis number or VIN number ground off or removed or obliterated.

[123]. It was eventually attended to by the South African theft of motor vehicles experts who were asked to examine it. It was in particular examined by PW 26 Warrant Officer Michael Mbhuti Sigudla who introduced himself as an expert in the identification of stolen motor vehicles. He also stated his qualifications and experience in the identification of such motor vehicles. He testified that he examined the chassis frame described as D1. He in fact stated that he applied what has been described as the etching process which is a process that entails the application of the electro acid on the part where the chassis number had been ground-off. Often the ground-off number would be revealed and that number would

then be fed into the computer system owned by the South African Police Service where if it had been registered the motor vehicle's true owner would be revealed. The same thing would apply in the case of a motor vehicle whose particulars would have been fed into the system. All these would be revealed.

[124]. During the etching process of the chassis frame marked as D1 by the Police, Warrant Officer Michael Sigudla told the Court that certain numbers were revealed. Upon being fed on the South African Police Service Motor Vehicle Identification System, they were found to be those of a motor vehicle stolen at Melrose Arch, Norwood, Johannesburg on the 24th August 2010. The motor vehicle was found to have been reported to the Police as stolen by Alexander Cameroon. It was otherwise a Toyota Hilux double cab, whose particulars were those revealed in the paragraph that fully covers the charges faced by the accused person in this Count. In fact this number was said to have been found to be AHTEZ 39G907014602. The case number it was allocated after its being reported to the Police was found to have been 450/08/2010. PW26's report was handed into Court and marked Exhibit P7(a).

[125] When he gave his evidence in Court, Alexander Cameroon, PW 31 reiterated how his car was stolen whilst parked at the basement of the Fire

and Ice Hotel at Melrose Arch, Norwood, Johannesburg. He also identified as his car, a certain motor vehicle body namely a silver grey Toyota cab and Bakkie with a removed identity number on both the firewall on the door pillar. It was marked D8. He could identify it by means of a special rhino sticker he had pasted on the tail gate of the said car. He also used a custom made rollbar which he had requested be made for him in order to fit the type of canopy he wanted to fit the car with given that the normal one was too tall. These items he showed to the Court from the loading bin of the car referred to.

[126] Although it was put to him that there was nothing special with the sticker and that anyone could have sought to have the rollbar he claimed to have had custom-made if he needed to fit a canopy, no seriousness could be attached to such cross examination because no evidence was led by the defence to counter the evidence of PW 31 on his alleged ownership of item D8. Further still, the evidence of the complainant could not realistically be disputed because there was no one to do so when considering the defence adopted by the First accused to the effect that all the items recovered in 2010 September had nothing to say about them given that he did not know them. They had allegedly been put at his Ngwane Park homestead when he no longer stayed there following a quarrel he had with his wife according to the first accused. That the body

of a motor vehicle marked D8 belonged to the complainant in Count 6 stands unchallenged therefore.

[127] That item D8 was a body of a stolen motor vehicle is confirmed by the fact that this item had all the parts, where there was meant to be found the identity numbers of the motor vehicle, removed. This was the case according to the evidence of Warrant Officer Ankel Makhosonke Mncina, with the firewall of the motor vehicle where the job number and the VIN number meant to be there was removed. The same thing was also done with the identity sticker bearing the VIN number on the left hand side rear door pillar of the motor vehicle as it was removed as could be seen from the remnants of the sticker situated there. It is not hard therefore to understand why the doors were removed and why there had to be some welding together with the removal of the original numbers, on the firewall. This was to conceal the identity of the motor vehicle just as it was to provide an opportunity for creating a new identity for the motor vehicle, where a different pillar was to be installed just as was to be installed a different firewall with different numbers.

[128] From the evidence of PW31 Alexander Cameroon as taken together with that of PW 29 Inspector Ankel Makhosonke Mncina as well as that of

PW 26 Warrant Officer Michael Sigudla, it is clear that D1 and D8 were components of the same motor vehicle.

[129] In analyzing the defence professed by the accused persons, one will have to consider whether the said defence by the accused can be said to be reasonably possibly true because a fanciful one cannot meet the muster. I shall therefore revert to this aspect of the matter in due course for purposes of stating conclusions including making known my findings.It otherwise suffices for me to indicate that the defence by the first accused in the form of the explanation is not reasonably probably true for the reasons already spelt out above. The second accused's case is worsened by the fact that he chose not to give an explanation in a case that called on him to do so given the establishment of a prima facie case against him on the basis of a common purpose with the first accused.

Count. 7

[130] This Count relates to the offence of violating Section 8 of Theft of Motor Vehicles Act, 1991which is directed against Accused 1 only. It is about the alleged dealing in a stolen motor vehicle, namely Toyota Hilux LDV forming the basis of count five, shown in that count to have been stolen from Erald Rabe of Lachkraal Farm,PaulPietersberg. This is the car that

became known as the Malkerns vehicle following its having had to be kept at the Malkerns police station following a misunderstanding between the person who bought it and the one who had sold it.

[131] The First Accused person tells the Court that the particular motor vehicle belonged to him. In fact in his evidence in chief including his cross examination, he does not say anything about the car having any parts of the motor vehicle stolen from Lachkraal Farm, Paul Petersburg or any parts supplied to him by anyone to be consistent with the case put to some crown witnesses.He contents himself with saying it is his car which he raises for the first time when he explains himself.Such is called an after thought and it is no defence at all in law.

[132] Section 8 of the Theft of Motor Vehicles Act, 1991 provides as follows verbatim:-

" Any person who engages in stealing and selling of, or other fraudulent dealings in motor vehicles is guilty of an offence and liable on conviction to a fine not exceeding Thirty Thousand Emalangeni or imprisonment not exceeding fifteen years and forfeiture to the Crown of all assets to the dealing."

[133] From the evidence of experts on the identity of the vehicle found parked at the Malkerns Police, in particular PW 26 Warrant Officer Jele, it is

clear that that motor vehicle was the one stolen at Lachkraal Farm,Paul Pietersburg, except that it now had some added components such as the VIN number on the door pillar; the VIN and job numbers on the firewall as well as the VIN number on the chassis frame now belonging to the car purchased from the CTA garage, which I am convinced was meant to conceal its true identity

[134]It being not in dispute that a car proved to have been stolen was shown to have been sold by the first accused he becomes duty bound to explain himself by giving a reasonably probably true explanation of his having had to sell such a car.Other than for the accused to claim that the car was his in the face of overwhelming evidence it was stolen from Erald Rabe of PaulPietersberg, there was no legally acceptable explanation by the accused.

[135] The position of our law is clear that if an accused cannot explain himself,he then cannot avoid an adverse finding against him. I will have to resort to this aspect of the matter later- on to make the pronouncement I should with regards my conclusion and finding.

COUNT.8

[136] This count relates to the theft of a motor vehicle at Burnham Drive, La Lucia, Republic of South Africa on the 26th October 2012. The allegations are that the accused persons violated Section 3 (1) as read with Section 4 of the Theft of Motor Vehicles Act by stealing a motor vehicle at the said place whilst acting in furtherance of a common purpose. It was contended further that since the motor vehicle was brought to Eswatini,it was taken in law to have occurred in Swaziland given that theft was in law a continuing offence. The motor vehicle in question was said to belong to John Robinson and was worth R210 000.00 at the time. The full description of the motor vehicle concerned was a white Toyota Hilux; Registration Number X2M 186 GP; chassis number, AHTEX 3G960711064; engine No. 2TR 8156786.

[137] The alternative charge to Count 8 was the common law theft of the same motor vehicle as mentioned in the same count. Other than saying that this charge did not envisage the violation of any paticular statute in the commission of the offence, I do not need to repeat its particulars here.

[138]. Pw44, Peter Robinson gave evidence narrating how a Toyota Hilux double cab he had bought for his son John Robinson was stolen on the 26th October 2010.It was at the time parked at Burnham Drive, La Lucia, Durban Republic of South Africa.He handed into court documentation

comprising the full particulars of the motor vehicle concerned in an attempt to prove s ownership of it.These were from an insurance deregistration certificate,which was eventually marked as exhibit ZM 26-1.

[139] He testified further that when stolen, the motor vehivcle had in it a matric certificate that belonged to his son John Shane Robinson. A copy of the said certificate he had in his possession was handed into court and was markd as exhibit ZM26-2

[139] The motor vehicle was registered in the name of an entity called Precision Industrial Balancing. It was bought from that entity. Change of ownership had still not been done. According to PW47,Bhekani Shiba, a matric certificate was found lying on the floor among other items in the garage of the first accused's Nhlambeni homestead. The certificate was handed over to Colonel William Mokatse Pw27.Mokatse testified to having investigated the certificate in particular by feeding the ID number into the police national computer system. The system revealed that it belonged to a person who had reported theft of a motor vehicle with the certificate on board,which was stolen from Burnham drive,La lucia,Durban belonging to Peter Robinson.

[140] It is important for me to point out that the defence raised by the first accused was that of a general nature. This motor vehicle having been stolen on the 26thOctober2012,formed part of the items seized by the police between the 22ndSeptember2012 and the 24th January 2013 from the 1st accused's two homesteads of Nhlambeni and Ngwane Park. This motor vehicle was one of those the 1st accused said was handed over to him by James George Maluleka with whom he was going to conclude an agreement of sale of the items in question. Although he said he had paid some money to the said Maluleka, he maintained they had still not concluded any agreement with him and he referred to him as the owner of the items.

[141] The starting point is whether it can be said that a prima facie case has been made against the accused and taking it forward from there, whether it can be said that the explanation given by the first accused person did amount to a reasonable and probably true explanation. The other consideration will be whether it can be shown that the accused persons acted in furtherance of a common purpose and if in law it can be so shown, what the effect of the failure by the second accused to give an explanation that is reasonably and probably true is.

[142]I should point out that from my observation the explanation by the first accused is fanciful and not reasonably probably true.It is unclear why Maluleka would have delivered to him the certificate from a stolen motor vehicle as there is obviously no obvious value in that for him. The only reasonable inference is that the certificate got there on board the stolen motor vehicle belonging to Peter Robinson. Since the accused could not reasonably explain the presence of the certificate at his home then the only reasonable inference is that it was stolen together with the motor vehicle stolen whilst on Burnham Drive,La Lucia,Durban North. In that case an adverse inference has to be made against the first accused. Again, an adverse inference should be drawn against the second accused on account of his failure to give an explanation in circumstances that require him to give an explanation. I will have to revert later to pronounce my findings including the conclusions I have reached on this count.

COUNT 9

[142] This count relates to a motor vehicle stolen from Pongola, Republic of South Africa on the 11th May 2012. It belonged to one Thembinkosi Andreas Ndwandwe. It was stolen whilst parked at Haliya's yard. The particulars of the charge are that the accused persons acted in furtherance of a common purpose when they stole the motor vehicle fully described as a Toyota Hilux, blue in colour, registration number DXC 203

MP,chassis number AHT31UNE208003476,engine number 1RZ2633648.It was allegedly valued at E45000.00. This theft was said to be in violation of section 3(1) as read with section 4 of the Theft of motor vehicles Avt,1991.

[143] the alternative charge to that of violating section 3(1) as read with section 4 of the theft of M/V Act 1991, is the alleged commission of the same offence under the common law. It also contends that because of theft being a continuing offence, it was taken to have occurred within this court's jurisdiction.

[144] PW6 Detective Constable Simiso Mamba testified in court that during the police raid at the first accused Ngwane park homestead on the 22nd November 2012, he found a number plate of a motor vehicle bearing the number DXC 203 MP. This number plate was eventually handed over to PW26 Colonel William Khazamula Mokatse of the South African police who were assisting during the raids. Colonel William Mokatse for his part testified and said that as an expert in motor vehicle identification he examined the said number plate by inter alia finding it into the South African police national computer system. It revealed that it belonged to a motor vehicle that was stolen whilst parked at Hayilas yard in Pongola, belonging to one Thembinkosi Andreas Ndwandwe who testified as PW8.

Colonel Mokatse prepared a report marked as exhibit “P8E” by the court when it was handed in.

[145] According to Thembinkosi Ndwandwe he had left his said car parked at Hayilas yard in Pongola. When he discovered that the said motor vehicle, the Toyota Hilux fully described in the paragraph that discloses the charges, had been stolen, he reported this to the Pongola police. Of significance is that his motor vehicle bore the registration plate number as DXC 203 MP. He was later approached by the Swazi police who asked him about the number plate they were having that is if he knew it. Upon confirming that it belonged to his stolen car, he was informed about coming to this court to testify even though he was reluctant to do so out of anger. The number plate was otherwise marked as “1B4” by the police and as exhibit “1” by the court.

[146] Although it was put to Colonel W. kazamula Mokatsi thet he could not dispute the possibility that the registration plate concerned was actually found on the road and used as a fan, no such defence was pursued finally. By the first accused in his testimony. It in fact fell under the same general broad defence put forward by the first accused namely that it was part of the items that were allegedly delivered at the first accused’s homestead by one James George

Maluleka pending his concluding a deal with the said Mr Maluleka whether or not they were being sold to him.

[147] The question is whether a prima facie case has been made against the accused persons who are said to have acted in furtherance of a common purpose. If that case has been made, the next question is whether they have given a reasonable and probably true explanation. It is important to clarify that the second accused has given no explanation at all, while the first accused has given an explanation as recorded above. That is an explanation to the effect that the registration plate in question was one of the items delivered at the first accused's homestead by on James George Maluleka. I will have to revert to this defence later on in this judgement given that it is of a general nature. It suffices for one to clarify now that the explanation by the first accused does not amount to one that is reasonably probably true. Firstly, the defence put by the accused in chief differs from that put to witnesses. Secondly it would have been of no value for the said Maluleka to deliver to the accused a number plate of a stolen car. As for the second accused, his failure to explain means an adverse inference has to be drawn against him because of his being connected to the offence through his having allegedly acted in furtherance of a common purpose which he could not dispute on a sound basis as he never gave an explanation.

