IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

CASE NO: CC 16/2013
DELIVERED: 19 & 20 MARCH 2014
REPORTABLE

In the matter between

THE STATE

AND

UNATHI WANA	ACCUSED 1
MLUNGISI PATRICK NTSUME	ACCUSED 2
LONWABO NETI	ACCUSED 3
MADODA DOPLA NUBE	ACCUSED 4
LUYANDA NJOKWENI	ACCUSED 5
XOLANI EDWARD NANTO	ACCUSED 6
VUKILE NGCANGISA	ACCUSED 7

JUDGMENT

GOOSEN, J.

Introduction

[1] On 8 November 2011 an armoured security vehicle operated by the Brinks Security Company carrying liquid platinum was intercepted in Stevenson Road in Deal Party Port Elizabeth by a group of armed men.

Shots were fired at the driver and passenger in the Brinks vehicle and a number of 25L drums were removed from the rear of the vehicle. The robbers exchanged fire with a group of policemen who are members of the National Intervention Unit who had been placed on the scene in anticipation of the robbery. At the end of the exchange of gunfire six persons lay dead on the scene of the robbery, a scene which extended over hundreds of metres in the Deal Party industrial area. Three persons were wounded two of whom allegedly participated in the commission of the robbery. One of the deceased persons and one of the wounded persons were bystanders not involved in the commission of the robbery.

[2] The seven accused were charged with 17 offences, namely robbery with aggravating circumstances; conspiracy with, or incitement, instigation or procurement of other persons to commit robbery with aggravating circumstances, in contravention of section 18 of the Riotous Assemblies Act, 17 of 1956; three counts of unlawful possession of firearms, including a fully automatic firearm, and unlawful possession of ammunition in contravention of the Firearms Control Act, 60 of 2000; three charges of attempted murder; six charges of murder and three counts of theft relating to the theft of three motor vehicles used during the perpetration of the robbery.

[3] The accused all pleaded not guilty to all of the charges. The accused, with the exception of accused 4, elected not to disclose the basis of their defences and to exercise their right to remain silent during the plea proceedings. Accused number 4's plea explanation, presented from the bar, was that he did not participate in the alleged robbery on 8 November and that he was not involved in the stealing of any drums from the Brinks security vehicle. He denied that he conspired to commit any robbery and furthermore denied that he had ever been found in possession of any unlicensed firearm or ammunition at any time and that he did not, by reason of his non-involvement in the robbery on 8 November, participate in the murder, attempted murder of any person on that day. He also denied that he had any knowledge of the alleged theft of motor vehicles.

Synopsis of the state case

[4] It is appropriate to set out by way of introduction to the evidence and issues raised in this matter, the essential factual allegations advanced by the prosecution in seeking to establish its case against the accused. These are that as a result of certain difficulties experienced by the police in addressing organised crime syndicates who are allegedly responsible for so-called business robberies, the police approached the Director of Public Prosecutions in order to obtain a written authority in terms of

section 252A of the Criminal Procedure Act, 51 of 1977, to permit the police to make use of an undercover operation. The purpose of the operation was to apprehend members of a syndicate believed to be involved in the robbery of liquid platinum in the Port Elizabeth area. The Director of Public Prosecutions issued a written approval for the operation and, as a result, a police agent was placed within Brinks SA as an employee. Brinks SA is a security company that transports, inter alia, precious metals such as platinum. The police agent was to act as the driver of a security vehicle. The police anticipated that members of the syndicate would approach the agent in order to facilitate the carrying out of a robbery. The police agent was indeed approached by members of a syndicate and requested to divulge confidential information about the date, time and route that the security vehicle would take when transporting the liquid platinum. The prosecution alleged that accused 2, 4, 5 and 7 together with known and unknown persons planned to rob a Brinks security vehicle on 11 October 2011. That robbery was however aborted due to the presence of police members in the vicinity. As a result of further meetings held with the police agent during which information was supplied to the syndicate by the agent, a robbery was planned to take place on 8 November 2011. Prior to the robbery on 8 November a group of robbers armed themselves with firearms and ammunition. The group of robbers also are alleged to have stolen and or obtained vehicles unlawfully which were to be used in the commission of the robbery. On 8

November 2011 the police placed a policeman as a passenger in the Brinks Security vehicle and other police members were also present in Stephenson Road, Deal Party, where the robbery was expected to take place. The security vehicle was forced to stop in Stevenson Road by a group of armed robbers. The robbers shot at the occupants and the vehicle. The police who were in the vicinity returned fire. Some of the robbers succeeded in escaping with five of the containers that were in the back of the security vehicle. It is alleged by the prosecution that five of the robbers were killed in the gunfight that ensued with the police and that three of the robbers were arrested on the scene. I have already mentioned that one civilian person was shot and killed in the exchange of gunfire and an innocent bystander was injured. In respect of the attempted murder and murder charges the prosecution alleged that the robbers acted with a common purpose which entailed the use of firearms and that all of the accused foresaw that somebody could be injured or killed and that, notwithstanding this foresight, they proceeded to execute the robbery. The prosecution also alleged that the common purpose that existed amongst the group of robbers, is based on a prior agreement to corrupt an employee of Brinks, to obtain confidential information and to rob liquid platinum whilst in transit.

The admitted facts

[5] During the course of the trial, the accused each made a number of formal admissions in terms of section 220 of the Criminal Procedure Act. These admissions are recorded in Exhibit X and related in the main to the firearms and ammunition recovered on the scene of the robbery. Also admitted was the identity and cause of death of the deceased persons who are the subject of the six murder charges and the ownership of and places of recovery of the vehicles which formed the subject of charges 15, 16 and 17.

[6] It was not in dispute that the six persons who are the subject of the murder charges, died on the scene of the robbery on 8 November 2011 and that they died as a result of gunshot wounds sustained during the course of the exchange of gunfire at the scene of the robbery. It is also not in dispute that the three motor vehicles were indeed stolen vehicles, that they had been stolen during August and September 2011, that one of the vehicles was recovered on the scene of the robbery on 8 November and that the other two vehicles were recovered as abandoned vehicles in Deal Party on 8 November and Motherwell on 9 November. It was also not in dispute that each of the vehicles recovered had false registration plates attached to the vehicles. In addition to these formal admissions the accused also admitted the correctness of the transcripts

of 12 video recordings made by the police agent during the course of the police undercover operation which preceded the robbery on 8 November. The video evidence was presented by way of evidence tendered by the state during the course of the trial. In respect of the firearms and ammunition recovered the scene of the robbery, the accused admitted that:

6.1. a 5.56 X 45 mm calibre Vector LM6 semi-automatic rifle of which the serial number was erased, was recovered on the scene;

6.2. a 5.56 X 45 mm calibre Vector model R5 fully automatic rifle of which the serial number was erased with 32 rounds of ammunition was recovered at the scene;

6.3. a 9 mm calibre parabellum FEG. model N80 automatic pistol of which the serial number was erased was recovered at the scene;

6.4. a 9 mm calibre parabellum Norinco semi-automatic pistol with serial number 44001933 with 10 rounds in the magazine no bullet the chamber was recovered at the scene; and

6.5. a 6.35 mm calibre Astra semi-automatic pistol with serial number 76241 was found on the scene.

[7] The accused also admitted the content of an affidavit tendered in terms of section 212 of the Criminal Procedure Act by a Warrant Officer attached to the Ballistics Section of the Forensic Science Laboratory as a Forensic Analyst. The effect of this forensic report was that the firearms recovered on the scene were, with the exception of the 6.35 mm calibre Astra semiautomatic pistol, all in working condition and that they functioned normally.

The background to the police undercover operation

[8] Col Manyana, who is the investigating officer in the case, explained that he was requested in 2010 to take charge of the investigation of a series of armed robberies that had been committed in the Port Elizabeth area. At that time he was assigned to the Crime Intelligence Unit based in Queenstown. In 2009 there had been a number of armed robberies in which consignments of liquid platinum were stolen whilst being transported by a security company transporting the platinum from the Port Elizabeth airport to various businesses in the industrial areas of the city. In February 2009 there had been a robbery in Algoa Park during which

platinum valued at R6 million was stolen. Later in that same month, there was an attempted robbery of a consignment of platinum also in the Algoa Park area. In June 2009 platinum to the value of R1 million was stolen during a robbery in Algoa Park, and later in that year platinum to the value of R4 million was stolen in the vicinity of the airport.

[9] After being requested to take charge of the investigation of these matters, which had remained unsolved, Col Manyana decided that it would be necessary to conduct an undercover police operation in order to infiltrate the syndicate apparently responsible for these armed robberies. As a result of this he made an application in terms of section 252A of the Criminal Procedure Act requesting authorisation for the launching of such an operation. The first application for authorisation was made on 22 December 2010. It was approved. On 22 May 2011 authorisation was sought for the extension of the operation and a further application for extension was made on 27 November 2011. Col Manyana explained that the strategy used was to place a police agent in the employment of the Brinks security company as a driver of a security vehicle. It was anticipated that this police agent would make contact with members of the syndicate or would be approached by members of the syndicate for the purposes of providing information to facilitate the commission of a robbery.

[10] Manyana explained that when the application for approval of the operation was first made it was planned to infiltrate a police agent into the syndicate and that the agent's task would be to win the confidence of members of the syndicate and thereby obtain information about their planned activities. It was then intended that this agent would facilitate the introduction of a second agent who would be in the employment of Brinks. He explained that although approval was granted for that *modus operandi*, the actual *modus operandi* employed did not involve the deployment of two police agents. Instead only one agent was deployed after the Director of Public Prosecutions approved a substitution of the authorised agents.

[11] This agent, Constable Mudau, who testified in the matter, was deployed as an employee of Brinks in the position of a driver of the security vehicles. I shall deal hereunder with the evidence of Mudau.

[12] I shall deal hereunder with the arguments advanced by the defence counsel in respect of the admissibility of the evidence obtained during the course of the police undercover operation. It is as well however, to record, since it will make it easier to follow the nature of the evidence presented by the prosecution, that the prosecution tendered by way of the evidence of Constable Mudau 12 video and audio recordings of meetings held between the agent and some of the accused and other members of the alleged syndicate between 19 August 2011 and 7 November 2011. The

prosecution also submitted in evidence transcripts of each of the video and audio recordings, the content of which was admitted by each of the accused by way of a formal section 220 admissions. It is therefore not in dispute that these meetings were held and that the persons reflected as participating in these meetings by way of the transcripts in fact participated in the meetings and that what they are recorded to have said during the course of those meetings is correct. What is apparent, as will become clear in the discussion which deals with the evidence presented by Constable Mudau, the police agent, is that the proper interpretation of the content of those meetings was placed in issue.

The undercover police operation

[13] Constable Mudau is a Venda speaking member of the South African Police Services who was stationed as a detective at a police station outside of Port Elizabeth prior to his assignment to undertake undercover operation. Prior to his testimony he was advised of the effect of the provisions of section 252A (5) and the provisions of section 204 of the Criminal Procedure Act. These provisions provide for an indemnity from prosecution in respect of the involvement in the matters giving rise to the charges being preferred against the accused and that he would be obliged to answered the questions which may be incriminating of him,

but that he would be entitled to be discharged from prosecution in the event that he answers questions put to him frankly and honestly.

[14] Mudau testified that he was recruited to operate as an agent under the direct command of Col Manyana. He joined Brinks Security on 20 June 2011. He received training within the company and was employed as a driver of an armoured vehicle. He was initially stationed in Johannesburg for the purposes of his training. Thereafter he was placed in the Brinks security company in Port Elizabeth. The Brinks security company provides transit security services for the collection and delivery of liquid platinum and other precious metals to 4 companies in Port Elizabeth. The liquid platinum is collected from the Port Elizabeth airport and then transported in armoured vehicles to these companies.

[15] On 12 August 2011 Mudau drove to the Steers takeaway food outlet in Algoa Park to buy food. It was between 3.00 and 4.00pm in the afternoon. He drove there in the Brinks security vehicle and he was dressed in his company uniform. After purchasing food he returned to his vehicle to collect money so that he could buy airtime from the local garage. Whilst on his way to the shop he was approached by an unknown man who came from the vicinity of a black BMW parked nearby. This man asked him where he was working. After explaining to this person where he was employed he was asked for a contact

telephone number since this person was apparently interested in looking for a job at the company. He then left. On the following day he received a missed call on his telephone, but did not return the call. On the day thereafter he received a telephone call from a person by the name of Xolani. This person said that he wanted to meet with Mudau apparently to discuss a job. It was agreed that they would meet on the following day. That meeting did not, however, take place. Mudau explained in his evidence that he suspected that the approach to him may have been from persons involved in the syndicate. On 18 August 2011 he was again telephoned by a person calling himself Xolani who indicated to him that he would come to see him on the following day.

[16] On 19 August, in the early evening he received a further telephone call from Xolani. He told him that he was on his way. Mudau was then staying in a flat in Central, Port Elizabeth. Xolani then phoned to say that he was in Central. Mudau arranged to meet him at a shop near the flat. Mudau drove his vehicle to the shop to meet with this person. He explained that his vehicle had been fitted with an audio and video recording device apparently located in the front dashboard of the vehicle. When he arrived at the meeting place Mudau activated the audio and video recording device. He asked the person whether he was the one who had telephoned him, which was confirmed. Mudau informed the persons that he needed to go somewhere to fetch a charger from his

girlfriend. Two persons got into his car and he then drove to his flat. When the two individuals got into the car one of them introduced him self as Xolani. Mudau explained that the conversation was essentially about his work and the need to have money.

[17] The transcript of the video recording records that two persons met with the police agent on that day. They were accused 2 and 5. Accused 5 was seated in the passenger seat. He introduced himself as Xolani and as the friend of the person who came from the black BMW and spoke to Mudau. Accused 5 mentioned the need to build trust between them. The conversation touched briefly on the previous arrangements to meet and then, when the car was stationary and parked on the side of the road, the conversation moved to discussion about Brinks Security Company and the work that it does. Mudau responded to questions about the company and explained that it transported platinum to four companies in Port Elizabeth. Accused 5 commented on the fact that he was involved in transporting cargo worth millions. Accused 5 then said that he would again come to meet with Mudau on the following day so that " then we will talk seriously". He stated that he would come with one of his friends who drives a Mini Cooper. Accused 5 is then recorded as having a conversation with a person on his telephone. He handed the phone to Mudau who spoke to the person. In his evidence he stated that he was

speaking to a person who identified himself as Dopla. An arrangement was made that they would meet with Mudau again on the following day.

[18] According to Mudau he was not telephoned on 20 August and did not meet anyone. The next meeting occurred on 21 August. He said that he received a telephone call late morning on that day and arranged to meet the caller in Central. He drove his vehicle to the arranged place and there four persons got into his car, namely accused 2, accused 4, accused 5 and one other person. Accused 4 sat in the front passenger seat. Mudau then drove his car a short distance and parked it in the vicinity of the Edward Hotel. Accused 5 was seated in the back of the vehicle in the middle. He explained that these were the people who were his friends that he had brought along to meet Mudau. When asked where he was from Mudau said he was from Zimbabwe. Accused 4 explained that there was a need to build trust between them and that he should trust them. During the course of this conversation, according to the transcript accused 4 indicated that accused 5 was the person who had made the initial contact with Mudau and introduced them to him. Accused 5 indicated that accused 4 was the person with whom he had spoken on the phone and who had introduced himself as Dopla.

[19] Mudau said the persons were wanting to know from him how long he had been employed by the company and where he had worked before.

When, after a while, he said that they should come to the point of the conversation, accused 4 indicated that they were interested in obtaining platinum. Accused 5 said what they wanted from him was information. He pointed out to them that he is not allowed to give information about his work. Accused 4 indicated that he would not regret giving the information to them. It was explained to him that he would be given money in exchange for information.

[20] The transcript of the video recording indicates that accused 4 explained to Mudau that he was aware that a helicopter was used to deliver platinum to the Port Elizabeth airport and that on a previous occasion 11 drums of liquid platinum had been stolen at the airport and that no one had been apprehended in connection with that theft.

[21] Mudau testified that as the conversation continued he explained to them that he would think about what they were suggesting and that they would have to meet again over the coming weeks because he was scheduled to undergo a polygraph test at work and that they would meet after that. It was agreed that he would inform them when he was due for a polygraph test and that they would then meet thereafter. He obtained telephone numbers from Xolani (accused 5) and the other person who was present.

[22] Following this meeting Mudau reported what had transpired to Col Manyana. Mudau received a telephone call from Xolani asking about when the polygraph test was to be held. He also received an sms message from Xolani. When Xolani again called Mudau informed him that he had undergone the polygraph test and it was then arranged that they would meet on 3 September 2011. This meeting took place at Mudau's flat in Central. He explained that a video and audio recording device had been installed in equipment beneath the television set which faced onto a couch in the lounge of his flat. When the suspects came to meet him at his flat they rang the doorbell and before he let them into the flat he activated the recording device.

[23] Three persons came to the meeting, namely accused 2, 4 and 5. The three of them seated themselves on the couch facing the hidden camera. Mudau explained that he understood the purpose of the meeting was to obtain information from him about the platinum that he transports and how they could get hold of the platinum. Accused 4 asked about the different forms of the platinum, whether in bars, powder or liquid. Mudau said that the persons wanted to know from him what the easiest way would be to get hold of the platinum, whether it would be possible to get access to the platinum whilst on the company premises or elsewhere. The suspects indicated to Mudau that the decision as to where to take the platinum would depend on the information that he

gave to them. They also indicated to him that there was some urgency to get access to the platinum within that month. It was agreed that he would get information about deliveries and let them know.

