

HIGH COURT
(BISHO)

CASE NO. CC 11/97

THE STATE

versus

VUYANI KENNETH MPENZO

ACCUSED

J U D G M E N T

EBRAHIM J: The accused, Vuyani Kenneth Mpenzo, is arraigned on two Counts of murder, eight Counts of attempted murder, five Counts of robbery with aggravating circumstances, two Counts of attempted robbery, five Counts of rape, one count of housebreaking with intent to steal and theft, one count of theft, one count of malicious injury to property, two Counts of possession of a firearm without a licence, two Counts of the unlawful possession of ammunition and one count of negligently discharging a firearm. The accused pleaded not guilty to these charges and elected in terms of s 115 of the Criminal Procedure Act 51 of 1977 not to disclose the basis of his defence and put the State to the proof of the allegations against him.

The State case

The State has presented the evidence of thirty (30) witnesses and what follows is a brief summary of their testimony.

COUNTS 1, 2, 3 AND 4: Nombulelo Eunice Mbande, the complainant in Count 4,

is also an eyewitness in respect of Counts 1, 2 and 3. She testified that on 2 March 1995 shortly after 4.30pm she was a passenger in a Ford Cortina bakkie driven by the deceased, Khululekile Jonisile. They proceeded to Kanana Village near Berlin and close to the Border Technikon the deceased turned into a minor road near Ezinkomeni and stopped. They alighted from the vehicle and went to a spot not visible from the tar road. There the deceased placed a sheet of cardboard on the ground which he had taken from the bakkie. They lay down on this and had sexual intercourse.

A short while later a man approached and with this the deceased took out his firearm and placed it next to his head. She described this man as a person of medium height, average build and dark in complexion with a brimless hat. His face was scarred and he had thick lips. The person drew a firearm and ordered the deceased, who was sitting up at this stage, to raise his hands. The assailant shot the deceased, and took his firearm after he fell down. She was ordered to search the deceased and took out the gun's magazine with bullets from his shirt pocket. When she attempted to put on her panty and shoes the assailant ordered her not to do so and said she had to proceed to the deceased's vehicle while he pointed his firearm at her.

He ordered her to get inside and to open the cubby-hole in the dashboard. She found a R50 note which she handed to him. He also got into the vehicle but before doing so pulled his jersey over his hands. She was forced to remain in the vehicle and he drove further down the road and into the bushes where he stopped and told

her that they had run out of petrol. She was made to disembark and search the interior of the vehicle but found nothing. The assailant searched the vehicle himself and found a piece of rope. She requested him to fetch the deceased but he refused, saying he wanted him dead. He then forced her to walk into the bushes, pointing the firearm at her. They walked some distance before he stopped and ordered her to undress and when she refused he threatened to shoot her and forced her to undress completely. They continued a little further and she was told to spread her jersey and skirt on the grass while the assailant took off his pants and underwear. He then had sexual intercourse with her, swearing and threatening to shoot her if she did not submit to his demands. It was light enough for her to be able to see his face and she had a good look and observed the structure of his face. After he had finished he got up but would not allow her to dress immediately. He asked whether she preferred being hanged or shot to which she responded that he should rather shoot her. He asked why she chose this and she replied that if he shot her she would die immediately whereas she would die slowly if he hanged her. She pleaded for mercy, covering herself with her skirt, and heard a shot but it did not strike her. Suddenly her assailant said he had forgiven her and left leaving her there.

She tried to find her way home and crossed a number of rivulets until she arrived at a village called Mchotsho where she went to a house and related to a woman what had happened to her. She was taken to a Mr Mlongeni where she repeated her story but since there were no cars to take her to Fort Jackson he suggested that she stay there until the following morning and she accompanied the woman

and spent the night at her house. She says she had been afraid and felt ill and not in control of her senses. Her body was dirty and wet from lying on the grass. The following morning she was provided with water to wash and clean herself. Mr Mlongeni then accompanied her and they proceeded by car to the Fort Jackson Police Station. Later she accompanied the police to the spot where the shooting had occurred and found the body of the deceased.

The cross-examination of this witness by Mr Nxusani, who appears *pro deo* for the accused, was prolonged and detailed. Understandably, his cross-examination of her, and that of the other eye-witnesses, focused almost entirely on what opportunity the witness had to identify the assailant and whether she was not mistaken in her identification of the accused as her assailant. It was put to her that she had exaggerated the version she had given to the police and embellished her evidence but she strongly denied this. She was adamant that the individual who had killed Mr Jonisile and raped her was the accused. She had identified him at the identification parade by virtue of the scar on his cheek, his dark complexion, the shape of his face and his general physique. When questioned about what had taken place at the identification parade she confirmed that she had pointed out the accused and that he was standing more or less in the middle of the line-up. The relevant identification parade form, Exhibit 'B', reflected that she had pointed out the accused but that he was in position number 1 on the parade. She denied that she had identified the accused simply because he was bald and said she was not even aware of this as he had worn a knitted skullcap when he committed the crimes. It was put to her that the accused was a chain smoker but she said that

he did not smell of cigarette smoke. It was put to her that the accused would say that he was a boxer and had an athletic physique to which she replied that she could not dispute this and that he was the person who had raped her.

Zolile Malville Mlongeni testified that he resided at Nkqonkqweni, Berlin and was the Chairman of the Residence Committee and attended to any complaints in the area. He confirmed that the witness Mbande had arrived at his house accompanied by a few of the residents of the area. Her clothes were wet and she was without shoes and had reported that someone had been shot. He advised her that she should spend the night there and they would attend to the matter the following morning. The next morning he accompanied her to where the body of the deceased was and they then reported the matter to the police.

He confirmed during cross-examination that she had told him that she had been raped. She had arrived at the village at approximately 7.00pm and that it was raining slightly. They had only gone to where the body of the deceased was and not to the place where she had been raped.

The next witness Melumzi Silewana was a member of the South African Police Services. He confirmed that on 3 March 1995 the witnesses Mbande and Mlongeni had reported at the police station what had occurred and taken them to where the body of the deceased was. The deceased was lying on his back with a shot wound in the chest. He found the shoes and panty of the witness Mbande near the body and a search had been conducted for cartridges but this had been

unsuccessful. The witness Mbande also took them to where the deceased's vehicle had been left and found the keys were missing. She had confirmed that the person who had raped her was the same person who had shot the deceased.

During cross-examination he stated that the witness Mbande had told him that she could recognise her assailant. She described the person and had stated that he had a scar on his face. He also confirmed that she had told him that her assailant had covered his hands with his jersey when he drove the motor vehicle of the deceased. He could not remember if she had told him about the money the assailant had taken nor that the assailant had asked her to choose between being hung or shot or that she had pleaded for her life and been shot at. She had been unable to lead them to the place where she had been raped but he did not question her further as she was in a state of shock.

The next witness, Mzuzile Alphius Mkohlwa, said he had taken a statement from Nombulelo Eunice Mbande who had attended the identification parade. She had confirmed that she had pointed out a person at the identification parade.

He was cross-examined on the difference in the testimony of the witness Mbande and her statement regarding the position in the line-up of the person she had pointed out. The statement, he said, accurately reflected what she had told him, namely, that the suspect was in position number 1 in the line-up. He was unable to explain why her testimony had differed from this.

COUNTS 5,6,7,8 AND 9: Mbuyiselo Anthony Bodla testified that he was a member of the South African Police Services for the past sixteen years with the rank of Sergeant. On 4 March 1995 at about 1.30pm he was travelling in his motor car from East London to Mdantsane. Near Frere Hospital he saw a nurse hitchhiking and stopped to give her a lift to King Williams Town. As they neared Da Gama he turned off towards an area near Cementile Products where there were wild flowers as he wanted to propose love to her since she was very beautiful. He stopped, opened his car door and after a few minutes heard a voice and saw a man running towards the vehicle. This person, whose face was covered by a white cloth and a balaclava, pointed a firearm at him and told him not to move or he would shoot. The individual swore at him and told him to get out of the vehicle but before he could respond the person asked him if he thought that he was joking and swore at him again by referring to his mother's private parts. This person fired a shot which struck him on the right side of his abdomen causing him to slump forward onto the steering wheel.

