



**IN THE HIGH COURT OF ESWATINI**  
**JUDGMENT**

**HELD IN MBABANE**

**CASE NO. 409/2015**

In the matter between:

**REX**

Versus

**NKOSINATHI C. NDZINISA**

**First Accused**

**NKOSINATHI NTJALINTJALI**

**Second Accused**

**BHEKITHEMBA B. NDZINISA**

**Third Accused**

**SANELE SIBUSISO TSABEDZE**

**Fourth Accused**

**Neutral Citation:** *Rex v Nkosinathi C. Ndzinisa [409/2015] [2021] SZHC 06 (10 February 2021)*

**Coram:** **LANGWENYA J**

**Heard:** 27 February 2019; 28 February 2019; 27 May 2019; 28 May 2019; 3 June 2019; 4 June 2019; 9 October 2019; 14 October 2019; 15 October 2019; 9 December 2019; 10 February 2020; 11 February 2020; 18 February 2020; 20 February 2020; 24

February 2020; 26 February 2020; 28 February 2020; 13 March 2020; 7 July 2020; 26 August 2020; 17 November 2020.

**Delivered:** 10 February 2021

**Summary:** *Criminal Procedure-accused charged with robbery, attempted murder, housebreaking with intent to steal and theft-accused pleaded not guilty-pointing out-accused cautioned and their rights explained before pointing out-evidence of accomplice-court has warned itself about dangers of convicting on the basis of accomplice evidence-accomplice found to have been truthful and his evidence corroborated by evidence independent of the evidence of the accomplice-accused convicted as charged-accused 1 acquitted and discharged on charge of escaping from lawful custody-the second accused was acquitted and discharged on count 34 and count 35 because no evidence was led by the Crown in this regard.*

## **JUDGMENT**

### **Introduction**

- [1] At the commencement of trial, the Court was informed by the Crown that the charges against the third accused were being withdrawn because he has died. Supporting documents to that effect were presented in Court.
- [2] The Crown also applied to withdraw charges against the fourth accused who was now an accomplice witness. Ms. N. Ndlangamandla who represented the fourth accused confirmed the withdrawal of charges that the fourth accused was now an accomplice witness.

[3] The Crown withdrew the first count where the first and the third accused were charged with the murder of Sandile Sibandze.

[4] The trial proceeded against the first and the second accused.

## **The Charges**

### **Charges: Contravention of the Arms & Ammunition Act**

[5] The first and second accused persons were indicted before me on nineteen (19) and seventeen (17) counts of robbery respectively; as well as four (4) and five (5) counts of the contravention of the arms and ammunition Act, 1964 respectively. The first accused further faced two (2) counts of housebreaking with intent to steal and theft; two counts of attempted murder as well as one count of escaping from lawful custody.

[6] In count 2 and count 3 the accused persons were indicted before me for contravening Section 11(1) read with Section 11(8) of the Arms and Ammunition Act 24/1964 as amended, in that on 25 September 2014 and at Central Filling Station, in the district of Manzini they found in unlawful possession of a parabellum 9mm pistol and an astra 9mm pistol in count 1 and count 2 respectively.

[7] In Count 4 and count 5 the accused are alleged to have contravened section 11(2) read with section 11(8) (c) of the Arms and Ammunition Act 24/1964 as amended, in that on 25 September 2014 and at or near Central Filling station in the district of Manzini they were found in unlawful possession of 33 live rounds of ammunition and 209 live rounds of ammunition for count 4 and count 5 respectively.

- [8] In count 6, the second accused was indicted for contravening section 11(2) read with section 11(8)(c) of the Arms and Ammunition Act 24/1964 as amended, in that on 9 September 2014 and at or near Mobeni in the district of Manzini the accused was found in unlawful possession of 2 live rounds of ammunition.
- [9] Notably, although accused 1 and 2 are co-charged for counts 2,3,4 and 5, the Crown has not alleged the doctrine of common purpose.

### **Robbery Charges**

- [10] The various counts of robbery were allegedly committed between the months of February, July, August and September 2014 along the Manzini/Mbabane corridor and specifically at Nhlambeni eZulwini, Malkerns, Phondo eNgculwini, Lugaganeni, Rest Camp, Mahlangatsha and at Mbabane, Fonteyn areas.
- [11] It was alleged in terms of count 7 and count 8 that the accused persons, on 24 September 2014 had forced Ibrahim Variyava and Amina Variyava into submission by threatening to shoot them and that they stole from Ibrahim Variyava an amount of E38 770-00 in count 7; and that they stole a silver ring, 2 silver earrings, 1 silver necklace, 1 bracelet and cash in US dollars amounting to E2 230-00 in count 8. The Crown alleged that the accused acted in furtherance of a common purpose.
- [12] The offences in count 9 and count 10 are alleged to have been committed by the accused persons on 25 August 2014 at eZulwini where the accused, acting in furtherance of a common purpose forced Jabulane Simelane into submission by threatening to shoot him and took from him a sum of

E600,00; Astra pistol valued at E3 900; blackberry cell phone valued at E1 900; Samsung S4 cellphone valued at E6 900; Nokia C7 cellphone valued at E4 500. On count 10 the accused forced Sifiso Simelane into submission by threatening to shoot him and took from him a black blackberry cellphone 210 valued at E3 500; Acer laptop valued at E4 000; and a sum of E100.

[13] It was alleged by the Crown in terms of count 11 and count 12 that on 27 July 2014 and at eNgculwini, the first accused person, forced Masiko Dlamini into submission by threatening to shoot him and took from him a 9mm parabellum pistol valued at E15 000; Samsung galaxy tab valued at E6 000; 70 live rounds of ammunition valued at E11 000; a sum of E5 000; red wine valued at E150. In count 11 the first accused is alleged to have forced Hlobisile Mngometulu into submission by threatening to shoot her and took from her a Samsung tablet cellphone valued at E5 000; Samsung S5 cellphone valued at E8 900 and a sum of E100.

[14] In respect of count 13 it was alleged that on 21 August 2014 the first and the second accused forced Gugulethu Dlamini into submission threatening to shoot her and took from her a Samsung cellphone valued at E899 and a sum of E2 065.

[15] In respect of count 14, the Crown alleges that on 19 August 2014 and at Malkerns, accused 1 forced Donatus Nkonotja Zwane into submission by threatening to shoot him and took from him a Lenovo laptop valued at E12 500 and a Samsung galaxy note 3 valued at E7 410.

[16] On 19 September 2014 the second accused is alleged to have forced into submission Rian Carby by threatening to shoot him and took from him a

HTC cellphone valued at E3 000 and bronze half boots valued at E800. This charge is reflected as count 15 in the indictment.

- [17] In respect of count 16 the second accused is alleged to have forced into submission Marcel Smith by threatening to shoot him and took from him a VW Passat motor vehicle valued at E380 000; a sum of E12 000; 2 iphones valued at E20 000; and a Nokia cellphone valued at E3 000.
- [18] It was alleged in respect of count 17 and count 18 that accused 1 and 2, at Lugaganeni area forced Kiddy Mahlalela into submission by threatening to shoot her in respect of count 17 and took from her a LG G2 cellphone valued at E6 500; navy blue Nokia C3 valued at E2 400 and a sum of E600. With regard to count 18 it is alleged that accused 1 and 2, at Lugaganeni area forced Archie Morale into submission by threatening to shoot him and took from him a Nokia 1100 cellphone valued at E300. In respect of count 19 both accused persons are alleged to have forced Fikile Fihla into submission by threatening to shoot her and took from her a Hisense cellphone valued at E1 800 and cash amounting to E1 400. Regarding count 20 accused 1 and 2 at Lugaganeni area forced Ncami Kunene into submission by threatening to shoot her and took from her a Nokia Lumia 610 cellphone valued at E500; Samsung galaxy S111 mini cellphone valued at E2 500 and cash amounting to E80.
- [19] Count 21 and count 22 are alleged to have been committed at Rest Camp on 22 September 2014 where Gugu Mahlindza and Mpilo Zwane were forced into submission by accused 1 and 2 through threats of being shot with a firearm before they were robbed of their property. Gugu Mahlindza was allegedly robbed of a sum of E8 200; 5 bottles of wine valued at E3 000 and

Sunbird perfume valued at E150. Mpilo Zwane was allegedly robbed of Beckham perfume valued at E450; karimo bag valued at E300 and a Nike bag valued at E300.

[20] It was alleged in respect of count 23 and count 24 that accused 1 and 2 at eNgculwini, Ntabamhloshana area and on 6 September 2014 the accused forced Nolwazi Dlamini into submission by threatening to shoot her with a firearm and took from her a Netsurfer tablet cellphone valued at E2 000; a sum of E600; and a telephone handset valued at E200. Concerning count 24, the accused persons forced into submission Dumile Vanessa Dlamini by threatening to shoot her with a firearm and took from her a MTN Stapper cellphone valued at E500 and a sum of E550.

[21] The first accused is alleged to have on 15 August 2014, at Fonteyn forced Gugu Maphalala into submission by threatening to shoot her with a firearm and took from her a proline computer valued at E3 500; Samsung notebook laptop valued at E3 000; iphone valued at E5 000; Nokia cellphone valued at E700; Kiddies laptop valued at E300; a sum of E700 and food valued at E200. Count 25

[22] The first accused is alleged to have, on 22 July 2014, at eZulwini forced Mduduzi Dlamini into submission by threatening to shoot him with a firearm and took from him a Nokia Lumia cellphone valued at E7 800; Asha 303 cellphone valued at E1 500; Sony Erickson cellphone valued at E3 000 and a pair of size 8 Nike tekkies valued at E800. This is count 30

[23] Accused 1 is alleged to have, on 7 February 2014 and at Mahlanya area forced Lindelwe Treasure Mabuza into submission by threatening her with

violence and in the process took from her a list of electronic gadgets, personal effects and clothes as listed in count 33 of the indictment.

### **Housebreaking and Theft charges**

- [24] The first accused is charged with three counts of housebreaking and theft. The offences are alleged to have been committed at Waterford and at eZulwini. He is alleged to have stolen electrical appliances, cash and personal effects of Banele Dlamini at Waterford on 11 July 2014. The property alleged to have been stolen is: Sony laptop; Compaq laptop; E1700 cash; black bag; cellphone chargers; ipad; a pair of khakhi pants; a bag; a wallet; a cable; ipad charger; international passport; card wallet; Hong Kong dollars of 120; Czech Republic Korans. This is reflected in count 26 of the indictment.
- [25] The first accused is further alleged to have broken into a house belonging to Lindokuhle Dlamini at eZulwini on 16 May 2014. He is alleged to have stolen an Emachines laptop; Toshiba laptop; Gigabyte laptop; Nokia E63 cellphone; E440 cash; Hallmark wrist watch and Tomato wrist watch. This is reflected as count 27.
- [26] In count 32 the first accused is alleged to have committed the offence of housebreaking and theft on 2 July 2014 at Nhlambeni area. The property alleged to have been stolen is: a blackberry curve cellphone valued at E3 000; Samsung galaxy S4 cellphone valued at E3 000; a decoder Xplitor valued at E 2 000 and an ipad valued at E8 000. The property in count 32 belongs to Nikiwe Nxumalo.

## **Escaping from lawful custody**

[27] On count 29, accused 1 is charged with contravening section 43(1) of the Criminal Procedure and Evidence Act, 1938 it being alleged that on 29 September 2014 and at Matsapha police station whilst the accused was in the lawful care of a police officer 3401 Detective Sergeant Themba Dlamini, the accused wrongfully and unlawfully escaped from custody.

## **Plea**

[28] The accused persons pleaded not guilty to the charges.