[24] The next meeting was held on 10 September 2011 at Mudau's flat. The meeting was attended by accused 2, 4 and 5. Mudau explained the options available to get access to the platinum and that he would be acting as a driver of the vehicle from the 15th of that month and that he would be involved in making deliveries to various companies as well as collecting consignments from the airport. According to the transcript of the video recording he explained the various routes that he would be travelling between the companies and the airport. Accused 5 asked whether he would be able to give them the time at which he would make a delivery to which Mudau responded that he would only be informed the day before when he would be given his schedule. Mudau asked them where they wanted to do this. A discussion ensued about possible places where the vehicle could be intercepted. The suspects wanted to know from him what procedures are followed if a security vehicle is robbed.

[25] What followed was a discussion about possible places where the vehicle could be stopped. Mudau was asked about the procedures to be followed if the vehicle is stopped by traffic police. He explained that in

those circumstances the company policy is that the driver must not stop and must drive on to the nearest police station. He was asked whether the vehicle had a satellite tracking device to which he replied that it does. Accused 4 asked him where the drums containing the liquid platinum where kept in the vehicle and he was asked what security measures he was required to take when approached by robbers. He explained that he was required to drive on, even over the persons. A discussion then ensued about how the security vehicle could be forced to stop by having a vehicle stop in front of it and one behind it. Accused 5 referred to this as 'bracketing' the vehicle. Accused 4 suggested that they drive to check on the routes that he had explained so that they could decide on a place for this to happen. They did not however do that on that occasion.

[26] Mudau also explained to them that he and the passenger in the security vehicle would be armed. Accused 5 said that if the vehicle is brought to a stop it would be approached by armed robbers. Mudau told them that the platinum is loaded in the back of the security vehicle and that access is controlled by two doors which he can open by pressing a button on the inside of the vehicle. Accused 5 then said that they would need to meet with other people and he asked whether they could bring along some other persons to another meeting.

[27] Subsequent to this meeting Mudau was telephoned by accused 4 who informed him that they would be coming to meet with him on the following day and that they would be bringing along some other people.

[28] That meeting took place on 13 September 2011. It was attended by accused 4, 5 and three other persons one of whom was accused 7. The other two persons were not known to him. One of those he did not see again, the other is the deceased in Count 11, Welisile Eric Jimu (whom it is admitted is also known as Cousin).

[29] Mudau said that the discussion centred on the route that he would take with the security vehicle. The transcript of the meeting indicates that accused 7 was an active participant in the discussion. Cousin and Accused 7 suggested that Mudau be supplied with a different phone for communicating with the group because of the risk of a police investigation focussing on calls made from Mudau's phone. Accused 4 then said he would get a phone and sim card for Mudau. Thereafter the discussion turned to ensuring that when the robbery takes place no suspicion should fall on Mudau. It was suggested that a fake bomb be placed on the vehicle to induce him to get out of the vehicle or open the back to allow access to the drums of platinum. The transcript records that it was agreed that the best way to bring the vehicle to a stop was at

the stop sign at the railway crossing in the street he would be driving along.

[30] A further meeting was arranged for the following day, the 14th September. On that day Mudau met with accused 4, 5 and the deceased, Cousin, at the Five Ways shopping centre in Cape Road. It appeared to Mudau that each of the persons had arrived there in his own vehicle. Accused 4 suggested that they should drive the route to be followed in his vehicle. Mudau refused. As a result accused 5 and the deceased boarded Mudau's vehicle and accused 4 followed in his own vehicle. Mudau then drove his vehicle to Stephenson Road in Deal Party and stopped at the stop sign at the railway line. Accused 4 pulled his vehicle alongside Mudau's vehicle and the four of them spoke about details of the robbery again. Mudau was then given a cell phone. An audio recording was made of this meeting although it was not tendered in evidence.

[31] Mudau also testified that an inspection of the Brinks security vehicle was arranged. He stated that at a previous meeting accused 4 had suggested that he show them the vehicle and how they would gain access to the platinum at the back. On the day when he was to show them the vehicle he discovered that his own motor vehicle had been damaged. He then took his vehicle to the Humewood Police Station to

report the matter. Whilst there he telephoned accused 4 and explained what had happened. It was then arranged that they would meet him at his flat. Accused 4, 5 and the deceased person, Cousin, arrived there. He showed them where his vehicle had been damaged. According to him they were concerned because they thought he was referring to the Brinks security vehicle. They agreed to come back later that evening. That evening they met with Mudau at his flat. They were joined by accused 7. Arrangements were made for him to show them the Brinks security vehicle. The following day he called accused 4 and it was arranged that he would meet them near the Nelson Mandela Bay stadium. Accused 5 and Cousin arrived in a vehicle and accused 4 in his own vehicle. Mudau showed them how the back doors are opened from inside the vehicle. Accused 4 left whilst he was doing so.

[32] Mudau was out of Port Elizabeth between the 27th September and 4th October. Whilst he was away he received several calls from accused 4 who wanted to know when they would meet. On his return on 4 October he held a meeting with accused 4 and 5 in his motor vehicle. He drove them to the airport to show them the route that he would be taking from the airport. Accused 4 pointed out where he would be stationed on the day so that he would be able to inform the others that Mudau was indeed leaving the airport along that route. Mudau informed them that the

charter flights usually arrive on a Tuesday and that he would be able to let them know the details on the Monday before.

[33] On Thursday 6 October Mudau sent an sms to accused 4 to inform him that the charter would be arriving on the following Tuesday. He received no response. He then called accused 5 to inform him and it was arranged that they would meet on the following day, the 7th October.

[34] On that day he met with accused 5, 7 and the deceased person at his flat. The discussion was about the details of the planned robbery, the arrangements for getting his money and what would happen during the police investigation after the robbery.

[35] On 9 October 2011 Mudau met with accused 5 and the deceased at his flat. The deceased brought along a brown paper packet in which was contained the material to make a fake bomb. He showed Mudau how he would construct it and what it would look like.

[36] On the following day, he met with accused 5, 7 and the deceased. The meeting took place in a vehicle driven by accused 7. An audio and video recording was made by the accused using a concealed device. They were driving in a white VW Golf 5. They drove to Deal Party following the route that he would take on the following day when transporting the

platinum from the airport. At that stage the robbery was planned to take place on 11 October 2011. It was agreed that Mudau would telephone accused 5 when he left the airport to inform him that he was on his way.

[37] On 11 October 2011 Mudau travelled to the airport in the company of a policeman who had been placed in the vehicle as his accompanying passenger. On leaving the airport he telephoned accused 5 and told him that he was leaving. He then drove along the route exactly as had been planned. When he arrived at the railway line in Stephenson Road where the robbery was planned to occur nothing happened. He continued driving along Stephenson Road. At the T-junction between Old Grahamstown Road and Stephenson Road he saw accused 2 standing alongside the road. He proceeded on to Umico, the business where he was to deliver the platinum.

[38] Later that day after he left work he tried to call accused 5 to find out what had happened. He was initially unable to raise him but later that day they were in contact. It was arranged that they would come to his flat to explain what had happened. That evening accused 5, 7 and the deceased came to his house and explained what had happened. The explanation, in essence, was that the robbers had noted a heavy police presence and had received information that the then Commissioner of Police, Bheki Cele, was visiting Port Elizabeth. They therefore decided to

abort the robbery. Mudau was informed that they were all set to proceed and that their members were in position throughout. He confirmed to them that he had indeed seen accused 2 in the vicinity. Mudau said that he needed time to consider his position.

[39] On 1 November 2011 he was telephoned by accused 5. A meeting was arranged to take place at his flat. The meeting was attended by accused 4, 5 and the deceased. Mudau had placed a telefax on the couch setting out the detail of the schedule of consignments expected in the next week. At this meeting the detailed plans as previously discussed were again discussed. It was agreed that the robbery would take place on 8 November. It was agreed that accused 4 would wait along the route to be taken from the airport and that Mudau would telephone him to inform him when he leaves the airport. He was given a phone and supplied with a telephone number to call.

[40] A final meeting was held on 7 November 2011 between Mudau and accused 4, 5 and the deceased. He was given a phone number and told to phone accused 4 when he leaves the airport.

[41] The robbery was planned to take place on the following day at the railway crossing in Stevenson Road, Deal Party. Three vehicles would be used in the commission of the robbery, namely a Toyota HiLux, a

Ford Bantam and a VW Polo. The robbers would be disguised as construction workers wearing blue overalls and reflector jackets. One of the perpetrators would be stationed at the railway crossing with a red flag in order to control traffic crossing the railway line. It was anticipated that the Brinks security vehicle would be brought to a halt at or near the railway crossing and that the robbers would then approach the vehicle armed with firearms. A fake bomb would be placed on the vehicle. The police agent was required to telephone accused 4 upon leaving the airport. Accused 4 would be stationed along the route to be able to provide information to the perpetrators about the progress of the Brinks security vehicle. The police agent, Mudau, would be in the company of another security officer in the vehicle and both of them would be armed.

[42] During the course of the conduct of the undercover operation Mudau regularly reported to Col Manyana about his contacts with members of the syndicate who were planning the robbery. In the course of these reports he furnished information to Col Manyana about the nature of the planned robbery and when it was to take place. Based on these reports Col Manyana arranged for the deployment of members of the National Intervention Unit (NIU) at the scene of the anticipated robbery in order to facilitate the arrest of the perpetrators.

[43] The members of the NIU deployed at the scene of the robbery on 8 November 2011 were divided into four groups. Two groups were deployed in a building overlooking the intersection between Stephenson Road and the railway line that crosses it. One of these groups was positioned on the ground floor behind a metal roller door. The other group was positioned on the first floor of the building at the windows overlooking the scene. The third group of NIU members under the command of Capt Martin was stationed at the western end of Stephenson Road near the intersection between Stephenson Road and the Old Grahamstown Road. This group would serve as a blocking group, preventing the escape of any of the robbers from the scene. A fourth group under the command of Capt Mpolase was deployed to follow the Brinks security vehicle from the airport and once it entered Stephenson Road from the Burman Road side on the eastern end, that group would seal off the area and cut off access to Stephenson road to members of the public. It would also serve as a group to stop any perpetrators from attempting to escape back along Stephenson Road. Col Manyana was stationed with the group on the first floor of the building in Stevenson Road and maintained contact with the commanders of NIU groups.

The events of 8 November 2011

[44] On the morning of 8 November Mudau collected his vehicle and proceeded to a place called Harriers before leaving the airport to travel to Deal Party. He was in the company of another crew member, a police constable Hermaans, who had been stationed with him for the day. On leaving the airport Mudau telephoned accused 4 as arranged, and thereafter switched off his phone. He drove in the direction of Deal Party. Whilst travelling on the freeway he noticed a white Toyota Yaris being driven by accused 4. The accused was on his telephone. Mudau travelled off the freeway and into Burman Road. He again saw the white Toyota Yaris at the traffic lights in Burman Road, where that vehicle turned off to the left. He proceeded along Burman Road in the direction of Stephenson Road. After the Toyota Yaris had turned off Burman Road he noticed a white VW Polo vehicle behind him. When he turned into Stephenson Road he noted a white Toyota bakkie behind him. He saw a blue Bantam bakkie on the left-hand side of the road in Stephenson Road. As he approached the stop sign in Stephenson Road the blue Bantam forced its way in front of his vehicle and applied brakes there was a truck in front of the Bantam bakkie. He was forced to stop the Brinks security vehicle. A number of men who were seated on the back of the Bantam jumped off the vehicle and approached his vehicle. The person on the passenger side of the vehicle had in his possession an R5

rifle. There were two or three men directly in front of his vehicle who had small arms in their possession. A person approached his side of the vehicle and attached a bomb to the driver's window. Some of these men went to the back of the Brinks security vehicle and were banging on the vehicle, commanding him to open the back. He did so. Shortly after doing so gun shots rang out and shots were fired at the Brinks security vehicle from the direction of the passenger side of the vehicle. The cab of the Brinks security vehicle was fitted with bullet-proof glass. There are two layers of glass in the door windows. The outer layer is not bullet proof whereas the inner layer is. The outer layer of glass on the passenger side door shattered as a result of bullets striking the vehicle. As the shots were being fired at the Brinks vehicle Mudau drove the Brinks vehicle along Stephenson Road across the railway line. Both he and Constable Hermaans fired shots in the direction of one of the perpetrators who had approached the passenger side of the Brinks security vehicle and was in possession of an R5 rifle. This individual returned fire in the direction of the Brinks vehicle whilst also running down Stephenson Road across the railway line. That individual fell, as a result of being shot, in the vicinity of the gate to business premises down the road, on the western side of the railway line. Mudau executed a U-turn at that point and drove back along Stephenson road across the railway line and turned the Brinks vehicle around again to face in the direction in which he had originally been driving. He brought the vehicle

to a halt in the position that it had been at the commencement of the robbery. By then the shooting had abated and he and Hermaans were able to alight from the vehicle.

[45] Hermaans, who was a member of the NIU deployed to accompany Mudau in the Brinks security vehicle, explained that as the Brinks security vehicle approached the railway line in Stephenson Road he noticed a man in blue overalls with a red flag controlling traffic. He saw a Toyota bakkie which had “construction” workers on the back. A blue bantam bakkie, also carrying workers wearing blue overalls stopped in front of the Brinks vehicle. These men came towards the Brinks vehicle carrying firearms. One of them approached his side of the vehicle. He was carrying a large R5 rifle. He saw someone place an explosive device on the driver’s window. The man on his side of the vehicle shot at him and the window on his side of the vehicle shattered. A chaos of shooting then erupted and the person who had shot at him ran down Stephenson Road shooting as he was retreating. He returned fire. He saw the man collapse near the gate of business premises down the road and he saw the firearm he was carrying lying nearby. After the shooting had stopped he alighted from the vehicle and went to where the person who had shot at him was lying. He arrested the man, who was later identified as accused 1.

[46] According to Warrant Officer Tyiso, a member of the NIU, he was stationed in the group located on the first floor of the building overlooking the intersection of Stephenson Road with the railway line. They were there to keep a lookout over the scene. He observed a blue Bantam bakkie with a number of persons on the back of the vehicle wearing blue overalls and reflector jackets pass along Stephenson Road in the direction of the Old Grahamstown Road. He also saw a Toyota bakkie travelling in that direction. It also had persons on the back who were wearing blue overalls. A short while later he noticed a group of persons wearing blue overalls and reflective jackets walking back along Stephenson Road from the direction of the Old Grahamstown Road. They passed in front of the building where he was stationed and he did not see where they went. A short while later he noticed two persons wearing blue overalls and reflector jackets, one of whom was carrying a red flag standing near the stop sign regulating the intersection between Stephenson Road and the railway line. When next he saw the Bantam bakkie it was proceeding along Stephenson Road in front of the Brinks security vehicle. At the railway intersection that vehicle stopped and a group of men alighted from the back of the vehicle. They were wearing blue overalls and reflector jackets. One of those men was carrying what he described as a large firearm and he approached the passenger side of the vehicle. Others moved in the direction of the driver's side of the vehicle. He then noticed that there was a group of men wearing blue

overalls and reflector jackets that were removing items from the back of the Brinks vehicle. A shot was fired in the direction of the passenger side of the Brinks vehicle and he saw the glass window shatter. At that point shooting then ensued and he together with his colleagues also fired shots in the direction of the persons surrounding the Brinks security vehicle. He saw a person in a blue overall, near the back of the Brinks security vehicle fall to the ground and in doing so, saw a small firearm drop out of his hand. That person remained lying on the ground in the vicinity of the back of the Brinks security vehicle in a position a few metres away from the firearm. He ceased firing as soon as he saw members of the NIU unit stationed on the ground floor of the building emerge onto the street. He then ran down stairs and also moved onto Stephenson Road. Tyiso identified the person as being accused 2. It was common cause that accused 2 was shot during the course of the robbery and that he was found injured in the position described by Tyiso as being where the alleged participant fell after being shot. A pistol was recovered lying a short distance away. The evidence of Bekker and Mlumbi was that this was a 9mm calibre Norinco semi automatic pistol.

[47] Constable Mhlana was also stationed on the first floor of the building. His observations accord broadly with those of Constable Tyiso although there were some respects in which they differed. He too noticed a person in a blue overall with a reflector jacket and holding a red flag

standing in the position of the stop sign near the railway crossing. There was another person also wearing a blue overall and reflective jacket in his company. He said that he saw the blue Bantam bakkie drive along Stephenson Road in the direction of the Old Grahamstown Road and, after a short while return back along Stephenson Road. He did not see a Toyota Hilux bakkie. When he again saw the blue Bantam bakkie it was in front of the Brinks security vehicle. It stopped and persons alighted from it. They approached the Brinks security vehicle with firearms in their possession. When the shooting ensued the person carrying the red flag ran away from the scene in the direction of the Old Grahamstown Road. The other person in his company ran in the opposite direction back along Stephenson road towards Burman Road. According to him, this person, whom he identified, was subsequently arrested where he was standing in the company of a crowd of onlookers at a business premises further down Stephenson Road in the direction of Burman Road. This person, whom it was common cause was accused 3, for reasons which are not presently germane, was discharged at the conclusion of the state case.

[48] Capt Martin was in command of the NIU members stationed on the western end of Stephenson Road. They were positioned in Old Grahamstown Road to act as a “stopper group”. At approximately 10.30 am he was informed by Capt Mpolase that the Brinks vehicle had entered Stephenson Road. A short while later he heard gunshots.

Immediately after this a white Toyota Hilux and a blue Bantam bakkie came down Stephenson Road and turned into Old Grahamstown Road at high speed. The Toyota was in front. There was a person on the back of the Toyota bakkie and he also noticed a white canister on the back. The NIU members fired shots at the vehicles in an attempt to stop them. Capt Martin was unable to say whether any of the shots struck the vehicles or whether any person in the vehicles had been injured. He said however that the person on the back of the Toyota fell down. The two vehicles were pursued but they were able to make their escape. Capt Martin then returned to the scene where he took charge of the scene together with Colonel Manyana.