[148] I will, from this point not deal with the charges sequentially but will, for the sake of convenience and continuity deal firstly with all the theft of motor vehicle counts, be they in terms of the common law or in terms of the alleged violations of section 3(1) as read with section 4 of the theft of motor vehicle Act of 1991.I will thereafter turn to the other charges in due course; that is those charges that deal with the alleged violation of section 6(1) as read with section 6(2) as well as that of section 7(2) as read with section 7 (3) of the Act.

COUNT 18

[148] This count relates to the alleged theft of a motor vehicle belonging to David Sean Bransma. This motor vehicle was alleged to have been stolen at the La Lucia Mall parking lot, William Campbell drive, Durban North Republic of South Africa on the 5th November 2012.The accused persons namely the first and second accused persons, are alleged to have acted in furtherance of a common purpose. The particulars of the said motor vehicle were stated as follows in the charge sheet; Toyota Hilux double cab, blue in colour, registration number ND261629, chassis number ANTFZ 296409001470, engine number IKD 7040746. The main charge in this count is alleged to have been in violation of section 3(1) as read with section 4 of the theft of motor vehicles Act of 1991.Owing to theft

being a continuing offence, it is alleged that same is taken to have occurred in this country's jurisdiction.

[149] The alternative to the charges mentioned in this count is theft at common law levelled against both accused who are contended to have acted in a furtherance of a comm purpose. Other than that the alternative count is founded on the common law as opposed to the main count which is founded on the alleged violation of statute. Owing to the similarity in all the other particulars I do not need to mention the particulars of the alternative count or charges fully herein.

[150] According to PW39, Hammel Naidoo was asked by the investigating officer in the matter, one Inspector Bhekani Shiba, to examine certain motor vehicles and some motor vehicle components. Otherwise Hammel Naidoo introduced himself as a vehicle specification technician which entails expertise in the identification of Toyota motor vehicles. This job he had done for over 24 years as a Toyota specialist and although he was now a consultant to Toyota he was still doing the same job.

[151] Among the items Inspector Shiba asked him to examine was an item marked 1A3.It resembles a Toyota Hilux LDV with only a cab removed. Upon inspecting the portion where the chassis or vin number is normally stamped in Toyota Hilux vehicles, which is the front right side of the

chassis frame, he said he observed that the chassis number there appearing did not appear to be original. It was clear to him that the initial vin number had been cut and removed with the current one having been rewelded on that part of the chassis frame as a replacement so as to come up with a new chassis number. This he said was not allowed as no one had the right to replace an original vin number with a different one. He clarified that one who did that was committing an offence.it was clear to him therefore that the reflected Vin number was not an appropriate one. A report prepared by Mr Naidoo was marked as exhibit ZM8 .

[152] In an endeavor to come up with the true identity of item 1A3, he checked its bakkie or loading bin's edge because he knew that certain brands of Toyota Hilux bakkies, had a secret vin label hidden there. He indeed found the vin label there which upon examination he found it was for a motor vehicle which had been stolen from the La Lucia parking mall Lot, William Campbell Drive, Durban North Republic of South Africa. In fact, according to PW39, Du Preeze was the one to have ascertained who the true owner of item 1A3 is. The pasted vin number read as follows; AHTEZ39G907011893.The vin number found concealed at the edge of the loading bin read AHTFZ29G409001470.

[153] Captain Hercules Albertus Du Preez informed the court that he was employed by the South African police services and was the head of the

police unit situated inside the Toyota plant in Durban. His job entailed the identification of stolen Toyota motor vehicles. He had the right to log into the Toyota system to determine the authenticity of any Toyota motor vehicle just as he had the right to enter into the police national system to detrmine stolen motor vehicles.

[154] He said that he was given the vin number AHTFZ29G409001470 by Hamel Naidoo to examine its authenticity and also to determine if it was or was not from a stolen motor vehicle. When he put this number into the SAPS computer circulation system, he discovered that it was registered under the registration number ND 261269. This motor vehicle was actually reported stolen at the Durban North police station under case number 60/11/2012. It was otherwise a Toyota Hilux double cab,2006 model. This motor vehicle had been reported stolen from David Sean Bransma.

[155] Hamel Naidoo PW39, further examined item IA7. According to Inspector Shiba PW47, this item was seized from the first accused's Nhlambeni homestead on the 22nd November 2012. Item IA3 and IA7 shared the same colour which prima facie suggested a relationship when considering that one was the missing part in the other to come up with a complete body of a car. The suggestions of a relationship between the two were

bolstered in that whereas item 1A3 comprised a chassis frame with everything on it including the chassis frame with all attached components such as an engine, wheels and the loading bin; item IA7 was a double cab of a motor vehicle, the only thing missing in item IA3. The same chassis number rewelded onto item IA3 was visibly rewelded onto a door pillar of item IA7.Similary a job number of the car with the same vin numbers rewelded onto both IA3 and IA7 was also rewelded onto item IA7.This was obviously a sign that item IA7 was the cab meant to be fitted onto item IA3 and that the true identity of both items IA3 and IA7 was concealed or changed. Colonel Ankel Makhosonke Mncina had examined item 1A7 and confirmed that the part of the firewall with the job number on it was rewelded onto 1A7 after the original one from there had obviously been cut off. It was also found by Ankel Makhozonke Mncina PW29 that item IA7 had not been involved in any accident to have required the repairs suggested by fitting that item with the vin and job numbers fitted on item IA7.This confirmed that item IA7 was meant to be fitted onto 1A3 so as to make it look like a completely different motor vehicle from the original one.

[156] In his defence, the first accused sought to suggest that the components of IA3 and IA7 were parts of the motor vehicle he had purchased from one George Velibanti Machawe Gamedze of Siphofaneni, PW21, as an

accident damaged motor vehicle. He also in the same breadth suggested that these items were handed over to him by George James Maluleka who was closing his own motor vehicle body shop business in Doornfontein, Johannesburg.

[157] The prospects of the success of the defence on the items being those of the suggested motor vehicle purchased from PW21, George Velibanti Gamedze, are dashed by the fact that it has been found by at least two experts that the vin number on the chassis frame, which could be that of the motor vehicle bought from George Velibanti Gamedze, was rewelded onto the chassis frame whose original number had been cut off. The question here is why was the original portion of the frame bearing the original chassis number removed from the chassis frame to enable the rewelding of that belonging to PW 21, Velibanti Gamedze?

[158] The second question is why would Velibanti Gamedze's car bear a chassis or VIN number of a motor vehicle stolen less than a month earlier in La Lucia, Durban North, Republic of South Africa. This is because the motor vehicle belonging to David Bransma had just been stolen if one considers the date of its theft proved to be the 5th November 2012 (the chassis frame bearing the vin number of PW 21's motor vehicle was found on the 22nd November 2012.

[159] Thirdly; why did the cab of Gamedze's car have to be rewelded around those parts that bear the identity numbers such as the door pillar and the firewall, now that the court has been shown that the rewelded door pillar bears the chassis or vin number sticker whilst the firewall bears the same sticker and a job number. The only conclusion is that the numbers of Gamedze's car were being super imposed onto the motor vehicle of David Bransma. It should also be borne in mind that Mr. Gamedze's car had been damaged on its cab which is not the one with the identity numbers rewelded thereon as that one had clearly not been panel beaten which would have been a natural repair. It is clear therefore that what was being done here was an exercise in terms of which the identity of David Bransma's motor vehicle was being concealed.

[160] The other wing of the defence to the effect that those particular items 1A3 and 1A7 were items brought by George Maluleka to accused 1's is rendered palpably false by the circumstances herein. Firstly it is a contradiction in terms that items brought and handed over by George Maluleka, a South African, would be fitted with items of a car or scrap car bought from George Gamedze without an explanation how that had come about. For the first accused to pursue this defence, it is a sign that the whole defence of certain items having been brought by Maluleka as raised by the accused person is and or fictitious. This is made even clearer

by the fact that the explanation of any items having been brought to the first accused's homesteads by Mr. Maluleka was palpably false.

[161] It was also contended on behalf of the accused persons that the complainant had not seen who stole his motor vehicle and further that there was nothing mentioned which linked accused 2 with the alleged theft. The reality is that a motor vehicle that marched the particulars of the stolen one were found at the first accused's homestead. The second accused was shown to be one of the employees of the first accused who used to work on that accused's cars. Furthermore, these two accused persons were charged with acting in furtherance of a common purpose. This means that the accused persons were required to each give an explanation how they were found to be in possession of the stolen parts belonging to a motor vehicle, including why the parts with the rewelded vin numbers were so welded if the car in their possession was authentic.

[162] Like I have observed the explanation by the first accused looks palpably false whilst there was none at all by the second accused. The position of the law is settled that an explanation that meets the muster is that which is reasonably probably true and also that the failure to give an explanation would be tolerated only in those instances where no prima facie case had been made so as not to create a duty to give an explanation that is reasonably probably true. In the circumstances of this matter it can not in my view be said that a reasonable and probably true explanation had been

given in the case of the first accused nor can it be said that no duty had arisen for the first (second) accused to give a reasonably true explanation. I shall revert to the conclusion to reach later on in this judgement.

COUNT 33

[163] This count relates to the theft of a motor vehicle alleged to have occurred at Piet Retief, Republic of South Africa, on the 30th August 2011. Owing to theft in law being taken to be a continuing offence the said theft is taken to have occurred in Swaziland. It does not matter much whether the said theft was at common law or it was in violation of a statutory provision. The main count herein was in violation of section 3 (1) as read with section 4 of the Theft of Motor Vehicles Act, 1991. The particulars of the motor vehicle stolen are that it a Toyota Hilux double cab, white in colour, registration NO. NCW 12769, chassis NO. AHT31LNE508023684, engine NO. 245550947. It was otherwise alleged to have been stolen from Frederick Christian Van Vuuren on the 30th August 2011.

[164] The alternative count differs from the main one in that it contends the basis of the charges to be on the common law as opposed to the main charge/count which contends the basis to be the Theft of Motor Vehicles Act. Otherwise all the other particulars are similar between the two counts and therefore do not need to be restated herein.

[165] According to PW 40, Frederick C Van Vuuren, a motor vehicle he was driving and keeping in his possession was stolen on the 30th August 2011 whilst parked at his home in Piet Retief. This motor vehicle belonged to TWK Transport Services, which was an employer of Frerderick C. Van Vuuren. Following the theft of the said motor vehicle, he reported to the Piet Retief police. He was only to be called by the Swaziland police some years later who informed him that the car whose theft had been reported by him had been found in Eswatini. The motor vehicle in question was otherwise a White Toyota Hilux LDV, 2.4 Diesel with registration numbers NCW 12769. He otherwise could not recall the engine number and chassis number because he had left the company that owned it which was the keeper of the company documents. Otherwise the insurance company had settled the claim.

[166] According to PW 46, Kobus Stapelberg, he was the corporate manager of a company called TWK Transport (PTY) LTD. He was the risk placement manager of the company together with its insurance affairs. He was aware of a company vehicle stolen in 2011 whilst allocated to its employee Frederick C. Van Vuuren. The motor vehicle was fully settled by the insurance company which settled it for R 68,250-00. This witness had the registration documents of the said motor vehicle which he handed over into court. These particulars were that the motor vehicle was a Toyota Hilux LDV, 2005 model, registration number NCW 12769, v in

number AHT31LNE508023684, engine number 2L5550947. It was registered in the name of TWK Landbour B Perk, Kokstad. The registration certificate of the car was marked as exhibit “ZM 28”.

[167] 4072 Detective Inspector Bhekani Shiba, told the court that during the police raids at the homesteads of the first accused situated at Nhlambeni and Ngwane Park, there was seized among the items there seized, on the 24th January 2013 a certain chassis frame which was marked item 4B2 (exhibit 23), by the police. Given that the chassis frame had no vin number as it had been ground off, he engaged experts from the South African Police Services to identify it, that is to establish from which vehicle it came from and the possible reason for it having had to be ground off.

[168] To determine these, the chassis frame concerned was given to Detective Constable Vusie Nkosi, PW25, for examination purposes. After disclosing his qualifications and experience all of which entitle the witness to refer tom himself as an expert, Mr. Nkosi told this court that upon arrival at the Lobamba Police security yard in the company of his colleagues, he was allocated a certain chassis frame to examine. The vin number had been ground off the chassis frame.

[169] H e said he applied the so called etching process on the part where the vin number was meant to be. A certain number was revealed as a result. It reads AHT51LNE508028684. This number he recorded down and

handed over to the investigating officer, Bhekani Shiba. Inspector Shiba, he says, asked him to check that number from the SAPS…….. system. He did that but found that the number could not be found on the system. The report recording this was marked exhibit “p 5” and handed into court. This witness revealed that it was not allowed that any chassis frame would not have a chassis number on it. In fact whenever this situation was found it was clear there had been some tempering with the vin numbers.

[170] Apparently owing to the result the said officer Vusie Nkosi had come up with, the investigating officer, Inspector Shiba was forced to engage the services of Harnel Naidoo who gave his testimony as PW 39. Although a motor vehicle identification expert in his own right, Mr. Naidoo was different in that he said he had direct access to the Toyota system. He had previously, and for a period of 24 years, worked at the Toyota Plant as a vehicle specification technician. At present he was contracted to Toyota doing the same job.

[171] He was given the item 4B2, a black chassis frame to examine from the Toyota system. This he was given by Inspector Bhekani Shiba. As he was given that chassis frame to examine, he says, it was disclosed to him that it had already been subjected to the etching process where a certain number, namely AHT51LNE508028684 was revealed. The problem with this number, he says he was told was that it could not be found on the

SAPS enactes System used by police to verify the identity of motor vehicles, particularly those stolen. He said as this number was given to him, he noted two mistakes with it which he could tell owing to his experience and close proximity working with Toyota vehicles production.

[172] The first error in the number was in the first five digits of the number particularly the last two of those first five digits. In the range of vehicles produced with the digits LNE, he knew there was no 51 in the last two digits of the first five. In that range those digits would be 31 after the first three alphabets. Further, as concerns the last five digits of the chassi number picked up by the etching process, he knew that those numbers could not exceed 25 000on LNE range. This was because in tha range of cars, Toyota had not produced beyond 25 000 which means that if it was not 25 000 it would not be anything beyond 24 999 for those last five digits.

