IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO: CC 90/2017

In the matter between

THE STATE

VS

JABULANI JOHN NDLOVU	**Accused no 1**
FORGET NDLOVU	**Accused no 2**
SIBUSISO SANI NDLOVU	**Accused no 3**

JUDGMENT

PICKERING J:

[1] The three accused were initially charged with 65 counts relating to 13 separate incidents of alleged rhino poaching which, in terms of the Schedule to the indictment as amended are alleged to have occurred at various farms and reserves in the districts of Albany, Jansenville, Graaff Reinet and Cradock. At the outset of the trial the charges relating to incidents number 3, 4 and 10 were separated. These incidents had reference to rhino poaching at Pumba Game Reserve (incidents number 3 and 4) and Sibuya Game Reserve (incident number 10). The trial proceeded before me with regard to the remaining ten incidents. Each one of these ten incidents gave rise to five counts.

INCIDENT NUMBER 1: COUNTS 1 – 5: FORT BROWN CAS05/06/2016

[2] Counts 1 to 5 relate to incident number 1 on the Schedule, which occurred on 17 – 18 June 2016 at Bucklands farm in the district of Albany, in the course of which a white rhino, known as Cambell, belonging to one Ian Steward, was darted with a tranquiliser gun and its horn removed, resulting in the death of the rhino. The accused are charged on count 1 in respect of this incident with theft of the horn.

[3] On count 2 they are charged with a contravention of section 57(1) of the National Environmental Management; Biodiversity Act, 10 of 2004 (committing a restricted activity involving a protected species without a permit) in that at the said time and place they cut off and had in their possession the said rhino horn without a permit issued in terms of Chapter 7 of the Act. On count 3 they are charged with a contravention of section 29(k) of the Cape Provincial Ordinance on Nature and Environmental Conservation, 19 of 1974, (illegal hunting of wild animals by means of a device injecting an intoxicating or narcotic agent into the said rhino without holding a permit authorising them to hunt by such means). On count 4 they are charged with a contravention of section 22A(1) of the Medicines and Related Substances Act, 101 of 1965 (illegal possession of a schedule 6 medicine or substance) in that at the same time and place they had in their possession a scheduled substance, namely M99 (Etorfine) and/or Thiafentanil listed in Schedule 6 of the Act, other than in accordance with the prescribed conditions. On count 5 they are charged with a contravention of section 90 of the Firearms Control Act, 60 of 2000, read with section 250 of the Criminal Procedure Act, 51 of 1977 (unlawful possession of ammunition) in that they unlawfully possessed an unknown quantity of .22 calibre ammunition while they were not the holders of valid licences in respect of firearms capable of discharging such ammunition or the holders of permits or authorisations to possess such ammunition.

INCIDENT NUMBER 2: COUNTS 6 – 10: JANSENVILLE CAS49/10/2013

[4] Counts 6 to 10 have relevance to incident number 2 in the Schedule in respect of which the accused are charged on count 6 with the theft of four rhino horns on 19 – 20 October 2013 at Koffielaagte farm, in the district of Jansenville, the property of C. Kunal and/or PJ Smith, valued at R700 000,00. On counts 7 to 10 the accused are charged with contraventions of the same statutory offences as in counts 2 to 5.

[5] As I have said counts 11 to 20 were separated and no more need be said about them.

INCIDENT NUMBER 5: COUNTS 21 – 25: GRAAFF REINET CAS191/05/2014

[6] Counts 21 to 25 relate to incident number 5 on the Schedule. On count 21 the accused are charged with the theft on 11 – 13 May 2014 at Mount Camdeboo farm in the district of Graaff Reinet of two rhino horns, valued at R300 000,00, the property of R. Slater. Again, on counts 22 to 25 the accused are charged with contraventions of the same statutory offences as set out in counts 2 to 5.

INCIDENT NUMBER 6: COUNTS 26 – 30: GRAAFF REINET CAS82/11/2014

[7] On count 26 the accused are charged with the theft of two rhino horns, again at Mount Camdeboo farm, on 7 – 8 November 2014, the property of R. Slater, valued at R300 000,00. On counts 27 – 30 the accused are again charged with contraventions of the same statutory offences referred to in counts 2 to 5.

INCIDENT NUMBER 7: COUNTS 31 – 35: GRAAFF REINET CAS26/03/2015

[8] On count 31 the accused are charged with the theft of two rhino horns, the property of R. Slater, at Mount Camdeboo farm on 1 – 3 March 2015. On counts 32 to 35 they are charged with the same statutory offences as in counts 2 to 5.

INCIDENT NUMBER 8: COUNTS 36 – 40: CRADOCK CAS11/02/2016

[9] On count 36 the accused are charged with having killed one white rhino, valued at R700 000,00 the property of Erwin Tam, on 30 January – 1 Feb 2016 at Klein Doornberg farm, in the district of Cradock. On counts 37 to 40 they are charged with having contravened the same statutory offences as set out in counts 2 to 5.

INCIDENT NUMBER 9: COUNTS 41 – 45: CRADOCK CAS159/03/2016

[10] On count 41 the accused are charged with the theft of two white rhino horns valued at R900 000,00, the property of Erwin Tam, at Spekboomberg farm, Cradock on 17 – 18 March 2016. On counts 42 to 45 they are charged with contraventions of the same statutory offences as in counts 2 to 5.

[11] As I have set out above counts 46 to 50 which relate to incident number 10 were separated at the outset of the trial and no more need be said about them.

INCIDENT NUMBER 11: COUNTS 51 – 56: CRADOCK CAS258/04/2016

[12] On count 51 the accused are charged with the theft on 21 – 22 April 2016 of one rhino horn, the property of Erwin Tam, valued at R550 000,00, at Spekboomberg farm, Cradock. On counts 52 to 55 they are charged with contraventions of the same statutory offences referred to in counts 2 to 5.

INCIDENT NUMBER 12: COUNTS 56 – 60: CRADOCK CAS172/05/2016

[13] On count 56 they are charged with the theft on 15 – 16 May 2016 at Kleindoringberg farm, Cradock, of one white rhino horn the property of Erwin Tam, valued at R600 000,00. On counts 57 to 60 they are charged with contraventions of the same statutory offences as in counts 2 to 5.

INCIDENT NUMBER 13: COUNTS 61 – 65: FORT BROWN CAS01/06/2016

[14] On count 61 the accused are charged with the theft on 15 – 30 May 2016 of two black rhino horns valued at R1,2 million the property of G, Shaw. On counts 62 to 65 they are charged with contraventions of the same statutory offences as in counts 2 to 5.

[15] On all the main counts of theft, namely counts 1, 6, 21, 26, 31,36, 41, 51, 56 and 61 the accused are charged in the alternative with statutory conspiracy to commit theft in contravention of s 18(2)(a) of the Riotous Assemblies Act, 17 of 1956 and, in the second alternative count, with malicious injury to property.

[16] The accused pleaded not guilty to all the counts and gave no plea explanation. However, they made a number of admissions in terms of section 220 of Act 51 of 1977 (Exhibit G).

[17] With reference to the Schedule to the indictment it was admitted that on the various dates and places listed in the Schedule the number of rhino specified therein were darted with tranquilisers and a number of horns removed and stolen from these animals as listed therein. It was admitted further that all the rhino died as a result of the high quantity of tranquilisers administered save for one of the rhino in respect of incident number 2 as well as both rhinos in respect of incident numbers 12 and 13. Certain post-mortem reports in respect of the dead rhinos were handed into court by consent.

Incident no 1: 17 – 18 June 2016 – Bucklands Game Farm

[18] On 18 June 2016 Dr. Fowlds, a veterinary surgeon, performed a post-mortem examination on the rhino bull Cambell at Bucklands Game Reserve. Dr. Fowlds also testified.

[19] According to his report (Exhibit H1) the bull was lying in a large pool of blood and blood tainted foam on its right side with the front horn missing. The blood emanated from the traumatised sinuses and airways which had been traumatically exposed when the horn was removed.

[20] In the opinion of Dr. Fowlds the horn had been removed by a sharp serrated blade. Judging by the amount of bleeding which had occurred the rhino was still alive whilst its horn was being removed.

[21] Dr. Fowlds concluded, based on the lack of decomposition of the carcass and the degree of pressure that had built up in the abdomen, that the rhino had died less than 24 hours before the post-mortem examination had commenced. In his view, in the absence of any evidence of a bullet entry into the body, the rhino had been immobilised by the use of highly potent opioid drugs. The level of the incision and the damage to tissues and blood vessels was sufficient to cause substantial blood loss which, along with the amount of pain that this trauma would have caused, led to the death of the animal.

Incident no 2: 19 - 20 October 2013 – Koffielaagte Farm

[22] A post-mortem examination was performed on a carcass of a rhino cow found on 20 October 2013 by Dr. Macfarlane, State Veterinarian, Graaff Reinet. In his report (Exhibit H2) Dr. Macfarlane stated that a puncture mark was present over the rhino's left shoulder which, when the area of skin was removed, enabled him to identify an area of muscle haemorrhage and the passage through the skin where a sharp object of 1 – 2 mm diameter and 3 – 4cm long had penetrated. He stated that this lesion was consistent with what one could expect if the animal had been darted from the ground, from slightly in front of its left shoulder. A 3mm Pneudart dart was found on the scene.

Incident no 5: 11 - 13 May 2014 – Mount Camdeboo Farm

[23] On 14 May 2014 Dr. Fowlds was called to the post-mortem of a male white rhino at Mount Camdeboo Game Reserve. The rhino was lying on its right hand side with its head placed on two rocks which appeared to have been deliberately placed in order to aid in the removal of its horns. Indeed, its two horns were removed by what appeared to be a saw or blade with a serrated edge at a level which transsected the growth plates and exposed the frontal sinus.

[24] No indication of a bullet entry or exit wound could be found or obvious internal bullet track. There was a lesion over the left neck/shoulder area which was consistent with a small penetrating wound of subcutaneous and underlying superficial muscle bruising. The bruising and haemorrhage over the spinal areas along with the laxation of the vertebra were in the opinion of Dr. Fowlds a combination of tissue decomposition accelerated in these areas by traumatic damage as a result of falling and rolling over these pressure points. (Exhibit H5)

Incident no 6: 7 - 8 November 2014 – Mount Camdeboo Farm

[25] Dr. Fowlds performed a post-mortem on the carcass of a female white rhino at Mount Camdeboo Game Reserve on 8 November 2014. His post-mortem report (Exhibit H6) revealed that both of the rhino's horns had been removed by what appeared to be a saw or blade with a serrated edge, thereby exposing the frontal

sinus. A small bleeding lesion was evident in the skin just in front of and above the elbow. On removal of the skin over this area subcutaneous haemorrhage and underlying muscle damage consistent with a penetrating object was found. On further examination of the skin a tract through the skin was exposed which contained a gel plug of the type found on the needles of darts known as "*drop out darts*" designed to partially dissolve some time after entering the skin of a darted animal, allowing the dart to fall out once the contents had been ejected.

[26] Dr. Fowlds concluded that the lesion through the skin, the skin tract and the underlying tissue trauma was consistent with a recent dart injury. The gel "*collar*" remnant indicated that the dart used was a model made by Pneudart. In his opinion the rhino died following complications of an immobilisation (darting) during which its horns were removed.

Incident no 7 – 1 – 3 March 2015 – Graaff Reinet

[27] A post-mortem examination was performed on the body of a female white rhino as well as her sub-adult calf by Dr. Fowlds on 3 March 2015. In his report (Exhibit H7) he stated that the adult rhino was found on her chest with her head elevated on a branch, both horns removed, as depicted in the photographs in Exhibit H7 with a saw with a serrated edge. The rhino was heavily pregnant. The sub-adult rhino was lying on its side with a stone under its head. Its front horn had been removed with a saw with a serrated edge. A dart needle consistent with a Pneudart model was found in its underlying tissue.

[28] Dr. Fowlds concluded that both rhinos had died following complications of darting during which time their horns had been removed.

Incident no 8 – 30 January - 1 February 2016 – Kleindoringberg Farm

[29] A post-mortem examination was performed upon the carcass of the rhino in respect of this incident which was found in the veld on the morning of 1 February 2016. The report of Dr. Malan, the State Veterinarian, Elliot, was handed as Exhibit H8. Dr. Malan stated that both of the rhino's horns were in fact still present at the

carcass. The nostril horn was completely loose and the caudal horn was partially loosened. An elongated, cylindrical dart with a smooth needle and an orange plastic rear end was located in the right dorsolateral cervicothoracic area, with the needle penetrating deeply though the skin. The dart resembled the Pneudart 2/3 CC type, with a long smooth needle. Dr. Malan concluded that the rhino had died in consequence of "*suspected opioid-toxicity (as a result of chemical immobilisation).*"

[30] The evidence of Mr. Erwin Tam casts greater light on the circumstances of the rhino's death.

[31] Mr. Erwin Tam is the owner of Spekboomberg and Kleindoringberg farms, both situate in the district of Cradock. Both farms were utilised as game and hunting farms, approximately 15km from each other. Amongst the animal species on the farms are black and white rhino.

[32] With regard to incident number 8 the killing of a white rhino at Kleindoringberg during the period of 30 January to 1 February 2016 he stated that he and his father were at the time visiting the USA for marketing purposes. His staff were left in control of the farm. It was reported to him that a white rhino had been killed but that its horn had not been removed. See in this regard the post-mortem report by Dr. Malan. The value of the rhino was R700 000,00.

[33] He stated that he had at the time an employee, ironically named Honesty Mwariwanga, little suspecting that he was harbouring a viper in his bosom. It is common cause that Mwariwanga made a written statement to Capt. Viljoen admitting his involvement in rhino poaching. The accused consented in terms of section 213 of Act 51 of 1977 to his statement, Exhibit V, being admitted in evidence.

[34] In that statement Honesty admitted that he had been involved in the killing of the rhino but stated that before its horn could be removed he had been charged and, in a rare reversal of fortune, gored by a black rhino, necessitating him and his accomplices leaving the scene for medical attention without completing the dehorning of the dead or tranquilised rhino. It appears from the statement that

Honesty was paid R35 000,00 in cash for his services which he used "*to pay for repairs to my vehicle and the rest I spend on my house.*"

[35] Mr. Tam stated that this was consistent with the behaviour of black rhino which were very much more aggressive than white rhino. He stated that he himself had often been charged without provocation by black rhino.

[36] The aforementioned Dr. Fowlds stated that he had had regard to the report that was compiled by the State Veterinarian, Dr. Malan. In that report Dr. Malan had indicated only that the death of the rhino had occurred more than twenty four hours before the autopsy which was conducted on 1 February 2016. It was admitted by the defence that the rhino had died in consequence of a high dose of tranquiliser as found by Dr. Malan. (Exhibit H)

[37] Dr. Fowlds stated that it was difficult to give a more precise estimation of the time of its death. Having regard to the photographs of the rhino taken at the time of the autopsy and the fact that Dr. Malan had reported that the horn had come off very easily without breaking the skin he was of the view that the shortest possible time that the rhino could have lain in the veld would be three days, but, depending on weather conditions, that could be as long as a week.