He was forced to alight from the vehicle and his assailant ordered him to walk into the bushes. As he turned and started walking he heard the assailant shouting at his companion to get out of the car. The assailant had seen a firearm which the witness had in the car and ordered the woman to hand it to him. The witness, who was bleeding profusely, heard two clicks in quick succession and felt someone tapping on his shoulder and thought that he heard a voice whispering to him that he should turn around. He turned and saw the assailant with two firearms - his own and the one belonging to the witness. He was fiddling with the safety catch

of one of the firearms and this allowed the witness to dive at the assailant and hit him under the chin. A struggle ensued and he shouted to his female companion to hand him the firearms so that he could shoot the assailant. The assailant pulled his balaclava off as he was having difficulty in breathing and the witness then saw his face. The witness began to weaken and the assailant was able to push him away and got up. The female companion of the witness approached with the firearms and he shouted to her to shoot the assailant and she fired a shot. He took the firearm from her and fired two shots at the assailant, who fell, and it appeared that the second shot had struck him. He approached the assailant who managed to get up and ran away.

The witness was becoming weaker and had difficulty in breathing and returned to the car. He drove for about five metres before he became dizzy and began to lose consciousness. His female companion then took over and took him to the Cecilia Makiwane Hospital. He says that when the assailant pulled off the balaclava he saw his face and retained a picture thereof. He describes the assailant as being dark of complexion. At the hospital he had asked his companion to hand over the firearms to a nurse, sister Gcawu. He received emergency treatment and was later transferred to Groote Schuur Hospital in Cape Town where he underwent a further series of operations. He was unable to walk, speak or eat and remained in hospital until July 1995 when he returned home. Later he identified his firearm to the police. As a result of the injuries he had been compelled to take early pension. Asked if he could identify his assailant he replied that it was the accused.

During cross-examination he confirmed that when he provided a statement to the police on 15 June 1995 he had stated that he was unsure that he could identify his assailant except by his height. Further, he had not seen the accused again until now. Further questioning revealed that apparently he had seen the accused using the public telephone at the High Court at some stage and this had made him recall what the person looked like. However, he had not informed the police that he was now able to identify his assailant.

Nyameka Sybil Gqangeni-Gcawu is a nursing sister at Mount Frere Nursing College. Her testimony is very brief. She confirms that the witness Bodla was brought to the hospital in a serious condition accompanied by a woman who said that he had been shot. She confirms that two firearms were handed to her which she kept in a locker at the hospital. Later the firearms were handed to a security guard, Mr Ntshebe. Cross-examination did not reveal anything significant.

The evidence of Monde Ntshebe confirms that he received two firearms from the witness Gqangeni-Gcawu. He was employed as a security officer at the Cecilia Makiwane Hospital and had noted down the serial numbers of the two firearms in his pocket book. These were 335031 and the other 9311049. He had taken the firearms to the NU 12 Police Station and handed them over to the police as there was no safe available at the hospital in which he could store them.

He confirmed under cross-examination that the one firearm was slightly bigger than the other. The smaller contained one bullet and the bigger five bullets. He

removed the magazines from the firearms and handed everything to the police. He was told by sister Gcawu that the firearms belonged to the witness Bodla.

Zamuxolo Patrick Tene is an inspector in the South African Police Services, stationed at Vulindela Police Station Mdantsane, and has been a policeman for thirteen years. His evidence related to the recording of exhibits in the Exhibit Register (SAP 13). An extract of the register relating to certain entries was handed in as Exhibit 'G'. A 9 mm Browning Short firearm serial number 9311049 was handed in as Exhibit '1' and its magazine and one live round as Exhibit '2'. A 9 mm Parabellum P38 firearm was handed in as Exhibit '3' and its magazine with five live rounds as Exhibit '4'. He confirmed that these exhibits were under his control and were brought to court by him. During cross-examination he again confirmed that the firearms had been in his possession and under his control.

Noncamane Zamani testified that the late Khululekile Jonisile was her husband. She identified the identity document which had been issued to her late husband and this was handed in as Exhibit 'H'. Cross-examination of this witness did not reveal anything of much import.

COUNTS 11,12,13,14,15,16,17,18 AND 19: Thineka Hina, 27 years old, testified that on 25 April 1995 she accompanied the deceased, Mtanase Tukute, for the purpose of receiving driving lessons. They left her home in his Toyota Venture motor vehicle and drove to Ezinkomeni where she commenced the driving lessons. While driving on a gravel road she saw a man walking towards them and

noticed that the bottom half of his face and part of his nose was covered with a white cloth and that his head was covered. It was just after 5.00pm but still light. She was afraid to continue driving and asked the deceased to drive further. The deceased then drove a little distance into the veld and parked the vehicle and there she and the deceased made love on the passengers seat of the vehicle. Afterwards the deceased alighted in order to urinate while she remained in the vehicle. As he was about to re-enter she heard him screaming and looked in his direction and saw the individual, whom they had passed previously, standing at the rear of the vehicle. The person fired four shots at the deceased who fell down. She screamed when this person approached her but he told her to keep quiet as he was not going to shoot her. He told her to hand the deceased's firearm to him. She took it out of the cubby-hole with the magazine, which was lying separate, and gave it to him.

The assailant ordered her to wipe off the blood on the inside of the driver's door which had been splashed with the deceased's blood when he was shot. She had to re-enter the vehicle and the assailant drove off with her in the direction of the rural villages. A short while later they stopped next to a rivulet and he ordered her to alight and undress, pointing the firearm at her. She was ordered to lie on the ground and he then raped her. She was only able to see his eyes as his face was covered with a white cloth and his head by the hood of his lumber jacket. After raping her, he ordered her to get up, to dress and re-enter the vehicle and drove back to the spot where the deceased was lying. He ordered her to take out the deceased's wallet and when she was unable to do so she had to remove the deceased's trousers and hand it with the belt and the wallet, containing R30, to the

assailant. The deceased was left lying there with his underpants on and she had to return to the vehicle and the accused drove off once more with her inside. She remembers that he pulled his shirt over his hands to cover them while he held the steering wheel.

From time to time he spoke to her and had to lower the cloth over his face so that she could hear him clearly. At times he forgot to replace the cloth and she was then able to see his face clearly. Near the Border Technikon he again stopped and ordered her to undress. She was told to lower the backrest of one of the seats and he raped her a second time. They remained in the vehicle for some time while her assailant listened to music from the audio tapes in the vehicle. He then raped her for the third time.

Thereafter he attempted to drive off but was unsuccessful as the vehicle had developed a puncture and become stuck. When they were outside the vehicle they heard voices and he told her he was going to ask the person for matches as he intended burning the vehicle. He tied her to a pole while he approached a man at the Border Technikon to ask for matches. He returned, untied her and they returned to the vehicle. There he again listened to music after which he set the vehicle alight and watched it burn. Once the fire had subsided he threatened to kill her pointing the firearm into her nostril. She implored him to take her to where the deceased was lying and to kill her there so that her body might be found. But, he took her into the forest and suddenly told her that she could go home. Two shots were fired but these did not strike her and she ran off. She reached a house and

there she had related to a woman what had happened to her. This woman's son went to the police station on a bicycle and returned to the house with the police who took her to try and find the body of the deceased. But, she was in such a state of shock that she was unable to locate the body. She was then taken to hospital for treatment and later discharged.

About a month later she was travelling in a taxi near Da Gama when she saw a person, who she says is her assailant, seated on the grass next to the road. She requested the taxi driver to take her to the NU 1 Police Station and en route they met a police vehicle. She informed the police of what had occurred and a search was conducted but her assailant was not found. The following occasion she saw the assailant was at the identification parade held at the prison. She recognised him immediately from his overall appearance and this person was the accused. She described him as having sharp cheeks with a mark on the right cheek which, to her, appeared to have been caused by a burning cigarette. He had big thick lips and a dark complexion and was a tallish person with an average build.

