

CASE NO.: CC 04/2002

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**THE STATE**

and

<b>HYACINTH JAMES NINGISE</b>	<b>Accused 1</b>
<b>MCDONALD KAMBONDE</b>	<b>Accused 2</b>
<b>HENDRICK HENNY TSIBANDE</b>	<b>Accused 3</b>
<b>BRANDON DAVID OMSWA SIMILO</b>	<b>Accused 7</b>
<b>ARVO TSHEELI NATANGWE HAIPINGE</b>	<b>Accused 8</b>
<b>ISMAEL OAEB</b>	<b>Accused 9</b>
<b>VINCENT NDABULA MABUZA</b>	<b>Accused 10</b>
<b>MIKE SANDILE MABENA SKUMBUZA APANI</b>	<b>Accused 11</b>

**CORAM:** Silungwe, J.

Heard on: 2002.10.15; 2002.10.28-31; 2002.11.01-20; 2003.01.15-22;  
2003.01.24-30; 2003.02.03-28; 2003.03.10-14; 2003.04.14-30;  
2003.09.23-30; 2003.10.03-09; 2003.10.14-15; 2003.10.20; 2003.10.23-31;  
2003.11.03-13; 2004.02.09-26; 2004.03.01-31; 2004.04.01-06;  
2004.05.26-28; 2004.06.02-11; 2004.06.21; 2004.11.11;  
2005.02.07; 2005.02.21 2005.02.28; 2005.03.14; 2005.03.17-18;  
2005.04.25 2005.04.27-29; 2005.05.19-20; 2005.07.04-15; 2005.07.18  
2005.07.20; 2005.07.27; 2005.12.06

Delivered on: 2006.02.22

**JUDGMENT**

**(1) SILUNGWE, AJ:** All the present  
eight accused are jointly arraigned for the

following charges:

Count 1: Robbery with aggravating  
circumstances as defined  
in section 1 of the  
Criminal Procedure Act,  
(Act 51 of 1977) as  
amended;

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Count 2.1: Robbery with  
aggravating  
circumstances as  
defined in section 1  
of the Criminal  
Procedure Act, (Act  
51 of 1977) as  
amended;

Alternatively,

2.2 Theft

Count 3: Possession of a machine gun or machine rifle in contravention of section 29(1)(a), read with sections 1 and 38(2)(a), of the Arms and Ammunition Act, (Act 7 of 1996);

Count 4: Possession of Ammunition in contravention of section 29(1)(a), read with sections 1 and 32(2) (b), of Act 7 of 1996.

[1.1] The particulars of the charges are set out as follows:

Count 1.1: in that on or about 16 November 2000, and at or near Erf number 17, Schweringburg Street, Klein Windhoek, in the district of Windhoek, the accused unlawfully and with the intention of forcing him into submission, threatened to assault Harald Schutt by threatening to shoot him with firearm(s) and

unlawfully and with intent to steal took from him at gunpoint his cellular telephone (valued at N\$ 1000.00), his Nissan Bakkie with registration number N12701SH (valued at N\$51,000.00) with a canopy valued at N\$5,807.50 and a toolbox with a socket set, spanners, hammers, chisels, pliers, wire stripper, screwdrivers, drill set, test lamp, saws, files, drill (all valued at N\$ 17,618.70) the property of, or in the lawful possession of, the said Harald Schutt; and that aggravating circumstances as defined in section 1 of Act 51 of 1977 are present in that the accused were before, during or

after the commission of the offence wielding firearms and threatening to inflict grievous bodily harm.

Alternative to count 1:

Count 1.2 in that during the period 16 to 17 November 2000 and at or near Windhoek in the district of Windhoek, the accused did wrongfully and unlawfully steal a motor vehicle, a Nissan bakkie, with registration number N12701SH (valued at N\$1,000.00) with a canopy (valued at N\$5,807.50), a cellular telephone at N\$1000.00), and a toolbox with a socket set, spanners, hammers, chisels, pliers, wire stripper, screwdrivers, drill set, test lamp, saws, files, drill (all valued at N\$ 17,618.70) the property of, or in the lawful possession of, the said Harald Schutt.

Count 2.1 in that on or about 17 November 2000, and at or near Windhoek, in the district of Windhoek, the accused unlawfully and with the intention of forcing him into submission, threatened to assault Kapira Gerhard Thihuro by threatening to shoot him and/or

by shooting in his direction with firearms and by wounding him with a shot fired from a R5 automatic machine gun or machine rifle wrongfully and unlawfully and with intent to steal took from him

N\$5,300,000.00 cash, the property of, or in the lawful possession of, City Savings Investment Bank (CSIB) and/or in the lawful possession of, the said Kapira Gerhard Thihuro; and that aggravating circumstances as defined in section 1 of Act 51 of 1977 are present in that the accused were before, during or after the commission of the offence, wielding firearms and threatening to inflict grievous bodily harm.

Alternative to Count 2:

Count 2.2 in that during the period 17 November 2000, and at or near Windhoek in the district of Windhoek and/or in an unknown district in the Republic of Namibia, the accused did wrongfully

and unlawfully steal N\$5,300,000.00 the property of, or in the lawful possession of, City Savings Investment Bank (CSIB) and/or in the lawful possession of the said Kapira Gerhard Thihuro.

Count 3: that the accused are guilty of contravening section 29(1)(a), read with sections 1 and 38(2) (a), of Act 7 of 1996:

in that on or about 17 November 2000, and at or near Windhoek in the district of Windhoek, the accused did wrongfully and unlawfully possess a machine gun or a machine rifle number 309094 being a firearm capable of delivering a continuous fire

[2] All the accused pleaded not guilty to all the charges. I pause here to mention that Immanuel Hanjamba Kaukungua, Joseph Heinrich and Bertha Nanduda all of whom had been jointly charged (with the rest of the accused) as Accused 4, 5 and 6, respectively and who had also pleaded not guilty to all the charges preferred against them, were discharged: Accused 4 and 5 were discharged during the

as long as pressure is applied to the trigger thereof, without a permit issued to them.

Count 4: that the accused are guilty of contravening section 29(1)(e), read with sections 1 and 38(2) (b), of Act 7 of 1996:

in that on or about 17 November 2000, and at or near Windhoek in the district of Windhoek, the accused did wrongfully and unlawfully possess an unknown number of rounds of ammunition without being in lawful possession of a machine gun or machine rifle capable of firing that ammunition.

State's presentation of evidence when prosecution against them was discontinued; and Accused 6 was discharged at the close of the case for the State.

[3] A summary of the (alleged) substantial facts is set out as follows:

[3.1] On Thursday 16 November 2000, the Windhoek Branch of the Bank of Namibia issued the Windhoek Branch of the City Savings and Investment Bank (CSIB) with an amount of N\$7,360,000.00. This amount consisted of N\$3,000, 000.00 in new/used N\$50.00 notes within a specific range of serial numbers, N\$4,000,000.00 used/re-issued N\$50.00 notes and N\$360,000.00 in used/re-issued N\$ 10.00 notes.

[3.2] This money was collected during the morning of 16 November 2000, from the Bank of Namibia by Accused 2 and Kapira Gerhard Thihuro who were both employed by Professional Security Services CC (PSS) as security officers. They transported this money to the offices of CSIB in Windhoek. As CSIB requested PSS to transport some of that money to the Ondangwa branch of CSIB, Accused 2 and Kapira Gerhard Thihuro collected an amount of N\$5,300, 000.00 of that money from CSIB during the afternoon of 16 November 2000. The money was kept in safe custody at the offices of PSS in Windhoek before (the

anticipated) transportation thereof to Ondangwa on Friday 17 November 2000, at OlhOO.

[3.3] At approximately 22h45 in the evening of Thursday 16 November 2000, Harald Schutt arrived at his residence at No 7 Schweringburg Street in Klein Windhoek, driving his Nissan bakkie with registration No. N12701 SH. As he was opening the gate to his residence, the accused or some of them approached him and demanded the keys of the motor vehicle and his cellular phone at gunpoint. The accused took the Nissan bakkie with canopy and tools listed in Count 1 as well as the cellular phone and drove off, after threatening to kill Harald Schutt.

[3.4] At approximately OlhOO on Friday, 17 November 2000, Accused 2 (as driver) and Kapira Gerard Thihuro (as crewman) departed for Ondangwa with the N\$5,300,000.00 in a PSS company vehicle, an armoured Toyota bakkie

registration No. N43572W. Whilst driving on the Windhoek-Brakwater road towards Okahandja, the accused, who were travelling in the Nissan bakkie of Harald Schutt, approached the Toyota bakkie and bumped against it. Accused 2 pulled the Toyota bakkie from the road and stopped the vehicle. The accused in the Nissan bakkie fired shots towards the Toyota bakkie and demanded the money and the key to the safe in which the money was. The accused received the key to the safe from Accused 2, whereafter they removed the money from the back of the Toyota bakkie. During the incident, Accused 1 shot Kapira Gerard Thihuro in the abdomen with an R5 machine gun machine rifle number 309034 whereafter Kapira Gerard Thihuro shot Accused 1 with a PSS company 9mm pistol in the hand and/or abdomen. The accused drove off in the Nissan bakkie with the money and the cellular telephone of Accused 2, leaving behind Kapira Gerhard Thihuro and Accused 2.

[3.5] At approximately 07h45 on Friday 17 November 2000, the police found the Nissan

bakkie of Harald Schutt abandoned near Daan Viljoen road. The canopy, registration plates, toolbox and tools as listed in Count 1 (*sic*) had been removed from the vehicle and a registration plate with registration No. N63013W was affixed to this vehicle. The Nissan bakkie as well as the Toyota bakkie were damaged due to the bumping.

[3.6] During the morning of Friday 17 November 2000, Accused 7 took accused 1 to the Roman Catholic Hospital in Windhoek where Accused 1 received treatment for the gunshot wound in his abdomen. Accused 1 was arrested by the Namibian police whilst in the Roman Catholic Hospital. Accused 2 and 3 were arrested in Namibia.