<u>Incident no 9: 17 – 18 March – Spekboomberg Farm</u>

[38] Dr. Erasmus visited Spekboomberg on 18 March 2016. He found an adult white rhino cow lying on its right side with a dart attached to the anterior aspect of its right foreleg. The front horn had been removed close to its base, apparently with a thin bladed saw. The back horn which was fitted with a microchip was intact. The cow was pregnant with a bull calf in the last trimester of pregnancy.

[39] Dr. Erasmus also found a young rhino bull, approximately 4 years old with its front horn removed.

[40] A very distressed young rhino heifer calf was found running around with an area of haemorrhage on her upper back area.

Incident no 11: 21 – 22 April 2016 – Spekboomberg Farm

[41] Dr. Hennessey, a veterinary surgeon practicing at Camdeboo Veterinary Clinic practice performed a post-mortem examination on the white rhino cow belonging to Tam which had been found dead at Spekboomberg farm.

[42] In his post-mortem report (Exhibit H11) Dr. Hennessey stated that the rhino's horn had been removed flush with the skin on the nose. On examination a small puncture wound was found on her right shoulder. The section of skin surrounding the penetration wound was removed and examined. A tract mark was visible through the skin running diagonally and extending all the way to the subcutaneous tissues. This was consistent was damage seen during darting. Dr. Hennessey concluded that the most likely method of capture and death was by darting with a chemically immobilising drug.

Incident no 12: 15 – 16 May 2016 – Kleindoringberg Farm, Cradock

[43] With regard to this incident which relates to the dehorning of a white rhino on Kleindoringberg farm Mr. Tam stated that he was present at the farm on 18 May 2016 when a live white rhino was seen at 07h30 without its horn. He did not inspect it more closely as he did not want to dart it again.

Incident no 13: 15 – 30 May 2016 – Great Fish Reserve

[44] A report (Exhibit H13) in respect of the rhino involved in this incident was prepared by Dr. Tindall, a veterinary surgeon practising at Robberg Veterinary Clinic, Pletternberg Bay.

[45] The particular rhino whose horn had been removed had survived the incident and had been located by Mr. Gavin Shaw who contacted Dr. Tindall on 4 June 2016.

[46] On 5 June Dr. Tindall immobilised the rhino in order to examine and treat the wound. On examination he ascertained from the state of the wound that the

poaching incident must have occurred approximately 7 – 10 days prior thereto. He stated that the rhino cow had been chemically immobilised by a darting procedure and her horns removed completely by cutting below the level of horn attachment. In doing so the underlying bone was cut and the sinus cavities penetrated. The back horn was removed with little damage to the underlying structures.

[47] He stated that black rhino are more tolerant to anaesthesia than white rhino and that as a result this rhino cow was able to survive both the extensive trauma sustained from the brutal removal of her horns as well as the anaesthetic procedure.

[48] The accused admitted further as follows:

> "*3. All the rhinos involved were tranquilised during the respective incidents by means of Etorphine and/or Thiafentanil, both substances being tranquilisers/narcotic agents listed in Schedule 6 to Act 101 of 1965.*
> *4. The said tranquilisers were administered by means of darts fired from a dart gun.*
> *5. At no times relevant to the charges did any of the 3 Accused hold valid prescriptions or fire arm licences/permits or permits in terms of environmental legislation to have in their possession the said tranquilisers or any .22 blank ammunition or rhino horns or to hunt rhinos*."

[49] It is common cause that the three accused were arrested at 22h35 on 17 June 2016 and inside chalet 8, Makana Resort, Grahamstown. It is also admitted that at the time of their arrest the following items were found in chalet 8:

> "*6.1 One freshly removed rhino horn;*
> *6.2 Tranquiliser dart gun;*
> *6.3 Five tranquiliser darts;*
> *6.4 Etorphine (M99) tranquiliser;*
> *6.5 Yellow bow saw;*
> *6.6 Rounds of .22 blank ammunition;*
> *6.7 Two knives;*

6.8 Side cutter pliers;

6.9 Cordless drill;

6.10 Six cellular phone handsets containing sim cards and one loose sim card."

Further admissions were made as follows:

"7. The rhino horn referred to in 6.1 was removed with a saw from the rhino "Cambell" *during incident no 1.*

*8. Forensic testing found DNA material of the said rhino "*Cambell" *on the saw referred to in 6.5 above.*"

[50] Certain photographs of the scene, Exhibits O and P, at and in the chalet were handed in by consent depicting, *inter alia*, the rhino horn found in the chalet and the tranquiliser dart gun. It is common cause that the rhino horn weighed 10,7kg. The photographs also depict boots covered in mud with pieces of cactus attached to them. Photographs were also handed in depicting the maimed and dead rhino from which the horn referred to in paragraph 6.1 of the admissions was removed. A case docket, namely Grahamstown CAS142/06/2016 was opened.

[51] The defence contested the admissibility of the evidence relating to the finding of the items referred to paragraph 6 of Exhibit G, it being alleged by the defence that the search conducted by the police, which was conducted without a warrant and which led to the finding and seizure of the said items, was unconstitutional and unlawful. A trial-within-a-trial was accordingly conducted as to the admissibility of this evidence. At the conclusion thereof I ruled that it was admissible and gave my reasons *in extenso* for my finding. My judgment in the trial-within-a-trial should be read in conjunction with the present judgment.

[52] In that judgment I dealt with the evidence of Captain Viljoen in detail, he being the commander of the Stock Theft and Endangered Species Unit based in Jeffrey's Bay as well as being the Provincial Coordinator for Rhino Poaching Investigations in the Eastern Cape. As appears from my judgment he testified to the effect that, based on the modus operandi of rhino poachers in the Eastern Cape as well as on certain information received from an informer concerning the movements of a white

Audi he travelled from Jeffrey's Bay to Grahamstown in order to oversee a police operation called Full Moon.

[53] He testified at considerable length as to the ensuing events in Grahamstown on the 16th and 17th June which culminated in the finding of the various items listed in paragraph 6 of the admissions made by the accused (Exhibit G). In particular, he testified that he had been present at the scene at chalet 8, Makana Resort, on the night of 17 June when entry was gained by the police to the chalet. In my judgment I summarised his further evidence as follows:

> *"[23] He drove into the resort and up a tarred road past chalet number 8 where he saw the Audi parked approximately five metres from the chalet. He stopped his motor vehicle at a point above the chalet where the road ended in order to turn it around. When he stopped McLaren got out and went towards the chalet. Having turned his motor vehicle he saw Vos coming from out of the dark along the side of the chalet towards the Audi. He switched off his motor vehicle, climbed out and ran in the direction of the chalet. He was just behind McLaren when the door of the chalet suddenly opened from inside. He heard McLaren and Vos ordering the occupants of the chalet to lie on the ground. At that stage he was in the doorway of the chalet. He could see into the chalet and saw a backpack on the floor, more or less in the centre of the room, with what he described as being a greyish pointy object protruding from it, which he realised was a rhino horn.*"

[54] He stated further that everything had happened very quickly – in a matter of seconds.

[55] Viljoen testified in the main trial as well. He confirmed the evidence which he had given in the trial-within-a-trial. During the course of his cross-examination by Mr. Price it was put to him that according to instructions given to him by the accused Viljoen had in fact not been present at all at the time that the events at chalet 8 unfolded and that his evidence in this regard was a complete fabrication. To this end Mr. Price sought and obtained a number of documents from the State, which documents, so he submitted, established the falsity of Viljoen's evidence that he was

present. The trial was accordingly postponed to enable the State to furnish the requisite documents to the defence, which it duly did.

[56] One of these documents was the vehicle register of the motor vehicle in which Viljoen allegedly travelled from Jeffrey's Bay to Grahamstown on 16 June 2016. In my view there could be no other reason for having requested this document than that the defence was of the view that it might support the allegation that Viljoen was not in fact present in Grahamstown at the relevant time. At the resumed hearing, however, Mr. Price stated, as he had to in the light of the vehicle register, that there was no argument that Viljoen had reached Grahamstown at approximately 23h45.

[57] The vehicle register (Exhibit Z3), which is a certified copy of the original, is in respect of a VW Amarok number BTW 484 GP in use by the Stock Theft and Endangered Species Unit. It reflects that the vehicle was indeed booked out by Captain Viljoen on 16 June 2016 at 21h00 with an odometer reading of 6412. It was then booked back by Viljoen at Jeffrey's Bay on 18 June 2016 at 09h15 with an odometer reading 6995, having travelled a distance of 583km.

[58] Under the column "*Destination and Nature of Service*" Viljoen wrote:

"*Grahamstad – following information and Investigate Fort Brown CAS5/6/2016."*

[59] It is common cause that this docket refers to incident 1 in the course of which the rhino Cambell was killed. It is further common cause that the docket was only opened at 09h30 at Fort Brown. It was therefore put to Viljoen by Mr. Price that in the circumstances it was impossible that he could have referred to a CAS number that was non-existent at the time. Viljoen explained that on his return to Jeffrey's Bay at 09h15 he had gone to his home and had a rest. After the rest he returned to the office where the vehicle register was kept. He was obliged to enter the time of 09h15 because the vehicle was fitted with a tracking device and his time of return had to correspond with that. It was then that he filled in the information concerning CAS5/6/2016. He stated that he had in fact found out for the first time where the rhino had been killed and to whom it belonged when he was telephoned by a certain Captain Ruiters whilst he was driving back to Jeffrey's Bay.

[60] It was put to him that he was not allowed to back date entries in the register and that "*you are trying to create the impression that you were actually going to Grahamstown to investigate this.*" He denied that he was not allowed to back date entries and denied that he was trying to create a false impression thereby. I should state immediately that whatever the deficiencies in his testimony may be it is clear that he did in fact travel to Grahamstown to oversee the Full Moon operation. It was not put to him that the vehicle register was a forged document.

[61] Viljoen was further taken to task concerning his diary entries for 16 and 17 June 2016 (Exhibit W1 and W2 respectively). He conceded under cross-examination that in terms of Police Standing Orders he was compelled to enter into his diary each and everything he did relevant to the incident at chalet 8. The synopsis of the entries in his diary for 16 June reveal that he departed from Jeffrey's Bay at 21h15 arriving at 23h45 at Settlers Monument, Grahamstown, where he met Vos, Scheepers and Eksteen. In his evidence he stated that he had discussions with them at the Monument but conceded that nothing of this was contained in his diary. He conceded that very little was contained in his diary upon which he would later be able to construct the statement which he eventually made during July 2018, some thirteen months after the incident. He conceded that his testimony as to what had happened on the 16 and 17 June went far beyond what was contained in his diary. He stated that he had not in fact written his statement from the facts contained in his diary but from contemporaneous notes made by him on separate pieces of paper. Once he had made his statement he destroyed these notes, as was his invariable practice.

[62] He stated that on Saturday afternoon after the operation had been concluded he was appointed by McLaren to be the investigating officer in respect of all the cases. He conceded that no entry to this effect appeared in his diary. He conceded further that there was nothing in his diary concerning the movements of the white Audi save for an entry at 11h50 reading "*follow white Audi.*" He stated that there was simply too much information to put into his diary. He conceded further that certain of the entries in the diary were wrong.

[63] It is common cause that the pocket books of Brits (Exhibit AA) and McLaren (Exhibit BB) which had also been sought by the defence make no mention of Vijoen having been present during the incident. It is also common cause that Vos' pocket book (Exhibit Y) mentioned the name of Viljoen only once and did not place him in the chalet.

[64] It was also put to Viljoen by Mr. Price that his evidence that he had seen the rhino horn whilst peeping through the legs of Vos and McLaren was utterly improbable. An application by Mr. Price to conduct an inspection in loco at the chalet was granted but in the event was abandoned by Mr. Price.

[65] Based on all the above Mr. Price submitted that the evidence of Viljoen on his recall that he was present at the scene at Makana Resort was false and could not be accepted. He submitted in this regard that in accepting Viljoen's evidence in the trial-within-a-trial I had been unduly generous to him. It was submitted that his evidence on being recalled to testify in the main trial was extremely poor and he had "*lied outrageously*" on a number of issues. He submitted accordingly that I should revisit my decision to admit the evidence relating to the search of the chalet. It is so that Viljoen's further evidence of his exact movements at the chalet was confused and contradictory in a number of respects. However, his evidence that he was present was corroborated by McLaren who confirmed that he had met Vijoen on the road near the monument on the night of 17 June 2016 and had been fully briefed concerning the erratic driving of the Audi on the Fort Brown road, the observations of the covert surveillance team in that regard, as well as the fact that the registration number of the Audi vehicle which had been entered into Exhibit S, the Makana Resort Gate Register, did not correspond to the actual registration number which was on the vehicle. He fully corroborated Viljoen's evidence that they had proceeded to Makana Resort in the latter's motor vehicle. His evidence, as I summarised it in my judgment on the trial-within-a-trial reads as follows:

> "*At the Resort they travelled up the road past the chalet where the Audi was parked. At that time he was unaware that the chalet was number 8. Viljoen stopped the motor vehicle in order to turn it around. McLaren alighted therefrom and started walking down the road intending to meet up with the*

*other members who had entered the resort first. He was, however, not in contact with Vos, nor could he find any of the other police members. He had no idea where they were. There was no prearranged meeting place. He proceeded towards the chalet and was almost in line with the door, approximately five metres away, when the top half of the stable door was suddenly opened by one of the accused. According to McLaren he "*got such a fright*" and realised he was* "a sitting duck". *He accordingly immediately approached the door but* "the next moment" *Vos appeared* "virtually forcing his way" *in front of him. He stated that the situation evolved very quickly, in a matter of seconds. Because of the door opening it became a matter of urgency.*"

[66] As I stated in my judgment McLaren impressed me as being honest although I was less impressed by his recall of events. I stated that he appeared somewhat confused and that his memory as not particularly good, no doubt because of his ill-health. It bears mentioning that the defence also requested the vehicle register of the vehicle in which McLaren had driven to Grahamstown but in the end nothing was made of this and it was accepted that he had been present.

[67] A logical consequence of Mr. Price's argument concerning the presence or not of Viljoen at the Resort at the time the entry into the chalet was made by Vos would be that McLaren was himself lying as to Viljoen's presence and that he and Viljoen must have conspired together falsely to testify as to Viljoen's presence. In my view this submission can be rejected out of hand. It was never put to McLaren that he was lying in this regard.