## **The Case for the Crown**

[29] The Crown led the evidence PW1 Sanele Sibusiso Tsabedze (Tsabedze) who was introduced as an accomplice witness. He related before Court how, on divers occasions he was hired by the first accused to take him to different locations between Mbabane, Manzini, eMangwaneni to name a few. Tsabedze testified that he was employed as a driver of trucks by day and moonlighted as a taxi driver by night. His evidence was with regard to robbery that was committed at eNgculwini. Tsabedze testified that the first accused is his home-boy; and that in July 2014 and at about 10pm at the request of the first accused, he transported him from Manzini to Sidvokodvo. Accused 1 paid Tsabedze E200 as taxi fare. Accused was carrying a bag which he asked to put in the car boot when he boarded the taxi. At Sidvokokdvo, the first accused alighted from the taxi and went to ka Tembe shopping complex. On return, he asked Tsabedze to drive him to Nhlambeni. It was while they were en route Nhlambeni that the first accused ordered Tsabedze to stop in the middle of the road and said he was waiting for

someone to join him on the trip to Nhlambeni. It was while the car had stopped that the police came and requested them to alight from the car. They both alighted from the vehicle. It was dark outside. It was while the police were conducting a body search on Tsabedze that the first accused disappeared into the night and left his bag in the boot of PW1's motor vehicle.

[30] The police took Tsabedze to the police station at Sidvokodvo; they searched the motor vehicle and first accused's bag. In the bag they retrieved a tablet, a play station and clothes. When questioned about the bag and its contents, Tsabedze explained that it belonged to the first accused. At the instruction of the police, Tsabedze called the first accused, his phone rang unanswered. When Tsabedze again called the first accused on the following day, he gave them a run-around and misled them that he was aboard a bus en-route to Siteki. When he was called later on that day by Tsabedze who was with the police at Siteki, the first accused switched off his phone. Except to argue that there was bad blood between himself and PW1, the first accused did not dispute the evidence testified to by Tsabedze.

[31] The police returned to Sidvokodvo police station with Tsabedze and locked him up. The police later took Tsabedze to his homestead at Maliyaduma to collect his medication. He was kept in custody but was subsequently released.

[32] Nikiwe Nxumalo was called as PW17 and testified that she lives in Nhlambeni. Her evidence was in connection with count 32. On 2 July 2014 and before she went to bed, she secured her house by locking her doors and shutting windows of her house. She switched the lights off and went to bed.

She was woken by a light that had been switched on at the passage and she saw a tall thin figure peeping through her bedroom door. She raised an alarm and fled out of her bedroom to the cottage outside. She woke her children and the gardener. When they all came back to the house, they found all the lights were turned on and the door in the passage was broken and the window at the lounge area was open. The intruders entered through the window and took a decoder, cellphones and an Apple ipad. She later identified her Apple ipad (serial number 01232800243) at Sidvokodvo police station. She typed her password into the ipad and was able to access her documents. Nikiwe identified the ipad in Court. The first accused denied breaking into Nikiwe's house and stealing her property. Nikiwe did not see the intruder who stole her property and could not identify him. It is notable that Nikiwe's ipad was found in the bag that was said to belong to the first accused when the police searched it after arresting PW1. It is notable also that the first accused was with PW1 and at the Nhlambeni area when the police asked to search the car. The accused has not disputed that he fled the scene when the police asked to search the car in which he was travelling at Nhlambeni area on the night in question. The accused has also not disputed that the bag and its contents belonged to him.

[33] The evidence of PW38-5387 Detective Constable Nhlanhla Makhanya is relevant to the evidence given by PW1. PW38 was stationed at Sidvokodvo police station in 2014 in the Criminal Investigation Department (CID). On 2 July 2014 he was assigned a case involving a housebreaking with intent to steal and theft case which allegedly took place at Nhlambeni. The complainant was Nikiwe Nxumalo. She reported that her house had been broken into in the early morning hours of 2 July 2014 while she was asleep

inside. She told the police that a black Samsung galaxy; blackberry cellphone and an iphone black and grey in colour and an Apple ipad were taken by the intruder(s). It was PW38's evidence that in the evening of 3 July 2014 he and 6750 Constable Sabelo Dlamini patrolled at Nhlambeni and while doing so, they came across a motor vehicle to wit: a Jetta, registration No. HHP 005NW parked adjacent to the road next to a bush. They stopped and went to investigate. He knocked on the driver's window several times before the driver opened the door. After officer Makhanya had introduced himself to the driver of the stationary vehicle, the driver told him that his name is Sanele Tsabedze from Maliyaduma.

[34] It was when he requested the driver to alight from the vehicle and questioned Tsabedze why he was at Nhlambeni at that time of the night if his home was at Maliyaduma. Officer Makhanya suddenly heard a loud bang from the left side of the motor vehicle at the back seat. It was a male person getting off the vehicle and fleeing the place into the bushes and into the night. PW1 informed the police that the person fleeing the place was Nkosinathi Ndzinisa, the first accused herein. Tsabedze told the police that the first accused was his friend. Tsabedze told the police he had been hired by the first accused to collect him from Nhlambeni. The police searched the vehicle and found a bag which contained a bushknife, crow bar, screwdriver, clothes of a male person, an Apple ipad whose description fitted that given by Nikiwe. The serial number of the Apple ipad was 01232800243. Tsabedze told the police the property inside the bag belonged to the first accused.

[35] Tsabedze was questioned at the police station and locked up. Officer Makhanya's evidence corroborates that of Tsabedze regarding the run

around that the first accused gave them when he was called by Tsabedze. The docket regarding this matter was later transferred to Manzini regional headquarters after the first accused was arrested. In Court officer Makhanya identified the Apple ipad that was retrieved from the bag said to belong to the first accused.

- [36] In August 2014 the first accused again hired Tsabedze's taxi and asked to be transported from Malkerns. Tsabedze informed the first accused that the police were looking for him and that he should report at Sidvokodvo police station. The first accused never told PW1 why he eluded the police from the night he fled from them in July 2014.
- [37] When Tsabedze fetched the first accused from Malkerns, the first accused was carrying a black bag. The time was after 12 midnight when he fetched the first accused from Malkerns. Tsabedze drove the first accused to Mpolonjeni, Mbabane.
- [38] On another day in August 2014, PW1 received a call from an unknown person who asked to be taken to Malkerns. When he arrived at Malkerns to collect the unknown passenger, he found him in the company of the first accused. They asked to be dropped off at Malkerns where there are horses and stables. They requested PW1 to wait for them. The time was around 11pm. PW1 went to fill up the car and returned to the spot where he waited for the first accused and the unknown passenger. The time was past midnight when he received a phone call from the unknown passenger asking him to find them at Bethany. At Bethany, Tsabedze found the passengers he had initially dropped at Malkerns in the company of three other people who were

unknown to him. They all boarded his taxi. The first accused sat on the front passenger seat.

[39] On a different date, in August 2014, PW1 was once again called by the first accused and asked to fetch him from eNtabamhloshana. The time was about 12 midnight when Tsabedze drove to Ntabamhloshana to fetch the first accused. The first accused was found at a bus stop at Ntabamhloshana. On this night, PW1 was driving a truck. The first accused asked PW1 to accompany him on foot to a place around Ntabamhloshana as he explained that the place he was going to was inaccessible by motor vehicle. PW1 testified that the first accused said that he needed PW1 to help him carry certain things from a certain homestead which was not far from the bus stop.

[40] They went to a certain homestead where the first accused opened the door and got inside the house. PW1 says he heard noise coming from inside the house and got inside to enquire. Inside the house, PW1 found the first accused standing next to the bedroom door and carrying a firearm that was silver in colour. The firearm was shining in the dark. PW1 heard the first accused shouting and asking the occupants to give him live ammunition. PW1 saw a woman taking live ammunition and money from a box and gave it to the first accused. PW1 and the first accused subsequently left the homestead. The first accused took a bag from the lounge when they left the homestead.

[41] It was the evidence of PW1 that he realized when they were inside the house that the occupants of the house were being robbed by the first accused. He stated that the first accused pointed the man who was inside the bedroom with a firearm when he demanded to be given the live ammunition. PW1 did

not see the contents of the bag that was taken by the first accused from the lounge of the house in which a man and a woman was robbed at Ntabamhloshana.

[42] When the first accused and PW1 reached the bus stop where they left the truck they found that the truck had developed mechanical problems. When the truck was fixed, PW1 and the first accused travelled to Manzini where the first accused was dropped off at Mangwaneni in Manzini. The first accused paid E200 for taxi fare and E500 for the delay he had caused PW1. When the first accused was dropped off at Mangwaneni, the time was between 1am and 2am.

[43] The first accused denied involvement in the robbery referred to in count 11, 12 and 27 and stated that Tsabedze implicated him in the said offences because there was bad blood between them which goes far back into their childhood as herd boys at Maliyaduma. The first accused also said he does not see eye to eye with PW1 because he was once suspected by PW1's family of having broken into a shop belonging to PW1's mother at Maliyaduma. It is not clear to me how the first accused could, on various occasions hire and use the taxi service of PW1 if they were sworn enemies. The first accused has not taken the Court into his confidence in this regard.

[44] The Court heard that PW11-Masiko Mduduzi Dlamini and PW12-Hlobisile Fortunate Mngomezulu were robbed of their properties while asleep at their home at eNgculwini, Ntabamhloshana. PW11 and PW12 are husband and wife. They told the Court that in the night of 27 July 2014 while they were asleep in their home, they were rudely awoken by intruders who demanded to be given money. Masiko Dlamini testified that when he woke, he found

the intruders in his bedroom and they shone a light in his eyes. When he looked at where he had put his firearm before retiring to bed, he noticed it was no longer there. He was ordered to face down and not move as doing so would result in him being shot. He obliged. The intruders demanded to be given money and live ammunition. He told the intruders that money and ammunition was in the safe. The intruders ordered Hlobsile Mngomezulu to give them the money and the live ammunitions from the safe. Hlobsile did as she was ordered. The total amount of cash taken was E5 000. Masiko Dlamini testified that his firearm was a 9mm parabellum chrome silver in colour with a black handle, serial number 403539 and had one magazine. He produced a license for the firearm. He also testified that in addition to the firearm, ammunition, cash; a Samsung S5 was also taken by the robbers.

[45] Masiko Dlamini and Hlobsile Mngomezulu testified that prior to retiring to bed they had locked the doors in their house. It was their evidence that the robbers gained entry by breaking a sliding door-a main entrance into the house. They testified that there was light inside their bedroom from what appeared to be a torch carried by the robbers. According to the evidence of 5606 Constable Thembinkosi Dlamini, Masiko Dlamini positively identified the second accused as one of his assailants during an identification parade conducted at Matsapha police station in September 2014. Hlobsile testified that a sum of E100 and coins were taken from her handbag; and two tablets and a Samsung cellphone S5 belonging to her husband was taken by the intruders. She told the Court that she was threatened with violence if she did not do as ordered by the intruders.

## **Evidence relating to Count 7 & 8**

[46] PW19 and PW9 Amina Variyana and Ibrahim Variyana are husband and wife. In 2014 they lived at Mahlangatsha, Mankayane Sibovu where they operated a grocery shop business. On 24 September 2014, PW10 went to Manzini to buy stock for the business and left his wife to run the shop. PW10 returned with the stock and the couple closed their business at around 630pm and went home. They used the truck to go home. PW10 was driving the truck while PW9 and their three children were passengers therein. When they got to the gate of their house, PW10 alighted from the truck to open the gate. No sooner had he arrived at the gate than he was accosted by a male stranger who pointed a firearm at him. The male stranger was in the company of another male person. They demanded to be given money. PW10 pleaded with them to spare his life and go to his house with him. He gave them money which was in his pockets there and then. One of the men drove the truck from the gate into PW10's yard.

[47] It is PW9's evidence that she and the children also got to the house after the truck was parked outside by one of the intruders. The intruders ransacked the house and took cash, jewellery and cellphones among other things. PW9 identified accused 2 as one of the people who robbed them. She testified that she was frog-marched by one of the intruders to different locations within the house searching for money. The intruders made off with cash in local currency as well as in US Dollars. According to PW9, the intruders remained inside the house for at least two hours. Inside the house the lights were on and the TV light was on. The intruders asked them to turn the TV on so that the children could watch it and not make noise. While she went

from room to room looking for and identifying money in the house, one of the intruders kept watch over PW10 who sat on the bed with the robber standing behind him and carrying a firearm.

