REPORTABLE

CASE NO.: SA 97/2011

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

SILAS FIKAMENI SHILONGO **Appellant**

and

THE STATE **Respondent**

Coram: SHIVUTE CJ, MARITZ JA and MAINGA JA

Heard: **4 March 2013**

Delivered: **15 November 2013**

APPEAL JUDGMENT

MAINGA JA (SHIVUTE CJ and MARITZ JA concurring):

[1] The appellant as Accused No. 1, appeared together with one Ferdinand Kutamundu before a Regional Court Magistrate at Oshakati on charges of murder and robbery with aggravating circumstances. Mr Kutamundu, Accused No. 2 in the

Regional Court, absconded during the trial in that Court. The case proceeded against the appellant. He was convicted on both charges and sentenced to 20 years imprisonment on the murder charge and 15 years imprisonment on the robbery with aggravating circumstances. He appealed against both convictions and sentences to the High Court at Oshakati. Frank AJ and Hinda AJ dismissed the appeal on conviction and the appeal on sentence partly succeeded in that 10 years of the sentence on robbery was ordered to run concurrently with the sentence on murder. The appeal, brought with leave from the two Acting Judges, was granted on nine grounds of appeal set out in the application for leave to appeal and is against conviction only.

[2] The grounds of appeal read as follows:

> ‘1. The court *a quo* erred by using the evidence to the effect that a similar vehicle to the appellant was seen in the vicinity of the commission of the crime with two persons, as part of evidence linking the appellant to the crime.
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> 2. The court erred in finding that a vehicle similar to that of the Accused was involved in the robbery and Accused No. 2 was one of the perpetrators.
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> 3. The court *a quo* erred in not finding that there was no admissible evidence that the handcuffs that were apparently found to bear the letters of *“SH”* and *“GO”* are the handcuffs that Olavi (one of the complainants) was handcuffed with. The court materially erred in this respect by relying on handcuffs in respect of which there is no evidence linking them to the complainant. There was no admissible evidence linking the handcuffs to the crime.

4. The court failed to make a proper assessment of evidence relating to the tracks of the vehicle used by the robbers despite material shortcomings in the evidence of Olavi.

5. The court erred by relying on the fact that the appellant was found with a grinder when there was no evidence linking the grinder to the commission of an offence.

6. The court erred in taking it that it was proved that the AK47 that was examined at the National Forensic Lab was the firearm from which fatal shots were fired and that it was the same firearm found by a member of the public when it was not proved beyond reasonable doubt that the firearm found by a member of the public was indeed the firearm allegedly examined by witness Nambahu.

7. The court erred in finding that the pistols found by the member of the public at a certain village were the pistols that allegedly went missing in two instances where the Accused was involved as a police officer and were the same pistols referred to in court. These findings were made despite material shortcomings in the identification of the pistols.

8. The court also erred in relying on the evidence of witness Popassi who did not testify at the trial in relation to the identification parade where Accused 2 was allegedly identified. The court *a quo* erred and acted unfairly to the prejudice of the appellant in taking it that the case against Accused 2 was proved beyond reasonable doubt and taking it as if it is common cause that Accused 2 was one of the robbers and using such evidence despite the absence of and the purported separation of trial against the appellant. In that respect the appellant did not have a fair hearing at appeal level in terms of Article 12 of the Namibian Constitution.

9. The court erred in not finding that the learned Magistrate should have recused himself, alternatively that he unfairly dealt with the appellant's notice of application for his recusal.'

[3] The High Court linked the appellant to the crimes on the evidence, which it summarised as follows:

3.1 A vehicle similar to the appellant's was seen in the vicinity of the scene of the crime prior to the commission of crime with two persons in it, one being Accused No. 2.

3.2 A vehicle similar to his was involved in the robbery and Accused No. 2 was one of the perpetrators.

3.3 Mr Olavi, one of the victims of the robbery, was handcuffed during the commission of the crime with handcuffs which, at least at some point, had the appellant's surname or the letters 'sh' and 'go' as part of a word etched onto them.

3.4 The tracks of the vehicle that was used in the robbery were similar to those of his vehicle.

3.5 He had a grinder and was in a position to grind off identifying numbers from one pistol.

3.6 The AK-47 rifle which fired the fatal shots was found in close proximity of the two pistols. One of its serial numbers was also partially grinded off.

3.7 Both pistols had gone missing in circumstances where he was the investigating or responsible police official.

3.8 He was found at around 18h00 on the day of the incident in his vehicle and in the company of Accused No. 2.

[4] This judgment should be read with the findings of fact formulated by Frank AJ. His findings are comprehensive enough for the purposes of this judgment. They are furthermore fair and the attack directed at them is devoid of any merit.

[5] Without, therefore, repeating the full account of the crimes as described in the judgment of Frank AJ, I should repeat the facts which are common cause. On 31 August 2000, a robbery took place at Omakange Settlement on a gravel road between Kamanjab and Ruacana, some 67 km from Opuwo. A pick-up vehicle of Rubicon Security, whose main office is in Oshakati, was intercepted while on its way from Opuwo to Oshakati with money which the company had collected at various businesses at Opuwo. When intercepted, the pick-up vehicle was shot at and the driver of the pick-up, Mr Mathys Marthinus Steyn Venter, was killed. This incident is the subject matter of the murder charge. His colleagues, Mr Paulus Olavi and Ms

Vincencia Shanyanana, lived to tell the story of their ordeal. They were made to lie down and their hands were cuffed behind their backs: Ms Shanyanana with silver or chrome cuffs and Mr Olavi with bigger, black cuffs. The robbers got away with the money which totalled just over N$147 000,00. This incident is the subject matter of count 2. The two victims later managed to stop a Government vehicle at the scene of the crime and the occupants of the vehicle assisted them to summon the police which they had seen at a cuca shop nearby. Ms Shanyanana's handcuffs were removed on the scene while those of Mr Olavi were removed at Opuwo Police Station.

[6] The primary question to be answered in this appeal is whether the evidence adduced at the trial established the guilt of the appellant beyond reasonable doubt. In this regard the appellant's counsel argued that the appellant's conviction on each of the charges was wrong as the State did not prove beyond reasonable doubt that he committed the offences. He further argued that both the High Court and the Regional Court committed a series of errors in evaluating the evidence. He makes a further argument that where the evidence in a criminal trial hinges on probabilities, it behoves the trial court to bear in mind the relevant principles relating to the assessment of evidence. He refers to a decision of the South African Supreme Court of Appeal in *S v Shackell* 2001 (4) SA 1 (SCA) para 30, where that Court reiterated the trite principle of proof by the State of its case beyond reasonable and that a mere preponderance of probabilities would not be enough for a conviction and, equally trite in view of the high standard of proof in criminal matters, the observation that a Court need not be convinced that every detail of accused's version is true. If the accused's version is

reasonably possibly true in substance, the Court must decide the matter on the basis of that version. Counsel further suggests that the grounds of appeal viewed against these principles relating to the assessment of evidence, the evidence in this case should be considered with due regard being had to the following:

6.1 Before the trial two other persons were also arrested and charged but the charges against them were dropped prior to the commencement of the appellant's trial.