[68] In particular Mr. Price has not challenged the evidence of Vos in respect of which I said the following in the trial-within-a-trial judgment:

"*[27] He then returned to his motor vehicle and phoned Viljoen to inform him that he had located the vehicle and told him what he had seen. Viljoen asked him to go back and search the vehicle and the persons involved. He accordingly drove into the resort. The Audi motor vehicle was still outside the chalet but the boot was now closed and there was no one outside next to it.*

He stated that he was expecting to search the Audi for a firearm or binoculars or an axe or saw possibly used by persons while poaching. At that stage he decided to enter the chalet. He stated that he had no idea what he might find inside the chalet. He was approximately one metre away when the door was suddenly opened and a man whom it is now common cause was accused no 3 came out … He was asked what reasonable evidence he had that a crime had been committed before he entered the chalet. He conceded that he had none but stated that he was instructed by Viljoen to do so. He stated that he had received all his information from Viljoen. Viljoen had never told him to pick up a search warrant. Having said that Viljoen had instructed him to search the chalet he then stated that the decision to enter the chalet was his alone."

[69] He stated further that shortly after he had entered the chalet "*the LCRC member arrived and Captain Viljoen arrived.*"

[70] Of cardinal importance is the fact that the accused did not testify in their defence. Their version has accordingly not been placed before me.

[71] In S v Katoo 2005 (1) SACR 522 (SCA) the following was stated by Jafta AJA, as he then was, at paragraph [19]:

"The other issue relates to the weight attached by the trial judge to the defence version which was put to state witnesses under cross-examination. It was treated as if it were evidence when the trial court considered its verdict on the merits. As the respondent failed to place any version before the court by means of evidence, the court's verdict should have been based on the evidence led by the prosecution only."

[72] In my view Viljoen's regrettable failure to observe Police Standing Orders by, contrary thereto, backdating the vehicle register and by not keeping a proper diary and the consequent making by him of his statement does not translate into an inference that he was lying about his presence at the scene, more especially in the absence of any gainsaying evidence from the accused. By not complying with

Standing Orders, however, he presented Mr. Price with ample ammunition for cross-examination, an opportunity seized upon by Mr. Price, and Viljoen was clearly somewhat rattled in the course thereof. He may not have emerged unscathed therefrom but the rest of his evidence as to the events on the 16 and 17 June was far-ranging covering the time from the initial report to him by the informer in Port Elizabeth until his return to Jeffrey's Bay in respect of which evidence he was relatively unshaken. I am quite unable to agree with the submission by Mr. Price that his evidence was a concoction and that it fell to be rejected in toto. I am satisfied that he was entirely truthful about his presence on the scene.

[73] In any event, I agree with the submission by Mr. Coetzee that any criticism of Viljoen's subsequent testimony pertaining in particular to his inaccurate and cryptic diary keeping as well as his confusing and contradictory recall of his exact movements and observations before entering the chalet is immaterial to the basis on which the ruling of admissibility relating to the search was made, namely, that the police conduct in entering the chalet without a search warrant was not part of a settled or deliberate policy but occurred in consequence of the spur of the moment decision to enter taken by Vos and in the course of chaotic events in all probability precipitated by the sudden opening of the chalet door by accused no 3. In this regard what I said in my judgment on the trial-within-a-trial is relevant:

> *"[40] In the view I take of the matter, whatever contradictions exist between the evidence of Vos and Viljoen as to the events leading up to Vos' visit to Makana Resort on the night of 17 June are in any event of no great moment. What is relevant is that Viljoen was clearly in overall charge of the operation which he directed from the Monument and that it was in consequence of his instructions that Vos proceeded to Makana resort to check on the presence of the Audi. The evidence of Viljoen and Vos does coincide in that both alleged that once Vos had checked on the presence of the Audi he reported back to Viljoen who instructed him to go back and search the Audi. It was on the basis of this instruction that Vos drove into the resort and proceeded towards the chalet. Although Vos at some stage stated that Viljoen had instructed him to enter the chalet he then contradicted himself and conceded that in fact the decision to do so was his alone and that his instructions had only been to*

search the Audi. As Viljoen stated, he believed that any poaching paraphernalia which existed would be found in the Audi. I accept his evidence in this regard.

[41] It is clear on all the acceptable evidence that Vos had no instructions whatsoever to enter the chalet. His decision to do so was taken by him alone on the spur of the moment before the door of the chalet was opened and was contrary to the instructions of Viljoen. He was unable to explain why he suddenly decided to do so. In the circumstances it is clear that there was no prior decision by Vos' superiors deliberately to enter the chalet in violation of the accuseds' constitutional rights. Be that as it may, the entering and searching of the chalet by Vos and immediately thereafter by McLaren and Viljoen without a search warrant, was, in my view, unlawful and was in violation of those constitutional rights. In these circumstances the contradictions between the evidence of Vos, McLaren and Viljoen as to the presence or not of Havenga and Brits is in my view irrelevant and is not necessary to resolve. What emerges clearly from the evidence is that the police had no pre-arranged meeting place and that events at the scene were chaotic.

[74] Mr. Price submitted further that I had in any event erred in my finding that the evidence as to the events at the chalet was admissible. He submitted that I incorrectly applied the provisions of section 35(5) of the Constitution in finding that the admission of the evidence did not render the trial unfair and that it had not brought the administration of justice into disrepute. In this regard he referred to a number of authorities to which he had not made reference in his argument at the conclusion of the trial-within-a-trial. In particular, with reference to S v Mkize 1999 (2) SACR 632 (N), Mr. Price suggested that I had not taken into consideration the latest approach to the admission of unconstitutionally obtained evidence. With respect to Mr. Price a glance at my judgment is sufficient to put this submission to rest. I made reference therein, inter alia, to S v M 2002 (2) SACR 411 (SCA); S v Pillay 2004 (2) SACR 419 (SCA); S v Tandwa and Others 2008 (1) SACR 613 (SCA); Nombewu v S [2008] 3 All SA 159 (SCA) and S v Gumede 2017 (1) SACR 253 (SCA). I am entirely satisfied therefore that I correctly applied the current South

African Law relating to the admission of unconstitutionally obtained evidence as expounded by the Supreme Court of Appeal. In my view further the Canadian and American authorities referred to by Mr. Price do not add anything more to this issue.

[75] I am therefore unpersuaded that I erred in admitting the evidence at the conclusion of the trial-within-a-trial.

[76] It will be convenient to deal next with the evidence of Captain Olivier and Warrant Officer Schoeman with regard to certain darts recovered from certain of the crime scenes. Captain Olivier has been in the employ of the South African Police Service since 1994 and has been attached to the Ballistics Unit since 1999. He has investigated approximately 4500 cases as a ballistics expert and tool mark examiner. Since 2012 he has been a group leader with other ballistics experts under his supervision. His qualifications as an expert were accepted by the defence.

[77] He stated that he was requested to examine the dart gun, Exhibit 2, and to verify whether it was a firearm in terms of the Firearms Control Act and whether the blank ammunition found in the possession of the accused was ammunition as defined in the section 90 of the Firearms Control Act read with section 250 of the Criminal Procedure Act. He described the dart gun, Exhibit 2, as being "*a normal .22 Marlin bolt action firearm which had been modified by means of shortening the barrel in the front, sealing it up, and putting a second barrel on top of the actual barrel.*"

[78] He stated that Exhibit 2 was indeed a firearm in terms of the Act. He stated that once the tranquiliser dart was loaded into the gun it was propelled by means of a .22 calibre blank ammunition cartridge. When the trigger of the gun was pulled the gas generated from the blank cartridge moved through the system under high pressure and propelled the dart forward. He explained that the blank ammunition had a cartridge case with propellant in it with a priming compound in the rim itself. This is pressure sensitive. Instead of a bullet, the front end of the cartridge was crimped into a closed position. When the back of the rim was hit the priming compound and propellant ignited.

[79] He concluded that the cartridges were therefore primed cartridges in terms of the Firearms Control Act. In other words, the possession of such primed cartridges without a valid licence would constitute a contravention of section 90 of the Act read with section 250 of the Criminal Procedure Act.

[80] Olivier stated that he had examined numerous darts which had been recovered from certain crime scenes involving rhino poaching. Most of these darts had been fired from a CO2 tranquiliser gun which had a smooth barrel with no grooves inside it, such as a shotgun barrel. He stated that a smooth barrel leaves marks caused by vibration on the bullet or dart and because of this it is impossible to individualise the bullet or dart. He stated that this was the first time to his knowledge that a tranquiliser gun with a grooved barrel as in a normal firearm had been recovered.

[81] He stated that every firearm has certain class marks, which are given to a firearm in the course of the manufacturing process, these being the blue print of that particular make of firearm. If the class marks are not the same as the bullet or dart which is being examined that bullet or dart is automatically excluded as having been fired by that firearm.

[82] It appears from his evidence as well as that of Warrant Officer Schoeman who is attached to the Ballistic Section of the Forensic Science Laboratory, Port Elizabeth, as a forensics analyst, that the gun, Exhibit 2, has various so-called tool marks, namely six grooves and six lands. The inside surface of the barrel of the gun is a circle with grooves that turn in a spiral form. The grooves are deeper than the actual surface of the barrel, with the original surface being called the "*lands*." The barrel of the gun has twelve tools which leave marks on a bullet when it is fired.

[83] He stated that he examined two darts which had been recovered from the scene of two of the rhino poaching incidents. The first thereof was recovered from the scene of incident no 2, namely Jansenville CAS49/10/2013 during October 2013. He stated that this dart was not fired from the tranquiliser gun, Exhibit 2, or any other rifled tranquiliser gun. There was no indication that it had been fired from a grooved barrel.

[84] The second dart was recovered from the scene of a rhino poaching incident at Spekboomberg farm in March 2016, relating to incident no 9, Cradock CAS159/03/2016. Olivier stated that the class marks on this darts were the same as on Exhibit 2 but that there were not enough unique marks on the dart to individualise it to Exhibit 2. This finding was accordingly inconclusive: he could not exclude or include it as having been fired from Exhibit 2.

[85] It is common cause, as will appear hereunder from the evidence of Schoeman that in the course of her duties she received and, using a so-called comparison microscope, examined certain darts recovered from the scenes relating to incidents number 7 and 8. She also received darts recovered from rhino poaching scenes at Port Alfred and Hoedspruit. She concluded that all these darts had been fired from the tranquiliser gun, Exhibit 2.

[86] Olivier stated that in his position as Schoeman's group leader or supervisor he had checked and verified her results with the use of the comparison microscope.

[87] It was put to him under cross-examination that the testing of a dart in order to ascertain whether it was fired from a particular tranquiliser gun was extremely novel. Olivier replied that, novel or not, the whole procedure was precisely the same as in the case of a bullet, the only difference being that instead of a bullet a dart was involved, the actual bullet compound being different.

[88] He was questioned under cross-examination concerning the use of Court charts to illustrate the similarities between the darts found on the various scenes and the test darts. The following question was put to him:

> *"The way I understand the court chart is there are arrows and the chart actually*
> *shows where the exactness of the two marks is."*

[89] He replied:

> "*With ballistics we seldom use arrows, what we do with ballistics you have got a comparison microscope which uses two stages, lets use cartridge cases, the left cartridge and the right cartridge case and by means of a prism and a bridge we can actually bring these cartridges together and sequence them. Where with fingerprints there are two different images, separated, in a case of ballistics the two images are brought together with a dividing line between the left and right which stops us having one image.*"

[90] He stated that the marks on the left dart should correspond or continue with the marks on the right dart and that this should be visible to the court from the photographs. He added the qualification that not all the lines would be 100% due to the fact that the test dart shot in the laboratory was pristine whereas certain of the darts, found on the various scenes, sustained some damage. However, the biggest problem in producing a photographic image of what was viewed in the comparison microscope was the lighting of the microscopes. The microscope gave horizontal lighting across a face so that when a cartridge was viewed from the top the lights shone at 90 degrees across the surface creating the appearance of mountains and valleys and darker and lighter shades.

[91] He explained at some length the process of individualising the darts. He stated that an examination started by looking at dissimilarities, in other words, looking at class marks. If the class marks were dissimilar the conclusion was automatically negative. It was put to him that despite the difficulties with photographing the darts the marks on the left and on the right should correspond as being part of the same line and that that link ought to be apparent to the court. He stressed, however, that not all the lines would correspond 100% due to the fact that the test dart that was shot in the laboratory was pristine with no damage to the back whereas some of the darts were damaged by, for instance, the rhino falling on the dart.

[92] The following question was put to him under cross-examination:

> "*Are there any specific number of points that should overlap and be 100% conclusive in your eye like for instance fingerprints?*"

[93] He replied:

"*We must remember we are looking at twelve different tools, if in that one tool there is enough marks for me to be satisfied I will go over to the second tool as a backup and once that is there I am happy.*"

[94] The following question was put to him by Mr. Price:

"*Q: Let me ask you this I know you Captain, I have questioned you before and I have great faith in your integrity, can you say conclusively without any possibility of being incorrect that the two darts that you compared were 100% the same?*

A: Which darts are we talking about?

Q: The darts that you linked as being the actual darts fired from this firearm?

A: Yes my Lord in these cases if I verified it I am happy that they were fired out of the same firearm.

Q: You don't foresee the possibility that another expert may come to a different conclusion?

A: No my Lord. We must also remember that at ballistics if we show a court chart, right it is an illustration of a part of specifically how this dart, it will be one of twelve parts that we looked at, we did what is on the court chart yes that is what we looked at, however, there are other parts that we have also looked at, that was verified."

[95] Warrant Officer Schoeman testified that she was asked to compare the dart gun found at chalet 8, Makana Resort, with various tranquilisers darts which were found on different scenes where rhinos had been darted. She then prepared and signed certain affidavits in terms of section 212 of Act 51 of 1977. She also testified. The respective affidavits signed by her were handed in as Exhibits C1, D1, E1 and F1.

[96] Exhibit C1 relates to Graaff Reinet CAS26/03/2015, namely incident no 7 which occurred at Camdeboo Private Game Farm. Schoeman stated therein in paragraph 4.3 that on 9 December 2016 she received in the case file Graaff Reinet CAS26/03/2015 a sealed evidence bag containing one piece of rhino horn; one bottle containing rhino horn saw dusts; and one tranquiliser dart marked 50638/15C.

[97] On 13 December 2016 she received in the case file Grahamstown 142/06/2016 a sealed evidence bag containing "*five fired tranquiliser darts (tests) marked 809T1 – T3, G10b and G10c respectively.*" See paragraph 5.1 of her affidavit.

[98] She described the intention and scope of her forensic examination in respect of the above items as being "*microscopic individualisation of fired tranquiliser darts.*"

[99] She examined the darts referred to in paragraph 4.3 and paragraph 5.1 respectively and compared the individual and class characteristics markings on them using a comparison microscope. Her conclusion in paragraph 7.1 of her affidavit was that the tranquiliser dart referred to in paragraph 4.3 of her affidavit and marked 50638/15C (Graaff Reinet CAS26/03/2015) and the five fired tranquiliser darts referred to in paragraph 5.1 marked Grahamstown CAS142/06/2016 were fired from the same tranquiliser gun namely, "*13mm calibre Pneudart Inc. tranquiliser gun with serial numbers 91641322 and 2809.*" In other words, Exhibit 2.