[48] Inside the house, the robbers turned the lights on and ordered PW10 to sit on the bed. The robber took shoe laces and tied PW10's hands at the back while the other robber took PW9 to another room where he was looking for more money. The other intruder stood behind PW10 holding a firearm. The other man took cash from the wardrobe and put it in his pockets. They also took cellphones and before they left they admonished them not to call the police and that if they did, they would kill them.

[49] PW10 testified that the intruders made off with E40 000 as well as R10 000. The robbers further took an undisclosed amount of US Dollars. The Court heard that one of the accused persons' carried a firearm which was silver in colour while the other one carried a black firearm.

[50] After the intruders left, the couple called PW9's brother and informed him of the robbery and he then reported the matter to the police at Mankayane police station. The police came and recorded statements. Later, they were called by police at Mankayane where PW9 identified her jewellery which was recovered by the police.

[51] During cross examination PW10 stated that the first accused is the intruder who stood behind him holding a firearm when his house was being ransacked for money. PW10 testified that he later identified both accused at Matsapha police station when an identification parade was conducted. PW 39 5606 Constable Thembinkosi Dlamini, the police officer responsible for

conducting the identification parade at Matsapha police station confirmed in his evidence in Court that both accused persons were identified by the couple as their assailants when they were allegedly robbed in their house in 2014.

[52] The defence of both accused persons was a bare denial.

### **Evidence of Count 9 and 10**

[53] PW 18 Jabulani Albert Simelane and PW19 Sifiso Njabuliso Simelane are father and son. In 2014 they lived at EZulwini, ka Mvubu eMvana. PW18 testified that on the night of 25 August 2014 he was asleep in his bedroom alone as his wife was at work. He slept with the lights on. It was at around 2am when he heard a loud noise of a window being broken in his bedroom. He was shocked and jumped out of bed and tried to rush to the door but was met by a man who was holding a firearm. The intruder got inside the house through the broken window. He pointed PW18 with the firearm which was silver in colour and ordered him not to move. PW18 obliged. The intruder came next to the door where PW18 stood and demanded to be given a safe for money. PW18 told him he did not have one. The intruder assaulted PW18 on the head with a butt of the firearm he was carrying. PW18 bled from the head as a result of the assault. The first intruder was soon joined by another male person who gained entry through the broken window.

[54] PW18 was ordered by the first intruder not to move when he stood next to the door. The second intruder carried a rod that looked like a crow-bar. The second intruder took PW18's T-shirt and wiped the blood that came from his head. While that was happening, the first male person to enter the house was

ransacking the drawers in PW18's bedroom where he retrieved PW18's licensed firearm and live ammunition. The firearm is an Astra with serial number S1654 and 200 live rounds of ammunition. In PW18's bedroom the intruders further took a Blackberry cellphone, a Samsung S4 cellphone as well as a Nokia cellphone as well as E600 cash.

- [55] PW18 and the two intruders then left his bedroom and went to PW19's bedroom. When they entered Sifiso's bedroom one of the intruders said if he (referring to Sifiso) so much as shows his face he will shoot him. The intruders ransacked Sifiso's bedroom while he slept and covered his face. They took Sifiso's cellphone and laptop.
- [56] The intruder who carried a firearm jumped out of the house through Sifiso's bedroom window only to return and inform his associate in crime that the security guard manning the place had escaped. The security guard was hired by PW18. The intruders spent about thirty minutes inside the house before they left. Police were notified and they came and recorded statements. PW18 identified accused 2 as one of the intruders who entered his house and was not carrying a firearm but had a rod that looked like a crow bar. PW18 testified that he also identified the second accused person at Matsapha police station during an identification parade.
- [57] He was called later by the police where he identified his firearm and 90 live ammunition. The witness identified the Astra firearm in Court as his; he also identified the 90 live ammunitions before Court and stated it belonged to him.

- [58] PW18 testified that he was traumatized and pained by the conduct of the intruders who robbed him of his property. He lamented the fact that the robbers were young people who had no respect for someone his age-as he was old enough to be a parent of the intruders.
- [59] The evidence of PW19-Sifiso Njabuliso Simelane corroborates the evidence of PW18. PW19 testified that the intruders took 3 cellphones (blackberry ZTO and a blackberry 9790) and a wallet which had cash amounting to E100 and his cards next to his bed. They also took an Acer laptop which was under a continental pillow in his room.
- [60] PW19 did not see the intruders. He however heard one say to him should he show his face he will have his brains blown off with a firearm. At the time he had covered his face with a blanket as he lay on his bed. The intruder spent less than ten minutes in PW19's room. He did not recover any of his property that was taken by the intruders. He did not see the intruders and could not identify them. PW19 was not cross examined by both accused persons.

#### **Evidence concerning count 14**

- [61] The Crown called the evidence of PW16 Donatus Zwane and that of PW14 Gugu Treasure Zwane; the two witnesses are husband and wife. They testified that their home is at Malkerns. In the year 2014 while they were asleep at night, they woke to a loud bang of their bedroom door being kicked open and immediately thereafter they heard a gunshot ring out. Gugu fled into the rest room and locked herself there while Donatus remained on the bed.

- [62] Donatus saw two men enter his bedroom and they shone a torch light in his face and one of the intruders demanded to be given money. Donatus pleaded with the intruders not to kill him. The intruders took cellphones, Lenovo computer and a Samsung notebook.
- [63] The intruders gained entry through breaking the main door. When the couple retired to bed, the lights on the outside of the house were on while the lights inside the house were turned off. The doors were securely locked. When the couple was woken by the loud noise of the bedroom door being kicked, PW16 observed that the light in the passage was now on.
- [64] The matter was reported to the police. The couple did not recover what was stolen from them.
- [65] The ballistic expert's report reflects that the empty cartridge that was found at Zwane's home matched one of the firearms that were subsequently pointed out by the accused persons.

### **Evidence of Count 15**

- [66] Ryan Norman Canby was called as PW7 and testified that on the morning of 19 September 2014 and at about 3am he was at his home in Malkerns when he heard the sound of glass breaking at the front door of his house. He woke and went to investigate after he had woken his wife and told her he thought someone was breaking into their house. He found two men breaking the glass door and tried to stop them by throwing a chair at them. They shot at PW7 but missed and he retreated to his bedroom where he used his cellphone to call his boss who lived close to PW7's home and reported the incident. PW7 then threw his phone in the wardrobe and left it on.

- [67] PW7's boss reported the matter to the police and they came to the scene. PW7's boss arrived driving his vehicle and shone the lights at the back of PW7's house. The intruders fled the scene into the woods.
- [68] The second accused is one of the intruders who came inside the house wearing Rian's boots- bearing trademark-Bronx, and size 9. PW7 had left the boots outside the door when he retired to bed. The intruders took PW7's HTC Desire cellphone and a small amount of money. Only the boots were recovered. Ryan identified the second accused as one of his assailants. He testified that he also identified the second accused during the identification parade organized by the police at Matsapha police station.
- [69] The first accused did not cross examine PW7. During cross examination by the second accused PW7 stated that he was seeing the second accused for the third time during the trial. He stated that the first time he saw accused 2 was the night he robbed him and was wearing the boots. It was put to PW7 that the second accused had also met with him at KaMthunyelelwa bar at Fairview; this was denied by PW7. While PW7 admitted that he went to KaMthunyelelwa from time to time, he denied knowing the second accused. When the second accused denied robbing PW7, he insisted that he was robbed by the second accused. During cross examination it was put to PW7 that the boots belonged to accused 2 and were bought from South Africa by his father. This was denied by PW7 who insisted the boots belonged to him. Curiously, the second accused did not call his father to buttress his version.
- [70] PW4 is Matewu Hedzane and a resident of Moneni in Manzini. He is a retired member of the community police at Moneni. He knows the second accused as a resident of Moneni. The second accused stayed in a one-room

house alone at Moneni. On the night of 25 September 2014, PW4 was at his home and asleep when he was woken by police who asked him to come with them to second accused person's house. The police told PW4 that the second accused had asked that he be present at his house. On arrival at second accused's house he found him standing at the doorway of his house. The door of the house was unlocked. The second accused led the way and entered inside and was followed by the police and PW4.

[71] Inside the house, the second accused requested PW4 to remove a pillow which was on the bed and there-were two rounds of ammunition. The police took the two rounds of ammunition. The second accused also pointed out a pair of brownish boots from under his bed; these too were taken by the police. The second accused further retrieved a small amount of dagga which was in a plastic bag from the roof. The second accused appeared to be alright when he was pointing out the items to the police and before PW4.

### **Evidence relating to count 16**

[72] In the year 2014 PW22 Marcel Leon Smith was a resident in Malkerns opposite Phondo next to Brookside Lodge. In August 2014 and at about 3am he was asleep and was woken by someone shining a torch in his face and also pointing a firearm at him. There were three intruders in his bedroom and one of them held a silver gun which he pointed at PW22. The intruders demanded to be given money and they took E1 000 from PW22's wallet; they also took cash from PW22's wife's handbag and E6 000 cash which was in the wardrobe. They also took 2 Apple cellphones and 1 Nokia cellphone. The intruders further demanded to be given car keys of a VW Passat sedan, metallic paint Registration No. USD 867 AM and the remote

gate key. They took a VW Passat sedan. The intruders ordered PW22 and his wife to remain in their bedroom until they (intruders) had gone.

[73] After a while PW22 and his wife went outside his house and found his security guard's hands and feet tied and in his mouth stuffed with a cloth. They untied him and called the police who came and recorded statements. The motor vehicle was subsequently found abandoned at Bethany. He was subsequently called to identify his assailants at Matsapha police station. He identified the first accused as one of the intruders who robbed him of his property in August 2014. This was confirmed by the officer who carried out the identification parade in Matsapha in the year 2014.

[74] Entry into his property was gained by the intruders through jumping a wall, immobilizing the security guard and breaking a window in the lounge. They gained entry into the house through the window they broke in the lounge.

### **Evidence regarding robbery counts 17, 18, 19 and 20**

#### Count 17

[75] PW26 Kiddy Mahlalela testified that in 2014 she lived at Lugaganeni, Manzini with her children-Archie Morale, Fikile Fihla and Ncami Kunene as well as her grandchild- Tshepo Morale in a double storey house. The house also has an outside cottage.

[76] During the night of 17 September 2014 she was at home and asleep when she was woken by a loud bang which sounded three times. It was during the second bang that she jumped out of bed, shouted and attempted to shut and lock her bedroom door. When she held on to the bedroom door knob, the door was kicked open by two men. PW26 jumped back to bed and covered

herself with blankets. She again open the bed cover and threw her cellphone at the intruders. On the dressing table there were car keys and another cellphone. She was ordered by one of the intruders to take her handbag and give them cash. It was while she was shaking her handbag that she saw her son Archie Morale; she told him to leave because the intruders were armed with firearms and Archie left. The intruders took E600. They enquired who else was in the house and PW26 told them some of her children were upstairs. She was frog marched to her children's bedrooms by the intruders. PW26 instructed her children to give the intruders anything they asked for and not resist or fight back. Fikile gave the intruders E1 200 which was money she had been given by PW26 on the previous day. Ncami was assaulted by the intruders with the butt of a firearm when they found her on the phone and they asked who she was calling.

[77] PW26 was carrying her grandson and was with her two daughters (Fikile and Ncami) when they forced them to go to the cottage. One of the intruders used foul language at her by saying don't play games with us, whore. At the cottage they found no one as Archie-who slept there had left to ask for help. Inside the cottage, the intruders took cigarettes and a cellphone. The fact that Archie was not forced into submission by violent means because he was not present in the cottage when the robbers came means he was not robbed. This may, however be a crime of theft as the intruders made off with cigarettes and a cellphone from the cottage.

[78] When PW26 and her children (Ncami and Fikile) were ordered back into the house, the intruders opened the car which was parked outside and called PW26 to give them cash from the car, and she did.