[3.7] On Sunday 19 November 2000, Accused 7, 8 and 9 left Namibia together with Accused 11 in motor vehicles of the latter and accused 9. They entered South

Africa on Monday 20 November 2000, with these two vehicles. On Sunday 19 November 2000, Accused 10 flew from Windhoek to Cape Town.

[3.8] At approximately 04h30 on Wednesday 22 November, 2000, Accused 11, Accused 10 and Accused 7, 8 and 9 were arrested by the South African Police Service in house No. 75 Teresa Street, Camps Bay in Cape Town, South Africa, and a bag containing N\$909,250.00 in N\$50.00 notes was found in this house. Accused 11 was in possession of keys to open the padlock with which the bag was locked. Accused 10 had N\$50.00 notes in his possession.

[3.9] Marie Antoinette Blignaut of the Bank of Namibia identified the serial numbers of the new/unused notes in the bag as falling within

[3.11] The accused (*sic*) did not have a permit to possess the R5 automatic machine gun or machine rifle or ammunition to be fired from this gun or rifle. The accused acted with

the range of serial numbers of the new N\$50.00 notes issued by the Bank of Namibia on 16 November 2000, to, amongst other banks, the Windhoek branch of CSIB.

[3.10.] During January and February 2001, Accused 5 deposited some of the money stolen during the robbery into his account at SWA Bank in Oranjemund. On 12 February 2001, Accused 4 deposited N\$100 000.00 of the money stolen during the robbery into his account at Swabou Bank in Oranjemund. In September 2001, the Namibian Police recovered N\$200 000.00 of the money stolen during the robbery in a hole in the ground near the homestead of Jacob Thimoteus Nanduda in Ohangwena where it (*sic*) had been buried by Accused 6.

common purpose at all material times.

[4] In this judgment, I will hereinafter refer to the accused as follows:



Hyacinth James Ningise,  
Accused 1, as James;  
MacDonald Kambonde,  
Accused 2, as MacDonald;  
Hendrick Henry Tsibande,  
Accused 3, as Hendrick;  
Brandon David Omswa  
Similo, Accused 7, as  
Brandon; Arvo Tsheeli  
Natangwe Haipinge, Accused  
8, as Arvo; Ismael Oaeb,  
Accused 9, as Ismael; Vincent  
Ndabula Mabuza, Accused  
10, as Vincent; and Mike  
Sandile Mabena Skumbuza  
Apani, Accused 11, as Mike.

[5] MacDonald, Hendrick, Brandon, Arvo and Ismael (Accused 2, 3, 7, 8 and 9, respectively) are Namibian citizens and were residents of Windhoek at all material times. However, James, Vincent and Mike are non-Namibians who happened to be in Windhoek, from South Africa, during the period 16-18 November 2000.

[6] Initially, Mr Christians represented James, Hendrick and Mike but during the trial, his mandate to act for Mike was withdrawn. Mr Christians remains the legal representative of James and Hendrick. MacDonald, Brandon, Arvo and Ismael are all represented by Mr Murorua who also took over the representation of Mike until the close of the case for the defence when Mike opted to represent himself. Mr Neves appears for Vincent. The State is represented by Mr Small, the Deputy Prosecutor-General.

[7] The case for the State is in substance a replica of the (alleged) substantial facts. The case for the defence will be considered as I deal with the accused individually. This has been a long trial, lasting nearly three and a half years, with numerous witnesses testifying and the record (inclusive of exhibits) is in excess of 12,000 pages. In the circumstances, it

would be inappropriate to even attempt to summarise the evidence of the witnesses. However, I bear in mind all the evidence adduced in the matter as I prepare this judgment.

[8] The following facts are not in dispute.

[8.1] On October 13, 2000, Mike, with whom Vincent had stayed in Durban, left Johannesburg, South Africa, by air together with Vincent, on a Windhoek -bound flight.

[8.2] On October 29, 2000, James too took a flight from Johannesburg to Windhoek.

[8.3] On their respective arrival in Windhoek, Mike, Vincent and James stayed at Sadrach (alias Falazza) Dube's residence as a result of Mike's initiative.

[8.4] From November 1, 2000 up to the end of that month, Ismael rented house number No. 1709 Agnes Street in Khomasdal, Windhoek, from (Ms) Heller Bezuidenhout.

[8.5] On Thursday November 16, 2000, the Bank of Namibia (BON) issued to the Windhoek Branch of City of Savings and Investment Bank (CSIB) a sum of N\$7,360,000.00. This amount consisted of N\$3,000, 000.00 in new N\$50 notes within a specific range of serial numbers, N\$4,000,000.00 in used N\$50 notes and N\$360,000.00 in used N\$10 notes.

[8.6] MacDonald and Kapira were at all material times security officers employed by Professional Security Service CC (PSS). In the morning of November 16, 2000, they collected, in their official capacity, the amount of money referred to in [8.5] above from the BON and transported it to the offices of CSIB in Windhoek. That money was earmarked for transportation to CSIB Branches at Ondangwa and Katima Mulilo.

[8.7] CSIB requested PSS to transport N\$5,300,000.00 (out of the total amount

received from the BON) to its Ondangwa Branch. Consequently, in the afternoon of November 16, 2000, MacDonald and Kapira fetched the said sum of money from CSIB and took it to the offices of PSS in readiness for its transportation to Ondangwa.

[8.8] At about 22h45 on November 16, 2000, one Harald Schutt (Schutt) arrived at his residence No 7, Schweringburg Street, Klein-Windhoek, driving a Nissan bakkie with registration No. N12701SH.

[8.9] At once, assailants approached him and demanded, at gunpoint, keys of the bakkie as well as his cell-phone.

[8.10] The robbers then took the Nissan bakkie with a canopy, tools as listed in count 1 above and the cell-phone, threatening to kill Schutt as they drove off. This was the first robbery which is the subject of the first count.

[8.11] At about 01h00 on Friday, November 17, 2000, MacDonald (as driver) and Kapira (as

crewman) set off for Ondangwa, transporting the N\$5,300,000.00 in a PSS company vehicle, to wit: an armoured Toyota bakkie with registration No. N43527W. The money was kept in a locked safe located in the back of the bakkie.

[8.12] While MacDonald and Kapira were on the outskirts of Windhoek, *en route* to their destination, persons driving Schutt's Nissan bakkie caught up with them and bumped against the Toyota bakkie they were travelling in.

[8.13] Using MacDonald's cell-phone, Kapira attempted to call Johannes Henning Krugger Senior (Johannes Snr.), a co-proprietor of PSS, on the latter's cell-phone. Johannes Snr. also endeavoured to telephonically contact Kapira in response. These calls were registered in the Mobile Telecommunications Ltd System (MTC) on Friday, November 17, 2000 between

01:29:20 and 01:32:11.

[8.14] MacDonald pulled the Toyota bakkie he was driving off the road and stopped.

[8.15] The assailants in the Nissan bakkie fired shots at the Toyota bakkie and demanded money and a key to the safe.

[8.16] The assailants obtained the safe key, and emptied the safe of its contents. This was the second robbery which is the subject of the second count.

[8.17] During the second robbery, Kapira was shot in the abdomen whereupon he returned fire and thereby shot one of the robbers with a PSS company 9mm pistol.

[8.18] The robbers drove away in the Nissan bakkie, taking with them the money (from the Toyota bakkie), MacDonald's cell-phone and the rest of the property referred to in the second charge, leaving behind the injured Kapira as

well as MacDonald.

[8.19] At approximately 07h45 on November 17, 2000, the Namibian Police recovered Schutt's Nissan bakkie which had been abandoned near Daan Viljoen Road, Windhoek. The canopy, registration plates, toolbox and tools as listed in Count 1 were missing from the vehicle and a registration plate with No. N63013W was affixed thereto.

[8.20] The Nissan and the Toyota bakkies were both damaged as a result of the incidence of bumping, aforesaid.

[8.21] On November 17, 2000, Brandon requested Dr L C Nghalipoh to accord medical attention to James who had sustained a gunshot wound in the abdomen.

[8.22] Consequently, Dr Nghalipoh visited house No. 1709, Agnes Street in

Khomasdal which was being rented by Ismael and there attended to James who was suffering from a serious abdominal wound. As James' condition required surgery, he was referred to the Roman Catholic Hospital in Windhoek where he was admitted and he received treatment for the gunshot wound in his abdomen.

[8.23] While he was receiving treatment in the Roman Catholic Hospital, James was arrested by the Namibian Police on the same day of his admission, namely, November 17, 2000. A blood sample was obtained from him.

[8.24] MacDonald, too, was arrested in Windhoek on November 17, 2000, by the Namibian Police. Hendrick was equally arrested by the police in Windhoek on December 20, 2000.

[8.25] During James' treatment at the Roman Catholic Hospital, a projectile was not removed from his body. X-rays taken of James by Dr

Agnew on November 20, 2000, showed that a bullet was still lodged in his body.

[8.26] None of the accused was at all material times in possession of a R5 automatic machine gun or machine rifle or ammunition to be fired therefrom.

[8.27] On Sunday, November 19, 2000, Vincent took a flight from Windhoek to Cape Town, South Africa. On the same day, Brandon, Arvo and Ismael, travelling in Ismael's Volkswagen Golf car (Golf) with registration No. NI 1322W, and Mike,, travelling in his BMW car with registration No. FH2377GP, left Windhoek on their way to South Africa.

[8.28] On Monday, November 20, 2000, at 00h08, Mike and Ismael arrived at Violsdrift border in South Africa in Ismaels' Golf car. On the same date at 00h10, Brandon and Arvo arrived at the South African Violsdrift border in Mike's

BMW car.

[8.29] At approximately 04h30 on Wednesday, November 22, 2000, Brandon Arvo, Ismael, Vincent and Mike were all arrested by the South African Police in house No. 75 Teresa Street, Camps Bay, Cape Town.

[8.30] Subsequently, all the accused referred to in paragraph [8.29], *supra*, were returned to Windhoek (as regards Vincent and Mike, following their extradition proceedings).