[100] The incident in number 7 was therefore linked to the gun found in Grahamstown at chalet no 8.

[101] Exhibit D1 relates to Cradock CAS11/02/2016, incident no 8. In paragraph 3.1 of her affidavit Schoeman stated that she received a sealed evidence bag containing "*one fired tranquiliser dart marked by me 388122/16A.*" She examined the tranquiliser dart mentioned in 3.1 and found that it was of .50 (12,7mm) calibre. She compared the dart referred to in paragraph 3.1 with the five fired tranquiliser darts (tests) marked 809T1 – T3, G10b and G10c respectively to which reference was made in Exhibit C. Again she used a comparison microscope to compare the individual and class characteristics markings on the darts and found "*9.1 the*

tranquiliser darts mentioned in 3.1 marked 388122/16A (Cradock CAS11/02/2016) and 7.1 marked 809T1 – T3, G10b and G10c (Grahamstown CAS142/06/2016) were fired from the same tranquiliser gun (13mm calibre Pneudart Inc. tranquiliser gun with serial numbers 91641322 and 2809." The incident in number 8 was therefore linked to the gun found in Grahamstown in chalet no 8, Makana Resort.

[102] Exhibit E1 relates to the case file Port Alfred CAS996/03/2016, in respect of Sibuya Game Reserve. She received a sealed evidence bag relating to this case file containing three .50 (12,7mm) calibre fired tranquiliser darts marked 397655/16A –C respectively. She examined these tranquiliser darts with the five fired tranquiliser darts 809T1 – T3, G10b and G10c (Grahamstown CAS142/06/2016) and ascertained that they were fired from the same tranquiliser gun as found in chalet no 8.

[103] Exhibit F1 relates to an incident at Hoedspruit, CAS72/01/2016. Schoeman received a sealed evidence bag containing two .50 (12,7mm) calibre fired tranquiliser darts marked 463151/16A and B and respectively. She compared these with the five fired tranquiliser darts marked 809T1 – T3, G10b and G10c respectively and ascertained that the two tranquiliser darts mentioned in paragraph 4.1 were fired from the same tranquiliser gun as was found in chalet no 8.

[104] Her qualifications as an expert were disputed by Mr. Price. In Holtzhauzen v Roodt 1997 (4) SA 766 (WLD) Satchwell J stated, correctly with respect, that it was for the Judge to determine whether the witness has undergone a course of special study or has experience or skill such as will render him or her an expert in the particular subject. It is not necessary for the expertise to have been acquired professionally. This approach was confirmed by the Supreme Court of Appeal in S v Mlimo 2008 (2) SACR 48 (SCA) at paragraph [13] where the following was stated:

> "*In my view a qualification is not a sine qua non for the evidence of a witness to qualify as an expert. All will depend on the facts of the particular case. The court may be satisfied that despite the lack of such a qualification the witness has sufficient qualification to express an expert opinion on the point in issue. It has been said:*

> 'It is the function of the judge [including a magistrate] to decide whether the witness has sufficient qualifications to be able to give assistance. The court must be satisfied that the witness possesses sufficient skill, training or experience to assist it. His or her qualifications have to be measured against the evidence he or she has to give in order to determine whether they are sufficient to enable him or her to give relevant evidence. It is not always necessary that the witnesses's skill or knowledge be acquired in the course of his or her profession – it depends on the topic. Thus, in R v Silverlock it was said that a solicitor who had made a study of handwriting could give expert evidence on the subject even if he had not made any professional use of his accomplishments.'
>
> *(See DT Zeffertt. AP Paizes, A St Q Skeen The South African Law of Evidence (2003) 302; see also Lirieka Meintjies van der Walt, 'Science Friction: The Nature of Expert Evidence in General and Scientific Evidence in Particular' (2000) 117 SALJ 771 at 773-4.)*"

See too my judgment in Naude and Others v Naude and Another ECD case no 4349/2014 delivered on 9 March 2017. I am satisfied having regard to Schoeman's qualifications, training and experience that she can be accepted as an expert.

[105] Schoeman confirmed Olivier's evidence that the class characteristics of the tranquiliser gun were looked at first. If the class characteristics were positive then individual characteristics were looked at. She confirmed that in conducting her examination she had used a comparison microscope. This entailed taking the two images, merging them at a point where there were a dividing line and then looking for similarities such as marks which would continue from one side to the other. If on viewing the images dissimilarities were present then she would continue her examination to the next land or groove. If the similarities were present a positive determination would be made. If not the finding would be "*undetermined.,*"

[106] During his cross-examination of Schoeman Mr. Price was assisted by a ballistics expert, Mr. Steyl. Mr. Price questioned Schoeman at some length concerning so-called minimum thresholds or standards required to link one dart to a

specific gun. Schoeman replied that if she were satisfied with regard to the class characteristics she would then proceed to individual characteristics. She stated "*if there is corresponding marks, if there is sufficient agreement, if there is contour patterns that match up*" she would be satisfied. She stated that unlike fingerprints there was no threshold and reiterated that "i*f there are corresponding marks and there is follow up then we would make that a positive.*"

> "*Q: So you are saying that whether you find two, three, four, five corresponding marks that is enough?*
> *A: Even if there is three corresponding marks, and if there is a follow up for instance on this land we get three corresponding marks we will go to the next groove to see if there is marks that corresponds and if we are satisfied that there is corresponding marks, we make it positive.*"

[107] It was put to her that according to Mr. Steyl the minimum standard for a three dimensional object such as the darts which were tested was "*to find three consecutive striation marks, two lots of three, or one consecutive group of six striation marks.*" She replied:

> "*We do not have to rely on the consecutive matching, we can also use the ATHPY theory of identification which I relied on that there is a significant agreement between contour patterns and striations marks.*"

[108] Asked whether her "*significant agreement*" could be as low as two marks which were similar she replied "*no, we will go further to see if there is corresponding marks, a follow up as I explained.*" She stated further that "*significance is determined by comparing two or more sets of surface contour patterns that are made up of individual peaks, regions and furrows. The agreement is significant when it exceeds the best agreements of marks known to have been produced by different marks and it is consistent with the agreement of marks known to have been produced by the same tool. When there is a significant agreement between the two tool marks it means that the agreement is of such quantity and quality that the chances that the marks could have been produced by another tool is so small that it*

is considered to be impossible." She stated that the procedure followed by her is the procedure which every ballistic expert in South Africa followed.

[109] In respect of exhibits C1 to F1 she took certain photographs, C2A, D2A, E2A and F2A. She conceded that to the naked eye whilst there were similarities, there were also obvious dissimilarities on the photographs, stating that she had trouble with the lightning. She stated, however, that what was depicted on the court charts was "*just a portion*" of what could be seen under the microscope and that accordingly "*we can't just go on this."* She stated that she did not rely only on the photographs. She looked through the microscope and looked at the striations and was satisfied that the darts were fired from Exhibit 2.

[110] In her evidence in chief she was asked:

> "*If the defence would like to have their own expert review your tests are there more test results, photographs available?*

[111] She replied that the exhibits were available for any expert to view and added:

> "*They are welcome to have a look at the exhibits, our results are open for review by a qualified, trained expert.*"

[112] She stated that there were two different methods which could be applied either the consecutive method or the significant agreement and pattern contours method. She stated that the method referred to Mr. Steyl was not the only method that could be relied upon to come to a conclusion.

[113] She confirmed that Olivier had come to confirm her microscopic results on 14 December. She stated that she took some of the photographs while he was there as he looked through the comparison microscope. She stated that she did not need to show Olivier with arrows or by circling similarities because he could also see the significant agreement. He agreed with her results. If he had not agreed he would have said so. In the event of him not agreeing a third opinion would have been obtained.

[114] It was put to her as had been put to Olivier that the particular procedure of testing a dart shot through a tranquiliser gun was novel and "*has never been placed before and accepted by any Court anywhere in the world, can you accept that?*" She replied "*I do not agree, as I have said that it is just like any other tool which I had examined, the material is just different, we cannot say if there is a new tool or firearm that has been manufactured and it has been fired now we say it is novel because it is now the first time that it is being done, it still stays a firearm, it still has a barrel as Captain Olivier explained, it is just that the material was different.*" She stated that the testing of the dart was no different from any other tool mark case which she had previously examined.

[115] She stated that there were standard operating procedures which guided her as a ballistics expert as to how to go about the examination. She stated further that there was no minimum amount of similarities that had to be found before the conclusion could be reached that there was an exactitude. Questioned about the existence of dissimilarities she stated that she would look at all the similarities and "*if I am satisfied and my colleague who is the one who is reviewing my work is satisfied with my results we will go through as a positive. We do not disregard dissimilarities, we will go further and check for more to confirm if there is more matching marks. If it does not match up, we will either make it as a negative or if the class characteristics are the same and we do not have enough marks we will go for undetermined.*"

[116] Despite having been present during Schoeman's further cross-examination Steyl was not called as a witness. In these circumstances the evidence of Olivier and Schoeman as to the standard operating procedures used by them can be accepted. Schoeman was a good witness and Olivier, in particular, was an excellent witness. They were both clearly honest and reliable.

[117] It is so that there are what appeared to be obvious dissimilarities between the test darts and the rhino scene darts as depicted on the photographs. In this regard the following question was put to Schoeman by Mr. Price:

"*Are you saying that every one of these obvious dissimilarities which you have referred to, you checked and excluded as possibly affecting the final conclusion?*

A: I have checked that, I have taken them into consideration before I made my finding. We checked it under the microscope. So we can't just go on this."

[118] Both Olivier and Schoeman convincingly explained the difficulty of reproducing photographically what was seen by them through to the comparison microscope, stating that there was a difficulty in portraying a curved surface on a flat photograph, namely a three dimensional object on a one dimensional photograph and that the photographs were "*not three dimensional as what we see on the microscope.*" It must be remembered in the circumstances of this case that the photographic charts are introduced into evidence as aids for the court and are by no means definitive of the issue.

[119] I accept that there is no onus on an accused to obtain his own expert in order to disprove the findings of experts called by the State. The onus is at all times on the State to prove by way of acceptable ballistic evidence that the exhibits found at the scene were positively linked to the firearm subsequently found in the possession of the accused. In the present matter Schoeman's results were verified by Olivier whose integrity and expertise were fully accepted by the defence. In this case, however, Steyl was present in Court and was specifically invited to review the tests. Schoeman's evidence in this regard reads as follows:

"*Q: If the defence would like to have their own expert review your tests are there more test results, photographs available?*

A: They are welcome to have a look at the exhibits, our results are open for review by a qualified trained expert.

Q: Is it your evidence that there are more than this one photograph which you can present.

A: I only did this one photograph, <u>the others can be checked through the microscope if they want to</u>. (My emphasis)

Q: Everything is still available for review by another expert?

A: Correct."

[120] Had the invitation for Steyl to review the results been accepted the issues might have been put to bed one way or the other. The invitation was, however, declined and no expert evidence was led on behalf of the accused. In my view in these circumstances the evidence of Olivier and Schoeman as to their Standard Operating Procedure and as to what was visible under the comparison microscope stands uncontroverted and can safely be accepted as reliable. Much was made by Mr. Price of the fact that the procedure relating to the forensic analysis of darts was novel and without peer review. Both Olivier and Schoeman, however, stated that, novel as the procedure may be, the principles remained the same. The fact that a dart was involved was of no consequence. The novelty of the procedure may well be due to the fact that, as Olivier stated, this was the first time to his knowledge that darts had been recovered which had been fired through a rifled barrel.

[121] In S v Mkize and Others 1999 (1) SACR 256 (WLD) Boruchowitz J stated as follows at 263c – d:

> "*Before evaluating the opinions and findings expressed by inspector Nkuna, it is necessary to say something concerning the basis upon which expert evidence is received in cases such as the present. The use of a comparison microscope for comparing exhibits is a technique which is well known and considered to be reliable. The need to receive expert evidence arises from the fact that the Court, by reason of its lack of special knowledge and skill, is incapable of drawing properly reasoned inferences from the various images which are to be seen under the microscope. Because of the specialised nature of the investigation the Court, with its untrained eye, is hardly in a position to itself, from its own observations, draw any conclusions and is thus dependent upon the opinion of skilled witnesses such as forensic ballistic specialists.*"

[122] I interpose to state that what was said by Le Grange J in Stewarts and Lloyds of SA v Croydon Engineering 1979 (1) SA 1018 (WLD) at 1019 G – H is apposite:

"*However, [counsel] seeks through the witness Gilchrist to educate my eye, because he first wishes Mr Gilchrist to explain to me what he saw when he looked through the microscope. I gather this will be done, and it is necessary for Mr Gilchrist to do this, in order that I should know what to look for. Well, the Court declines the opportunity of qualifying itself in this branch of science. It appears to me that it is undesirable from every point of view that the Court should look through certain sophisticated instruments and rely upon its own observations when, from its limited knowledge of the subject, it does not know whether its observations are reliable or not and whether an inference can reliably be drawn from them or not. The Court therefore declines the invitation to look at the document through the microscope.*"

In other words the court is reliant on the evidence of the relevant experts.

[123] Boruchowitz J continued as follows at 263e – 264a:

"In my view the approach to be adopted when evaluating ballistic evidence appears to be similar to that adopted by the courts in relation to fingerprint evidence. See in this regard R v Morela 1947 (3) SA 147 (A) where Tindall JA, after referring to previous decisions in respect of such matters, said the following at 153:

'. . . If these decisions were intended to lay down a general rule that the court will not accept an expert's opinion unless he can demonstrate the points of similarity in such a manner as to enable it to understand them sufficiently to form its own opinion on them, then I disagree. Of course a court should not blindly accept and act on the evidence of an expert witness. It is necessary to get the expert on fingerprints to explain as clearly as possible the nature of the similarities; and as a result of his interrogation or for other satisfactory reasons the court may not be prepared to act on his testimony. There may, for instance be conflicting evidence by two fingerprint experts called on opposite sides, in which case the court will have to decide whether it can safely act on the evidence of the expert called by the Crown. But the court or the jury in, cases of the present kind, has not the special training to enable it to act

> on its own opinion; it really decides whether it can safely accept the expert's opinion.'

See also R v Smit 1952 (3) SA 447 (A) at 451A - F.

[124] Because of the nature of Mr. Price's cross-examination of Olivier and Schoeman wherein the value of the court charts was questioned and because of Mr. Price's equation of the points of identity on photographs of the darts with fingerprint charts it is necessary to say something concerning the correct approach to the evaluation of fingerprint evidence.