6.2 At an identification parade held during the investigation of the case, witness Paulus Kolele Olavi identified two persons as the robbers, to wit Accused No. 2 and another person. This was after he had already met and spoken to Accused No. 2 at the Opuwo Police Station, but failed on that occasion to point him out as one of the robbers.

6.3 When the matter was called in court for continuation of trial on 24 February 2005, Accused No. 2 was absent and remained absent to the end of the trial. The trial was therefore effectively separated.

6.4 Witness Paulus Olavi testified that he had not seen the appellant at the scene of crime.

6.5 There was no attempt to make a cast of the suspect vehicle's tyre imprints found on the scene.

6.6 Chief Inspector Malan uplifted finger and palm prints from the deceased's vehicle and such finger and palm prints did not link the appellant or Accused No 2 to the complainant's vehicle.

6.7 The same witness drove with the appellant to the crime scene shortly after the robbery (on the same day) and did not in any way suggest that the appellant appears to be one of the suspects.

6.8 The witness Casper Popassi stated that the vehicle he had seen before the robbery did not have a canopy, did not have an antenna and did not have a bull bar like that of the appellant.

6.9 There was no admissible evidence on the origin of the handcuffs etched by witness Dry to substantiate the High Court's conclusion that the black handcuffs that had been used to cuff Paulus Olavi were the same handcuffs that were produced in Court as Exhibit "1" and found at Oshakati, because the witness (Scholtz) alleged that he had been given those handcuffs by Malan - but Malan, on the other hand, did not testify to that effect. He stated that he had been given the handcuffs by Sowden. Witness Shanyanana testified that she gave Scholtz silver

handcuffs. Furthermore, Paulus Olavi testified that the handcuffs that were used to cuff him were left at Opuwo Police Station.

6.10 The three firearms allegedly picked up by a member of the public, Mbahono, were not properly identified at the scene as no serial numbers were recorded so as to establish that the firearms produced in Court were, beyond reasonable doubt, the same firearms that had been picked up by him.

[7] To these points of criticism, which counsel labelled as special and material and that they were favourable to the appellant, he, in his oral argument added a further attack, i.e. the finding that the vehicle allegedly used to commit the crime was similar to appellant's vehicle.

[8] Before considering these submissions, I might perhaps usefully refer to *S v Nango* 2006 (1) NR 141 (HC) at 145J where it was stated:

> '. . . Steeped in the atmosphere of the trial, the learned magistrate was best positioned to assess the credibility and reliability of the evidence presented by both the prosecution and the defence. While this Court will not overestimate those advantages, it must also be mindful of its limitations by having to adjudicate the matter only by reference to the record of proceedings transcribed for purposes of the appeal (see generally *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705-6).'

[9] In *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645e-f, h-j and 646a-b, Marais JA spelt out the approach to be adopted on appeal of this nature as follows:

> '. . . there are well-established principles governing the hearing of appeals against findings of fact. In short, in the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. The reasons why this deference is shown by appellate Courts to factual findings of the trial court are so well known that restatement is unnecessary.
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> . . . the credibility findings and findings of fact of the trial court cannot be disturbed unless the recorded evidence shows them to be clearly wrong. In assessing whether or not such is the case, the approach which commended itself in *Moshephi and Others v R* (1980-1984) LAC 57 at 59F-H seems appropriate in the particular circumstances of the matter:
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> > "The question for determination is whether, in the light of the all evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual parts of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical, examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees." '

[10] In *R v De Villiers* 1944 AD 493, counsel for the defence had pressed upon the court that, in a case depending on circumstantial evidence, 'the court must take each factor separately, and, if each of them is possibly consistent with innocence, then it must discard each in turn'. The Court dismissed the argument as entirely fallacious for the reason that:

> '. . . It is in the first place inconsistent with the statement . . . in *Rex v Blom* 1939 AD at p. 202): "The proved facts should be such that they exclude every reasonable inference from them save that one sought to be drawn." It is not each proved fact which must exclude all other inferences; the facts as a whole must do so. . . . This argument is also inconsistent with the reasoning of this Court in all the cases, such as *Rex v Shein* (1925 AD 6), where convictions upon circumstantial evidence have been called into question. As stated by Best, *Evidence* (5th ed., sec. 298): -
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> > "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 a 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."
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> See also *Evans' Pothier on Obligations* (2.242), and Wills, *Circumstantial Evidence* (7th ed., p 46). 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. To put the matter in another way; the Crown must satisfy the Court, not that each separate fact is inconsistent with the

> innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence.'
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> See also *S v Reddy and Others* 1996 (2) SCR 1 (A) at 8c-9c-e.

[11] Before, I turn to the evidence; I propose to deal with the submission that the magistrate should have recused himself, when Chief Inspector Becker who at the time he testified was a staff member of the Anti-Corruption Commission of which the magistrate became the Director before he could finalise the trial. The appellant's submission was that whether or not there had been an application for recusal was of less relevance in view of the most unfair way in which the magistrate had dismissed an attempt to bring such an application at the time: he made it clear that the application had no merits. In my view the submission is devoid of any merit.

[12] I am in agreement with the sentiments of the High Court on this issue when it expressed itself as follows on this issue:

> '[52] Prior to Mr Becker being called as a witness the lawyer acting for Accused No. 1 raised the issue but did not bring an application for recusal. It is so that the magistrate was very dismissive of this approach and suggested that this should rather be taken up if his decision is appealed against. One can understand the frustration of the magistrate with the point being taken at the trial that started prior to May 2003 and which had, with various adjournments, proceeded up to May 2008 before Mr Becker was even called as a witness. The lawyer apparently took the magistrate's view as a ruling, which was not, did not take this matter any further as no application for recusal was made. No facts apart from the very cursory facts mentioned at the time and which appears on the record were placed before Court and nor was the State given the

opportunity to respond to such an application. In this matter the State at least will be prejudiced if the point is allowed to be taken. Had it been taken properly and a proper application for recusal brought, the State could have considered its position and could either have opposed the application, decided not to call Inspector Becker or to see whether it would cut some of his evidence and produce some of the other evidence by way of calling other witnesses. Here it must be borne in mind that the evidence of Mr Becker was not referred to in the judgment and the vehicle identification parade he initiated did not feature at all as the video recording and photos thereof assumedly went missing in the meantime and further that no credibility finding was necessary in respect of his evidence for the Court *a quo* to reach its conclusion. To raise the point half-heartedly and without allowing the State to respond thereto and without putting full facts before Court, I am not inclined to allow the accused to now raise it. Furthermore, had the accused's lawyer thought there was a ruling; he should have appealed it so that the matter could have been sorted out at that stage. To wait and keep this point in abeyance as it were so as to take it when it would be the most advantageous to the accused and the most prejudicial to the State in my view should not be countenanced. (*Brown v Papadakis and Another* 2009 (3) SA 542 (C).)'

