IN THE HIGH COURT OF SWAZILAND

Crim. Trial No. 127/2002

HELD AT MBABANE

In the matter between

REX

Versus

KENNETH GAMEDZE	1st Accused
SABELO MAZIYA	2nd Accused
MADALA MATSENJWA	3rd Accused
CORAM	J.P. ANNANDALE, A C J
For the Crown	Ms. N. Lukhele
For all 3 accused persons	Mr. S. Bhembe

JUDGMENT

(23 October 2003)

In this protracted trial the three accused persons are charged with the hi-jacking of a motor vehicle, during which the driver was shot and killed, also further charges relating to unlawful possession of a fire arm and ammunition by the second accused. All three were represented by Mr. Bhembe who meticulously and painstakingly challenged the crown's case on their behalf, following their pleas of not guilty to all

charges in the indictment. Under the term "protracted" is to be understood that the accused persons altogether appeared in court on twenty-two different days, from the day they pleaded on the 27th January 2003 until finalisation of submissions by counsel on the 23rd June 2003. On many of these days no evidence was heard due to diverse reasons as recorded in the record of proceedings. Nevertheless, it is indicative of how long a criminal trial in Swaziland can take to be brought to finality, a trial that could have been thought to take no more than a day or two under ideal circumstances.

The three accused persons have been detained since the first quarter of 2001 with two being released soon before the commencement of the trial, again kept in custody after the commencement of the trial.

This observation is not recorded as a criticism of counsel but to indicate that criminal trials can and do take considerable time to be finalised, which in turn does not auger well for the expeditious trial of other accused persons who may very well be incarcerated for the time being, bearing in mind that presently more than four hundred trials are in line to be heard at the High Court of Swaziland. This is apart from eight times more civil matters on the waiting list, all this with a small bench of only five judges, two of whose appointments are challenged and pending determination by the courts. This is in a country with an estimated population figure of almost 1 million people, in the year 2000. Furthermore, there is presently no prospect of a timeous hearing of any appeal which arises from this decision or any other as no Court of Appeal is in existence at the moment, since the end of November 2002.

That this bleak situation cannot be tolerated to continue bears no argument.

In the first count, all three accused are charged with the murder of Mthunzi Dlamini, acting jointly with a common purpose, on the 10th February 2001, at Lugongolweni in the Lubombo district. The second count of Robbery has it that all three, again acting jointly with a common purpose, threatened Mthunzi Dlamini and Assiana Nomsa Dlamini by threat of being shot on the same date and place and unlawfully (sic) stole various items (nineteen in all) especially so a Toyota Hilux SD 497 JG, briefcase, cell phone, keys, airline ticket, passport, bankbook, cards, etcetera, being property or in their lawful possession.

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The third and fourth counts apply to the second accused only, being statutory contraventions of sections 11(1) and (2) read with Section 11(8) of the Arms and Ammunition Act of 1964 (Act 6 of 1968), relating to the alleged "wrongful and unlawful" possession of a brown 9 mm pistol, serial No. EF 6223 and a magazine with 4 live rounds of 9 mm ammunition, at the Mpolonjeni bus stop area, on the 9th March 2001.

In all, apart from documentary evidence, the testimony of twelve witnesses for the crown was heard, two of which were introduced as accomplices and five of which are police officers, as well as four defence witnesses.

In the chronological sequence of events, the evidence commences with what could be termed the planning and preparation of the anticipated crime which would have entailed the hi-jacking or theft of a Toyota double cab four wheel drive bakkie. The evidence on this aspect, as well as the later events, were related by one Mandla Emmanuel Matsenjwa, hereafter referred to as PW1. He was introduced by the Crown as an accomplice, meaning that Section 234 of the Criminal Procedure and Evidence Act, 1938 (Act 67 of 1938 and here under referred to as the Act) has application, apart the relevant cautionary rules and principles.

The Act reads in part, under Section 234(1) that:

"If any person who to the knowledge of the public prosecutor has been an accomplice, either as principal or accessory, (my emphasis) in the commission of any offence alleged in any indictment... is produced as a witness... and submits to be sworn as a witness, and fully answers to the satisfaction of the court ... all lawful questions put to him... he shall be absolutely freed and discharged from all liability to prosecution for such offence...".

Such discharge is to be duly entered on the record of proceedings of the criteria are met.

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It is not so much the fact that a witness is formally introduced as an accomplice that matters most, as this really only serves to place the presiding judge on guard prior to hearing of the evidence and secondly to make the witness aware of what is expected of him, possibly to include immunity from prosecution, if applicable. Being so introduced does not release and activate any magical formula of acceptance of evidence. More important is the caution with which his evidence will have to be evaluated, especially so by corroboration of the accomplice in material respects. If the corroboration evidence does not implicate the accused, or if there is no evidence aliunde that implicates the accused person(s), further caution will have to be applied and the evidence of a single witness, who is an accomplice in addition, begs very careful scrutiny prior to acceptance. I shall refer to these aspects further down.

PW1, Mandla Matsenjwa's evidence, is that he knows each of the three accused persons to different degrees. On the 9th February 2001, a day before the crime was committed, he says that the second accused, Maziya, called him to his car, inside which the other two accused also were. The first accused then enquired from him about the whereabouts of a certain 4 x 4 vehicle, used by the late Mtunzi, belonging to the Ministry of Agriculture. After arranging to see him the following day at the third accused's homestead, the three left.

As arranged, he went to the homestead of the third accused the following day, where he found all three and was again asked about the 4 x 4, this time if he knew whether it uses diesel. He says that it was at this stage that he was told by the first accused that he, Gamedze, had already secured a buyer for the vehicle, in Maputo.

A taxi then arrived, driven by PW4, one Mandla Gamedze, which took the four of them to consult with a Nyanga or Traditional Healer, PW2 Sarah Fakudze. There, according to this witness, the first two accused talked to the Nyanga and they then went to the place "where her herbs are kept." A few minutes later he and the third accused were also called to the hut wherein he saw some bones having been cast, to foretell problems, difficulties and illnesses. He says that the Inyanga then asked the first two accused "why they do mischief and causing us to join them - we are weak and not strong enough for criminal activities."

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The Inyanga then said that it is not a problem, she would give the two (PW1 and accused 3) something to cleanse them, to avoid bad luck. At this stage he and the third accused were sent out of the hut while the other two remained inside with the Inyanga, as she wanted to give them "something", a "muti".

The first two accused are said to then have emerged from the hut, on which the second accused told them that the "father of the home" had been sent to fetch something and that in the meantime, they should move to a sports ground. There, some boys arrived and they joined them to play soccer, while the first accused remained outside the grounds, 'till sunset, when the first two accused decided it is time to go home. On their way, PW1 says that he saw a bulge on the waist of the first accused. He enquired what it was and was told it is a firearm, which he says frightened him. He heard that the man who was sent to fetch something did not get what they wanted.

I have summarized the evidence relating to the visit at the Inyanga in some detail, as much was made during the course of the trial about differences of opinion as to what exactly transpired there, as enumerated further down.

PW1 testified further that along the way home, the planned robbery of the 4 x 4 was again discussed and that it was agreed that it would be taken by force, without the use of a firearm.

Later that evening, around 21h00 , the four of them congregated at the place where the arrival of the vehicle was awaited, at a gate leading to the homestead of the late Mtunzi Dlamini who used the vehicle. He says that while waiting, he and the third accused were sent to the homestead to verify if the vehicle had not in the meantime been taken home. On their return, the two of them were sent off to wait on the other side of the road as the first two accused were going to take the vehicle by themselves.

Some twenty minutes later, the awaited vehicle arrived and turned off the road towards the closed gate where the first two accused were standing. As he watched, the driver got out to open the gate, exiting the white 4 x 4 double cab bakkie which had stickers on it. He left the door open and the engine running and as he was busy with

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the gate, the first two accused went to the bakkie. The driver's wife was inside the vehicle and he heard a noise as if an alarm was raised, and as the driver ran back to the car, he was blocked by the two accused. A fight ensued between them during which he heard the sound of two shots, which he suspected to have been fired by the first accused, who earlier on told him that he had a gun. His suspicion was fortified when after the shots were fired, they all converged at the vehicle, with the witness remaining standing at a door. He was then pointed with a fire arm by the first accused who swore at him saying "voetsek", asking why he stood waiting outside the car and accusing him of trying to be "smart", adding that he could see that he, the witness, wanted to report to the police that he, the first accused, killed a person.

As they were about to drive off, he saw the deceased, Mr. Dlamini, lying on the ground with blood on his head, visible in the lights of the car. He says that at this stage the second accused, who drove the vehicle, unsuccessfully suggested to the first accused that as they had killed someone, they should abandon the vehicle. On the way, he again asked to be left behind as their objective, to rob the vehicle, had been achieved. Again the first accused said that he wants to report them to the police as he thinks he is "smart."

They drove to Lomahasha, which borders on Mocambique where the intended purchaser was; the vehicle was hidden at some homestead where he and the third accused remained for the night while the first two went off to make arrangements for a border crossing. They returned at daybreak, angry that their plans were frustrated by additional military presence along the border after soldiers were reportedly shot.