[125] In R v Nksatlala 1960 (3) SA 543 (A) Schreiner JA at 546C - E described the approach to be adopted in evaluating fingerprint evidence in this way:

> *"That is not of great importance since in relation to fingerprint evidence the court is not obliged to form its own opinion, instructed by the expert, as to the identity of the prints (R v Morela 1947 (3) SA 147 (A); R v Smit 1952 (3) SA 447 (A)). It is right to recall the remarks of Tindall JA in the former case quoted by Fagan JA in the latter that a court should not blindly accept and act upon the evidence of an expert witness, even a fingerprint expert, but must decide for itself whether it can safely accept the expert's opinion. But once it is satisfied that it can so accept it, the court gives effect to that conclusion even if its own observation does not positively confirm it. Where, as here, there is only one fingerprint, where it does not appear to be an ideally clear one, and where the points of resemblance that are visible are near to the minimum in number, it is of the greatest importance that the expert evidence, whether it is that of one or more witnesses, should be closely scrutinised to eliminate as far as humanly possible all risk of error.*"
>
> *The essential question therefore is whether the opinion and findings expressed by inspector Nkuna, can be safely accepted.*"

[126] I would refer further to what was said in R v Morela *supra* at 151 – 152:

"*Mr. Edeling, who presented an able argument before us on behalf of the accused, submitted that a proper comparison reveals that some of the alleged points of similarity are not truly similar and that some of them are actually points of difference. He also argued that a proper comparison reveals numerous points of difference which were not brought to the notice of, or considered by the trial Court. It seems to me that if this Court were to embark on that comparison it would be ignoring the true nature of the question of evidence which is involved in this aspect of the present case. It was the evidence of an expert witness on a subject in regard to which a person cannot be said to be competent to judge unless he has been through a course of highly specialized training. It is true that in regard to some subjects, on which expert evidence is called, the Court will act on its own opinion arrived at after considering the expert evidence, for instance in the case of evidence in regard to disputed hand-writing; see Annama v Chetty (1946, AD 142 at pp 154, 155). But this is not so where finger-prints are in dispute. No doubt in many cases, particularly where the chance impression is clear, judicial officers or jurymen may be able, with the aid of a magnifying glass to see and understand some of the alleged similarities or differences. But though this is so, such investigators, being untrained, cannot justifiably profess to be competent in all cases to come to a conclusion by means of their own comparisons. In the present case the expert evidence was very strong. Joubert had the chance impressions of two fingers to work on for the purposes of his comparison. The trial court had before it an expert witness who was fully cross-examined and it was satisfied that his evidence was reliable.*"

[127] In S v Nala 1965 (4) SA 360 (AD) the following was stated at 362 B – F:

"*In the course of cross-examining the witness in relation to the points of identity, counsel for the appellant suggested that an examination of the enlargements revealed that some of the points in question were in fact not identical. The witness stated that that might be the impression of a layman who undertakes the comparison without the aid of expert knowledge and skill.*

The witness insisted that the ten points relied upon by him in expressing his opinion were in fact identical. He invited counsel to submit the enlargements to some other impartial finger-print expert for comparison. In this connection it is of some importance to note that five of the points of identity relied upon by van Staden were not disputed at any stage by the appellant.

It appears from the judgment of Kennedy, J., that the members of the Court were able upon examination of the enlargements to determine the existence of some, but not all, of the points of identity. The trial Court was, however, correct in its approach to opinion evidence given by a finger-print expert. The Court is not called upon to determine the existence or otherwise of points of identity, inasmuch as special knowledge and skill (and, possibly, special equipment) are required to undertake the necessary comparison. Where the trial Court investigates the expert's e*vidence regarding points of identity it does so, not in order to satisfy itself that there are the requisite number of points of identity, but so as to satisfy itself that the* expert's opinion *as to the identity of the disputed finger-print may safely be relied upon. If the Court is itself able to discern all the points of identity relied upon by the expert, it will no doubt more readily hold that the opinion of the expert may safely be relied upon than in a case where, e.g., it is quite unable to discern any of the points of identity relied upon.*"

[128] The Court stated further at G – H:

"At the end of the case, therefore, the trial Court had before it the evidence of an expert witness who was fully qualified by reason of his training and experience to state his opinion in regard to the identity of the disputed finger-print. His honesty was never questioned by the defence. A perusal of his evidence fails to reveal any basis upon which it might be said that van Staden, though honest, was unreliable and possibly mistaken in his opinion. Five of the points of identity relied upon by him were not disputed. The defence led no expert or other relevant evidence to contradict or cast doubt on his opinion. The appellant elected not to give evidence himself, nor did he lead the evidence of any witness to testify in his defence."

[129] In Coopers (South Africa)(Pty) Ltd v Deutch Gesellschaft für Schädlingsbekämpfung MbH 1976 (3) SA 352 (A) the following was stated at 370E – G:

> *"'In the ultimate result, it is the court's duty to construe the specification and on the merits to draw inferences from the facts established by the evidence. (See Gentiruco's case supra at 616D--618G.) There are, however, cases where the court is, by reason of a lack of special knowledge and skill, not sufficiently informed to enable it to undertake the task of drawing properly reasoned inferences from the facts established by the evidence. In such cases, subject to the observations in Gentiruco's case, loc cit, the evidence of expert witnesses may be received because, by reason of their special knowledge and skill, they are better qualified to draw inferences than the trier of fact. There are some subjects upon which the court is usually quite incapable of forming an opinion unassisted, and others upon which it could come to some sort of independent conclusion, but the help of an expert would be useful.*"

[130] What appears from the above authorities therefore is that even with fingerprint evidence the court itself is not called upon to determine the existence or otherwise of points of identity. It is a question of the reliability and honesty of the expert witness. In my view therefore, applying the principles set out in the above cases, the State has proved beyond reasonable doubt that the darts found at the scene of incidents number 7 and 8 were fired from the tranquiliser gun, Exhibit 2. So too has it proved that the darts relating to the rhino poaching incidents at Port Alfred and Hoedspruit were fired from Exhibit 2.

[131] In respect of these latter darts, however, Mr. Price objected during the course of the trial to evidence being led in respect thereof. I overruled the objection and held that it was admissible as similar fact evidence.

[132] As stated in Schwikkard and Van der Merwe: Principles of Evidence 4th ed at 77 similar fact evidence is generally inadmissible because it is irrelevant. It will be admissible only when it is both logically and legally relevant. The evidence will be

excluded if it merely proves propensity. It is generally irrelevant because its prejudicial effect outweighs its probative value. In DPP v Boardman 1975 (AC) 421 the Court stressed that similar fact evidence was admissible only where its probative value exceeded its prejudicial effect.

[133] In S v D 1991 (2) SACR 543 (A) FH Grosskopf JA, with whom Corbett CJ and Kriegler AJA concurred, referred with approval to DPP v Boardman and in particular, to the passage at 444 D – E, namely:

> "*The basic principle must be that the admission of similar fact evidence (of the kind now in question) is exceptional and requires a strong degree of probative force. This probative force is derived, if at all, from the circumstance that the facts testified to by the several witnesses bear to each other such a striking similarity that they must, when judged by experience and common sense, either all be true, or have arisen from a cause common to the witnesses or from pure co-incidence.*"

[134] In DPP v P [1991] 2 AC 447 (HR) the following was stated at 460 – 1:

> "*The essential feature of evidence which is to be admitted is that its probative force in support of the allegation that an accused person committed a crime is sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused in tending to show that he was guilty of another crime… Once the principle is recognised, that what has to be assessed is the probative force of the evidence in question. The infinite variety of circumstances in which the question arises, demonstrates that there is no single manner in which this can be achieved. Whether the evidence has sufficient probative value to outweigh its prejudicial effect must in each case be a question of degree.*"

[135] In Savoi and Others v National Director of Public Prosecutions and Another 2014 (1) SACR 541 (CC) Madlanga J referred to this as a salutary proposition. With reference to the passage from S v D *supra* which I have set out above the learned Judge stated at [55]:

> "*The insistence on striking similarity may lead to sophistry and technicality and raise more questions than provide answers. The real question should be whether, when looked at in its totality, evidence of similar facts* 'has sufficient probative value to outweigh its prejudicial effects*' and that is a matter of degree in each case."*

[136] At [56], however, the learned Judge stated that S v D *supra* appears to still be the law in South Africa. See too S v Nduna 2011 (1) SACR 115 (SCA).

[137] In the light of the above it is clear that to be admissible the evidence relating to the darts found at Port Alfred and Hoedspruit must have probative value in the sense that such evidence can give rise to reasonable inferences in deciding the facts in issue. In my view the fact that other darts had been fired from Exhibit 2 in incidents where rhinos were killed and dehorned is both logically and legally relevant and of very high probative value such as to outweigh its prejudicial effect. In method and in circumstances there is a concurrence of common features between the two sets of facts such as to give rise to the reasonable inference that the accused were involved in a course of conduct involving rhino poaching.

[138] I am satisfied therefore that I correctly admitted the evidence pertaining to the Port Alfred and Hoedspruit incidents.

[139] Reverting to Viljoen's evidence in the main trial he stated that before the arrest of the three accused at Makana Resort he had collected all the case dockets pertaining to the poaching of rhino by means of darts. Whereas the charges relating to the accused go back to 2013 there were other rhino darting incidents prior thereto in the Eastern Cape. In this regard he testified that cellphone records could only be obtained from the various cellphone companies for a period of three years from the time of the arrest of the accused. He confirmed the list of items found at chalet 8. With regard to the yellow bow saw visible on photographs of the scene at chalet 8, namely Exhibits O and P, he stated that a flake of yellow paint had been picked up on the scene of a previous rhino poaching incident at Cradock. (Cradock CAS159/03/2016 in respect of incident no 9 relating to the theft of two white rhino

horns at Spekboomberg Farm on 17/18 March 2016). The flake of paint was picked up by forensic field officer, Warrant Officer Bekker, who photographed it. (Exhibit J9). The defence admitted that the flake was properly sealed on the scene where it was found and was submitted for forensic testing and received in untampered form by Lieutenant-Colonel van Huyssteen, to whose evidence I shall now turn.

[140] Viljoen stated that he also caused the yellow saw found in the chalet to be forwarded to Lieutenant-Colonel van Huyssteen, a chief forensic analyst in the Scientific Analysis Section of the South African Police Services Forensic Science Laboratory at Pretoria. An affidavit prepared by her in terms of section 212 of Act 51 of 1977 was handed into Court as Exhibit U and she also testified. She stated that on 22 August 2016 she was requested to examine a yellow saw frame with a blade which she received in a sealed evidence bag marked, *inter alia*, Grahamstown CAS142/06/2016. See paragraph 3.1.1 of Exhibit U. She also received a sealed evidence bag marked Cradock CAS159/03/2016 containing a yellow paint chip and a piece of paper ruler. See paragraph 3.2.1. of her Exhibit U. As set out above Cradock CAS159/03/2016 is in respect of incident no 9 relating to the theft of two white rhino horns at Spekboomberg farm Cradock on 17/18 March 2016.

[141] Van Huyssteen was requested to examine these exhibits in order to determine whether the yellow paint chip as described in paragraph U3.2.1 formed a physical match with the yellow paint on the saw frame. She stated that after she had removed what appeared to be blood from the paint chip she performed a paint analysis on the paint on both the chip and the saw frame. She testified that the paint analysis entailed a microscopic analysis as well as a comparative technique known as the Fourier Transform Infrared Technique used to determine the class characteristics of the specific compounds in the paint.

[142] Her findings were that physically and chemically the yellow paint on the paint chip was indistinguishable from the yellow paint on the saw handle. She conceded that there would be many saw handles in South Africa with exactly the same paint composition and that in the light thereof she could say no more than that the paint chip could have originated from the saw.

[143] She also caused to be taken certain photographs of the saw blade (photographs 1 and 2 of Exhibit U) and of the paint chip. As appears therefrom a piece of yellow paint is missing from the handle of the saw in the area where the clasp of the saw affixing the handle to the blade is open. The area where the paint on the handle is missing is brown in colour because of rust. She stated that she matched the paint chip with the area of the handle where the paint was missing. As a result of her examination she determined that a physical match was formed with the paint chip exactly matching the outlines of part of the remaining paint on the handle. She presented two enlarged photographs of the area (U1 and U2). It is apparent, with the naked eye, from U1 and U2, that the paint chip does fit exactly into part of the remaining paint on the handle as a missing piece in a jigsaw puzzle would do.

[144] Mr. Price criticized van Huyssteen for having cleaned the paint chip before examining it because, he said, in so doing she removed marks from it that might have differed from marks on the saw. In my view this criticism in ill-founded. Three months had elapsed from the time the paint chip was found and the time it was compared with the saw which had, in the meantime, been used to saw off the horn of Cambell. All that van Huyssteen removed was blood or dirt. In my view Mr. Price's submission in this regard amounts to no more than speculation. So too is his submission that the chip might have come from a yellow grader which is visible in certain of the photographs.

[145] It was admitted by the accused that Cambell's horn had been removed with a saw and that DNA material of Cambell was found on the saw which was found in the possession of the accused at chalet 8. That saw, when found, had a piece of yellow paint missing from its handle and the area where the paint was missing had rusted. The paint chip which had been found next to the carcass of the rhino in incident no 9 was physically and chemically indistinguishable from the paint on the saw. Although it was not microscopically examined it forms a perfect match with part of the area of the saw where the paint was missing.

[146] In my view it is beyond the bounds of coincidence that a chip of paint found on the scene of a rhino killing should happen to fit exactly into the gap of missing part

on the saw which, it has been proved, was used for purposes of cutting off rhino horn. The probabilities therefore, in my view, are overwhelming that the paint chip came originally from the saw in the accused's possession.

[147] Viljoen testified that in all the incidents referred to in the schedule to the incidents the rhinos were darted. None had any bullet wounds. He stated that at the time of the arrest of the accused various unused tranquiliser darts as well as vials of tranquilising fluid were found in the chalet. He stated that only veterinarians (not vegetarians as stated in the transcript) had the requisite permits to purchase such tranquilising fluid. Although attempts had been made to scrape off the barcode on the vials there were portions that were readable. He also found a manufacturing mark on one of the bottles. Armed with this information he was able to determine that the vials of tranquilising fluid originated from Johannesburg where they were lawfully manufactured. He established further that the particular vial had been sold to a distribution company which had sold it in Zambia. He stated that the tranquilising fluid was packaged together with a bottle of antidote.

[148] He stated further that knives were found in the chalet, the purpose being to clean the grooves on the horns to stop them bleeding.

[149] Viljoen testified further that at all material times relating to the various rhino poaching incidents the three accused each had their own motor vehicles. Accused no 1 owned a black GTI Golf (his wife also owning a BMW); accused no 2 and his wife owned a Toyota Verso; and accused no 3 a silver Audi.