[49] Capt Mpolase was, as indicated, stationed with the NIU group on the Burman Road end of Stephenson Road. He stated that his group followed the Brinks security vehicle from the airport. When the Brinks vehicle entered Deal Party, Mpolase noticed a white Toyota Yaris driving near the Brinks vehicle. The driver of the vehicle did not pass and was talking on his phone. That vehicle turned off Burman Road to the left shortly before they got to the scene where the robbery was to take place. When the Yaris turned off the road a white VW Polo that was alongside the road pulled in behind and followed the Brinks security vehicle. When the Brinks vehicle turned into Stephenson Road Mpolase instructed his

team to deploy to prevent any other persons entering and any persons leaving.

[50] Shortly after that he heard gunshots. He saw the white Polo execute a u turn in Stephenson Road. He saw a person in a blue overall and with a large firearm in his possession get out of the Polo. He started shooting in the direction of where the NIU members were stationed. Fire was returned and the person ran in the direction of some buildings on the side of Stephenson Road. Mpolase set off after him. When he arrived at the gate to the business premises he found the person lying outside the gate. He was dead.

[51] Tendayi Zakhata is a Zimbabwean national employed as a truck driver. On 8 November 2011 he had accompanied his brother to a place in Deal Party where he was to undergo a test as a truck driver. His brother was driving a truck. They stopped in Stephenson Road in the area on the Burman Road side of the railway line. His brother got out of the truck to go collect some documents. He returned and when he boarded the truck Zakhata heard shouting, what sounded to him like *Vula, Vula!!* from behind the truck they were in. He looked into the side mirror and he saw a man wearing a blue overall with a reflector jacket carrying a white container. He was near a white bakkie. He could not tell whether the person was removing it from or placing it in the white bakkie. Shots were

being fired and he ducked down in the cab of the truck. He heard glass shatter and then realised that he had been shot. He was struck once. Because he was crouching down the bullet struck both his knee and his shoulder. It was his impression that the shot that struck him came from the Burman road side of Stephenson Road. He was treated at Livingstone Hospital and discharged the following day.

The forensic evidence

[52] The forensic evidence presented by the prosecution consisted in the main of evidence relating to the crime scene in Stephenson road. Two photograph albums, Exhibits, B and C were submitted in evidence. These albums consisted of some 562 photographs depicting the crime scene, the vehicles recovered both on the scene and elsewhere, post-mortem photographs and photographs of firearms and other evidence recovered on the scene of the crime. Aerial photographs of the crime scene were also submitted in evidence.

[53] It was not in dispute that the firearms and ammunition which relate to the counts three, four and five were recovered on the scene of the crime. It was also not in dispute, where the firearms were found on the scene. The position of the deceased persons was also admitted and the forensic evidence relating to the deceased persons formed the subject of

section 220 submissions made by the accused. It is accordingly not necessary to set out the nature of this forensic evidence and the particular evidence found on the scene of the crime, in any detail. Where necessary this will be dealt with in the evaluation and assessment of the evidence presented by the prosecution and that presented by the defence.

[54] Warrant Officer Bekker, who undertook the crime scene analysis and was in charge of the collection of evidentiary material from the crime scene. He also examined the vehicles and objects found on the scene to identify any discernible fingerprints. Before dealing with the fingerprint evidence presented by Warrant Officer Bekker, it is appropriate to record the key findings of his crime scene analysis as recorded in the photograph album (Exhibit B) prepared by him.

[55] Bekker arrived at the scene at 11:50 on the morning of 8 November 2011. The scene of the events of 8 November extended over a considerable area along Stephenson Road and included some business premises situated alongside the road. Bekker organised the scene into several zones that oversaw the collection and recording of evidence found in each of theses several zones. An aerial photograph of the entire area (Exhibit D) was taken and served during the trial as a means of

orienting witnesses as to their evidence regarding what was found on the scene.

[56] Stephenson Road runs in an east – west direction between Burman Road (on the eastern side) and the Old Grahamstown Road (on the western side). Stephenson Road is intersected approximately midway along its length by a railway line that runs in a north – south direction. The railway crossing is regulated by a stop sign. The Brinks security vehicle was travelling in an east to west direction along Stephenson Road prior to the robbery. The robbery occurred on the eastern side of the railway crossing. The building in which the NIU members were deployed is situated on the south eastern corner of the railway crossing of Stephenson Road. The building was designated as Zone I.

[57] Zone A was designated as the zone in which evidence relating to accused 1 was recovered. It is situated on the south western corner of the railway line intersection. Accused 1 was found lying wounded near a pillar and outside of the gated entrance to a business premises situated there. He was on the western side of the gate entrance. An R5 automatic rifle was found at point A5 between accused 1 and the gate at the entrance. A deceased person (designated Zone B) was found at the eastern side of the same entrance. A 9 mm Star pistol with one magazine was found at point A15 near the corner of the business

premises situated on the south western corner of the railway intersection with Stephenson Road. A piece of red cloth was found at point A16 in the vicinity of the Star pistol. The deceased person to whom I have referred is the deceased person in count 10, Sithembiso Jackson Kula. It was common cause that the traces of human tissue found on the piece of red cloth were matched by means of DNA analysis with the blood of the deceased Kula and found to be the same.

[58] The deceased person in Count 13, Luphumlo Goqwana, alias Hooper, was found at point D along the railway line on the northern side of Stephenson Road.

[59] The area on the eastern side of the railway line and where the Brinks security vehicle was stopped at the commencement of the robbery was designated as Zone E, the Brinks vehicle being designated as Zone F. It is not necessary to record the details of cartridges and ammunition found in this zone, nor the damage caused by gunshots to private vehicles that were parked in that are at the time of the commission of the offences. It suffices to record that it was common cause that accused 2 was shot when he was in the vicinity of the Brinks security vehicle at a point on the eastern side (i.e. behind) the Brinks vehicle. A Norinco pistol was found some metres away from where accused 2 fell and was arrested. Two 25 L plastic drums in which the liquid platinum was transported were also

found in this area, in a position slightly further to the east of where accused 2 was found to be lying.

[60] Examination of the Brinks security vehicle established that it had sustained damage as a result of gunshots. The window in the passenger side door was damaged and there were bullet holes on that side of the vehicle. A fake explosive device was attached to the driver's side window. This device consisted of short plastic tubes which had been wrapped in brown paper and bundled together to resemble sticks of dynamite. A timing device had been attached to the bundled sticks. The fake explosive device consisted of some materials shown on the video recording referred to earlier.

[61] The deceased person in count 9, Monwabisi Patrick Ngowapi, alias Guy, was found at point J near the entrance to a business premises on the eastern side of Stephenson Road. Blood found on an automatic rifle found on the inside of the yard of the business was matched by DNA analysis with the blood of the deceased Ngowapi. Ngowapi was found in the position pointed out by Capt Mpolase.

[62] The deceased person in count 11, Welisile Eric Jimu, alias Cousin was found in Burman Road near a white VW Polo. The Polo had several

bullet holes on the front of the vehicle. No firearm was found in or near the vehicle.

[63] The deceased in count 12, Sipho Tshunungwa was found on the northern side of Stephenson Road near the intersection with Burman Road.

[64] The deceased in count 14, Phumlani Arthur Sauti, alias Mahoyi was found inside the FCU Building on Stephenson Road. Blood found on a pistol which was recovered from near the body was matched by way of DNA analysis with the blood of the deceased Sauti.

[65] As indicated both the Toyota Hilux and the Bantam bakkie were subsequently found abandoned and recovered. Forensic analysis indicated that these vehicles had sustained damage as a result of gunshots.

[66] The prosecution also presented evidence of fingerprints found on the butt of the R5 rifle recovered on the scene alongside the point where accused 1 was wounded and arrested. The fingerprint analysis conducted by Warrant Officer Bekker established that the fingerprints identified on the rifle were those of accused 1. This was not disputed. Warrant officer Bekker's analysis showed that there were a number of

layers of fingerprints which, he suggested, was indicative of the fact that the person handling the weapon had gripped the butt of the rifle on a number of occasions. This, in his opinion, was consistent with the normal handling of an object, such as the firearm by a person who was adjusting his grip on the butt. Warrant officer Bekker's analysis also indicated that the identifiable prints on the butt of the firearm were those of the right little finger, the right middle finger and the right ring finger of the accused. The position of these imprints on the butt of the firearm was consistent with a normal right hand grip of the butt of the firearm. Warrant Officer Bekker stated that he did not find an identifiable print of the right index finger on the weapon which, he stated, was consistent with the right index finger being used as a trigger finger.

[67] He stated that on one of the layers of prints he found a particular pattern of the right middle finger print. This pattern consisted of a circular void at the centre of the print. He described this pattern as arising as a result of what the academic literature describes as extreme deposition pressure. Extreme deposition pressure is described in the academic literature as:

> "[involving] weight being applied through the digit from other parts of the body or by holding a very heavy object in the hand. At times extreme deposition pressure can obliterate most second and third level detail. Carriage is absent in the centre of the pattern."

[68] Bekker described the absence of ridge patterns at the centre of the fingerprint as being caused by the muscular pressure exerted through

the digit bone during the exercise of the grip on the object. He stated that in the event that pressure is applied externally to a finger, as for example, during the taking of a fingerprint or by manually pressing a finger against an object, such external pressure does not result in a flattening of the ridge pattern. The flattening of the ridge pattern is usually only observed in instances where the mechanical force is applied through the muscles of the hand itself.

[69] Based on this analysis, it was Bekker's opinion that the fingerprints lifted from the butt of the R5 rifle were deposited by accused 1 exercising a normal grip on the butt of the rifle and not as a result of the accused's hand having been placed onto and wrapped around the butt of the firearm by the application of external force.

The admissibility of the statement made by accused no. 6

[70] Accused 6 was arrested at a house in New Brighton at 4 AM on the morning of 11 January 2012 by Col Manyana, who was assisted by Warrant Officer Siyepu. Later on that day accused 6 made a statement to Col Cele which the prosecution tendered in evidence. The accused objected to the admissibility of the statement and, following a trial within a trial to determine the admissibility, I ruled it to be admissible. My reasons for doing so are set out hereunder.

[71] The state bears the onus to prove that a statement made by an accused person containing admissions and / or amounting to a confession was made freely and voluntarily by the accused whilst he was in his sound and sober senses and that the accused was not unduly influenced to make the adverse statement. In challenging the admissibility of the statement the accused alleged that he had been assaulted and threatened by Col Manyana and Warrant Officer Siyepu following his arrest and that the statement was accordingly not freely and voluntarily made.

[72] In the trial within a trial the prosecution presented the evidence of a number of witnesses, including the arresting police officers, Col Manyana and Warrant Officer Siyepu, the police officer who made arrangements for the accused to appear before a commissioned officer, Capt Mayi, the police officers who were responsible for transporting the accused, the district surgeon who examined the accused prior to him making the disputed statement as well as the commissioned officer, Col Cele who interviewed the accused before recording the statement allegedly made by him.

[73] Col Manyana testified that following the arrest of other suspects he had obtained information about the alleged involvement of one Xolani. His

investigations resulted in him identifying the suspect and obtaining an address where he could be traced. As a result of this he travelled to Port Elizabeth in the company of Warrant Officer Siyepu on the night of 10 January 2012. At 4 AM on 11 January 2012, Col Manyana and Warrant Officer Siyepu travelled to the address that they had obtained in the company of members of the New Brighton police. The accused was found to be present and identified himself as the person for whom Col Manyana was looking. Col Manyana informed him that he was a suspect in the commission of an armed robbery which had taken place in Deal Party in November 2011 and placed him under arrest. According to Col Manyana he informed the accused of his right to remain silent and his right to legal representation. He also informed him that in the event that he should wish to make any statement regarding the matter that that statement would be recorded and may be used in evidence against him. After warning the accused of his rights, Col Manyana and the police officers present conducted a search of the premises for which they had been given permission. Nothing was found at the premises linking the accused to the commission of the offences. After the search was concluded, Col Manyana and Warrant Officer Siyepu placed the accused in their motor vehicle and transported him to the Uitenhage detective officers. According to Manyana they arrived at the Uitenhage detective officers shortly after 5 AM in the morning. He and Siyepu took the accused into a boardroom which had been made available for his use.

There Col Manyana formally explained the notice of rights in terms of section 35 of the Constitution to the accused. He recorded on the SAP14A that the accused's rights were explained to him at 4 AM at the time of his arrest at New Brighton and also thereafter at Uitenhage.

[74] Manyana explained that he went through the notice of rights in detail and line by line reading it to the accused and that it was interpreted for the accused by Warrant Officer Siyepu. Once the rights had been explained to the accused he was afforded an opportunity to sign an acknowledgement which he did.

[75] The formal explanation of the accused's rights took some time to complete. After his rights had been explained to him the accused, according to Manyana, said that he wanted to explain to him his involvement in the commission of these offences. Manyana stopped the accused from doing so and told him that in the event that he wished to make a statement regarding his involvement that he would arrange a neutral person, either a magistrate or a police officer, to take a statement from the accused. During this interview Manyana, Siyepu and the accused had had coffee in the boardroom. Col Manyana then took the accused to the Uitenhage police station where he was booked into the police cells at 06h10. Col Manyana and Warrant Officer Siyepu then left.

[76] Later that morning at approximately 8 AM Col Manyana telephoned a Capt Mayi, who was known to him, and who is stationed at the Uitenhage detective services to ask him to arrange for an officer to take a statement from the accused.

[77] At 10:12 AM Col Manyana collected the accused from the Uitenhage police cells, and transported him to the offices where Capt Mayi was stationed. When he arrived he was informed that Capt Mayi was involved in a briefing meeting and that he should wait for him. According to Manyana he waited for Capt Mayi for between 30 and 40 minutes. Whilst he was waiting he took a detailed set of fingerprints from the accused. When Capt Mayi was finished with his meeting he informed Col Manyana that he would make the necessary arrangements for the accused to make a statement to a police officer. Thereafter, Col Manyana took the accused back to the Uitenhage police cells and booked him in at 12:10 PM. Col Manyana did not see the accused again until the following day. Later that evening, however, he received a copy of a statement made by the accused to Col Cele from Capt Mayi.

[78] Warrant Officer Siyepu confirmed the evidence given by Col Manyana. According to him, it was his impression that the accused was relaxed and at his ease and that he freely indicated his desire to make a statement concerning his involvement in the offences.

[79] Capt Mayi stated that he was contacted by Col Manyana at approximately 8 AM on the morning of the 11 January 2012 and that he was asked by him to make arrangements for a suspect to make a statement before a police officer. Since the call came in after 8 AM in the morning he did not attempt to contact a magistrate. This was so, he said, because in his experience, it was extremely difficult to obtain the services of a magistrate at short notice and at that time of the day because magistrates are engaged in court hearings. He therefore contacted Col Cele at the Kwazakhele police station and asked him whether he would be able to assist with the taking of a statement from the suspect. Col Cele indicated to him that he would only be able to do so later that day at approximately 4 PM. This was conveyed to Col Manyana.

[80] At approximately 3 PM he dispatched two members of his task team to the Uitenhage police cells to collect the accused and to transport him to the hospital where he would be examined by the district surgeon. Col Mayi accompanied them in a separate vehicle in order to make the necessary arrangements for the district surgeon to examine the accused.

[81] The district surgeon, Dr Mpofu, examined the accused at the Dora Nginza Hospital at 3:20 PM. He completed a forensic medical examination form which recorded that the accused had no injuries and showed no signs of any trauma whatever. In his testimony Dr Mpofu confirmed the contents of the medical examination form and also stated that he had examined the accused, as he put it, "from top to toe", and found no evidence or signs of any injuries or any trauma. He recorded the accused's mental state as being calm and at ease.

[82] Following the medical examination accused 6 was taken to the offices of Col Cele who conducted the interview with him. He completed a interview with the accused prior to recording the statement made by him. He made use of the services of an isiXhosa speaking member of the uniformed police who acted as interpreter during the course of the interview.

[83] The preliminary interview form records that he warned the accused that he was not obliged to make any statement and informed him of his rights to silence and to obtain legal representation. He was also told that if he wished to make any complaint about assaults or ill treatment that Cele would arrange appropriate protection for him in that regard. The content of the form and responses given by the accused were not disputed save

in one respect namely regarding a response to what he said about making a statement to a magistrate.

[84] The accused's version of what transpired following his arrest on the morning of 11 January 2012 is in stark contrast to the version set out by the prosecution witnesses above.

[85] According to the accused he was awoken in the early hours of the morning by loud banging on the door. When he went to open the door he was wearing only his trousers and shoes since he was still in the process of getting dressed. On opening the door he was confronted by a large number of policemen who were pointing firearms at him. He was dragged outside of the house and thrown face down on the ground outside and his hands were handcuffed behind his back. He was asked about firearms. He asked for a shirt because he was cold. Col Manyana was given a shirt but did not give it to the accused. The accused then asked Manyana to take him to his home so that he could get his asthma medication. This was refused. He was taken to a car. On the way Siyepu slapped him in the face. This occurred within sight of his girlfriend. He was then placed in a motor vehicle with Manyana and Siyepu and they drove out of Port Elizabeth towards Uitenhage.

[86] Whilst they were driving Col Manyana said to him that he was going to tell them everything that he knows. Manyana apparently told him that he is from the Crime Intelligence Unit at Mthatha and that they “do not take nonsense from criminals” unlike the Port Elizabeth policemen. When the vehicle passed Despatch it slowed and then turned off the road into the bushes near some small houses. When the car stopped Manyana said that he did not come there to play. He said that the accused is the Xolani who they want. To this the accused said that he was not the Xolani they were looking for. Manyana said that he is the one who was working with a policeman named Ntokozo. The accused laughed at this at which point Manyana became angry. He said to Siyepu that they must show him how things work.