Thineka Hina had to endure prolonged and detailed cross-examination. Her opportunity to observe the facial and bodily features of her assailant and the reliability thereof was extensively tested by defence counsel. Questions centred on the shape, size, colouration, age and prominence of the scar on the assailant's face as well as what, she thought had caused the scar. Her reply was that it appeared to have been caused by a burning cigarette. In addition to the other facial features described by her she had also noticed his thick lips. She denied that

he had a moustache at the time of the events and could not see if his head was clean-shaven as it was covered by the hood of his lumber jacket. She was unable to describe the clothing that he had worn. When her ability to observe the face of her assailant in the light from the flames of the burning vehicle was questioned she insisted that she was able to see his face properly. It was put to her that the flames from the fire would also have caused shadows across a person's face and this would have prevented her from properly identifying the assailant's features. She maintained that she was able to see his face clearly and that she had noted the features which she described. Further questioning related to the size of his teeth, whether they were his own or false, but she had not noticed this. She confirmed that his nose was big and that he had moderate sized eyes. At the request of defence counsel, but only after the Court had ascertained from the witness whether she felt comfortable in doing this, she agreed to inspect the scar on the accused's face. She confirmed that it was the same scar and that the accused was her assailant. The court inspected the scar on the face of the accused at a distance of about a metre away. The scar is in the area between the right cheek and the nose and is circular in appearance with two small discolourations.

Finally, it was put to her that the accused was not her assailant as the accused had only sustained the injury resulting in the scar on his face on 21 May 1995 and that medical evidence would be presented to substantiate this. She was insistent, however, that on 25 April 1995 the assailant had this scar and that this person was the accused. Counsel put to her that the accused was a chain smoker and, if he was her assailant, she should have smelt the smoke. She denied that the

person had smelt of smoke. It emerged further that she had told the police that she could easily identify the assailant because of the scar on his face and she had mentioned the size of his lips. It appeared an identikit had been drawn up but when two identikits, Exhibits 'I' and 'J', were shown to her she said neither reflected the person she had described.

Counsel then focused his cross-examination on the identification parade that the witness had attended on 14 June 1995. She confirmed that Nombulelo Eunice Mbande, Nandipha Mnikelwa and a man, whom she said had told her he was a security guard at the Border Technikon, had also attended the identification parade. According to her, the other women had discussed that they had been attacked. When counsel pertinently asked her whether they had talked about the assailant she replied that their discussions only related to what had happened to each of them. She denied that the witnesses Mbande and Mnikelwa had described the scar on the face of the assailant. The witness Mbande was the first person to be fetched by a policeman to attend the identification parade and did not return to the room in which the rest of them were waiting. It emerged further that prior to the policeman fetching the witness Mbande all of them had been moved to another room and they were placed under police guard. While waiting in this room they had not discussed any of the incidents at all. She was the next person to be taken to the room where the identification parade was being held. She entered the room backwards and had to face a wall. It was explained that she had to ascertain whether the person who had raped her was present and she then turned around and looked at the men in the line-up. She walked up to one of the men and

touched him. This person was the accused. She could not remember if he had any injuries on his head but she had recognised his face. After this she did not return to the room where the other witnesses were waiting.

In response to questions from the Court she said that she had not told any of the other witnesses which person to point out nor did she give them a description of the person. She, in turn, had not been told by anyone whom she should point out nor had any of them provided a description of the assailant. She had also not seen a photograph of the accused in any of the newspapers nor at any other place prior to the identification parade. The assailant had laid on top of her and had taken a long time when he raped her on each occasion. On the first occasion it was still light and she was able to see his face. On the second occasion when he raped her in the vehicle, although it was already dark she was still able to see his face. She indicated that his face was a distance of about 30 cm from hers. Even on the third occasion she was able to see his face. She had also been able to observe his face when he lowered the handkerchief and turned towards her to speak to her.

COUNT 10: Tanatu Elliot Keli, is employed as a prison warder at Mdantsane Prison. On 24 April 1995 he placed his firearm in his briefcase at his home. He intended visiting the rural areas later that day but before departing he went out briefly to NU 12. On his return he discovered that the kitchen door was broken and that someone had gained entry to his premises. On checking his briefcase he found that the locks had been opened forcibly and his firearm, a 7,65 mm pistol with serial number BO9725 had been removed. Certain other items had also been

taken. The firearm was recovered by the police but it had not yet been returned to him. The cross-examination of this witness did not elicit anything further of particular significance.

The evidence of the next witness, Mbuyiselo Paris Makanoza, related to the information in the police Exhibit Register (SAP 13). On 4 March 1995 he made certain entries. In brief, these relate to a 9 mm Browning firearm and magazine containing one live round and a .38 mm Parabellum firearm and magazine containing five live rounds. He also recorded that the person who had possession of these firearms was Mr Bodla. This information he had obtained at a later stage and then entered in the register. In cross-examination he conceded that he had not completed the register contemporaneously.

At this stage Mr Nxusani informed the Court that the legality of the identification parade was being attacked on the basis that the accused had been denied the right to legal representation. He submitted, however, that it was not necessary to hold a trial-within-a-trial. Mr Sontenjwa, submitted that there had not been any objection to the admissibility of the evidence of two of the witnesses, Nombulelo Eunice Mbande and Thineka Hina, in respect of what had occurred at the identification parade. He contended that if the defence had indicated earlier that it was challenging the validity of the identification parade the State would have led evidence in support of the validity and correctness of the procedures adopted at the identification parade. Notwithstanding the accused's belated objection to the validity of the identification parade, the Court decided that a trial-within-a-trial be

held in order to determine if the testimony of the witnesses who identified the accused at the identification parade is admissible against the accused or not. In this respect, it was agreed by the defence and the State that the evidence given by the witnesses, Nombulelo Eunice Mbande and Thineka Hina, in respect of the identification parade would be admitted and form part of the evidence of the trial-within-a-trial. The defence confirmed that there was no need to recall these witnesses to testify again on what had transpired at the identification parade.

Trial-within-a-trial

The State then proceeded to lead further evidence in respect of the identification parade. The first witness, Nyamazeli Celu, testified that he was a member of the South African Police services for sixteen years with the rank of inspector and was stationed at East London. He had been involved in a number of identification parades and was requested by Warrant Officer Matoti to undertake the holding of the identification parade involving the accused. He had completed form CP 84 (Exhibit 'B') and had obtained the accused's details from the police docket. There were a total of eleven men on the parade which included the accused. The men in the line-up were more or less of the same height and their skin colour was similar to that of the accused. He had informed the accused of the allegations against him and the reason for holding the identification parade. He had also given the accused an opportunity to obtain legal representation and had informed him that he had a right to do so. The accused, however, had stated him that they could proceed with the holding of the identification parade without an attorney being present.

Detective Sergeant Makanaza (since deceased), Detective Sergeant Jikumlambo and Detective Sergeant Zenani assisted him in holding the parade. It was the task of Detective Sergeant Makanaza to bring each of the witnesses to the room where the identity parade was being held. Detective Sergeant Jikumlambo was in charge of the witnesses while Detective Sergeant Zenani was responsible for accompanying the witnesses to another room after they had been given an opportunity to see if they could identify any of the suspects in the identification parade as their assailant. Apart from himself the other persons in the room where the identification parade was being held were the accused, the ten men who formed part of the line-up and the prison warders.

The first witness to be brought in to identify the person who had raped her, was Nombulelo Eunice Mbande. The door to the room was closed and when Ms Mbande entered the room she had to do so with her back towards the line-up and had to face a wall. He explained to her that she had to ascertain if her assailant was in the line-up and, if so, to approach him and place her hand on his shoulder without speaking to him. She was told to turn around and thereupon identified the person who was in position number 1 in the line-up. This person was the suspect, Vuyani Mpenzo. He recorded this in paragraph 17 of Exhibit 'B'. Ms Mbande was then asked to leave the room and was accompanied by Sergeant Zenani. He asked the accused if he wished to change his position in the line-up and the accused thereupon moved to position number 6 in the line-up.

The following person to be brought in was Thineka Hina and a similar procedure

was followed. She also pointed out the suspect, Vuyani Mpenzo, who was in position number 6 in the line-up. He recorded this in paragraph 17 of Exhibit 'L'. She was then led away by Sergeant Zenani. The accused was asked once more if he wanted to change his position in the line-up but he indicated that he would remain in position number 6.