The vehicle was then concealed until the following day, Sunday 11th February, when it was refuelled for the border crossing which was re-arranged by the first two accused. The witness says that the vehicle was then driven off, heading for Mocambique through an illegal access point, again with accused number two behind the wheel, and apart from the four of them, a further person brought along by the first two accused. They stopped en route where that man got out and another two persons joined the party.

Along the way they encountered trouble in the form of a parked police car from which shots were fired at them. They sped off, later to abandon their bakkie and fled on foot through the bushes, towards Lomahasha, where some ten kilometres later they took refuge in a homestead until the following day. The others then set off to Maputo with the witness being allowed to return home after some haggling between them.

After some time, during the month of March, he received word that the police were looking for him and he reported at the police station where he was taken into custody. He says that his conscience bothered him all along and that he decided to give a full account of events to the police. He described the hi-jacked vehicle as white in colour, registration No. SD 497 JG, with green stickers depicting trees, on it its doors and bonnet. He thought it to belong to the Ministry of Agriculture, usually driven by the deceased who lived very close to his own homestead.

At court, the vehicle exhibited during an inspection in loco was identified by this witness as one and the same which was robbed from the deceased. He noted that the number plate had since been changed. He said that the stickers on the vehicle, depicting green trees and some words, are the same as those which were initially on the vehicle. The wording on the stickers read:- "Ministry of Agriculture and Cooperatives" and "Forest Policy & Legislation Project" and "Forestry Section, Swaziland". The present registration number is SG 072 AG. It is a white Toyota double cab 4 x 4, 2.8 diesel.

The second witness for the prosecution was the Inyanga that was consulted on the day before the crime was committed, Sarah Fakudze (nee Malaza). She has it that the first accused, accompanied by three others, one of them being the second accused, came to consult her as traditional healer. Although the Inyanga was non-specific as to how the accused persons and PW1 arrived at her place, the crown called the taxi driver that took them there, one Peter Gamedze (PW4). His evidence is in line with that of PW1, namely that on the 10th February 2001 he conveyed the three accused and a fourth person from Siteki to the Inyanga at Masotsheni, with the instructions coming from the first accused. In her hut, before she cast the bones, she told the younger two persons (PW1 and accused 3) to leave, upon which she saw that the bones forecasted "bad luck" or "darkness", such that "a person could die for him" (referring to the first

accused), or that if he was to "pick up a fight with someone, that person can die at his hand". As in the case of Macbeth, he asked for some "muti" to cleanse himself with.

In cross examination she confirmed that she did not administer anything to the companions of the first accused, that she sent the younger two persons out of the hut, not that she called them in and that she did not send her husband on an errand in relation to this matter. She also confirmed that she did not ask the first and second accused why they are "going around with people that do not use muti."

The evidence of both PW1 and the soothsayer, that the third accused and PW1 did enter the hut but were sent out before the bones were cast is contrary to the defence version. The defence attorney, Mr. Bhembe, emphatically put it to PW1 that he was instructed that PW1 and the third accused "never, at any stage, entered the hut of the traditional healer, only accused 1 and 2 who knew her, entered."

Chronologically, the next witness, PW6, is the wife of the deceased, Mrs. Assianah Nomsa Dlamini. Her evidence centred on the events that occurred at the scene of crime. During the night of the 10th February 2001, she and her late husband, Mthunzi Dlamini returned home. They drove in his official vehicle, the Toyota Hilux double cab 4x4, registered SD 497 JG, bearing the green Forestry Policy Legislation Project stickers described above - her late husband was a project coordinator in the Agricultural Ministry.

After about 21h30 they stopped at their gate and her husband got out to open it, leaving the engine running and the headlights on. She says that it was full moon that night. As he returned to the bakkie she heard a shout of "voetsek!" and "shaya" (hit), a gunshot was fired and she saw her husband holding his chest. As he tried to regain his balance another shot was fired and his head "swayed". She saw two men, the taller one light in complexion and the shorter one dark. She then opened her door and fell down, expecting to die.

Their vehicle was then driven off by their attackers after which she attended to her husband who was bleeding, hoping to get him to a hospital. She set off seeking for help, but got none after going to a number of nearby homesteads, eventually to find a

Samaritan with a cell phone who made some calls. She again set off, this time to the apparently nearby army barracks where she obtained a vehicle to return to the scene. En route, they heard emergency vehicle alarms and on arrival, found that her husband had already been removed with only a pool of blood remaining where he fell down. She was then also taken to the hospital where she found her husband on a stretcher, already dead. She then went to the police station to have her statement recorded.

She described a number of personal belongings that were left in their vehicle, mainly as listed in the indictment. None of these items were exhibited in court at the trial, nor was any evidence heard about the recovery of any of those items.

After the police recovered the vehicle, she positively identified it as the same that was taken from them by force at the time her husband was killed. She noted that the stickers had been removed and that there was a (bullet) hole in a window, apart from some scratches.

In court, her evidence was that their vehicle appeared to her to be "similar" as the one depicted in the photographs marked as exhibits 1, 3 and 4. It has the same registration number (SD 497 JG) but is without the stickers (the green tree and forestry wording). The holes she saw in the side window and mirror at the police station were not so patently visible to her in the photographs.

During cross-examination it surfaced that indeed almost all the additional personal items that were taken together with the vehicle were recovered. She was not shown any of those items to identify nor were any later produced as evidence during the trial. It remains a mystery how and where or by whom it was found. It remains a lacuna in the case for the prosecution.

She further confirmed that she was not shown any suspect to identify nor could she positively identify any of the accused in court in connection with the crime. She also did not see that the deceased was involved in any physical scuffle with his assailants at the scene of crime.

The prosecution also introduced witness Samuel Makhubula (PW3) as an accomplice, with the same implications as those which pertain to its "star witness", PW1. He is a resident from Lomahasha, a village bordering on Mocambique and who says he knows the first accused very well.

One Saturday in February 2001 the first and second accused persons came to his house where the first accused asked him to help smuggle a vehicle into Mocambique. He agreed to it, saying that he could not do it alone. The two then left, to return later in the company of two others, Elias Malindzisa and Angelina Mabila. They set off on a recce by foot to check their intended crossing point, during which Malindzisa left the group under the pretext of answering the call of nature. On their way back a vehicle approached and they dispersed.

The following day the first accused again came to his house, this time accompanied by one Booyzen Silombo, to arrange the illicit whisking of the vehicle into Mocambique. They arranged to bring it from where it was hidden and later met at a bus stop, from where they drove off, only to find the white Astra, already mentioned by the first witness and later in the trial by the police. From this Astra car they were fired upon by the police. The driver (accused 2) continued for a short distance, they stopped and the occupants all made off on foot.

A few days later he was fetched by the police and shown to accused one and two who confirmed that "he is the one they looked for." This witness also confirmed that the vehicle he was to have helped smuggle into Mocambique is the same Toyota 4 x 4 and that it is "similar" to the one depicted in photograph marked "exhibit 1".

Defence counsel challenged his evidence on various aspects and most notably to deny the association he said he had with the first two accused and the helpers. He steadfastly maintained it to have been as he related it to court and would not budge at all. When told that he is mistaken as to when (in the year 2000 or 2001) the events he spoke of took place, although it was shown that he can get somewhat confused with dates, he again adamantly maintained his version as related in his evidence - in -chief. The same applies to the version put to him that it was a different vehicle brought to him by the first two accused persons. He motivated his denial by referring

to the number of persons that were in the bakkie in question, especially so with reference to the back row of seats, three in front, three in the backseat.

It was also challenged that the people he said to have travelled with them to assist were there at all, again causing him to hold to his original evidence. Although he did not actually see the fire-arm when the policeman fired it from the white Astra they met on their way at Shewula, nor hearing the impact of a bullet when it hit their vehicle, he has no doubt or reservation about his recollections. He readily conceded that the vehicle in photograph No. 1 looks exactly like the one he testified about, it might possibly be another similar vehicle as he did not pay notice to any special unique features it had. He could not recall whether it had the "green tree" stickers on it at the time either, but attributed his apparent inattentiveness to the very short time he actually saw the vehicle's exterior.

At no stage did he impress as a witness who adjusts his sails according to the prevailing winds, nor that he embellishes his evidence at all, nor that he has any improper motive to either implicate anybody falsely or has any malice against the accused persons. He did not try to underplay his own role nor to exaggerate. In all, he made a good impression as witness. He did not require much prompting from the crown counsel and though he kept his eyes averted to the floor most of the time, nothing adverse is to be drawn from it. He unhesitatingly responded to all questions without appearing to be searching for answers. All that one cannot be sure of is exactly when he was employed, and where.

Identification of the stolen vehicle vis-a-vis the recovered one was placed in issue at the trial. To this end, the crown called Mr. Solomon Gamedze (PW7), a colleague of the late Dlamini who was shot on the fateful night when he returned home in the Toyota 4x4 double-cab bakkie. This witness said that Dlamini used the bakkie, donated by the Danish, in the course of his work as coordinator of a Forestry Policy Legislation Project. A week or two after the incident he heard that the police had recovered the stolen vehicle. At the Ministry's request, the vehicle was released to it after an application in court.