[9] A blood sample was collected from the steering wheel of Schutt's recovered Nissan bakkie and when that sample, as well as two samples taken from James, were sent for DNA testing, Dr Agnew found a positive match between the sample collected from the Nissan bakkie (that had been used to facilitate the commission of the second robbery) and the samples taken from James.

[10] Further, a fingerprint was lifted from the

dashboard of the recovered Schutt's Nissan bakkie which the State's evidence shows matched that of Hendrick. But Mr Christians argues that the State has failed to establish that the fingerprint in question was lifted from the Nissan bakkie. I will later return to this point.

[11] The evidence of the South African police witnesses alleges that on November 22, 2000, approximately five days after the commission of the second robbery, a sum of N\$909,250.00 in N\$50 notes was found in house No. 75 Teresa Street, Camps Bay, Cape Town. That money was contained in a black suitcase which was allegedly identified by Vincent as his. Brandon, Arvo, Ismael, Vincent and Mike were all found there and arrested. They all (including Vincent) claim they have no knowledge of the money found in that house.

[12] I will later assess and determine the

case against and for each accused individually.

[13] Mr Small's submission, on behalf of the State, as to what he reckons should be the outcome of this case is set out here below.

[13.1] *James:*

[13.2] *MacDonald:*

Not guilty on Count 1;

Guilty on Count 2 as an accomplice;

Not guilty on Count 3;

Not guilty on Count 4.

[13.3] *Hendrick:*

Guilty on Count 1 as a co-perpetrator

; Guilty on Count 12 as a co-perpetrator;

Guilty on Count 3 as a co-perpetrator;

Guilty on Count 4 as a co-

Guilty on Count 1 (Robbery: Re: Schutt) as a co-perpetrator; Guilty on Count 2 (Robbery: Re: money) as a co-perpetrator; Guilty on Count 3 (Possession of machine gun) as a co-perpetrator; Guilty on Count 4 (Possession of ammunition) as a co-perpetrator; perpetrator.

[13.4] *Brandon*

Not guilty on Count 1;

Guilty on Count 2 as an accessory after the fact; Alternatively: guilty of theft Not guilty on Count 3;

Not guilty on Count 4.

[13.5] *Arvo:*

Not guilty on Count 1;

Guilty on Count 2 as an accessory after the fact; Alternatively: Guilty of theft;

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[13.6] *Ismael:*

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Not guilty on Count 1;



Guilty on Count 2 as an accomplice; Guilt  
Alternatively: Guilty as an accessory y on  
after the fact; Cou  
Alternatively: Guilty of theft; nt 3  
Not guilty on Count 3; as a  
Not guilty on Count 4. co-  
perp

[13.7] Vincent:

Not guilty on Count 1; or;  
Not guilty on Count 2 but guilty of the  
alternative crime of theft; Guilt  
Not guilty on Count 3; y on  
Not guilty on Count 4. Cou  
nt 4

[13.8] Mike:

Guilty on co-  
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[14] The evidence adduced on behalf of the State shows, *inter alia*, that on November 16, 2000, at about 20h00, Detective Sergeant R W Nangolo (D/Sgt)

of the Serious Crime Unit of the Namibian Police, while on standby duty, observed a Volkswagen Golf car, with registration no. N113228W parked in front of Nandos Restaurant (Nandos), Independence Avenue, Windhoek. The Golf car had three occupants whom the witness came to know as James, Brandon and Ismael. James and Ismael alighted from the car and went into Nandos.

**[15] SOME RELEVANT GENERAL  
LEGAL PRINCIPLES APPLICABLE TO  
THIS CASE**

**[15.1] Onus of proof**

[15.1.1] It is elementary that the onus of proof in our criminal justice system rests upon the State to establish its case against each accused beyond a reasonable doubt. In *S v Ngunovandu* 1996 NR 306 (HC), Steyn, J. expressed himself in these terms, at 317G-318B:

"Of course anything in life is possible and extraordinary events do occur. However, the criminal justice system and the administration of criminal justice would be in serious jeopardy if

absolute certainty were to be the required criterion for a conviction.

Denning J, as he then was, in the judgment in *Miller v Minster of Pensions* [1947] 2 All ER 372 at 373 in a well-known passage, says the following:

'Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable", the case is proved beyond reasonable doubt, but nothing short of that will suffice.'

A similar *dictum* is to be found in a judgment of the South African Court of Appeal in *S v Glegg* 1973 (1) SA 34 (A). An excerpt from

the English headnote at 34H reads as follows:

The phrase "reasonable doubt" in the phrase "proof beyond reasonable doubt" cannot be precisely defined but it can well be said that it is a doubt which exists because of probabilities or possibilities which can be regarded as reasonable on the ground of generally accepted human knowledge and experience. Proof beyond reasonable doubt cannot be put on the same level as proof beyond the slightest doubt, because the *onus* of adducing proof as high as that would in practice lead to defeating the ends of criminal justice.' "

[15.1.2] An in *S v Van Wyk* 1993 NR 426 (SC), the Supreme Court (per Ackermann, AJA, with Becker, CJ., and Mahomed, AJA. [as he then was] concurring) made the following observations at 438F-439A:

"It is convenient to cite here the following passages from the judgment in *S v Sauls and*

*Others* 1981 (3) SA 172 (A) at 182G *et seq* which were quoted in the judgment of the Court *a quo*:

The State is, however, not obliged to indulge in conjecture and find an answer to every possible inference which ingenuity may suggest any more than the Court is called on to seek speculative explanations for conduct which on the face of it is incriminating ... A passage in a minority judgment given by Malan JA in *R v Malambo* 1957 (4) SA 727 (A) at 738 is apposite. I may add that two paragraphs in this passage were cited with approval by Rumpff JA in *S v Rama* 1966 (2) SA 395 (A) at 401:

In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability

is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused.

An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case."

[15.1.3] An accused person, however, has no obligation to prove his innocence. The Supreme Court of Appeal in the case of *S v V2000* (1) SACR 453 succinctly put it thus at 455a-c:

"It is trite that there is no obligation upon an accused person, where the State bears the *onus*, 'to convince the court'. If his version is reasonably possibly true he is entitled to his

acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. It is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true but whether one subjectively believes him is not the test. As pointed out in many judgments of this Court and other courts the test is whether there is a reasonable possibility that the accused's evidence may be true."

## **[15.2] CIRCUMSTANTIAL**

### **EVIDENCE**

Courts normally consider independent items of circumstantial evidence and their cumulative effect. In *R v De Villiers* 1944 AD 493, the Appellate Division said at 508 (per Davis, AJA with Watermeyer, CJ, Tindall, JA, Centliver, JA, and Feetham, JA, concurring):

"As stated by Best, Evidence (5<sup>th</sup> ed ...) 'Not to speak of greater numbers; circumstantial evidence - though each taken by itself weigh but as a feather - join them together, you will find them pressing on the delinquent with the weight of a millstone ... It is of the utmost

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number of independent circumstances

point to the same conclusion the probability of the justness of that conclusion is not the *sum* of the simple probabilities of circumstances but is the compound result of them.'

...The Court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn."

See: also *R v Blom* 1939 AD 188 at 198; *S v Hotel Onduri (Pty) Ltd and Another* 1993 NR 78 at 82I-J - 83A-C.

### [15.3] SINGLE WITNESS

In terms of section 208 of Act 51 of 1977, an accused may be convicted of an offence on the evidence of any single competent witness provided the court, after weighing the evidence of the single witness, is satisfied that the truth has been told. A case in point is *S v Sauls and Others* 1983 (3) SA 172 (AD) where the Appellate Division held as follows, at 180E-G:

"There is no rule of thumb, test or formula to apply when it comes to a consideration of the credibility of the single witness (see: the remarks of Rumpff JA in *S v Webber* 1971 (3) SA 754 (A) at 758). The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers, JP in 1932 may be a guide to a right decision but it does not mean

'that the appeal must succeed if any criticism, however slender, of the witness' evidence were well founded.'

Per Schreiner, JA, in *R v Nhlapo* (AD 10 November 1952) quoted in *R v Bellingham* 1955 (2) SA 566 (A) at 569. It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense."

#### **[15.4] ACCESSORY AFTER THE FACT**

Section 257 of Act 51 of 1977 provides that:

"If the evidence in criminal proceedings does not prove the commission of the offence charged but proves that the accused is guilty as an accessory after that offence or any other offence which he may be convicted on the offence charged, the accused may be found guilty as an accessory after that offence."

A person is an accessory after the fact to the commission of the crime if, after the completion of the crime, he/she unlawfully and intentionally engages in conduct intended to enable the perpetrator or the accomplice in the crime to evade liability for his/her crime, or to

facilitate such person's liability.

In *S v De Villiers* 1992 NR 363, this Court expressed itself in these terms at 370A-E (per O'Linn, J, with Teek, J [as he then was] concurring):

"In the case of *R v Nkau Majara* 1954 AC 235 (PC), the Privy Council, in a case which came on appeal from Basutoland and fell to be decided under the Roman-Dutch common law as applied in the Cape of Good Hope, decided that:

The term "accessory after the fact" as in criminal law does not, under the law of South Africa - the Roman-Dutch common law - bear a meaning identical with that which it has under the English law. To constitute a person an accessory after the fact in South Africa it is sufficient to establish that assistance was given to the principal offender in circumstances from which it would appear that the giver associated himself with, in the broad sense of

that word, the offence committed, and Roman-Dutch law makes no distinction for this purpose between giving assistance by remaining inactive and refraining from doing something, and giving assistance by doing something. The kind of impassivity, when it occurs after the commission of an offence by another, which has for its objective the giving of assistance to that other to escape, is under the law of South Africa punishable as the offence of being an accessory after the fact.'

With humble respect I accept this quotation from the headnote of that case as correctly stating our law. It is of course clear from the details of that case that it is not merely impassivity in the case of failing to report a crime to the proper authorities that amounts to an offence. It is that failure, coupled with the other circumstances of accused's conduct, which constitutes such association with the crime that thereby material assistance is rendered to the principal offender after the completion of the offence."