Nandipha Mnikelwa was brought in next and the same procedure, as adopted with the two previous persons, was followed. She similarly pointed out the suspect, Vuyani Mpenzo, who was standing in position number 6 in the line-up. Thereafter she accompanied Sergeant Zenani to another room.

The witness Celu recalls that a male, whose name he could no longer recall, also participated in the identification parade and the same procedure, as in the case of the others, was followed. This completed the identification parade and he handed over the relevant documentation to a Warrant Officer Bout. He identified his own signatures on the forms and stated that Detective Sergeants Zenani and Jikumlambo had also signed. Three forms had been used and he accepted that certain sections in the different forms had not been completed. However, when viewed together the forms contained all the required information.

Inspector Celu was cross-examined at length. It was put to him that the presence of the accused at the Mdantsane Prison had evoked tremendous interest. Further, that the accused had to be placed in solitary confinement as he was being threatened by the other prisoners. Inspector Celu, however, was unable to

comment on this. He denied that the accused was the only person on the parade who was bald or who had a scar. He had specifically asked for the other individuals in the identification parade to have a similar appearance to the accused and of similar height, physique and colour. He confirmed that the accused had been in position number 1 in the line-up. He had spoken loudly when informing the accused of his right to legal representation and denied that the accused had not heard him.

In reply to questions from the court he said that if the accused had indicated that he wanted an attorney he would have postponed the identification parade. The accused had not objected to the identification parade proceeding and had not refused to participate. The three female complainants had not hesitated in pointing out the accused. With the court's permission defence counsel was permitted to question Inspector Celu further in regard to a fourth witness involved in the identification parade. Inspector Celu stated that the relevant form relating to this witness had been handed to Inspector Matoti, the investigating officer. He confirmed that this witness had also identified the accused.

Mzwandile Louis Zenani stated that he is a member of the South African Police Services for the past sixteen years and presently holds the rank of sergeant. He assisted Inspector Celu with the identification parade and was stationed outside the door of the room where the parade was being conducted. His task was to escort the witnesses to another room once they had participated in the parade. He said that he knew the accused as they had grown up together but he was unaware that

he was a suspect nor had he seen him the day the identification parade was held.

Under cross-examination he said that he had not known that the accused had been arrested in connection with the murders that had been committed. When he was instructed to assist with the identification parade he had not known that the accused was involved. He denied that he was at the door of the room when the accused had been brought there and taken inside. He had only arrived after the line-up had been formed. He disputed that he could see the line-up when the door was opened. He had also not entered the room at any stage.

In reply to a question from the court he said that no one had said '*Hello*' to him while he was stationed outside the room.

Mzwamadoda Jikumlambo testified that he is a sergeant in the South African Police Services and assisted with the identification parade. His task was to watch over the witnesses. He never conversed with any of them nor did they talk to each other in his presence. The witnesses were taken one by one to the room where the identification parade was being held and did not return to the room where he was waiting with the other witnesses. He did not know the accused and had not seen him on that day. He confirmed that he had signed the forms relating to the identification parade.

In cross-examination he stated that he had not been told what the name of the suspect was. The witnesses had been taken from one office to another and in the

second one they had been placed under his supervision. While the witnesses had been in the first office they had been speaking and while he could not say what they had discussed it could not have related to the case as they were laughing. In the second office no discussions took place. If he had heard them discussing the case he would have called Inspector Celu.

In reply to a question from the court he said that the room where the identification parade was being held was not visible from the office where he and the witnesses were waiting. And, no one had mentioned the name of Vuyani Mpenzo.

Enoch Mlandeni Thusi stated that he was a security guard. In 1995 he had been employed at the Border Technikon. He had attended an identification parade at the Mdantsane Prison and on his arrival had met three women there. They were placed in an office and later transferred to another room and placed under the supervision of a policeman. He was the last person to be called to go to the identification parade where he had entered the room backwards and faced a wall. He was informed that he had to see if the person who had approached him at the Border Technikon and asked him for a match was amongst the individuals in the line-up. He then walked along the line-up until he came to the person and pointed him out. He had recognised him by his face and cheeks as well as his height and build. The evening when the person had asked him for a match he had told the person to come closer to him out of the dark and into the light.

In cross-examination it emerged that because of his training as a security guard he

had taken a good look at the person so that he could recognise him again at a later stage. He confirmed that the person that he had seen that evening was bald. He denied he had discussed with the other witnesses what the assailant had done to them. None of the women had spoken to him nor had he introduced himself to Ms Thineka Hina. He remembered that the accused was the sixth person in the line-up and he had not recognised the accused because of his clothes.

In response to a question from the court he said that from the time of the incident until he attended the identification parade no one else had approached him to ask for a match while he was on duty at the Border Technikon.

The next witness, Nandipha Mnikelwa, stated that she had also attended the identification parade at the prison. She had been taken first into one room and then to another with the other witnesses. They had been told not to discuss the case and they were supervised there by a policeman. She confirmed that Nombulelo Eunice Mbande was the first witness to be taken to the identification parade, followed by Thineka Hina. Thereafter she was taken to where the identification parade was being held. She could not see into the room from the corridor and when she entered had to face the wall. She was told to turn around and saw the men in the line-up. She had looked at each person and returned to the accused whom she pointed out by touching him on his shoulder. She had recognised him because of his big mouth and his face. The top part of his face was wide while the lower part was narrower. She had taken a good look at the person on the day of the incident and had seen him in the lights of the motorcar

and she knew that if she saw him again she would be able to recognise him.

During cross-examination this witness denied that she and the other complainants had discussed what had happened to them - they had only introduced themselves to each other. She could not remember Enoch Thusi introducing himself to them. She conceded that there was no street lighting at the place where she had seen the accused on the night of the incident. However, she had seen him in the headlights of the motor vehicle and was able to see his face clearly, which was v-shaped. At the identification parade she had looked at everyone in the line-up before pointing out the accused. She had been asked to do so and it was not because she was uncertain who her assailant was. She recognised him because of the shape of his face, his mouth, lips and chin. The police had taken a statement from her but she had not been asked to provide a description of her assailant.

Questioned by the court she said that she had not seen a photograph or sketch of the person in the newspapers nor had anyone provided her with a description of him. No one had told her beforehand in which position the suspect was standing and she had no doubt at all that the accused was her assailant.

The evidence of the accused in the trial-within-a-trial

The accused, Vuyani Kenneth Mpenzo, testified and stated that on 14 June 1995, while in custody at the Mdantsane Prison, he was summoned by a warder and taken to the reception area of the prison. On their way there, they came to a holding cell with big windows and he was told to enter the cell as an identification

parade was being held there. He did so, and he found a line-up of men inside. He was then told that the identification parade was for him. A policeman holding a book told him to join the line-up in position number 1. Another policeman, Mzwandile Zenani, came into the cell and stood facing the line-up for about ten minutes. A woman entered, walked up to the line-up and touched him on the shoulder. She was then taken away. The policeman with the book told him to change his position in the line-up and he moved to another position, but could not recall which position that was. Another woman came in and also touched him on the shoulder and was then taken outside by the policeman with the book. He was not told to change position and remained in the same place in the line-up. A third woman entered and touched him on the shoulder. She was similarly taken outside by the policeman with the book. A male person then entered and touched him on the shoulder; at this stage he was still in the same position in the line-up. The policeman with the book also took this man outside and thereafter told the accused that the identification parade had been completed whereupon the accused returned to his cell.

He disputed that he had been informed that he could have an attorney present or that the identification parade could be postponed if he wanted the services of an attorney. He had never been involved in an identification parade before and it had not been explained to him what it was all about. He also alleged he had been harassed in the prison, assaulted by the warders for no reason at all but no one had witnessed this.

When cross-examined by Mr Sotenjwa, the accused said that he had been assaulted at a shebeen by three people. He had been punched, stabbed with a knife and shot. The police had also assaulted him with their fists and a hose. He had sustained injuries on the top of his head, a scar in his face and his jaw had been fractured. The police had also suffocated him by using a tube and he had been assaulted by the prison warders. When he appeared in court on 24 May 1995, three days after his arrest, the wounds were still visible. He was asked to explain why his counsel had put to witnesses that Detective Sergeant Zenani had remained outside the room whereas in his testimony he had said that he was inside the room. He replied that counsel had misunderstood him. The room, he said, had big windows and those outside could see into the room and he in turn could see all of them. He alleged that as one entered the room one could immediately see all the persons in the line-up. He admitted that he was not the only person in the line-up with a v-shaped face or with high cheek bones. Further, if his legal rights had been explained to him in the same manner as Inspector Celu had testified he would have been satisfied with such an explanation. He was dissatisfied with the identification parade as he had been identified by the witnesses. His objection to the identification parade was that he had not been given notice thereof. He admitted though that all the witnesses had identified him but claimed that their pointing out of him was unlawful.