[150] Viljoen ascertained that the two motor vehicles, namely the Audi and Kia Picanto found in the possession of the accused at Makana resort, were rental vehicles. In the light of this he undertook an investigation as to whether at the time of the other nine incidents referred to in the indictment the accused had rented other vehicles. He discovered that accused no 1 had indeed rented other vehicles and he believed that it was the modus operandi of the accused to do so rather than to use their own vehicles. He stated that there were many car rental companies and it was impossible to go to all of them. He therefore sought information from only Bidvest and Avis for the three years prior to the arrest of the accused. He obtained

information from them which reflected that accused no 1 had indeed rented other motor vehicles at times relevant to certain of the incidents. Copies of the rental agreements were handed into Court as Exhibit K and it was admitted by the accused that accused no 1 had rented vehicles from Bidvest and Avis as reflected in Exhibit K. (See para 11 of Exhibit G)

[151] Exhibit K1 reflects that accused no 1 rented a motor vehicle at George Airport from Bidvest from 15 June 2016 with the agreed return date being 17 June 2016. Accused no 2, who it is common cause resides at Pacaltsdorp, George, was named as an additional driver. Accused no 1's credit card was debited in the sum of R2 500,00. It is in any event common cause that both the Audi and the Kia found at chalet no 8 were rental vehicle. The dates 15 – 17 June 2016 coincide with the dates on which incident number 1 occurred at Bucklands farm.

[152] Exhibit K2 reflects that accused no 1 rented a motor vehicle at Johannesburg from Avis on 21 October 2013 with the agreed return date being 23 October 2013 at OR Tambo International Airport. (The carcass of the rhino cow involved in this incident was found on 20 October 2013.) Further light will be thrown on K2 when I deal with the cellphone usage of the accused hereunder.

[153] Exhibit K7 reflects that accused no 1 rented a motor vehicle from Avis on 25 February 2015 with the agreed return date being 28 February 2015 at Port Elizabeth Airport. This coincides with the dates on which incident no 7 occurred as also with certain cellphone usage over that period with which I will deal hereunder.

[154] Exhibit K11 reflects that accused no 1 rented an Audi A3 motor vehicle from Bidvest at Port Elizabeth Airport on 18 April 2016 with the agreed return date being 22 April 2016, these dates coinciding with the dates on which incident number 11 occurred at Spekboomberg farm. I will return to this motor vehicle hereunder when I deal with Exhibit L.

[155] Exhibit K12 reflects that accused no 1 rented a Mercedes Benz motor vehicle with registration letters and number DL63XM GP from Bidvest at Port Elizabeth Airport on 15 May 2016 with the return date being 19 May 2016 and that his credit

card account was debited with a sum in excess of R7 000,00. These dates coincide with the dates on which incidents 12 and 13 respectively occurred at Kleindoringberg farm and Great Fish River Reserve.

[156] Exhibit K13(ii) reflects that on 20 May 2016 accused no 1 rented a motor vehicle at OR Tambo International Airport with the agreed return date being 21 May 2016 at OR Tambo Airport, these dates coinciding with the dates on which incident number 13 occurred.

[157] With regard to Exhibit K12 Viljoen established that the number of the motor vehicle with registration letters and number DL63XM GP was entered into the guest register of a Cradock guesthouse on 17 May 2016. In this regard it was admitted by the accused in paragraphs 2 and 3 of Exhibit G1 that:

> *"Accused no 2 booked into Annies Guest House in Cradock on 16 March 2016 and accused no 1 on 17 May 2016. On the occasion of 17 May 2016 accused no 1 furnished DL63XM GP as car registration number particulars in the guest house register.*"

[158] As set out in paragraph 14 of my judgment on the trial-within-a-trial Viljoen testified that he had checked the gate register at the Makana Resort Caravan Park. This register, Exhibit S, revealed that an Audi with a CA registration number had been booked into chalet no 8 at the Makana resort at 18h15 on 16 June 2016 under the surname Dlovu. Viljoen testified further that on 17 June 2016 he had observed the Audi parked at chalet no 8 and noted that its registration number was different to that recorded in Exhibit S. On investigating he established that the actual number of the vehicle belonged to Bidvest. On further investigations he obtained a second gate register, Exhibit S2, for Makana resort in which, a year earlier, on 18 May 2016, the vehicle registration number on the Mercedes was correctly entered as DL63XM GP together with the name Ndlovu. He stated that the presence of the vehicle at Cradock coincided with the period during which incident number 12 occurred. The entry in the gate register in Grahamstown coincided with the date on which incident number 13 occurred.

[159] In respect of the Audi A3 motor vehicle, rented by accused no 1 at Port Elizabeth Airport on 18 April 2016 as reflected on Exhibit K11 a GPS tracker had been fitted. The tracker provided a record of the movements of that motor vehicle (Exhibit L). The record shows that on 19 April 2016 the vehicle travelled to Cradock, arriving there at 20h29, but then returning to Port Elizabeth where it first stopped at Mtesane Street and then proceeded to Mqabara Street, Motherwell, where it remained overnight. It is not in dispute that at that time accused no 3's address was at 130 Mqabara Street, Motherwell and it is common cause that Honesty Mwariwanga was at the time also staying in Mtesane Street, Motherwell.

[160] Thereafter, on 20 April, the vehicle travelled out of Port Elizabeth and arrived in Michausdal in Cradock at 12h26. The tracker then recorded various movements of the vehicle onto the N10 between Cradock and Middelburg and then onto the R61 which leads off the N10 in the direction of Graaff-Reinet. It is not in dispute that Spekboomberg farm lies between the V formed by the intersection of the N10 and R61 roads and is bordered by both roads. The farm can be accessed from either road. The tracker showed that at 14h55 on 20 April the vehicle left Cradock in a westerly direction on the N10 leading to Middelburg before turning onto the R61 leading to Graaff Reinet. It travelled approximately 21km. At 15h17 it stopped for ten seconds before turning back to Cradock.

[161] At 17h58 on the following day the vehicle followed the same route out on the R61 before stopping for 60 seconds at approximately the same place that it had stopped the previous day. It then again returned to Cradock.

[162] At 04h48 on 22 April it left Cradock travelling exactly the same route on the R61 for a distance of approximately 9,8km west of Cradock where, at 05h03 it stopped in the same area as before for a period of two minutes and three seconds before returning again to Cradock where it arrived at 05h25. At 06h15 it returned to Port Elizabeth, arriving at the airport at 09h55. At 10h19 it left the airport but returned there at 12h38.

[163] Evidence was adduced by the State concerning certain cellphone usage. The following admissions were made by the accused relating to the cellphones and sim cards (Exhibit G1):

> "*16. The cell phones and sim cards found in the Chalet and rented car where the 3 accused were arrested, as tabulated in Exhibit A (Affidavit of Carmen van Tichelen), were submitted to and received by the SAPS Digital Forensic Laboratory at East London in untampered condition for downloading and extraction of all data and information contained in the said devices/cards.*
>
> *17. All records of the said cell phone devices/sim cards were lawfully obtained by the State in terms of the provisions of Act 51 of 1977 as well as The Electronic Communications and Transactions Act, 25 of 2002 from the relevant cell phone service providers.*
>
> *18. The contents of the said cell phone records obtained are admitted as correctly reflecting the usage/activity of the respective phones/sim cards.*"

[164] These cell phones and sim cards are tabulated in paragraph 4 of Exhibit A which is an affidavit prepared and signed by Ms. Carmen van Tichelen, a Wild Life Crime Data Manager (Rhino Security Unit for Ezemvelo KZN Wildlife Agency). She holds a BSC Honours degree in Geography from the University of Natal within which she specialised in Geographic Information Systems (GIS). She is also trained at tertiary level Education in digital mapping.

[165] She stated in her evidence that the bulk of her work is specifically analysing data seized by the police in terms of s 205 of Act 51 of 1977. In the present matter she was requested by Viljoen to assist with the analysis of the six seized cell phone handsets and associated cell phone usage data.

[166] In paragraph 4 of Exhibit A she tabulated the six cell phones and sim cards as follows:

Item	Cellphone (IMEI)/Handset Make	IMEI #	SIMCARD #
A	Blackberry	3577590509920189	8906800000003232 (Vodacom)
B	Samsung	359377047624613	37800074498
C	A.G. Mobile phone	355818062670183	3906262902 (MTN)
D	Apple iPhone	013414000398543	Unidentified
E	Samsung	353239070332512	3906262431 (MTN)
F	Samsung DUOS (two sim slots)	353015070381565	3493749451 (MTN)
		353015070381567	2371849730 (MTN)
G	-	-	1971219724 (MTN)

[167] She stated that "*IMEI*" stands for International Mobile Equipment Identification, in effect the serial number of the handset.

[168] On analysis she confirmed usage of the respective cell phones as follows:

> "*Item A – Blackberry – Usage by accused no 1 confirmed.*
> *Item B – Samsung – Usage confirmed as by accused no 1.*
> *Item C – AG Mobile – Usage confirmed as by accused no 2.*
> *Item D – Apple iPhone – Usage confirmed as by accused no 2.*
> *Items E and G – Samsung – sim card – Usage confirmed as by accused no 3.*
> *Items F – Samsung DUOS – Usage confirmed by accused no 3.*"

[169] In further admissions made by the accused in Exhibit G1 the following admissions were made:

> "*At all relevant times to all the charges the three accused individually used the cell phone handsets and sim cards as respectively indicated in paragraph 13 of Exhibit A as well as the following additional handsets/sim cards:*
>
> *Accused no 1: IMEI 01341500823276 with SIM 27715782139 (Code JJ 02a);*

Accused no 1: IMEI 358289030022290 with SIM 27719327387 (Code JJ 12a)'

Accused no 2: IMEI 353561051233130 with SIM 27747058810 (Code F 03a);

Accused no 3: IMEI 354581058750410 with SIM 27731893888 (Code SS 02b);

Accused no 3: IMEI 358373050526990 with SIM 27719327387 (Code SS 07b);

Accused no 3: IMEI 354581058750410 with SIM 27735640302 (Code SS 21)."

[170] The table in paragraph 13 will be annexed to this judgment as Annexure A. Van Tichelen stated that she was supplied with 289 files by Viljoen concerning the various case dockets, the time frames of the various rhino poaching incidents as well as the GPS co-ordinates relating to each incident. Using the section 205 data she could confirm that the cell phone numbers were active during the key period in that area and had either made or received a call or sms. She stated that every time a phone was used that use would be registered in the records of the nearest cell phone tower that enabled that communication. The phone was therefore used somewhere in the reception area of that particular tower. It was not possible to pinpoint the exact GPS location of the phone when the particular tower was activated. Her evidence in this regard was corroborated by Mr. Dinesh Kanti, the Manager, Law Enforcement Agency Liaison Services at MTN (M1). He stated that a cellphone would choose a tower closest with the strongest signal in line of sight and that the radius of reception in rural areas was 17km. However, if there was a mountain or some other obstacle such as a tall building between the phone and the closest tower the phone would choose a different tower further away.

[171] Van Tichelen stated that together with the seized data and all the section 205 data she had to work through over 1000 files. She stated that she could not recall in total the number of different sim cards and cellphones that were sued by the accused over the previous three years but that it was "*a staggering amount*", and

could not all be displayed as, the paper would not be big enough. Some of the 289 files consisted of up to 6000 pages in each file. It was so voluminous because it recorded every sms, every call received or made as well as internet usage of the respective phones over the three year period.

[172] She had, however, a digital copy which was handed into court on a flash stick as Exhibit 1 which contains "*all the data received from Captain Viljoen including the extraction data, the rica data, the IMEI mapping and the call records.*" Van Tichelen did, however, extract or excise certain information from Exhibit 1 which she printed and which is contained in Exhibit N.

[173] Ms. van Tichelen stated in paragraph 6 of Exhibit B and also as explained in her evidence that the coordinates she received from Viljoen were converted to decimal degrees and imported into GIS software to create a so-called shape file overlay. A shape file overlay of cellphone tower locations was also used to identify cellphone towers located around or in the close vicinity of each rhino poaching scene. Her task, she said, was to plot the section 205 data onto a map. A map output was produced using Google My Maps for each of the scenes on which the various phones used by the accused are reflected. See Annexures 4 – 16 of Exhibit B.

[174] Van Tichelen allocated codes to the various cellphones used by the accused as indicated in paragraph 13 of Exhibit A.

[175] These codes were as follows:

"*Accused no 1: JJ01 – JJ12*

Accused no 2: F01 – F18

Accused no 3: SS01; SS02; SS02a; SS03 – SS07; SS07a; and SS08 – SS20."

[176] A summary of her findings in respect of each of crime scenes is set out in Exhibit B as follows:

> "*INCIDENT NO 1: key period 17 June 2016 – 18 June 2016, Counts 1 - 5*
> *The following cellphone numbers were present at or near the Koonap Reserve farm and Grahamstown area towers during the key period:*
>
> *JJ03 – 17 June: 20h19*
>
> *JJ03 – 17 June: 20h54*
>
> *F03 – 16 June: 18h33*
>
> *F01 – 17 June: 17h53*
>
> *SS02 – 17 June: 12h04*
>
> *SS01 – 17 June: 20h54*
> *(Annexure 4)*
>
> *INCIDENT NO 2: key period 19 October 2013 – 20 October 2013, Counts 6 - 10*
> *The following cellphone numbers were placed near the scene (Wolwefontein tower area) during the key period:*
> *JJ12 – 19 October: 03h51*
> *F03 – 20 October: 01h06*
> *(Annexure 16)*
>
> *INCIDENT NO 5: key period 6 May 2014 – 10 May 2014.*
> *The following cellphone numbers were placed near or in the vicinity of the scene (Tandjiesberg and Bruintjieshoogte towers), Graaff Reinet area during the key period:*
> *JJ02 – 6 May: Tandjiesberg tower - 18h02*
> *JJ12 – 7 May: Bruintjieshoogte tower - 20h17*

F03 – 8 May: Bruintjieshoogte tower - 23h56
SS07a – 8 May: Tandjiesberg tower - 22h00
(Annexure 13)

INCIDENT NO 6: key period 7 – 8 November 2014.
The following cellphone numbers were placed in the vicinity of the scene (Cookhouse tower), Graaff-Reinet area, during the key period:
JJ09 – 5 November: 17h49
SS02a – 8 November: 20h44.
(Annexure 12).