[13] I may add, as the High Court correctly pointed out, the application was not made; nor was an attempt made. What transpired in Court is recorded as follows:

'MR UYAKA: Your worship on the other hand we have considered on the basis of the current position with the Magistrate who is the head of Directorate of Anti-Corruption Commission where the State witness Mr Nelius Berker is also employed in the same directorate whether this will not be viable for Your Worship to hear and make a judgment pertaining to credibility, reliableness and unreliableness of the witness' evidence given by Mr Nelius Berker who is currently under your leadership.

COURT: Its very interesting are you now saying I must recuse myself from the case or what?

MR UYAKA: Your Worship that is what I have considered to apply for.
(The underlining is mine.)

COURT: Just because one witness is from the Anti-Corruption Commission?

MR UYUKA: That was not the case before but instantly the situation is quite different.

COURT: I do not see that as a good reason for me to recuse from this case which has come such a long way but you have got your right. If you feel that by virtue of that I am not fit to sit on this case I think that can be a case for you to appeal against whatever outcome of this case but I do not see that. I see that as a sheer waste of time. I do not see that as a good ground.

MR UYAKA: As the Court made a ruling and I am much obliged to it. May my client remain seated in the course of proceedings?

COURT: Yes please sit.'

[14] The argument is silent on whether the learned magistrate was biased and not objective in the consideration of Mr Nelius Becker's evidence. To generally argue that the magistrate should have recused himself because the witness was his subordinate in the absence of allegations of prejudice to the appellant's case or perceived reasonable apprehension of bias on the part of the magistrate takes appellant's case no further. Magistrates being the face of the judiciary in lower courts, preside over cases in which their subordinates are witnesses, namely, maintenance cases, missing records, etc. They preside over cases in which police officers they may have known for many years in their jurisdictions are witnesses. They may castigate them or

criticise them in one case and commend them in another. It does not follow that in subsequent trials, the magistrate should recuse him/herself where the same person is a witness. To do so would be tantamount to grounding the wheels of justice. The argument fails to appreciate that among the many witnesses called by the State, Mr Nelius Becker was the only witness in respect of whom the appellant considered to move an application for recusal. This was at the stage when the State case was almost at its end. To have the case started *de novo*, for the only reason that Mr Becker happened to become a subordinate of the magistrate while the trial was pending, would have been absurd. Without more, the mere fact that a subordinate of a magistrate is a witness at a trial is not sufficient to infer a reasonable apprehension of bias justifying his or her recusal. I must not be understood to mean that in other applications, where additional facts justifying such an inference would be established and the circumstances so dictate, a presiding officer should not recuse himself. However, in the circumstances of this case the argument was correctly rejected.

[15] I now turn to the evidence. An argument is made that the High Court erred when it relied on the evidence of Popassi, who did not testify at the trial relating to the identification parade, where Accused No. 2 was allegedly identified; that the Court erred and acted unfairly to the prejudice of the appellant when it held that the State's case against Accused No. 2 had been proven beyond reasonable doubt and when it assumed that Accused No. 2 was one of the robbers and using that evidence against the appellant despite the separation of the trials: therefore, it is contended, the

appellant did not have a fair hearing at the High Court in terms of Article 12 of the Namibian Constitution.

[16] This argument presupposes that the High Court should have ignored the evidence of Popassi and the evidence relating to the guilt or innocence of Accused No. 2. This contention is contrary to a well-founded principle that a court does not base its conclusion, whether it be to convict or to acquit, on only part of evidence: the conclusion must account for all the evidence. See *S v Van der Myden* 1999 (1) SACR 447 at 449g and 450a. The fact that Accused No. 2 had absconded and a separation of trial was ordered could not preclude the High Court from considering the evidence which implicated Accused No. 2, more so if the evidence against him points in the direction of the appellant as well. The State had a strong case against Accused No. 2 and his conviction was certain. It is that evidence against Accused No. 2 that also implicates the appellant.

[17] In the week that followed the incident, that is 3 – 8 September 2000, Accused No. 2 according to the evidence of his half-brother, Mr Jaziki Rukambura, spent N$14 670,00 around Oshakati. This evidence was not challenged during cross-examination. He was not working at the time. He allegedly sold his Nissan sedan vehicle for N$6000,00 and received N$2700,00 cash and the balance was to be paid in the form of cattle. He also sold three cattle and he also received ± N$6000,00 from which it was alleged, he gave his half-brother N$800,00. The two amounts added together do not amount to the N$14 670,00 he later spent. It must be remembered that when he

sold his Nissan sedan, he bought an Opel sedan from the appellant. While in Oshakati, he heard that the appellant was arrested and that the police were looking for him. Instead of returning to Opuwo, as he had initially planned, he made haste to leave Oshakati towards the South and was arrested on the way to or at Oshivelo. He absconded during the trial, and remains a fugitive from justice.

[18] After his arrest, he was taken to Opuwo. W/O Albanus Nuujoma testified that he was questioned as to the source of the money he spent in Oshakati. He could not give a satisfactory answer. All that he could say was that he sold cattle without mentioning how many were sold, to whom or where the cattle were sold. During cross-examination of his half-brother, who was the keeper of the bag that contained the money, his legal representative revealed, as already mentioned, that he sold three cattle which fetched ± N$6000,00. Deducted from the amount he spent in Oshakati, there is an amount of ± N$8000,00 which he did not account for, especially that he claimed that from the N$6000,00, he gave his half-brother N$800,00. W/O Nuujoma also testified that during his investigation, he established that Accused No. 2 had deposited N$500,00 at Agribank. That amount added to N$14 670,00 increases the total amount expended to N$15 170,00. His half-brother indeed confirmed that he sold three cattle that belonged to their uncle. Without an explanation as to the source of the other money which was not denied, the only reasonable inference, when considered together with the other evidence against him, is that it was the proceeds of the robbery.