In response to questions from the court he said that he knew Detective Sergeant Zenani and that his wife and Zenani's girlfriend were sisters. Zenani, who had been in the room for ten minutes, had looked at him most of the time and was

about three to four metres away from him. However, neither he nor Zenani spoke to each other nor did they exchange greetings. He had not thought of doing so as he was shocked at being at the identification parade. He had also not thought of obtaining a lawyer. He alleged he had informed his counsel as well as his previous legal representative that the room where the identification parade was held had large windows and that people could easily see into the room. The line-up of suspects stood facing the window and was parallel to it. No further evidence was tendered by the defence.

Evaluation of the evidence in the trial-within-a-trial

Nombulelo Eunice Mbande was a truthful witness and confident in her identification of the accused. She provided plausible and acceptable reasons for the basis of her being able to identify the accused as her assailant. The identifying features, such as the shape of his face, the scar on his cheek, his dark complexion and his physique, which she provided, cannot be faulted. It is so that she has erred in stating that the person she pointed out was standing more or less in the middle of the line-up but this does not negate the fact that it was the accused whom she had identified. This the defence has not disputed at all. She had ample opportunity to observe the accused's features since she was in his company for a long time. Through this period she was in close proximity to him - he was only a metre or two away - and for a great deal of the time it was in daylight and in circumstances which provided a proper opportunity for observation. The fact that she might have been frightened of her assailant does not necessarily diminish her ability to identify

him; if anything, it seems to have resulted in her capturing a clear picture of the face of the accused.

Thineka Hina, too, had more than sufficient opportunity to observe the facial and physical features of her assailant. She was in his company for a number of hours and in very close proximity to him throughout. In describing the opportunity she had to see his face she could so easily have been less than frank in this regard but, far from doing so, she frankly described the true position. She indicated that a white cloth had covered the bottom half of his face and this he only removed, from time to time, so that she could properly hear what he was saying. On these occasions she was able to see his face clearly and this enabled her to recognise him when she saw him again. She also had sufficient opportunity to see his face in the light provided by the flames of the burning vehicle. Her description of the identifying features by which she recognised him can similarly not be faulted. She described him as having sharp cheeks with a scar on the right cheek, big thick lips, and as a tallish person with a dark complexion. These features fit the accused and has not been disputed by the defence. During cross-examination she had indicated that she and the other complainants, while they were in a room before the identification parade commenced, had discussed what had happened to them at the hands of their assailant. This was not substantiated by the other complainants though. But, even if this had occurred, the fact is that she is adamant that the discussion did not involve either she or any of the other describing what the appearance was nor whether the person had any identifying features. Counsel for the defence has suggested that such a discussion amounts to an irregularity which

invalidates the identification parade. I am not persuaded that a discussion as described by this witness, if it occurred, has this result in the circumstances of this matter. There is no evidence that the discussion entailed the appearance of the assailant or the scar on his face, at any stage, alone at the time that they were placed under police supervision. I am satisfied, therefore, that her identification can safely be relied upon and I accept her evidence in this regard.

The evidence of Nandipha Mnikelwa did not contradict that of Nombulelo Eunice Mbande or Thineka Hina with the exception the evidence of Ms Hina in relation to the discussion between the witnesses. Of the three complainants she had the least opportunity to observe the facial features of her assailant. The events had taken place at night and under artificial light which, it must be noted, was provided by the headlights of the car and the light inside the cubby-hole. Despite this she was still able to notice certain distinctive features such as the v-shape of his face - the bottom part of his face being much narrower than the top - the shape and size of his mouth, his lips and chin. Although, defence counsel suggested that she had pointed out the accused because he was the only person whose head was clean-shaven, she denied this. She impressed as a witness. She could easily have adjusted her evidence to include the obvious distinguishing feature of the scar on the accused's face, but she did not even mention the scar as the reason for identifying the accused. In her case, too, I am satisfied that her identification is reliable and trustworthy. She had a proper opportunity to observe the facial features of her assailant, even in the limited time available, to observe his facial features. I am satisfied that there is no reasonable possibility of her being mistaken

and I, accordingly, accept that her identification of the accused as her assailant, is correct.

The last identifying witness was Enoch Mlandeni Thusi. The relevant particulars form relating to his identification of the accused at the identification parade, was not produced as it had been misplaced. However, the defence did not seek to have his evidence excluded. His opportunity to observe the accused the evening he was on duty at the Border Technikon, was very limited. Notwithstanding this he was able to observe that the person had a mark on his right cheek next to his nose and that his cheeks gave the impression of being swollen. And, this person was tall with a slender physique. I am mindful of the short period of time that was available to him for observation, but this is offset by the training he has received as a security guard. One of the purposes of such training is to enable him to take particular note of people and events and to be observant about the appearance of people. It is this that enabled him to remember what this person looked like. In his case, too, I am satisfied that his identification of the accused is reliable and trustworthy. I accept his evidence that the accused is the same person who approached him to ask him for a match on 25 April 1995.

Form CP 84, which was utilised to record what transpired at the identification parade, has provision for the recording therein of the results of any pointing-out by up to three witnesses. However, Inspector Celu chose instead to use a separate form in respect of each of the witnesses and these have been handed in as Exhibits 'B', 'L' and 'M'. The information recorded in these forms confirm that

Eunice Mbande, Thineka Hina and Nandipha Mnikelwa, respectively, identified the accused at the identification parade. It emerges further that while Detective Sergeant Makanaza signed all three forms, Inspector Celu only signed Exhibits 'B' and 'L' and Detective Sergeant Jikumlambo Exhibits 'L' and 'M'. Counsel for the accused has contended that these are irregularities which render the identification parade invalid and consequently that the pointing-out of the accused by the witnesses should not be admissible as evidence against him. He submits that since a different form has been used for each of the witnesses a separate identification parade has been held in each instance.

I am, however, not persuaded that this argument has merit to it. In my view, the use of separate forms, when there is more than one identifying witness, does not convert what would normally be a single identification parade into several individually conducted identification parades. In the normal course of events, where there are several witnesses and a single form is used various answers and formal details are recorded once only and not duplicated with each witness. Also, upon the completion of the identification parade the official organising the parade and those assisting him are only required to sign the form once. In the circumstances of this matter, since it was manifestly intended to be, and in fact was, a single identification parade, even though it involved four witnesses, it does not necessarily follow that the failure to duplicate on each form the answers to certain questions, is in itself an irregularity. In my view, the same applies in regard to the signing of the forms. Taking all the factors into account I consider that there has been more than substantial compliance with the requisite procedures and

formalities relating to the conduct of the identification parade. The forms, when viewed together, reflect that each requirement has been complied with. I do not deem the variations, if they can be termed such, to amount to irregularities and the attack on the validity of the identification parade in this respect, fails. I find further that the State has proved that the procedures which were followed in the holding of the identification parade were not improper nor irregular.

I find Inspector Nyamazeli Celu to be a credible and reliable witness. I accept his evidence that he informed the accused, prior to the commencement of the identification parade, of his right to legal representation and that the accused had stated that the identification parade could proceed as he did not require such representation. I also accept the evidence of Detective Sergeant Zenani. I similarly find him to be a credible and reliable witness. There is nothing which indicates that they have lied or sought to deceive the court, nor are there any improbabilities, contradictions or inconsistencies in their evidence. The same also applies to the evidence of Detective Sergeant Jikumlambo. I similarly find him to be a credible witness and I accept his testimony.