[87] The door of the car was opened and the accused was taken out of the vehicle. The boot of the vehicle was opened and a black plastic bag was taken out. There was also a 2 litre plastic bottle of water. According to the accused Siyepu then put him inside the boot of the vehicle so that his lower body was inside the boot and his upper body outside. He was on his back facing upwards and his hands were handcuffed behind his back. Manyana then took a long cloth which was wet and beat the accused in the face with it. Siyepu pressed downwards on the accused’s chest with one hand. The accused tried to move sideways but he was overpowered. Manyana then wrapped a towel around the accused’s

mouth and nose two or three times. Manyana poured water over the towel. The accused had difficulty breathing. When the towel was removed he lay on his side and vomited. Manyana and Siyepu laughed with one another saying that the accused is afraid of dying. The towel was then again wrapped over his mouth and nose. The black plastic bag was put over his head and tightened around his neck. The accused struggled and kicked out with his feet. When the plastic bag and towel were removed he again vomited. Manyana told him that he must co-operate with them. He then took out a phone and spoke to someone. After the call Manyana told the accused that the person he had just spoken to was going to come and kill him. He said that they would pretend that he, the accused, had tried to escape. He also said that if he had listened to the news, he would know that they were looking for Luyando Njokweni, accused 5, and that they had gone to an address to find him. When they got there they found it was the wrong person and so they killed him. According to the accused as a result of this he admitted to them that he knows about the robbery.

[88] After this he was given his T shirt and allowed to dress. He was again handcuffed and then driven to the Uitenhage police station. At the police station Manyana came to him with some documents. He was asked how far he had progressed at school and whether he can read English. He was then given the documents and told to read them. Thereafter he was

detained at the Uitenhage police cells. Manyana allegedly told the police officers there that the accused should not be allowed access to a phone.

[89] Later that morning after he had had breakfast he asked one of the police officers to allow him to make a telephone call. The policeman said that they were instructed not to allow that. Nevertheless he was allowed to make a call. He telephoned his girlfriend and told her where he was. He asked her to contact his lawyer, a Mr Louis van Rensburg. Shortly after that Manyana and Siyepu arrived. He was then taken to the detective offices in Uitenhage. There Manyana again showed him the documents and told him to read them. He was told that he was going to be taken to a high ranking police officer and that he must tell him what was set out in the documents that he had been made to read. He agreed to do so. According to him there was at no stage any mention of being taken to a magistrate. The accused was made to sign the documents and then his fingerprints were taken. He was taken back to the Uitenhage police cells and later was taken to the Dora Nginza Hospital where he was examined by the District Surgeon.

[90] At approximately 4.00pm he was taken to Col Cele. The accused did not place in dispute the content of the questions and answers recorded by Col Cele in the preliminary interview held with him other than to state that he at no stage said to Col Cele that he had been informed that he

could make a statement to a magistrate. According to him he only said that he was told that he would be taken before a police officer. The form however records in a quote of direct speech what the accused said to Cele. That indicates that he said he would be taken to either a magistrate or police officer.

[91] The accused did not lead the evidence of any witnesses. I was informed by Mr Cilliers, that he could not call the accused's girlfriend because she had been present in court throughout the proceedings.

[92] As indicated the onus is upon the state to prove that the statement is freely and voluntarily made and that it was not made as a result of any undue influence brought to bear upon the accused.

[93] In cross-examination the accused stated that the statement made by him to Cele was based on what he had been told to say to Cele. He stated that he derived the information from that which was set out in the documents shown to him by Manyana. According to him the statement made to Cele was false.

[94] Somewhat surprisingly the prosecution did not seek to introduce the content of the statement in the trial within a trial in order to test the veracity of the claim that it was a false statement. Instead the

prosecution was content to argue that the accused had made for a poor witness, that his allegations of torture were entirely unsupported by objective evidence, in particular that of Dr Mpofu, and that the accused had had several opportunities to disclose the alleged assaults but had failed to do so. In this regard he had made no complaints to any officer at the Uitenhage police station, he had made no complaints to his girlfriend whom he had telephoned, he had made no complaints to any of the officers who collected him from the Uitenhage police cells and took him to the District surgeon. He did not report anything to the District Surgeon, nor to Col Cele who specifically indicated to him that if he wished to report anything steps could be taken to protect him.

[95] It was argued that the accused's version of the protracted assault and the events leading to the making of the statement is inherently improbable and false.

[96] It was argued on the accused's behalf that the level of detail given by the accused as to the assault is suggestive of a ring of truth.

[97] I disagree. The accused's version of what gave rise to the statement is inherently improbable. According to him the investigating officer seized upon the name Xolani as that of a person who was involved and then without any cause whatever arrested him because his name is Xolani.

The investigating officer then subjected him to a brutal and terrifying assault which began in full view of other persons and continued later in an isolated spot until such time as the accused agreed to falsely implicate himself. The accused was then made to memorise a statement about events of which he knew nothing and – some hours later – repeat that statement. On his version he did all of this despite the fact that he had had contact with the outside world in the person of his girlfriend and despite the fact that he had requested her to contact his attorney. It is in my view so highly improbable that the investigating officer would act in that manner as to be without any substance at all.

[98] There is furthermore the improbability that a person subjected to the type and extent of the assault described by the accused would have no injuries at all. He was thrown to the ground outside his house when he was naked on his upper body; he was slapped hard across the face by Siyepu; his hands were cuffed behind his back; he was then forced into the boot of a car and, with his hands behind his back, made to lie half in and half out of the boot. He struggled against the policemen who had to overpower him; he kicked out with his legs and rolled to his side. The assault caused him to vomit. Yet when he was examined by the doctor no abrasions or any signs of trauma were found despite him being examined "from top to toe".

[99] In addition to this the account of the assault does not accord with the objective evidence regarding the accused’s time of arrest, that he was driven to Uitenhage where he was formally warned in terms of section 35 of the Constitution (an aspect he failed to deal with in his evidence in chief) and thereafter booked into the police cells at 6.10am.

[100] When all of these facts are considered and when regard is had to the probabilities I am satisfied that the accused’s version of what transpired between his arrest and when he made the statement to Col Cele cannot reasonably possibly be true. Indeed it is in my view manifestly false. I am satisfied therefore that the state discharged the onus of proving that the statement was made by the accused whilst he was in his sound and sober senses; that he was not subject to any undue influence and that it was freely and voluntarily made.

The admissibility of the ‘trap” evidence

[101] It was argued on behalf of accused 5 and 7 that the undercover operation conducted in terms of section 252A of the CPA was unlawful and that the evidence adduced by the state pursuant to the entrapment of the accused was inadmissible.

[102] The challenge to the lawfulness of the undercover operation (advanced by accused 5's counsel) was based on the submission that the state had failed to adduce evidence establishing that the authorisation obtained for the conduct of an undercover operation was lawfully obtained. In this it was submitted that the state had failed to prove that other techniques other than the employment of a trap could not be used to detect, investigate or the uncover commission of the offence or the prevention thereof.

[103] This particular challenge to the admissibility of the trap evidence was not foreshadowed in the conduct of accused 5's defence. It was raised for the first time during argument. Col Manyana was not cross-examined on the issue as to whether he was able to employ ordinary means to investigate the offences. In any event, it was Col Manyana's evidence that he was appointed to investigate the activities of a criminal syndicate that might have been responsible for the commission of a number of previous armed robberies in which platinum had been stolen in the Port Elizabeth area. It was his evidence that information had been obtained in which certain suspects were identified. He stated that because of the organised nature of the criminal activity that he considered that the only effective means of investigating the commission of these offences would require the conduct of an undercover operation. For this reason he applied for authorisation and obtained such authorisation.

[104] His evidence in this regard was not seriously challenged. It is so that Col Manyana was challenged in cross examination (primarily by counsel for accused 2) in regard to whether there had been a second agent deployed as part of the undercover operation and whether the guidelines set out in the written authorisations had been complied with. In relation to the former issue Manyana explained that the initial authorisation envisaged the deployment of two agents. However the operation that was conducted only involved the deployment of a single agent. It was for this reason that he sought an amended written authorisation from the DPP. This aspect, in my view, has no bearing whatsoever on the question of admissibility.

[105] As far as compliance with the conditions stipulated in the written authorisations is concerned much was made in cross examination about whether Manyana and / or Mudau had kept proper notes and had reported on the progress of the undercover operation by way of submission of statements and affidavits. These aspects were not pursued in argument however no doubt because the evidence presented established that Mudau had kept a diary and that the statements submitted by him during the course of the operation were based on those notes and the content of the audio and video recordings made by him during the undercover operation.

[106] The further basis upon which it was argued (by accused 5 and 7) that the evidence of Mudau should be disallowed was that his conduct had gone beyond merely creating an opportunity for the commission of the offence. It was submitted in this regard that Mudau had, during the meetings, played a prominent role and that he in effect induced or incited the accused to commit the offences.

[107] There is in my view no merit at all in the submission. Neither counsel could point to specific evidence indicative of the fact that the police agent Mudau had solicited the accused or had incited them to commit the offences. This hardly surprising since the video evidence and the transcripts submitted in evidence do not support such a submission, as is apparent from the summary presented above.

[108] The circumstances in which the police agent was contacted were common cause. Accused 5 played a prominent role in this regard. A reading of the transcript of the meetings of 19 August and 21 August clearly indicate that Mudau is trying to establish what t is that these people want. It's clear from the second meeting that it is the accused (specifically accused 4) who makes it plain that they are interested in the platinum that he transports. At a subsequent meeting accused 4 and 5 make it plain to Mudau that they had been trying to make contact with

someone in Brinks and that they considered the meeting on 12 August to have been a breakthrough.

[109] It was suggested that Mudau had been the person who had suggested that a robbery be staged, that he “chose” the place where it was to take place and that he had determined how it should take place as well as when. This, it was suggested, is indicative of the fact that he had gone beyond merely creating the opportunity for the commission of the offence.

[110] I disagree. As will be denudated in this judgment the essential terms of the conspiracy to commit and offence had been agreed at a very early stage in the meetings between Mudau and the conspirators. What followed that agreement was a process of planning to facilitate the carrying out of the criminal enterprise. The information supplied by Mudau and his contribution to the discussions went no further than creating the opportunity for the commission of the criminal enterprise.

[111] It bears mentioning that the accused did not seek to invoke the procedure provided for in s 252A(6) and (7) to challenge the admissibility of the trap evidence and at no stage was the basis for the challenge set out on the record. In the light of the basis upon which the admissibility of the trap evidence is challenged it is not necessary to deal at length with

the factors which a court is called upon to consider in deciding whether the conduct of the agent went beyond providing an opportunity to commit an offence (see s 252A(2) and (3)). It suffices to say that I have considered each of those factors as may be relevant to this matter and I do not consider that there is any evidence to warrant a finding that evidence presented by the prosecution by way of the police undercover agent ought to not to be received. That is, essentially the evidence presented by the prosecution. I shall deal with the evidence presented by the defence when I deal with the assessment of the case against each accused. Before turning to that it is necessary to examine the legal issues relevant to the state's case and to evaluate the main prosecution witnesses.

The conspiracy to commit robbery and common purpose

[112] The state's case against the accused is founded upon the allegation that the accused (specifically accused 2, 4, 5 and 7) conspired with the police agent Mudau and other persons unknown to the state to commit or procure the commission of an offence. The offence which it is alleged was the subject of the conspiracy involved the commission of robbery with aggravating circumstances. In respect of the commission of the offence itself, the state relies upon the doctrine of common purpose

inasmuch as it is alleged that the perpetrators who carried out the robbery acted in concert and with a common intention to commit the robbery. The further charges arising from the commission of the robbery are founded upon this common purpose and the foreseeability of injury or death that may arise from the commission of the robbery by a group of men armed with semi- and fully-automatic firearms. The state alleges that the perpetrators had a common intention in the form of *dolus eventualis* to commit murder.

[113] I have already set out the evidence regarding the conspiracy don't need to highlight that here.

[114] It was submitted in argument (on behalf of accused 2, 4, 5 and 7) that the conspiracy did not involve the commission of robbery. Instead, so it was argued, to the extent that a conspiracy is established (a fact not seriously disputed) that conspiracy involved no more than the commission of the crime of theft. The reference to "robbery" and the discussion relating to the means by which the "robbery" would be carried out constituted an agreement to stage a robbery and that the conspirators at no stage intended to use violence or the threat of violence to gain access to the liquid platinum, which was the object of the theft. Thus, it was submitted, the forced stopping of the Brinks security vehicle; the brandishing of firearms and the placing of a fake

explosive device on the vehicle were intended and calculated to create the impression that force or the threat of force had been used to overcome the resistance of the occupants of the Brinks security vehicle, whereas, in reality, the police agent had agreed to open the rear of the Brinks security vehicle in order to give the perpetrators access to the liquid platinum being transported in the vehicle. Based on these submissions it was argued that the evidence of the police agent and the video recordings of the planning meetings do not constitute evidence of an agreement on the part of the conspirators to use violence or the threat of violence in the execution of the theft. It was accordingly submitted that, at best for the state, the evidence establishes a conspiracy to commit theft. It was further argued that since there was no prior agreement on the part of the conspirators to use violence or the threat of violence in the execution of the theft, that the state had failed to prove that the perpetrators had acted with a common purpose to execute an armed robbery and, by extension, had failed to establish the requisite intention upon which a conviction for attempted murder or murder could be found.

[115] It is necessary, for what follows in this judgment, to consider the legal principles applicable to a charge of conspiracy to commit or procure the commission of an offence as well as the principles applicable to the doctrine of common purpose.

[116] Section 18 of the Riotous Assemblies Act, 17 of 1956 provides as follows:

> "(2) Any person who –
> (a) conspires with any other person to aid or procure the commission of or to commit; or
> (b) incites, instigates, commands or procures any other person to commit,
> any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable."

[117] In *S v Alexander and Others (2)* 1965 (2) SA 818 (A) at 821 the following is stated about the crime of conspiracy:

> "A conspiracy is an agreement between two or more persons to commit a crime. The parties to the agreement must be *ad idem* as to their object – *Harris v R*., 1927 NPD 330 – and in terms of decisions in English Courts the agreement must be such that, if lawful, it would be capable of being enforced. It is not necessary, to constitute a conspiracy, that anything should be done to put the criminal design into execution, for the conspiracy is complete as soon as the persons concerned have agreed together. Nor is it necessary on a charge of conspiracy that the prosecution establish that the individual conspirators were in direct communication with each other. In this connection the following quotation in the judgment in *R. v. Meyrick*, 21. C.A.R. 94 at p. 99, is illustrative:
>
>> "And as far as proof goes, conspiracy, as GROSE, J., said in *Rex v. Brissac,* is generally 'matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them'. The other passage to which I wish to refer is in the well-known charge of Mr. JUSTICE FITZGERALD in the case of Q*ueen v Parnell and Others,* reported in 14. Cox, Criminal Cases at p. 515. Mr. JUSTICE FITZGERALD, having cited the words of Mr. JUSTICE GROSE which I have just read, said: 'It may be that the alleged conspirators have never seen each other, and have never corresponded. One may have never heard the name of the other, and yet by the law they may be parties to the same common criminal agreement. Thus, in some of the Fenian cases tried in this country, it frequently happened, that one of the conspirators was in America, the other in this country; that they had never seen each other, but that there were acts on both sides which led the jury to the inference, and they drew it, that they were engaged in accomplishing the same

> common object, and when they had arrived at this conclusion, the acts of one became evidence against the other."
>
> See also *R v Heyne and Others* (1) 1958 (1) SA 607 (W), to the effect that on a charge of conspiring to commit an offence proof of concerted action is not confined to direct evidence of an agreement to commit the offence but the entire conduct of each conspirator may be relied upon to establish either an agreement to commit the offence or the actual commission of the offence or both.
> Where two or more persons have associated themselves in an organisation with the agreed purpose or object of committing an offence, they have in law formed a conspiracy to commit the contemplated offence. It follows that any person who joins such an organisation as a member, well knowing the object or purpose thereof or who remains a member after becoming aware of the purpose thereof, has signified by his conduct his agreement with the aims of the said organisation and has made himself guilty of a conspiracy to commit such offence."

[118] The agreement between the parties constitutes the unlawful conduct element of the crime of conspiracy (see *S v Khoza en 'n Ander* 1973 (4) SA 23 (O) at 25A-B). What is required is an actual meeting of the minds of the conspirators as to the object or purpose and that object or purpose must constitute an offence or crime (see *Snyman* Criminal Law 5th ed, p. 295; *R v S* 1959 (1) SA 680 (C) at 683C-D; *S v Moumbaris* 1974 (1) SA 681 (T) at 687A-B). It is however not necessary that the parties should agree about the exact manner in which the crime is to be committed (see *Snyman* op cit p.297).

[119] In *R v Adams and Others* 1959 (1) SA 646 (SCC) the court, after citing several authorities, said the following at 660H – 661A:

> "These passages support the contention that as long as the conspiracy remains constant in regard to its aims, and as long as the aims are unlawful, the particular or varying means adopted by any one of the conspirators are attributable to the others, provided that they were employed for the purposes of achieving the so-called 'grand object'; also, that the means whereby this

> object is to be achieved are of no real moment. Indeed, *Roscoe, supra,* points out that they need not be alleged or proved."