[19] On 30 August 2000, Mr Casper Popassi and his father Mr Abraham Popassi were grading the Kamanjab-Ruacana road and they were at Omakange. On that day a white Toyota pick-up with a black stripe on the side, dark tinted windows, an aerial (looking like ‘ears of a hare’) on the roof and without a canopy came to a stop under a tree, near the place he and his father were working. Its bonnet was opened. It had a Windhoek registration number at the rear and no number plate fitted to its front. It had two occupants. The passenger who was light in complexion alighted from the vehicle and approached Mr Popassi (senior) and asked for a cigarette. The person spoke Afrikaans. He could not see the other person clearly as he remained seated in the cabin behind the steering wheel. On 31 August, they moved their road grader and equipment to a place called Alpha, which is 16 km from Opuwo. While at that place, at about 14h00, he saw a Hyundai bakkie, a Government vehicle and the same Toyota pick-up, which he had seen the previous day at Omakange, driving by from the direction of Opuwo. On 8 September 2000, he was collected and taken to the Opuwo Police Station where he identified at an identification parade Accused no. 2 as the person who had asked for cigarettes from his father. Exhibit “N”, which is the written record of the identification parade also shows that Mr Abraham Popassi identified the same person. He was not asked to identify the vehicle at the time but he identified the vehicle of the appellant during the trial, 8 years later, at an inspection *in loco*, at the house of the appellant. He particularly testified that the ‘mag’ wheels were still the same.

[20] Mr Paulus Olavi identified Accused No. 2 at the same identification parade as the person who had approached him and pointed a firearm at him on the scene of the robbery, which firearm he thought resembled an AK-47 or a G3. Mr Olavi later testified that, whilst the vehicle carrying the cash in transit was being driven along the road, he heard a bang as if there was a tyre burst. As soon as the vehicle came to a stop in the bushes next to the road, the person he later identified as Accused No. 2 approached him on the passenger side where he was seated and pointed the firearm that resembled an AK-47 at him. He saw a second person who had two firearms, one being a pistol. The three firearms that Mr Olavi saw in possession of the two robbers appear to be similar to the three, namely, an AK-47, semi-automatic Commando and 7.65 pistols and magazines that were found next to the road between Okarukoro and Kasheshe villages by Messrs Maiteputi Mbahono and Kapeumba Chirazo. Inspector Uiseb handed the three firearms to Inspector Becker who in turn handed them to Chief Inspector Malan together with the three empty cartridges that were earlier picked up on the scene. Chief Inspector Malan handed them to the National Forensic Science Institute (NFSI). Mr Nambahu of the NFSI testified that he tested the AK-47 and established that the empty cartridges that were picked up on the scene of the robbery were discharged from the AK-47.

[21] An argument is made that on the day of the incident Mr Olavi saw and spoke to Accused No. 2 at the Opuwo Police Station but did not identify him as the suspect. To the contrary, Mr Olavi identified or had a strong suspicion at the police station that Accused No. 2 was the person he had seen on the scene but the police officers

discouraged him when they told him that Accused No. 2 spoke Herero and not Oshiwambo, being the language that the person on the scene spoke to him. He nevertheless persisted that Accused No. 2 was the person. He testified that at the police station he was staring at him, prompting Accused No. 2 to ask him: 'Why are you looking at me like that, do you know me?' He told the police officers who were with him that 'that person looks like that other person, (the person who robbed them) he is the exact person I saw, it is the person that one'. The police officer said 'no, that person does not speak Oshiwambo that person is speaking Herero language'. He said to the police officer 'the person is the one, it is the person, it is that one'.

[22] Had the police officers paid attention to Mr Olavi, both Accused No. 2 and appellant would have been arrested on the same day. After the report of the murder and the robbery had been made at the Opuwo Police Station, the Crime Coordinator, Inspector Uiseb, took the appellant and Mr Olavi to the scene. Before they left, the appellant asked the Inspector to take him to his house to fetch a jacket. When they stopped at the appellant's house, Mr Olavi saw tyre tracks at the house of the appellant. In the presence of the appellant, he told Inspector Uiseb that those tyre tracks were identical to the tracks of the vehicle of their assailants which he had seen on the scene. He described the vehicle of the robbers as Mr Casper Popassi did but the Inspector testified that he thought Mr Olavi was still confused as a result of the incident. I interpose here to say that, on the day of the incident, Inspector Uiseb saw Accused No. 2 in the appellant's Toyota pick-up as a passenger at the entrance of the hospital. He stopped the appellant and jokingly informed him that he was looking for

appellant's vehicle. W/O Nuujoma testified that Accused No. 2 was used to be seen in that pick-up with the appellant.

[23] On the day of the incident, 31 August 2000, Inspector Michael Kleophas, a colleague Constable Frieda and another lady whose name the Inspector could not recall, were at Omakange at Benson's Cucashop. He described Omakange as a junction of the road from Opuwo and the road from Welda and Kamanjab. They were outside the shop facing the road which is about 30 – 40 m from the shop. While at the shop, at 15h00, he saw a Rubicon Security pick-up vehicle from the direction of Opuwo driving by in the direction of Ruacana, followed by a white Toyota pick-up without a canopy, with tinted windows and, later, a Government vehicle. When he saw the white pick-up, he told Constable Frieda that 'this Toyota looks like Shilongo's Toyota', (the appellant). After a while the Toyota pick-up returned, driving in the direction of Opuwo. After a while again, the Government vehicle returned and its occupants reported to him that the Rubicon Security vehicle had been shot at; that it had been robbed; that its driver had been wounded and that the vehicle was standing in the veld. The Inspector and one Betu rushed to the scene. He checked the scene and he could see that no vehicle had come from Ruacana. It was only the tracks of the Rubicon Security and the Government vehicles on the scene. He left Betu and Ms Shanyanana on the scene. He took Mr Olavi and proceeded to Opuwo where he reported the incident to the Crime Coordinator Inspector Uiseb. He reported to him that he suspected the appellant's vehicle. He was told to drive out and look out for the Toyota pick-up. He saw the appellant's vehicle in Otuzemba location, parked in the

garage at appellant's house. Appellant was also in the garage at the time, just standing. On both occasions, the Inspector said the Toyota pick-up vehicle, had a canopy fitted onto its load box. I must interpose here, to mention that Inspector Uiseb testified that he lived in the same street as the appellant, and he used to see the appellant's pick-up parked at one spot in the yard but on the day of the incident, he did not see the pick-up on that spot or in the yard. It was possibly parked in the garage, but why in the garage that day?

[24] Ms Shanyanana corroborated the version of Mr Olavi. She was a passenger in the load box of the Rubicon Security vehicle, the deceased being the driver and Mr Olavi a passenger in the front seat. While on the way, after they had left Opuwo, she heard a bang and the vehicle veered off the road and came to a standstill in the bushes next to the road. She opened the back of the canopy and alighted to determine what had happened. As she was approaching the passenger side where Mr Olavi was seated, she saw a man in shorts with a brownish balaclava pointing an AK-47 at her. She was ordered to lie down. The person spoke Oshiwambo, which was either of the Oshikwanyama or Oshindonga dialect. She complied with the order and lied on her stomach. She heard the person speaking to Mr Olavi enquiring about the money boxes and keys. Another man, who spoke Afrikaans, arrived on the scene shortly afterwards. She heard the rattling of the keys and boxes opened. The next thing, she heard the person who spoke Oshiwambo ordering her to put her hands behind her back and she was handcuffed. The two persons left. She and Mr Olavi, who was also handcuffed, stood up from where they were ordered to lie down, walked

through the bushes and returned to the road where they stopped the Government vehicle that later summoned the police to the scene.