See: also *S v Velumurugen and Another* 1985 (2) SA 437 (D) at 446I-J -447A; *Jonas Kadila*

*and Others* 2001, Case No. SA 5/2000 (unreported judgement of the Supreme Court).

#### [15.5] **COMMON PURPOSE**

The doctrine of common purpose provides that where two or more persons agree to commit a crime or to actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number which falls within their common design. Liability arises from their "common purpose" to commit the crime. See: *S v Safatsa and Others* 1988 (1) SA 868 at 897D; *S v Mgedezi* 1989 (1) SA 687 (A) at 705D-J - 706A; *S v Khumalo* 1991 (4) SA 310(A) at 315G-I.

On a charge of having committed a "consequence crime", it is not necessary to establish precisely which member of the common purpose brought about the consequence, provided that it is established that one of the group caused

this result.

### [15.6] THEFT

It is trite law that theft is a continuing crime.

By this is meant that:

"[T]he theft continues as long as the stolen property is in the possession of the thief or of some person who was a party to the theft or of some person acting on behalf of or even, possibly, in the interests of the original thief or party to the theft."

See: Per Tindall, J., in *R v Attia* 1937 TPD 102 at 106; *R v Von Elling* 1945 AD 234 at 240.

"Someone (X) who *amino furandi* assists the thief after the original *contrectatio* is a thief and not merely an accessory after the fact if at the time of his assistance the crime still continues (viz if the property is still in the possession of the thief or of someone on his behalf). If the crime still continues, the thief by his continuing control is effecting a present *contrectatio* and will in future effect further *contrectationes*".

See: South African Criminal Law and Procedure, Vol. II, Common Law Crimes, Milton, 3<sup>rd</sup> Ed. at 631.

In *S v Velumurugen and Another* 1985 (2) SA 437, it was held at 446I-467D that:

"Since theft is a 'continuing crime' in the sense that it continues to be committed as long as the thief, his agent or party to the theft is in possession of the stolen property, one who assists such a person after the original taking but while the theft 'continues' usually qualifies as a perpetrator and not merely as an accessory after the fact."

And in *S v Nakale* 1994 NR 264 (HC) Strydom, JP (as he then was) and Frank, J, observed at 265A, that: "As theft is a continuing offence, there is no such thing as an accessory after the fact to the theft". A person, who does what would for another crime result in such a person being an accessory after the fact, will be



guilty of the crime of theft.

What is articulated in the South African Criminal Law and Procedure, Vol. II, Common Law Crimes, Milton, 3<sup>rd</sup> Ed. at 630 is, in my view, apposite:

"A person whose conduct amounts to the crime of receiving stolen property commits theft in nearly every case. By 'receiving' the property he effects a *contractatio* of it, and the mere fact that the thief has already effected an initial *contractatio* does not matter. The receiver is a thief on an application of the definition of theft, quite apart from the fact that this conclusion may perhaps also be justified by the 'continuing crime' doctrine. The only time that a 'receiver' is not also a thief is where he lacks *animus furandi*."

[16] I now turn to consider the evidence against and for each accused in the light of the preceding general legal principles.

[17] *James*

[17.1] The evidence against James is, *inter alia*, that he is a South African citizen whose home is located in Soweto, Johannesburg. On

October 29, 2000, he left South Africa through Johannesburg Airport on flight No. SA 070, bound for Namibia and that on arrival at Hosea Kutako Airport, he was granted a 90-day visitor's entry permit. He was subsequently brought by Mike to stay with him and Vincent at Falazza's residence.

[17.2] On November 11, 2000, James bought a Motorola cell-phone in Windhoek for which he obtained a pre-paid No. 081 247 8851.

[17.3] On November 16, 2000, at about 20h00, D/Sgt Nangolo of the Serious Crime Unit of the Namibian Police, who was on standby duty, observed a VW Golf car with registration No. N113228W, parked in front of Nandos in Independence Avenue, Windhoek. He saw Brandon remain in the vehicle and two other occupants (of the vehicle), namely, James and Ismael, go into Nandos.

[17.4] During the commission of the second robbery, Kapira shot one of the assailants in the abdomen with a PSS company 9mm pistol.

[17.5] The assailants took N\$5.3m from the Toyota bakkie and drove off in the Nissan bakkie with the money, et cetera.

[17.6.1] On November 17, 2000, at about 07h30, Brandon telephonically contacted Dr LC Nghalipoh and told him that a friend of his was very ill and that he needed to be seen at home. Dr Nghalipoh told Brandon that he should bring his friend to the practice but Brandon responded that the friend was very ill, adding that the doctor should go and relieve him of pain. The doctor reiterated that the patient should be brought to his practice at 08h20; Brandon agreed. When Brandon later arrived at the doctor's practice, without his injured friend, he once again requested the doctor to go and relieve the patient of pain at home. On the doctor asking Brandon what was wrong with his friend, he responded that he had been shot by a friend.

[17.6.2] When the doctor enquired about payment for the patient he was required to attend to, Brandon replied that money was not a problem, adding that they could even pay N\$3,000.00 should that be needed. The doctor indicated that he would not go out to see the patient in the absence of a prepayment. Brandon left the practice and returned within a few minutes with a batch of N\$50 notes. Thereafter, the doctor and his secretary were led by Brandon to a house in Khomasdal (which, as it transpired, was No. 1709, Agnes Street) where the doctor found James. On examination, the doctor indicated that the injury was quite serious and that the patient (James) should be taken to a hospital or else he would die. Brandon and another person insisted that he be treated there, but James was keen to be taken to hospital. James allegedly told Dr Nghalipoh that he had been in pain for almost eight hours.

[17.6.3] Subsequently, James was transported to the Roman Catholic Hospital in Windhoek where he was admitted and given medical attention. On admission, he gave his cell-phone number as well as that of Mike to the hospital authorities.

[17.6.4] On November 20, 2000, X-rays were taken which, on the testimony of Dr Nadine Agnew, showed that there was a bullet present in James' body.

[17.6.5] On examination of the X-rays, Warrant Officer Frederick Johannes Vilonel (a ballistics expert) came to the conclusion that the bullet in James' body was a 9mm projectile.

[17.6.6] It is Mr Small's submission that a positive DNA match was made between James' blood and a sample of blood collected by D/Sgt Shikufa from the steering wheel of Schutt's Nissan bakkie which had been used to perpetrate the second robbery.

[17.6.7] James' version is, *inter alia*, that on

November 16, 2000, he was invited to a party by Cheeks at house number 1709, Agnes Street, in Khomasdal; that he remained at that house from 18h00 up to 21h00, during which period a cousin of his and two girls used his cell-phone. At 21h00, he and others went to Kalahari Sands Hotel and later to the Country Club where they remained up to 00h50 on November 17, 2000. From there, they went to his girlfriend's house in Eros and subsequently his cousin took him back to Cheeks' house in Khomasdal at 02h30, arriving there at 02h45. After he had had a bath, he started calling persons in South Africa. No explanation is given why such calls were made so early in the day!

[17.6.8] Cheeks allegedly returned home at 06h00 - 06h10 on November 17, 2000, and allegedly shot James accidentally. Thereafter, Cheeks went out but later returned with Brandon. Subsequently, James was seen by Dr Nghalipoh. He then went to the Roman Catholic Hospital, by

taxi, for treatment. He was later arrested by the Namibian Police. He denies having been taken to the hospital by Brandon.

[17.6.9] James' witness, Ashley Warner, testified that he and James were in Eros during the early hours of November 17, 2000.

[17.6.10] Mr Christians submits that it is common cause that James had cellphone No. 081 247 8851 at the time of the second robbery. He goes on to say that the position of the person who used James' cell-phone at the time of the second robbery is indicated as Erospark which corroborates James' evidence and that of Ashley Warner that they were in Erospark during the time of the second robbery. He contends that the defence evidence of alibi as well as the defence evidence showing the circumstances under which James was shot should be accepted as reasonably possibly true; and that the Court should thus give the benefit of doubt to James and thus acquit him.

[17.6.11] Mr Small, however, argues that the

defence evidence in rebuttal of the State's evidence is false and should be rejected as such. He submits that some of the evidence against James and his co-accused is direct while some of it is circumstantial. As regards circumstantial evidence, Mr Small contends that it can, when put together, be compelling.

[18] On a proper evaluation of the evidence against and for James, the following facts emerge.

[18.1] On October 29, 2000, James arrived in Windhoek and within about three days of his arrival, Ismael (Accused 9) rented house No. 1709, Agnes Street in Khomasdal.

[18.2] He subsequently joined Mike (Accused 11) and Vincent (Accused 10) as they all stayed together at Falazza's house in Windhoek.

[18.3] On November 16, 2000, at about

20h00, D/Sgt Nangolo observed James and Ismael emerge from Ismael's VW Golf car with registration No. N113228W wherein Brandon (accused 7) remained; this was at Nandos in Independence Avenue, Windhoek.

[18.4] At about 22h45 on November 16, 2000, the first robbery took place at Schutt's residence in Klein Windhoek during which the assailants got away with Schutt's Nissan bakkie with registration No. N12701SH.

[18.5] Shortly after 01h00 on November 17, 2000, Schutt's Nissan bakkie was used to facilitate the commission of the second robbery during which one of the robbers was shot by Kapira, the crewman who had been travelling with MacDonald in the PSS unmarked security Toyota bakkie on a mission to transport N\$5.3 million to Ondangwa.

[18.6] On November 17, 2000, D/Sgt Shikufa collected a blood sample from the steering wheel of Schutt's Nissan bakkie which positively matched the blood sample taken

from James. The expert evidence shows that there is only one in 14 trillion chance that James is not the depositor of the blood found in Schutt's Nissan bakkie.

[18.7] In the morning of November 17, Brandon telephoned Dr Nghalipoh and asked the latter to give medical attention to James at home.