[120] In *S v Cooper and Others* 1976 (2) SA 875 (T) the court said (at 879B – F):

> "A conspiracy normally involves an agreement, express or implied, to commit an unlawful act. It has three stages, namely, (1) making or formation, (2) performance or implementation and (3) discharge or termination. When the conspiratorial agreement has been made, the offence of conspiracy is complete, it has been committed and the conspirators can be prosecuted even though no performance has taken place. But the fact that the offence of conspiracy is complete at that stage does not mean that the conspiratorial agreement is finished with. It is not dead. If it is being performed, it is very much alive. So long as performance continues, it is operating, it is being carried out by the conspirators, and it is governing or at any rate influencing their conduct. The conspiratorial agreement continues in operation and therefore in existence until it is discharged (terminated) by completion of performance or by abandonment or frustration whatever it may be; *per Lord PEARSON in Director of Public Prosecutions v Doot and Others*, (1973) 1 All E.R. 940 (H.L.) at p. 951. While the conspiratorial agreement is in existence it may be joined by others and some may leave it. The person who joins it is equally guilty; *R v Murphy,* (1837) 8 C. & P. 297 at p. 311 (173 E.R. 502 at p. 508). Although the common design is the root of a conspiracy, it is not necessary to prove that the conspirators came together and actually agreed in terms to have the common design and to pursue it by common means and so carry it into execution. The agreement may be shown like any other fact by circumstantial evidence. ….. It is generally a matter of inference deduced from certain acts of the parties concerned, done in pursuance of a criminal purpose in common between them."

[121] Count two, the charge of conspiracy, is founded upon the allegation that during the period between August 2011 and 8 November 2011 the accused wrongfully conspired with the deceased and/or the police agent and with other persons to the state unknown "to aid or procure the commission of or to commit the offence of robbery with aggravating circumstances".

[122] The offence of robbery consists in the theft of property by unlawfully and intentionally using violence to take property from another alternatively by using threats of violence to induce the possessor of the property to submit to the taking of the property.

[123] It is however appropriate to mention, at this stage, that accused 4 and 5 concede that they were party to discussions regarding the commission of theft of liquid platinum from the Brinks security vehicle. Accused 4 stated that by 4 October 2011 which was the last meeting that he attended before the meeting of 1 November 2011, no agreement had been reached regarding the commission of the offence of theft. He was therefore not a party to any conspiracy as at that date. In respect of the aborted robbery on 11 October 2011 it was common cause that accused 4 was not directly involved since he was, at that time in custody on an unrelated charge. According to him he was reluctant to continue participation in the discussions with Mudau and only did so because he did not want “the other persons involved” to know that he was reluctant to continue with the enterprise. He stated that following the meeting held on 1 November 2011 he decided to withdraw because he had become concerned about the fact that there was discussion about the use of explosives. He conveyed this to accused 5 who apparently shared his concern. They decided however to continue with the meetings because

they did not want the "other participants" to know that they were withdrawing. According to accused 4 agreement to carry out the theft was only reached on 7 November 2011 and by that stage he had already subjectively decided not to participate. On this basis it was submitted that he was not a party to any agreement to commit theft or any other offence. It was furthermore argued that he actively dissociated himself from the events of 8 November 2011 by physically not participating and by informing the police about the fact that an offence was to be committed.

[124] Accused 5 essentially raised the same defence. He too stated that he had become concerned about continuing his involvement and had decided to withdraw. He stated that on the evening of 7 November 2011, after the meeting with Mudau, he left Port Elizabeth and travelled to Durban. He was accordingly not involved in the execution of the theft or robbery on 8 November 2011 since he only returned to Port Elizabeth on 25 November.

[125] The determination as to whether or not there was an agreement to commit robbery is a question of fact to be decided upon consideration of all of the evidence presented by both the state and the prosecution in relation to the alleged conspiracy. It is also a matter of inference

deduced from the acts of the parties done in pursuance of a criminal purpose in common between them (cf *Cooper (supra)*).

[126] It was not in dispute that the purpose of the meetings held with the police agent was to induce the agent to furnish the conspirators with information regarding the manner in which platinum was transported by the Brinks security company and the security measures that were in place. The purpose of obtaining the information was to allow the conspirators to unlawfully obtain liquid platinum. It was submitted on behalf of the accused that the content of the video recordings indicate that the accused who participated were attempting to establish the easiest method by which they could obtain the liquid platinum. Reference was made to the statements by the accused that they wanted to avoid the police and that they did not wish to cause harm to any person.

[127] It was suggested that the references to the fact that the "robbers" would be brandishing firearms, considered in context, indicate that they were intended to be used merely to create the impression that it was a robbery.

[128] What is apparent from the evidence of Mudau and the content of the audio and video recordings is that the common criminal design which

constitutes the agreement between the conspirators involved the illegal or unlawful taking of platinum which was in the control and custody of Brinks security company.

[129] That agreement was concluded at a very early stage of the meetings held with the police agent. The essential elements of this agreement were concluded at the meeting held between the police agent and accused 4 and 5 on 3 September 2011. At that meeting accused 4 and 5 declare that their purpose is to illegally take platinum from Brinks security company and that they wish to secure the participation and assistance of Mudau. He makes it clear that he will assist them but he seeks assurances as to the method that the conspirators will employ.

[130] What follows the meeting of 3 September is a detailed planning exercise which goes to the means by which the criminal object is to be achieved. The following exchange takes place at the meeting on 10 September.

> MUDUA: Then … The way that I was thinking ….I don't know….
> ACCUSED 4: Mmm, just say whatever you want to say.
> MUDUA: Ja, the way that I was thinking….
> ACCUSED 4: Aha?
> MUDUA: Is that we can do it in the road. I think it is a better one – I don't know, but how?

[131] Later in the same meeting the participants begin discussing the detail associated with the taking of liquid platinum from the Brinks vehicle whilst it is en route between the airport and its delivery destination.

> ACCUSED 4: Okay, so you will be a driver for all these places?
> MUDUA: Aha.
> ACCUSED 4: Okay. No it is up to the guys. I don't know. Let me hear the guys about what they are going to say or maybe they still (interjection)
> MUDUA: I don't want to end up being killed.
> ACCUSED 4: Mmm.
> MUDUA: I am talking this, serious.
> ACCUSED 4:You don't have to be (interjection)
> MUDUA: I am serious. I don't want to be in danger.
> ACCUSED 4: Mmm
> ACCUSED 5: Okay. I think this is the first option this one, ne.
> MUDUA: That is the one. I think this is the other one. There. This is the one. The other one is going to take long.
> ACCUSED 4: The other one?
> MUDUA:That one is going to the.. it is going to take long.
> ACCUSED 4: Which one?
> ACCUSED 5: To the Company?
> MUDUA: Going in the Company. You see sometimes it is not there. There is nothing at all there. Sometime they (inaudible), you see, sometimes.

[132] It was argued that the process which followed this, namely the discussion regarding the routes that the Brinks vehicles follow; the usual times of delivery and the security protocol applied by the drivers of the Brinks vehicles when confronted on the road as well as the security measures installed on the vehicle all constituted "negotiation" between the protagonists and that this ongoing discussion was not finalised until the night before the commission of the aborted robbery or the actual robbery on 8 November. On this basis it was submitted that there was in fact no "meeting of the minds" of the conspirators and that the prosecution had therefore not established the conspiracy.

[133] The argument fails to take into account the authorities referred to hereinabove. As noted in the *Adams* matter the means by which the criminal enterprise is to be carried out need not be established in order to establish the existence of the conspiracy. It is sufficient if the evidence discloses an agreement to commit an unlawful act which is the object or purpose of the conspiratorial agreement. The argument also misconstrues the nature of the discussions which followed the meeting of 3 September. The transcripts of the meetings and the evidence of Mudau establish that the accused had by then agreed that they would commit an offence in order to secure access to the platinum. The further meetings were concerned with planning the means by which the unlawful act would be carried out.

[134] It was known to the accused that Mudau would be armed and that his co-worker, the passenger in the Brinks vehicle, would also be armed. He was not a party to the agreement. His control over the Brinks vehicle and its content also needed to be overcome in order for the conspirators to carry out the theft of the platinum. Although it may be accepted that the passenger's degree of control was less than that of the driver of the vehicle, he nevertheless constituted an inherent level of resistance that would, to the knowledge of the conspirators, have to be overcome in order to carry out the taking of the platinum. The presence of firearms

and the use of the fake explosive must also have been calculated to act as a threatened use of violence directed at the passenger. It must also be borne in mind that the perpetrators had no intention of making use of fake firearms. It was explicitly said that they would be real.

[135] The conspirators had secured the agreement of the driver to open the vehicle thereby facilitating their access to the platinum. However it is clear from the development of the plan over the period covered by the meetings that the accused contemplated the use of violence to effect the taking of the platinum. The taking of firearms to the scene and ammunition to be fired from such firearms is, in my view, consistent only with the intention to use violence or the threat of violence to carry out the agreed criminal enterprise, namely the unlawful taking of platinum from the Brinks security vehicle. Robbery is a form of theft. It consists in the theft of property by intentionally using violence or the threat of violence to induce submission to the taking of the property that is the subject of the theft.

[136] In my view it matters not that the conspirators did not intend to direct violence or the threat of violence at Mudau, their co-conspirator. What matters for the purposes of determining the nature of the crime they intended to commit in the execution of the separate crime of conspiracy, is what may be inferred from all of the facts established by the evidence

to have been the intention of the conspirators in executing the criminal enterprise they had reached agreement upon. In this regard the evidence clearly establishes that the conspirators intended to bear arms during the execution of the planned taking of the platinum. In my view the only reasonable inference that can be drawn from this fact is that they foresaw the possibility that, in the execution of the criminal enterprise violence or the threat of violence may be required in order to achieve the object of the criminal enterprise, namely the unlawful taking of the platinum.

[137] It was suggested in argument that the conspirators at no stage referred to the possibility of being prevented from carrying out their enterprise and that they did not anticipate any resistance or the presence of police.

[138] Against this however must be considered the fact that the conspirators knew that the criminal enterprise would take place in a public street in broad daylight from an armed vehicle in which there was at least one person who was armed and who was not a party to the planned criminal enterprise. In these circumstances it can hardly be seriously suggested that they did not, as a matter of fact, foresee the possibility that violence would be required in order to carry out the enterprise. Why else would they declare that firearms would be taken to the scene. The criminal

enterprise which was the subject of the conspiracy contemplated the commission of the offence of robbery.

[139] It is appropriate at this stage to deal with a further argument advanced on behalf of the accused, namely that what transpired on the 8th was no more than a theft since the evidence, taken as a whole, establishes that the platinum was already removed from the Brinks vehicle when the first shot was fired, i.e. that to the extent violence was used it did not precede the taking of the platinum.

[140] It is trite principle of law that to constitute robbery the use of violence or the threat of violence must be directed at the possessor and must precede the taking.

[141] In *S v Yolelo* 1981 (1) SA 1002 (A) at 1015, after an exhaustive consideration of the authorities in our law which deal with the relationship between the violence or threat of violence and the taking by theft, the court came to the conclusion that:

> "Ek meen derhalwe dat roof gepleeg kan word ook indien geweld volg op die voltooiing van diefstal in 'n juridiese sin. In elke geval sal nagegaan moet word of daar in die lig van al die omstandighede, en veral die tyd en plek van die handelinge, so 'n noue verband tussen die diefstel en die geweldpleging bestaan dat dié as aaneenskakelende komponente van wesentlik een gedraging beskou kan word."

[142] What *Yolelo* establishes is that the use of violence does not have to precede the taking. It is sufficient if the violence is sufficiently closely

connected to the process of taking that the violence and the taking constitute a single course of conduct.

[143] In this instance the evidence establishes that a shot was fired at the Brinks security vehicle immediately after the back of the vehicle had been opened and when the containers were being removed. The evidence of Mudau and Hermaans was that the shooting was commenced by the person who was at the passenger side of the vehicle and was in possession of the R5 rifle, namely accused 1. The police stationed on the first floor of the building opposite the stop sign then also commenced shooting at the persons surrounding the Brinks vehicle. The exchange of gunfire continued across a wide area as the robbers attempted their escape. Two vehicles used in the robbery made their getaway with canisters removed from the Brinks vehicle. When all the facts are taken into consideration there can be no doubt that what occurred on 8 November was indeed an armed robbery.

Evaluation and assessment of the evidence of the prosecution witnesses

[144] It will be apparent from what is stated above that the prosecution presented the evidence of a number of witnesses. I shall deal with the credibility and reliability of particular witnesses where necessary in

setting out the state case against each of the accused. I shall then also deal with the credibility and reliability of the accused as witnesses.

[145] It is however appropriate to make a few general comments about certain prosecution witnesses inasmuch as their evidence has a bearing on prosecution case a whole.

[146] The first of these is Col Manyana, the investigating officer. Manyana impressed as a very competent and thorough investigating officer who was, as may be expected, very familiar with every aspect of the investigation. He remained unshaken during cross examination and, tellingly, no argument was advanced on behalf of any of the accused (save accused 6 in relation to the trial within a trial) suggesting that Manyana's evidence should be rejected as being not credible or reliable.

[147] Mudau, also impressed as a witness. Despite lengthy cross examination over a number of days he remained clear and unequivocal in his evidence and there is no indication that his evidence was tainted by contradiction. His recollection of what had transpired throughout what must have been an exceptionally stressful undercover operation during which he was at considerable risk was excellent. Although he was criticised for not keeping more detailed notes in his diary his account of what had transpired was unaffected thereby. He was, in my view, a

credible and reliable witness. His viva voce evidence was supported by the content of the video and audio recordings made of his several meetings with some of the accused.

[148] It was suggested that because of the poor sound quality in some videos, as reflected by the number of instances where a transcription records the exchange as “inaudible” that this evidence is not reliable and that it ought to be disregarded as corroborating Mudau.

[149] The evidence was not tendered as corroboration of Mudau. It was tendered and received as real evidence. The fact of the poor quality as reflected on the transcripts does not bear upon Mudau’s evidence. To the extent that the video and audio recordings are not decipherable and that it is not possible to make out what is said in portions means only that there is no evidence before the court. Those portions as are clear and decipherable make up the body of that evidence and its import and meaning is to be evaluated in the context of the evidence considered as whole.

[150] As I have already indicated I found him to be a credible and reliable witness. I deal with the particular aspects of his evidence in relation to the case against each of the accused set out below.

The position of the section 204 witnesses

[151] The prosecution presented the evidence of six witnesses who gave evidence of potentially incriminating acts by them relating to the charges preferred against the accused. These were Mudau, the police agent; Hermaans, the NIU member who accompanied Mudau as a passenger in the Brinks vehicle on the day of the robbery; Tyiso and Mhlana, NIU member who were deployed in the building overlooking the scene of the robbery; Martins, the commander of the NIU team deployed on the western side of Stephenson Road; and Mpolase, the commander of the NIU team on the eastern end of Stephenson Road.

[152] Of these witnesses only Mudau; Tyiso and Mhlana were warned in terms of section 204 of the Criminal Procedure Act

[153] Section 204 provides that a competent witness who is compelled to answer questions even though they may incriminate him or her in the commission of an offence shall be discharged from prosecution if the court is satisfied that the witness answered all questions put frankly and honestly.

[154] In the case of Tyiso and Mhlana there can be no suggestion that they did not answer questions frankly and honestly. When asked about the critical issue as to how the shooting had commenced on the day in question both testified that it was their view that the firing had commenced from accused 1 who fired at the passenger side of the vehicle. In respect of their response they both stated that the police had immediately retaliated with fire because they considered the persons in the Brinks vehicle to be in danger. Neither of the witnesses sought in any way to provide unnecessary justification.

[155] I am satisfied that they gave their evidence frankly and honestly and that in these circumstances they are entitled to be discharged from prosecution in respect of the attempted murder and murder charges flowing from the events of 8 November 2011.

[156] In the case of the police agent Mudau it is essential to bear in mind that the question of the admission of trap evidence in terms of section 252A is a wholly separate enquiry from that in respect of the indemnity from prosecution that arises from section 204.

[157] In the former instance one is concerned with whether the agent or trap has exceed the bounds of the authorisation and done more than merely create the opportunity for the commission of the offence. In the latter

case one is concerned with whether the witness answered incriminating questions frankly and honestly.

[158] Such criticism as was directed at Mudau's evidence is confined in the main to an attack related to the former issue. I have already addressed this earlier in this judgment.

[159] Mr Wolmarans, who appeared for the section 204 witnesses on instructions of the Minister of Police submitted correctly, in my view, that the only instances in which Mudau was reluctant to answer questions related to attempts by the defence to elicit information regarding his identity and personal circumstances. In the case of all other issues canvassed in cross examination he was forthright and clear in his evidence.

[160] In my view he tendered his evidence frankly and honestly. He is accordingly entitled to be discharged from prosecution in respect of all of the charges arising from the events of 8 November 2011.

Assessment of the case against each of the accused

[161] Before evaluating the case presented by the prosecution against each of the accused and their respective defences, it is appropriate to highlight

the fact that the state bears the onus to prove each of the elements of each offence for which the accused stand charged beyond all reasonable doubt.

[162] An accused person bears no onus whatsoever and he or she is accordingly not required to prove any aspect of his or her defence or to persuade the trial court of anything (see *S v Jochems* 1991 (1) SACR 208 (A) at 211f). An accused person is entitled to be acquitted if, upon an assessment of the evidence considered as a whole, there is a reasonable possibility that version put up in defence to a charge may be true.

[163] In evaluating the evidence and in coming to a decision as to whether the state has proved beyond a reasonable doubt that the accused is guilty of an offence the correct approach, as noted in *S v Chabalala* 2003 (1) SA SACR 134 (SCA) at 139i–140a is:

> "…to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt."

[164] The state's case against accused 1, 2 and 6 stands on a different footing to its case against accused 4, 5 and 7. In the case of accused 1, 2 and 6 the state founds its case on their alleged liability as perpetrators of the

offences committed on 8 November 201. Insofar as the element of causation is concerned in respect of each of the offences reliance is placed on the doctrine of common purpose as set out in *S v Safatsa and Others* 1988 (1) SA 868 (A) and *S v Mgedezi and Others* 1989 (1) SA 687 (A). In the case of accused 4, 5 and 7 the state's case is founded upon proof of a prior agreement operative between them to commit the offences. Their liability, it is alleged, rests on their status as co-perpetrators.