[25] The evidence that implicated Accused No. 2 is inseparable to the body of the evidence as a whole, particularly, his presence in the 'similar Toyota pick-up vehicle' to that of appellant which had been seen by Mr Casper Popassi and his father on 30 August 2000 at Omakange. The 'similar pick-up' was seen by Mr Casper Popassi at Alpha, by Inspector Michael Kleophas at Omakange and Mr Olavi on the scene of the crime on 31 August 2000. Accused No. 2, being the person Mr Olavi saw on the scene; the evidence of the AK-47 which Accused No. 2 wielded on the scene to execute the robbery; it being subsequently established through forensic analysis that it was the murder weapon; the presence of Accused No. 2 in the appellant's Toyota pick-up vehicle on the day of the incident when Inspector Uiseb stopped the appellant at the gates of the hospital at 18h00 are all permissible facts to be weighed together with the balance of evidence against the appellant.

[26] Notwithstanding the finding by the High Court that appellant's Toyota pick-up was of a common type, it found that it had been identified as his by Mr Olavi as well as by Inspector Kleophas. In my opinion, Accused No. 2's presence in this 'similar vehicle' strengthens the possibility that that vehicle was appellant's. W/O Nuujoma testified that Accused No. 2 was used to be seen with the appellant in the vehicle, even before the incident. Although there was evidence of other vehicles similar to that of the appellant in Opuwo, particularly that of Mr Mushimba and the Postmaster, there

is no evidence that Accused No. 2 knew the owners of those vehicles or that he had been seen in those other vehicles. On the contrary, the evidence is that even before the incident he was used to be seen in the company of the appellant and, most importantly, shortly after the robbery and murder he was seen by Inspector Uiseb in the appellant's vehicle when the latter stopped that vehicle at the hospital's gates.

[27] This evidence considered together with the evidence of the handcuffs, the three firearms found together a distance away from the scene of crime, the tyre tracks and the grinder leaves no doubt as to the appellant's involvement in the commission of the crimes. In this regard, counsel for the appellant argued that there was no admissible evidence that the handcuffs that were apparently found to bear the letters 'sh' and 'go' are the handcuffs that Mr Olavi was handcuffed with, and that there was no evidence linking the handcuffs to the crime; that the High Court failed to make a proper assessment of the evidence relating to the tyre tracks of the vehicle used by the robbers; that the High Court could not have relied on the fact that the appellant was found with a grinder when there was no evidence linking the grinder to the commission of the crimes; and that there was no evidence that the AK-47 that was examined by Mr Nambahu at the NFSI Laboratory was the murder weapon; and that it was the same weapon found by Mr Maiteputi Mbahono and his uncle Mr Kapeumba Chirazo; that the pistols (the Commando and 7.65) were the pistols that allegedly went missing in two instances where the appellant was involved as the investigating officer and were the same pistols referred to in Court.

[28] In weighing these submissions one must have regard to the evidence, as found by the High Court which was either undisputed or the finally accepted evidence.

[29] Regarding the handcuffs with which Mr Olavi was handcuffed the Court *a quo* had this to say:

> '[16] The black handcuffs seem to be South African Police issue as it has the letters **"SAP"** engraved on them on the one side. On the back thereof is an area which clearly has been tampered with. It is clear that the black paint has been scratched off so as to erase engravings, etchings or inscriptions that have been placed on the handcuffs. These handcuffs were subjected to a test that brings out the original etchings and is also ironically called **"etching".** This test according to the person who did it established that an etching on this part of the handcuffs that was erased was the name of **"Shilongo"** which, of course, is the surname of Accused No. 1. A photo was taken of this fact and although this photo is not clear, it shows the letters **"Sh"** fairly clearly and from my own observation of the photos also faintly the letters **"go".'**

[30] The Court considered the criticism levelled at the etching process and continued to say:

> '[32] It is also correct that the person who conducted the **"etching process"** on the handcuffs could certainly not explain the process in any intelligible manner and one was left with the impression that he just mechanically followed a procedure to see what results followed without understanding the nature of the procedure. However, his evidence was attacked on the basis that he had no witness to verify the fact that the name **"Shilongo"** actually appeared (he insisted a colleague also saw this) and that he delayed in taking a photograph depicting this name. Whereas his qualification is not very academic, he did spell out any qualifications and training as a member of the force to conduct the kind of test that he did conduct. In fact as pointed out already the

photograph depicting the handcuffs with the inscriptions mentioned thereon was produced and handed into Court and the fact that it was a photograph of the handcuffs subsequent to the **"etching"** process was not disputed. There was no suggestion that the "etching" process would or could show up different letters to that which was originally engraved or etched on to the handcuffs. In these circumstances one can accept at least the letters appearing on the photograph were at some stage etched or engraved onto the handcuffs and if the witness is to be believed that the word "Shilongo" appeared on the handcuffs immediately after the etching process.

[33] The fact that the witness could not explain the process or that the court does not understand it does not, in my view, detract from the fact that a result of a certain process a word or certain letters appeared. This is real evidence and if a court can accept inferences from experts where the facts upon which it is based are not disclosed then surely the result of the application of a certain process which is not attacked or suspect (even if not understood) can likewise be accepted as evidence. With the necessary adaptions the following principles should be equally applicable in such matter:

> "Where an expert witness, who possesses special knowledge, skill and experience, carries out a test requiring the application of such knowledge, skill and experience, and thereafter draws an inference based on the results of his test, then his evidence of that inference is admissible, and it constitutes *prima facie* proof, even if the facts from which he drew the inference are not mentioned by him. If the *prima facie* proof is not contested, the court is entitled to rely thereon."
>
> *State v William en Andere* 1985 (1) SA 750 (K) at 750I.

. . . . .

[42] As far as the handcuffs are concerned, it was pointed out that according to the evidence the surname **"Shilongo"** is not uncommon and Accused No. 1 could mention a number of **"Shilongo's"** who were in the police force. He did not mention another one in Opuwo nor anyone who had lost handcuffs and the sheer coincidence

> of such handcuffs ending up at the crime scene where there are other indications of his involvement, needs to be considered.'