[18.8] Dr Nghalipoh was subsequently led to house No. 1709 Agnes Street, Khomasdal, the very house that was being rented by Ismael, where he found James with a serious abdomen injury. James told Dr Nghalipoh that he had been in pain for almost eight hours.

[18.9] The cell phone used by Brandon to call Dr Nghalipoh bore Mike's cell phone number, but Brandon claimed that it belonged to Cheeks who was allegedly using house No. 1709 Agnes Street.

[18.10] Brandon gave as reason for

requesting Dr Nghalipoh to treat James at home that he was apprehensive about James' treatment elsewhere because the latter was not in possession of (the requisite) immigration papers. On the contrary, however, James had been given the 90-day entry visa on arrival at Hosea Kutako Airport on October 29, 2000.

[18.11] When James's X-rays were examined, it was revealed that he still had a 9mm projectile in his abdomen. I will later return to James.

[19] The next accused for consideration is MacDonald (Accused 2). It is common cause that he was the driver of the PSS Toyota bakkie which was used for the purpose of transporting the N\$5,3 million from Windhoek to Ondangwa.

[19.1] It is not in dispute that MacDonald and Kapira were both security employees of the PSS; and that they commenced their journey to Ondangwa at 01h20 on November 17, 2000. MacDonald had with him cell-phone No. 081 245 5850.

[19.2.1] The evidence against MacDonald, according to Kapira's testimony, is, *inter alia*, that when the Nissan bakkie bumped against the Toyota bakkie which MacDonald was driving, the latter said that persons (in the Nissan bakkie) were going to rob them. When Kapira asked him why he had said so, MacDonald made no response. Kapira then suggested that they should make a U-Turn and quickly drive back; however, MacDonald yet again made no reply.

[19.2.2] Kapira used MacDonald's cell-phone and called his boss, Johannes, Snr , about the (sudden) turn of events.

[19.2.3] The assailants demanded money and keys.

[19.2.4] MacDonald then said: "the keys are taken". When Kapira queried how (the keys had been taken), MacDonald kept quiet. Kapira denies having ever handed

the keys and the cell-phone to the assailants. A person was on the top of the Toyota bakkie (MacDonald confirms this) and that person fired a shot downwards upon the roof of the Toyota bakkie.

[19.2.5] When Kapira asked MacDonald for a pistol, the latter made no response, whereupon Kapira found the pistol under MacDonald's seat. He denied having been handed the firearm by MacDonald.

[19.2.6] When Kapira tried to shoot, MacDonald told him not to do so as he (MacDonald) would be able to identify the robbers!

[19.2.7] A cell-phone print-out of MacDonald's cell-phone shows seven incoming calls from a cell-phone bearing James's cell-phone number on November 16, 2000, after 20h00. He is evasive when confronted with calls made to his cell-phone from fixed numbers 271 266, 215 749 and 262 340, especially that the said

numbers also contacted cell phone numbers of Mike and Hendrick.

[19.2.8] In a bail application, MacDonald said that he had heard one of the robbers scream words to the effect that he had been shot or injured. But before this Court he denies having said that.

[19.2.9] During the bail application, MacDonald stated that the robbers had demanded safe keys. Before me, however, his testimony is that it was Kapira that demanded the safe keys; he cannot say whether the robbers asked for the safe keys. He is noticeably evasive.

[19.2.10] In his defence, MacDonald testifies, *inter alia*, that he did not participate either directly or indirectly in any of the robberies, *et cetera*.

[19.2.11] In his attack on the prosecution evidence of MTC computer cellphone print-outs, Mr Murorua submits on behalf

of MacDonald and the other clients of his (Accused 7, 8 8s 9) that such evidence is fraught with many lacunae to be a useful aid to the argument advanced by the State, to wit, that the cell-phone print-out evidence shows proof of interconnectivity between MacDonald's cell-phone on the one hand and James' cell-phone on the other and that, consequently, Macdonald was not party to the conspiracy in respect of the second robbery. He goes on to say that the oral evidence of two witnesses from the MTC, i.e. Messrs Riedel and van Wyk, is inadmissible as such evidence is not only based on inadmissible MTC computer print-outs but also the true author and preparer of the said print-outs is the MTC IT (Information Technology) Department. In support of his argument, Mr Murorua cites the case of *S v Harper & Another* 1981 (1) SA 88 (AD) at 91G-H and 94A. Mike (Accused 11) joins issue with Mr Murorua in this regard.

[20] In *casu*, it is noteworthy to mention that there was, in reality, no resistance to the admissibility of the computer print-outs.

[20.1] The admissibility of computer print-out evidence in criminal cases falls within the purview of section 221(1) of the Act 51 of 1977.

[20.2] In *S v Harper & Another, supra*, the crucial question that arose was whether or not computer print-outs are admissible as documents. In considering the meaning of the term 'document', as defined in section 221, *supra*, Milne, J, made the following remarks at 95E-H, 96D-E and 97C-H:

"The extended definition of document is clearly not wide enough to cover a computer, at any rate where the operations carried out by it are more than the mere storage or recording of information...

The wording of the section ... is entirely appropriate to the production of microfilm as evidence since the microfilm itself can be produced. Furthermore, microfilm is a means by which information is stored, and recorded ... The computer print-outs consist of typed words and figures and



would, *prima facie*, clearly fall within the ordinary meaning of the word 'document'.

It seems to me, therefore, that it is correct to interpret the word 'document' in its ordinary grammatical sense, and that once one does so the computer printouts themselves are admissible in terms of section 221. Once that situation has been achieved, then it seems to me that the main thrust of the attack upon the admissibility of those documents disappears.

I, accordingly, hold that the documents objected to are admissible and the objection is overruled."

[20.3] My understanding of the rationale in *S v Harper & Another, supra*, is that information obtained from computer print-outs is, *prima facie*, admissible provided the function of the computer was purely passive in that it merely recorded or stored the information. In other words, the recording or storing of such information by the computer should have been mechanical, that is, without the intervention of the human mind.

[20.4] *In casu*, the information on the computer print-outs was recorded and stored without the intervention of the human mind, I come to the conclusion that those computer print-outs are admissible in evidence. Consequently, the objection to their admissibility is overruled.

[21] One outstanding issue that needs to be resolved in relation to MacDonald is the question of credibility to which I will return later.

[22] I now turn to consider the evidence against and for Hendrick (Accused 3).

[22.1] The prosecution case against Hendrick is that a fingerprint lifted from the dashboard of Schutt's Nissan bakkie, the subject of the first robbery, which was used to facilitate the commission of the second robbery, matched his own fingerprint.

[22.2] Schutt testifies that a sticker shown on photograph 8 in Exhibit D had been on the dashboard of his Nissan bakkie for a long time; and that it was still there when the assailants relieved him of the vehicle during the first robbery and after its recovery on the 16 and 17 November, respectively. Indeed, the said sticker was still in the vehicle when Schutt gave evidence in this Court.

[22.3] On November 17, 2000, after the recovery of Schutt's Nissan bakkie, D/Sgt Shikufa took photographs of the vehicle and lifted a fingerprint from the sticker on the dashboard of the vehicle.

[22.4] Hendrick was arrested on December 20, 2000, but he could not say where he was during the material time on November 16-17, 2000.

[22.5] His fingerprints were taken from him on December 20, 2000, and on January 31, 2001, allegedly because his first set of fingerprints was not clear enough.

[22.6] Inspector Blaauw, a fingerprint expert, compared the fingerprint lifted from the Nissan bakkie with those of Hendrick and found that both sets belonged to Hendrick.

[22.7] Mr G M Coetzee, Hendrick's fingerprint expert witness, is of the opinion that Hendrick's fingerprint was on the folien.

[22.8] On being asked whether he had a cell-phone (at all material times), Hendrick's response is that he took it for repair and that it got stolen. He does not deny in cross-examination that he previously used a cell-phone No. 081 244 3351.

[22.9] On January 21, 2001, a starter pack for cell-phone No. 081 244 3351 was found in Hendrick's house.

[22.10] Exhibits Z4.1-Z4.9 show calls made from cell-phone No. 081 244 3351

between November 13 and 20, 2000.

[22.11] From November 13, 2000, at 12:43:20 up to November 16, 2000, at 23:32:23, a cell-phone with serial No. 493006303866116 (Exhibit 17) was used with a sim card bearing No. 081 244 3351 which is attributable to Hendrick.

[22.12] On November 17, 2000, the sim card No. 081 244 3351 was used in a cell phone with serial No. 448 8354 14 32 79 610 (Exhibit 16) at 08:04:44 and 08:06:22. This cell-phone allegedly belonged to Mike.

[22.13] Still on November 17, at 08:34:37, cell-phone with serial No. 49 3006303866116 (Exhibit 17) was again used with sim card No. 081 244 3351 (Hendrick's No.) until 19:02:05 on November 17, 2000.

[22.14] On November 18, 2000, the sim card with No. 081 244 3351 was used in a cell-phone with serial No. 5678747874987412 until November 20, 2000.

[22.15] According to exhibit Z3.7-Z3.15, Mike allegedly used mostly exhibit 16: a grey Motorola with serial No. 4488354143279610 from November 13-18, 2000 at 20:59:08 until he allegedly changed his sim card to exhibit 14: a silver Nokia 8850 with serial No. 448901105890700.

[22.16] On November 12, 2000, a miss-call was indicated from a fixed telephone No. 262 340 which appears on the print-out of MacDonald. Further, on November 16, a cell-phone print-out of Hendrick registered incoming calls from the same fixed line telephone No. 262 340. The printout of MacDonald also reflects such calls.

[22.17] In addition, telephone contacts as shown on the print-outs of MacDonald and Hendrick were made on November 16 from 18:31:28 to 23:32:23 and on November 17 at 08:34:37.

[22.18] Hendrick's version before this court is, *inter alia*, a denial of the State's incriminating evidence. He alleges that he is unable to remember where he was during the evening of November 16 and the early morning of November 17, 2000.

[22.18.1] He knew James and Mike, for instance, as he used to see them in the company of Falazza.