Mr. Gamedze gave a description of the hi-jacked vehicle, SD 497 JG, which was used by the deceased at the time of the incident, namely a white Toyota Hilux 4 x 4 double cab with 2.8L diesel engine, bearing the afore-described "green tree" stickers of the "Forestry Policy Legislation Project." He said that at the time, such stickers were on the doors of both sides, the tailgate and bonnet. During his evidence he produced the original registration document (exhibit Bl and B2) relating to SD 497 JG - a Toyota Hilux L. D. V. registered in the name of "Forestry Policy Legislation Project", the same entity as per the "Green Tree" stickers on the bakkie. He also identified the vehicle depicted in photographs 1,3 and 4 as one and the same vehicle.

His further evidence is that on its release by the Siteki Magistrate Court, the stickers had been removed and there was fresh minor damage to the vehicle. Most notably were markings at the right hand side window sealing rubber and the mirror, which had a hole in it.

He also explained that in November 2002 the vehicle was donated to Government, after it had been kept in use during the preceding three or four years. In order to have it serviced and maintained by Government, the registration was changed to an official Government number, SG 072 AG (SD= Swaziland Government; AG=Ministry of Agriculture). It is this vehicle registration number that is affixed on the vehicle exhibited to court. The holed exterior mirror was also replaced.

During an inspection of this vehicle at court it was found to match with all aforementioned evidence relating to it. The registration document of SD 497 JG, the original number plate, also indicates the engine and chassis numbers. These match the numbers seen on the vehicle itself, a white Toyota diesel Hilux 4 x 4 double cab. The "Green Tree" stickers have since recovery been replaced. Both the engine and chassis numbers also match with the numbers recorded in his diary by PW8, Mkhatshwa, who was present when the Toyota was shot at by the Police who were in the white Astra, near the Mocambique border.

Noteworthy was a deep scratch mark of approximately 1 x 6 cm, grooved into the lower window sealing rubber of the driver's door, near the mirror, which had since been replaced. Prior to its replacement, the damage can best be seen on photographs

5 and 6. The hole in the mirror is said to have been caused by a bullet, fired from the white astra vehicle by a policeman, Shabangu, as related by Detective Constable Mkhatshwa (PW 8) whose evidence follows further down.

Gamedze (PW7) was taken to task in cross examination about the change of number plate, re-affixing of the "Green Tree" stickers and replacement of the broken mirror, contrary to an assumed condition of release to his Ministry. The court order itself was not produced during the trial.

Most essentially, it was put to him as fact that the vehicle exhibited to court is not the same which was released to the Ministry of Agriculture. This version of the defence was denied by Gamedze and quite rightly so, in my view. Gamedze's evidence is supported not only by his own evidence but also by the registration document and the vehicle itself, beyond the identification on the photographs. Whether the changes made to the vehicle are contrary to a court release order or not, his explanation and motivation for the changes do hold water. It is quite understandable that in order to have the vehicle fuelled, serviced and maintained by Government, that it was allocated the present Governmental number plate. Further, in

order to use it, the replacement of the exterior mirror which by all accounts had a bullet fired through it. Considering the fact that it is a vehicle donated by the Danish Government to be used in a Forestry Policy Legislation Project, it is in line with the appropriate stickers to be replaced after they were removed following the hi-jacking. It may well violate the letter of a court order of which the terms remain unknown, but there is nothing sinister about these changes. Furthermore, the bald assertion that the exhibited vehicle is not the same as which the police recovered after it was shot at and abandoned by the occupants, later to be released to the Ministry of Agriculture and used since then, remains a bald assertion and no more.

One further distinguishing feature of the vehicle remains the deep groove in the window sealing rubber near the side mirror. This mark was seen and commented on both before and after release of the recovered vehicle. There is no room to speculate that the damaged rubber was removed from the recovered vehicle, to be fitted to the vehicle shown to this court as an exhibit.

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Direct evidence about the events that ended in the recovery of the vehicle was heard from Detective Constable Mkhatshwa (PW8). Acting on a crime report late at night on the 10th February he and other police officers went to the Lomahasha area, which borders on Mocambique. They fruitlessly spent the night checking on known exit points along the border. The following day at Shewula, another such area, in the late afternoon, they heard the sound of an approaching vehicle. As it came towards them he noted six occupants, which tallies with the evidence of both PW1 and 3. It was a white Toyota 4x4 twin cab which failed to stop when the police tried to bring it to a halt.

It was then that officer Shabangu fired a shot at it. Some 200 metres further it came to a standstill. The occupants scrambled out and ran off into the bush, outpacing their pursuers who then gave up the chase and returned to the abandoned vehicle.

This witness noted the damage to the window sealing rubber where the bullet ricocheted into and through the side mirror. He further noted that the engine and chassis numbers were the same as the vehicle reported to be stolen, also that there were telltale signs that stickers had been removed. He recorded the engine and chassis numbers in his diary. Of noteworthy importance is his evidence that in the process of the bakkie being driven past them, he noticed that the driver was Sabelo Maziya, the second accused, whom he knew to stay in Siteki. This evidence again corresponds with that of PW1 and 3 who both testified that it was the second accused who drove the stolen vehicle.

He identified the recovered vehicle as being the same as the one shown in photographs 5, 6 and 7, with specific reference to the bullet marks and the faintly visible marks of residue on the tailgate where a sticker had been removed.

Officer Shabangu who is said to have fired at the Toyota LDV was not called as a witness - he has since passed away.

Mr. Bhembe established during cross examination of PW8 that although the witness said he recognised the driver of the Toyota 4 x 4 as the second accused, he knew that he stayed in Siteki and recorded this in his police statement, this accused was not

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sought for by this witness, nor was he arrested until the month of March. For his failure to search for and arrest the accused, also his apparent loss of interest in the case after the vehicle was recovered, Mkhatshwa explained that he got word that his father was seriously ill and that he took time off to attend to his father, in the belief that the other police officers would look for the suspects.

I find no reason to doubt or disbelieve anything this witness said. His identification of the driver, the second accused, was fortified by statements made to him by the defence counsel, to the effect that he

was likewise known to the second accused. The correctness and authenticity of his recording the engine and chassis numbers of the vehicle he saw at Shewula on the 11th February 2001 was left unchallenged. It matches the numbers seen by court on the exhibited vehicle, also those recorded on the registration document. His evidence further ties in with the deep groove on the window sealing rubber and its origin - a bullet fired at the moving vehicle at the time they tried to stop it in the vicinity of the border of Mocambique, the destination according to PW1 and 3. His evidence that the shot was fired from a white Astra also tallies with the evidence of these same two persons, who said that they were inside the Toyota 4 x 4 when it was fired at from the white Astra.

Evidence of the arrests was heard from Constable Mbatha - PW9, one of the investigating officers. On the 8th March 2001 he arrested PW1 Mandla Matsenjwa. The following day the second accused, Sabelo Maziya was arrested, also the first accused, Kenneth Gamedze. A few days later the third accused, Madala Matsenjwa was likewise taken into custody. According to him, all were duly cautioned and charged with the murder of the late Dlamini and the robbery of his vehicle.

A slightly more detailed account of his evidence was solicited in cross examination, namely, that the second accused was arrested while on a bus by Detective Inspector Ndlela (PW 10, below) and that the cautioning in terms of Judges Rules was done by the late Shabangu, who also effected the arrest of the first accused, in his presence. A long debate ensued as to whether indeed the arrestees were duly and properly cautioned and whether they made any statements or not. He was also accused of torturing the third accused, which he denied. He also denied that PW3 - Samuel Makhubela, was not traced with the help of the first and second accused but that he

found them at the police station. He further denied soliciting the third accused for his evidence against his co-accused, or that he sought to speak with the accused persons in prison. Whether the accusations levelled against him have merit or not, it does not do away with the fact that each of the accused persons were indeed arrested, charged and prosecuted. PW9 did not testify about discoveries of exhibits that might be contentious, following unorthodox investigative methods. Nor did he testify about potentially inadmissible pointings out by any accused resulting in self incrimination. No new evidential material was discovered and used at the trial as result of any "confession" made to the police. The nearest to that would be a confirmation by the first two accused persons, when shown the witness Makhubula (PW3), and saying that "he is the one." The defence version which was put to him is that it actually was PW3 - Makhubula, who came to the police station after they were already in custody, not that they accompanied the police to Makhubula's home. He also denied this. It does not take the matter any further either.

A further two policemen testified about photographs that they took. The first of these, Detective Constable Sihlongonyane (PW11) photographed the recovered vehicle after its release by court. He is the uncontested author of photographs 1, 3 and 4 handed in as exhibits in this trial.

The second, Sergeant Joubert Magagula (PW12) photographed the scene of crime, depicted in the photographs marked exhibits 8, 9, 10 and 11. It shows a closed farm gate, the general scene, also the remains of what apparently was the residue of a pool of blood and two different empty handgun cartridges on the ground.

No forensic evidence was adduced in an effort to prove that the empty cartridges were fired from any particular handgun or about the blood either, to link it to the deceased.

These four photographs were taken the day after the robbery and shooting the previous night.
Four days later, on the 15th February, 2001, he took further photographs of the recovered vehicle, SD 497 JG. He handed in exhibits 5, 7 and 12 but was not asked about photo number 6, an apparent omission of no consequence.

The evidence summarised above is the crown's case pertaining to the murder and robbery charges. In respect of the two firearm related charges against the second accused the crown called Detective Inspector Ndlela (PW10), a single witness on the material issues.