[165] With these general principles in mind I turn now to consider the state's case against each of the accused in turn.

Accused 1

[166] The case against accused 1 consists of the evidence of Mudau and Hermaans, both of whom identified accused 1 as one of the participants in the robbery, who alighted from the back of a Bantam bakkie and who was in possession of an R5 rifle. According to Hermaans accused 1 approached the passenger side of the Brinks security vehicle, and pointed the firearm at the occupants. The first shots fired in the execution of the robbery, according to Hermaans, were fired by accused 1. When the further shooting erupted accused 1 retreated firing back in the direction of the Brinks security vehicle as he did so. Hermaans

testified that he kept accused 1 in his sight as he was retreating and also fired in his direction. He saw where the accused fell to the ground and after the Brinks vehicle had been brought to a halt and he was able to alight from the vehicle he kept the accused in his sight until he went up to him to effect the arrest. According to Bekker and Mlumbi's evidence an R5 rifle was recovered from a point in close proximity to where accused 1 was found. Bekker's evidence was that the R5 rifle had the accused's fingerprints on the butt of the rifle.

[167] The accused's explanation for his presence on the scene was that he had left his home earlier that morning. After cleaning his yard and washing his car he had walked to Stephenson Road en route to a place where he intended to purchase a 25L drum of liquid soap. According to him when he approached the railway intersection he noticed some workers at the railway line, who were wearing blue overalls and reflector jackets. One of these had a red flag in his possession. He saw a number of persons wearing blue overalls and reflector jackets surrounding a vehicle on the other side of the railway crossing. They had in their possession firearms. Shortly thereafter he heard shouts and then gunshots. When one of these robbers came running towards him with a firearm in his possession he too ran away. It was then that he was shot and fell down. Whilst lying there, he noticed a person who was wearing a blue overall and a reflector jacket standing near the column of a gate

entrance to the business premises. He then saw a white bakkie approaching and that this person jumped onto the back of the bakkie before it sped away down the road.. He said that the robber, who made his escape left his firearm at the gate before making his escape. Whilst lying on the ground. He was approached by some people and shots were fired in his direction. One of these shots he said struck him on the ear. He pretended to be dead and lay there motionless. A person then came and squatted over him, this person suggested that they should “marry him with the firearm”. He explained that he opened one eye and identified the investigating officer, Col Manyana, as the person squatting over him. According to him, Col Manyana then “fiddled” with the accused’s right hand, apparently removing a glove that he was wearing. He then felt his hand been placed against an object. Accused 1 was subsequently treated on the scene by paramedics and removed by ambulance. He denied any involvement in the robbery and denied any knowledge of the persons who were involved.

[168] Accused 1 made a very poor impression as a witness. It was apparent from the cross examination of state witnesses that the accused’s version of what had transpired underwent a significant adaptation as the case progressed. When Manyana testified it was put to him that the accused had felt him fiddling with his right hand although he did not see what he was doing. When the fingerprint expert Bekker testified the accused’s

version, namely that Manyana had held his hand against the butt of the firearm was put to him. Bekker conceded that it would be possible in those circumstances for the accused's fingerprints to appear on the butt of the firearm. He however explained that he had identified a number of layers of fingerprints, indicating that the person whose fingerprints they were had gripped the butt of the firearm on several occasions. Following his evidence Bekker was recalled, at the request of accused's counsel, so that the accused's version, namely that Manyana had placed his hand on the butt of the firearm a number of times, could be put to Bekker. In response to this Bekker pointed to the fact that he had found evidence of extreme deposition pressure in the fingerprints identified on the butt of the firearm. Bekker said the following:

> "M'Lord, the scenario that was put to me, if a finger is pressed against the object and the force that is exerted on it again is not by the muscles of the hand itself or by the weight of the object itself. It also has very significant characteristics or features that I can identify. As I've testified previously, on slide number 8 the area that I've marked with the yellow circle and the print that I've marked out there, 1 with a yellow arrow, that is typical of the features of a print whereby the object or the muscle of the hand exerted pressure on the finger. That is the bone itself obliterates the ridge features and then clear ridge features are left on the sides of the finger as is visible to the right and the left of that circle. If the finger is pressed by someone else against the object, and a common example of that is the normal taking of fingerprints by ink which is done every day by the police, it actually leaves a very clear print in the core as well as on both sides and the top. If however the pressure that is applied by the person on the hand, the second person on hand, is heavy, what will change is the ridges itself will flatten and widen. And this will normally, in normal circumstances happen throughout the finger that came in contact with the pressure on the object. Not one of the ridges visible on slide 8 exhibits that flattened ridge features that aren't talking about. And it is actually quite visible to anyone looking at slide 8 at the ridges all of them are narrow in appearance."

[169] This expert evidence, which remained unchallenged by the defence, is entirely destructive of the accused's version as to how his fingerprints came to be deposited on the firearm.

[170] The accused's version as to how the firearm came to be in his vicinity is also highly improbable. As indicated he suggested that it was left there by one of the robbers who fled the scene. If that was indeed the case, and accused 1 was indeed an innocent bystander caught up in the crossfire, as he alleged, then one would have expected him to have to have drawn to the attention of the investigating officers at the earliest opportunity. The accused furthermore, testified that he was wearing woollen gloves on the day in question. He gave as his reason for doing so the fact that he had, earlier that morning, washed his car and that his hands were very cold as a result. In support of the allegation that he was wearing woollen gloves on the day, a photograph taken of the accused on a stretcher and being loaded into the ambulance was tendered in evidence. The photograph depicts the left-hand side of the accused. It appears from the photograph that his left hand is covered by what may be a dark glove. This photograph, it was suggested, lends credence to his assertion that he was wearing gloves on the day in question and, as I understood the argument, supports his version that his right-hand glove was removed and his hand placed on the butt of the firearm in order to ensure that his fingerprints appeared on the weapon. Even if it is

accepted that he was wearing a glove on his left hand that does not necessarily mean that he was wearing a glove on his right-hand. Even if it does appear odd that a person would wear only one glove. The fingerprint evidence, in my view, decisively puts paid to the suggestion that the accused's fingerprints were planted on the weapon by Col Manyana for the purposes of implicating him in the commission of the offences.

[171] When all of the evidence pointing to accused 1's involvement in the commission of the offences on the day in question is evaluated and when regard is had to his performance as a witness, I am satisfied that his version as to the events of that day is not reasonably possibly true. Indeed it is, in my view, false beyond a reasonable doubt..

[172] I shall return hereunder to consideration of the effect of this finding in considering what charges the prosecution has succeeded in proving against accused 1.

Accused 2

[173] The case against accused 2 consists of the evidence of Mudau, who testified that he saw accused 2 alight from the back of the Bantam

bakkie and that he was in possession of a firearm. He saw the accused move towards the back of the Brinks security vehicle. He was wearing a blue overall with a reflective jacket. Constable Tyiso testified that he saw a number of persons at the back of the Brinks security vehicle unloading canisters from the rear of the vehicle. When the shooting erupted he saw that person fall down in the vicinity of the back of the Brinks security vehicle. He noticed that a small firearm that he had in his possession fell out of his hand when he fell to the ground. Col Manyana testified that when he emerged from the building after the shooting had died down he saw a person lying in the vicinity of the back of the Brinks security vehicle and that there was a firearm lying in the road a short distance from him. That person, it is common cause, was accused 2 who was arrested on the scene, received medical treatment and was transported from the scene by ambulance. It is also common cause that accused 2 attended four meetings with the police agent Mudau, namely the meetings held on 19 and 21 August and on 3 and 10 September 2011.

[174] According to the accused he came to attend those meetings as a result of meeting with a certain Roger on the evening of 19 August 2011 when he was waiting for a taxi to take him to his girlfriend's house in Walmer. This person Roger was in the company of accused 5 and he was driving a black BMW. He was offered a lift. He was told that they needed to meet someone in Central who would be able to provide him (accused 2)

with a job. It was on this occasion that he met Mudau in his motor vehicle. The accused stated that he went along with accused 5 and accused 4 on 21 August because he was interested in obtaining a job. Accused 4 was at the time unknown to him. He again attended meetings at Mudau's flat in Central on 3 and 10 September. He was not aware of what it was that was being discussed at these meetings and, according to him, did not pay any attention to the discussion. Since there was no indication that he would in fact receive a job offer he decided not to attend any further meetings. He denied that he was involved in or was a party to the planning of either an armed robbery or theft.

[175] He stated that on 8 November he had decided to go to Deal Party in order to look for casual employment, as he usually did. He explained that he was walking along Stephenson Road from the direction of the Old, Grahamstown Road and was crossing the railway line when he noticed a group of armed men surrounding a white bakkie. He heard shouts of "Vula!, Vula! Vula!" as he was crossing the road to go to a nearby cafe to buy airtime. He heard gunshots and he started running. He felt something strike him on his backside as he was running, and he took some steps before falling to the ground. He does not know what transpired thereafter, as he lost consciousness for a time.

[176] It was argued on behalf of accused 2, that the accused's version of events was reasonably possibly true on the basis that the identifying witnesses were unsatisfactory; that no objective evidence as to the clothing that he was allegedly wearing on that day was adduced in evidence to gainsay the accused's version that he was not wearing a blue overall and a reflective jacket; and that he was not seriously challenged in cross examination by the prosecutor, other than that the prosecutor put aspects of the state case to him.

[177] The proper approach, in my view, is to have regard to all of the evidence produced by the prosecution, which has a bearing on the accused's alleged involvement in the commission of the offences as well as the evidence adduced by the defence; to consider the credibility and reliability of the witnesses and to have regard to the overall probabilities as they emerge from an assessment of that evidence.

[178] The accused's account of his involvement in the meetings with the police agent, namely that he was merely attending because he had been promised a job by Roger and was waiting for Mudau to offer him the job and that he knew nothing of the conversations that were taking place must be evaluated against the admitted the content of the conversations held by the participants in those meetings. In this regard it is clear that from the outset, in particular, commencing at the meeting he held on 21

August, that the purpose of meeting with Mudau was to explore means by which platinum transported by the Brinks security company could be illegally obtained by the persons who were participating in the meeting. Indeed, both accused 4 and 5 concede that that was the purpose of those meetings. When regard is had to the transcript of the video recordings and in particular the clear and unequivocal terms in which that topic is discussed, it is inconceivable that accused 2 could not have known what the purpose of the meetings was and that the object was an illegal enterprise. It is therefore inconceivable that he could not have known that he was engaged in the preparation for the commission of an offence. It is also highly improbable that accused 4 and 5 would set about conducting a conversation which envisaged the commission of a crime in the company of a person who was unknown to them, or did not share their object. To the extent therefore that accused 2 seeks to suggest an innocent involvement in those preliminary discussions such explanation is palpably false.

[179] Accused 2's alleged innocent presence on the scene of the robbery on 8 November does also not bear scrutiny when weighed against the evidence presented by the prosecution as a whole.

[180] Mudau testified that on 11 October 2011, on the day of the aborted robbery, he saw accused 2 standing at the corner of Stevenson Road

and Old Grahamstown Road. The transcript of the meeting held between Mudau and accused 5 and 7 and one of the deceased persons on the evening of 11 October 2011 contains a significant exchange when Mudau tells the suspects that he saw one of the group who had come to previous meetings, that one who had come along but didn't talk much. That can only be accused 2 (when regard is had to the videos and transcript).

[181] There is the further extraordinary coincidence, namely that accused 2, who was admittedly part of the group of persons engaged in the early planning for the commission of the theft of liquid platinum should select the very day on which the robbery was carried out to go to the very place where the robbery was in fact executed, ostensibly for an innocent purpose. That coincidence stretches credulity to breaking point. When evaluated against the positive identification of accused 2 by Mudau, who had met him on a number of occasions, had seen him on 11 October and knew him to be part of the group, the conclusion is inescapable that accused 2's version as to how he came to be there is not reasonably possibly true.

[182] It was submitted on behalf of accused that Mudau's identification of them as being perpetrators who were present at the scene of the robbery is unreliable. In this regard it was submitted that since he was a party to

the conspiracy his evidence should be treated with caution. I accept that. The assessment of the identification must be considered also in the light of Mudau's evidence as a whole.

[183] Accused 2 attended several meetings with Mudau in the presence of, inter alia, accused 4 and 5. Mudau had therefore had ample opportunity to familiarise himself with accused 2 and therefore to recognise him when he saw him. On the day of the robbery Mudau saw this person alight from the back of the Bantam and move towards the back of the Brinks vehicle. He was carrying a firearm. That is where he was found when the shooting died down. I accept Mudau's identification of accused 2 as a perpetrator as credible and reliable. I find that accused 2's explanation for his presence on the scene to be false beyond a reasonable doubt and according I accept that the state has proved beyond a reasonable doubt that accused 2 participated in the commission of the robbery on 8 November 2011 and that he was armed when doing so.

[184] In respect of both accused 1 and 2 the state sought their conviction on the basis of the doctrine of common purpose. In this regard reliance was placed on the well known principles set out in *Safatsa* and *Mgedezi.*

[185] In *Mgedezi* the court held that if there is no proof of a prior agreement between the perpetrators of an offence an accused whose individual act is not causally related to the death of the person who died during the commission of the offence can nevertheless be convicted of murder on the basis of the doctrine of common purpose. For such a conviction to follow five requirements have to be met, namely (a) he must have been present at the scene where the violence was committed; (b) he must have been aware of the assault; (c) he must have intended to make common cause with those committing the assault; (d) he must have manifested his sharing of a common purpose by himself performing some act of association with the conduct of the others; and (e) he must have had the requisite intention to kill or to contribute to the death of the deceased.

[186] In the case of accused 1 and 2 both were present at the scene where the violence was committed. Both were armed with firearms and both had travelled to the scene in the company of their co perpetrators who were also armed. The evidence establishes that that both actively associated themselves with the common intention of the perpetrators to commit the robbery and, in the case of accused 1, he pointed and fired his firearm in the direction of the occupants in the Brinks security vehicle. Insofar as intention is concerned the accused must have foreseen that one or other of the co-perpetrators would use the firearm in his

possession to commit violence directed at another person in the course of executing the robbery and overcoming any resistance to the theft of the platinum or in the course of retaining possession of the stolen goods or making good their escape. In the circumstances of this case, therefore it must follow that the accused foresaw the possibility that such violence would cause injury or even death to another person and, notwithstanding such foresight, the accused continued to make common cause with the co-perpetrators in the execution of the robbery. On this basis the requirements of the doctrine common purpose are established in relating to accused 1 and 2.

Accused 4

[187] The evidence against the accused 4 consists of the evidence presented by the police agent, together with the content of the video and audio recordings made by him during the course of several meetings attended by the accused.

[188] Accused 4's defence, disclosed during the proceedings, was to the effect that he had not participated in the commission of the robbery on 8 November 2011, in any manner and that although he had participated in some meetings with the police agent he had not conspired to commit or procure the commission of any offence.

[189] The accused stated that he was introduced to the police agent by accused 5 and that the purpose of those meetings was to discuss with the police agent the possibility of unlawfully obtaining liquid platinum, which was being transported by the Brinks security company. He admitted that he was interested in participating in an unlawful enterprise to obtain platinum because he wanted to make easy money. He stated that it was never his intention to engage in or procure the commission of an armed robbery. Instead, he stated, he was interested in establishing a means whereby the liquid platinum could be stolen. According to him, no agreement was reached by the participants in the meetings prior to 4 October 2011, in which they had agreed as to the means by which the liquid platinum would be obtained. Various options were being considered. These included the possibility of a theft of the platinum at the premises of Brinks security. According to him, it was certainly not envisaged that any violence would be used in order to procure the platinum.

[190] On 5 October 2011 accused 4 was arrested on a charge of kidnapping and he remained in police custody until he was released on 25 October 2011. This was not placed in dispute by the prosecution. The accused stated that during this period he received no telephone calls or SMS messages from the police agent. It was only after his release that

accused 5 indicated to him that Mudau had been asking about his whereabouts and he then decided to again meet with Mudau.

[191] Two further meetings were held between accused 4, 5 and Mudau before the commission of the robbery on 8 November. The accused stated that following the meeting of 1 November he had become very concerned about his continued involvement in the plan to steal platinum. This was so, he said, because during the course of that meeting mention had been made of the use of explosives. Since it was not within his contemplation that violence would be used during the commission of these offences he decided that he did not wish to participate any further. Following this meeting he expressed his reservations to accused 5, who, apparently, agreed with him. Accused 5 however, said that they should not indicate their withdrawal from the enterprise at that stage. For this reason accused 4 was agreeable to meet with Mudau again and to continue with those meetings. He and accused 5 together with one of the deceased then met the police agent on 7 November 2011. This was to finalise the arrangements for the commission of the offences which were to take place on the following day. According to accused 4 he pretended to Mudau that he was committed to the enterprise.

[192] After this meeting the accused telephoned a certain Grootboom when he referred to a friend who is a member of the South African Police

Services. He said that he told him that there was to be a robbery in Deal Party on the following day, although he did not specify the place where it would take place. He said that he did so because he did not want anything to do with the planned criminal enterprise.

[193] On 8 November 2011 he did not in any way participate in the commission of the offences. He stated that during that morning he had gone with one Lucky to a used car dealership in Port Elizabeth in order to assist in the purchase of a motor vehicle. When that was completed he then returned to his home in New Brighton because his child was ill. At approximately 12 noon that day, and whilst he and his brother-in-law were seated in his Mini Cooper vehicle outside of his house a traffic officer, known to him, arrived. They had a brief conversation with one another during which the traffic officer informed him about a shootout that had taken place in Deal Party that morning. He later ascertained that the shootout related to the robbery of the Brinks security vehicle in Stephenson Road.