[31] Before this Court a further argument which appears not to have been raised in the High Court , is that there is no evidence that the black handcuffs with which Mr Olavi was handcuffed were the same handcuffs allegedly produced in Court, as the witness Mr Scholtz who had kept the handcuffs at the premises of the Rubicon Security Services testified that he received them from Chief Inspector Malan for safekeeping, while the Chief Inspector did not testify to that effect except for saying he received them from Mr Sowden; while Ms Shanyanana testified that she gave to Mr Scholtz silver handcuffs and Mr Olavi testified that the handcuffs that were used to handcuff him remained at the Opuwo Police Station. This argument, too, has no merit. Ms Shanyanana was handcuffed with silver or chrome cuffs and her testimony was that once they were removed from her, they were given back to her and she in turn handed them over to Mr Scholtz. Those handcuffs have nothing to do with the black handcuffs. Mr Sowden who was the manager of Rubicon Security at Oshakati, Ondangwa and Oshikango at the time of the incident, testified that at Rubicon Security they used chrome handcuffs and that he had never seen black handcuffs before; that it was the first time for him to see black handcuffs. Inspector Uiseb testified that he gave them to Inspector Becker and that Inspector Becker took them to Windhoek for further investigation. Inspector Becker was specifically asked by counsel for the appellant whether he took them to Windhoek but he denied it and said that if they were taken, they must have been taken by Chief Inspector Malan. Mr Scholtz testified that he received them from Chief Inspector Malan. When Mr Scholtz

gave the keys of the safe where they were kept to Mr Sowden, he showed him the handcuffs and Mr Sowden handed them to Chief Inspector Malan and he in turn handed them to Mr Dry who did the etching. It is possible that between Inspector Becker and Chief Inspector Malan one had forgotten who had received the black handcuffs from Inspector Uiseb and possibly Chief Inspector Malan handed them to Mr Scholtz for safekeeping. In any case, it cannot be said that the chain of custody was lost as the description of the handcuffs is clearly distinguishable from the handcuffs that were used to handcuff Ms Shanyanana or other handcuffs used by the Rubicon Security. Chief Inspector Malan testified that the type of those handcuffs in the previous dispensation were issued to members against a serial number and he wanted to determine to whom they were issued but he was later informed that that procedure had been done away with. I am satisfied that the handcuffs that were etched by Mr Dry are the handcuffs that were used to handcuff Mr Olavi.

[32] I now turn to consider the evidence of the tyre tracks and the grinder found with the appellant. The High Court, notwithstanding the criticism it levelled at the evidence of Mr Olavi on the tyre tracks, nevertheless accepted his evidence on that score and it was one of the factors it considered to find that the appellant was involved in the commission of the crimes. His evidence was that the tyre tracks of the white Toyota he had seen on the scene of crime were identical to the tracks he saw at the appellant's house. At the time, Mr Olavi, Inspector Uiseb and the appellant were on their way to the scene of crime. He repeated the remark in the presence of the appellant but the appellant did not comment. That evidence considered with the

evidence of Inspector Uiseb that on that particular day appellant's vehicle which was usually parked at one spot in the yard that day was parked in the garage; the evidence that Inspector Uiseb did not see Accused No. 2's Opel sedan which according to the appellant was in the yard and was the reason that when he arrived at home and found the vehicle in the yard, he went to look for Accused No. 2 lends credence to Mr Olavi's evidence of the tyre tracks. The High Court was justified to accept the evidence as an integral part of the body of the whole evidence, but correctly, in my view, did not attach much weight to it.

[33] On appellant's possession of the grinder the High Court stated:

> '[28] Not much was made of the grinder despite it (or one of its discs) being sent to the forensic department to see whether it could be linked to the home-made silencer or the erasing of identifying marks on the one pistol) and could not be positively so linked. Further, grinders are common items and nothing adverse can be stated of its mere possession.'

But continued in paragraph 34 of the judgment to say:

> '. . . The fact remains that Accused No. 1 had such a grinder and could use it for grinding work.'

[34] I have no quarrel with this finding. It is a fact that appellant had a grinder and, therefore, the means to grind off some letters from the 'Shilongo' name on the handcuffs and some of the serial numbers on the Commando pistol.

[35] Coming now to the submissions on the AK-47 and the two pistols, I will do no better than to extensively refer to the judgment of the High Court and it amounts to this:

> '[17] Before I turn to the firearms relevant to this matter it is apposite to mention that it was established that the gunshots that struck the security vehicle and killed Mr Steyn was fired from the AK47 weapon that was eventually recovered. The weapons belonging to the security company were found at the scene of the crime. As Mr Olavi who survived the attack referred to, at least one of the assailants having a pistol, this aspect needs further attention.
>
> [18] The AK47 and two further pistols were recovered by members of the public in the veld along the road where the robbery occurred albeit not at the scene but some distance away. In respect of one of the pistols part of the identifying numbers had been grinded off. However in view of the make and (remaining) numbers and with reference to the record of firearms reported missing, their origins were traced.
>
> [19] One disappeared from a caravan somewhere near Opuwo and was reported as missing by the owner thereof. This weapon disappeared after a visit by a woman and Accused No. 1 (appellant) to the caravan to allow the woman to remove some of her property on which occasion the pistol was discovered under the mattress.
>
> [20] The second pistol was in a cubby-hole of a car that overturned. Whereas some of the property of the occupants of the vehicle was eventually returned to them, the pistol in the cubby-hole likewise disappeared. The person who had the licence for the pistol died as a result of this accident. Accused No. 1 (appellant) was the investigating officer in respect of this calamity.
>
> . . . . .
>
> [35] There was no confusion about the AK47's serial number and the witnesses who testified about this item who also testified about the number mentioned the same

number. This weapon through forensic tests and with reference to bullets from the scene and from the body of the deceased established this to be the AK47 used at the scene of the robbery. The weapons found at the scene belonged to the security company and were not forwarded for forensic testing. The fact that some witnesses could thus not identify the AK47 as such where it was found together with the pistols does thus not take the matter any further so as to suggest that the weapon found with the pistols was not the AK47.

[36] As far as the pistols are concerned the one belonging to Nangombe was for some reason not handed in as an exhibit. This pistol was however referred to and identified by its serial number and issue was taken with the State in this regard in main to indicate that there were many potential thieves of this pistol and thus no inference could be drawn implicating Accused No. 1 (appellant) with the pistol being removed from the vehicle.

[37] The other pistol described as a **"Commando"** in evidence has a more chequered career as it were. Mr Becker testified that he handed this firearm with some other exhibits to Mr Dry. They both confirm that this firearm had a number 584 on a **"moving part"** and that the pistol eventually handed in as an exhibit was this pistol. Mr Dry indicated that at a different place on the pistol the numbers 7 and 8 also appeared in a smaller form and opined that this must have been part of the serial number. The serial number appearing on the licence handed in of Mr Kessler starts with 78 and is 78KA00584. Mr Nambahu of the forensic laboratory saw more numbers than the other witnesses on this firearm. He in fact confirmed the number 584 on the moving part and then stated there was a number 781 on the firearm as well. He prevaricated whether the **"1"** could be the **"K"** that he mistakenly jotted down as a **"1"** but correctly conceded if indeed it was a **"1"** it could not be the same pistol as the one on the licence. Sight should not be lost that if the letter K is partly grinded off that the remaining part might appear as an I or 1. Mrs Kessler testified and identified the firearm of her late husband with reference to the remaining **"78"** digits of the serial number. She in fact stated that only those two digits would be sufficient as no other firearm would commence with the same digits. When she was confronted, as if a fact, that another witness had seen the firearm with the number 781 she conceded that she

could do no more than state her late husband's firearm was an identical one. Mr Uiseb stated that when he saw the firearm he noticed its serial number had been grinded off and thus did not record it. He noticed that two numbers were still in place and as far as he recall those were 8 and 9. When reference was made to the 78 he conceded that his memory might have failed him in this respect. He, too, when faced with the evidence of Mr Nambahu relating to a number 781 was not sure as to the identity of the firearm before court.