INCIDENT NO 7: key period 27 February 2015 – 3 March 2015.
The following cellphone numbers were placed in the vicinity of the scene (Tandjiesberg tower), Graaff Reinet area during the key period:
JJ05 – 27 February: 22h58
F03 – 28 February: 20h09
SS18 – 26 February: 23h12
SS02 – 28 February: 19h07
(Annexure 11)

INCIDENT NO 8: key period 18 January 2016 – 1 February 2016
The following cellphone numbers were placed in the vicinity of the scene:
JJ04 – 28 January: 02h41
SS17 – 28 January: 05h35
(Annexure 10)

INCIDENT NO 9: key period 16 March 2016 – 18 March 2016
The following cellphone numbers were placed in the vicinity of the scene:
JJ04 – 16 March: 21h08
F03 – 16 March: 21h17
SS17 – 16 March: 21h08
(Annexure 9)

INCIDENT NO 11: key period 20 April 2016 – 23 April 2016

The following cellphone numbers were placed in the vicinity of the scene (Cradock area)
JJ04 – 22 April: 01h29
F03 – 20 April: 23h02
SS12 – 20 April: 12h22
(Annexure 7)

INCIDENT NO 12: key period 17 May 2016 – 18 May 2016
The following cellphone numbers were placed in the vicinity of the scene (Cradock area)
JJ04 – 17 May 2016: 16h22
F01 – 17 May 2016: 16h16
SS01 – 18 May 2016: 03h30
(Annexure 6)

INCIDENT NO 13: key period 18 May 2016 – 19 May 2016
The following cellphone numbers were placed on or near the scene (Koonap Reserve Farm Tower)
JJ04 – 19 May 2016: 06h13
F01 – 19 May 2016: 05h53
SS01 – 19 May 2016: 21h20
(Annexure 5)

[177] It is necessary to deal finally with the abovementioned statement (Exhibit V) attested to by Honesty.

[178] In that statement he stated "*I was recruited by Mike and S.K and I gave them information regarding the rhinos and I went with them during January 2016 to Mr. Tam's farm where a rhino was shot by Mike … A black rhino came and we ran away but the black rhino got me and attacked me and lifted me twice in the air and I was injured in my right hand side stomach.*"

[179] He stated further that after some weeks he was back at work when S.K phoned him during March 2016, telling him that Mike would pick him up. He was

picked up and he went with him to Cradock. At Cradock he and S.K got into a V.W. Polo vehicle and proceeded to Spekboomberg farm where he "*showed them the place where the rhino were.*" Thereafter he was taken back to Port Elizabeth. After a week he was told by S.K that they had got a rhino horn that same week. With regard to this statement Viljoen stated that the letters S.K. were emblazoned on the boot lid of accused no 3's motor vehicle.

[180] That then was the evidence adduced by the State. The accused closed their respective cases without testifying.

[181] It is clear from the authorities, including S v Brown en 'n Ander 1996 (2) SACR 40 (NC) as well as the further authorities referred to in Schwikkard and Van der Merwe *supra* at page 785, that no adverse inference can be drawn against an accused merely by virtue of the fact that he has exercised his constitutional right to refuse to testify.

[182] If an accused exercises such right the Court is left with nothing but the uncontroverted *prima facie* case presented by the State. As stated in S v Brown *supra*, at 63 h – i the silence of the accused has no probative value. However, as pointed out Schwikkard and Van der Merwe, the accused's constitutional right to silence cannot prevent logical inferences being drawn. The circumstances of a case may be such that a *prima facie* case, if left uncontradicted, must become proof beyond reasonable doubt. In S v Boesak 2001 (1) SACR (1) (CC) Langa DP (as he then was) said the following at [24]:

> "*The right to remain silent has application at different stages of a criminal prosecution. An arrested person is entitled to remain silent and may not be compelled to make any confessions or admissions that could be used in evidence against that person. It arises again at the trial stage when an accused has the right to be presumed innocent, to remain silent, and not to testify during the proceedings. The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such*

evidence, a Court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified would depend on the weight of the evidence."

[183] Langa DP referred in this regard to Bosman and Another v Attorney General, Transvaal 1998 (2) SACR 493 (CC) where Madala J stated at paragraph 22:

"*Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of their right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice.*"

[184] It is therefore necessary to determine whether the State has produced evidence sufficient to establish a prima facie case, in other words, is there evidence which calls for an answer from the accused.

[185] I will deal firstly with the case against the accused on counts 1 – 5, relating to incident number 1 at Bucklands.

[186] As set out above I have found that the evidence relating to the events at chalet no 8, Makana Resort, is admissible. This evidence is, of course, damning for the accused and Mr. Price's strenuous efforts to exclude it are in the circumstances understandable. In the absence of any explanation, much less an innocent one, for their possession of the various items of rhino poaching paraphernalia, including tranquiliser fluid sourced as from far afield as Zambia, as well as the freshly cut horn of the rhino Cambell, as listed in paragraph 6 of Exhibit G, the guilt of all three accused on counts 1 to 5 have been proved beyond any reasonable doubt. In this regard it can properly be inferred that the accused acted with the common purpose

to commit the offences. With regard to the charges relating to the illegal possession of Schedule 6 medicines and of ammunition it was correctly submitted by Mr. Coetzee, with reference to Makhubela v The State 2017 (2) SACR 665 (CC) that it can be properly be inferred that the three accused as a group throughout had the intention to exercise possession of the items through the actual detentor and that the actual detentor had the intention to hold the items on behalf of the group. Consequently there was joint possession involving the group as a whole and the detentors or common purpose between all three accused to be in possession all the items.

[187] Mr. Price did not argue to the contrary.

[188] The evidence concerning the finding of the items at the chalet does not stand alone. There is too the evidence of accused no 2's visit to Bucklands as a paying guest in January 2016. In the absence of an innocent explanation for his visit the reasonable inference is justified in the light of subsequent events that accused no 2 was scouting the scene on behalf of the group. There is also the evidence concerning the presence of the cellphones of the accused at or near the reception area of the Koonap Reserve Farm and Tempe Cellphone tower during the night of 17 June 2016. This evidence ties in completely with the later discovery by the police of the various items at the chalet. Furthermore, the accused entered a false registration number for the Audi in the Makana Resort gate register, the only reasonable inference being that they wished to cover their tracks.

[189] In the circumstances all three accused are guilty as charged on counts 1 – 5.

[190] In respect of the remaining counts the State relies on circumstantial evidence. The proper approach to circumstantial evidence has been enunciated in S v Reddy and Others 1996 (2) SACR 1 (A).

[191] Zulman AJA stated therein as follows at 8c – 9e:

> *"In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece*

of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oft-quoted dictum in R v Blom 1939 AD 188 at 202-3, where reference is made to two cardinal rules of logic which cannot be ignored. These are, firstly, that the inference sought to be drawn must be consistent with all the proved facts and, secondly, the proved facts should be such 'that they exclude every reasonable inference from them save the one sought to be drawn'. The matter is well put in the following remarks of Davis AJA in R v De Villiers 1944 AD 493 at 508-9:

The Court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way; the Crown must satisfy the Court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence.

Best on Evidence 10th ed 297 at 261 puts the matter thus:

> 'The elements, or links, which compose a chain of presumptive proof, are certain moral and physical coincidences, which individually indicate the principal fact; and the probative force of the whole depends on the *number, weight, independence, and consistency* of those elementary circumstances.
>
> A number of circumstances, each individually very slight, may so tally with and confirm each other as to leave no room for doubt of the fact which they tend to establish. … Not to speak of greater numbers, even two articles of circumstantial evidence, though each taken by itself weigh but as a feather, join them together, you will find them pressing on a delinquent with the weight of a mill-stone. … Thus, on an indictment for uttering a bank-note, knowing it to be counterfeit, proof

> that the accused uttered a counterfeit note amounts to nothing or next to nothing; any person might innocently have a counterfeit note in his possession, and offer it in payment. But suppose further proof to be adduced that, shortly before the transaction in question, he had in another place, and to another person, offered in payment another counterfeit note of the same manufacture, the presumption of guilty knowledge becomes strong. . . .'

Lord Coleridge, in *R v Dickman* (Newcastle Summer Assizes, 1910 - referred to in *Wills on Circumstantial Evidence* 7th ed at 46 and 452-60), made the following observations concerning the proper approach to circumstantial evidence:

> 'It is perfectly true that this is a case of circumstantial evidence and circumstantial evidence alone. Now circumstantial evidence varies infinitely in its strength in proportion to the character, the variety, the cogency, the independence, one of another, of the circumstances. I think one might describe it as a network of facts cast around the accused man. That network may be a mere gossamer thread, as light and as unsubstantial as the air itself. It may vanish at a touch. It may be that, strong as it is in part, it leaves great gaps and rents through which the accused is entitled to pass in safety. It may be so close, so stringent, so coherent in its texture, that no efforts on the part of the accused can break through. It may come to nothing - on the other hand it may be absolutely convincing. … The law does not demand that you should act upon certainties alone. … In our lives, in our acts, in our thoughts we do not deal with certainties; we ought to act upon just and reasonable convictions founded upon just and reasonable grounds. … The law asks for no more and the law demands no less.'

[192] Mr. Price submitted that it was not the duty of the accused to deal with specifics and to point out all the errors, improbabilities and shortcomings of the State's evidence, the onus being squarely on the State to satisfy the Court that the cellphone records were accurate and that the only reasonable inference that could

be drawn from them is the one the State seeks to draw. This of course is correct. In the present matter, the submission overlooks the admission in paragraph 18 of Exhibit G to the effect that the contents of the cellphone records obtained are admitted as correctly reflecting the usage/activity in respect of the respective phones/sim cards (Exhibit N).

[193] Mr. Price submitted that the cellphone records were *"all over the place*" and that the State had made no attempt to be more accurate in assessing the distance which the phones of the accused came to be from the places where rhino killing occurred. He submitted that the cellphones themselves were seldom all three in one place and the dates tendered to differ. Even where they were near one scene over a period of time, the dates and times often differed. Because there was no evidence as to distances it was impossible to know how close the phones were to each other. He pointed out with reference to certain of the incidents that the closest some of the phones came to the rhino poaching scenes was in excess of 74 kilometers.

[194] Mr. Coetzee, however, stated that regard must be had not only to those excerpts printed by van Tichelen (Exhibit N) or the particulars indicated by her on the maps which she produced, (Exhibit B) but also to the entire contents of the flash stick, Exhibit 1, regarding the accused's cellphone activity. In this regard he undertook a painstaking analysis of the movements of the accused as indicated by the respective cellphone activity.

<u>Incident no 1: Bucklands: 17 – 18 June 2016</u>

[195] As submitted by Mr. Coetzee accused no 2's admitted visit to Bucklands on 23 January 2016 justified the reasonable inference of that he was scouting the scene on behalf of the accused for subsequent rhino poaching. As appears from Exhibit K1 as well as Exhibit 1 accused no 1 rented a car in George on 15 June 2016, whereafter on 16 June the three accused travelled to Grahamstown in the Audi and Kia Picanto and booked into chalet 8 at 18h15. That evening all three accused moved to the area where the poaching occurred the following day and, as appears from the cellphone records, accused no 1 and 2 remained in the reception area of Koonap and Tempe towers near the crime scene the whole night and following day

whereas accused no 3 returned to Grahamstown the same evening. The following evening accused no 1 who was near the scene communicated a number of times with accused no 3 in Grahamstown. The accused were thereafter arrested.

Incident no 2: Koffylaagte October 2013

[196] The cellphone evidence in respect of this incident as contained in Exhibit 1 reveals that the cellphone of accused no 2 (F03(a)) moved from George to Port Elizabeth on 18 October 2013. It was then switched off until 20 October at 00h52 near Nash farm, Jansenville, not far from Koffylaagte, before he returned the same night to Port Elizabeth and then back to George.

[197] The records show that accused no 1 travelled from Port Elizabeth to Wolwefontein and Nash farm area on 20 October where he called accused no 3 (SS21) on numerous occasions until 23h55. These calls were not picked up by accused no 3. At 01h57 accused no 1 received a call from accused no 2 (F03(a)) when both were in the Wolwefontein tower area. Mr. Price submitted, however, that there was evidence on record that accused no 2 only received that phone in November 2013. This submission is without foundation, based entirely as it is on what Mr. Price had put to the witnesses. That does not constitute evidence. See S v Katoo *supra.* Accused no 1 then travelled back to Port Elizabeth. The following day the cellphone activity showed that he was in Bruma, Johannesburg having hired the motor vehicle referred to in Exhibit K2. This evidence must be viewed against the fact that accused no 1 spent a night as a paying guest at Koffylaagte Lodge on 13 June 2013 at an inclusive rate of R2 500 per night. Four months later he was in the vicinity of Wolwefontein cellphone tower near Koffylaagte Lodge in the middle of the night. In my view the only reasonable inference to be drawn from this is that during his visit to Koffylaagte Lodge during June 2013 he was scouting the scene in preparation for his later poaching activities.

Incident no 5: Camdeboo 6 – 10 May 2014

[198] As appears from Exhibit 1, accused no 2 (F03(a)) moved from George to Port Elizabeth and on 7 May from 17h42 his phone went onto call forwarding mode (off or

out of reception). It was reactivated at 23h54 on 8 May between Pearston and Somerset-East travelling towards Port Elizabeth. It is common cause that Camdeboo is situate between Pearston and Graaff Reinet.

[199] Accused no 1 (JJ01 and JJ02) was in the area of Tandjiesberg on 6 May before returning to Port Elizabeth. On 7 May he travelled back towards Camdeboo via Somerset-East at 20h17. His phone JJ12 was then off for a period of 25 hours before being activated at Melkrivier which, it is common cause, is situated beyond Camdeboo on the R75 road between Graaff Reinet and Jansenville. Accused no 1 then turned around and travelled back past Camdeboo towards Somerset-East at 00h29. During this period when travelling near Camdeboo his only calls were to accused no 3 (SS07(a)) at a time when accused no 3 was near Pearston and then Tandjiesberg. Accused no 3 (SS07(a)) himself travelled on 7 May from Port Elizabeth to Pearston and Tandjiesberg before returning to Port Elizabeth. On 10 May accused no 1 (JJ01) was at OR Tambo Airport.

Incident no 6 – Camdeboo: 7/8 November 2014

[200] In very similar fashion as occurred in incident no 5 accused no 2 (F03(a)) moved from George to Port Elizabeth and on 5 November from 17h48 his phone was on call forwarding mode. It was activated again at 06h31 on 8 November at Port Elizabeth airport. Thereafter accused no 2 returned to George.

[201] Accused no 1 swopped phone JJ08 for JJ09 on 5 November. He then moved towards the Camdeboo area via Somerset East at 19h49. Thereafter there was no activity on his phone for a period of two and a half days. His phone was thereafter activated in the Melkrivier tower area on the other side of Camdeboo on the R75 from Graaff Reinet to Jansenville. During this period near Melkrivier the only calls made by him were to accused no 3 (SS14) and again when accused no 3 was in the vicinity of Pearston and then Tandjiesberg.

[202] Before finding himself at Tandjiesberg accused no 3 moved on 5 November from Port Elizabeth to Pearston where he remained until 8 November at 02h31 when he received the call from accused no 1 (JJ09) and then moved to Tandjiesberg.

[203] Thereafter the accused returned to Port Elizabeth. On 12 November, accused no 1 was located at Bruma, Johannesburg (JJ02(a)).

Incident no 7 – Camdeboo: 1 – 3 March 2015

[204] As appears from Exhibit K7 accused no 1 rented a motor vehicle from Avis on 25 February 2015. Accused no 2 travelled from George to Port Elizabeth on 26 February. On 28 February he travelled via Somerset East to Pearston when his phone went onto call forwarding mode. It was activated again at 07h00 on 3 March on the way to Port Elizabeth Airport and then to George.