As part of a group of seven police officers, he went to Mpolonjeni area on the 9th March 2001. There, they stopped and entered a bus, this witness following Mbatha (PW9), as also related by the latter. Mbatha is said to have entered first because "he had knowledge of the suspects."

His specific evidence is that he found the second accused, Sabelo Maziya, in the third row of seats of the bus. After introducing themselves to him as police officers and asking to search him, he stood up. He says that as the man raised his arms, he noticed a bulge in the front of his trousers. He pulled it out and found a loaded 9mm pistol. Unable to produce a licence for it, he was taken off the bus, put into the police van and taken to Siteki Police Station. There, after due cautioning, he elected to remain silent and was formally charged with the unlawful possession of the firearm and four rounds of ammunition. On the 13th March 2001 he took the second accused and the firearm to the police firearms expert who tested it in the presence of the second accused and found it to be serviceable. He handed in the 9mm pistol, serial number EF 6223 together with three live rounds, one empty cartridge and a magazine as exhibits at the trial.

In cross examination he said that Mbatha (PW9) witnessed how he found the pistol tucked into the trousers of the second accused and that he was surprised that Mbatha did not testify about it. He vehemently denied that instead of finding the pistol concealed on the body of accused two, that he would have found it on the floor of the bus, blaming ownership of it on the second accused as he was said to be a killer and that he would bear the consequences of dropping it. He further refuted the defence version that would be to that effect, even if given by the person who was with the second accused on the bus at the time, one Macoseso Kunene.

As said above, Ndlela remains a single witness on the firearm related charges. Although both he and Mbatha said that they entered the bus, Mbatha did not give any evidence about the discovery of the pistol that Ndlela said he would have seen to occur. None of the other passengers on the bus who surely would have seen the event happen were called to corroborate Ndlela either.

Lastly, the crown called the Police Force Armourer who tested the firearm, Sergeant Gamedze (PW5), a man appropriately experienced to testify about the serviceability of firearms. His evidence is that on the 13th March, 2001, PW10 - Ndlela, gave him a Makarov 9mm pistol with magazine and four 9 x 18 mm rounds to test. He tested it and found it in working order - he fired one of the four rounds from it. He has it that it is classified as an "arm of war" under the relevant Act.

Following an admission of the Post Mortem report by consent of defence counsel, wherein pathologist Dr. Reddy recorded his findings and concluded that the deceased died due to "cranio-cerebral injury consequent to gunshot", the case for the prosecution was closed, as outlined above.

The evidence presented by the crown clearly establishes a prima facie case against the accused persons and no application for their discharge under Section 174 of the Criminal Procedure and Evidence Act was made. All three accused gave evidence in their defence and the second accused furthermore called a witness to support his version of the events on the bus when he was arrested. Predictably, their collective version of innocence flies in the face of the accounts of events heard from the prosecution witnesses and require careful scrutiny to determine whether it couldn't well be reasonably possibly true. Throughout however, one has to bear in mind that the accused do not have an onus or a burden of proof to prove their innocence - the onus is on the crown to prove guilt beyond a reasonable doubt. If the exculpatory version of an accused could reasonably possibly be true, even if the court does not believe it to be so, he is entitled to an acquittal. Ultimately, what will have to be borne in mind, is not whether the totality of evidence is only consistent with the guilt of the various accused persons, but whether it is inconsistent with their possible innocence on the diverse charges levied against each of them.

The sworn evidence of the first accused, Kenneth Gamedze (DW1) is a denial of knowing PW1, Matsenjwa, to a further extent than merely having seen him before, certainly not that he ever went to his house and enquired from him anything about a 4x4 vehicle or disclosing any plans to "take" one and sell it in Mocambique.

He readily concedes that PW1 accompanied him and the others to the Inyanga's homestead on the 10th February 2001 and gave an elaborate explanation as to how it came to be. In a very cumbersome manner he says that he went to the home of the second accused from where the latter's brother would have been sent to Siteki town to fetch a taxi as the taxi of the 2nd accused had a problem. It was here that he coincidentally found PW1 and the third accused. He says that when PW4 arrived with his taxi, the second accused "requested" PW1 and the third accused to also go with them to the Inyanga. He himself wanted to consult the Inyanga (PW2) about health and business problems.

At the Inyanga's homestead, they all entered her ancestoral hut, from which she would have sent out PW1 and the third accused as they did not come to seek help. He said that they were "weak" for her "muti". Some bones were then cast, he obtained his business advice from the Inyanga and also some "muti", which he used to cleanse himself with outside the hut, after which they left her hut and joined the other two who were waiting for them, then returned to the nearby town on foot. He says he did not tell the woman of any planned vehicle robbery, nor that he told the others to wait while the woman's husband was sent somewhere or that he returned to her hut at that stage. He is emphatic that he did not get any fire arm from her, nor did he conceal one in his trousers and that he never told PW1 anything about a gun.

He further denies that he would have gone to Lugongolweni on that day, that he would have sent PW1 to check if a vehicle had been returned to the homestead of the deceased and especially that he robbed any vehicle at all. His denial of any wrongdoing include any prior discussion of plans with PW1, whom he only knew by sight, or any arrangement to abstain from violence, or that he would have ordered PW1 and the third accused to move a distance away from himself and the second accused at the time of the robbery. Also dismissed as lies by PW1 is his admission of having shot the deceased or forcing him into the vehicle at gunpoint before driving off

to Lomahasha, or himself going there in the Toyota 4x4 bakkie which had green stickers on it.

His evidence continues as essentially denying all attributed to him by PW1, including the events at Lomahasha pertaining to arranging a border crossing into Mocambique, the shooting incident from the white Astra car with the subsequent running away from the Toyota and any threat made to PW1 to ensure his silence in the matter. He says the first time he again saw PW1 subsequent to the visit at the Inyanga was when he met him at the Siteki Police Station, after their arrest. A further set of denials centred on the aspects of being cautioned in terms of Judges Rules by the police during and after his arrest.

He further disagrees that he and the second accused would have taken the police to the homestead of Samuel Makhubula (PW3) - instead, it was the other way round -they were taken there by the police. He also denies Makhubula's evidence that he was engaged to assist in the smuggling of the Toyota into Mocambique at a promised payment of E500, as recounted by his attorney.

His only admitted dealings with PW3 Makhubula is an admission of a previous occasion in the year 2000 when he, the second accused and another person solicited Makhubula's assistance in smuggling a South African registered single cab Toyota LDV, "which had documents that are not straight" into Mocambique. During that matter he got to know where Makhubula stays and therein he was promised E500, which he did not get.

At the trial, I did not get the impression that the mention of the E500 not received as reward for his own

participation in the earlier illegal border crossing with a suspect or stolen vehicle, was to lay a basis to discredit Makhubula. If anything, it is the first accused who has an axe to grind with Makhubula, not vice versa. In my understanding the E500 was mentioned in passing, as part of the earlier illegal dealings the two had, with the objective of shifting the focus away from the present matter to a similar deal in the past, also to explain how his association with Makhubula came into being, other than the denied dealings which concern the double cab Toyota 4x4 which Makhubula testified about.

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His further evidence focused on the vehicle itself. He says that the Toyota LDV released by the magistrate at Siteki was seen by him and that it is not the same one produced during this trial. He motivates it by referring to the conditions of release, inter alia that the Agricultural Ministry was not to change any of its features without leave of court. The released vehicle had SD (Swaziland) registration letters, whereas the exhibited vehicle has SG (Government) registration letters. Further, the released vehicle had no stickers on its sides, whereas the exhibited vehicle has prominent "Green Tree" stickers affixed to it. Further again, the man who produced the exhibited vehicle (PW7) is not the same as the one to who it was released (the Principal Secretary, Agriculture.)

No proof of the release order with its conditions was produced during the trial, nor of any subsequent application to change the registration, replace the broken mirror or affix the stickers. There is also no reason to doubt what the first accused had to say about the court order and its contents. Herein, it prima facie appears that the Ministry of Agriculture did not adhere to the provisions and stipulations, in disregarding an Order of Court and going ahead to change features of an exhibit to be used in court, knowingly it to be impermissible to do so without leave of court. It is a matter that readily could adversely impact on a criminal prosecution and is ordered to be brought to the attention of the Acting Director of Public Prosecutions and the Attorney General. However innocent and well-meaning the intentions of the Ministry may have been, such conduct cannot be merely condoned and overlooked and needs strong discouragement. It may also cause courts of law to adversely rule on applications for the release of motor vehicles to be used in criminal prosecutions where the conditions of release are anticipated to be disregarded, as the case appears to be here.

In this specific matter, the probative evidentiary value and consequences of the unauthorised changes of the features of the vehicle concerned was the subject of protracted argument by defence counsel and the crown. The impact and final analysis follows further down in this judgment.

Concerning the position of PW1 Matsenjwa the evidence of the first accused is to the effect that he initially was charged and held as a fourth accused. After repeated

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efforts by the police, who are said to have visited him a number of times in prison, seeking him to confess and falsely implicate the others, which resulted in his eventual release after a prosecutor also stepped in. Most of this is based on hearsay, as is his apparent initial refusal to testify for the crown. The mother of PW1, as well as his sister and others are also said to have helped persuade him, unlike the third accused, to eventually decide on rather being a witness than an accused. He nevertheless is said to have visited his former co-accused a number of times after his release, to "check on them and find out if they are okay".