The accused, on the other hand, was an unimpressive witness. His evidence was riddled with untruths, inconsistencies, contradictions and improbabilities. The version which he provided of what had transpired at the identification parade was totally inconsistent with that put to the witnesses by his counsel in cross-examination. His evidence also did not support the various propositions which his counsel had put to the witnesses. Thus, it is only when he testified that

it emerged that the room where the identification parade had been held had large windows and that people in the corridor were able to observe what was taking place inside. This was undoubtedly a crucial matter since, if there was any truth to his allegation, the identification parade was fatally flawed. But, this alleged fact was never put to any of the State witnesses nor was the evidence of the State that what had transpired inside the room was not visible to anyone outside, ever challenged on the basis that it was possible to see into the room through windows which fronted onto the corridor. The obvious and only reason why this was never challenged is because the accused had fabricated this crucial evidence and then only at the time when he gave his testimony. It is totally incomprehensible that such an important issue would not have been addressed by his counsel during cross-examination of the witnesses, had his counsel been aware thereof. I have no doubt whatsoever that he is lying in this respect and that his counsel was totally unaware of this information until the accused testified.

Similarly, the evidence of the witnesses Celu and Zenani that the latter had been stationed outside the door to the room and remained there, was never challenged on the basis that the accused alleged that Zenani was inside the room for at least ten minutes prior to the commencement of the identification parade. Again, had the accused informed his counsel of this, I have no doubt, that the witness Zenani would have been confronted with this in cross-examination. Once more, the only reason for Zenani's evidence not being challenged in this respect is that the accused fabricated this evidence and, did so, at the time when he gave his testimony.

It is highly improbable, too, that if the accused had indeed seen Zenani there, as he alleges, that neither of them would not have spoken to each other. After all they not only knew each other but were also closely linked by their relationships with two sisters. The accused is married to one sister while the other was Zenani's girlfriend. They would, at the very least, have greeted each other if nothing else. But, the accused says he did not speak to Zenani as he, the accused, was surprised by the identification parade and was waiting for it to be completed. Further, when taxed on why he had not even told Zenani that he needed a lawyer he said that he did not know that it was necessary for a lawyer to be present. This story is far-fetched to say the least.

The accused's account of what transpired in respect of the identification parade is completely unconvincing. It abounds with improbabilities and I do not consider it to be reasonably possibly true. On the contrary, the only conclusion that I am able to reach is that his version is manifestly false and I, accordingly, reject same. The accused has alleged that his constitutional right to legal representation was violated in that he was refused the opportunity to obtain such representation when the identification parade was held. The accused bears the onus of proving such violation on a balance of probabilities. See *Qozeleni v Minister of Law and Order* 1994(2) SACR 340(E) and *S v Van den Berg* 1995(4) BCLR 479 at 496F [also reported at 1996(1) SACR 19(Nm)]. Since the accused has failed to discharge this onus his attack on the validity of the identification parade, based on this ground, fails.

In the result, the evidence of the identification of the accused by the witnesses, Nombulelo Eunice Mbande, Thineka Hina, Enoch Mlandeni Thusi and Nandipha Mnikelwa, is admissible against the accused. It follows that the ruling that I gave in these terms on 26 August 1997 is hereby confirmed.

Further evidence in the main trial

Upon the completion of the trial-within-a-trial the State proceeded with a presentation of further evidence in the main trial. In this regard Norman Moyakhe testified that he resided in the Potsdam area of Mdantsane. Thineka Hina had arrived at his residence at about midnight. Her clothing was dirty and she was distressed. When he enquired what had happened she related that she had been raped and that the person who had been teaching her to drive, had been shot. He had then gone to fetch the police.

When cross-examined he said that Thineka Hina had not provided a description of her assailant. Nothing further of relevance arose from cross-examination.

At this stage both counsel for the defence and the State confirmed that it had been agreed that the evidence of the identifying witnesses, Nombulelo Eunice Mbande, Thineka Hina, Enoch Mlandeni Thusi and Nandipha Mnikelwa, in the trial-within-a-trial would form part of the main trial. They agreed further that there was no necessity to recall these witnesses to repeat their testimony. The State then presented further evidence in respect of the remaining Counts.

COUNTS 20, 21, 22, 23, 24, 25, 26 AND 27:

Further testimony given by Nandipha Mnikelwa was to the following effect. On 18 May 1995 she, her two sisters, Ntombizanele and Monica Mnikelwa, as well as Lucas Zenzile, Norman Mayeki were taking a young man named, Siyabulela, to the police in a motorcar. They intended lodging a complaint regarding the behaviour of Siyabulela towards Ntombizanele. They stopped when they encountered Mr Khumalo, an elder in the community, and some of them alighted to report the problem concerning Siyabulela to him. Siyabulela then tried to get away and she shouted to the others to stop him. He was taken from the car and the rest also alighted. A person appeared in an area above the road, and shouted, *'What are you doing there? Are you killing somebody?'*, and approached, firing shots, forcing them to retreat. She heard Norman Mayeki begging him and another shot being fired, with Norman Mayeki saying, *'He has finished me'*. When Norman was pleading with the person the latter had been about 2 metres away from her and she was able to have a good look at him. She saw the person approaching in the headlights of the car when he fired further shots. She tried to run away but stopped when he pointed the firearm at her. He had a sjambok with him, which Mr Khumalo had dropped, and hit her over her back as she lay on the ground and ordered her into the motorcar.

When she got into the car the assailant walked in front of the car and stopped to do something. She was then able to see him in the light from the headlamps. In addition, when he got in he opened the cubby-hole to look at what was inside and she again saw his face in the light from the cubby-hole. The vehicle moved off

without him starting the engine as it was on an incline, and she shouted for help but he ordered her to keep quiet. After they had travelled some distance the car came to a stop and he ordered her to get out. When she resisted he got into the vehicle, pulled her out and took her into the bushes, threatening to kill her. She resisted and he struck her on the head with a firearm and pushed her further into the bushes. He ordered her to undress and take off her panties and, when she refused, he forced her further into the bushes, grabbed her skirt and panties, tore them off forcing her onto the ground. He then raped her. After he had finished he told her to go and she was forced to wander through the bushes until she reached the road. She was trying to find her way home when she met her sister, Monica, and shortly thereafter the police and was taken to hospital for treatment. The next time she saw the person who had raped her was at the identification parade.

She was subjected to extensive cross-examination which focused primarily on the lighting in the area, or rather the lack thereof, and the opportunity she had to observe the facial features of her assailant. It emerged that there was no street lighting. The only artificial lighting emanated from the sewerage works and the Sisa Dukashe stadium some distance away. She conceded that had it not been for the artificial lighting it was impossible to see clearly, nor could one see the colour of someone's clothing or the finer details of a person's face. However, she had seen him in the light from the headlamps of the car and these were sufficiently bright to enable her to see his face properly. She reiterated that his face was also visible to her when he had opened the cubby-hole inside the vehicle. Asked if the police had told her that there had been a series of rapes in the Mdantsane/Fort

Jackson area, she said they had not. She had also not seen newspaper reports that indicated that the person responsible for these rapes had been arrested, nor had she been shown an identikit of the alleged rapist.

When questioned by the court she indicated that when the assailant had hit her on her head he was about half a metre away from her. At a distance of under 2 metres it was possible to make out the features of a person without the help of artificial light. At the stage when he took her into the forest she had not looked at his face nor did she do so at the time that he raped her. However, when he had told her to undress he was standing in front of her and she was able to see his face then. She was unable to estimate how long he stood in front of her but it had taken a little time as she had refused to undress and they had argued about this. Finally, at the time that she saw him in the headlights of the car she had taken particular notice of his face as she wanted to make sure if the person was known to her or not.

The next witness was Monica Ntombizodwa Mnikelwa. She confirmed the events involving Lucas Zenzile and that they had met Mr Khumalo while on their way to the police station at NU 2 as well as Siyabulela trying to run away. She says they were all shouting at him when she heard shots being fired. At the same time she had heard a person saying, *'Are you killing a person there?'*. She hid in the grass and got up when the firing stopped and heard Nandipha and her husband, Norman Mayeki, talking. She saw the person who had fired the shots and pleaded with him and tried to explain what had happened there. However, this person was not

prepared to listen to her. Further shots were fired and she hid behind the vehicle and finally in a tree. Thereafter, she heard the vehicle moving off and met her sister, Ntombizanele, who told her she had been shot. She told her sister to remain there and she proceeded to the location to obtain transport to convey her to hospital. At the location she met a neighbour who was conveying her husband to hospital as he, too, had been shot. On returning to fetch Ntombizanele she met Nandipha who told her that the person who had fired the shots had slept with her. Nandipha was crying and her skirt and shirt were both dirty. The police then arrived. That there was no street lighting where the shooting had occurred but it was not too dark as there was some light from the lights at the sewerage plant and a chicken farm. The light was sufficient for her to be able to see a person at a distance and whether it was a male or female and she could recognise a person when he or she was about a metre away. When they met Mr Khumalo the headlamps of the vehicle were left on after they had stopped.