[194] In his defence the accused tendered the evidence of both the traffic officer and Grootboom. The traffic officer confirmed that he had met the accused at approximately 12 noon on 8 November 2011, outside of his house. Grootboom testified that at approximately midday on 7 November 2011 he had received a telephone call from a person who did not identify

himself. However, since accused 4 is known to him, he recognised his voice. Accused 4 told him that "there would be an incident going down in Deal Party tomorrow". When he asked about this he was not given any further details. He said that he would report this to his superiors and, in due course, be in touch regarding further details. He reported this to his commanding officer, Col Maqashala on that day. According to Grootboom on the morning of 8 November 2011 he accompanied Col Maqashala and Col Manyana to a scene in Stephenson Road. While there he received another telephone call from the same person who had contacted him on the previous day, namely accused 4. Col Manyana and Col Maqashala were present when he received this telephone call. He turned his phone on to speakerphone and they were accordingly able to hear the content of that telephone call. Accused 4 informed him that he was on the freeway and that the vehicle had just passed him or words to that effect, indicating that the incident of which he spoke previously was about to take place.

[195] It was argued on behalf of accused 4 that the video evidence and the transcripts of the audio recordings do not establish that the participants in those meetings reached agreement in respect of the commission of an armed robbery. It was submitted that prior to 4 October 2011 there was in fact, no agreement in respect of the commission of any offence and

that accordingly accused 4 was not a party to any conspiracy to commit robbery or theft on 11 October 2011 when he was then in custody.

[196] I have already dealt with this aspect earlier in this judgment and need not repeat that here. It suffices to state that the accused's denial of an agreement to commit an offence prior to 4 October 2011 does not accord with the facts as established by the prosecution.

[197] As indicated the accused's defence was that he dissociated himself from the planned commission of the offences on 8 November and that he had already withdrawn from participation in the conspiracy.

[198] In *S v Nduli and Others* 1993 (2) SACR 501 (A) at 504 D the following was said in regard to the defence of dissociation:

> "Dissociation consists of some or other form of conduct by a collaborator to an offence with the intention of discontinuing his collaboration. It is a good defence to a charge of complicity in the eventual commission of the offence by his erstwhile associate or associates (see *S v Nomakhlala and Another* 1990 (1) SACR 300 (A) at 303g-304d; *S v Nzo and Another* 1990 (3) SA 1 (A) at 11H-I; *S v Singo* 1993 (2) SA 765 (A) at 771E-773E). The more advanced an accused person's participation in the commission of the crime, the more pertinent and pronounced his conduct will have to be to convince a court, after the event, that he genuinely meant to disassociate himself from it at the time. It remains, I tend to think, a matter of fact and degree as to the type of conduct required to demonstrate such an intention. In *S v Beahan* 1992 (1) SACR 37 (ZS) at 324b-c, the position was stated, after a review of some English authorities, in rather more rigid terms:
>
> 'I respectfully associate myself with what I perceive to be a shared approach, namely, that it is the actual role of the conspirator which should determine the kind of withdrawal necessary to effectively terminate his liability for the commission of the substantive crime. I would venture to state the rule this way: Where a person has merely conspired with others to commit a crime, but has not commenced an overt act towards the successful completion of that crime, a withdrawal is effective upon timely and unequivocal notification to the co-conspirators of the decision to abandon the common and unlawful purpose. Where, however, there has been participation in a more substantial manner

> something further than communication to the co-conspirators of the intention to dissociate is necessary. A reasonable effort to nullify or frustrate the effect of his contribution is required.'
> These remarks, to which I shall refer to as the 'the dictum in the *Beahan's* case', are applicable, as was pointed out in *Singo's* case *supra* at 772B-C, to persons who, by prior arrangement, become co-conspirators and not to those who, by active association falling short of prior agreement, became associates to a common purpose to commit a crime. The correctness of the dictum in the *Beahan's* case was accordingly not considered by this Court in *Singo's* case. The instant case, unlike *Singo's* case, is indeed one of co-conspirators. The dictum in *Beahan's* case would accordingly be applicable. But whether it is essential to apply to the facts of this case, or to express a view as to its correctness, is another matter to which I shall in due course revert." (my emphasis)

[199] The court in the *Nduli* matter went on to consider the particular facts upon which the defence of dissociation was founded and came to the conclusion that it had not been established as a reasonable possibility that the appellant had dissociated himself from the planned enterprise. That conclusion was arrived at without regard to the dictum in the *Beahan's* case and the court went on to state (at 506J-507B): that:

> "If the letter of that dictum were to be applied to the facts of this case, it would of course be an *a fortiori* situation: even in terms of his own statement to the first appellant failed to notify his co-conspirators, when he had ample opportunity of doing so, of his fixed intention to abandon the unlawful common purpose; and to the extent that the matter had already progressed well beyond the mere planning stage, he failed to nullify or frustrate its implementation. But because I come to the conclusion, without regard to the dictum in *Beahan's* case, that dissociation has not been established, it is not necessary to venture a view as to whether that dictum, expressed as a rule, is a rule of law in this country or at best a rule of thumb. That issue can be left for consideration by some other court at some other time."

[200] In *S v Lungile and another* 1999 (2) SACR 597 (SCA) at 603, this issue was again considered. The court stated at para 20, that:

> "The present case differs from *S v Singo (supra)* where there was no prior agreement and a common purpose was manifested simply by conduct (see

> 233*a-c*). It may well be the correct position, as was stated in *S v Beahan* 1992 (1) SACR 307 (ZS) by Gubbay CJ, that where there had been a prior agreement to commit a crime, and participation to some substantial degree in its execution, that something more than a mere withdrawal is required to establish a legally effective dissociation, eg a notification to the co-conspirators and a nullification or frustration of the further implementation of the enterprise. Whether the *dictum* in the *Beahan's* case applies in our law, and whether it is a rule of law or rule of thumb, have been left open by this Court in *S v Nduli and Others* 1993 (2) SACR 501 (A) at 504*d-j* and 506*j*-507*b*. The matter need not be decided in the case now before us, because it is clear that, on whatever view one takes of the matter, there was no effective dissociation. The first appellant's mere departure from the scene is a neutral factor. It is more likely that he fled because he was afraid of being arrested, or of being injured, or to make good his escape with the stolen money and goods. It has, therefore, not been established as a reasonable possibility that the first appellant dissociated himself from the planned enterprise and its *sequelae* (cf *S v Nduli and Others* (*supra* at 506*j*))."

[201] The present is a case involving co-conspirators and a conspiratorial criminal enterprise which had already advanced to a substantial degree by the time of the alleged dissociation.

[202] In my view it is necessary to consider the effect of the *Beahan dictum* in the circumstances of this case. That dictum, it seems to me, proceeds from the logical premise that the greater the involvement and the more advanced the execution of the criminal enterprise, the more clearly an accused person who relies on dissociation must establish a basis for a finding of dissociation. This is not to say that such an accused attracts an onus. Rather it is to suggest that the accused should establish the performance of some positive act of withdrawal or dissociation. It is also necessary to establish that the accused had a clear and unambiguous intention to withdraw from the criminal enterprise (see *Singo* (supra) at 772H, I).

[203] *Snyman* (supra at page 267) suggests that the type of act required for an effective withdrawal depends upon a number of considerations. These may include an attempt to dissuade co-conspirators from proceeding with the plan (cf *S v Ndebu* 1986 (2) SA 133 (ZS) at 137C; see also *S v Nzo supra* at page 10 to 11). Other considerations may include the taking of steps to thwart or prevent the performance of the criminal enterprise such as by reporting the matter to the police timeously and providing the police with the means to prevent the commission of the offence (see *Beahan; supra)*.

[204] The dictum in *Beahan* referred to above commends itself to me as sound principle and as one which is consistent with our law. In my view a co-conspirator who has by his conduct and actions played a central role in the initiation of a conspiratorial enterprise and who proceeds to facilitate its execution must – if he wishes to establish effective dissociation from the performance – actively set out to undo the conspiracy or where that is not possible thwart its execution. What will constitute effective dissociation will depend of course on the particular facts of the matter.

[205] In this instance the evidence establishes that accused 4 played a significant role in devising the plan to commit the planned robbery. It appears from the transcript of the meetings that he functioned as the key link in securing buyers for the platinum and that he had functioned in that

capacity previously. He brought other persons into the planning process and referred in the discussions with the police agent to the involvement of other "guys" in the planning.

[206] It is apparent also that although he was not directly involved in the events of 11 October since he was at that time in custody, he immediately returned thereafter to the central role that he had previously played.

[207] His evidence as to the basis for his decision to withdraw must also be considered. He stated in his evidence that it was the discussion about the use of explosives that had sparked his decision to withdraw. He asserted that this occurred at the meeting of 1 November. When confronted with the fact that no such discussion had occurred at the meeting of 1 November he prevaricated. When it was pointed out to him that the discussion about a bomb which had taken place at the meeting of 13 September, a meeting at which he was present, was plainly a discussion about a fake bomb, he claimed that he did not hear that discussion. He suggested that the discussion had occurred at another meeting. Yet the evidence establishes that apart from the meeting of 13 September the issue of a bomb had not been discussed at any other meeting at which accused 4 was present.

[208] Accused 4's explanation for what had prompted his alleged withdrawal is not supported by the facts and appears to be a self-serving explanation seized upon by him. In addition to this there is the evidence, on his version, as to what he did to manifest his decision to withdraw. He claims to have told accused 5 that he wished to withdraw. He claims that they agreed to continue meeting with Mudau so as not to alert the others of their decision to withdraw. He only elected to take other steps, i.e. to inform a policeman whom he knew, on 7 November on the evening before the robbery. On his own evidence he did not tell this person what was to happen, nor where this was to take place.

[209] The fact that he told Grootboom something on 7 November was not disputed by the prosecution. According to Grootboom he was not given any details as to what was to take place nor where it was to take place other than in the Deal Party area. It seems plain that on the basis of that which was conveyed to Grootboom that no effective steps could then be taken to frustrate the carrying out of the prior agreement to commit an offence nor to dissuade the co-conspirators from continuing with that criminal enterprise.

[210] There is also the further consideration of the effect of Grootboom's evidence. In this regard he stated that the accused telephoned him again on 8 November in the morning and informed him that that the vehicle

had passed him or that he had passed the vehicle on the freeway. Mr Price, who appeared for the accused, argued that this evidence was not reliable because no mention had been made by the investigating officer about this fact when he had testified. The difficulty with this submission is that the alleged lack of reliability of the evidence is advanced by the accused himself, the very person who presented the evidence of the witness in his case.. No doubt the reason why it was sought to suggest that this evidence should be discounted or that it should be disregarded as unreliable is because it serves to undermine accused 4's evidence that he had nothing to do with the carrying out of the criminal enterprise on 8 November. Grootboom's evidence, if it is to be accepted, provides some support for the evidence of the police agent Mudau who testified that he saw the accused 4 driving a white Toyota Yaris pass the Brinks vehicle on the freeway. This evidence, if it is to be accepted and there is no reason not to do so, suggests that contrary to accused 4's assertion that he had nothing to do with the events of 8 November that he continued to play the role, which it was intended that he should play on that day, namely to monitor the movement of the Brinks security vehicle from the airport to Deal Party where the robbery was to take place and to furnish his co-conspirators with information to that effect.

[211] In my view the accused's conduct does not, in the circumstances of this case, establish that he manifested an unequivocal intention to dissociate

himself from the commission of the offences or that his positive act was sufficient to establish dissociation from the commission of the crimes which he had conspired to commit with his co-conspirators.

[212] Accordingly accused 4's liability for the commission of the offences is to be determined on the basis of the existence of a prior agreement to commit the offence and the existence of a continuing common purpose to carry into effect the criminal enterprise which was the subject of the conspiracy.

[213] In regard to this aspect the prior agreement consisted of an agreement to commit robbery. Accused 4 knew that the perpetrators would be armed with firearms. He knew that the robbery was to take place in broad daylight and in a public place and that both Mudau and his companion would be armed. He knew too that the passenger in the Brinks vehicle was not a participant in the criminal conspiracy. He must have foreseen that there was a possibility that violence might be used to overcome any resistance that might be encountered and that in the execution of the criminal enterprise persons might be injured or even killed.

[214] In the circumstances he is liable as a co-perpetrator for the commission of the offences on 8 November. I shall deal hereunder with what the state has proved in that regard.

Accused 5

[215] The case against accused 5 is founded upon a similar basis to that of the case against accused 4. The evidence against accused 5 consists of the evidence of the police agent, together with the content of the audio and video recordings tendered by the prosecution. It is not in dispute that accused 5 participated in numerous meetings with the police agent. Indeed it is common cause that he was present at the very first meeting and that he continued to remain involved in the process of planning the unlawful and illegal acquisition platinum throughout.

[216] The evidence of the police agent was that accused 5 introduced himself as Xolani and that he indicated that he was aware of the initial contact, which had been made with him at the Steers food outlet in Algoa Park on 12 August 2011. According to the police agent it was accused 5, who introduced accused 4 to him when he brought accused 4 to the second meeting that was held on 21 August 2011. It was the evidence of the police agent that accused 5 played a key role throughout in the

conspiracy to commit an offence and that accused 5 was an active participant in the discussions that were held.

[217] The accused denied that he participated in the robbery, which was executed on 8 November. He conceded in his evidence that he indeed did participate in the meetings that were held with the police agent and that he was indeed interested in unlawfully and illegally obtaining liquid platinum in order to make money. He alleged, however, that he became uncomfortable with the discussions at a certain stage and that he decided not to participate in the planned activities on 8 November. In respect of his whereabouts on 8 November he stated that he was not in Port Elizabeth and that he was in fact in Durban where he had gone in order to purchase clothes which he intended to sell as part of his business. He accordingly effectively pleaded alibi in respect of his whereabouts on 8 November.

[218] The accused was confronted in cross-examination with an extract of the bail application proceedings in the lower court. In that application accused 5 had submitted an affidavit in which he alleged that he had travelled to Durban for the purposes of purchasing clothes and that he was in Durban on the 6th and 8th of November and that he returned to Port Elizabeth on or about 24 November. In support of this allegation he attached to the affidavit handwritten receipts indicating the purchase of

certain clothing items. These receipts were dated 6 and 8 November and on both receipts there is a date stamp reflecting those dates. During the course of the bail application the video recording made by the police agent on the evening of 7 November 2011, on the day before the robbery, was presented in evidence, as it was at trial. That video, it is common cause, indicates that accused 5 was present in Port Elizabeth on the evening of 7 November 2011.

[219] The accused's evidence at trial was that he was mistaken as to his presence in Durban on 6 November and that he had in fact only travelled to Durban on the evening of 7 November after he had had the meeting with the police agent. His evidence before this court was therefore that the receipt dated 6 November was apparently incorrect as a result of an error in the date.

[220] The accused's evidence in respect of his alleged alibi was a clear attempt to overcome the difficulty of damning evidence as to his presence in Port Elizabeth on 7 November 2011 and a clear attempt to avoid the charge that he had put up a false alibi during the course of the bail application proceedings. During his evidence before this court he could offer no explanation as to how the error had occurred in respect of the invoice dated 6 November 2011. Nor, what, if it was indeed an error, the correct date should have been. What was also striking is the fact that

accused 5's counsel, when he was cross-examining the prosecution witness initially put it to the witness that the accused would say that he was not in Port Elizabeth on 8 November 2011 that he was in Durban. The record shows that when counsel was putting this proposition to the witness the accused drew his attention and that counsel took further instructions regarding that aspect. Immediately thereafter counsel withdrew the proposition that the accused would say that he was in Durban at the time of the commission of the offence.

[221] It is in my view clear beyond any doubt that the accused had initially sought to put up a false alibi as to his whereabouts on 8 November 2011 and, when caught out, sought to adjust his version of events in a manner that would not lead to the conclusion that he was a dishonest witness in that regard. In my view his efforts failed. The accused was a poor witness who, somewhat belatedly sought to capitalise on the case presented by accused 4 regarding his alleged dissociation from the robbery and withdrawal from the conspiracy. Accused 5's alleged withdrawal from the conspiracy on the evening prior to the commission of the offence is not supported by any credible and reliable evidence. To the contrary, his assertion of a false alibi suggests that he did not in fact withdraw from or dissociate himself from the commission of the offences that flowed from the conspiracy of which he was undoubtedly a part.

[222] I have, in respect of the discussion of the case of accused 4, already dealt with the nature of the conspiracy and it is therefore not necessary to repeat those remarks here.

[223] It flows from what I've set out above that accused 5, as a party to the conspiracy, shared a common purpose and intent with the perpetrators of the robbery on 8 November 2011 and that the state has, beyond a reasonable doubt, established accused 5's liability for the commission of the offences which flowed from the execution of that prior agreement and common purpose.

Accused 6

[224] The case against accused 6 is founded upon the content of the statement made by him to Col Cele. For the reasons indicated hereinabove the statement was ruled to be provisionally admissible following the trial within a trial. It was submitted on behalf of accused 6 that the admissibility should be reconsidered in the light of the evidence tendered by the accused and in the light of the fact that it is the only evidence tendered by the prosecution, which bears upon the accused's alleged involvement in the commission of the offences.

[225] There is in my view no basis for doing so. That is so because the accused tendered no additional evidence to suggest that the statement was not freely and voluntarily made and that he was unduly influenced to make the statement.

[226] It was argued on behalf of the accused that the content of the statement made by him was not supported by evidence tendered by the prosecution or was unsubstantiated and therefore unreliable. In particular, it was submitted that the reference in the statement to a first meeting at 51 Club as well as the second meeting between accused 6 and the other persons mentioned is not supported by any other evidence tendered by the state.