Lastly, on leading questions as to whether he conspired with his co-accused to kill the deceased and rob him of his vehicle and other possessions, he simply replied: "never".

This manner of giving his evidence also manifested throughout the bulk of his evidence. Portions of the crown's case was frequently put to him, soliciting his comment, which invariably came to bare denials, save for the odd occasions where he spoke his mind, mainly on peripheral issues. He did not offer an explanation as to why the witnesses called by the prosecution would falsely implicate him in so many aspects, save for the unfounded implication that PW1 Matsenjwa, would have decided to conjure up a

fanciful story about a man he barely knew, in exchange for his release. He seems to disregard Matsenjwa's evidence about his own personal involvement in the event, save for a threadbare denial of it all. He also did not seem to appreciate the corroborating evidence of other witnesses who connect him to events. He does not say where he was at the time the crime was committed, or at the subsequent happenings at Lomahasha on the Mocambique border.

He was cross examined at length. He was not shown to be a compulsive liar, nor did he seriously deviate from his evidence in chief. If some of his explanations seem to be over-elaborate, like the taxi episode to transport them to the Inyanga, it was not shown to be manifestly untrue or impossible. It may be doubtful if his explanations of the arrangements for the taxi and his reasons for walking or not walking certain distances, with an ailing chest, are really the truth, likewise with the reasons why PW1 had to accompany them on the visit to the Inyanga.

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Various aspects of his evidence were questioned in detail without any real impact on his credibility, like the events in the inyanga's hut and the manner in which the former fourth accused was liberated and persuaded to be a witness for the crown. This aspect showed his conclusions to be based on hearsay, not that he is untruthful. Whether he last saw PW1 at the Inyanga's place or in Siteki town is not of serious consequence either.

More relevant to this matter and in forming an opinion of his performance as witness is his evidence about his past dealings with the car smuggler, PW3 (Makhubula). If anything became clear it is his resistance to come clear on the details of his past association and dealings with this man. Like a cat on a hot plate, he tried to downplay his own role as either intermediary or facilitator. His explanations as to why he would have to be paid E500 for his role also smack of evasiveness, a reluctance to own up to his past dealings, which he himself introduced in his evidence in chief.

The manner in which he sought to dismiss the evidence of the two accomplice witnesses did not come across as convincing at all. He tried to substantiate the position of PW1 Matsenjwa, as going through all of his fabricated evidence merely because he was released from custody to avoid being placed on trial. He tried his best to diminish any prior knowledge of this person in a dismissive manner, saying he only knew him from sight. The alleged "misunderstanding" between himself and Makhubula, PW3, is equally unconvincing. The version of the first accused is that it is Makhubula who used the E500 due to him after helping to smuggle a vehicle into Mocambique. Ordinarily, it would be the accused who could hold a grudge against Makhubula not that Makhubula has reason to get the accused into trouble by giving false evidence against him.

One also has to bear in mind that the bare denials and repeated allegations of fabricated evidence has to be seen from a bigger perspective than the evidence of the individuals. Where evidence is fabricated the details are more likely to diverge between the versions of individuals than what it would be if they speak the truth. In this regard, one may for instance look at the crown's version of who the occupants in the Toyota 4x4 were at the time it was shot at. PW1 and PW3 both said that they were six in all, with the second accused being the driver. The first accused says that

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he is not able to drive a car. Both Makhubula and Matsenjwa said that there were two additional passengers to show the way across the border. The police officer who was present when a shot was fired at the Toyota, Constable Mkhatshwa (PW8), recognised the driver as being the second accused. This again raises the question as to how it would tally with the allegation by the first accused that Matsenjwa dreamed up his fabricated evidence in order to be released from custody, that Makhubula did likewise because of the "misunderstanding" about the E500 he did not give to the accused, and that constable Mkhatshwa fortuitously saw the same man driving the vehicle as related by the others.

The first accused did not go further with his bare allegations of fabrication to also include a conspiracy

between the various witness, to falsely blame him for the crime. The reasons he gave for the fabrication of evidence, in my view, are without any substance or proper foundation. His threadbare denials are equally unmotivated with the sufficiency one would expect of a man who has an overwhelming body of evidence that squarely places him in the arena of the criminal acts at its various stages of planning, execution and attempted disposal of the stolen vehicle.

Likewise, his efforts to convince the court that the exhibited vehicle is not the same one that the police recovered after it was shot at and abandoned by the six occupants, does not take into account the evidence by constable Mkhatshwa who independently recorded its engine and chassis numbers at the time the police found it.

Judging on the totality of evidence presented by the first accused, Gamedze, one would be extremely hard-pressed to hold it as reasonably possibly true. As witness, he is unconvincing.

To some extent, the second accused, Maziya, fared slightly better. Apart from being alleged to have been involved in the same manner as the first accused related to the killing and robbery, he was also said to have possessed a loaded handgun at the time of his arrest.

His version of the events on the 10th February 2001 is that he was at home, together with the third accused and PW1 when he received a phone call from the first accused,

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asking his whereabouts. On hearing that he was at home, he came over and asked for transport to the inyanga (PW2). He then told him that his car was without petrol, as opposed to the evidence of the first accused who said that the car "had a problem." It was then agreed that his younger brother would go to town to bring a taxi and he returned with Gamedze (PW4) and his "Badonse Taxi".

On their arrival at the Inyanga (PW2) the four of them entered her hut, after which the younger two (accused three and PW1 Matsenjwa) were sent out while the first two accused remained and the Inyanga did her thing, before the four of them walked back home. He says that contrary to the evidence of PW1, the Inyanga did not send her husband to fetch anything for them, nor did the first accused have any gun with him nor was anything discussed about an intended robbery of a motor vehicle. As in the case of the first accused, much of his evidence is a denial of the crown's evidence in so far as he is implicated.

He denies any involvement with the robbery, the murder and the subsequent disposal of the vehicle or the coercion of PW1 Matsenjwa to participate against his will. He also denies that Constable Mkhatshwa (PW8) could have seen him behind the steering wheel of the stolen vehicle at the time the police shot at it, as "it never happened." Also, that he does not know the police officer or that the officer knew where he stayed and never came to look for him. He further denies that he and the first accused would have taken the police to the homestead of Makhubula (PW3) at Lomahasha. He does concede to a marginal acquaintance with PW3 (Makhubula) on similar lines as that of the first accused, when in the year 2000 they met for the purpose of Makhubula's assistance with dealings pertaining to a white single cab Toyota bakkie.

He disputes the evidence of Constable Ndlela (PW10) about the finding of a pistol at the time he was arrested on a bus. Whereas Ndlela said that he found the pistol inside his trousers while he was inside the bus, the second accused says that he was already taken outside the bus when Ndlela emerged with the pistol from the bus, saying that "he found it in the bus", adding that he saw the accused "drop it".

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Concerning the recovered and subsequently released vehicle, he disputes it to be the same one that was exhibited during the trial, due to the different registration plates and absence/presence of the "green tree" stickers, mindful of the conditions imposed by court on its release.

His further evidence centred on the events that culminated in the release of PW1 (Matsenjwa) after he agreed to testify for the crown, much on the same line as the first accused, and how PW1 subsequently would have visited them in prison.

Much of the crown's version of events was put to him in cross-examination all of which he consistently denied when contrary to his own version. Also, the defence version as put to the crown's witnesses, was explored, without any serious discrepancies between the attorneys' instructions and his own version. He was not shown to be an outright liar, nor that he tripped over smaller details. His evidence is consistent throughout.

What does become clear from his evidence, especially under cross examination is the flimsiness of his denials and excuses. For instance, he readily acceded to be on friendly terms with PW1 (Matsenjwa) and that there is no "bad blood" between them, yet he cannot readily explain why Matsenjwa would falsely testify against him, save that he has been "schooled" and would fear re-arrest and prosecution if he did not testify for the prosecution. Yet, when confronted with corroborating aspects of evidence, like the three different witnesses (Matsenjwa, PW3 Makhubula and PW8 Constable Mkhatshwa) who independently place him behind the steering wheel of the stolen vehicle when it was shot at, he comes up with a new excuse, saying that PW3 had a misunderstanding with a person he (the second accused) knew, that PW1 would lie as he wanted to be released but not saying a word about why the police officer, PW8, would be the third person to tell the same lie. His reasons why the two accomplice witnesses, PW1 and 3, would falsely testify against him are not persuasive or convincing at all. On the contrary, the first time the court was to hear of the possible reasons why they would have fabricated their evidence was when he was specifically asked by the crown's counsel and not when the two men were cross examined by defence counsel.

The remarks made above pertaining to the evidence of the first accused, referring to the manner in which his evidence was solicited and the constantly repeated denials are equally apposite to the second accused.

His evidence about the firearm falls in a different category. Both in his evidence in chief and in cross examination, he related his own version of events, from the time the policeman confronted him in the bus, saying it has "burned", until the time he was taken away by the police. His version is radically different from that of the police officer, Ndlela (PW10). It is clear from both men's evidence that Ndlela was not alone when he entered the bus, but that other policemen were with him. The version of this accused was put to Ndlela by his attorney and it clearly transpired that there were further police officers on the bus at the time the second accused was arrested, apart from himself, who would have been able to corroborate his evidence. Yet, he remained a single witness. The crown chose not to call a corroborating witness, despite the challenges to his evidence and the version of the accused, that he was outside the bus when the witness Ndlela emerged with the firearm.