- [79] After the intruders left, PW26 heard gunshots coming from the direction they took. Police were called and they came and recorded statements.
- [80] The intruders gained entry into the house by breaking the kitchen door. They were carrying two firearms, one black in colour and the other was silver in colour. When they got inside PW26's house, the intruders turned on the lights in the kitchen and in PW26's bedroom. PW26 testified that the robbery incident traumatized her so much so she still undergoes counseling. She did not see the faces of the intruders. This witness was not cross examined by the accused persons.
- [81] PW23 Ncami Portia Kunene's evidence corroborates that of PW26. When she heard the noise of a bang of the door, she quickly called 999 and reported to the police that there was a break in in her house. It was while she was talking over the phone that her mother (PW26) came into her bedroom in the company of two men who led the way. The men hit her with a butt of the firearm on her hand and her cellphone fell to the floor and broke into two parts. The intruders took two of PW23's cellphones a Nokia 610 and a Samsung S3mini which was being charged on the dressing table; they also took E80 from PW23's handbag. On their way out to the cottage, the intruders went to the kitchen and opened the fridge and took 2 castle lite beer.
- [82] After some time they were called by the police and asked to attend an identification parade at Matsapha police station. She identified the second accused as one of her assailants.

[83] During cross examination of PW23 by the second accused, this witness denied that police first brought the accused persons to her home and informed her that they were the people who had committed the robbery at her home. This was denied by PW23.

### **Count 21 and 22-evidence**

[84] Pw5 Gugu Mahlindza gave evidence in connection with count 21 while PW21 Mphilo Phila Zwane gave evidence in connection with count 22.

[85] PW5 testified that in 2014 she resided with PW21 at Rest Camp past Moneni in Manzini at a Maziya homestead. On the night of 22 September 2014 and at about 1250 hours PW5 heard noise and a door opening. Mphilo came outside PW5's bedroom and told her to open her bedroom door as he was in the company of two armed men. PW5 opened the door and one of the intruders came inside her bedroom and told her they were looking for money. Pw5 gave them E300 which was in her purse. One of the intruders stated that they will search for the money and if they find more without PW5 giving it to them, they will shoot and kill both PW5 and PW21. They started searching and found money hidden in a drawer of the headboard totaling E5 300; they also took money from a safe that was hidden in the wardrobe totaling E5 800.

[86] They further took bottles of wine which were in the kitchen; sunbird perfume 5ml and a backpack-Karima brand among others.

[87] The robbers gained entry through forcing open the main door which had been locked prior to the occupants retiring to bed. PW5 identified the second accused as one of the people who robbed her. It was her evidence that her

attackers locked both herself, Mphilo and Nokulunga Ntimane in the bathroom before they left the scene. They managed to unlock the bathroom door and called the police.

[88] At a later date, the police called and asked them to come and identify certain things which had been found by the police. Mphilo went to the police station and identified some of the property that had been stolen from PW5's house.

[89] When the intruders came into her house, they were carrying firearms-one firearm was black and the other was silver in colour.

[90] PW21's evidence corroborates the evidence of PW5 in material respects. He testified that he was asleep in the night of 22 September 2014 and had turned off the light in his bedroom. He woke to find two men who had put on the light in his room and demanded to be given money. The men asked who else was in the house and PW21 told them he was with PW5. The intruders told them that if they called police they would shoot them. The intruders took wine from the kitchen as well as cash from PW5's bedroom and a navy blue backpack Garmer brand. He identified his perfume-Sunbird perfume and Beckham perfume at the police station. The perfumes were later recovered from the first accused's rented flat at Mvutshini.

[91] At Matsapha police station he identified the intruder who carried a black gun as he was the vocal one. The one who carried a silver firearm ordered PW21 not to look at him. PW21 identified the second accused as one of his assailants. During cross examination, PW21 stated that he was able to identify the second accused because he looked at him when he was talking. The second accused stated that he could not have pointed at PW21 with a

firearm because he does not know how to use a firearm. That Mphilo Zwane identified the second accused as one of his assailants is confirmed by the evidence of the police officer who was responsible for conducting the identification parade at Matsapha police station.

#### **Count 24**

[92] The Crown led the evidence of PW6 Dumile Dlamini. She testified that on the night of 6 August 2014 she was at home at eNgculwini at Thulani Dlamini's home. She was with her sister Nolwazi Dlamini and the time was about 11pm when she heard a loud noise at her mother's bedroom of a window being broken. PW6, her baby and her sister were in their bedroom when they were suddenly accosted by one male intruder who lifted PW6's pillow and took her cellphone which had been put there by the witness. The cellphone was charging and a heater was on. The intruder then summoned his accomplices and three people came into her room.

[93] PW6 identified the second accused and described him as dark in complexion- as one of her assailants. She testified that the second accused was carrying a firearm which was shiny; he took it and placed it on the bed with one live round of ammunition. He stated that this was a real gun and not a toy gun. The intruders took PW6's cellphone-MTN Stepper with MTN logo at the back with serial number 356858051535145. She referred to a statement she made to the police on 7 September 2014. The witness showed the court the phone and the serial number on the phone corresponds with the evidence of the witness. They took E500 cash from the handbag of PW6 as well as a cellphone belonging to Nikiwe Dlamini. They ransacked the house looking for more money but did not find it.

- [94] They tied hands and feet of PW6 and of Nikiwe with belts and neckties and immobilized them. They also put the baby's underwear in Nikiwe's mouth and left the scene. PW6 and Nikiwe later freed themselves and went to report the matter to a neighbour's home; police were called and statements were recorded.
- [95] While they were being robbed the lights inside the house were on because they had not retired to bed for the night at the time they were attacked.
- [96] PW6 subsequently identified her cellphone at Manzini police regional headquarters; she was carrying the cellphone box when she went to identify it at the police regional headquarters.
- [97] PW34 is Bongani Matasatasa Dube testified that he knows the second accused and referred to him as Maguzumbela. PW34 resides in Mahwalala, Mbabane. In the year 2014 he visited his brother at Moneni, Manzini and saw the second accused moving around Moneni. The second accused requested that PW34 gives him E200 so he could give his girlfriend bus fare. PW34 gave accused 2 a sum of E100. The second accused gave PW34 a MTN touch screen cellphone bearing MTN logo at the back in exchange for the E100. The second accused promised to take the cellphone back when he brought the E100 that had been given him by PW34.
- [98] PW34 took the phone and kept it in a wardrobe at his home until police came to his home and enquired about a cellphone he had received from the second accused. He gave the police the phone and they recorded a statement and left.

[99] During cross examination, the second accused did not deny that he gave PW34 a cellphone; he stated that the cellphone PW34 gave to the police was not the one he received from him. The second accused stated that he gave PW34 a Nokia C1 cellphone black in colour and it had a crack. This was vehemently denied by PW34. PW34 stated during cross examination that when the police took the phone they recorded its serial number.

### **Count 25**

[100] PW24 is Gugu Maphalala and a complainant in the alleged robbery in count 25. She testified that in 2014 she lived with her help and her child at Fonteyn next to Magwinya's homestead. On the night of 15 August 2014 she locked and secured her door before she went to sleep. During the night she woke up to find two male intruders inside her house. One of the intruders shone a light on PW24's face while the other one carried a crow bar. They demanded to be given money; Pw24 gave them E720 which was inside her handbag. They also took electronic gadgets namely: a Proline black computer which had a crack at the corner, a black notepad with a maroon strip, a child's notepad with the child's name Ncenge Maphalala and with stickers outside, a Samsung notepad and a child's phone. The intruders also took food from the fridge.

[101] The intruders ordered PW25 and her help to lie on the bed and cover themselves with blankets. They were able to call the police after their assailants had left the scene; they used the phone belonging to the help.

[102] In the morning the police called and asked PW24 to come to the police station where she identified all but the Samsung notepad and the iphone at

the police station. The witness further identified the items in Court. She told the court that she was able to identify her laptop by inserting her password and accessed her documents.

### **Count 26 Housebreaking with intent to steal and theft**

[103] PW2 is Banele Dlamini; he gave evidence in connection with count 26. In the year 2014 he was employed at Waterford and lived at Waterford park, Mbabane. On 11 July 2014 he was in his house asleep when he woke up in the morning and found his house in shambles and some of his property taken. He arrived home and locked the door, sat on the bed but eventually fell asleep because he was tired. There was a semi open window in his house through which the TV cable passed from outside to inside the house. When he woke up, he found that window wide open and the house in shambles.

[104] A lot of items were stolen from his house including clothes, ethernet cables, laptops, bags, wallet with money. The cash that was stolen and was shown to Court by the witness included: E1 700; 120 Hong Kong Dollars; 12 US Dollars; 200 Czech Republic Kronas; 20 Duwafun (currency from the Phillipines). The witness also showed the court a black bag which had a side bag as well as a black bag with silver colour patches or dots as some of the items that were stolen from his house in July 2014. It was his evidence that he had not given anyone permission to remove his property from his house.

[105] It was the evidence of PW2 that he got the foreign currencies from his travels and when he studied in the United States of America in the year 2012.

[106] When he discovered that his property had been stolen, he reported the matter to the police. In October 2014, the police called and told him to report to Manzini regional police headquarters where he identified his bags and cash in foreign currency.

[107] During cross examination, PW2 testified that police had told him that some of his property was found at Mvutjini.

### **Count 27**

[108] Lindokuhle Nosipho Dlamini led evidence pertaining count 27. He testified that he resided at eZulwini, Enshakabili in the year 2014. On 16 May 2014 his house was broken into and 3 laptops (Lenovo, Toshiba and E-machine brands), Nokia E63 cellphone and cash amounting to E4 000, a hallmark watch white in colour and a wrist watch- Tomato brand were stolen. Entry was gained through a window that was broken by the intruders and they exited through a sliding door. The door was locked prior to entry by intruders. The matter was reported to the police.

[109] The discovery that his house had been broken into was made in the morning at around 5am. In September 2014 he was called by the police to come and see if exhibits they had did not include property taken from his house in May 2014. At the police station he identified the two wrist watches the rest of the property was not at the police station.

[110] The wrist watches were subsequently found at the rented flat of the first accused at Mvutshini.

## **Arrest of the first accused**

[111] PW 35 Tshepo Comfort Dlamini testified that he is a taxi driver; that on 25 September 2014 at about 2pm he was at Mahhala shopping complex chatting with his friend when he saw a crowd apprehending someone. He and his friend got close to the action and saw that the people arresting the person were police officers in mufty. The police apprehended the first accused. Police searched the first accused and found an amount of E18 644 in his person. They put the cash on the ground and counted it in the presence of the first accused. The money was of South African Rand and of Emalangeneni notes.

[112] During cross examination, the first accused stated that when he heard the police conversing among themselves, he thought he was being robbed. According to PW35, the police stated that they had been trailing the first accused from Manzini while the crowd asked where the first accused had got so much money. It was also put to PW35 that the police assaulted the first accused when they arrested him; this was denied by PW35. PW35 testified that the police arrested the first accused, took money from him and then took him to a motor vehicle they were using. It was put to PW35 further that he had been chosen by police to testify by telling lies and protect the police; this was also denied by the witness.

## **Count 30 robbery Accused 1**

[113] PW3 Mdzizi Dlamini led evidence in connection with a robbery in count 30. He testified that one early morning (430am) in July 2014 he was asleep at his house at eZulwini, Nshakabili when he woke to find a male intruder in

his bedroom. He was frightened and asked who the intruder was; in response he was insulted with foul language. The intruder demanded money and PW3 told him there was none but that he could take whatever else he pleased. This he said because he was frightened and scared. The intruder told PW3 that he had taken the cellphones already. He then locked him inside his bedroom and left. Before the intruder left, he was heard talking to someone who was outside and reporting that PW3 had no money. The response from the person outside the house said PW3 must be shot because he must have money as it was month end and he had been paid.

[114] The house was lit at the time as the intruder had turned the light on when he got into PW3's bedroom.

[115] The intruder who came into PW3's bedroom was carrying a crow bar and something that looked like a pipe or a firearm. The intruder took two cellphones belonging to PW3 and one cellphone belonging to PW3's child. They also took a pair of white Nike sneakers which had black stripes and are size 8. The sneakers belonged to PW3. He reported the matter to the police. He later identified his sneakers at Manzini police regional headquarters as his. The rest of the stolen property was never recovered. The witness identified the sneakers in Court.

[116] During cross examination, PW3 was only asked questions about whether or not he could identify any of his assailants. His response was in the negative.