[173] Considering all the possibilities, he considered that assuming all the numbers are correct, the only number not correct would be that on the fourth digit from the last five which means that the 8 there. A mistake could possibly be made with one number and indeed that mistake could be having mistaken the “8” for a “3” or a “0”. He therefore produced the numbers AHT31LNE50802**3**684 and the number AHT31LNE50802**0**684.

[174] W hen these two numbers were fed into the SAPS enactes system, it was found that the number AHT31LNE50802**3**684 was that of a motor

vehicle belonging to TWK Transport (PTY) LTD, reported stolen from Piet Retief with its full particulars mentioned in the evidence of Kobus Stapelberg. The other number was found never to have been reported on the system. It was then found that the one revealed by the etching process was the TWK vehicle stolen from Frederick C. Van Vuuren on the 30th August 2011.he prepared a report in this regard marked "ZM 22".

[175] In their defence he accused persons did not suggest any defence under cross examination and also did not raise any specific defence with regards this chassis frame and the findings surrounding it. In fact in thi case of accused 1, there was raised only a general defence namely that was, like all the other items found at the said homesteads during those particular raids, they had been delivered there by James George Maluleka who the police were allegedly made aware of. I note that the second accused has not placed any defence at all because no explanation at all was given by him despite that he had appreciated that a prima facie case had been made against him. I agree that the question as against the first accused is whether or not it can be said that a reasonable and possibly true defence has been made by him. I shall therefore have to revert to this aspect of the matter in due course.

The counts relating to the alleged violations of sections 6 as read with sections 6 (2), 7 (2) and (3) alternatively sections 7 (2) and (4) 0f the Theft of Motor Vehicles Act of 1991.

[176] Sections 6 (1) and 6 (2) of the Theft of Motor Vehicles Act reads as follows verbatim:

> *"6 (1). Any motor vehicle dealer, or manager of a garage or person who carries on the business of repairing or servicing motor vehicles, who discovers or has reasonable grounds to suspect that the registration number, engine or chassis number of, or other identification marks on, the motor vehicle delivered to him for sale, repair or service have been altered, disfigured, defaced, obliterated or tempered with in any manner, shall forthwith report the matter to the nearest police station, and the police shall unless a satisfactory explanation is obtained, without warrant seize that motor vehicle."*
>
> *"6 (2). Any motor vehicle dealer or manager of a garage or person who carries on the business of repairing or servicing motor vehicles who contravenes sub section (1) is guilty of an offence and liable on conviction to a fine not exceeding five thousand Emalangeni or to imprisonment not exceeding two years or both".*

[177] On the other hand section 7 (2) and 7 (3) of the Theft of Motor Vehicles Act 1991, reads as follows verbatim:

> *"7 (2). Any person who purchases or receives a motor vehicle commits an offence if at the time of purchasing or receiving the motor vehicle he does not demand from the seller or*

transferor a document effecting the purchasing or receiving of the motor vehicle

7 (3). Any person who contravenes subsection (1) or (2) shall be liable on conviction to a fine not exceeding five thousand Emalangeni or imprisonment not exceeding two years".

[178] Given the relationship between the counts relating to the receipt of certain specific items without demanding documents confirming such sales and those of failing to report to the police the receipt of items whose identity marks, be it registration numbers, chassis numbers or engine numbers have been removed or tempered with or defaced in any manner, contrary to the relevant sections, it was decided those counts relating to the same be dealt with jointly. It is in this sense that two counts relating to the same item will be dealt with jointly herein below.

COUNT 10 AND 39

[179] These counts relate to the failure by the accused persons to report to the police the receipt of an engine block marked as item 1B1 that had its engine numbers remove or tempered with as well as the alleged failure to demand the documents effecting the purchase or transfer of such an item to the accused persons. These failures were contended to be in contravention of sections 6 (1) as read with section 6 (2) and section 7 (2) read with section 7 (4) of the Theft of Motor Vehicles Act of 1991 respectively.

[180] With regards count 10, the allegations against the accused persons are that they, whilst acting in furtherance of a common purpose, failed to report to the police an engine block with altered, defaced, removed or tempered with engine numbers. The evidence led by Inspector Bhekani Shiba, indicated that during the police raid at the first accused person's Ngwane Park homestead on the 23rd November 2012 the police seized item 1B1 after it was discovered to have obliterated, defaced, removed or tempered with engine numbers. This state of affairs was observed by the court during an inspection in loco.

[181] Colonel William Khazamula Mokatse, PW 27, confirmed that after he had examined the same engine block through the use of the etching process, he discovered that its engine numbers or vin numbers had indeed been removed, obliterated, defaced or tempered with. This was done in a manner contrary to section 6 (1) read with 6 (2) in so far as this anomaly was not reported to the police. The fact that there was no declaration demanded effecting the purchase or transfer of the engine block to the accused person meant that there was a violation of section 7 (2) as read with section 7 (3) of the Theft Of Motor Vehicles Act of 1991. The report handed into court by PW 27 as part of his testimony was marked exhibit "P8F".

[182] The other expert who examined the same engine block was Hamel Naidoo who had already introduced himself as an expert employed by the Toyota Plant in Durban who had qualifications in the identification of Toyota motor vehicles. He confirmed that the identity marks of the engine block comprising the engine numbers had been obliterated or tempered with. His report handed into court was marked exhibit “ZM15”. Otherwise item 1B1 was given by the court exhibit number “22A”.

[183] Notwithstanding the allegations about the accused having failed to report the engine block in question to the police, the accused person failed to give an explanation which I can possibly describe as being reasonably probably true as would be required in law with regards the failure to report item 1B1 to the police as well as their failure to demand a declaration effecting the purchase of the item. The only conclusion to draw is that the item was not a legitimate one.

[184] The defence suggested by the first accused was the general one he had raised with regards the alleged stolen motor vehicles, which was that this block was one of the items delivered at his homesteads by one James George Maluleka with whom a deal for their purchase had not yet been finalized although he claimed to have paid about E 9 000 as a means of

defraying the said Mr. Maluleka's transportation costs. The obvious problem with this defence is that whilst there was no document from the border confirming that such an item had legitimately come into Swaziland, the first accused could himself not say when such items were delivered by the said Mr. Maluleka. Another problem with this defence was the one shown in the earlier paragraphs to the effect that part of the items allegedly delivered by Mr. Maluleka from his allegedly closing spares shop in Doornfontein, Johannesburg were shown as having been rewelded with some chassis numbers on the chassis frame and the door pillar, of some salvaged vehicles purchased in Swaziland by the first accused which makes his defence fanciful and not bona fide. I once again reject this defence by the accused person.

[185] I notice that notwithstanding allegations of both accused persons having acted in furtherance of a common purpose, the second accused chose to give no explanation at all. I am convinced that in the circumstances of the matter he was obliged to do so and that by his failure to so explain he cannot avoid the drawing of an adverse inference against him.

[186] I will revert to the conclusion I have to make and the finding I have to reach later on in this judgement which would have to embrace the other related counts in this matter.

COUNTS 11 AND 40

[187] These counts relate to a motor vehicle engine described only as item 1B5. According to the evidence of Inspector Bhekani Shiba, this engine was seized from the first accused's Ngwane Park homestead on the 22nd November 2012 during the police raid. It was seized because its engine numbers had obviously been tempered with. Hamel Naidoo, PW 39, confirmed that these numbers (engine) had been tempered with and this had resulted in it being difficult if not impossible to ascertain its original numbers. The report prepared by Hamel Naidoo was handed into court and was marked exhibit "ZM15". This item was itself marked exhibit "22C".

[188] As was the case with counts 10 and 39, the foundations of the current counts were respectively the failure by the accused persons to report to the police their having received the engine in question together with their failure to demand a declaration effecting their purchase of same. These were of course the alleged contraventions of sections 6 (1) as read with section 6 (2) as well as those of section 7 (2) as read with section 7 (3) of the Theft Of Motor Vehicles Act of 1991.

[189] The defence raised by the first accused on these counts is similar to that raised in the foregoing paragraph. My analysis and conclusion of these counts is similar to that above and I have to avoid repetition by referring to the foregoing one. It suffices to say that I have to reject this defence herein as I did above on the same basis that it was not a reasonably probably true explanation as required in law. It was for the reasons set out above fanciful and not bona fide.

[190] I shall revert to these counts later on in this judgement as I record my conclusion and decision therein.

COUNTS 12 AND 41

[191] These counts relate to a chassis frame seized from the first accused's Ngwane Park homestead on the 25th September 2010. It was after being seized marked item "D4" by the police. It was testified to in this regard by PW10 Justice Mziyako. Its chassis numbers were ground off from the frame. This was such that although examinations on it were carried out by experts, the original numbers could not be ascertained. The expert examinations of the chassis frame concerned were carried out by Hamel Naidoo PW39 and Warrant Officer Michael Mbuti Sigudla PW26.The report prepared by Michael Mbuti Sigudla was handed into court and was marked exhibit 'P7B' whilst the one by Hamel Naidoo, PW39 was marked exhibit 'ZM20'.

[192] The foundations of the charges in these counts are as set out in the foregoing counts which are the contraventions of sections 6(1) as read with section 6(2) and those of section 7(2) as read with section 7(3) of the Theft Of Motor Vehicles Act of 1991 respectively. Ofcourse these are about the alleged failure to report the chassis frame with obliterated or removed or tempered chassis numbers to the police just as they are about the failure to demand a declaration effecting the purchase or transfer of the chassis frame to the accused persons.

[193] There is no denial by the accused persons from the facts, firstly that the chassis frame had its chassis numbers removed or obliterated and that this was not reported to the police. There is also no denial that a declaration effecting the purchase or transfer of the item to the accused had not been demanded.

[194] The first accused's defense was the same one as that stated in some of the above stated paragraphs which arose under similar circumstances. This defence was to the effect that the first accused knew nothing about this chassis frame and the similar ones because he did not stay at his Ngwane Park homestead at the time following a misunderstanding he had allegedly had with his wife which had forced him to leave that place and stay at his Nhlambeni homestead. This defence being similar to those in similar circumstances calls for it to be treated similarly with those others.

This is to say I have to reject it herein for similar reasons as those others like it. This is because it does not amount to a reasonable and possibly true explanation.

[195] I note again that the second accused chose not to testify in his defence notwithstanding that he was charged with having acted in furtherance of a common purpose with the first accused. It had also not been in doubt that a prima facie case had been made against him to the extent there was not even an attempt for an application to have him released at the close of the crown's case. Ofcourse the effect of that is settled in law, it being that he can not avoid the drawing of an adverse inference against him.

[196] I will therefore have to revert to this aspect of the matter later on in this judgement where I will record my conclusion and verdict.

COUNTS 13 AND 42

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[197] These counts relate to the chassis frame seized from the first accused's Ngwane Park homestead on the 25th September 2010. It was marked item D5 by the police. This was testified to by PW 10, Justice Mziyako. Its chassis number on the chassis frame was ground off. According to the experts who examined it, its true identity could not be ascertained

because the grinding off of the chassis or vin number had gone in deeply. This examination was carried out by PW 26, Michael Mbhuti Sgudla and PW 39, Hamel Naidoo. They confirmed these findings in their individual reports which they handed into court. That of Mr. Sgudla was marked exhibit “P7C” whilst that handed into court by Mr. Naidoo was marked exhibit “ZM20”. The item itself, D5, was upon being handed into court marked exhibit “9”.

[197] Given that the contention in these counts is again the alleged contravention of section 6 (2) as read with section 6 (3) on the one hand and that of section 7 (2) as read with section 7 (3) of the Theft of Motor Vehicles Act on the other, together with the contention that there was retrospectively a failure to report to the police the item whose chassis numbers had been removed on the one hand and the failure to demand a declaration effecting the purchase of the said item on the other hand, I find it not necessary to repeat word for word what was said in the foregoing paragraphs in this regard.

[198] I only note that there was no contention by the defence that this item (D5) was ever reported to the police nor that any declaration effecting the purchase of it had been demanded. The defence raised on this one was the general one raised with regards to all the items seized during the 25th

September 2010 police raid at the first accused's Ngwane Park homestead. This defence was that the items were not known to the first accused who was not aware they were there because of a quarrel he claimed to have had with his wife who stayed there. This defence had a number of flaws in it. Firstly, whereas the items seized in September 2010 at the first accused person's Ngwane Park homestead had initially been attributed to the first accused's wife and her cousin Botsotso Jele, this had not been maintained when Botsotso was called to testify as a witness. Instead the items were now attributed to the first accused's wife and one Jerry Dlamini who was now reported dead. Secondly, whereas the accused sought to suggest that he did not know anything about repairs being carried out in that homestead of his, it was clear from the evidence of Botsotso Jele that such was already happening at Ngwane Park as he was said to have stood next to a scrap vehicle he had previously purchased from the CTA which bore a lot number during the police raid of that day. This confirms that as at that time body repair business was already going on at first accused's Ngwane Park homestead such that it is untrue for the first accused to claim that no such business or activity was already going on at this particular homestead, as at the time he allegedly left after allegedly quarreling with his wife.

[199] As indicated when I dealt with the theft of motor vehicle counts involving the items seized during the 2010 police raid, I am convinced that the accused's defence is not reasonably probably true and that I should reject it for similar reasons as before. I shall otherwise revert to these counts later on in my judgement as I record the conclusions I have to draw including the findings I have to make. It suffices at this point for me to acknowledge that once again in this count, the second accused person has chosen not to give any explanation as stated in the foregoing paragraph. I note as well that in this manner he cannot possibly escape an adverse inference being drawn against him.

COUNTS 14 AND 43

[200] These counts relate to a chassis frame seized by the police from the first accused's Ngwane Park homestead. It had no chassis numbers; they having been ground off. It was seized on the 25th September 2010. This aspect of the evidence was given by Justice Mziyako, PW 10. This particular chassis frame was marked D3 by the police. The experts who examined it were Detective Constable Mboni Sambo, PW 28 and Hamel Naidoo, PW 39. They both confirmed that the original numbers of the chassis frame could not be ascertained after their examination of same. The report by Detective Constable Sambo was handed into court and was

marked exhibit “P8M”. The one by Hamel Naidoo was marked “ZM20”. Item D3 was itself marked exhibit “5”.