Cross-examination of this witness related to visibility and the opportunity for observation. She confirmed that she had informed the police that she would not be able to identify the assailant as she had not been close to him.

Norman Mncedisi Mayeki then testified. His evidence corroborated the versions given by Nandipha Mnikelwa and Monica Ntombizodwa Mnikelwa. When the shots were fired he ran towards the grass and threw himself face down. When the firing stopped he got up and held up his hands and said to the individual, *'Please sir we are not killing'*. As he said this a shot was fired and it struck him in the waist

causing him to fall down. He crawled up the hill towards houses in the distance and he did not have any opportunity of seeing what the assailant looked like. He was eventually taken to hospital for treatment and stayed there for a week until he was discharged. He still suffered from the effects of the shooting and tired easily if he walked for long distances or stood for a long time. He even experienced difficulty in sleeping.

Cross-examination did not produce any contradictions between his evidence and that of the other witnesses. He confirmed, when asked, that a member of the family was able to recognise the assailant. When this was clarified by the court he said that it was Nandipha Mnikelwa who had said so.

Lucas Zenzile in his testimony confirmed that he had taken Nandipha Mnikelwa and the others to the home of Siyabulela. At about 10.00pm they returned from NU 1 and met Mr Khumalo and he was asked to stop as they wanted to speak to him. While they were speaking to him he heard gunshots but did not see who fired these shots. They all ran and he hid in the grass. He heard somebody saying, *'Are you killing a person there?'* but did not see the speaker. Norman Mayeki pleaded with the individual and he heard a further shot with Norman saying words to the effect that he had been finished off. With this he ran away and abandoned the car. He encountered Norman a little later at houses above the road and assisted him as he was bleeding and unable to walk and he later saw Nandipha Mnikelwa in hospital where she was being treated. She was not in good health, vomiting at times, and had weal marks on her back. He confirmed that there was no street lighting in the

area where the incident occurred. The only lighting came from the sewerage works and a factory a *little* distance away.

When cross-examined he confirmed that he had left the lights of the car on after he stopped. He had not looked at the gunman and could not identify him. He disputed that the visibility was so poor that you were unable to see a person next to you. When re-examined by counsel for the State he stated that it was possible to recognise someone at a distance of about a metre away. In response to questions from the court he confirmed that the light in the cubby-hole of the car was functioning. He stated further that although the headlights of his car were not very bright one could see a person clearly in front of the car's lights.

The next witness was Khumalo Maphathisa Mvambi. He confirms that he met Monica Mnikelwa, Norman Mayeki and the others that evening near the sewerage works. He was walking along the road carrying a sjambok. He did not have a light with him but was able to see the road. He confirms the events that transpired in regard to the shooting. He also ran away to the other side to where there were houses in order to phone the police and in his haste dropped the sjambok. Although there were no streetlights he was able to see a person at a distance and make out the person's face when about a metre away. In cross-examination he stated that he could recognise the facial features of an individual but not necessarily any specific marks. Also, the lights of the vehicle were on but he was not sure if they were on bright or dim.

Ntombizanele Mnikelwa in her testimony, confirmed the events that took place that evening and her version is consistent with that of the others. The shots had come from an area higher up but she had not seen who fired them. When the person appeared, Norman Mayeki pleaded with him but he fired further shots and she was struck in her left thigh. Although the wound was painful and bleeding she was able to get away to seek refuge in the grass. When the car moved off she heard Nandipha crying. She eventually received assistance and was taken to hospital where she remained until the first week of June 1995 and is able to walk now.

COUNTS 28, 29 AND 30: The first witness in regard to these Counts was Thozama Mvuyo. She was working at a shebeen when the accused arrived and bought liquor. She noticed that he had a firearm tucked into the front of his pants. Later the accused went to the toilet and when he returned she heard the sound of a shot and ran into the diningroom to see what was happening. There she saw the accused with the firearm in his hand being held down by some people while others tried to disarm him. A further shot went off which injured one person in his foot. She ran next door to telephone the police and on her return found the accused being assaulted by a group of people. The police arrived and when the accused tried to run away, caught him and brought him back. She noticed that he had swelling on his right forehead and on the right side of the top of his head but there was no blood on his face.

In cross-examination it was put to her that the accused had blood all over his head and face to which she replied that he did not have any wounds on his face. She

also refuted the accused's assertion that he was not in possession of a firearm and had not fired the shots.

The evidence of Mlungiseleli Qhayiso is that he had encountered the accused at the shebeen. When the accused drew a firearm he and two or three other men tackled the accused and held him down to prevent him from pointing the firearm at someone and in the process a shot went off. As they struggled to get possession of the firearm a further shot went off. The owner of the shebeen then hit the accused on the head with a stick causing him to drop the firearm. The accused managed to get out of the house but was caught and assaulted again. When the police arrived the firearm was handed to them. Despite the assaults there were no injuries on the accused's face.

During cross-examination he said that he could not dispute that the accused may have sustained injuries to his head, face and other parts of his body. But, when asked about this by the Court he stated that he had not seen a wound or blood on the face of the accused. Further, at no stage was the accused unconscious and he had entered the police van unassisted.

Taruni Gonyela testified that he was at the shebeen when he heard a noise in the diningroom. Someone was pretending to be a policeman and two shots were fired. He went to the diningroom where he found the accused lying in a corner with people pressing him down. He assisted these people by trampling on the accused who thereupon shot him in the foot. Another person dispossessed the accused of

the firearm. The police arrived and both he and the accused were taken to hospital. He saw a wound on the accused's head behind his left ear and a swelling on the forehead but, the accused did not have any injury to his face. The gunshot wound which the accused had inflicted on his foot had now healed but it was still painful when he walked.

In cross-examination his version was disputed but he maintained that he was telling the truth. The accused was in possession of a firearm and it was the accused who had shot him and from whose hands they had to take the firearm. He conceded that the accused had been assaulted. He did not know if the accused was semi-conscious but could not accept this as the accused had even tried to run away from the hospital. In reply to questions from the Court he said that he and the accused were in the same ward at the hospital and their beds were about two metres apart. He could see the accused and there were no wounds on his face which were bleeding. The only blood came from the wound on his head.

Mthozami Madikane is a member of the South African Police Services, stationed at Vulindela Police Station, and holds the rank of inspector. He first saw the accused on the day that he arrested him at NU 12 Mdantsane. When he arrived at the premises he found the accused lying on his back with a number of people around him. A firearm was handed to him by someone who claimed that the accused had been dispossessed of the weapon. It was a 7,65 mm calibre firearm. This was said in the presence of the accused and could be heard by him. However, the accused had not responded. The accused was placed in the van and

he noticed that he had a wound on his head. He took the accused to the Police Station and handed the firearm with the magazine and two live rounds to Sergeant Mdledle. He and two other policemen then transported the accused to hospital where he received treatment.

It was put to him in cross-examination that the accused was semi conscious and did not recall being arrested by the police. However, he could not say whether the accused was fully conscious or not. He had not seen any cuts or wounds or lacerations or bruises on the face of the accused except for the wound and swelling on his forehead. In response to questions from the Court he said that the accused was able to walk without assistance to the police van. He had spoken to the accused who appeared to understand him. At the hospital the accused had also walked unassisted. The accused was not dazed and appeared to him to be aware of everything that was happening.