### **Count 33**

[117] PW13-Sipho Mabuza and PW8-Lindelwa Treasure Motsa-Mabuza are husband and wife and they gave evidence in connection with count 33. PW8

was at home at Mahlanya on the night of 7 February 2014 at about 3am when two male intruders entered her bedroom. She woke and saw one of the men take two of her cellphones next to her headboard. The intruder who took her cellphones then came next to her bed and warned PW8 to do everything they asked her to. He told her that they had restrained her children (boys) already and were monitoring them. They said they were looking for cash and admonished her not to play smart as doing so will result in her being hurt. PW8 says she told the intruders there was no money in her bedroom but there was a sum of E2 000 in a bedroom upstairs. She was frog marched to different parts of the house and she gave them cash totaling E2 900.

[118] In the bedroom upstairs, PW8 was pushed aside by the intruders and they took a laptop which was on a sofa as well as two cellphones which were on a coffee table-the cellphones were new. They took E2 000 which was in the wardrobe. They opened drawers and found an iphone and a tablet which they took. PW8 was further told to take them to the lounge where they asked for a safe and whether PW13 had a firearm. When she said they had no money safe, the intruder became violent. They showed her a sharp metal which was carried by one of them. She was told by the intruder who carried the sharp metal that *lentfo le iyi jwayele ingati ngitakugwaza kanye ufe*-this iron rod is accustomed to being used to kill people, I will stab you with it and you will die. PW8 stated that when she heard the threats she was so frightened, she knelt and soiled herself. One of the intruders said *ekse iyachama lenja*-this dog is urinating. At the time PW8 was urinating on herself. PW8 told them to go to the study room where there was an amount of E500 and that there

was also cash in the rooms downstairs, she was scared she would be killed in the room upstairs.

[119] The intruders then told her they would leave her in bed as they were still going to ‘work’ in the other homes nearby. PW8 also showed the intruders an exercise book next to the TV which contained E400-they took the money. They then led her to her bedroom where she was ordered to cover herself with a blanket and lie in bed. It was after a long time that she moved out of bed and she was assaulted with an iron rod on the head and was asked *sitsite lala kuphi? Sewuyaphi nyalo?* –‘where did we say you should sleep? Where are you going now?’ After that assault, she remained in bed until it was morning and she heard her children flush the toilet. Her children told her no one kept watch over them during the night. It was when she asked to use her children’s phones to call PW13 that the family realized their phones were stolen. She finally used her help’s phone to call the police. The police came and she reported the incident. A lot of electronic gadgets and personal effects of PW8 and those belonging to PW13 were stolen by the intruders.

[120] PW8 cannot identify her assailants but did see that the other intruder carried a bush knife. Entry was gained into the house by pushing a small glass door and pulling the key from the main door and using it to open door.

[121] She later went to identify some of the property that was stolen at her home at the Manzini regional headquarters in the company of her husband. She and her husband identified four pairs of shoes belonging to her husband-black nike sneakers, white grand-pre sneakers, half boots, brown in colour and brown grasshopper shoes.

[122] PW13 confirmed the evidence of PW8 in material respects. He was not present when his wife was robbed of their property. He was away at work in Nhlanguano. He returned home after getting the report and found that his laptop, polo shoes, Adidas grand prix pair of sneakers size 9, sneakers black adidas size 9, grasshopper shoes, khakhi shoes size 9, Jeep brown shoes size 9, brown Jeep jacket, alcohol Johnnie Walker and Jameson alcoholic drinks were missing too. His tablet, was also missing. He later identified the white grand prix adidas pair of sneakers and the grasshopper shoes as well as the Jeep half boots at the police regional headquarters in Manzini.

### **Evidence relating to Count 36 & Count 37- Attempted Murder**

[123] PW28 is Sifiso Mzileni. He worked as a taxi driver in the evening hours in Mbabane in the year 2014. On the night of 16 August 2014 he was hired by a man who was short in stature while parked at Picaddily and he asked to be taken to Mahwalala kaMasuku. The customer told PW28 to stop and take someone he was travelling with at Engen Filling station. The passenger who boarded the taxi at Engen Filling station was tall and he was also carrying a bag. He charged the customers E50 and they paid him. The man of short stature was carrying a backpack. When PW28 enquired from him where they were going with bags at night, the response he got was that they were from work and they stayed at a Bar until late.

[124] At the traffic circle at Hilltop he was stopped by police who were patrolling the area. The police asked him to produce his driver's licence and then ordered all of them to alight so they could search the car. His two passengers complained and asked why they were being asked to alight from the motor vehicle. No sooner had PW28 alighted from the vehicle than he heard the

sound of gunfire from one of his passengers directed to the police. PW28 was shocked. The police took cover on the ground and the passengers fled into the night. The police questioned him and drove his taxi to the police station. He was later given his car and was not charged.

[125] PW31 6457 Constable Siza Magongo and PW32 4521 Constable Ntombenhle Fakudze are complainants in the attempted murder charges reflected as count 36 and count 37.

[126] On 15 August 2014 PW31 Constable Magongo was on night duty from 10pm until 6am in Mbabane. He was patrolling and doing side-checks around Mbabane with Constable Fakudze when they received a message from 999 about a robbery at Fonteyn. They delayed getting to Fonteyn because they were far when they got the message from 999. When they finally arrived at Gugu Maphalala's home they found that their colleagues from the rapid response department were at the scene already. The complainant showed them where the intruders had gained entry and the items that were taken by the intruders. Gugu Maphalala related to the police that the robbers took a Proline laptop black in colour, a purse, a Samsung notebook, food from the fridge and cellphones.

[127] Officer Magongo and officer Fakudze left the other officers at the scene and went to patrol roads to see if the culprits could not be found. They were patrolling at Hilltop when they stopped a maroon sedan with registration number ASD 184AS which was coming from the direction of Mbabane towards Hilltop. PW28 was the driver of the vehicle. Inside the vehicle there were two passengers. One passenger sat on the front passenger seat next to the driver while the other one sat at the back seat behind the front passenger

seat. Constable Fakudze requested all the occupants of the vehicle to alight so they could search the car. Officer Magongo was a few metres away from the stationary vehicle when officer Fakudze was talking to the driver and requesting the occupants of the car to alight so the car could be searched. Officer Magongo got close to the car and opened the door of the front passenger seat of the car and asked the passenger to alight. The passenger did not resist. It was when they had alighted from the car that the passenger at the backseat came out brandishing a shiny firearm and ordered the passenger who had been sitting on front seat to give way as he wanted to kill the dog. These words were directed to officer Magongo. While officer Magongo was still shocked at what was happening, he saw the passenger with a firearm point the firearm at him; Magongo took cover and a gunshot rang out. Magongo returned fire. The two passengers fled and crossed the main road to Mhlambanyatsi through the homesteads.

[128] When the young man pulled the trigger, officer Magongo was on the front passenger door while officer Fakudze was on the driver's side. When the young man pulled the trigger, Magongo fled to the driver's side where he took cover at the same place and time as officer Fakudze.

[129] The driver of the vehicle did not flee the scene. When questioned, the driver explained that he was hired by the two passengers and that the bags that were in the car belonged to the passengers. It is officer Magongo's evidence that some of the property that was found in the car belonged to Gugu Maphalala the complainant in the robbery incident at Fonteyn. They found food, Proline computer; e-play children's computer, purse and Samsung

notebook. They also found a crow-bar and bags which contained clothes. They informed the CID who took over the investigation of the matter.

[130] In court, officer Magongo identified exhibit 4- Proline computer; 2 cables for laptops-exhibits 5 and 6; white e-play children's computer-exhibit 7; black purse-exhibit 8; Samsung notepad black in colour-exhibit 9.

[131] Officer Magongo identified the first accused as one of his assailants.

[132] During cross examination officer Magongo stated that he saw the first accused on the day of the incident. It was put to officer Magongo that the charge of attempted murder is misplaced as he did not suffer any injuries and was not examined by a doctor. Officer Magongo stated that the fact that the first accused aimed the firearm at them is enough to show he meant to harm them.

[133] The evidence of PW32 4521 Constable Ntombenhle Fakudze corroborates the evidence of officer Magongo in material respects concerning their patrol, their attendance to the scene of crime at Fonteyn and their patrol and stopping the taxi at Hilltop; and the fact that they came under fire from the occupants of the taxi they had stopped. She confirms also that there were items found in the taxi that were suspected to have been stolen from Fonteyn. She also referred to exhibit 10-being a brown bag and that inside the bag was jewellery; the jewellery-exhibit 11 and a badge with inscriptions 'stop wrong'-exhibit 9.

[134] Constable Fakudze testified that when she stopped the taxi and the occupants of the car had been asked to alight so the police could search the car, she first talked to the driver and then opened the rear passenger door behind the

driver. The passenger who sat at the back seat quickly alighted from the vehicle. Officer Fakudze said she ran to the side where officer Magongo was to try and assist in arresting the passenger who was fleeing. She saw the passenger who had come out of the back seat cocking a silver pistol and she took cover on the front part of the motor vehicle and she crawled around the motor vehicle. She heard a sound of gunfire and the suspects fled the scene and only the taxi driver remained. Officer Fakudze identified the first accused as her assailant. Officer Magongo and officer Fakudze testified that they were able to identify the first accused as one of their assailants because visibility was not bad at the time they came under attack.

[135] PW 36 is 3889 Inspector Duduzile Khayiyane. He attended to the scene of crime of the attempted murder of officer Magongo and officer Fakudze at Hilltop traffic circle. He testified that he searched inside the motor vehicle - the Mazda Familia with registration ASD 184AS where he found certain items that were taken to the police station and handed over to the recording officer. Inspector Khayiyane was with PW37 4233 Constable Bongani Emmanuel Zwane when they attended to the scene of crime at Hilltop. Officer Zwane testified that he inspected the scene of crime outside the motor vehicle and on the left hand side, outside the passenger seat, he found two empty cartridges at a distance of about a metre from the sedan. He also found another cartridge on the right hand side of the motor vehicle in the middle of the road near a white line of the Mahwalala/Mbabane road by the traffic circle. He collected the empty cartridges and wrapped same with a tissue paper and took them to the police station. At the police station he put the empty cartridges in two seal bags. The cartridges he retrieved from the middle of the Mahwalala/Mbabane road was put in a seal bag marked

SWAG 035515 while the other empty cartridge was put in a seal bag that was marked SWAG 035516. Officer Zwane handed the seal bags to officer Sandile Choncho who was attached to the scenes of crime department at the time.

[136] PW40 3905 Detective Sergeant Sandile Choncho received the cartridges in sealed bags from officer Zwane and transmitted them to the police headquarters where they were received by 7077 Sergeant Lindi Mbukwane who signed register acknowledging receipt of same. According to officer Choncho, in seal bag marked SWAG 035515 there were two spent cartridges while in SWAG 035516 there was one spent cartridge. He received the said sealed bags on 10 October 2014 and handed them over to the police headquarters on 12 December 2014. On 31 December 2014 officer Choncho received a ballistic report from the police headquarters; he photocopied same and gave the original report to the investigating officer in the matter. The investigating officer is 3401 Sergeant Themba Dlamini. He also gave the investigating officer the three (3) empty cartridges which were now in one seal bag and marked SWAG 055110. Officer Choncho then handed in Court the three empty cartridges in seal bag SWAG 055110 for RCCI 4578/2014 case which was an attempted murder case.

[137] PW39 5606 Constable Thembinkosi Dlamini is the officer responsible for the conduct of the identification parade at Matsapha police station. He testified that on 27 September 2014 he was assigned by the case administrator in Manzini to conduct an identification parade of the four accused persons stated in the indictment.

[138] Regarding the first and the second accused persons, their identification was positive. Before he conducted the identification parade, he met with the accused persons and introduced himself to the accused. He explained the reasons for the ID parade. The accused were encouraged to come to inform their attorneys, if they had legal representation- to come with them to the ID parade. PW39 secured people who resembled the accused persons (Fillers). The accused stated that they did not have legal representatives and asked that the ID parade continue. He got 21 people who acted as fillers from the correctional facility. He used one filler for one ID parade but should not use the same filler on the next accused person. Ntshalintshali had 7 fillers and he was the 8<sup>th</sup> person; they wore the same outfit which was blue two piece overall. He asked Ntjalintjali if he was alright with people that had been put as fillers and his response was in the affirmative.