The Crown did not inform the court of any plausible reason as to why none of the other policemen who were on the scene were called to testify and support Ndlela's version. The court does not know why Ndlela had to remain as a single witness, whereas he said there were others who could support his evidence, in the face of the defence version that was put to him. When this is the case, an adverse inference may possibly be drawn against the prosecution's evidence, especially so where there is no explanation as to why the crown chose not to add any of the other police officers who were present when Ndlela was on the bus, confronted the accused and would have discovered the weapon concealed on his body, contrary to what the accused said and which was put to Ndlela. It is accepted that the evidence of a single witness may suffice under certain circumstances, but in the present matter, it becomes necessary to look at the evidence with a sceptical eye, moreso when the evidence of his own witness, Makhosazana Kunene (DW3) has to be considered.

The second accused called DW3 to testify about the events on the bus at the time of his arrest. Kunene said that he was travelling with the second accused on a bus in March 2001 when it was stopped by the

police at Mpolonjeni. He said that two

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policemen boarded the bus and came to the accused, who sat next to him and that they were both told to get outside, where they were ordered to lie on the ground. While the two officers who fetched them from the bus were guarding over them, a further three officers entered the bus. On their exit from the bus, one of the latter three officers exited, holding the firearm (that eventually formed the substance of the further charges against the second accused).

He has it that when that police officer, one of the three that entered the bus after the first two removed the two suspects from the bus and guarded over them whilst prone on the ground, that it was this officer who came out of the bus and told the second accused:- "Here is your firearm".

Essentially, his version is that the police found the weapon inside the bus, after the second accused had already been taken out of the bus. On face value, it seems to support the version of the second accused, who said the same. He also corroborates the second accused, as well as officer Ndlela, who all placed the second accused in the third row of seats of the bus. When prompted by defence counsel, he said that it is not true that the gun was recovered from his person, tucked away under the belt.

This evidence, that the gun was retrieved from the bus only after the second accused had been ordered to exit the bus, prone on the ground, in line with what the evidence of the second accused but contrary to Ndlela's evidence, has to be seen in context. On a proper understanding, it seems prima facie that DW3 (Kunene) says that it is the second batch of police officers, the three persons, who found a gun inside the bus, only after the first batch of two officers removed the two persons from the bus. Thus, the two officers who first entered the bus and took them outside and guarded over them, were not the same officers who recovered the gun.

This has to be compared with the evidence of the second accused, who said that he saw police officers Mbatha, Ndlela and others when their bus was stopped. Mbatha would have told him that "it has burned, we came to collect you," after which they alighted, to be searched outside the bus. He said that it was only then, while the other officers remained inside the bus, to search there, that Ndlela came out and said that he found the gun inside the bus, asking him why he dropped it there.

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In cross examination, the witness (Kunene) said that he did not know the police officer who came out of the bus with the gun he was said to have found there. He also said that he did not know the two officers who would have first entered the bus, ordering the two men to the outside. Thus, if his story is to be contextualised, it is that two officers first entered the bus, took them out, and that three other officers then went in, searched the interior of the bus, after which one of them came out with the gun, saying it belongs to the second accused, and notably, that he does not know any of those five policemen, except officer Shabangu. Shabangu, he says, he found at the police station. The officer who told the second accused "here is your firearm", he does not know.

Yet, Ndlela testified in court for the crown, and was fully well known to the second accused, being the man he said to have told him it is his gun. Kunene says that the two policemen who first entered the bus and took them out, remained outside while the others entered. The upshot of this is that according to Kunene it could not have been Ndlela who found the gun, but one of the other three, while the second accused has a conflicting story, namely that Ndlela remained inside the bus after the accused was taken outside and that it was Ndlela who came out with the gun.

From this, the inevitable conclusion is that according to the second accused, Ndlela found the "abandoned" gun inside the bus and came out to confront him with it. His witness Kunene however comes with a conflicting version, that it could not have been Ndlela, who he avers he does not know, but a different officer, one of the second group of three, who found the weapon inside the bus. Their two

versions are mutually destructive. It cannot be so that Ndlela first entered the bus, took the two suspects outside and guarding them, while at the same time also being one of the group of three officers who are said to have discovered the "abandoned" gun inside the bus. The only inference that can be drawn under these circumstances is that neither of the two witnesses, the second accused and his defence witness Kunene, can be believed in this aspect, as to when the gun was found and by whom. Ndlela could not have been inside and outside the bus at the same time.

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It is with a factual finding as outlined above, that the evidence of both the second accused and his witness Kunene has to be rejected as impossible and patently false as pertaining to the discovery of the firearm. In this context, the absence of an available corroborating witness to support the evidence of Ndlela on the discovery of the firearm takes a different turn than an adverse inference.

A single witness can be relied upon inter alia when the opposing evidence is patently false and is rejected, leaving the evidence of the single witness as the only available evidence, which by all other means remains intact. Apart from the false and rejected version of the second accused and his witness Kunene, there is no other reason to doubt the version of Ndlela as to how he came about to find the handgun on the person of the second accused, while he was inside the bus. The adverse inference that otherwise might have been drawn against the single witness ceases to be an impediment which might have reflected as a potentially adverse credibility issue and his evidence is accepted as the true and correct version of events. Furthermore, no reason has been advanced by the defence as to why he should be disbelieved. The onus remains on the crown to prove not only the guilt of an accused person, but to do so without a reasonable doubt. There is no reason to doubt the crown's version, but there is a severe credibility problem with the defence version, which cannot be found to be reasonably possibly true.

The third accused was also called to testify and had a difficulty to understand the oath, which was to bind his consciousness to speak only the truth and nothing else. His sworn evidence is, just like that of his two co-accused, that on the 10th February 2001 he was at the home of the second accused when PW1 (Matsenjwa) arrived, later to be followed by the first accused, who then talked with the second accused, after which the "Badonse" taxi (of PW4 Gumedze) arrived. He omitted to also say, as his co-accused did, that the brother of the second accused was sent to fetch the taxi from Siteki Town.

The four of them went to the inyanga by taxi, where she was consulted by the first accused, with the second being present, after the third accused and PW1 were sent out of her consulting hut. Afterwards, they all walked back to town.

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His further evidence continues on the pattern of his co-accused, to deny aspects of the crown's case as held to him by his attorney. He denies having murdered or robbed, he denies having been at the scene of the crime where the deceased was shot, denies that the Jnyanga's husband was sent to fetch something while they waited at her homestead. He also denies that PW1 (Matsenjwa) was forced or coerced to board the motor vehicle to go to Lomahasha and to remain there. He said he himself never got into the Toyota 4x 4 double-cab as related by Matsenjwa, nor that he himself went to Lomahasha after their visit at the Inyanga. He disputes being inside the 4x4 double cab when it was shot at by the police, also that he was cautioned in terms of Judges' Rules by Mbatha after his arrest. He says that no incriminating items were found in his possession.

His evidence about the Toyota 4x4 is that he did not ever see it before it was shown to court during the trial and that the vehicle he saw at Big Bend (Magistrates) court when it was conditionally released, is not the same one that was eventually exhibited, as it had no stickers at that time, also, the registration letters had been changed from an SD to an SG prefix.

He testified that he had also been asked to testify for the crown but did not do so, as he "knew nothing about the case" and that he "did not know what to testify about." He further has it that after the release of

PW1, he was visited by him in prison, where he says he was told by PW1 that "he was forced to testify in this matter" and that officer witbooi and his mother promised him "green pastures."

These latter aspects appear to be afterthoughts, which he did not instruct his own attorney about. His attorney meticulously and painstakingly put as much as he possibly could to the witness Matsenjwa without canvassing the "promised green pastures" and the "forced to testify" with PW1 as he most assuredly would have done if so told by the third accused. From his answers in cross examination it seems as if he was not physically present when Witbooi and the mother of PW1 spoke to the witness about the "promised green pastures", but in an adjacent room, with an open door. It was not canvassed whether he actually heard what was said or whether it was a conclusion he drew, either from bits and pieces he put together or based on hearsay. With his evidence that Matsenjwa was forced to testify and that PW1 did not know

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what to testify about, the position is worse. Over and above not canvassing it properly with Matsenjwa himself, there is no basis on which the accused formed these opinions. If Matsenjwa really did not know what to testify about and was somehow coerced and forced to give evidence for the crown, he by necessary implication would have to be taught what to say in court. All of the many details he gave would have to be learned by heart and practised over and over, ensuring in the process that it tied in exactly with the evidence by the other witnesses, to avoid him being caught out as a false witness. It also would have had to be so that the other witnesses, where applicable, would likewise have had to be taught to adjust their own evidence in order to include Matsenjwa's presence, while he was not there at all, to fabricate corroborating evidence.

This was not in line with the evidence as a whole, as heard during the trial. If Matsenjwa really fabricated his evidence, as from the time the men left the inyanga until their arrest, because he was not there, it is my firm view that he would not have been able to rehearse his lies so well that it could tie in with the corroborating evidence, without at least one person being caught out. This was not the case at all, quite the contrary.