[38] The evidence is clear that a portion of the original serial number has been grinded off. This was also the case with the weapon recovered with the others including the AK47. The one recovered had the number 584 on a moving part in the inside of it. Both Messrs Becker and Dry identified the weapon before court with reference to this number. As pointed out above the confusion of the numbers started with the reference to the number 781 which incidentally also related to a weapon with a moving part number of 584. In these circumstances the concession by Mr Nambahu that the 1 might have been mistaken rendition or part rendition of a K cannot be taken to establish that it was a different weapon and neither can the evidence of Mr. Uiseb who from the beginning stated that he was giving evidence from memory and that the correct number can be obtained by reference to his statements made in this regard be taken to cast any real doubt on the identification of this pistol.

[39] There is no direct evidence that Mr Kessler's firearm had gone missing. There is however evidence that based on the records of the police such a report was made to it. This is what prompted the investigation in the present matter after the weapon found where it was found and in the state it was found. The police found a weapon in circumstances where there was reason to believe it was used in a crime. They then tried to trace the licence holder of the weapon involved which was a challenge seeing the serial number had been grinded off. This they did by reference to their records about missing firearms which led them via the late Mr Kessler to Accused No. 1 (appellant). The fact that they could not lead direct evidence that Mr Kessler's pistol had gone missing does not detract from the evidence they uncovered as a result of the report made to the effect that the firearm had gone missing.

[40] When it comes to the pistols it must be borne in mind that they were recovered with the AK47 which was established to be the murder weapon. Furthermore they were in one bag. Whereas Accused No. 1 (appellant) denies any knowledge of how they went missing, what is the probability that two weapons that went missing in two different areas (Opuwo and Oshakati) would end up on the same crime scene had they been appropriated by two separate individuals. And this in the context indicating that the handcuffs used also had the surname or very similar surname as that of Accused No. 1 (appellant) etched or engraved on them. One must also take into account that Accused No. 2 – the only other person identified as a perpetrator – was not implicated in respect of the pistols involved.

[41] In an ideal situation one would expect the police to be meticulous in recording the identification numbers as well as the chain of delivery of exhibits to ensure there is absolute certainty that the exhibits found at the scene of crime are those presented in evidence. The more fragile or delicate an exhibit is the more important it is to deal with it correctly. Firearms, unlike say, blood specimens or fingerprints which can be contaminated easily by dust and other environmental elements, are robust instruments able to withstand harsh conditions and cannot be equated with more sensitive exhibits so to mechanically seek to apply the same criteria to it when considering how it is handled is not useful. Of course, it must be properly identified so that if forensic tests are conducted on them the tests must be linked to them. Furthermore this must also be done so as to ensure that the correct exhibits are placed before court and not something similar to what was involved. For the reasons set out above, I am satisfied that despite criticism in this regard that this was done in the present matter. Furthermore when considering the firearms in relation to the facts from which inferences are sought to be drawn they (like the other facts) must be assessed taking the criticisms into consideration and as pointed out below cumulatively with the other facts and not in isolation.'

[36] I respectfully agree with the above assessment of the evidence and the conclusions reached in connection therewith. I may add that, in my opinion, even without the serial numbers, the chain of custody of the AK-47 and the Commando

automatic pistol was proved beyond reasonable doubt. First, the evidence is that the AK-47, the Commando pistol and the 7.65 pistol that allegedly belonged to the late Mr Nangolo were found a distance away from the scene. The firearms that were found on the scene were accounted for by Mr Olavi who testified that the rifle that Chief Inspector Malan thought was an AK-47, which turned out not to be, was the rifle which Mr Olavi had and the pistol the deceased had. The fact that Chief Inspector Malan initially described the rifle found on the scene as an AK-47, or that Inspector Becker testified that he was not sure as to who exactly between Inspector Uiseb and Chief Inspector Malan gave him the exhibits does not in any way break the chain of custody. Inspector Uiseb testified that he gave the exhibits to Inspector Becker. Indeed, Inspector Becker was not present when the AK-47, Commando and the 7.65 pistols were found. When the report was made at Opuwo Police Station of the discovery of the three firearms, Inspector Uiseb and Constable Judith Salome van Wyk travelled to the scene. Constable van Wyk took the photographs of the firearms on the scene. The two officers took the firearms with them and it makes sense that Inspector Uiseb must have handed the AK-47 and Commando to Inspector Becker and Inspector Becker in turn gave them to Mr Dry who submitted them to NFSI Laboratory. Mr Olavi testified that the person who approached him on the scene, pointing a firearm at him had a firearm that resembled an AK-47. Ms Shanyanana was positive that it was an AK-47. The AK-47 found with the two pistols was established as the murder weapon. One looks in vain for the alleged lapse of the chain of custody of the AK-47 and Commando.

[37] Finally, the appellant's alibi was correctly rejected. His alibi as stated by the High Court is this:

> '[47] . . . on the day of the incident at about 12h00 he went to a business place where he spoke to Mr Ben Puriza (a witness also called Ben Gurirab) about a pool table he helped to repair. After this discussion he went home where he stayed during the lunch period and around 14h00 he returned to the business to effect repairs to the pool table. He stayed there working on the pool table until about 16h00 when he went home where he found the vehicle he had sold to Accused No. 2. Because of the fact that he had previously undertaken to assist Accused No. 2 with repairs to it , he went to look for Accussed No 2 and when he found him he picked him up and hence the presence of Accused No. 2 in his car later that day.
>
> [48] Mr Ben Puriza confirmed the discussion at around 12h00 during the day of the incident and that certain staples would be needed to complete the repairs to the pool table. He stated that Accused No. 1 (appellant) did not return during the afternoon to work on the table but did so only the following day. He conceded that his sister has a key to the premises and that Accused No. 1 (appellant) could have visited the place without him knowing this. His brother known by the nickname Never Die who was a defence witness, stated that he went to fetch the correct type of staples at Telecom and that Accused No. 1 (appellant) returned the afternoon to work on the pool table between 14h00 and 15h00. According to him his brother Ben was aware of this fact that Accused No. 1 (appellant) came back that afternoon. Never Die was however not certain about the date and thought this was the same day that he withdrew money for payment to Accused No. 1 (appellant). The payment was not on the day of the incident, but only some days later after the work to the pool table had been finalised. The sister of the Puriza's was not called as a witness. Ms Muvangua who resided with Accused No. 1 stated that he came home for lunch on the day of the incident and that after lunch he went on foot and that his vehicle remained parked at his house.'