[201] The contention against the accused persons is that they violated section 6(1) as read with section 6(2) of the Theft Of Motor Vehicles Act of 1991 by failing to report their having received the chassis frame with chassis numbers that had been removed, obliterated or tempered with contrary to the sections in question. They are also accused of having contravened section 7(2) as read with section 7(3) of the Theft Of Motor Vehicles Act by failing to demand a declaration effecting their purchase of the chassis frame in question.

[202] It is not in dispute that the accused persons had not reported the chassis frame without chassis numbers to the police as required by the Act and that they had also not demanded a declaration effecting their purchase of same from its seller contrary to the provisions of the Act.

[203] Whereas the first accused sought to give the explanation he had given with regards to the other items seized from his Ngwane Park homestead on the same date, the 25th September 2010, the second accused person chose to give no explanation at all. Whilst I do not need to repeat my comments with regards the purported explanation by the first accused, it

suffices for me to say I have rejected same on the grounds that it does not amount to a reasonably probably true explanation envisaged by the law in such circumstances. As against the second accused, I have concluded that he can not possibly escape an adverse conclusion being drawn against him on the basis of failure to explain himself in a situation where a prima facie case had been made against him.

[204] I will therefore have to revert to these counts later on in this judgement as I record the conclusion I reach taken together with the findings I make.

COUNTS 15 AND 44

[205] These counts relate to a chassis frame seized from the first accused's Ngwane Park homestead on the 25th September 2010 during the police raid there. The chassis numbers were ground off from this chassis frame. It was marked as item D6 by the police. This was testified to by PW10, Justice Mziyako. This chassis frame was handed over to experts in Motor Vehicle Identification. These were Warrant Officer Ankel Makhosonke Mncina PW29 and Hamel Naidoo PW39. They both confirmed that the chassis numbers on this chassis frame had been ground off in such a manner that it was impossible to establish its true identity. Warrant Officer Mncina's Report was marked exhibit "P9B"

whilst that of Hamel Naidoo was marked exhibit “ZM20”. Item D6 itself was marked exhibit “6”.

[206] The contention was that the accused had contravened section 6(1) as read with section 6(2) of the Theft Of Motor Vehicles Act by failing to report to the police their being in receipt of a chassis frame with removed, obliterated or tempered with chassis numbers contrary to the sections in question. The other contention is that the accused violated section 7(2) as read with section 7(3) of the Theft Of Motor Vehicles Act of 1991 by failing to demand a declaration effecting their purchase of the chassis frame in question from its seller or transferor.

[207] As in the other related counts, there is no dispute that the accused persons had not reported their receipt of the chassis frame in question to the police. It is also not in dispute that they had also not demanded a declaration effecting their purchase of the chassis frame in question.

[208] Even in these counts, the first accused gave the same explanation he had given in the other related ones which were all seized on the 25th September 2008. As I do not need to repeat that explanation which applies equally herein, I note that I also cannot accept that defence herein for the same reason that it does not amount to a reasonably probably true explanation for the same grounds I gave in the other related counts. I again acknowledge that the second accused chose

not to give an explanation not withstanding his having been alive that a prima facie case had been made against him and it therefore follows that an adverse conclusion has to be drawn against him.

[209] Again I shall revert to these counts later on in this judgement to record the conclusion I have reached together with my findings thereon.

COUNTS 16 AND 45

[210] These counts were abandoned by the prosecution. In so far as this happened after the accused had already pleaded, its effect was an acquittal in law which I am obliged to pronounce with regards these counts.

COUNTS 17 AND 46

[211] These counts relate to a cab of a Toyota Hilux seized on the 22nd November 2012 from the first accused's Nhlambeni homestead. It was given a police identity mark as 1A2. To establish its identity, it was given to two experts to examine it. This is testified to by Inspector Bhekani Shiba PW47. The two experts who examined item 1A2 were Warrant Officers, Ankel Makhosonkhe Mncina PW29 and Hamel Naidoo PW39. It had been apparent that its identity features particularly its chassis number located on both the firewall and the left-hand side door pillar together with its job number also located on the firewall

had been removed or ground off. I have already mentioned that Warrant Officer Mncina informed the court of his intensive training in the identification of motor vehicles by the South African Police. This training was accompanied by experience informed by a lengthy period of service. On the other hand, Hamel Naidoo informed the court of his intensive training on the identity of Toyota motor vehicles also informed by a period exceeding at least 24 years of service whilst working at the Toyota Plant in Durban, Republic of South Africa.

[212] Warrant Officer Mncina and Hamel Naidoo concluded at different intervals that the identity of item 1A2 had been permanently concealed as a result of the removal of the said vin tags and job numbers. They to that extent prepared reports which confirmed this conclusion. The report by Warrant Officer Mncina PW29 was marked exhibit “P9B” whilst that by Hamel Naidoo PW39 was marked exhibit “ZM7”. Item 1A2 was itself marked exhibit “28” by the court.

[213] The basis for the charges against both accused persons as regards the alleged contravention of section 6(1) as read with section 6(2) of the Theft Of Motor Vehicles Act 1991 was effectively that they had failed to report the Toyota Hilux cab whose identity numbers had been removed, obliterated or tempered with contrary to the said sections. As regards the alleged contravention of section 7(2) as read with section 7(3), the allegation was effectively that they

had failed to demand a declaration effecting the purchase or transfer of the item in question from its seller to them.

[214] It is not in dispute that the accused had not reported their receipt of item 1A2 whose identity marks had been removed contrary to the provisions of the Act. Further still, it is not in dispute that the accused had not demanded a declaration effecting their purchase of the item in question.

[215] According to the first accused, all these were not done because this item was one of those delivered at his aforesaid homestead by James George Maluleka because he was closing his spares body shop situated in Doornfontein, Johannesburg and was therefore still in the process of negotiating a deal with the first accused. This defence has been raised elsewhere in similar counts and has been rejected by this court on the basis that it does not amount to a reasonably probably true explanation required of an accused in such circumstances in law. For instance, despite that the accused had a difficulty saying when these items were delivered to him, he could not say what value lied in items like the cab in question which were without identity numbers for them to have been delivered at his place, particularly where he knew or would have known that possessing such was a crime. For that reason, I found the explanation he tried to give to be fanciful and to lack in bona fides hence my rejecting it.

[216] The second accused on the other hand chose not to give evidence at all. This meant that this court had to draw an adverse inference against him particularly because he was himself aware that he was now obliged to give an explanation that would be reasonably probably true taking into account that he had been alive to the fact that there was a prima facie case against him arising from the fact that he had not moved an application for discharge at the close of the crown's case.

[217] I shall revert to these counts later on in this judgement for purposes of pronouncing my conclusion together with my findings on them.

COUNTS 19 AND 49

[218] These counts relate to a chassis frame seized from the first accused's Nhlambeni homestead on the 22nd November 2012. This chassis frame was marked item 1A6 by the police. This was testified to by Inspector Bhekani Shiba PW47. This particular chassis frame was given to experts in motor vehicle identification to examine it. These were PW34 Chumani Lenox Nkowane and PW39 Hamel Naidoo. Like Hamel Naidoo who I have referred to in various paragraphs of this judgement above, Lenox Nkowane testified of his qualifications in Motor Vehicle Identification which he acquired during his training as a police officer which included further other courses in that regard.

[219] The findings of these experts were that although the VIN or chassis number on this chassis frame appeared legitimate at first glance in so far as it belonged to a legitimately registered motor vehicle. It was apparent upon close scrutiny that the part reflecting the VIN or chassis number on the frame had been welded thereon after the original one had been cut off. The experts further revealed that it was apparent that the appropriate VIN number had been removed to conceal the true identity of the motor vehicle to which that chassis frame belonged. The report by PW34 Chumani Lenox Nkowane was handed into court which marked it exhibit "ZL1" whilst the one by Hamel Naidoo was marked exhibit "ZM9". Otherwise the chassis frame itself marked item 1A6 was marked exhibit "1" by the court.

[219] The contention with regards the alleged contravention of section 6(1) as read with section 6(2) of the Theft of Motor Vehicles Act 1991 is that the accused persons failed to report to the police their having received the chassis frame bearing tempered with VIN or chassis numbers which was contrary to the said sections of the act. On the other hand, the contention with regards the contravention of section 7(2) as read with section 7(3) is that the accused persons failed to demand a declaration effecting the purchase of the chassis frame in question when its VIN numbers had been tempered with contrary to the provisions of the Act.

[220] It was not in dispute that whereas item 1A6 had its original numbers removed and unlawfully replaced by those appearing there, this fact had not been reported to the police. Similarly no declaration effecting the purchase of the item to the accused persons was demanded as required by the Act.

[221] The defence raised by the first accused was the general one referred to in other related counts above namely that item 1A6 (a chassis frame with all its tyres and other fittings still on) was part of those delivered to him by James George Maluleka and that the sale or purchase agreement between them had not yet been concluded. I have already rejected this defence in the similar counts where it has been pleaded. With regards this particular item, my stance is confirmed by the fact that not only does the accused fail to disclose when exactly this item was delivered to him but he also fails to say why the chassis number belonging to a motor vehicle whose scrapped body and chassis frame was sold to him was now unlawfully fitted onto this chassis frame he claims to have received from George Maluleka including the motive for doing that. I am left in no doubt that his explanation is fanciful and unrealistic such that it is not reasonably probably true. I am convinced that all that was happening here was a deliberate concealment of the true identity of the chassis frame in question which means that I should reject the first accused's explanation.

[222] I note that the second accused, as already observed in the other counts, has chosen not to give an explanation at all. Whereas that could be taken to be an

exercise of a right on his part, sight should not be lost of the fact he was in the circumstances obliged to explain and stand cross examination particularly taking into account that he had been charged with having acted in furtherance of a common purpose with the first accused and that he had, in acknowledgment of the prima facie case against him, not made an application for a discharge at the close of the crown's case. This leaves me with having to draw an adverse inference against the accused as I should in law.

[223] I shall revert to these counts later on in my judgement when I would have to record conclusion I have drawn and the findings I would have made.

COUNTS 20 AND 50

[224] These counts relate to the cab of a Toyota double cab which according to Inspector Bhekani Shiba was seized at the first accused's Nhlambeni homestead on the 22nd November 2012. It was thereafter marked item 1A7 by the police. Item 1A7 was later handed over to experts to examine its identity. These were PW29 Ankel Makhosonkhe Mncina, Lieutenant M. Nzinisa PW32 and PW39 Hamel Naidoo. They all confirmed that the true identity of the cab was tempered with in an apparent attempt to conceal its true identity. The report by PW29 Warrant Officer Mncina is marked exhibit "P9B", the one by Lieutenant M. Ndzinisa is marked exhibit "ZJ6" whilst that by PW39 Hamel Naidoo is exhibit "ZM10". The court marked item 1A7 exhibit "40".

[225] The exact nature of the tempering with the original VIN or chassis number was shown by the evidence to have been the removal of the original chassis number whilst replacing it with a different one which appeared legitimate on the face of it. The removed chassis or VIN number was the one contained in the stickers found on the door pillar situated on the left-hand side and that situated on the firewall. In view of the rough welding around these parts of a cab which should bear the sticker reflecting the chassis or VIN number of a vehicle, the only reasonable inference to draw is that this was done to conceal the true identity of the motor vehicle.

[226] The charges about an alleged contravention of section 6(1) as read with section 6(2) of the Theft of Motor Vehicles Act of 1991 is predicated on a failure by the accused persons to report to the police their having received the cab bearing VIN or chassis numbers that have been tempered with. Similarly, the alleged contravention of section 7(2) as read with section 7(3) of the Theft of Motor Vehicles Act is predicated upon the accused persons having failed to demand a declaration effecting the purchase of the cab bearing chassis numbers that have been tempered with.

[227] It is not in dispute that no report as envisaged in terms of the sections referred to above was ever made to the police by the accused. It was also not in dispute that no declaration effecting the purchase of the item by the accused was ever demanded by them from the person who sold it to them.

[228] A defence was only raised by the first accused who testified under oath. Although he was often too long in his answers, the defence he raised was the general one raised in similar counts where the items seized by the police during the November 2012 to January 2013 police raids was in issue. This defence has been raised repeatedly above and I find it unnecessary to go back to it as I am of the view I will be unnecessarily repeating myself. In a nutshell, he claimed that the deal between him and George Maluleka selling the item to him had still not been concluded at the time of the police raid even though the items had already been delivered. This defence I have already rejected for the reasons captured above in this judgement, the thrust of which is that the explanation given by the first accused is not reasonably probably true as that is the standard an explanation should meet in law for it to suffice in law. I maintain that the explanation given by the accused is fanciful and palpably false.

[229] I note that the second accused on the other hand chose not to give any explanation. While this could an exercise of a right, there are consequences that attach to it where a duty to explain himself had arisen. This duty arises in a situation where a prima facie case had arisen calling upon him to explain. Given that the accused had been charged with having acted in furtherance of a common purpose of the first accused and in view of his having been associated with working on the cars when the apparent grinding of the VIN numbers and the replacement of some by others through the welding is consistent with such

work, I am convinced he had a duty to explain. I am convinced further that if he failed to give a reasonable and probably true explanation, then an adverse inference should be drawn against him. I am of the considered view that he can not in the circumstances escape the drawing of such an inference against him.

[230] I shall revert to these counts later on in this judgement for purposes of recording the conclusion I have reached including the findings I have made on them.

COUNTS 21 AND 51

[231] These counts are based on an engine block seized from the first accused's Nhlambeni homestead on the 22nd November 2012. It was subsequently marked as item 1A8 by the police. This aspect has been testified to by Inspector Bhekani Shiba. It was examined by PW29 Warrant Officer Ankel Makhosonkhe Mncina as well as by PW39 Hamel Naidoo. These two are experts whose credentials have been a subject of several references above which make it unnecessary for me to repeat them herein. This item was referred to these experts for them to establish its true identity given that its engine number had been ground off or removed.

[232] Both experts confirmed that the engine number on this block had been ground off or removed. This was confirmed in the reports they prepared. The one prepared by PW29 Ankel Mncina was handed into court and marked exhibit

"P9B". The report by PW39 Hamel Naidoo was marked exhibit "ZM15". The item was itself marked as exhibit "34".