[227] That is indeed so. It is however hardly surprising that it is so since the meetings referred to did not involve the police agent and, at face value, appear to relate to planning activities undertaken by the perpetrators of the planned robbery. Rather than point to the unreliability of this statement this aspect of the statement gives the lie to the suggestion by the accused that he was told what to say and was given false information which he had to conveyed to Col Cele. In any event, the reliability of the statement is to be assessed as a whole, having regard to the existence of evidence, if there is such evidence, which provides some corroboration for the content of the statement.

[228] It was suggested that the references to the meetings with the driver of the security vehicle, as taking place at the Phakama building do not accord with the common cause facts which indicate that the meeting first took place at the Steers food outlet, and thereafter the series of meetings at the flat of the police agent.

[229] What is apparent from the content of the statement however is that the perpetrators of the robbery made contact with the driver of the security vehicle; that they sought and obtained information from the driver of the vehicle regarding the time of delivery and routes that he would follow; that it concerned the theft of platinum from the vehicle; that three stolen motor vehicles would be used in the course of executing the robbery; that accused 6 was assigned the task of providing surveillance of the area together with a policeman involved in the plan to rob the Brinks security vehicle; that the robbery was called off on an occasion and that it was carried out on a subsequent date.

[230] All of these features accord with the common cause or objective facts established by the prosecution. It is also clear from the statement that accused 6 was present at or near the scene of the robbery on the day in question.

[231] It was submitted that the reason given in the statement for calling off the robbery on the first occasion, namely that a suspicious Navy VW Golf was seen in the vicinity of the Brinks security vehicle, does not accord with the reason given by the perpetrators to the police agent for calling off the robbery. It is indeed so that police agent testified that he was informed that they had decided to call off the robbery because of the heavy police presence associated with the visit of the police commissioner to Port Elizabeth on that day. However, it is also apparent from the transcript of the meeting held on the evening of 11th of October 2011 that accused 7 referred to the fact that there was a suspicious Navy VW Golf in the vicinity of the Brinks security vehicle which they had not anticipated. In that exchange the police agent explained that the Navy vehicle with the four white occupants was in fact a vehicle conveying other security personnel from the Brinks security company. In my view the reference to a Navy golf as being present on the day of the aborted robbery is, contrary to the argument advanced on behalf of accused 6, strongly indicative of the fact that the accused had knowledge of those facts and was indeed a participant in the events of that day.

[232] That however is not the end of the matter. The state bears the onus to prove the guilt of the accused beyond a reasonable doubt. The sum total

of its case against the accused rests on the content of the statement by him to Col Cele.

[233] The question that arises is whether the content of that statement properly considered amounts to an unequivocal admission of all of the elements of the offence(s) for which the accused stands charged.

[234] The state concedes, quite rightly, that there is nothing in the statement which suggests that the accused knew or ought to have known that the perpetrators of the robbery of 8 November would be armed with firearms and that he would therefore have foreseen the possibility of injury or death occurring as a result of violence perpetrated during the execution of the robbery. For this reason the state did not seek a conviction in respect of the firearm charges, the attempted murder and the murder charges. The state only sought a conviction in respect of robbery and the three counts of theft.

[235] The conviction for theft was sought on the basis that the statement contains an admission that the vehicles to be used in the perpetration of the robbery were stolen.

[236] A close reading of the statement makes it clear that the admission, such as it is, relates to knowledge about the use of stolen vehicles for the robbery which was planned but was aborted. There is nothing contained in the statement which indicates that the accused admitted to knowledge of the use of stolen vehicles during the robbery executed on 8 November. There is accordingly no unequivocal admission relating to the theft of the three motor vehicles specified in the charge sheet. In any event the admission, such as it is does not establish a basis, beyond a reasonable doubt, for the conviction of the accused on those charges. That leaves the question of the robbery charge.

[237] The state sought a conviction upon the basis that the accused had by his admission made common cause with the perpetrators of the robbery. He was, according to the statement, on the scene in the sense that he had provided crucial information to the perpetrators during the course of the execution of the robbery so as to assist the robbers in the execution of the crime. That, according to the statement, was the particular role that he was required to play, namely surveillance of the area and to communicate with the perpetrators. There can be no doubt from the content of the statement that the incident referred to in the statement was that which occurred in Stephenson Road on 8 November. In this regard he stated that he saw Cousin lying dead near a white VW Polo. He also refers to the other persons who died on the scene by their

nicknames which were admitted by accused by way of section 220 admissions.

[238] It is nevertheless necessary to determine whether this admission – namely that he was part of a group that had planned to execute a robbery of platinum and that on the day of the robbery he was a participant in the execution of the robbery by playing a particular role – constitutes proof beyond a reasonable doubt that the accused was a co-perpetrator of the robbery.

[239] He admits that he was part of a group who planned the execution of a robbery. He identifies some of the members of that group, four of whom were shot and killed during the execution of the robbery on the 8 November. In the case of three of the deceased persons blood found on weapons recovered on the scene was linked by DNA analysis to that of the deceased. In another case human tissue found on a red flag was linked to that of a deceased person and, in the case of Cousin he was identified as the driver of the VW polo who was shot when that vehicle attempted to make its escape from the scene of the robbery.

[240] Accused 6's statement therefore contains an admission to being part of the group of perpetrators who planned and executed the robbery on 8 November. The statement makes no reference to firearms nor does it

indicate whether the accused was aware that the perpetrators would be armed with firearms. It cannot therefore be said that his admission of involvement in the execution of a robbery constitutes an admission either that firearms would be used or that grievous bodily harm would be threatened or would be inflicted. In the circumstances the content of the statement made by the accused constitutes no more than an admission in respect of the crime of robbery not robbery with aggravating circumstances. He can accordingly only be convicted of robbery in respect of count 1. In respect of all of the other charges he is entitled to an acquittal.

Accused 7

[241] The case against accused 7 is also based upon the evidence, in the form of the testimony of the police agent and the audio and video recordings of meetings held with the police agent, as to accused participation in the prior planning of the robbery which took place on 8 November. The prosecution accordingly relied upon the existence of a prior agreement as the basis upon which it sought to establish the existence of a common purpose between accused 7 and his co-accused and the perpetrators of the robbery on 8 November.

[242] It was not in dispute that accused 7 had participated in several meetings with the police agent. These meetings preceded the 11 October 2011 aborted robbery and, according to accused 7 he did not participate in any meetings after that date.

[243] It was suggested, in argument, on behalf of accused 7 that there had at no stage been an agreement concluded to perpetrate a robbery during the course of meetings which were attended by accused 7. The accused furthermore testified that that he was suspicious of the police agent and that he was not committed to participating in the execution of any criminal activity. He also stated that he had attended the meeting on 11 October solely to gauge the reaction of the police agent and to determine whether he could be trusted or not. He said that as a result of his observations of the agent's reaction during the course of the meeting of that he, accused 7, decided to have nothing further to do with the planned theft of platinum and that he therefore withdrew from any further involvement. He stated that since he is a long distance taxi driver that he was out of Port Elizabeth on 8 November 2011 and that he had nothing to do with the events of that day. He only came to hear about what had happened and in particular the death of his neighbour Cousin, sometime after 8 November.

[244] A careful reading of the typed transcripts of the meetings attended by accused 7 indicates that from the moment he began to participate in those meetings that he played a significant and leading role in the formulation of strategies to facilitate the execution of the planned robbery. He was present when the final decisions were taken regarding the route that would be followed by the Brinks security vehicle on the day of the robbery; he visited the scene where the robbery was planned to take place, together with the agent and other participants and, on that occasion, provided the transport for that purpose. He was present when the question of the use of a fake explosive device was discussed as a means to explain why the back of the Brinks security vehicle had been opened by the driver of the vehicle. His contributions in the meeting of 11 October indicate that he was fully aware of and very closely associated with the detail of the execution of the aborted robbery on that day. It was accused 7 who explained why the robbery had been aborted and, indicated unequivocally to the police agent that the group of perpetrators were present, were observing what was taking place and had decided not to execute the robbery on that day because of concerns about a significant police presence in the area but were unable to communicate with the driver because, as had been arranged, the driver had already switched off his cell phone. After informing them that he was en route from the airport. All of these were features of the plan as determined by the perpetrators of the conspiracy.

[245] All of this evidence derives from the content of the video recordings made by the police agent, the accuracy and correctness of the content of which was admitted by the accused. This evidence, properly considered, gives the lie to the assertion that accused 7 was only participating in a discussion in order to determine whether the police agent could be trusted and that there had been no agreement to execute any planned robbery at meetings in which he participated. In this regard the accused's evidence is demonstrably false.

[246] In my view the evidence of the police agent, coupled with the audio and video recordings establish unequivocally that accused 7 was a party to the conspiracy to commit robbery and that the prior agreement was carried into execution on 8 November 2011.

[247] Accused 7's claim to having withdrawn from the conspiracy cannot of course assist him in relation to the conspiracy charge. In so far as he claimed to have dissociated himself from the execution of the planned robbery on 8 November 2011 there is no evidence at all of any such positive act of disassociation. On his version he did nothing. He merely did not participate in the robbery. The accused relies only on the fact that there is no evidence to establish that the accused was present on the day in question as being the basis for his alleged disassociation.

That in my view is, for the reasons already set out in the judgment insufficient to establish either an unequivocal intention to withdraw or a positive act of dissociation.

[248] The prosecution's case against the accused was that he is a co-perpetrator of the offences and that there existed a prior agreement to carry out the offence. I am satisfied that the prosecution established beyond a reasonable doubt that accused 7 was a co-conspirator and that he is accordingly liable as a co-perpetrator of the crimes carried into execution in the furtherance of the criminal enterprise that was the subject of the conspiracy.

The verdict

[249] I have set out hereinabove my findings in respect of the case against each of the accused.

[250] The prosecution did not seek a conviction against accused 1, 2 and 6 on count two, namely the conspiracy charge. It also, correctly, did not seek a conviction against any of the accused on counts six and seven, namely the attempted murder charges involving the alleged assaults perpetrated on Mudau and Hermaans when shots were fired at the Brinks vehicle.

[251] The state did not seek a conviction against accused 4, 5 and 7 on the conspiracy charge even though it had proved its case against the accused. It sought their conviction for the principal offences executed pursuant to the criminal conspiracy. In this regard the prosecution's approach is undoubtedly correct.

[252] Insofar as accused 4 is concerned (although the same consideration applies to accused 5 and 7) the state argued that in the event that the defence of dissociation from the execution of the robbery is accepted then in that event the accused should be convicted on the conspiracy in the alternative.

[253] As I have indicated accused 4, 5 and 7 were beyond a reasonable doubt parties to the conspiracy to commit robbery and, on the basis of that prior agreement are guilty of the execution of that robbery as co-perpetrators. Since it is generally wrong to convict a person of both the conspiracy and the principal offence it is appropriate that they be acquitted of the conspiracy charge, as the prosecution conditionally conceded in the light of their conviction on the principal charges.

[254] The state only sought a conviction on counts fifteen, sixteen and seventeen, namely the theft of motor vehicles, against accused 6 on the basis that there is no evidence against any of the other accused upon

which such a conviction can be based. Already indicated such a conviction cannot be granted.

[255] As far as the firearm charges are concerned the prosecution sought a conviction against all of the accused, with the exception of accused 6, on all three counts relating to the possession of firearms and ammunition. In seeking such a conviction the prosecution relied upon the existence of a common purpose as the basis for establishing the joint possession by the perpetrators of the firearms and ammunition.

[256] In respect of accused 4, 5, 6 and 7 there is, it is common cause, no evidence that they were at any time in possession of any unlicensed firearms or ammunition. Their liability is solely to be founded on joint possession of the firearms recovered from the scene of the robbery on the basis of their status as co-perpetrators.

[257] The question of joint possession of firearms and ammunition has been dealt with in several judgments. In *S v Nkosi* 1998 (1) SACR 284 (W) at 286 Marais J found that the inference of joint possession is only justified where:

> "..the State has established facts from which it can properly be inferred by a Court that:
>
> (a) the group had the intention *(animus)* to exercise possession of the guns through the actual detentor and
>
> (b) the actual detentors had the intention to hold the guns on behalf of the group."

[258] The SCA agreed with the statement as being the correct legal position in *S v Mbuli* 2003 (1) SACR 97 (SCA) at para 71.

[259] In a more recent judgment (*S v Kwanda* 2013 (1) SACR 137 (SCA)) overturning a conviction on charges of contravening section 32 (1) (a) and (e) of the Arms and Ammunition Act 75 of 1969 (the now repealed Act) the court stated that knowledge that a co-accused is in possession of a firearm is not sufficient to establish that such accused had the intention to jointly possess a firearm with his co-accused. The court explained (at 139i -140a) that:

> "In this matter there are no facts from which it can be inferred that the appellant had the necessary intention to exercise possession of the firearm through Mahlenche or that the latter had the intention to hold the firearm on behalf of the appellant."

[260] That is also the case in this matter. There are no facts which permit an inference to be drawn that accused 4, 5 and 7 had the intention to exercise possession of firearms or that those who had actual possession intended to hold the firearms on behalf of accused 4, 5 and 7.

[261] Accordingly accused 4, 5 and 7 cannot be convicted of possession of firearms and ammunition as set out in counts, three, four and five of the indictment.

[262] In the case of accused 1 the evidence, as already dealt with hereinabove, establishes that he was in possession of the firearm that is the subject of count four and the ammunition dealt with in that regard in count five.

[263] In the case of accused 2 the evidence establishes that he was in possession of a 9mm Norinco semi-automatic pistol and a magazine containing ten rounds. A conviction on count three and five is therefore justified.

[264] I have already dealt with the position of accused 6 fully hereinabove regarding the possession of firearms. He too is entitled to an acquittal in respect of counts, three, four and five as rightly conceded by the prosecution.

[265] That brings me to the verdict in respect of each accused.

[266] For the reasons fully set out in the judgment hereinbefore I am satisfied that the state has proved beyond a reasonable doubt that the accused are guilty as follows:

a) ACCUSED 1 IS FOUND GUILTY ON COUNT ONE, ROBBERY WITH AGGRAVATING CIRCUMSTANCES, COUNT FOUR, COUNT FIVE,

COUNT EIGHT, COUNT NINE, COUNT TEN, COUNT ELEVEN, COUNT TWELVE, COUNT THIRTEEN, AND COUNT FOURTEEN. ACCUSED 1 IS FOUND NOT GUILTY AND DISCHARGED ON COUNTS TWO, THREE, SIX, SEVEN, FIFTEEN, SIXTEEN AND SEVENTEEN.

b) ACCUSED 2 IS FOUND GUILTY ON COUNT ONE, ROBBERY WITH AGGRAVATING CIRCUMSTANCES, COUNT THREE, COUNT FIVE, COUNT EIGHT, COUNT NINE, COUNT TEN, COUNT ELEVEN, COUNT TWELVE, COUNT THIRTEEN, AND COUNT FOURTEEN. ACCUSED 2 IS FOUND NOT GUILTY AND DISCHARGED ON COUNTS TWO, FOUR, SIX, SEVEN, FIFTEEN, SIXTEEN AND SEVENTEEN.

c) ACCUSED 4 IS FOUND GUILTY ON COUNT ONE, ROBBERY WITH AGGRAVATING CIRCUMSTANCES, COUNT EIGHT, COUNT NINE, COUNT TEN, COUNT ELEVEN, COUNT TWELVE, COUNT THIRTEEN, AND COUNT FOURTEEN. ACCUSED 4 IS FOUND NOT GUILTY AND DISCHARGED ON COUNTS TWO, THREE, FOUR, FIVE, SIX, SEVEN, FIFTEEN, SIXTEEN AND SEVENTEEN.

d) ACCUSED 5 IS FOUND GUILTY ON COUNT ONE, ROBBERY WITH AGGRAVATING CIRCUMSTANCES, COUNT EIGHT, COUNT NINE,

COUNT TEN, COUNT ELEVEN, COUNT TWELVE, COUNT THIRTEEN, AND COUNT FOURTEEN. ACCUSED 5 IS FOUND NOT GUILTY AND DISCHARGED ON COUNTS TWO, THREE, FOUR, FIVE, SIX, SEVEN, FIFTEEN, SIXTEEN AND SEVENTEEN.

e) ACCUSED 6 IS FOUND GUILTY OF ROBBERY BEING A COMPETENT VERDICT ON COUNT ONE. ACCUSED 6 IS ACQUITTED ON ALL THE REMAINING COUNTS (I.E. COUNTS TWO TO SEVENTEEN INCLUSIVE).

f) ACCUSED 7 IS FOUND GUILTY ON COUNT ONE, ROBBERY WITH AGGRAVATING CIRCUMSTANCES, COUNT EIGHT, COUNT NINE, COUNT TEN, COUNT ELEVEN, COUNT TWELVE, COUNT THIRTEEN, AND COUNT FOURTEEN. ACCUSED 7 IS FOUND NOT GUILTY AND DISCHARGED ON COUNTS TWO, THREE, FOUR, FIVE, SIX, SEVEN, FIFTEEN, SIXTEEN AND SEVENTEEN.

G. GOOSEN
JUDGE OF THE HIGH COURT

Appearances:

For the State: Adv M.L. Le Roux
Instructed by Director of Public Prosecutions

For the Section 204 Witnesses: Adv G. Wolmarans
Instructed by the State Attorney

For Accused 1: Adv K. Saziwe
Instructed by Legal Aid, Port Elizabeth

For Accused 2: Mr J. Riley
Instructed by Legal Aid, Port Elizabeth

For Accused 3: Adv J.W. Wessels
Instructed by Roelofse Meyer Attorneys, Port Elizabeth

For Accused 4: Adv T.N. Price
Instructed by Sikiwe Attorneys, Port Elizabeth

For Accused 5: Mr A. Ngqakayi
Instructed by Legal Aid, Port Elizabeth

For Accused 6: Adv G. Cilliers
Instructed by Legal Aid, Port Elizabeth

For Accused 7: Adv N.E. Skepe
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