[139] He had twelve (12) witnesses who came to identify accused persons. The ID parade was conducted in a house or room which has a glass partition that is tinted so that the accused cannot see through the glass while the witness can see the accused he is identifying. There is a speaker and microphone in the other room. The speaker enables one to communicate. In the room where the accused and fillers are there is an officer who takes photographs and in the room where the witnesses are there is parade coordinating everything that has to do with the witnesses.

[140] He had police officers helping him-7363 Constable Tsabedze who looked after witnesses and 6183 Constable Gina. A witness who had been to the room to identify the accused did not return to the room with witnesses who were yet to identify the accused.

[141] PW39 asked each of the accused to choose where they wanted to stand and told each one of them they have a right to change positions. He told Ntjalintjali so when witness Fikile Fihla came in as a first witness through the officer who escorted witnesses. PW39 could not leave ID room once the parade got underway. Eight people have numbers attached to them. Fihla pointed at accused Ntjalintjali who stood below number 3 and 2182 Detective Inspector Magagula took photographs of Ntjalintjali Nkosinathi.

[142] After the first witness left, Ntjalintjali elected not to change his position under number 3. The second witness was Ncami Kunene who also identified Ntjalintjali under number 3-a photo was taken. Ntjalintjali then changed his position to be under number 2 when the third witness Sizwe Dlamini came to make identification. Sizwe failed to identify anyone. The fourth witness was Siza Masango he also failed to identify anyone. Ntjalintjali still did not change the position under number 2. The fifth witness Ntombenhle Fakudze also failed to identify the accused. Masiko Dlamini pointed Ntjalintjali who now stood under number 5 and a photo was taken. The second accused then changed his position to number 7 when the seventh witness Mphilo Zwane came in. Mphilo identified Ntjalintjali under number 7 positively. The second accused then changed position to number 6 and he was positively identified by Ibrahim Variyana who was the 8<sup>th</sup> witness to make an identification. The second accused changed position to number 7 and Nokulunga Tibane identified the accused under number 7. The accused elected not to change his position when Rian Canby identified him positively under number 7; Marcel Smith (and his wife) also identified the second accused positively under number 7 and photos were taken.

[143] Nine witnesses positively identified the second accused and the other witnesses failed to identify him. The identification was considered positive as there were witnesses who positively identified the accused.

[144] Next was the identification of the first accused. The procedure was also explained to the first accused. He was positively identified by Mphilo Zwane and by Amina Variyana and by Ibrahim Variyana and by Phumlani Mamba. Marcel Smith and his wife failed to identify the first accused positively.

[145] PW41 Futhi Thwala is an independent witness who was present at Mvutshini when the first accused, in the company of police officers went to his rented room and pointed out certain items to the police. The police found a lot of personal effects as well as household items in accused's room as well as cash. They took cash from a pocket of a brown blazer and another sum of money from a purse as well as coins which was on a tray. There were Rand and Meticash (Mozambique currency). There was jewellery, bracelets earrings, perfume and watches among other things. She saw a wrist watch bearing a Tomato brand black in colour; there was also a Hallmark wrist watch white in colour. She also saw a Beckham perfume and a Sunbird perfume; backpacks-Dakina (1) and a black backpack, white sneakers nike size 8 with a blue stripe. She was present when the police searched the accused person's house. The witness identified the first accused as the person who rented a house next to hers at Mvutshini when the police arrived to conduct a search.

[146] During cross examination, the first accused stated that he was a small business person; this was denied by PW41. It was also put to PW41 that the backpack belonged to his brother and the witness said she had no comment.

[147] During cross examination the first accused denied that backpacks were found in his rented room. PW41 stated that the things referred to herein were found in first accused's rented room.

[148] PW42 is 3401 Detective Assistant Inspector Themba Dlamini. He investigated the case of attempted murder involving the police officers at Hilltop. On 16 August 2014 Ernest Magongo reported a case of attempted murder. On 22 August, 2014 PW42 received the docket about the matter and found 3 empty cartridges/bullet heads in the docket. These were transmitted to the scenes of crime officers. Officer Choncho gave him the ballistic report from expert and the empty cartridges found at the scene of crime in seal bag SWAG 055110. He read ballistic report and found that it was positive. He kept empty cartridges and put report in docket. Witness handed to court SWAG 055110 and it was marked exhibit 9.

[149] PW 25 Gugu Dlamini testified that on the night of 21 August 2014 she was asleep at her house in Malkerns when she was woken by intruders who shone a torch light on her face. She tried to turn on her bedside lamp but one of the intruders wrestled the bedside lamp from her. PW25 says she wrestled with one of the intruders and then heard her help shouting from another room raising an alarm. It is her evidence that the intruders demanded to be given money. She gave them her handbag and when he found no money in it, a fight ensued. The intruder then found cash amounting to E2065 in another red bag. When PW25 fought with one of the intruders, she was assaulted with a firearm below the jaw and below her breast and at the back. It was while she wrestled with the intruder and he hit her with the firearm and it discharged and the shot hit the roof and PW25 realised she was

assaulted with a firearm. The intruder took her cellphone which was next to her bed and gave it to his accomplice. Before the intruders left, they locked PW25 and her help in a rest room.

[150] PW25 testified that prior to retiring to bed they had locked the door. Entry was gained through breaking the burglar bar and door at the kitchen. It was her evidence that the incident traumatised her so much she had to relocate from her premises and stay at a hotel for some time. She testified that the injuries inflicted on her by the intruders took long to heal.

[151] PW 25 identified the first accused as one of the intruders and her assailant. She told the court she was able to identify the first accused because she switched on the light when they came to her bedroom. She tried to negotiate with her assailant when he demanded to be given money by saying he should come the following day to collect the money. PW25 did not identify the first accused as her assailant during the identification parade held at Matsapha police station because she said she was shocked, angry and hurt at the time. During the identification parade, she stated there were many other people who were traumatized and crying. She identified the first accused as her assailant from the dock in court. During cross examination, the first accused put it to her that it was not him who robbed her but his brother who is since deceased. PW25 insisted that it was the first accused who robbed and assaulted her on that fateful night.

[152] PW44 is 5374 Detective Constable Dumsile Dlamini and a scenes of crime officer in the alleged robbery case involving Gugulethu Dlamini. She testified that she arrived at Gugulethu Dlamini's house at eMagomini, Malkerns at babe Msibi's houses where Gugulethu was a tenant. On arrival

at the scene, they introduced themselves and were informed by the complainant that she was robbed by two men at night. She was informed by the complainant that the intruders fired a shot which ricocheted to the ceiling of her flat. They searched for the empty cartridge and did not find it. The police found and took other empty cartridges that were found at the scene and as well as fingerprints for forensic examination.

[153] It was two days' later that PW44 returned to the scene at Gugulethu's flat and found the cartridge at the ceiling after it was unearthed by people who were renovating her flat. PW44 took the cartridge and put in seal bag marked RSPSFL 00840 and transmitted it to the police regional headquarters, Manzini. From the regional headquarters in Manzini the empty cartridge was transmitted to the police headquarters, Mbabane where ballistic tests were carried out. At the police regional headquarters, the exhibit was given to PW44 3400 Detective Sergeant Patrick Bheki Dlamini. PW 46 testified that he received the said empty cartridge from Constable Dumsile Dlamini on 21 August 2014 in a sealed plastic bag marked RSPSFL 00840 RCCI 841/2014 and stored it in a safe place under lock and key. On 19 September 2014, Constable Dumsile Dlamini received another report of robbery at Phola Park at Rian Canby's house. She went to investigate with 4191 Sergeant Maseko. At Canby's home they found his wife and child. They introduced themselves and explained their mission. They were shown a place there a gunshot was fired. At the lounge on the floor there was blood and the house had been ransacked. The shots were fired on the wall and there were three holes on the wall as a result. Constable Dumsile took photos at the scene and searched for the empty cartridge which she found under a sofa. She put in in a seal bag and transmitted same to the

Manzini regional headquarters. The seal bag was marked SWAG 040961 and the case was for RCCI 841/2014 and case 739/2014. Constable Dumsile was also informed that the robbers also took Rian Canby's safety boots. She then explained to Court the contents of exhibit P-a photo album she compiled after her investigation of the robbery cases in Malkerns.

[154] During cross examination officer Dumsile explained that the bullet that fired at Gugulethu Dlamini's house was lodged in the roof after it penetrated a tile. She explained that Gugulethu's house was still under construction. She found the cartridge in the roof. It was during cross examination that officer Dumsile explained that the blood seen in the lounge of Rian's lounge belonged to Rian. Rian was injured by the robbers when he was assaulted by the intruders with a ladder and chair which they found inside his house. The blood was tested and returned a positive result for Rian's blood. Rian was injured on face, forehead and on his hand.

[155] Officer Dumsile told the court further that she took SWAG 040961 and handed same to 3400 Detective Sergeant Bheki Dlamini at regional headquarters-RSPSFL 00840 was also taken to regional headquarters and handed to the same officer. PW46 3400 Detective Sergeant Patrick Bheki Dlamini confirmed receiving the said exhibits which he then transmitted to police headquarters for ballistic examination.

[156] PW43 is 2182 Detective Inspector Siphon Magagula and a scenes of crime officer. On 25 September 2014 he was on duty at Manzini regional headquarters when he received a call to attend a crime scene at a place next to Manzini Central school at about 1400hours. On arrival at the scene he found officer Junior Dlamini and members of the public and two accused

persons who are before court. He was introduced to the accused persons by Mr Junior Dlamini. The suspects were handcuffed. They were cautioned in terms of the Judges' rule before they led the police to a bush that was close to Manzini Central School where they pointed out a stone under which was a black plastic bag. He took photos of the scene. After the plastic bag was retrieved, the police opened it and inside were two firearms and ammunition. One of the firearms was silver in colour and the other was black in colour. Both firearms had magazines and each was loaded with 15 live rounds of ammunition. Inside the plastic bag were three loose live rounds of ammunition. The total number of rounds of ammunition found was 33. He photographed the scene and items recovered. The two accused persons were assisting each other when they pointed out the stone under which the firearms and ammunition was found. They did so freely and voluntarily after due caution.

[157] On the same day, he travelled to Mahwalala/ Mpolonjeni, Mbabane where, after they were cautioned in terms of the Judges' rules the accused led the police to another site where they pointed out a black plastic bag that was buried under a rock. When police opened the bag, they found a number of live ammunition in containers for ammunition, a holster and a magazine. There were about 200 live rounds of ammunition which were contained in three cases of ammunition. The accused pointed out the plastic bag freely and voluntarily after they had been cautioned by the police in terms of the Judges' rules.

[158] PW 43 then left the scene after he had taken photos. He was driving his car and returned to Manzini. On 27 September 2014 he attended to the

identification parade at Matsapha police. Present at the ID parade was the parade commander and other police officers. He took photographs during the ID parade. He explained to Court the photographs he took during the ID parade. The witness handed into court the albums he compiled from the different scenes of crime and of the ID parade.

[159] During cross examination both accused persons denied ever pointing out anything at the scenes of crime referred to by the witness. PW 43 insisted they did. The accused pointed out that in court only 97 live rounds of ammunition were presented and not about 200. PW43 stated that he was a scenes of crime officer and that exhibits are not under his control. The first accused stated that the police were looking for his brother Bhekithemba and not himself; PW43 insisted that the police were with the two accused persons before Court and it was the two accused persons before court who pointed out the exhibits which he then photographed. The second accused stated that he was pressured through assault and being tubed by police to participate in the pointing out; this was denied by PW43.