[233] The basis for the alleged contravention of section 6(1) as read with section 6(2) of the Theft of Motor Vehicles Act 1991 is that the accused failed to report to the police their receipt of an engine block without an engine number or put differently with an engine number that had been tempered with contrary to the provision of the said section. On the other hand, the alleged contravention of section 7(2) as read with section 7(3) of the Theft of Motor Vehicles Act 1991 is based on the contention that the accused failed to demand a declaration effecting their purchase of the engine block which had apparently been tempered with in so far as its engine number had been removed.

[234] There is no dispute that whilst the engine block had its engine number removed, this had not been reported to the police by the accused. It is further not in dispute that the accused had not demanded a declaration effecting their purchase of the item concerned.

[235] Only the first accused purported to give an explanation. It was the same general one like in the other items namely that it had been delivered to him by one James George Maluleka who was closing down his spares body shop in Doornfontein, Johannesburg. It was said that this deal had not yet been concluded as at the time the police raided his homesteads. For similar reasons

as those captured above in similar counts, I have to reject this defence on the same conclusion that it not reasonably probably true which is to say that it is fanciful or palpably false.

[236] The second accused did not give an explanation at all not withstanding that he was said to have acted in furtherance of a common purpose with the first accused. For the reasons already stated in similar accounts, he can not avoid an adverse inference being drawn against him given that he was obliged in the circumstances to give an explanation which would be reasonably probably true.

[237] I shall revert to these counts later on in this judgement for purposes of recording the conclusion I have reached including the findings I have made on them.

COUNTS 22 AND 52

[238] These counts relate to a firewall joint to a fender of a Toyota Hilux. It was seized from the first accused's Nhlmbeni homestead. It was given an item number as "180" by the police. According to the investigating officer, Inspector Bhekani Shiba, it was seized on the 22nd November 2012 during the police raid. It was examined by PW29 Ankel Mncina and PW39 Hamel Naidoo. They both agreed that its VIN tag on the firewall had been removed or ground off in an apparent attempt to conceal its identity. Ankel Mncina's report was marked exhibit "P9B" while that of Hamel Naidoo was marked exhibit "ZM11". The item itself was marked exhibit "27".

[239] The contention with regards the alleged contravention of section 6(1) as read with section 6(2) of the Theft of Motor Vehicles Act of 1991 is that the accused failed to report to the police their receipt of item 1A10 not withstanding that it had a VIN tag or number removed from its firewall. On the other hand, the alleged contravention of section 7(2) as read with section 7(3) is that the accused persons failed to demand a declaration effecting their purchase of the item concerned in violation of the duty placed on them.

[240] It was not in dispute that no report had been made to the police about the item in question. It was also not in dispute that no declaration effecting the purchase had been demanded.

[241] The first accused gave the same explanation he had given with regards other items seized at his Nhlambeni homestead during the November 2012 to January 2013 police raids. I have already captured this explanation herein above and I do not need to capture it once again herein as that amounts to unnecessary repetition. For purposes of clarity, I can only mention in passing that the explanation I am referring to is the one that said that the deal selling the items to the first accused had not yet been concluded and that those items belonged to one James George Maluleka. This defence falls to be rejected as was the case in the other counts where it was raised. This is because for the

same reasons as set out in those related counts, it did not amount to a reasonably possibly true explanation. It was infact fanciful and palpably false.

[242] The second accused on the other hand chose not to give an explanation at all. Whereas that is consistent with the right he has, the are consequences that attach to it where a duty to explain had arisen. This duty arises in instances where a prima facie case had been created against an accused person requiring that he gives a reasonably possibly true explanation. The second accused was said to have acted in furtherance of a common purpose with the first accused. He was also shown in the evidence to have worked with the motor vehicles at the accused's homesteads. Given that the motor vehicles had had their identity marks removed or obliterated he was duty bound to explain himself. He realized this when he did not move an application for a discharge at the close of the crown's case. It seems to me that the second accused cannot avoid the drawing of an adverse inference against him.

[243] I shall revert to this aspect of the matter later on in this judgement when I will be required to record the conclusion I should draw together with the findings I should make.

COUNTS 23 AND 53

[244] These counts relate to a cab of a Toyota Hilux motor vehicle seized from the Nhlambeni homestead of the first accused on the 23rd November 2012. It was subsequently given the item mark 2A14 by the police. This was testified to by Inspector Bhekani Shiba PW47. It was handed over to experts, PW29 Warrant Officer Ankel Makhosonke Mncina and PW39 Hamel Naidoo for examination. The credentials of these experts have been set out above and are to be considered repeated here. They both found that the VIN tag bearing the identity number or chassis number of this cab had been removed or ground off. Because of this, they confirmed that its true identity could not be ascertained. The report by Ankel Mncina was marked exhibit "P9B" whilst that by Hamel Naidoo was marked exhibit "ZM13". Item 2A14 was itself marked as exhibit "26".

[245] The alleged contravention of section 6(1) as read with section 6(2) of the Theft of Motor Vehicles Act 1991 was based on the contention that the accused had failed to report to the police their receipt of an item whose identity marks had either been removed, obliterated or tempered with contrary to the said sections hence count 23. On the other hand the alleged contravention of section 7(2) as read with section 7(3) of the Theft of Motor Vehicles Act 1991 was based on the contention that the accused had failed to demand a declaration effecting their purchase of the cab in question which had its identity numbers either removed or tempered with contrary to the said sections hence the charges as they appear on count 53.

[246] It was in never in dispute that the accused had failed to report the items concerned to the police. It was also never in dispute that the accused never sought or demanded the declaration to effect their purchase of sale.

[247] The first accused's defence was the general one raised in all the items seized in the police raids of between the 22nd November 2012 and the 24th January 2013. In a nutshell, this is the defence to the effect that the items in question were delivered to the first accused by James George Maluleka with whom the deal for the sale of same to the accused had allegedly not yet been completed. I have already pronounced myself on this defence and I do not need to repeat it herein. It suffices to say I have rejected same for the reasons set out above which all culminate in the conclusion that the explanation by the accused is not reasonably probably true as would be required in law. This, in other words, means that the explanation is fanciful and palpably false.

[248] I note that the second accused chose not to give an explanation at all. Although this may be in exercise of a right, it leads to adverse conclusions being drawn against that accused were a duty to explain had been created. This duty is created would be created in those instances where a prima facie case had been created against the accused necessitating that he gives an explanation. That this was the case herein cannot be gainsaid. The accused himself had not applied for a discharge at the close of the crown's case in appreciation of this reality.

Consequently, I cannot help but draw an adverse inference against the second accused.

[249] I shall revert to this aspect of the judgment later on in this judgment as I will be required to pronounce on the conclusion reached as well as the findings made.

COUNTS 24 AND 54

[250] These counts relate to a Toyota cab seized by the police from the Ngwane Park homestead of the first accused on the 23rd January 2013. This cab was eventually marked item 3B4 by the police. This aspect was testified to by PW47 Inspector Bhekani Shiba. This cab was eventually handed over to Motor Vehicle Identification experts for examination. It was thus examined by PW29 Warrant Officer Ankel Makhosonke Mncina and PW39 Hamel Naidoo. Both experts confirmed that this cab had both its job number and VIN number removed, obliterated, ground off or tempered with from its firewall. This made it impossible for anyone to establish its true identity. The report by Ankel Mncina was marked exhibit "P9B" whilst the one by Hamel Naidoo was marked exhibit ""ZM16". Otherwise the item itself was marked exhibit "29".

[251] The basis for the alleged contravention of section 6(1) as read with section 6(2) is that the accused persons failed to report to the police their receipt of the item with removed, ground off or tempered with identity numbers contrary to the requirements of the said sections hence the charges borne out in count 24. On the other hand, the alleged contravention of section 7(2) as read with section

7(3) is based on the contention that the accused persons failed to demand a declaration effecting their purchase of the item in question hence the charges contained in count 54.

[252] There was no dispute that the situation of the cab with removed or obliterated or tempered with identity numbers was not reported to the police. There was also no dispute that the accused persons had not demanded a declaration effecting their purchase of the item in question despite its having its identity numbers removed, obliterated or tempered with.

[253] In an endeavor to put up a defence to the charges, the first accused attempted to give an explanation. It however can not be disputed that such a defence should be a reasonably probably true explanation. The first accused put up a general defence similar to that raised in all the instances of items seized by the police between the 22nd November 2012 and the 24th January 2013. This defence I have already mentioned in several similar instances. In passing, this is the contention that the item was one of those delivered at the first accused's homestead to which the deal relating thereto had allegedly not yet been completed. I have already rejected this explanation on the grounds that it is not a reasonably possibly true explanation which in other words means that it is fanciful and palpably false for the reasons given above.

[254] The second accused failed to give an explanation at all. Whereas this could be an exercise of a right but where there is a duty to explain, he is bound to do so. This would be in a case where a prima facie case had been made against him. In this case, he is said to have acted in furtherance of a common purpose with the first accused. He is also shown by the evidence as having been employed to work on the cars found at the first accused's homestead, fixing them. In my considered view, this called for him to give an explanation, failing which an adverse inference has to be drawn against him. I am therefore obliged to draw such an inference in a case where he fails to give an explanation that is reasonably possibly true.

[255] I shall revert to this paragraph later on in this judgement for purposes of recording the inferences I have drawn including the findings I have made.

COUNTS 25 AND 55

[256] These counts relate to a certain motor vehicle seized by the police from the first accused's Ngwane Park homestead on the 23rd January 2013. It was marked as item 3B7 by the police. This motor vehicle is a Toyota Hilux D4D. This aspect of the matter was testified to by PW47 Inspector Bhekani Shiba. It was handed over to some experts to examine it and in particular to determine its true identity. It was examined by PW11 Inspector Madonsela, PW29 Ankel Makhosonke Mncina and PW39 Hamel Naidoo. All these experts agreed that the cab of this motor vehicle was made of cut and join works. The parts that

had been cut and rewelded include the firewall and the door pillar that bears the manufacturer's VIN tag. As proof of these particular cut and join works, the area around the door pillar concerned and the firewall had apparently been joined through the use of a rough welding after they had initially been cut off. PW39 Hamel Naidoo went on to find that even the chassis frame of the said vehicle had the part where it bears the chassis or VIN number cut off and replaced with a rewelded one bearing a different number from the original one. The reports by these experts were handed into court and were marked as follows:- The one by Inspector Madonsela was marked exhibit "Q1", the one by Ankel Mncina was marked exhibit "P9B", and the one by Hamel Naidoo was marked exhibit "ZM18". Item 3B7 was itself marked exhibit "18".

[257] The contention that there was a violation of section 6(1) as read with section 6(2) is based on the allegation that the accused persons failed to report the item in question to the police notwithstanding that it had its original VIN and job numbers removed, obliterated, ground off or tempered with contrary to the requirements of the said sections. On the other hand, the contention that the accused persons had contravened section 7(2) as read with section 7(3) of the Theft of Motor Vehicles Act 1991 was based on the allegation that the accused persons had failed to demand a declaration effecting the purchase or transfer of the motor vehicle concerned.

[258] It was not in dispute that item 3B7 had not been reported to the police despite that its identity had obviously been tempered with. It was also not in dispute that no declaration effecting the purchase of the motor vehicle in question (3B7) had been demanded.

[259] The defence by the first accused was that the motor vehicle 3B7 was part of the items seized from his homesteads during the raids of the 22nd November 2012 to the 24th January 2013 which he said had been delivered there at by one James George Maluleka. Clearly there was no suggestion why George Maluleka would deliver such a car upon the first accused and for what purpose considering that it had clearly been remade. For this reason and the others set out above in related counts, I rejected this explanation as one that was not reasonably probably true as required by law. It was fanciful and palpably false.

[260] On the other hand the second accused gave no explanation at all. Whilst he is entitled to remain silent, he should be alive to the fact that the court is entitled to draw an adverse inference against him from his said conduct in instances where a duty for him to explain existed. I am convinced that given the explanation that the second accused was implicated in working on cars as an employee of the first accused, taken together with the fact that he was charged with having acted in furtherance of a common purpose with the first accused, he was duty bound to give a reasonably probably true explanation. His failure to explain in these circumstances means that I should draw an adverse inference against him.

[261] I shall therefore revert to these counts later on in my judgment to record my conclusion and findings.

COUNTS 26 AND 56

[262] These counts relate to an engine block referred to as 3B2. This engine block was seized from the Ngwane Park homestead of the accused on the 23rd January 2013. This aspect of the matter is testified to by Inspector Bhekani Shiba who was the investigating Officer. Item 3B2 was examined by experts, PW29 Ankel Makhosonke Mncina and PW39 Hamel Naidoo. They both that its engine numbers had been ground off. Because of this, the original identity of the engine block could not be ascertained. Ankel Mncina's report was exhibit "P9B" whilst that of Hamel Naidoo was exhibit "ZM14". Item 3B2 was itself given the exhibit number "33".

[263] The contention about the contravention of section 6(1) as read with 6(2) of the Theft of Motor Vehicles Act 1991 is that the accused persons failed to report to the police the engine block concerned (3B2) particularly after noticing that its original engine number had been obliterated, removed or tempered with which was contrary to the provision of the sections concerned hence the charges borne out by count 26. On the other hand the contention about the contravention of section 7(2) as read with section 7(1) of the Theft of Motor Vehicles Act 1991

is that the accused persons failed to demand a declaration effecting their purchase of the said engine block contrary to the provisions of the Act concerned hence the charges referred to in count 56.

[264] It was not in dispute that item 3B2 had not been reported to the police despite that its identity had obviously been tempered with. It was also not in dispute that no declaration effecting the purchase of the engine block in question (3B2) had been demanded.

[265] The defence by the first accused was that the engine block 3B2 was part of the items seized from his homesteads during the raids of the 22nd November 2012 to the 24th January 2013 which he said had been delivered there at by one James George Maluleka. Clearly there was no suggestion why George Maluleka would deliver such an engine block on the first accused and for what purpose considering that its identity had been destroyed. For this reason and the others set out above in related counts, I rejected this explanation as one that was not reasonably probably true as required by law. It was fanciful and palpably false.