[38] The High Court concluded on this issue, the sentiments with which I agree, as follows:

> '[50] The Purizas do not take the matter much further in view of their conflicting and at time uncertain evidence. Ms Muvangua is depended on Accused No. 1 (appellant) and the latter obviously has an interest in the matter. Even if it can be said that there is a reasonable possibility that Accused No. 1 (appellant) was not on the scene of the incident. (Here it must be borne in mind that a third person was arrested at a stage and indicted with the accused). The problem that arises, is that this does not exclude the possibility that he was in some other way involved. He does not explain the presence of the handcuffs and pistols nor the probability that his vehicle was involved. He does not explain this and he is the only person who can explain this. He simply says that he was not on the scene and denies his involvement totally. If he was involved to a lesser extent in that he allowed items in his possession to be used, he should have explained how this came about. In the circumstances the inference that he was a party to the crime, was justified. (*Rex v Ismail* 1952 (1) SA 204 (A), *S v Letsolo* 1964 (4) SA 768 (A) at 776B-D and *S v Rama* 1966 (2) SA 399 (A) at 400.)'

[39] What troubled the High Court though is the language spoken by the two assailants. From the evidence of Mr Olavi the one that spoke Oshiwambo to him was identified by him later as Accused No. 2 and the other person spoke Afrikaans. Ms Shanyanana corroborated Mr Olavi in that regard. That, the High Court found strange, as appellant is Oshiwambo speaking and Accused No. 2 should have been the one speaking either Otjiherero or Afrikaans which would have been more in line with the identities of the accused persons.

[40] I do not have that problem for two reasons. First evidence was led through Accused No. 2's half-brother Mr Rukambura that Accused No. 2 was in the Armed Forces at some point of his life. It was not made clear whether it was before or after Independence. Regardless of the period, I take judicial notice that, there were (before independence) and there are many Oshiwambo speaking persons in the Armed Forces. Accused No. 2 could have picked up or learnt a few phrases in Oshiwambo earlier on, as many people do, given his exposure to the language in the military and through other social exchanges. Secondly, this was a robbery, and no doubt it was carefully planned and executed in broad daylight. The false Windhoek registration number, the altered features of the vehicle were all intended to mislead and create the impression that it could have been committed by other persons. No fingerprints were uplifted either from the vehicle or the firearms. This tends to show that the robbery was executed by persons with knowledge how to avoid leaving fingerprints on the crime scene or on weapons used in the execution of the crimes. Appellant being not a mere police officer but an apparently seasoned detective perfectly fits that description.

[41] In my opinion not much turns around the fact that Oshiwambo was not Accused No 2's mother tongue, the evidence is that he is said to have spoken it during the robbery. The languages again were meant to confuse the eye witnesses. Indeed it almost worked, when Mr Olavi suspected Accused No. 2; the police officers told him that he did not speak Oshiwambo.

[42] Evidence is clear that appellant was in the background while Accused No. 2 was in the forefront. This is when regard is had to the fact that on 30 August 2000 when Accused No. 2 asked for cigarettes from Mr Popassi (senior), appellant remained in the vehicle and Mr Popassi (junior) did not identify him. On the day of the incident, he came on the spot where the vehicle of the victims of the attack had come to a standstill after Accused No. 2 had subdued the other occupants.

[43] I can only agree when the High Court in the final analysis held as follows:

> '[44] In my view the cumulative effect of the enumerated facts and circumstances are such as to link Accused No. 1 to the crime. The car, although a common type, was immediately identified as his by Mr Olavi as well as Mr Kleophas. One of the assailants, Accused No. 2, was seen in a car similar to his prior to the incident when he asked for a cigarette and subsequent to the incident when he was found in the car with Accused No. 1. The handcuffs which Mr Olavi was handcuffed with had his name on or at least letters making up his name. He had a grinder with which to remove identifying marks or number on a pistol and a pistol found had some of its number grinded off. The pistols – both linked to him by way of the matters he investigated or were responsible for – were found together with the murder weapon. To suggest that this is a mere coincidence that he be linked with handcuffs and pistols and that another person or persons could account for these items all being found in connection with the crime, is in my view mere conjecture and fanciful speculation.'

[44] One looks in vain for any misdirection or a failure to have assessed the evidence properly on the part of the trial court and the High Court that heard the appeal. The evidence given in the Regional Court was fairly and accurately summarised in that Court even more so in the judgment of the High Court. The High

Court particularly paid attention to the detailed criticisms of the evidence of the witnesses who testified for the State. The evidence was evaluated in the context of the entire body of evidence, and attaching appropriate weight to the evidence in the light of the evidence as a whole and the inherent probabilities and improbabilities of the case. Where caution was needed it was exercised and the Court rejected or preferred to place no reliance upon evidence for the State which might possibly not be accurate. It is for that reason that the findings of fact of the High Court cannot be disturbed.

[45] As was stated in *Miller v Minister of Pensions* [1947] 2 ALL ER 372 at 373:

> 'Proof beyond reasonable doubt does 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'.

[46] The above dictum was followed in a judgment of the South African Court of Appeal in *S v Glegg* 1973 (1) SA 34 (AD). An excerpt from the English headnote 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'.

See also *S v Ngunovandu* 1996 NR 306 (HC) at 317I-318A-B.

[47] I have carefully considered the judgment of the High Court and the submissions of the appellant's counsel and I am satisfied that the State has proved the guilt of the appellant beyond reasonable doubt. After all '… 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 …'. (See *S v Sauls and Others* 1981 (3) SA 172 (AD) at 182G.)

[48] In a minority judgment of *R v Mlambo* 1957 (4) SA 727 (AD) at 738A, Malan JA made the following observations with which I respectfully agree:

> 'In my opinion, there is no obligation upon the Crown to close every avenue of escape which maybe 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.'

(See also *S v Rama* 1966 (2) SA 395 (AD) at 401, *S v van Wyk* 1993 NR 426 (HC) at 438G-439A.)

[49] As the High Court correctly pointed out, the appellant's denials of the evidence that links him to the crimes and his version and that of his witnesses, is pure conjecture and fanciful speculation:

> 'An accused's claim to the benefit of a doubt when it might 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.' *See S v Mlambo supra* at 738B.

[50] The recorded evidence amply justifies the findings of the trial court and the High Court. The appellant's version is in conflict with or it is outweighed by the proved facts of the case. This follows that the appeal has no merits and has to fail.

[51] I, therefore, make the following order:

The appeal is dismissed.

_____
MAINGA JA

_____
SHIVUTE CJ

_____
MARITZ JA

APPEARANCES

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RESPONDENT:	D M Lisulo
	For the State