[160] PW45 is 4081 Detective Assistant Superintendent Vusi Robert Junior Dlamini. He is the chief investigator of this case. On 25 September 2014 different robbery cases were reported in the Manzini and Mbabane corridor. On 25 September 2014 he received information that one of the suspects in the robbery cases was at Moneni. He went to Moneni in the company of Assistant Superintendent Kunene and 3791 Detective Sergeant Gamedze and other police officers. They found the suspect who is the second accused and introduced themselves to him and explained their mission. The second accused resisted arrest but was subdued by the police. After he was

handcuffed, the police conducted a body search on him and cash in the amount of E4 692.40 was found in his pocket. PW45 recorded the currency serial numbers in his note book. There were E200 notes and E10 currency. There were no coins found in the pocket of the second accused.

[161] The second accused was cautioned in terms of Judges rules that the police were investigating multiple counts of robbery, murder, attempted murder amongst others and that he was not obliged to say anything but that if he said something, it could be used in evidence against him in court. They went with the second accused to Matsapha, Mahhala shopping complex and they were in mufti. The first accused was at Mahhala shopping complex. As soon as the first accused saw the police, he fled but was caught by members of the public who were baying for his blood. The police took the first accused to the police car and introduced themselves and explained their mission to him; they also cautioned him in terms of the Judges' rules. They searched the first accused and found an amount of E18 644 in his pocket. He recorded the serial numbers of the notes in his notebook. There were also E2 00 coins.

[162] After due caution, the first and the second accused led the police to a bush next to the Manzini Central School and or Filling Station. The police enlisted the help of an independent witness-Sanele Dlamini and a scenes of crime officer Mr Magagula. The accused persons led the police to a place with thick vegetation where they pointed out two firearms which were wrapped in a black plastic bag. Each firearm was loaded with 15 live rounds of ammunition. There were 3 9mm bullets which were outside the firearms. One of the bullets was special in that it was a 9mm and silver in colour with a blue head. The first firearm is silver and black in colour with serial number

403539 and belongs to Masiko Dlamini. The second firearm is black in colour and bears serial number S1654 and belongs to Jabulani Simelane of eZulwini. The special bullet belongs to Jabulani Simelane's firearm.

[163] The two accused persons further led the police to Mpholonjeni/Mahwalala in Mbabane where they pointed out a SPAR white plastic bag with 73 bullets or 9mm rounds of ammunition. The ammunition was inside the plastic bag but in their containers. There was another container of ammunition which had 90 bullets in a black plastic bag. There were also 46 rounds of live ammunition wrapped inside the plastic bag. There was a black gun holder or poach and a brown magazine holder and a magazine. The black poach and magazine holder and brown holder belong to Masiko Dlamini. In total there were 209 rounds of ammunition found and belonging to Jabulani Simelane. The scenes of crime officer took photographs. The accused were cautioned before they led the police to the place where they pointed out exhibits in this case. The pointing out in Mpholonjeni/Mahwalala was carried out in the presence of an independent witness-Philemon Msimango.

[164] At about 1700 hours, he received information and went to the rented flat of the first accused. He enlisted the help of an independent witness Futhi Thwala at Mvutshini and of Themba Mazibuko. At first accused's rented flat was his girlfriend and police introduced themselves and asked for permission to search the house of the first accused. In one of the tables they found a white air freshner plastic container and inside were coins amounting to E152 as well as R200 and R20 notes he recorded serial number of notes in his notebook. There was also money found in the pocket of a blazer of the first accused; in a grey purse and in drawers of the first accused's cupboard

was cash in foreign currency. Next to the bed was a collection of jewellery-a pair of earrings which were silver and pink in colour it belonged to Amina Variyana. There was also a necklace silver with pink crystals and a gold bracelet and a ring. Beckham and Sunbird perfumes were found next to the bed where jewellery was.

[165] Also, 1 Dakino bag, 1 Quicksilver bag belonging to Banele Dlamini was found in first accused's house. Two wrist watches-one bearing Tomato brand and the other bearing a Hallmark brand were found and they belong to Lindokuhle Dlamini of eZulwini. Also, a pair of white Nike sneakers size 8 belonging to Mduduzi Dlamini of ezulwini were found in the house of the first accused. All the items were seized and Inspector Magagula was called and took them away in a van. The items referred to herein were those that were identified otherwise there were many other things that were not identified but were taken from the first accused's house (see breakdown of things detained by police)

[166] At about 1745 hours of the same day, the second accused was cautioned and he went to Moneni with him there was an independent witness Hedzane. They conducted a search in 2<sup>nd</sup> accused's house and found a pair of brown boots bearing a Bronx trademark belonging to Rian Canby. They also found two live rounds of ammunition which were concealed between a mattress and a base of a bed. The accused did not have a permit to possess the live rounds of ammunition. There was a small amount of dagga found next to the bed.

[167] On 29 September 2014 he cautioned the second accused and informed him he was investigating robbery at eNgculwini where Dumsile Dlamini and her

sister Nolwazi Dlamini were robbed. He located Bongani Dube who gave him a black MTN cellphone with STAPPER inscription. Its serial number corresponded with the serial number given by Dumsile Dlamini 356858051535145. Dube recorded a statement and police seized the phone. On 30 September 2014, Dumsile Dlamini positively identified the cellphone as hers.

[168] Banele Dlamini of Waterford positively identified the Dikane and Quicksilver bags as his; he also identified Hong Kong Dollar (20) with serial number LR048509 as his.

[169] The accomplice witness Sanele Tsabedze handed himself over to the police and when he was interviewed it was discovered there was another case reported at Sidvokodvo police station where various electronic gadgets were stolen-Apple ipad black and silver in colour was recovered by police Sidvokodvo. The suspect who escaped was the first accused. On 30 September 2014, Nikiwe Nxumalo positively identified an Apple ipad as hers. Also Amina Variyana identified some jewellery that was found at first accused's house in Mvutjini.

[170] There was also an investigation of a robbery that took place at Fonteyn where Gugu Maphalala was robbed of her property including a children's lap top, a Proline lap top and a small lap top black in colour. Gugu Maphalala's laptop was released to her as, at the time the suspects had not been found. He got information that the suspects in the robbery at Fonteyn were intercepted at Hilltop but eluded the police leaving their clothes behind. He instructed the scenes of crime officers in Mbabane to package the items and clothes belonging to the suspects for DNA testing. The results of

the DNA test were positive in connecting the first accused with the clothes that were found at the taxi that was stopped by the police at Hilltop.

[171] PW45 further applied to have the firearms pointed out by the accused persons and the empty cartridges found at Hilltop at the scene of the attempted murder charges. He collected the dockets where a 9mm firearm was used. These included the dockets from Malkerns where the complainants were Gugulethu Dlamini, Rian Canby and Donatus Nkonotja Zwane. According to the ballistic reports received, all the cases referred to herein were linked by the results to the firearms and empty cartridges that were pointed out by the accused persons.

[172] PW45 then charged the accused with robbery and attempted murder.

[173] PW45 handed in Court the documents where he had recorded the serial numbers of the notes he had taken from both accused persons. He also handed in court the exhibits recovered; this was after the exhibits were labeled accordingly.

[174] During cross examination, both accused persons denied that they freely and voluntarily led the police and pointed out the firearms and ammunition in Manzini next to the filling station and in Mbabane, Mpholonjeni/Mahwalala areas. The first accused stated that he could not have gone to point out anything to the police in Manzini because he was crying when he was being taken there. They both stated that the money they were found in possession of were proceeds of their small businesses. The response from PW45 was that the accused led the police to the said sites freely and voluntarily and that

they pointed out the area where the exhibits were and the police retrieved same because the accused persons were handcuffed for security reasons.

[175] It is still unclear why it was not put to the independent witnesses that the accused were business people; it is unclear why the first accused did not put the aspect that he was crying when they got to the forest as he thought police were going to kill him. The evidence from the independent witnesses is that the accused persons were not assaulted nor were they forced to do what they did on that day. All the independent witnesses who accompanied the police where the pointing out was to be carried out testified that the accused persons looked ok when they assisted each other to identify the spots where the exhibits were eventually retrieved.

[176] It is the case for the first accused that the police were not looking for him but Bhekithemba his brother. PW45's answer is that the first accused gave them information about Bhekithemba and that from that information, they got the distinct impression that the accused persons were working in concert. This, PW45 testified was done freely and voluntarily by the first accused.

[177] It was also the case for the first accused that the amount found in his possession did not tally with the amount robbed the Variyanas so he could not have possibly carried out that criminal act at Mahlangatsha. PW45's response was that it could be that some of the money had been used already by the accused.

[178] The second accused stated during cross examination of PW45 that he informed the police that he had given one of his phones-a Nokia C1 to Bongani Dube. PW45 stated that the police retrieved a MTN Steplar phone

which had been robbed Dumile Dlamini. The second accused stated that he ran a market stall at Moneni, that is where he made the money that the police found him in possession of. This was denied by PW45. PW45 denied further that the accused persons were shown to the complainants from Lugaganeni, and to Jabulani and Sifiso Simelane before the identification parade was conducted. This was denied by the witness.

[179] The ballistic expert-PW33 Inspector Harry Vusi Madonsela that he received and tested a 9mm parabellum calibre semi- automatic pistol bearing serial number 403539 and found it to be serviceable. He tested another firearm-a 9mm parabellum Astra automatic firearm with serial number S1654 model 100 which had one magazine and found it to be serviceable. It was his evidence that he also received thirty-three 9x19 cartridges and visually examined them and found them to have all the components of a cartridge. PW33 conducted tests and found the said cartridges to be live ammunition. He also received fired cartridges from cases from Malkerns<sup>1</sup>. He determined that the cartridges were fired from the firearm with serial number 403539. PW33 determined further that the same firearm-serial number 403539 was used in the commission of offences at Hilltop (attempted murder).

[180] The ballistic expert ascertained from the firearm register that the two firearms referred to herein were registered in the names of Mduduzi Masiko Dlamini (serial number 403539) and Jabulani Simelane (serial number S1654).

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<sup>1</sup> Rian Canby; Gugulethu Dlamini, Marcel Leon Smith and Donatus Nkonotja Zwane.

## **The Defence Case**

[181] The first accused testified that he was arrested by the police kaMahhala in Matsapha. Before he was arrested, he fled from the people who came after him because they had not introduced themselves as police officers. He saw some people tracking him and was carrying a firearm. When it tried to cross the road, other people came in front of him and were carrying guns and they pointed the guns at him. He lay on the ground and pleaded with the people not to kill him but should take the money. One of the people said of the first accused-it is not Bhekithemba, it is his brother. They then asked the first accused where Bhekithemba was and he denied knowledge of his whereabouts. The people were of a violent streak when they dealt with the first accused. They kicked the first accused while he lay on the ground. The first accused says he did not believe the people were police officers as they were not wearing the police uniform. He however saw a police officer he knew among the group of people who were now assaulting him.

[182] The first accused then informed the police where he had left Bhekithemba. When the police enquired about where he had got so much cash, he told them these were proceeds from his business where he braiis meat. He says he was then bungled into a motor vehicle and he sat the back in the middle of police officers. Along the way, he was threatened with death by police officers. The vehicle went to Manzini where he was made to alight and go to a bush. At the time he was crying because he thought the police would kill him. He met up with a person who was handcuffed and was wearing dirty clothes. He was forced to tell an independent person that he was there to point out something. He did not but continued to cry. He was forced into the

bush with the other person who was handcuffed and made to point at a rock so they could take a photo, he refused to do so. The police dug next to the rock and took out a black plastic bag which contained two guns-one black and the other silver in colour. The first accused testified that as he was hysterical, he did not see what was happening. I pause here to observe that this evidence is contradictory and self-defeating. On the one hand, the first accused saw the police retrieve a plastic bag with firearms and on the other hand, he was so distraught and did not see what was happening. In my view, the chronology of events, absent the crying part-fits in with the evidence led by the Crown witnesses namely, PW45, the independent witness taken from the filling station as well as the evidence of the scenes of crime officer Magagula. It is telling also that none of the Crown witnesses saw the first accused crying when the pointing out was carried out in Manzini. The first accused also did not put it to the Crown witnesses that he was in tears at the time. This evidence, in my view has all the hallmarks of an afterthought and I reject it as such.