[266] On the other hand the second accused gave no explanation at all. Whilst he is entitled to remain silent, he should be alive to the fact that the court is not only entitled but obliged to draw an adverse inference against him from his said conduct in instances where a duty for him to explain existed without him doing so. I am convinced that given the explanation that the second accused was

implicated in working on cars as an employee of the first accused, taken together with the fact that he was charged with having acted in furtherance of a common purpose with the first accused, he was duty bound to give a reasonably probably true explanation. His failure to explain in these circumstances means that I should draw an adverse inference against him.

[267] I shall revert to this aspect of the matter later on to record the conclusion I have reached including the findings I have made in these counts.

COUNTS 27 AND 57

[268] These counts relate to item 3B9 which is a firewall of a Toyota Hilux. According to Inspector PW47 Bhekani Shiba, it was seized from the Ngwane Park homestead of the first accused on the 23rd January 2013. The experts who examined it were PW29 Ankel Mncina and PW39 Hamel Naidoo. They both found that the manufacturer's VIN tag on that firewall had been removed or ground off. Its original identity could therefore not be ascertained. Warrant Officer Mncina's report on it was handed into court and marked exhibit "P9B". The report by PW39 Hamel Naidoo was handed into court and marked exhibit "ZM19". Item 3B9 was itself marked exhibit "31" by the court.

[269] The contention about the violation of section 6(1) as read with section 6(2) of the Theft of Motor Vehicles act of 1991 is that the accused persons failed to

report to the police their receipt of a Toyota Hilux firewall which had no VIN tags to identify it, they having been ground off, removed or obliterated. On the alleged contravention of section 7(2) as read with section 7(3) of the Theft of Motor Vehicles Act 1991, the contention is that the accused persons failed to demand a declaration effecting their purchase or transfer of the firewall contrary to the provisions of the said sections.

[270] There is no dispute that item 3B9 which had its identity removed had not been reported to the police contrary to the said sections of the Act hence the charges as born out in count 27. There is also no dispute that no declaration effecting the purchase of item 3B9 had been demanded from the person from whom it was purchased. This led to the charges referred to in count 57.

[271] The defence by the first accused was that the firewall 3B9 was part of the items seized from his homesteads during the raids of the 22nd November 2012 to the 24th January 2013 which he said had been delivered there at by one James George Maluleka. Clearly there was no suggestion why George Maluleka would deliver such a firewall on the first accused and for what purpose considering that its identity had been destroyed which made it more of a scrap material. For this reason and the others set out above in related counts, I rejected this explanation as one that was not reasonably probably true as required by law. I was convinced it was fanciful and palpably false.

[272] On the other hand the second accused gave no explanation at all. Whilst he is entitled to remain silent, he should be alive to the fact that the court is not only entitled but obliged to draw an adverse inference against him from his said conduct in instances where a duty for him to explain existed without him doing so. I am convinced that given the explanation that the second accused was implicated in working on cars as an employee of the first accused, taken together with the fact that he was charged with having acted in furtherance of a common purpose with the first accused, he was duty bound to give a reasonably probably true explanation. His failure to explain in these circumstances means that I should draw an adverse inference against him.

[273] I shall revert to this aspect of the matter later on to record the conclusion I have reached including the findings I have made in these counts.

COUNTS 28 AND 58

[274] These counts relate to a Toyota Hilux chassis frame seized from the Ngwane Park homestead of accused 1 on the 23rd January 2013. This is according to the evidence of Inspector Bhekani Shiba PW47. This chassis frame was given the police mark 3B10. It was examined by PW29 Warrant Officer Ankel Mncina and PW39 Hamel Naidoo. These experts have long introduced themselves and their credentials have been recorded in this matter. Both experts testified that after examining this chassis frame, they found, at different intervals that its chassis or VIN number had been ground off. This made its original identity not

to be ascertainable. Ankel Mncina's report was handed to court and was marked "P9B". The one by Hamel Naidoo was also handed to court and was marked "ZM20".

[275] The contention about the violation of section 6(1) as read with section 6(2) of the Theft of Motor Vehicles act of 1991 is that the accused persons failed to report to the police their receipt of a Toyota Hilux chassis frame which had no VIN or chassis numbers which was contrary to the provisions of the Act. On the alleged contravention of section 7(2) as read with section 7(3) of the Theft of Motor Vehicles Act 1991, the contention is that the accused persons failed to demand a declaration effecting their purchase or transfer of the chassis frame contrary to the provisions of the said sections.

[276] There is no dispute that item 3B10 which had its identity numbers removed had not been reported to the police contrary to the said sections of the Act hence the charges as born out in count 28. There is also no dispute that no declaration effecting the purchase of item 3B10 had been demanded from the person from whom it was purchased. This led to the charges referred to in count 58.

[277] The defence by the first accused was that the chassis frame 3B10 was part of the items seized from one of his homesteads during the raids of the 22nd November 2012 to the 24th January 2013 which he said had been delivered there at by one James George Maluleka. Clearly there was no suggestion why

George Maluleka would deliver such a chassis frame on the first accused and for what purpose considering that its identity had been obliterated which the accused knew was a crime in accordance with the laws of the country. For this reason and the others set out above in related counts, I rejected this explanation as one that was not reasonably probably true as required by law. I was convinced it was fanciful and palpably false.

[278] On the other hand the second accused gave no explanation at all. Whilst he is entitled to remain silent, he should be alive to the fact that the court is not only entitled but obliged to draw an adverse inference against him from his said conduct in instances where a duty for him to explain existed without him doing so. I am convinced that given the explanation that the second accused was implicated in working on cars as an employee of the first accused, taken together with the fact that he was charged with having acted in furtherance of a common purpose with the first accused, he was duty bound to give a reasonably probably true explanation. His failure to explain in these circumstances means that I should draw an adverse inference against him.

[279] I shall revert to this aspect of the matter later on to record the conclusion I have reached including the findings I have made in these counts.

COUNTS 29 AND 59

[280] These counts relate to a Toyota cab, seized from the first accused's Ngwane Park homestead on the 24th January 2013. This was testified to by Inspector Bhekani Shiba. This cab was given an identity mark as item 4B1. The expert who examined it was Warrant officer Ankel Mncina. He found that the identity numbers on the firewall and the door pillar were removed or obliterated. His report was marked Exhibit 'P9B'. The item itself was marked exhibit '30'.

[281] The contention about the contravention of section 6(1) as read with section 6(2) of the Theft of Motor Vehicles Act is based on the allegation that the accused persons failed to report to the police the chassis frame in question notwithstanding their being aware or their being reasonably expected to know about its having its chassis numbers removed or obliterated. On the other hand, the alleged violation of section 7(2) as read with section 7(3) of the same Act is based on the contention that the accused persons failed to demand a declaration effecting the purchase or transfer to them of the cab in question.

[282] It was not in dispute that the accused persons had not reported their having received the cab in question with its identity numbers obliterated or tempered with contrary to the provisions of section 6(1) as read with section 6(2) of the Act hence the charges in count 29. It was also not in dispute that the accused had not demanded a declaration effecting the purchase of the cab with obliterated identity numbers contrary to section 7(2) as read with section 7(3)

of the Theft of Motor Vehicles Act 1991 hence the charges reflected in count 59.

[283] The first accused was the only one who attempted to give an explanation. This explanation was the general one he had given in all the other matters of items seized from his homesteads between the 22nd November 2012 and the 24th January 2013. In a nutshell, this defence was that the cab in question was like the other items, handed over to him by one James George Maluleka with whom a deal was not yet concluded. I rejected this defence in the other counts for the same reasons I have to reject it here. In a nutshell, the said defence is fanciful and palpably false as it is not reasonably probably true.

[284] The second accused on the other hand chose not to give an explanation. This was despite the fact that he had been charged with having acted in furtherance of a common purpose with the first accused. It was also in the face of evidence led showing that he had been employed by the first accused to work on motor vehicles at one or both of his homesteads. The evidence of PW3 Thandayena Gamedze, PW5 Bongani Christopher shabangu as well as PW38 Thulani Sidney Xaba is instructive in this regard. Whereas it is an accused person's right to choose whether or not to give an explanation, he is obliged to give same in instances where a prima facie case had been made against him. I take it not to be in contention whether or not a prima facie case had been made. This I say because at the close of the crown's case it was impliedly accepted that such

a case had been made hence the decision by the second accused not to apply for a discharge at that stage. I am convinced that I am obliged to draw an adverse inference against the accused person herein.

[285] I shall revert to this aspect of my judgement later on in this matter as I will be required to pronounce the conclusion reached together with findings made.\

COUNTS 30 AND 60

[286] These counts relate to an engine block seized from the Ngwane Park homestead of the first accused on the 24th January 2013. It was given the label 4B3 by the police. This aspect was testified to by PW47 Inspector Bhekani Shiba who introduced himself as the investigating officer in the matter. This item was later referred to experts in Motor Vehicle Identification for purposes of examination. These were PW29 Warrant Officer Ankel Makhosonke Mncina and PW39 Hamel Naidoo. They agreed in their findings that the engine number on the engine block was obliterated in such a way that its true identity could not be ascertained. The report handed into court by Warrant Officer Mncina in this regard was marked exhibit "P9B" whilst that by Hamel Naidoo was marked exhibit "ZM21".

[287] The contention that there was a contravention of section 6(1) as read with section 6(2) of the Theft of Motor Vehicles Act 1991 is based on the fact that the accused persons failed to report to the police their having received an item

with removed or obliterated engine numbers contrary to the said sections hence the charges reflected in count 30 of this matter. On the other hand, the contention that there had been a contravention of section 7(2) as read with section 7(3) is based on the fact that there was never demanded a declaration effecting the purchase of the engine block in question by the accused contrary to the provisions of the said sections hence the charges contained in count 60 herein.

[288] It was never in dispute that no report of the item in question had been made to the police by the accused notwithstanding their being aware that the engine numbers on the block had been removed or obliterated. On the other hand, it is not in issue that no declaration effecting the purchase of the engine block in question had been demanded from the sellers of the item.

[289] Only the first accused gave an explanation which was the one he had given in all the counts involving items seized from his homesteads in the raids of between the 22nd November 2012 and the 24th January 2013.Without attempting to capture this defence fully but to only state it in a nutshell herein, he contended that the items had been delivered to him by James Maluleka in a deal that had not yet been concluded. I confirm that because of a number of shortcomings noted in this defence I rejected the explanation by the accused. The detailed reasons for my rejecting this explanation by the first accused are contained in the related paragraphs above. In a nutshell, I rejected the explanation because

the first accused could not even say when the items were delivered at his places and no documents stamped at the border could be produced confirming such items were indeed brought from Johannesburg. Further still, this defence could not stand when juxtaposed against those items which were fitted with chassis numbers of items sold locally to the first accused a few days earlier. This renders his explanation devoid of credit. I am, for these reasons and the others raised above, convinced that the accused's explanation cannot stand and that it should be rejected.

[290] The second accused chose not to give an explanation at all probably in exercise of his right. There is however a duty placed on him to explain where a prima facie case has been made against him failing which an adverse inference should be drawn against him. I am convinced that in so far as he was alive that a prima facie case had been made against him, he was obliged to explain. His failure to explain obliges this court to draw an adverse inference against him particularly when considering his being linked to the charges over and above a reasonable inference by allegations of a common purpose between him and accused one.

[291] Consequently, I will have to revert to these counts later on for purposes of recording the conclusions I have reached and the findings I have made.

COUNTS 31 AND 61

[292] These counts relate to a Toyota chassis frame seized from the first accused's Ngwane Park homestead on the 25th September 2010. It was after being seized marked item "D7" by the police. It was testified to in this regard by PW10 Justice Mziyako. Its chassis numbers had been ground off. This was such that although examinations on it were carried out by experts, true identity could not be ascertained. The expert examinations of the chassis frame concerned were carried out by PW29 Warrant Officer Ankel Mncina and PW39 Hamel Naidoo. The report prepared by Warrant Officer Mncina was handed into court and was marked exhibit 'P9B' whilst the one by Hamel Naidoo, PW39 was marked exhibit 'ZM20'.

[293] The foundations of the charges in these counts are as set out in the foregoing counts which are the contraventions of sections 6(1) as read with section 6(2) and of section 7(2) as read with section 7(3) of the Theft of Motor Vehicles Act of 1991 respectively. Ofcourse these are about the alleged failure to report the chassis frame with obliterated or removed or tempered chassis numbers to the police just as they are about the failure to demand a declaration effecting the purchase or transfer of the chassis frame to the accused persons.

[294] There is no denial by the accused persons from the facts, that the chassis frame had its chassis numbers removed or obliterated and that this was not reported to the police. There is also no denial that a declaration effecting the purchase or transfer of the item to the accused had not been demanded.

[295] The first accused's defence was the same one as that stated in some of the above stated paragraphs which arose under similar circumstances. This defence was to the effect that the first accused knew nothing about this chassis frame and the similar ones because he did not stay at his Ngwane Park homestead at the time following a misunderstanding he had allegedly had with his wife which had forced him to leave that place and stay at his Nhlambeni homestead. This defence being similar to those in similar circumstances calls for it to be treated similarly with those others. This is to say I have to reject it herein for similar reasons as those others like it. This is because it does not amount to a reasonable and possibly true explanation.

[296] I note again that the second accused chose not to testify in his defence notwithstanding that he was charged with having acted in furtherance of a common purpose with the first accused. It had also not been in doubt that a prima facie case had been made against him to the extent there was not even an attempt for an application to have him discharged at the close of the crown's case. Ofcourse the effect of that is settled in law, it being that he cannot avoid the drawing of an adverse inference against him.

[297] I will therefore have to revert to this aspect of the matter later on in this judgement where I will record my conclusion and verdict.

COUNTS 32, 34 AND 35

[298] These counts were abandoned by the prosecution after the accused persons had pleaded. The effect of that in law is that the accused should be acquitted and discharged of them.

COUNT 36

[299] This count relates to a collective of three motor vehicle engines which according to PW10 Detective Constable Mziyako and PW16 Superintendent Aaron Methula were seized from the first accused's Ngwane park homestead on the 25th September 2010.These were jointly given the mark D10 by the police. They were all examined by Hamel Naidoo,who found that their engine numbers had been completely ground off. This had made their original identities unascertainable.Hammel Naidoo's report in this regard was marked as exhibitZM25.Item D10 was itself marked exhibit13.