[205] Accused no 1 travelled to George on 26 February. His phone JJ01 was then off until 3 March. His phone JJ02(a) was, however, located on 28 February at Somerset-East before going off until 3 March at Port Elizabeth. However, his phone JJ05 activated towers at Tandjiesberg and Somerset-East on 27 and 28 February. It was thereafter off for two and a half days until being activated in the Melkrivier tower area. Whilst near Melkrivier on 3 March accused no 1 called accused no 3 whilst accused no 3 was in Graaff Reinet. Thereafter accused no 3 moved to Melkrivier.

[206] On 26 February accused no 3 had moved from Port Elizabeth to Tandjiesberg/Graaff Reinet/Somerset-East area. After receiving the above mentioned phone call from accused no 1 on 3 March accused no 3 moved to Melkrivier before returning to Port Elizabeth.

Incident no 8 – Kleindoringberg: 30 January – 1 February 2016

[207] Accused no 1 swopped JJ09 to JJ04 in Port Elizabeth on 27 January. He travelled to Cradock and was in Cradock by 21h54. His sim card JJ01 was also located in Cradock. Accused no 3 travelled to Cradock from Port Elizabeth with three sim cards, namely SS02(a), 17 and 18 and two handsets. En route accused no 3 phoned Honesty. He was in Cradock by 20h53 and then moved to the vicinity of Kleindoringberg tower, returning to Cradock by 04h57. Accused no 3's telephonic communication with Honesty ties in with the statement by Honesty, Exhibit V and

with Honesty's reference to S.K. I agree with the submission by Mr. Coetzee that although Honesty refers to "*Mike and S.K*" the cellphone activity of accused no 1 and number 3 placed them not only in Cradock but also in the vicinity of the crime scene. Furthermore, as set out above, accused no 3 has the letters S.K stuck on his boot lid.

[208] Accused no 1's phone activated Kleindoringberg tower next to the crime scene at 02h39 on 28 January. Accused no 1 then contacted accused no 3, who was in Cradock, numerous times.

[209] As was submitted by Mr. Coetzee it is apparent from this activity that the rhino must have been darted on the night of 27/28 January which is entirely consistent with the estimation by Dr. Fowlds of the time of its death.

[210] Mr. Coetzee conceded that there was no evidence in respect of this incident which implicated accused no 2. He also conceded that accused no 2's cellphone activity showed that he was not at the scene.

Incident no 9 – Spekboomberg: 17 – 18 March 2016

[211] The records in Exhibit 1 show that accused no 1 moved from Port Elizabeth to Cradock on 16 March. Accused no 2 moved from Port Elizabeth, also to Cradock, as did accused no 3. On 17 March accused no 1 (JJ04) contacted accused no 3 numerous times. At 00h32 and again at 01h01 on 18 March accused no 1's phone activated Kleinplaas and Samekomst towers on the R61, calling accused no 3 who took the call in Cradock. Accused no 3 then moved to the vicinity of Kleinplaas tower from where accused no 1 had phoned him. Accused no 2's phone was also active at 01h00 and 05h00 in Cradock before travelling back to Port Elizabeth.

Incident no 11 – Spekboomberg: 20 – 23 April 2016

[212] I have dealt above with the movements of the hired vehicle as recorded in Exhibit L. The cellphone records cast further light on the movements of the accused. On 19 April accused no 1 was in Cradock at 18h42. On the same day accused no 2

moved from George to Port Elizabeth. Accused no 3 moved from Port Elizabeth to Cradock but, as recorded by the tracking device, returned to Port Elizabeth to the street in which he lives. The following morning, 20 April, he was at the airport at 09h34 before returning to Cradock. On 20 April all three accused were in Cradock. On 21 April at 17h58 the vehicle was on the R61. At 01h29 on 22 April accused no 1's phone activated the Kleinplaas cell tower on the R61 between Cradock and Graaff Reinet when he attempted to call accused no 3. It appears from the records that he phoned accused no 3 (SS17) no less than 23 times until at 04h28 he phoned accused no 3 on SS12. At 06h14 accused no 1 was back in Cradock.

Incident no 12 – Kleindoringberg: 15 – 16 May 2016

[213] The records show that accused no 2 travelled from George to Port Elizabeth on 16 May. On 17 May all three accused were in Cradock. Accused no 1 booked into Annie's Guest House on 17 May. It is admitted that accused no 2 had booked into Annie's Guest House on 16 March 2016, two months prior to this incident, the only reasonable inference to draw being that accused no 2 had done so in order to scout the area.

[214] At 20h34 accused no 1's cellphone activated the Burnside and Samekomst towers in the area when he called accused no 3 who was in Cradock. At 03h00 accused no 1 called accused no 3 in Cradock. Twenty five minutes later accused no 3's cellphone activated Kleindoringberg and Burnside towers.

Incident no 13 – Fish River Reserve: 18 – 19 May 2016

[215] All three accused travelled to Grahamstown in the same vehicle as was in Cradock the previous day. They were in Makana Resort at 19h26 (Exhibit S2). At 03h41 on 19 May the cellphones of accused no 1 and 2 activated the Koonap/Tempe cell towers northeast of Grahamstown. Accused no 1 returned the rented vehicle at 16h00 on 20 May and flew to Johannesburg at 20h29 on that date. He rented a vehicle (Exhibit K13) at OR Tambo Airport.

[216] With regard to the cellphone evidence Mr. Price relied on Ngubane and Others v The State unreported appeal case no AR158/17, Kwa-Zulu Natal Division, Pietermaritzburg. In that matter the court stated as follows:

> "[*28] In respect of the remaining counts, the Court a quo relied on evidence that Exhibit "NN" showed that their cellular phones were used within the range of a particular cellular phone tower near the scenes of the various crimes. This was notwithstanding evidence that the reception of some of the cellular phone towers had a range of up to 34kms. Even if one were to accept that some of the Appellants' cellular phones were found to have been used within the range of a particular cellular phone tower, the mere presence of their cellular phones within the area, cannot, without more, form the basis for drawing an inference that they were involved in the commission of the offences as set out in the indictment.*
>
> *[29] The caution in solely relying on cellular phone evidence, without corroboration, was alluded to by Jappie DJP (as he then was) in State v Green-Thompson and Others (unreported) Case no 63/2011, (30th August 2013) where the accused were charged with a number of robberies and where there was little direct evidence identifying each accused as being present at the various robberies. Whilst one of the accused was placed in the vicinity of a police station which had been robbed of certain firearms, and where the accused was later found in possession of one of the firearms stolen, coupled with an unsatisfactory explanation for his presence in the area, the Court was satisfied that there was sufficient evidence to convict him of robbery. On the other hand, the Court went on to say the following about the remaining counts:*
>
> > 'On counts 4 and 5 the only evidence that implicates Accused 1 are the cellphone records which places him in the vicinity of the Pump House Pub on 28th January 2010 and at the Pit Stop Pub on 30th January 2010. Suspicious as this cellphone evidence may be and that it may well establish an association with the other accused, there is no physical evidence linking him directly to the robberies at these two

pubs. In regard to these offences, we come to the conclusion that the evidence is insufficient to prove beyond reasonable doubt that Accused 1 was involved to the degree that the law requires with these robberies. We therefore find that the accused is not guilty on Counts 4 and 5.'

[30] Similar views were echoed by Cachalia AJA (as he then was) in State v Molimi and Another 2006 (2) SACR 8 (SCA), at paragraph 16, where the following is stated:

'… The only evidence against the Appellants were the abovementioned cellphone records that linked the three accused and, in the case of the Second Appellant, his own statement that had been found to be admissible against him.'

The Court concluded at paragraph 22 that:

'…Whilst incriminating, creating a strong suspicion of his complicity in the events of the day, the (cellular phone) records would not, in my view, without any further evidence, have created a sufficient basis to convict him.'

[31] When the matter presented before the Constitutional Court – State v Molimi and Another 2008 (2) SACR 76 (CC), it upheld the finding of the Supreme Court of Appeal, noting that:

'… The evidence contained in the cellphone records, while incriminating, would not, without further evidence, having created a sufficient basis upon which to convict the Applicant.'

[32] We were accordingly of the view that the Court a quo erred in accepting the cellular phone evidence as sufficient proof that the affected Appellants were at all the various scenes where the crimes were committed. On its own the evidence relating to the various cellphones suggests complicity where it links an Appellant to a significant area; but in our view the other available evidence does not create an evidential framework which, in combination with the cellphone evidence generates proof beyond reasonable doubt."

[217] Mr. Price submitted that the evidence contained in the cellphone records created at the most a whiff of suspicion of the accuseds' complicity in the commission of the offences and that the other available evidence failed to create an evidential framework which, in combination with the cellphone evidence, generated proof of their guilt beyond reasonable doubt. He submitted too that van Tichelen had made numerous errors in her analysis of the cellphone data. It is so that in the midst of her analysis of the plethora of data there were certain errors and anomalies but, in my view, these were not such as to cast any material doubt on the essential correctness and reliability of her analysis.

[218] The presence of an accused's cellphone at, near or in the vicinity of a particular rhino poaching scene does indeed create a strong suspicion of his complicity. However, it may be that an accused was merely unfortunate enough to use his cellphone in the wrong place at the wrong time on a particular occasion, hence the need for further evidence. When that accused is allegedly in the wrong place at the wrong time on ten different occasions the degree of suspicion created thereby is, in my view, of necessity elevated into an entirely different realm, more especially when that wrong place on each occasion is many kilometers away from his home and in the vicinity and at the time that a rhino had been poached.

[219] It is relevant in this regard that accused no 1 lives in Port Elizabeth; accused no 2 lives in Pacaltsdorp, George; and accused no 3 lives in a shack in Motherwell, Port Elizabeth. They have no overt connection to Grahamstown/Makhanda, Cradock, Graaff Reinet or Jansenville. They were portrayed during Mr. Price's cross-examination of Viljoen as not being possessed of any appreciable assets although it was common cause that each owned or had access to a motor vehicle, in accused no 1's case a GTI Golf, number 2's case a Toyota and in number 3's case an Audi. Despite this, the accused felt impelled every few months, when the moon was waxing full, to hire motor vehicles, including expensive models such as a Mercedes or an Audi, and to travel many kilometres from their homes in Port Elizabeth and George into the Eastern Cape hinterland, seemingly for no ostensible reason other than to drive around the Karoo and to sms and phone each other at extremely odd hours of the day, night and early hours of the morning such as 1am or

3am in the vicinity of scenes and at times where rhino happened to be poached. The accused gave no explanation for their highly suspicious conduct in this regard and it is difficult to conceive what innocent explanation for such conduct might be.

[220] It was correctly submitted by Mr. Coetzee that the evidence adduced by the State in respect of the remaining 9 incidents must be assessed against the background of the accepted evidence in respect of incident no 1, including the possession by the accused of such quantities of tranquilizing fluid and unused darts as to give rise to the reasonable inference that they had been or were pursuing a particular course of conduct involving rhino poaching. This inference is also entirely consistent with the similar fact evidence relating to the Port Alfred and Hoedspruit incidents. In the absence of any innocent explanation as to how darts found at these scenes had come to be fired from the tranquiliser gun found in their possession the only reasonable inference to be drawn is that they had been involved in those respective poaching incidents as well.

[221] This casts a very different light on the accuseds' activities in the vicinity of the various towns visited by them over the relevant periods. Apart from this the State has adduced a considerable body of other evidence implicating the accused in the commission of the offences relating to incidents 2 – 9. The cellphone records contained in Exhibit 1 and N establish, in my view, a clear pattern of the movements and communications of the accused with each other at the time the various poaching incidents occurred. In my view further, Mr. Coetzee is correct in his submission that a strikingly similar pattern of conduct by the accused is shown in respect of all the incidents.

[222] There is the evidence that accused no 1 visited Koffylaagte Lodge as a paying guest and that accused no 2 similarly visited Camdeboo and Bucklands as a paying guest, all these considerably expensive visits occurring a few months prior to rhinos being poached on the respective farms whilst the accused, according to their cellphone usage, were somewhere in the vicinity of each farm. Accused no 2 was booked into Annie's Guest House, Cradock on 16 March 2016 at the time incident no 9 occurred. Accused no 1 was booked into the same guest house on 17 May 2016, driving a hired Mercedes DL 63 XM GP at the time that incident no 12 at

Kleindoringberg, Cradock occurred. The next day on 18 May 2016 when incident no 13 occurred at Great Fish River Reserve, Grahamstown, accused no 1 was booked into Makana Resort having driven there from Cradock. No explanation for what on the face of it are striking coincidences when seen in the light of the cellphone records has been given.

[223] The accused are also connected to incidents 7 and 8 by the evidence relating to the darts. They are connected to incident no 9 by the paint chip. With regard to incident no 11 there is also the evidence in Exhibit L relating to the tracker record of the rented car. By any standards the peculiar movements of the vehicle near the area where the rhino was poached were, in the absence of an innocent explanation, highly suspicious to say the least. And again it is difficult to conceive of any possible innocent explanation. When regard is had to the stark landscape in the area it is unlikely that the accused were so enamoured of the scenery that they returned there again and again to view it, even by moonlight.

[224] As was stated in S v Reddy and Others *supra* one needs to be careful in an assessment of circumstantial evidence not to approach it upon a piece-meal basis but, rather, to consider it in its totality. The court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken but must carefully weigh the cumulative effect of all of them together and it is only after this is done that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn.

[225] Approaching the evidence in this manner I am satisfied having regard to the totality of the evidence, albeit circumstantial in nature, that the State has produced evidence sufficient to establish a *prima facie* case which called for an answer against the accused. They have chosen to leave that evidence unanswered. In the circumstances that evidence, in my view, is sufficient to prove the guilt of the accused beyond reasonable doubt on all 55 charges, save that in respect of count no 36 accused no 1 and 3 are guilty of the attempted theft of the rhino horn and in respect of counts no 36 – 40 accused no 2 is not guilty.

[226] In the result the accused are found guilty of the theft of rhino horn as charged on counts 1, 6, 21, 26, 31, 41, 51, 56 and 61.

[227] On count 36 accused no 1 and 3 are found guilty of attempted theft of rhino horn. Accused no 2 is found not guilty and discharged on this count.

[228] On counts 2 – 5; 7 – 10; 22 – 25; 27 – 30; 32 – 35; 37 – 40; 42 – 45; 52 – 55; 57 – 60; and 62 – 65 the accused are found guilty as charged save that in respect of counts 37 – 40 accused no 2 is found not guilty and discharged.

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J.D. PICKERING
JUDGE OF THE HIGH COURT

Appearing on behalf of the State: Adv. Coetzee

Appearing on behalf of the Accused: Adv. T. Price S.C.

Date heard: June 2018, November 2018, January 2019 and March 2019

Judgment reserved: 11 March 2019

Judgment delivered: 15 March 2019