[22.18.2] He explains that his fingerprint found in the Nissan bakkie got there when he had an innocent lift from one Temba. At one stage he suggests that the fingerprint was planted in the Nissan bakkie. At another stage, he suggests (through his expert witness) that it was not found in the Nissan bakkie but that it was lifted from another sticker!

[22.18.3] He denies having ever possessed the blue Nokia cell-phone (exhibit 17) and alleges that he knows nothing about the Tango Starter Pack with No. 081 244 3351 which was found in a cupboard in his house.

[22.18.4] He testifies that he cannot remember ever owning a cell-phone like exhibit 17 (the blue Nokia). Further, he states that he cannot be positive about that. Lastly, he says that he never owned a Nokia cell-phone.

[22.18.5] Hendrick's prevarication when giving evidence about the fingerprint found in Schutt's Nissan bakkie and whether he used or owned a Nokia cell-phone is conspicuous. I find that his version cannot reasonably possibly be true; it is in fact false. I am satisfied that the State's witnesses are credible; that the State has established that the fingerprint lifted from Schutt's Nissan bakkie belongs to Hendrick and that it had not been left there innocently.

Further, I am satisfied that the Tango Starter Pack bearing the No. 081 244 3351, which was found in his house, belonged to him; that he had a cell-phone at all material times; and that he made

common cause in the matter.

[23] This brings me to a consideration of the case against and for Brandon (Accused 7).

[23.1] The evidence that implicates Brandon is contained in the proceedings before this Court as well as in the proceedings during bail applications in Cape Town and in this Court (before another judge).

[23.2] Prior to, during the commission of the two robberies in question, and presumably sometime thereafter, Brandon was employed in the Ministry of Health and Social Services as an Assistant Personnel Officer. His office maintains an attendance register which has to be signed in and out by employees. Sick leave and vacation leave have to be notified to a relevant superior.

[23.3] Brandon did not sign the attendance register and he was absent from official duty for the weekdays: October 23-27; October 30-

November 03; November 6-10; November 13-17; and on November 20, 2000. He did, however, mention to one co-worker, Shikimeni, that he was not feeling well and that he was going to see a doctor, adding that he would report for duty later that day;

however, he never did. It is alleged that he informed both Shikimeni and another co-worker - van Wyk - that he was going to see a doctor; that he was booked off by the doctor and that he would send someone to bring to the Ministry a (medical) certificate. No such person was ever sent and no medical certificate was furnished by him.

[23.4] On November 16, 2000, at about 20h00, Brandon was, as previously indicated, seen by D/Sgt Nangolo at Nandos, Independence Avenue, Windhoek, in the company of James and Ismael. He remained in what we now know as Ismael's VW Golf car with

registration No. N113228W, while his other companions went into Nandos.

[23.5] On November 17, 2000, at about 07h30, Brandon telephonically contacted Dr Nghalipoh and reported to him that he had a very sick friend and that he would like the doctor to see the patient at home. The rest of the evidence in this regard is essentially a narrative of what was stated when the evidence against, and for, James was reviewed, save to say that Brandon allegedly told the doctor's secretary not to talk to anyone about the patient's (James') injury. In the event of the Court accepting this narrative, why would Brandon caution the doctor's secretary to refrain from revealing the patient's injury if there was nothing to hide?

[23.6] On November 18, Brandon contacted Dr Nghalipoh by telephone to get a progress report on his patient friend. The doctor spoke to him but made no mention about police intervention in the matter.

[23.7] In the evening of November 18, Brandon again contacted Dr Nghalipoh and expressed fury at him, accusing him of having reported the matter to the police. He told the doctor words to the effect that he (the doctor) had betrayed them. The question that at once springs to mind is whether Brandon's reaction was innocent or whether he had, at that early stage, a clear picture of some information or event about which he felt passionately protective!

[23.8] Subsequently, Dr Nghalipoh's secretary, who had accompanied the doctor when the latter attended to the patient at his "home", pointed out to Const. Hilundua, house No. 1709, Agnes Street, Khomasdal, Windhoek, as being the house where the doctor had attended to the patient. That was the very house that Ismael had rented from (Ms) Bezuidenhout at the beginning of November 2000. During that month, Bezuidenhout visited the house and there

found Ismael in the company of a friend of his, to wit, none other than Brandon!

[23.9] Upon Bezuidenhout visiting the rented house at the end of November 2000, she found no one there and was thus compelled to break into her own house!

[23.10] When Dr Nghalipoh was called to attend to James in the morning of November 17, it was Mike's cell-phone No. 081 245 7929 that was used by-Brandon, although the latter would like the Court to believe that that cell-phone belonged to someone by the name of Cheeks!

[23.11] On November 20, 2000, at 00h08, Ismael and Mike arrived in South Africa at Vioolsdrift, travelling in Ismael's VW Golf car registration No. N113228W. On the same date, at 00h10, Brandon and Arvo also arrived in South Africa at Vioolsdrift, travelling in Mike's BMW car registration No. FH2377GP. The explanation offered by Brandon, Ismael and

Mike that the Golf car had developed a clutch problem and that Mike was test-driving it across the border sounds extremely spurious in the circumstances of this case: why did the test-driving (if there was any) have to be through the international border?

[23.12] As already shown, it is common cause that at about 04h30 on November 22, 2000, Mike, Vincent, Brandon, Arvo and Ismael were all apprehended by the South African Police at house No. 75 Teresa Street, Camps Bay, Cape Town.

[23.13] On the occasion of the arrest of Mike, Vincent, Brandon, Arvo and Ismael, the South African Police found in the house (of their arrest) the sum of N\$909,250.00 in a black suitcase, reportedly identified by Vincent as his.

When Vincent was asked as to who the owner of the money was, he allegedly could not, or did not, provide an answer.

The money was in a plastic bag (within the suitcase) which was in batches of N\$50.00 notes. The bag was locked with a small padlock. Inspector Engelbrecht asked Vincent and Mike for a key. Mike said something in Xhosa or Zulu to Vincent and thereafter he handed over a bunch of keys from a drawer in the bedroom table. On being asked which key could unlock the padlock, Mike allegedly indicated a key to use whereupon Inspector Engelbrecht unlocked the padlock, opened the bag and discovered that it was full of N\$50.00 notes.

[23.14.] Brandon was aware, prior to the launching of the bail application in Cape Town, that the Namibian Police were interested in money that had been the subject of robbery in Namibia.

[23.15] Brandon's version, *inter alia*, is that he was not in any way involved in the commission of the crimes as alleged.

[23.15.1] Although he alleges that he was booked off by Dr Saunderson from October 23, 2000, the doctor's testimony, however, is that he saw Brandon on October 24, not on October 23, and that he had no record of having booked him off. If at all he booked him off, it would, at most, have been for a week as the patient's complaint merely related to an ankle sprain. Further, Brandon alleges that he returned to the doctor who booked him off again. But the doctor has no records to indicate that the patient ever came back to him. Thus, Brandon lacks medical support to show that he was booked off, as alleged, for a prolonged period in excess of one week; and indeed, no leave whatsoever was granted to him by his superior. It is quite clear that Brandon's story about his absence from his place of work on the alleged medical ground is nothing less than a figment of his imagination.



[23.15.2] Brandon alleges that Cheeks gave him his cell-phone number; that Cheeks was originally from South Africa but that he could not tell whether the latter was in South Africa or in Namibia at the time of giving evidence in Court. Further, he claims that he telephonically contacted the doctor in Cheeks' presence and that he used Cheeks' cell-phone!

[23.15.3] Brandon denies that he introduced Cheeks to Ismael which is contrary to Ismael's testimony during the bail application in Cape Town.

[23.15.4] Brandon states that he was with Ismael, Falazza and Ducks at Nandos. During the High Court bail application, however, Brandon testified that he had been with Ismael only. Obviously, Brandon's varying versions are a manifestation that he is lying through his teeth. It is clear that Brandon played a crucial role in facilitating the treatment of James and that he endeavoured to conceal the circumstances in which James had sustained his

serious abdominal injury.

[23.15.5] On a proper evaluation of the evidence in its entirety, in so far as it relates to Brandon, it is evident that the case against him is cogent. I accept as truthful the State's version that Brandon told Dr Nghalipoh's secretary to refrain from telling anyone about James' injury; that he accused Dr Nghalipoh of having "betrayed" them as was evidenced by the police intervention in James' case; that on his own version in his Cape Town bail application, he took James to the Roman Catholic Hospital; that he owned a cell-phone at all material times; *inter alia*, that he had told lies about, *inter alia*, having been on sick leave; and that I am satisfied that the so called Cheeks is a fictitious character. Brandon's cell-phone print-out tends to show that he must have been well aware of what had happened. It seems to me that the main reason for making his trip to Cape Town was possibly to go and

have a fair share in the ill-gotten loot. It is little wonder that he was found and arrested in the house where part of the money stolen in the second robbery was discovered. I find that he made common cause in the matter; that his version cannot reasonably possibly be true; that it is false and, therefore, it is rejected as such.

[24.] I will now briefly examine the evidence against and for Arvo (Accused 8). As in the case of Brandon, the evidence that implicates Arvo is contained in the trial proceedings of this Court as well as during the bail applications in Cape Town and in this Court before (a different judge).

[24.1] Arvo confirms that he travelled from Windhoek to Cape Town in Ismael's Golf's car together with Brandon. He was found and arrested in house No. 75 Teresa Street, Camps Bay, Cape Town, together with Mike, Vincent, Brandon and Ismael. It is common cause that the sum of N\$909,250.00 was also allegedly found in that house and that this was the subject of the second robbery.

[24.2] He states that he only met Mike in Cape Town. But in the HighCourt bail application, he testified that Mike and Ismael had driven through the (South African) border using the VW Golf car; and that he and Brandon had done the same, using the BMW car.

[24.3] It is alleged that Arvo made common cause with the lies of Brandon and Ismael in the Cape Town bail application by tailoring his evidence in an attempt to corroborate the false versions of Brandon, Ismael and Vincent.

[24.4] Arvo denies having in any way been involved in the commission of the crimes charged.