[3oo] The contention that there was a violation of section 7(2) as read with section 7(3) of the Theft Of Motor Vehicles Act,1991is based on the fact that the accused did not demand a declaration for their receiving the engines with removed engine numbers.

[301] Whereas there is no disputing that such a declaration was not demanded; the first accused sought to say that he knew nothing about these engines because he was not staying at his Ngwane Park homestead at the time they were brought there, following a quarrel he had had with his wife. This defence I have already

rejected because in my view it did not give a reasonable and probably true explanation. The reasons I gave above in counts that entailed similar issues and considerations are in my view equally applicable herein.

[302] I shall revert later on to this count for purposes of recording the conclusion I have reached as well as pronouncing o my findings.

COUNT 38

[303] This count was abandoned by the prosecution after the accused had already pleaded. The effect of that in law is that the accused deserves to be acquitted and discharged of such charges. This is the verdict I am obliged to pronounce by law on this count.

[304] This count relates to the body of a white Toyota Hilux seized by the police from the first accused's Ngwane Park homestead on the 25th September 2010. It was given a police item mark which read D9. This was testified by PW10 Detective Constable Justice Mziyako. It was confirmed that all its identification marks which included the VIN number and job number were all removed, making it impossible to ascertain its original identity. Hamel Naidoo's report was handed into court and it was marked exhibit "ZM24". This count marked the item itself as exhibit "14".

[305] The thrust of the change in this count is that the accused persons failed to demand a declaration effecting the sale to or purchase by or transfer by the

accused of the item in question in contravention of section 7(2) as read with section 7(3) of the Theft of Motor Vehicles Act 1991.

[306] There was no dispute that the accused persons never demanded a declaration effecting the purchase or transfer of the item in question. According to the first accused, this was the case because the item in question was part of those which he claims he knew nothing as they were allegedly brought to his said homestead without him having had a part to play. This was because he was allegedly not staying there at the time given that he had allegedly quarrelled with his wife which forced him to move out.

[307] Ofcourse this is the general defence the first accused has raised in a host of other similar counts involving items seized during that raid. This defence I have rejected. I found it not reasonably and probably true as every explanation by an accused should be, for it to be accepted.

[308] The second accused decided to give no explanation notwithstanding his being accused of having acted in furtherance of a common purpose with the first accused in the commission of the offence and despite there being evidence that links him to having been employed by the first accused where he worked on the motor vehicles. An inevitable conclusion is that the motor vehicles were being dismantled and reassembled as different ones there, if one considers the cutting and joining of different components, particularly those that carry the identity of motor vehicles together with the general habit of grinding off the identity numbers from either the chassis frames or the firewalls. It shall be remembered

that a grinder together with its worn-out discs was found at the first accused's homestead where a welding machine, among other tools, was also found. This in my view grounds the drawing of an adverse inference against the accused in this count and the similar ones because a prima facie case had been made against him.

[309] I shall revert to this count later on in this judgment when I record the conclusion I have reached together with pronouncing on my findings.

COUNT 62 AND 63

[310] These counts were abandoned by the crown which happened after they had already been pleaded to by the accused persons. As noted above, the effect of this is that the accused should be acquitted and discharged on these counts.

COUNT 64

[311] This count relates to a blue canopy seized from the first accused's Nhlambeni homestead on the 22nd November 2012 according to the Investigating Officer Bhekani Shiba. It was given an item number by as 1A4 by the police. The accusations against the accused is that they failed to demand a declaration from the person from whom they obtained the canopy. By so doing, the evidence went, they contravened section 7(2) as read with section 7(3) of the Theft of Motor Vehicles Act 1991. It was not in dispute that this declaration had not been demanded other than that it was part of the items delivered by James

Maluleka to the first accused for which a deal had not yet been concluded no defence was put forward by the first accused. This defence I have rejected for the reasons I stated which I maintain herein. The second accused again chose to give no explanation in a case where he should have, compelling me to draw an adverse inference against him.

[312] Consequently, I shall revert to this count later on in this judgment so as to record the conclusion I have reached as well as to pronounce on my findings.

COUNT 65

[313] This count relates to the four motor vehicle fuel tanks seized by the police from the Ngwane Park homestead of the first accused on the 23rd January 2013. They were treated as a collective for purposes of this count and were marked as item 3B5 in all. This count was testified to by PW47 Inspector Bhekani Shiba. He also testified that the accused persons failed to demand a declaration effecting their purchasing or receiving the fuel tanks in question. This it was contended was in contravention of section 7(2) as read with section 7(3) of the Theft of Motor Vehicles Act 1991.

[314] It was never in dispute that there was no declaration demanded by the accused persons. According to the first accused this was because the deal concerning the transfer of the items to him had not yet been finalized as the items belonged to George James Maluleka who had just delivered the. The reasons stated in the

above paragraphs on why I had rejected this defence apply with equal force here. The long and short of it is that I have found this defence not to be a reasonably probably true explanation.

[315] The second accused I have noted made no explanation at all. This was despite the fact that he was charged with having acted in furtherance of a common purpose with the first accused. Further still, his failure to explain ignores the evidence that he was found working on the cars at accused 1's homesteads. I have already stated what its effect is and I need not repeat it herein. It suffices that he had a duty to explain which he failed to discharge.

[316] I will have to revert to this count later on as I draw the conclusion I have to including pronouncing my findings therein.

COUNT 66

[317] This count relates to five motor vehicle fuel tanks seized by the police from the Nhlambeni homestead of the first accused on the 23rd January 2013. These items were collectively given one item number namely 3A3 by the police. This count was testified to by the investigating officer Inspector Bhekani Shiba PW47. The allegations against the accused are that they failed to demand a declaration effecting their purchase of the fuel tanks in question and thereby contravened section 7(2) as read with section 7(3) of the Theft of Motor Vehicles Act 1991.

[318] It was never in issue that the declaration effecting the purchase of the five fuel tanks was not demanded.

[319] The explanation given by first accused was that item 3A3 was part of the items handed over to him by James George Maluleka who was allegedly closing down his spares body shop in Johannesburg. I have already rejected this explanation in other similar and related counts. My reasons for that decision apply with equal force herein because such an explanation is fanciful and palpably false. It is in other words not reasonably probably true.

[320] The second accused on the other hand chose not to give an explanation at all. I have said above why it was necessary for him to give such an explanation and I maintain those reasons herein. It is not necessary to repeat this here. It suffices that I have to refer to those analysis in the related counts above. Consequently, I am obliged to draw an adverse inference against him.

[321] I will revert to this count in due course for purposes of drawing the conclusion I have to and to pronounce my findings.

COUNT 67

[322] This count relates to two motor vehicles exhaust pipes. They were treated collectively and marked 3B6. This item was upon being handed into court

marked as exhibit “12”. According to Inspector Shiba, these exhaust pipes were seized from the Ngwane Park homestead of the first accused on the 23rd January 2013. The accused persons it was contended failed to demand a declaration effecting their purchase of item 3B6. This was allegedly in contravention of section 7(2) as read with section 7(3) of the Theft of Motor Vehicles Act of 1991.

[323] It was never in dispute that the declaration in question had not been demanded. The first accused raised the same defence he had raised with regards the other items namely that they had been delivered to him by James Maluleka with whom a deal had not been concluded. For reasons which apply with equal force herein, I rejected this explanation; the same thing I have to do herein.

[324] The second accused chose to give no explanation. As it happened with other similar and related counts above, I have to draw an adverse inference against the accused herein for the same reasons as those referred to above.

[325] I will revert to this count for purposes of recording the conclusion I have reached together with the findings I have made.

COUNT 68

[326] This count relates to three motor vehicle exhaust pipes which according to PW47 Inspector Shiba were seized by the police from the Nhlambeni

homestead of the first accused on the 23rd January 2013. They were collectively referred to as item 3A5. It was contended that the accused had not demanded a declaration effecting the purchase of these exhaust pipes hence their being charged with contravening section 7(2) as read with section 7(3) of the Theft of Motor Vehicles Act 1991.

[327] The first accused gave an explanation in which he contended that the items in question were part of those delivered to him by James Maluleka. As this explanation was raised and rejected in similar counts above, I am of the view that nothing has changed as the circumstances are all for all similar. I avoid repeating the grounds for rejecting the explanation it sufficing that those reasons are hereby referred to herein and treated as if they have been specifically mentioned herein and that they do not amount to a reasonably probably true explanation.

[328] The second accused chose not to give an explanation at all. Given the nature of the charge against him (that is his alleged having acted in furtherance of a common purpose with the first accused and the evidence implicating him in working on the first accused's cars) I concluded in the similar counts as this one that he was duty bound to explain and that his failure to explain in such circumstances obliged this court to draw an adverse inference against him.

[329] I will revert to this count later on in this judgment where upon I will be required to draw necessary conclusion just as I will be required to pronounce on my findings.

COUNT 69

[330] This count relates to three propeller shafts which according to PW47 Inspector Shiba were seized from the first accused's Nhlambeni homestead on 23rd January 2013. These items were given a collective item number namely 3A4. The basis of their seizure was that no declaration had been demanded effecting their purchase by the accused persons. This was in contravention of section 7(2) as read with section 7(3) of the Theft of Motor Vehicles Act, 1991.

[331] The first accused gave a general explanation similar to that he had given to the other items seized between the 22nd November 2012 and the 24th January 2013. Because of the extent to which this explanation has been covered herein above I avoid repeating it here. It suffices that same is rejected for the same reasons as those in the other similar counts which is that the explanation is not reasonably probably true.

[332] As in the other similar counts, the second accused chose not to give an explanation. Without repeating what I have already said should happen with regards the second accused in those situations, it suffices for me to mention in passing that he failed to explain in a case where if he does so, an adverse inference should be drawn against him as he had a duty to explain.

[333] I shall revert in due course to record the conclusion I have reached as well as to pronounce on the findings I have made on this count.

COUNT 70

[334] This count relates to five Toyota fenders which were seized from the Nhlambeni homestead of the first accused on the 23rd November 2012; according to Inspector Bhekani Shiba. These fenders were marked items ZA6.2 to ZA6.5. These items were given exhibit numbers 53, 54, 55, 56, and 57 respectively.

[335] The contention was that the accused had not demanded declarations effecting the purchasing or receiving of the items in question.

[336] As indicated, there was no dispute that the declarations had been demanded. According to the explanation by the first accused, this was because he was still in the process of deciding whether to receive the items or not. For reasons given in the foregoing counts where similar defences were raised and rejected, I have to reject this one. I in a nutshell reject this defence because it was not a reasonably probably true explanation.

[337] I shall revert to this aspect of the matter later on as I will be drawing the conclusions I should draw in law including having to make the findings I should.

COUNT 71

[338] This count relates effectively to the employment of One Souza Vincent Mwambo by the accused. The allegations are that the first accused violated section 14(2)(d) of the Immigration Act No. 17 of 1982. It is contended he unlawfully harboured Souza Vincent Mwambo who was in the country illegally by employing him.

[339] Section 14(2)(d) of the Immigration Act 17 of 1982 reads as follows: -

[340] According to the evidence before count, which was not challenged, Vincent Souza Mwambo was arrested together with the accused persons before count. He was eventually tried of the offence of violating section 14(2)(c) of the Immigration Act whose thrust was that he entered and remained in this country without a lawful permit.

[341] Although the accused's defence is that he did not know that Mr. Mwambo was unlawfully in the country because in as far as he knew he used a passport to enter and remain in the country taken together with the fact that he had actually

participated in the Mozambican National Elections at some stage which were held at the Satellite Bus Rank in Manzini, where at he had brought the first accused a FRELIMO T-shirt, such is not a reasonable and probably true explanation. It is fanciful and unreasonable to say the least.

[342] The point is that the first accused had employed Mr. Mwambo who was subsequently convicted of entering and remaining in the country without a permit. For the accused to have employed Mr Mwambo, who he knew was a foreigner, he is then duty bound to produce his work permit as his employer to ably explain that his entering, remaining and eventually working in Swaziland was lawful. For the first accused to rely on a passport in an attempt to answer to charges of unlawfully employing a foreigner which passport is itself not produced, is proof that the explanation he is trying to give is fanciful and palpably false. Further still, assuming that the said Mr. Mwambo indeed participated in the Mozambican elections held at the Satellite Bus Rank in Manzini, that means nothing for purposes of the charge in a case where it is not explained what the rules of the said elections were vis-a-vis Mozambicans who are in the country lawfully or otherwise. Clearly the explanation by the first accused is fanciful and it is proof that the first accused had every reason not to believe that the accused was in the country lawfully for employment purposes.

[343] I shall therefore have to revert to this count for purposes of drawing the conclusions I should including pronouncing on the findings I have to make in the circumstances.

COUNTS 72 AND 73

[344] It is not in dispute that these counts were abandoned by the crown after the accused had already pleaded which means that the accused are entitled to an acquittal and discharge and that they are so discharged on the said counts.

APPLICABLE LAW ON THE CHARGES:

[345] Save for the alternative charges to the statutory ones alleging the theft of certain motor vehicles, which are founded on the common law, all the charges faced by the accused persons in this matter are based on alleged contraventions of at least three aspects of the Theft of Motor Vehicles Act of 1991. These can loosely be described as the violation or contravention of section 3(1) as read with section 4 of the Theft of Motor Vehicles Act 1991; The contravention of section 6(1) as read with section 6(2) of the Theft of Motor Vehicles 1991 as well as the contravention of section 7(2) as read with section 7(3) of the Theft of Motor Vehicles 1991. The common law charges as an alternative to the statutory charges apply only to the allegations of theft of motor vehicles.

[346] An issue arose as to the propriety of the statutory theft of motor vehicles charges preferred against the accused persons given that all the alleged instances of

theft are said to have occurred in various parts of the republic of South Africa. In summary, these charges are those reflected in counts 1, 2, 3, 4, 5, 6, 8, 9, 18, and 33. It was argued that although it is an accepted and settled principle of our law that theft as a crime transcends borders in as much as it is a continuing offence, the same thing cannot be said of applying a local statute on an incident that occurred in a foreign country like the Republic of South Africa in these circumstances. It was argued that a statute only applies within the precincts of a state and it does not apply on incidents that occurred outside of that state.