[183] The first accused also did not put it to the independent witness (Msimangu) that he was aggressive towards him. The first accused testified that at Mpholonjeni/Mahwalala inside a bush he saw police officers digging next to a rock and retrieving a black plastic bag and a white SPAR plastic bag. The first accused says he was taken aback by the retrieval of the bags and did not know what they contained. He did see the contents when the bags were opened namely containers of ammunition. In cross examining PW45, the first accused stated that he did not know the contents of the bag found at Mpholonjeni. He also intimated that he could not have pointed out any exhibits at Mpholonjeni as there are no photos showing him doing so. He

alleged further that in the absence of fingerprints connecting him with the firearms and the ammunition, it cannot be said he knew anything about the firearms and the ammunition. The Crown witnesses were unmoved and insisted that the first accused pointed out the exhibits in Manzini and at Mpholonjeni. It has not been shown what motive all the Crown witnesses would have in 'falsely' implicating him. The first accused has not disputed that he was warned in terms of the Judges' rules before the pointing out was carried out. From the evidence presented before Court, the police knew firearms and live ammunition were stolen with the aid of violence from Masiko Dlamini and from Jabulani Simelane. There is no evidence the police had prior knowledge where the said firearms and ammunition were kept after the complainants were robbed of same. That part of the puzzle was completed by the accused when they pointed out the said exhibits to the police. It is also not the case of the accused persons that the police planted the said evidence!

[184] The first accused testified also that the police went to his rented flat at Mvutjini and took his personal effects and said it was ill gotten gain when in fact he had receipts for the property taken by police. He further stated that the police undertook to return his property after he had told them he bought same using money from his business. I must state that this version was not put to the Crown witnesses. The Court therefore does not know what the response of Crown witnesses would have been.

[185] The first accused told the court that at the police regional headquarters, Manzini he was tortured by way of being tubed and suffocated. He says he told the police he is not a criminal. On a subsequent day, after Bhekithemba

had been arrested, the first accused, Bhekithemba and the police went to Bhekithemba's rented flat where a lot of property belonging to Bhekithemba was taken.

### **The Case for the Second Accused**

[186] The second accused was arrested on 25 September 2014 at Moneni while he was strolling with his girlfriend. He says he met a number of men travelling in different vehicles. They stopped and parked their cars and insulted him and his girlfriend. They ordered the second accused not to move or they will shoot him. The second accused says he was confused and did not know if the men wanted to rob him. One of the men knocked him and he fell to the ground; he put his foot on the second accused's neck. The other men body searched the second accused. He says he asked the men to spare his life and take the cash. One of the men said they are police officers. That both accused say they thought they were being robbed and begged the police not to kill them but take the money is not lost to me. It is strange that even though the accused persons were arrested at different places, they made similar utterances when they were arrested.

[187] It is notable also that the second accused did not confront the Crown witnesses about the insults they allegedly hurled at him when he was arrested. The accused says he was assaulted and injured and the police refused his mother permission to see him. It is surprising that the second accused did not call his mother and his girlfriend to support his version, nor did he give reasons why his mother or his girlfriend was not called.

[188] After his arrest, the accused led the police to kaMahhala where he said he was due to meet with Bhekithemba.

[189] At kaMahhala the second accused says he saw police come with a different person with whom they all drove to Manzini police regional headquarters, waited for Bhekithemba Ndzinisa and were taken to a quantum where they were paraded before complainants in the offences charged.

[190] Police took cash and cellphones belonging to the second accused. He told police that he had given one of his phones-a Nokia C1- to Bheki Matasatasa Dube from Mbabane. He went to Mbabane and Dube gave them a different phone and not the one he had given him earlier. It was accused person 2 that he had lent Dube the phone. The problem with this version is it was not put to Dube. Dube told the court that he gave the second accused E100 after he had asked for money to give his girlfriend bus fare. It was Dube's evidence that accused 2 undertook to pay back the E100 and take his phone then. This version was not disputed by the second accused.

[191] The second accused disputed that he freely and voluntarily went to Manzini next to the Filling station and to Mpholonjeni/Mahwalala to point out what turned out to be firearms and ammunition. He admits seeing police dig up a place next to a rock and retrieving a black plastic bag which contained one firearm which was silver in colour and another firearm which was black in colour. He admits seeing police retrieve plastic bags which contained live rounds of ammunition kept in its containers.

[192] He was later taken to his rented flat at Mobeni where police, in the company of Hedzane searched his house and took his Bronx brown boots, a plastic

bag with crushed dagga. It is his evidence that police came to his rented room with two live rounds of ammunition and planted it there. The police placed the live rounds of ammunition in his mattress and said they will say these were found in accused's house.

[193] Later he says he was taken to Lugaganeni where he was paraded to the witnesses in another case of robbery. He was later taken to Matsapha police station where an identification parade was conducted.

### **Conclusion**

[194] There is incontrovertible evidence that the offences charged took place and both accused persons are identified as the participants in the possession of firearms and rounds of ammunition without a license; various counts of robbery; housebreaking with intent to steal and theft and attempted murder of two police officers. The accomplice witness fingers the first accused in robbery that was committed at eNgculwini and in various areas around Malkerns. The Court is acutely aware of the danger of convicting on the evidence of an accomplice witness but in this case there is every guarantee that the evidence of the accomplice is correct and that the denial of being involved is completely false.

[195] Both accused persons deny any involvement in the commission of crimes charged. In fact their evidence is that they are not criminals as they made money from running small scale businesses. I find this evidence to be a fanciful bag of lies. Evidence before court shows that until the accused were arrested sometime in September 2014, they were acting like desperados by terrorizing and robbing people of their property at night time.

[196] The accomplice witness was apparently truthful and his account was confirmed not only by the evidence relating to the vehicle used in the commission of the offence at Nhlambeni and the fact that the first accused escaped into the night when police asked to search the motor vehicle in which he was a passenger with Sanele Tsabedze-the accomplice. The first accused did not deny he fled the scene at that time; he also did not deny that he subsequently gave Sanele Tsabedze the run-a-round and said he was at Siteki and later switched off his phone when he heard the police and Sanele Tsabedze were there looking for him. Surely if the first accused had nothing to hide, he would have availed himself to the police instead of fleeing from them leaving the accomplice in the lurch.

[197] There is no indication from the evidence led in court that when the robbery was committed by the accused persons in various places, that they wore masks or that they hid their faces with anything. It has also been established in most of the robbery charges that the events of the robberies did not take place in a split second. Most of the complainants saw and identified the accused persons; they testified that the accused carried guns and or other deadly weapons; the accused stood next to the witnesses when they were robbing them and there was mostly enough light in the rooms when the witnesses were robbed.

[198] Where the accused were not positively identified by the witnesses, they were linked to the crimes through ballistic evidence.

[199] The accused persons were also found in possession of property stolen during the robberies and housebreaking and theft cases that took place in 2014. The accused did not give a satisfactory explanation how they came to be in

possession of property that was taken from their owners by violent means. The law is settled that the recent possession of stolen property when taken in context and with other evidence may assist the Court to make a finding of guilt<sup>2</sup>. This is called the doctrine of recent possession.

[200] The first accused is connected to the crimes of attempted murder involving police at Hilltop by ballistic evidence. Firing at police officers who were only doing their job when they stopped the taxi that the first accused was travelling in was not only reckless but also showed an intention to inflict death on the officers. It is not necessary that the officers should have been injured in order for the charge of attempted murder to stick. What is necessary is to prove the intention to kill. From the nature of the weapon used and the firing aimed at the police by the first accused, I am satisfied that he intended to murder officer Fakudze and officer Magongo.

### **Escaping from lawful custody**

[201] The Crown has conceded, correctly in my view that no evidence was led to prove commission of the offence in count 29.

### **Charges about contravention of the Arms and Ammunition Act, 1964**

[202] The investigating officer testified that after both accused persons were arrested, they were informed of their rights and cautioned in terms of the Judges' rules and they freely and voluntarily led the police, in the company of independent witnesses to a place in Manzini and in Mbabane where they freely and voluntarily pointed out the spots where the arms and ammunition were found. The cumulative weight of the evidence by the police officers

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<sup>2</sup> *R v Ntokozo Dlamini & Another* High Court Case No. 92/1999.

and that of independent witnesses points in my view, overwhelmingly to the accused persons' guilt on the counts pertaining to the contravention of the arms and ammunition Act.

[203] On a totality of evidence before me I return the following verdicts:

[204] Count 2: Contravention of section 11(1) read with section 11(8)(a) of the Arms and Ammunition Act. Accused 1 and Accused 2 are guilty

[205] Count 3: Contravention of section 11(1) read with section 11(8)(a) of the Arms and Ammunition Act. Accused 1 and Accused 2 are guilty.

[206] Count 4: Contravention of section 11(2) read with section 11(8)(c) of the Arms and Ammunition Act. Accused 1 and Accused 2 are guilty.

[207] Count 5: Contravention of section 11(2) read with section 11(8)(c) of the Arms and Ammunition Act. Accused 1 and Accused 2 are guilty.

[208] Count 6: Contravention of section 11(2) read with section 11(8)(c) of the Arms and Ammunition Act. Accused 2 is guilty.

[209] Count 7: robbery at Mahlangatsha. Accused 1 and accused 2 are guilty

[210] Count 8: robbery at Mahlangatsha. Accused 1 and accused 2 are guilty

[211] Count 9: robbery eZulwini (Jabulani Simelane) Accused 1 and 2 are guilty

[212] Count 10: robbery eZulwini (Sifiso Simelane) accused 1 and 2 are guilty.

[213] Count 11: robbery eNgculwini (Masiko Simelane) accused 1 is guilty

[214] Count 12: robbery eNgculwini (Hlobisile Mngomezulu) accused 1 is guilty

- [215] Count 13: robbery Malkerns (Gugulethu Dlamini) accused 1 and accused 2 guilty
- [216] Count 14: robbery Malkerns (Donatus Nkonotja Zwane) accused 1 guilty
- [217] Count 15: robbery Malkerns (Rian Canby) accused 2 guilty
- [218] Count 16: robbery Malkerns (Marcel Smith) accused 2 guilty
- [219] Count 17: robbery Lugaganeni accused 1 and accused 2 guilty
- [220] Count 18: robbery Lugaganeni accused 1 and accused 2 acquitted and discharged.
- [222] Count 19: robbery Lugaganeni accused 1 and accused 2 guilty
- [223] Count 20: robbery Lugaganeni accused 1 and accused 2 guilty.
- [224] Count 21 robbery Rest Camp accused 1 and accused 2 are guilty.
- [225] Count 22: robbery Rest Camp accused 1 and accused 2 guilty
- [226] Count 23: robbery eNgculwini accused 1 and accused 2 guilty
- [227] Count 24: robbery eNgculwini accused 1 and accused 2 guilty.
- [228] Count 25: robbery Fonteyn accused 1 guilty
- [229] Count 26: Housebreaking with intent to steal and theft accused 1 is guilty
- [230] Count 27: Housebreaking with intent to steal and theft accused 1 guilty
- [231] Count 29: Escaping from lawful custody accused 1 is acquitted and discharged

[232] Count 30: robbery accused 1 guilty.

[233] Count 32: Housebreaking with intent to steal and theft accused 1 guilty

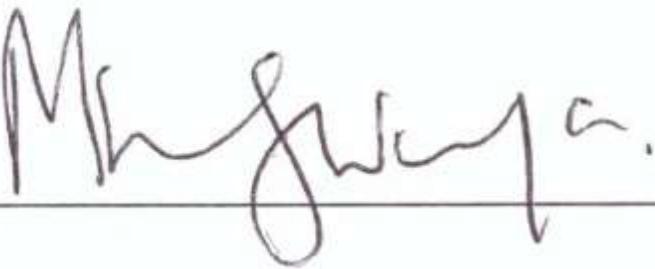
[234] Count 33: robbery accused 1 guilty

[235] Count 34: robbery accused 2 acquitted and discharged

[236] Count 35: robbery accused 2 acquitted and discharged.

[237] Count 36: attempted murder accused 1 guilty

[238] Count 37: attempted murder accused 1 guilty.



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**M. LANGWENYA J.**

For the Crown:

Mr. K. Mngomezulu

For Accused 1:

In Person

For Accused 2:

In Person