[24.5] Mr Murorua submits on behalf of Arvo that his client knows Brandon and Ismael but that he has no knowledge of the remainder of the accused. However, Arvo's own evidence in the bail

applications shows that Mike and Ismael entered South Africa through the South African-Namibian border, travelling in the Golf car while Brandon and Arvo did so using the BMW car.

[24.6] Mr Murorua further submits that in the circumstances of this case, there is no conduct on the part of Arvo that attracts criminal liability. It seems to me that there is merit in Mr Murorua's submission because I consider that the evidence against Arvo is not sufficiently cogent to warrant a conviction, either for being an accessory after the fact or for theft, as urged by the State. I arrive at this conclusion because I am not persuaded that Arvo performed some act or acts intended to assist the principal offenders to escape conviction as opposed to safeguarding his own interests. His association with Brandon, Ismael (with whom he had travelled together from Windhoek to Cape Town) and with Mike and Vincent (with whom he was found, together with Brandon and Ismael at house No. 75 Teresa Street, Camps

Bay) raises a serious suspicion against him but suspicions alone, no matter how strong they might be, are not enough to found a conviction.

[25] The next accused to be considered is Ismael (Accused 9). As previously shown, Ismael rented house No. 1709 Agnes Street, Khomasdal, from Bezuidenhout with effect from the beginning of November 2000. It was at this house that Dr Nghalipoh attended to the seriously wounded James, having been summoned there by Brandon.

[25.1] When Bezuidenhout visited the rented house during the month of November 2000, she found Ismael there in the company of his friend, Brandon.

[25.2] On visiting the house at the end of November, Bezuidenhout found no one there and had to break into it in order to gain entry.

[25.3] On November 16, 2000, at around 20h00, D/Sgt Nangolo saw Ismael's VW Golf car, registration No. N113228W, parked in front of Nandos in Independence Avenue, Windhoek. The Detective Sergeant observed James and Ismael emerge from the car and go into Nandos, leaving Brandon alone in the car.

[25.4] At 00h08 on November 20, 2000, Ismael and Mike entered South Africa at Vioolsdrigt travelling in Ismael's Golf car, registration No. N1 13228W. And at 00h10 on the same day, Brandon as well as Arvo entered South Africa through the same border post, using Mike's BMW car registration No. FH2377GP. Ismael testifies that prior to his arrival in Cape Town and to meeting Mike, he did not know him. When questioned that he travelled with Mike, his answer is a denial. But both answers are clearly false; in the case of the second answer, Ismael did in fact travel with Mike at the border between Namibia and South Africa, albeit for a short distance only. This revelation renders the first answer, too, false. When he was asked about calls made between him and Mike prior

to their arrival in Cape Town, he refused to respond.

[25.5] It is common cause that at about 04h30 on November 22, 2000, Mike Vincent, Brandon, Arvo and Ismael were all arrested at house No. 75 Teresa Street, Camps Bay, Cape Town.

[25.6] On the same day, the South African Police discovered N\$909,250.00 in the house where the five accused aforesaid were found too and arrested. This money was in the bag which was itself contained in the black suitcase that was allegedly identified by Vincent as his. The money was in batches of N\$50.00 notes and formed part of the money which, I am satisfied, was the subject of the second robbery.

[25.7] On being asked whether he knows Cheeks (to whom Brandon referred to), his answer is that he does not know him personally; that he only knows him by

sight, adding that he was introduced to Cheeks by Brandon.

[25.8] When asked during the bail application in the High Court, where he was during the evenings of November 16 and 17, 2000, he opted not to say where he was.

[25.9] On November 16, 2000, calls from Ismael's cell-phone were made to the cell-phone of Mike four times between 14:32:10 and 23:03:23. On November 17, he seemingly called Mike's cell-phone eleven times between 11:59:26 and 18:01:53. On the same day, Ismael apparently called Mike's cell-phone seven times between 18:19:13 and 21:42:06. And on November 19, it appears called Mike's cell-phone six times between 17:10:44 and 17:16:33. In the light of the evidence before the Court, coupled with the many cell-phone calls that Ismael made to Mike, not only on November 17, but also on November 16, 2000, nearer the occurrence of the second robbery, would it be unreasonable to infer that such calls were possibly not innocent?

[25.10] Like Brandon, Ismael denies having in any been involved in any of the crimes charged.

[25.11] He alleges that his car developed a clutch problem, which, as previously indicated, and for the reason given, sounds extremely spurious.

[25.12] It is clear to me that Ismael's evidence is replete with lies.

[25.13] Ismael was seen by D/Sgt Nangolo at Nandos, Independence Avenue, Windhoek, where his Golf car was parked in the company of James and Brandon prior to the commission of both robberies.

[25.14) It is not in dispute that Ismael rented the facility at house No. 1709 Agnes Street, Khomasdal, where James received his initial treatment. In addition,

it is evident that Ismael played a critical role in the scheme of things. The timing of the acquisition of the rented facility almost coincided with the arrival in Windhoek of James on October 29, 2000, Mike having previously arrived on the 13th of that same month. Was the acquisition of that facility and James' presence there a coincidence?

[25.15) Ismael, Brandon and Arvo all left Windhoek for South Africa on November 19, 2000, barely two days after the commission of the second robbery in this case. They all travelled in Ismael's Golf car. Was their travelling together a coincidence?

[25.16] It so happened that on the same day of the departure of Ismael and his companions, Mike, too, left Windhoek for Cape Town, driving his BMW car. Was this occurrence by chance?

[25.17] Was it a mere coincidence that Ismael and his companions arrived at the South

African border - Namibian border at about the same time as Mike?

[25.18] Was it by chance that Ismael and Mike crossed the South African - Namibian border together in Ismael's Golf car with Mike behind the steering wheel?

[25.19] Was is by coincidence that Ismael, Brandon, Arvo, Vincent and Mike all ended up together at house No. 75 Teresa Street, Camps Bay, Cape Town?

[25.20] Was it by chance that the South African Police raided house No. 75 Teresa Street, Camps Bay, and therein found not only the five accused referred to in paragraph 25.19, *supra*, but also the sum of N\$909,250.00 in N\$50.00 notes which was part of the N\$5.3 million that had been stolen during the second robbery?

[25.21] Were the telephonic contacts among the accused, particularly during the material times and in which Mike and

James appear to be dominant, a mere chance?

To this and the preceding questions, my answers are in the negative. However, the conclusions I am going to draw from my answers will not negatively affect Arvo for the reasons previously given.

[25.22] In considering circumstantial evidence, the observations of the Full Bench of this Court in *S v Hotel Onduri (Pty) Ltd and Another* 1993 NR 78 (HC) at 82I-J-83A-C are apposite:

"In *R v Sibanda* 1963 (4) SA 182 (SR) Beadle CJ the then Chief Justice of Rhodesia in an appeal said at 188F-G:

It seems to me that this is one of those cases where, although each individual item of evidence is quite insufficient to convict the appellant, the cumulative effect of all this evidence proves the appellant's guilt beyond doubt. I approach this case, therefore as was done in the case of *R v de Villiers* 1944 AD 493 at 508, where the Appellate Division approved the following statement of *Best on Evidence*:

"Not to speak of greater numbers; even two articles of circumstantial evidence - though each taken by itself weigh but as

a feather, join them together, you will find them pressing on the delinquent with the weight of millstone — It is of the utmost importance to bear in mind that, where a number of independent circumstances point to the same conclusion the probability of the justness of that conclusion is not the sum of the simple probabilities of those circumstances, but is the compound result of them."

This approach was also approved in the case of *R v G* 1956 (2) PH H266 (A), where the Court said:

The cumulative effect of a number of pointers converging from different angles was very much greater than the mere total of their weight taken in isolation.' "

[25.23] Bearing the contents of the preceding paragraph in mind, I am of the view that when the various items of evidence *in casu* are put together, the cumulative effect thereof brings me to the conclusion that Ismael is linked to the second robbery. I find that he made common cause in the matter; that the substance of his evidence cannot

reasonably possibly be true; and that it is false.

[26] As regards Vincent (Accused 10), he arrived together with Mike at Hosea Kutako Airport from South Africa, via Johannesburg, on October 13, 2000. He was thereafter taken to Falazza's house in Windhoek where he and Mike stayed; and where James subsequently joined them.

[26.1] During his sojourn in Windhoek, he used a cell-phone number 081 246 4427.

[26.2] On November 17, 2000, he informed Falazza, following receipt of a call from Mike to the effect that there was trouble, that James had been shot and that they had taken the money and were gone.

[26.3] On November 19, 2000, Vincent arrived at Cape Town Airport on a flight from Windhoek.

[26.4] On the same day, Brandon, Arvo and Ismael as well as Mike left Windhoek in two

vehicles on their way to South Africa.

[26.5] Vincent allegedly saw Mike and Ismael removing money from the panels of Ismael's car and later saw Mike counting the money in a room.

[26.6] On November 22, 2000, at about 04h30, Vincent and Mike together with Brandon, Arvo and Ismael were all found and arrested by the South African Police in house No. 75 Teresa Street, Camps Bay, Cape Town.

[26.7] On the same occasion, some five days after the commission of the second robbery, the South African Police found N\$909,250.00 in the said house No. 75 Teresa Street, Camps Bay, Cape Town, in a black suitcase identified by Vincent as his. In the suitcase, the South African Police found a plastic bag, which, as it transpired, contained a batch of N\$50.00 notes. Upon being asked as to whom the money belonged, Vincent allegedly could



not, or did not, provide an answer. The money was found on a top shelf of a cupboard in the house. Since the bag was locked with a small padlock, Inspector Engelbrecht asked Vincent and Mike for a key. After Mike had spoken to Vincent in Xhosa or Zulu, he (Mike) allegedly handed over a bunch of keys taken from a drawer in the bedside table. On request, Mike allegedly indicated which key to use in the bundle. Engelbrecht unlocked the bag, opened it and checked inside before handing the bag full of N\$50.00 notes to van der Walt. The money was identified by Ms Blignaut of BON as being part of the money stolen during the second robbery. I find that the South African Police witnesses are truthful and, therefore, that their evidence is credible.