[347] This very question arose ironically in the bail application brought by the first accused person after he had just been arrested on the charges he is currently facing. That case was cited as Mfanukhona Dlamini v Rex, criminal appeal case No.4 of 2013. Dealing with the same question at the High Court level, I had, whilst labouring under the misapprehension that the statute of Swaziland did not apply to motor vehicles stolen in the Republic of South Africa, concluded that because the local statute did not apply in the case of motor vehicles stolen in South Africa, there was statute controlling how to award bail in the case like that of the accused persons. This is how I had put my question in the body of the judgment a qou: -

> "19. I have noted that in the matter at hand, the facts reveal that all the motor vehicles were stolen in the Republic of South Africa. For this reason, there could not realistically be charg based on the statute as the alleged theft was in terms

of the common law in view of the fact that theft is in law a continuing offence. Indeed the theft charges referred against the accused in terms of counts 1, 4, and 7 of the Act are expressed in terms of the common law ex facie the charge sheet and are not in terms of section 3(1) of the Theft of Motor Vehicles Act.

20. This being the case, it does not seem appropriate to me that in a matter where the facts undoubtedly point to a possible charge of theft against the accused being only in terms of the common law, it would avail the crown to simply include in the charges the statutory offence which attracts restricted bail conditions as a means of ensuring that an accused is given bail as restricted in terms of the Act as in the case of one charged with contravening the statutory offences provided for in law which limit feasible bail conditions. I see no reason why this court should not take such a factor into account if anything as regards the strength of the case against the accused so as to determine whether bail would be appropriate."

[348] In the subsequent appeal against this judgment, the supreme court had the following to say on that point: -

"With the greatest of respect to the learned Judge a quo, we consider that he was in error in concluding that the statutory charges against the appellant were inappropriate. Similarly, the judge was incorrect in paragraph 22 of his judgment to the effect that he was 'not obliged by any statue on how to fix the bail. The very same principle that theft is a continuing offence means that when property is stolen from outside the country and brought into Swaziland, the theft is continuing. The theft now takes place in this country. Once that position is accepted as it must, the crown is, in our view perfectly entitled to bring any appropriate statutory charges against the accused, as happened here. Indeed, it will be seen from paragraph 2 above that some of the counts were based squarely on the Theft of Motor Vehicles Act 1991. Furthermore, we consider that it is within the crown's domain if so advised to amend counts 1, 4 and 7 in order to bring them under the Act." (Underlining added)

[349] It is apparent that the question whether the statutory charges preferred against the accused persons for all the motor vehicles stolen from the Republic of South Africa are appropriate, has been authoritatively settled to the effect that such charges are appropriate owing to the principle of our law that theft is a continuing offence. This means that I do not even need to consider the

alternative charges based on the common law. I can only mention in passing that there can be no doubt that on the ten (10) counts of theft of motor vehicles, the accused persons were no doubt found in possession of the stolen motor vehicles or their components in circumstances which left only one conclusion namely that they had stolen or taken part in the theft of such motor vehicles.

[350] Following my rejecting the two broad defences raised by the first accused in the form of the explanations he gave on how he came to be in possession of the said motor vehicles or their components and in the case of the second accused by virtue of his failure to give an explanation that was reasonably possibly true, I was left with one conclusion, and one conclusion only namely that the accused persons had stolen or had been party to the stealing of the motor vehicles particularized in the counts concerned.

[351] This brings about the question whether both accused persons can be found guilty of all the offences of allegedly violating section 3(1) as read with section 4 of the theft of motor vehicles Act 1991. The reality is that all the motor vehicles forming the subject matter of the counts referring to the theft of motor vehicles were shown to have been stolen by September 2010 as concerns those seized from the first accused's Ngwane Park homestead in September 2010 and up to November 2012 for those recovered from November 2012 up to January 2013 from the first accused's Nhlambeni and Ngwane Park homesteads.

[352] As long as I have found there to be no explanation that can be said to be reasonably probably true from that given by the first accused, it should follow in my view that he cannot possibly escape liability for the counts relating to the theft of the motor vehicles forming the basis of counts 1, 2, 3, 4, 5, 6, 8, 9, 18 and 33. These vehicles were found at his homesteads and he is the only one who can realistically give us an explanation that is reasonably probably true. The standard of proof required from an accused person is for him to give an explanation that is reasonably probably true. This was captured in the following terms in R V Difford 1937 AD 370 @ 373: -

> "No onus rests on the accused to convince the court of the truth of any explanation which he gives. If he gives an explanation, even if that explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable but that beyond any reasonable doubt it is false."

[353] This position was further clarified in the following words by Lord Denning in **Miller V Minister of Pensions [1947] 2 All ER 372 at 373**: -

> "The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence 'Of course it's possible but not in the least probable,'

the case is proved beyond reasonable doubt but nothing short of that will suffice."

[354] The question is whether the second accused can in law, and on the evidence before me, be convicted of the offences he is charged with. On the basis of the doctrine of common purpose taken together with his failure to give an explanation, after a duty to explain himself had arisen, I think he can. I am supported in this view by what was stated by **Smalberger JA** in **S V Francis 1991 (1) SACR 198 (A) at 203 h-J** when he said: -

"While an accused person's failure to testify may in appropriate circumstances be a factor in deciding whether his guilt has been proved beyond all reasonable doubt, this is only so where the State has prima facie discharged the onus upon it. A failure to testify will not remedy a deficiency in the State case such as the absence of apparently credible implication of the accused **(S v Masia 1962 (2) SA 541 (A) at 546E-F)**." (Underlining added).

[355] In **S v Changisa (K/S 15/2011) [2011] ZANCHC 16 (20 September 2011)**, the court per Phatsoane J said the following whilst expressing the same principle: -

"At the close of the state's case the accused exercised her right to remain silent and has therefore not rebutted the state's case. The principle applicable in this kind of situation has been set out in **S v Boesak [2000] ZACC 25; 2001 (1) SACR 1 (CC).** The Constitutional Court had to deal with the question whether the applicant's contention that his right under s 35(3)(h) of the Constitution 'to

remain silent and not to testify during the proceedings' was infringed by the SCA. It was contended amongst others that the SCA improperly relied on the applicant's failure to give evidence to conclude that there had been proof beyond reasonable doubt. At p9 para 24 Langa DP lays down the principle with regard to right to remain silent as follows:

'The right to remain silent has application at different stages of a criminal prosecution. An arrested person is entitled to remain silent and may not be compelled to make any confession or admission that could be used in evidence against that person. It arises again at the trial stage when an accused has the right to be presumed innocent, to remain silent, and not to testify during the proceedings. The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence. What is stated above is consistent with the remarks of Madala J… in **Osman and Another v Attorney-General, Transvaal**'**".**

[356] Common purpose consists in two or more people agreeing to commit a particular crime or to actively associate in a joint unlawful enterprise. Where the agreement or association is proved, each such accused will be responsible for the specific criminal conduct committed by one of their number, which falls within their common design. See in this regard **Jonathan Burchell's**

principles of Criminal Law, Revised 3rd Edition at page 574, see also S V Thebus 2003 (6) SA 505 (CC) as well as **Rex vs Musa Fakudze and 11 others High Court Criminal Case No. 42/2007.**

[357] In ***Rex vs Sicelo Chico Dludlu and Two others***, Case No. 10/2008, the High Court expressed itself in the following manner with regards the doctrine of common purpose:

> *"The principles involved in the notion or concept of acting in furtherance of a common purpose were, in my judgement sufficiently and authoritatively stated in **S v Mgedezi and others, 1989(1) SA 687 at 705I-706B**.*
>
> *In the absence of proof of a prior agreement, accused NO.6, who was not shown to have contributed causally to the killing or wounding of the occupants of room 12, can be held liable for those events, on the basis of the decision in Sv Safatsa and others 1988 (1) SA 868 (A), only if certain prerequisites are satisfied. In the first place he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of*

association with the conduct of the others. Fifthly he must have had the requisite mens rea;so in respect of the act of killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed, and performed his own act of association with recklessness as to whether or not death was to ensue''.

I can only say I associate myself fully with the foregoing principles as entailed in the doctrine of common purpose.

[358] In the present matter the facts prove that the accused was present at the accused's place or places where the only reasonable inference is that the chopping of the stolen motor vehicles took place. If the stolen motor vehicles were chopped off at the first accused's homestead, the only reasonable inference to draw is that the second accused associated himself fully with the said exercise including the stealing of the various motor vehicles and by extension the acquisition of certain motor vehicle components without demanding a declaration and without reporting the removal of their identity numbers. The evidence shows him as having been there from at least 2002/2003 according to Thandayena Gamedze and Thulani Xaba. He was also shown as having worked on the motor vehicles including the one proved to have been stolen. On the other hand, he could not avoid the drawing of an adverse inference given that he chose not to give any explanation in circumstances that called for him to do so. The only reasonable inference to

draw is that he had taken part and had played a crucial role in the chopping off of the stolen motor vehicles found there with removed identity marks.

[359] As concerns the offences that entailed the contravention of section 6(1) as read with section 6(2) of the Theft of Motor Vehicles Act, I am of the view that by failing to report the motor vehicle components which included chassis frames, engine numbers and firewalls (all of which had had their identity marks removed, obliterated or tempered with) and if I have found as I should that the second accused was party either by agreement or association to the conduct complained of, I do not see how I can avoid finding him guilty of the failure to the report such anomalies to the police as well. There can be no doubt that he knew about the anomalies on the identity marks of these motor vehicle components. For him to have failed as well to report that to the police means that he cannot avoid being held responsible. Of course, that covers both the motor vehicle components seized in 2010; the components of the Kombi quantum stolen from Badplaas and the various other motor vehicle components seized from the Nhlambeni and Ngwane park homesteads of the first accused during the November 2012 to January 2013 police raids.

[360] With regards the accused persons guilt or otherwise to the counts that contended the violation of section 7(2) as read together with section 7(3), I pointed out from the onset that it was not in dispute that the evidence before court was such that there was never a demand of the declaration effecting the purchase of the components, including those whose identities had been removed,

notwithstanding that the Act required that there be such a demand given that the items were found in the accuseds' possession.

[361] This means that there is no way the accused persons can escape guilt on those counts where the central question is whether a demand of the declaration effecting the purchase or receipt of the items was or was never made. This is all the more so when considering that I have rejected the explanation given by the first accused as being not reasonably probably true. Again, the second accused's position is compromised by his failure to explain himself at all.

[362] Having said all I have, I am certain that there is only one verdict I can return with regards the counts that concern the contravention of section 3(1) as read with section 4 of the Theft of Motor Vehicles Act 1991. These are counts 1, 2, 3, 4, 5, 6, 8, 9, 18 and 33. These counts loosely relate to the theft of the motor vehicles cited therein. The verdict I return in these counts is that I find both accused persons guilty as charged in each such main charge. I am otherwise convinced that owing to the view I have taken of the matter, I do not need to comment on the related alternative counts.

[363] On count 7 which is the one accusing both accused persons of dealing in a stolen motor vehicle, I am convinced that from the evidence, both accused persons are each shown as having played a role in that motor vehicle which led to its being sold. Whilst the first accused was the person who actually sold it and even claimed ownership of it, the second accused was shown as one who

was found working on it, apparently readying it for market when considering that its identities had had to be changed as testified to by officer Jele. Consequently, I can only pronounce a verdict of guilty against the accused on this count as well.

[364] On the counts that contend the failure to report the motor vehicles or their components with each tempered, obliterated or removed identity marks or numbers to the police, I am of the considered view that there is only one realistic verdict to return which is that the accused persons are guilty as charged. For the removal of doubt, these are counts 10, 11, 12, 13, 14, 15, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 and 31.

[365] On the contention of a failure to demand a declaration effecting the purchase or receipt of certain items found in the first accused's homesteads, that is, the alleged violation of section 7(2) as read with section 7(3) of the Theft of Motor Vehicles Act 1991, I noted that it was never contended that the declarations were ever demanded. The point made by the first accused was that the items belonged to a certain James George Maluleka with whom the first accused claimed not to have completed the process of purchasing all the items delivered to him. Of course, I have already rejected this explanation as being fanciful and not reasonably probably true. On the other hand, I have concluded that the second accused as well cannot escape being found guilty on these counts owing to his having allegedly acted in furtherance of a common purpose with the first

accused given his working on the cars whilst he failed to explain himself. I have thus concluded that both accused persons are found guilty on counts 36, 39, 40, 41, 42, 43, 44, 47, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 64, 65, 66, 67, 68, 69 and 70.

[366] Counts 16, 32, 34, 35, 37, 46, 48, 62 and 63 were abandoned by the crown which necessitated that the accused persons be acquitted and discharged on them given that they had already pleaded thereto.

[367] With regards count 71, that is the count that contends the contravention of section 14(2)(d) of the Immigration Act, I have come to the conclusion that the first accused is guilty of contravening section 14 (2)(d) of the Immigration Act 1982 by harbouring the said Vincente Souza Mwambo, which is the same thing as saying by employing him without a permit and keeping him at his homestead.

[368] For the removal of doubt I order as follows: -

1. The two accused persons are found guilty of contravening section 3(1) as read with section 4 of the Theft of Motor Vehicles Act, 1991 as particularized in counts 1, 2, 3, 4, 5, 6, 8, 9, 18 and 33.

2. Both accused persons are found guilty of contravening section 8 of the Theft of Motor Vehicles Act of 1991 as particularized in count 7. That is to say they, whilst acting in furtherance of a common purpose, dealt in a stolen motor

vehicle being a Toyota Hilux LDV which was stolen from Erald Rabe of PaulPieterzburg, Republic of South Africa.

3.The two accused persons are found guilty of contravening section 6(1) as read with section 6(2) of the Theft of Motor Vehicles Act, 1991 as particularized in counts 10, 11, 12, 13, 14, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 and 31.

4.Both accused persons are found guilty of contravening sections 7(2) as read with section 7(3) of the Theft of Motor Vehicles Act as particularized in counts 36, 39, 40, 41, 42, 43, 44, 47, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 64, 65, 66, 67, 68 and 70.