Matsenjwa gave a clear account of what he could recall. He mentioned many details of the events he was involved in that would have contradicted the evidence of other witnesses, were they not speaking about their own observations experienced at the same time. There are some differences between his own evidence and that of for instance the inyanga, PW2 Sarah Fakudze, like the mission of her husband before the group of men returned to town. It has to be borne in mind that different people do in fact observe the exact same event from different perspectives, forming different opinions and recollections of what has actually happened. What also has to be considered is the importance of the aspect that gets to be elevated to a level of great importance by counsel in the course of cross examination. How much does it really matter who was asked to leave her hut and who was asked to stay behind and for what purpose to stay? How much does it really impact on the case whether the husband was thought to be sent somewhere, on a mission unknown, or whether he was not sent off? There is no evidence that he supplied a fire arm to the first accused. If it is a conclusion sought to be inferred from the facts, it certainly is not the one and only one

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that excludes other reasonable conclusions and no such factual finding can be made on the available evidence.

If Matsenjwa subjectively deduced that it had to be the husband of the inyanga that procured a gun, he certainly did not say so in his evidence. He also remains a single witness on the aspect of whether or not the first accused in fact did have a firearm concealed in his trousers at the time they walked back to town. On a consideration of this evidence it would not be possible to come to an adverse finding that the first accused was in possession of a firearm at the time he and the other men walked back to Siteki Town after their visit to the inyanga. But also, it does not imply that PW1 gave false evidence in this regard. What it

comes down to is that there is insufficient evidence to sustain a factual finding, beyond reasonable doubt, that the first accused did have a gun at the time the four men walked back to town.

The cross examination of PW1 was exhaustive, prolonged and intensive. Throughout this all, he remained calm, collected and unruffled. His answers were to the point and he never made a negative impression by trying to be evasive or being contradictive. He readily conceded his role in the criminal activities he had been called to testify about - how he and the third accused were initially taken along to the inyanga and the subsequent events, how he had to establish the whereabouts of the vehicle that was the object of the exercise and how it came about that the driver was shot and the efforts to get the vehicle into Mocambique.

From his own evidence and that of the third accused it is clear how they were both approached by the police, prosecutors and in the case of PW1, his family as well, to exchange their roles from accused persons to crown witnesses. PW1 Matsenjwa accepted and the third accused refused. There is no basis at all, in my view, to find that Matsenjwa was originally falsely and erroneously charged, to be prosecuted as a co-accused with a common purpose, but later on tutored to come forth with a perfectly rehearsed fictitious account of the events. The third accused so easily could have obtained immunity from prosecution if only he also took up the same offer made to Matsenjwa.

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The evidence of Matsenjwa is credible and believable. It is also corroborated in many material respects, which corroboration implicates the accused persons independently from Matsenjwa. To mention a few of the latter aspects:

Matsenjwa said that the incident took place at the gate leading to the homestead of the late Mthunzi Dlamini and that he heard two shots being fired. Mrs. Assianah Dlamini, the widow of the deceased, also placed the incident to have been at the gate leading to their homestead and also heard two shots. Sergeant Joubert Magagula (PW12) found two empty cartridges at that same place, which he photographed (exhibits 10 and 11).

PW 3, Makhubula, corroborates PW1 as to the events at Lomahasha, as described above, like who arrived at his home, what he was required to do, the fetching of further people to help them, who drove the vehicle at the time it was shot at, who sat where in the vehicle and from what make and colour vehicle the shot was fired at them. This last aspect is further confirmed by PW9, Constable Mkhatshwa, who was a passenger in the white Opel Astra when his colleague fired at the stolen Toyota, driven by the second accused. To a lesser extent, the photographs on which the hole in the mirror of the Toyota can be seen (exhibits 4, 5 and 6) are at minimum consistent with the evidence by PW1, 3 and 8 as to the firing of a bullet at the vehicle, just before it stopped and was abandoned by the fleeing occupants.

As is the case with PW1, the evidence by PW3 Samuel Makhubula is also credible and corroborated. Not only are there no reasons to doubt the veracity of their evidence, but also there are the impressions they made as credible witnesses. Both men put forth their stories in logical, plausible and convincing manner. They made a clean breast of their own wrongful participation in crime, knowing of the possible consequences. It is without any reservation or hesitation that they are both found to be credible witnesses whose evidence is supported or corroborated separately and independently.

I have been referred to various authorities on the aspect of accomplice evidence. Invariably, the authorities draw from the salutary words of Schreiner J A in Rex vs Ncanana 1948(4) SA 399(A) at 405 - 406 which I yet again find a most useful

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guideline, "a classic statement of what has been described as 'the common rule of practice."

"What is required is that the trier of fact should warn himself, or, if the trier is a jury, that it should be

warned, of the special danger of convicting on the evidence of an accomplice; for an accomplice is not merely a witness with a possible motive to tell lies about an innocent accused but is such a witness peculiarly equipped, by reason of his inside knowledge of the crime, to convince the unwary that his lies are the truth. This special danger is not met by corroboration of the accomplice in material respects not implicating the accused, or by proof aliunde that the crime charged was committed by someone... The risk that he may be convicted wrongly,.. will be reduced, and in the most satisfactory way, if there is corroboration implicating the accused. But it will also be reduced if the accused shows himself to be a lying witness or if he does not give evidence to contradict or explain that of the accomplice. And it will also be reduced, even in the absence of these features, if the trier of fact understands the peculiar danger inherent in accomplice evidence and appreciates that acceptance of the accomplice and rejection of the accused is, in such circumstances, only permissible where the merits of the former as a witness and the demerits of the latter are beyond question."

It is with this in mind that the evidence of especially Matsenjwa but also of Makhubela has been critically evaluated both in abstract and in context, searching for a possible clue that they may have been either mistaken or false. Both withstand the acid test, especially so when the corroborating aspects are added to the equation. The second accused has shown himself as a lying witness about the events on the bus. None of the accused have been able to explain away the collective body of evidence against them. Independently obtained evidence, like the recording of the engine and serial numbers of the 4x4 Toyota double-cab that was abandoned at Shewula after the police shot at it, correspond with the same numbers appearing in the registration document of the vehicle used by the deceased at the time he was killed. Each of the accused has all the reason in the world to dispute that it is this same recovered vehicle which was driven by the second accused at the time it was shot at, that it was released on strength of a court order to the Ministry of Agriculture and subsequently exhibited

to court during this trial. But it could not be explained away that the noted changes to the vehicle, namely the new Government registration number and the stickers again placed on it, is due to any other reason than that explained by the Ministry's official, Mr. Solomon Gamedze - PW7. Also, it could not be explained away that the same engine and chassis numbers features on the same vehicle, throughout, namely the vehicle donated by the Danish government and recorded in the registration document and used by the deceased at the time of the robbery, also recorded by Constable Mkhatshwa (PW8) when it was abandoned after being shot at by the police, and finally when exhibited during the trial.

The manner how this hi-jacked vehicle came into the possession of the three accused before court has been reliably related by Matsenjwa, who partook in the crime at all its different stages, and his evidence has been extensively corroborated by various others, who implicated the three accused independently from PW1, as set out above.

Accordingly, the factual findings made in this matter is that on the 9th February 2001, PW1 was solicited for information about the Toyota 4x4 Double-Cab bakkie, the main subject matter of the second count, which was used by the deceased who was well known to the witness. The following day, as arranged, the three accused again met with him, seeking further information about the vehicle and he was told by the first accused that he had a purchaser for the Toyota in Maputo. The four men then set off to an Inyanga where she "cast the bones" for the first two accused, after which they all walked back to town discussing their plans to rob the Toyota, by force, if necessary but as apparently agreed between them, without use of a firearm, the possession of which the first accused declared to have when asked by the fourth man, Matsenjwa. Later that evening the four lay in ambush at a farm gate leading to the homestead of Mthunzi Dlamini, the driver of the vehicle they wanted.

Before the vehicle arrived and stopped at the gate, the third accused and the witness Matsenjwa were told to stand a distance away as the first two accused would take the vehicle by themselves. After the driver (Dlamini) got out of his bakkie to open the gate, two shots were fired, one fatally wounding him. Dlamini's wife fell out of the vehicle and was left behind at the scene while the four attackers took off with the

Toyota 4x4 double-cab bakkie, driven by the second accused, and registered SD 497 JG, containing various personal items of the Dlaminis.

By this time PW1 Matsenjwa had "cold feet" but could not persuade his partners in crime to let him go. The four ended at Lomahasha, where the plans to get the vehicle across the border were less successful than the robbery. The following day, 11th February 2001, the four robbers and two locals were driving towards a clandestine border crossing point when from a stationary police car the police tried to make them stop and when ignored, fired a shot at the vehicle which was, again driven by the second accused. A short distance later it stopped and the occupants all managed to get away. The bakkie was confiscated and its details noted by the police, later found to match with the vehicle used by the murdered Dlamini, subsequently released by the Magistrate's Court to the Ministry of Agriculture and eventually exhibited during the trial, sporting a new registration number, the mirror shot by the police being replaced and with the similar big distinctive green stickers removed between the robbery and recovery also neatly replaced.

All four men were later arrested with the second accused being found in possession of a pistol and ammunition. The fourth man in the first two crimes of murder and robbery wisely took the offer of not being prosecuted in exchange for his evidence. The car smuggler, Makhubela (PW3) did the same.