[26.8] During the trial, Vincent voluntarily made a statement to C/Inspector Becker on a video tape which was later transcribed and produced as an exhibit. In that statement, he endeavoured to exculpate himself and to essentially incriminate Mike.

[26.9] Print-outs of calls made from the cell-phone of Mike to that of Vincent show that on November 13, 2000, three calls were made; on November 17, five calls were made between 04:25:05 and 21:31:10; and on November 19, three calls were made.

[26.10] Vincent denies any involvement in the commission of the crimes charged.

[27] Mr Small submits that Vincent should, on his own version, be convicted of the alternative crime of theft in respect of the second count.

[28] On the other hand, Mr Neves, Vincent's legal representative, urges the Court to acquit his client on the ground that the ingredients of theft have not been proved.

[29] Mr Neves submits that the alleged crime of theft was committed outside the jurisdiction of this Court and that, as such,

Vincent cannot be convicted by this Court of the crime.

[30] Attention is here drawn to the case of *S v Mwinga and Others* 1995 NR 166 (SC) where the following observations were made at 171I-J-172A-B:

"In my view the Namibian Courts, faced with an 'international law friendly' Constitution (Art. 144) and with its already 'extensive' jurisdiction in common law, should not base its jurisdiction on 'definitional obsessions and technical formulations' but should stay in step with the other common law Commonwealth countries such as England and Canada. Thus in order to determine whether the High Court has jurisdiction in a trans-national crime or offence, all that is necessary is that a significant portion of the activities constituting that offence took place in Namibia and that no reasonable objection thereto can be raised in international comity."

[31] *In casu*, it is common cause that the second robbery with aggravating circumstances was committed in Namibia. The crime of theft is framed in the alternative. As previously

indicated, it is trite law that theft is a continuing crime. See: *S v Kruger en Andere* 1989 (1) SA 785 at 787G-H. In the case of *S v Nakcde, supra*, Strydom JP (as he then was) and Frank, J remarked at 265A:

"As theft is a continuing offence there is no such thing as an accessory after the fact to theft."

Thus, a person who does what would for another crime result in such a person being an accessory after the fact, will be guilty of the crime of theft. See: also *S v Kumbe* 1962 (3) SA 197 (N) at 199.

[32] It is clear that Vincent's own version of his exculpation cannot reasonably possibly be true and I find that it is in fact false. The discovery of the stolen money in his suitcase and his lies in the Cape Town bail applications especially lies in an endeavour to shield Mike, go to show that his intention in the matter was not innocent.

[33] I will now consider the case against and for Mike (Accused 11). The prosecution evidence shows that on October 6, 2000, he left Namibia by road to return to South Africa. He came back to Namibia by air with Vincent on October 13, 2000. Both of them stayed at Falazza's residence in Windhoek where they were later joined by James. It was Mike that had made possible the necessary accommodation arrangements for Vincent and James to stay at Falazza's residence. Mike used cell-phone No. 081 245 7929 whilst in Namibia.

[33.1] On Wednesday 17, 2000, four calls were made from Mike's cell-phone to that of James at 00:59:22; 01:02:14; 01:12:07 and 01:24:19.

[33.2] On November 16, 2000, five calls were made from Mike's cell-phone to that of Hendrick from 17:24:29 to 23:45:17; on the following day, seven more calls were made to that of Hendrick from 08:54:15 to 16:31:06;

and on November 18, four calls were made to that of Hendrick from 15:08:53 to 20:46:01.

[33.3] On November 16, four calls were made from Mike's cell-phone to that of Ismael from 14:32:10 to 23:03:23; on the following day, eleven calls were made to that of Ismael from 11:59:26 to 18:01:53; and on November 18, seven calls were made to Ismael's cell-phone from 18:19:13 to 21:42:06.

[34] It is not in dispute that at about 04h30 on November 22, Mike, Vincent, Brandon, Arvo and Ismael were all found and arrested in house No. 75 Teresa Street, Camps Bay, Cape Town. On that occasion, the South African Police had raided the said house. Also found in that house at about that time was money amounting to N\$909,250.00 in batches of N\$50.00 notes which was contained in the black suitcase identified by Vincent as his. When asked where a key to a padlock

securing the bag that contained the money was, Mike spoke to Vincent and subsequently handed over a bunch of keys to the police. On being asked which key could be used to unlock the padlock, Mike indicated the key, whereupon the bag was opened and found to contain the money aforesaid.

[35] Mike has given testimony at length in an endeavour to exculpate himself. He denies having taken part in the commission of any of the crimes charged. As already indicated, he submits that the computer print-outs are unreliable and should thus not be used in evidence. However, this issue has already been decided and it is here unnecessary to say anything more about it. It suffices to state that the evidence of the cell-phone print-outs speaks for itself.

[36] I accept as true the State's version of what transpired at the material time at house No. 75 Teresa Street, Camps Bay, in particular, the conduct of Mike and Vincent at the critical

time. I find that Mike made common cause in the matter; that his exculpatory version cannot reasonably possibly be true; and that it is false.

[37] In my view, Mike and James appear to have played a leadership role in the matter. On the evidence, it is apparent that Mike was possibly the mastermind in this case. Seemingly, however, it cannot conclusively be said that Mike was physically present when the commission of the second robbery took place on account of the fact that the cell-phone print-out evidence shows that calls were made between James and Mike at about the commission of the said robbery. Had they been together at the time, no such calls could necessarily have been made. But this does not mean that Mike was not involved in the planning of the commission of the second robbery in all the circumstances of the case.

[38] Reverting to James, is it a coincidence that he and Hendrick are (forensically) linked to Schutt's Nissan bakkie? I do not think so for I am satisfied, as already shown, that the blood sample that was left on the Nissan bakkie belonged to James; and that the said sample had not been deposited there innocently. I am further satisfied that the fingerprint found on the dashboard of the Nissan bakkie was that of Hendrick; and that it had not been left there in innocent circumstances. Moreover, I am satisfied that the first robbery was committed for the purpose of facilitating the commission of the second one. I have no difficulty in finding that the story as to how James came to sustain his abdominal gunshot wound is a cock - and - bull story; that Cheeks is a fictitious character; that James is placed at the scenes of the two robberies by virtue of the blood sample taken from Schutt's Nissan bakkie which matched his, as already indicated; that he is the robber that shot at Kapira, and at whom Kapira shot, in the shoot-out during the commission of the second robbery; that he still carries within

his body the 9mm projectile; that Brandon was insistent that James be treated at home by Dr Nghalipoh in an attempt to conceal the circumstances in which he had sustained his injury;

and that James' story of having been accidentally shot is a concoction, and, therefore, not credible. I find that the evidence of Dr Nghalipoh, his secretary, D/Sgt Shikufa, D/Sgt Nangolo, the South African Police witnesses and other State witnesses that testified in the matter is rather credible; that James made common cause in the matter; that his version cannot reasonably possibly be true; and, therefore, it is rejected as false.

[39] Returning to MacDonald, the critical evidence against him comes from Kapira and from his (MacDonald's) cell-phone print-outs which connect him with the commission of the second robbery.

[40] Mr Murorua raises the issue that

Kapira is a single witness. But evidence of a single witness suffices to convict an accused person if the witness is credible and the court is satisfied that the truth has been told. See: (*S v Sauls* 1981 (3) 172 (A) 180). I accept the evidence of Kapira as I find that he is a credible witness and that the truth has been told. On the other hand, I find MacDonald's evidence to be false.

[41] As regards, Hendrick I am here satisfied that the fingerprint that was lifted from Schutt's Nissan bakkie was his; that it had not been left there in innocent circumstances; that he was involved in both robberies; that he made common cause in the matter; and, therefore, his evidence is rejected as false.

[42] Brandon played a crucial role in facilitating the treatment of James and endeavouring to conceal the circumstances in which the former had sustained his serious abdominal injury.

[43] Bearing in mind all the evidence before me

and my findings, it is evident that the unfolding panorama in this matter demonstrates that the planning of the two robberies with aggravating circumstances had entailed a great deal of care and ingenuity. It is to the credit of the Namibian and the South African Police who succeeded in putting together the pieces of what appeared to be a jigsaw puzzle.

[44] In the light of what I have said in this judgment, I come to the following conclusions:

*James H Ningise (Accused 1):*

Count 1: Guilty as a perpetrator;

Count 2: Guilty as a perpetrator;

Count 3: Guilty as a perpetrator;

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Count 2: Guilty as an accomplice;

Count 3: Not Guilty;

Count 4: Not Guilty. He is acquitted on  
Counts 1, 3 and 4 but convicted on Count 2 as  
an accomplice.

*Hendrick H. Tsibande (Accused 3):*

Count 1: Guilty as a perpetrator;

Count 2: Guilty as a perpetrator;

Count 3: Guilty as a perpetrator;

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Count 2: Guilty as an accessory  
after the fact;  
  
Count 3: Not Guilty;  
  
Count 4: Not Guilty. He is  
acquitted on Counts 1, 3 and 4 but  
convicted on Count 2 as an accessory after  
the fact.  
  
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*Ismael Oaeb (Accused 9);*

Count 1: Not Guilty;

Count 2: Guilty as an accomplice;

Count 3: Not Guilty;

Count 4: Not Guilty. He is

acquitted on Counts 1, 3 and 4 but

convicted on Count 2 as an accomplice.

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Count 2: Not Guilty on the main  
count but Guilty of the alternate  
Count of theft;

Count 3: Not Guilty;

Count 4: Not Guilty. He is

acquitted on Counts 1, 3 and 4 but

convicted on the alternative count of theft.

*Mike S. M. S. Apani (Accused 11);*

Count 1: Guilty as a perpetrator;

Count 2: Guilty as an accomplice;

Count 3: Guilty as a perpetrator;

Count 4: Guilty as a perpetrator. He is  
convicted on all counts as indicated above.