It is from these facts that the crown seeks a conviction of all three accused persons in respect of the murder and robbery charges, on the basis that the accused persons "acting jointly with a common purpose did unlawfully and intentionally kill Mtunzi Dlamini" and also robbed him and his wife at the same time and on the same basis.

A very brief overview of the degrees of participation in a crime might be useful at this juncture. INNES CJ held in R vs PEERKHAN and LALOO 1906 TS 798 at 802 that:

"Our Law knows no distinction between principles in the first and second degree and accessories. I call a person who aids, abets, counsels or assists in a crime a Socius Criminis - an accomplice or partner in crime. And being so

he is... as guilty and liable to as much punishment as if he had been the actual perpetrator of the deed."

Perpetrators and co-perpetrators are those persons whose actions and intent must satisfy all the definitional aspects of the crime. The liability of a perpetrator or co-perpetrator is founded on his own act and his own intention and it is not accessory as in the case of an accomplice. The doctrine of common purpose provides that if two or more persons decide to embark on a joint unlawful or wrongful activity the acts of one are imputed to the other(s) which fall within their common purpose - see Du Toit et al., commentary on the Criminal Procedure Act, service 21, 1998 @ Section 155, page 22-10 and the authorities there quoted, notably R v Shezi and others 1948 (2) SA 119 (A) at 128 and S v Safatsa & others 1988(1) SA 868(A). In cases of murder a causal connection between the acts of each participant in causing the death of the deceased need not be proved (Safatsa).

An accomplice (both PW1 and PW3 were so introduced) is a person who takes part in the commission of an offence but who is neither a perpetrator or a co-perpetrator, nor an accessory after the fact. His liability is accessory so there can be no question of an accomplice without a perpetrator or co-perpetrator - an accomplice is not a perpetrator as he lacks the actus reus of a perpetrator but he knowingly affords the perpetrator or co-perpetrator the opportunity, means or the information which furthers the commission of the crime. (S v Williams en 'n ander 1980 (1) SA 60 (a)). An accessory after the fact (PW3 - Makhubela) is a person who knowingly renders assistance after the completion of the crime, "... (to associate) him/herself with the commission of the crime by helping the perpetrator or accomplice to evade justice" (S v Morgan & others 1993(2) SA 134(A) at 174, per Corbett, CJ). One aspect of the evidence that is crucial

to establish, is whether there was a common purpose in respect of the killing of the deceased and whether it can be factually found that the person who did not fire the fatal shot was aware of the possession of a firearm by the other accused or not, and if so, whether he foresaw that it may be used during the robbery. I here refer to the first and second accused, who separated themselves from the third accused and PW1 while they waited for the Toyota 4x4 to arrive at the farm gate. The latter two were told to wait across the road while the first two accused

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would take the vehicle by themselves. The fatal shot could only have been fired by either the first or second accused, not by the third accused or PW1.

PW1 testified that after they left the homestead of the Inyanga, he saw that "something was bulging around the waist of accused number one. I asked myself what it was. As we proceeded, I tried to ask him (accused 1) what it was, he said it was a firearm. Because of that I was frightened".

He further testified that also along the way, they again discussed the plan about the taking of the vehicle - "It is the motor vehicle we discussed previously, that the owner would have to be robbed by force. At that meeting, it was agreed that the motor vehicle must be taken by force only, without using a firearm."

After the two shots were fired during the scuffle with the deceased PW1 and the third accused went to the vehicle. He then said "the origin of the gunshot - I suspect it was from accused number one, I previously asked him about a firearm". He continues to say that as he (PW1) stood at the vehicle, with the rear door still open, that "accused one come by the side of the motor vehicle, pointed the firearm at me, said "voetsek" to me, why are you waiting outside the car. It was then that I got inside the vehicle, he completed his comments and said I think I am smart, he can see I want to report to the police that I killed a certain person."

After PW1 saw the blooded deceased laying on the ground and commented on it, he testified that the second accused then suggested to the first accused that they abandon the vehicle "as it looks like we (my emphasis) killed that person."

From the above, it is clear that when PW1 asked the first accused about the firearm he suspected him to have, the question was posed in the presence of the second accused. It was also in the presence of the second accused that the first accused confirmed that he had a firearm, tucked into his trousers. At that point, each of the four were aware that the first accused had a firearm with him and that they were on the point of hijacking a motor vehicle. They went further than having just the mere realisation that there is a firearm with the first accused, in that they decided to take the vehicle by force only, without using a firearm.

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It is with this knowledge that the first accused had a gun with him that the second accused stayed with him at the farm gate, waiting for the bakkie to arrive, while PW1 and accused three were on the opposite side of the road. During the ensuing confrontation, the deceased was fatally shot. There is no direct evidence as to which of the two fired the shot, but all the circumstances point to the first accused. Before the robbery he said he had a gun, immediately after the robbery he pointed a gun to PW1.

The second accused, who was with the first at the time the two of them had split ranks with the other two, to take the vehicle, said afterwards that "we" had killed the deceased. He was, as aforesaid, aware that the first accused had a firearm, shortly prior to the robbery, when the first accused spoke in his presence to PW1 about the gun. All four decided to overcome possible resistance "by force" and "without using a firearm".

The next question is whether the second accused did foresee that the firearm may be used during the robbery, with fatal results. There is no evidence whatsoever from the second accused that he did not think

that the first would use the firearm, nor for that matter, that he did not know the first accused had a gun at the scene. His evidence is a total denial of having been on the scene at all, which has been dismissed in the face of the acceptance of the evidence given by PW 1 and corroborated as aforesaid. I cannot and do not accept that the second accused did not foresee that the first accused would use the gun. He knew that they were going to rob the vehicle and the inherent distinct possibility that resistance may be offered by their intended victim. Knowing that the first accused was armed and that the reaction of their victim was an uncertainty, they nevertheless continued with their plan, especially so when PW1 and the third accused were sent away from the gate, to wait across the road.

The evidence of both PW1 and PW6, the wife of the deceased, is that the deceased moved back to the vehicle from the gate and that there was then an altercation during which the shot was fired. The second accused willingly and knowingly actively participated with the first accused to take the vehicle by force, in the knowledge that the first accused had a firearm that he might well use during the event despite an

arrangement not to use it. In the end, the firearm was used and fatally so, causing the death of Dlamini, in the course of reaching their common and shared goal, namely the robbery of the vehicle.

In the event, it is found that both the first and second accused had acted with a common purpose to rob, and in the process of doing so, caused the death of Dlamini. In both the first two counts of murder and robbery, the crown relies on common purpose, which in my view, has been sufficiently proven to establish its applicability.

The position of the third accused differs to some extent. His purpose and intent was also to participate in the planned robbery of the vehicle. However, in respect of the murder charge, it has not been established that he participated to the extent that he can be found to have acted with a common purpose regarding the killing, as is the case with the second accused.

Willingly or not, he and PW1 were distanced from the first two accused who said that they would take the vehicle by themselves. He was told to wait on the other side of the road. He did not physically partake in the actual taking of the vehicle and the killing during that phase of the activities. It is this which distinguishes his position from that of the second accused, who actively and physically shared the task of depriving the driver of his vehicle. It therefore follows that it cannot also be said of the third accused that he acted in common purpose with the first two accused in so far as count one, murder, is concerned.

The third accused however acted with a common purpose in concert with the others as far as count 2, robbery, goes, as did PW1 Matsenjwa.

Regarding the third and fourth counts, as indicated above, the exculpatory version of the second accused stands to be rejected in so far as it is inconsistent with the version of the crown. This results in a factual finding that he indeed had the firearm and ammunition he has been charged with having in his possession. It is common cause that he had no legal authority, like a licence to possess the items, which might have rendered his conduct lawful. Both the firearm and the ammunition were tested by a police officer (PW5, Sergeant Jabulane Gamedze) who is sufficiently skilled in his

trade as police force armourer to have proven the items in good working order. The only aspect of his evidence that I do not rely on is that he labours under the impression that a Makarov Pistol is classified in the Arms and Ammunition Act as "an arm of war". In the copy of the amended Act I have at my disposal, there is no such statutory classification of a 9mm Makarov pistol being of that category. Also, the second accused has not been charged with the possession of an arm of war but of an ordinary firearm, as mentioned in Section 11(1) of the Act.

It is to be noted that no forensic evidence has been adduced to establish whether this pistol found in

possession of the second accused is the same or a different one that was used during the hijacking of the vehicle and the killing of the driver. Further evidence conspicuous by its absence is anything whatsoever about the many items listed in the indictment that were in the vehicle at the time of the robbery.

From all that was said above, it is the judgment of this court that the crown has proven beyond reasonable doubt that the first and second accused, but not the third, are guilty of the crime of Murder, count one, and that all three are guilty of Robbery, count two and that the second accused is guilty of the unlawful possession of a firearm and ammunition, as set out in counts three and four.

Regarding the two witnesses, PW1 and PW3, it is endorsed in terms of Section 234(2) of Act 67 of 1938, that both be freed and discharged from any prosecution in respect of the offences they were involved in regarding this matter.

Orders regarding the exhibits are to follow at the end of the trial, after sentence.

The matter stands to be postponed to the first available date for proceedings on sentence, following a determination of possible extenuating circumstances in respect of the murder conviction of the first and second accused.

JACOBUS P. ANNANDALE

ACTING CHIEF JUSTICE