Lungile Oliphant Mdledle is a sergeant in the South African Police Services and stationed at Vulindela Police Station. He recorded certain information in the official Exhibit Register. He had received from inspector Madikane a 7,65 mm calibre firearm and its magazine which was empty, two live 7,65 mm rounds and a 7,65 mm cartridge plus a maroon balaclava. He was informed that the accused, Vuyani Mpenzo, had been in possession of these articles. He, in turn, had handed these to Constable Keni. Cross-examination of this witness did not produce anything new.

The next witness was Lizo Zamadoda Keni a constable in the South African Police Services. His evidence confirmed that the firearm, bullets and other articles which sergeant Mdledle had received from Inspector Madikani was handed to him by Sergeant Mdledle. His evidence also confirms that the serial number of the firearm was 673364 and there were other letters and numbers on the firearm - WR 224145. The firearm was then stored in the safe.

There was lengthy cross-examination of this witness but it did not result in doubt being cast on the safekeeping of the firearm.

Hereafter the State handed in various documents in terms of Section 212 (3) and (4). These were the postmortem reports in respect of the deceased Khululekile Jonisele and Wiseman Mtanase Tukute, including the reports on the medical examinations of Nombulelo Mbande, Mbuyiselo Bodla, Thineka Hina, Norman Mayeki, Ntombizanele Mnikelwa, Nandipha Mnikelwa and Taruni Gonyela. The defence had no objection to the handing in of these reports and accepted the contents thereof as well as the findings.

The final witness to be called by the State was Nceba Matoti who is a member of the South African Police Services and the investigating officer in this case. His evidence related to the three bullet heads he had received from the doctor who had conducted a postmortem on the deceased Wiseman Mtanase Tukute, which is recorded in Exhibit 'U'. Further, in pursuance to information which he had received he proceeded to house no. 4672, NU8, Mdantsane where he spoke to a Nikiwe

Albertina Mambinya and obtained her permission to search the premises. During the course of this search he found a 9 mm Z88 firearm and a 7,65 mm firearm, both of which contained bullets. He took possession of these and took them to the NU 13 Police Station where he entered the details in the Police Exhibit Register. This has been handed in as Exhibit 'AA' and records that a Z88 pistol, serial number TQ084540 with black holster, 5 rounds and magazine as well as a 7,65 mm Browning R78 pistol, serial number B09725 with one round and magazine was handed in. Thereafter he forwarded the 7,65 mm R78 pistol with serial number B09725 and magazine including the three 7,65 mm bullet heads, recovered in the postmortem, to the police forensic laboratory in Cape Town for analysis. He subsequently received a report, Exhibit 'CC', from the laboratory which confirms that the three 7,65 mm calibre bullet heads had been fired from the R78 pistol. The only issue addressed in cross-examination was that the accused denied any knowledge of the firearms or the tests conducted thereon.

Further Exhibits were then handed in by the State, namely, the following:

- 1 x Z88 pistol, serial number TQ084540 - Exhibit '9'
- 1 x empty magazine - Exhibit '10'
- 1 x 7,65 firearm, serial number B 09725 - Exhibit '11'
- 1 x empty magazine - Exhibit '12'
- 1 x 5 live 9 mm rounds - Exhibit '13'
- 1 x 1 live 7,65 mm round - Exhibit '14'
- 1 x black holster - Exhibit '15'
- 1 x shoulder holster - Exhibit 16.

This concluded the case for the State.

The Defence case

The defence has not disputed that any of the offences were committed. What is in dispute is that the accused is the perpetrator of any of the crimes. In regard to Counts 1 to 27 the defence of the accused is that of an alibi and in respect of Counts 28, 29 and 30 he denies that he was in possession of the firearms and ammunition as alleged therein.

While it was put to each witness that the accused denied being the person who had committed these crimes, the full extent of his alibi only emerged at the stage when he testified. His alibi is that, as he was working during 1995 he was at his place of employment, as far as he could remember, on the 2nd and 4th March 1995 and not at the scene of the crimes referred to in Counts 1 to 10. During 1995 he was employed by Pick 'n Pay in East London as an agent and sold what are referred to as *'Home Choice vouchers'*. He was at work every day, except Sundays, and left his home early in the morning to travel to work and only returned home after 5.00 pm. He says Nombulelo Eunice Mbande is mistaken in her identification of him as the person who committed the offences in Counts 1 to 4. Mbuyiselo Bodla is similarly mistaken in his claim that he is the person who attempted to kill and rob him, as cited in Counts 5, 6 and 7, and consequently he was not in possession of the firearm and ammunition, cited in Counts 8 and 9. In regard to Counts 11 to 19 his alibi is that on 25 April 1995 at the time when the offences were being committed, he was at home with his family and the witnesses are mistaken, therefore, in their identification of him as the perpetrator of those crimes. And, in regard to Counts 20 to 27 his alibi is that

after 10.00 pm on 18 May 1995 he was asleep at his home. Here, too, the witnesses are mistaken in their identification of him as the perpetrator. Finally, he says that the scar next to his right cheek was not there before 21 May 1995. He obtained the scar as a result of the assault on him at a shebeen on the day of his arrest.

Cross-examination of the accused exposed numerous contradictions, improbabilities and blatant untruths. He claimed that he was stabbed in his head and that his jaw appeared to be fractured. He was also assaulted with knobkieries and had weal marks over his body and a bullet wound on his left finger. The extent of these injuries had not been disclosed previously in the trial, save to say that it was put to witnesses that the accused would claim to have been assaulted with an assortment of weapons. In addition, he does not describe how the injury to his cheek would have been caused, despite the crucial nature of this injury in relation to his defence. If the accused indeed sustained the injuries as described by him there would certainly be a record of these and of the treatment administered by the hospital. This evidence was, of course, never produced. Further, he claimed that he was left lying in the police van overnight and only taken to the hospital the following morning. He says that he was not placed in the police cells until he returned from hospital. Again, the hospital records would reflect when he was admitted and when he received treatment. In this regard, too, the evidence of Taruni Gonyela was not challenged when he said that he and the accused occupied adjoining beds at the hospital and that this was on the same day of the incident, namely, 21 May 1995. Much of the detail of the fight that took place at the

she been was clearly not conveyed to his counsel as it only emerged in cross-examination. It is highly unlikely that his counsel would have omitted all this detail in cross-examining the various witnesses had the accused in fact provided him therewith at a stage prior to the accused testifying.

The accused's mother, Dinah Nodi Mpenzo, also testified in support of his alibi. She handed in documentation, which the accused had asked her to bring, and which purportedly was to verify that he had been employed by Pick 'n Pay in 1995. However, these documents (Exhibits 'EE', 'FF' and 'GG') reflected, firstly, that the accused had "qualified as a Silver Status agent for Home Choice in July 1994". Secondly, that during the period 17 January to 17 February 1995 he had conducted sales on behalf of an organisation called "Peaches and Cream Marketing and Promotions" and had earned various amounts of commission. She also said she had seen the scar on his right cheek for the first time after he was arrested. She enquired how he had obtained this mark and he had replied that he was assaulted. He was a person who was always at home and was never absent.

When she was cross-examined it transpired that while the accused claimed only to have two brothers she stated that in addition to the accused, she had another five sons. This information was obtained from her with great difficulty. She also contradicted the accused in regard to which of his brothers was staying with them. Later, she stated that the one boy Masibulele was not actually her own child but her sister's son. Finally, it emerged that she was not staying at home but at her place of employment and only went home when she was off from work on a

Thursday or Sunday.

In reply to questions from the Court she said that she had seen the wound on the accused's face when she visited him at the Mdantsane Prison. The wound did not have a dressing, it was emitting a discharge and the swelling was decreasing. He had told her that the police had assaulted him but did not say what the nature of the assault was. This concluded the case for the defence.

Evaluation of the evidence in the main trial.

Nombulelo Eunice Mbande was a good witness. In cross-examination Mr Nxusani levelled a startling accusation at her. He accused her of having exaggerated her version and embellishing her evidence, without, however, producing any examples thereof. I find no basis for this unwarranted and unsubstantiated criticism. There is nothing to indicate that she related anything more than what had actually happened. On the contrary, I found her to be somewhat restrained in her description of what had occurred and there is no suggestion of any exaggeration or embellishment on her part. Indeed, when Counsel put to her that the accused was a chain-smoker and, if he had been the rapist, she would surely have noticed that he smelt of cigarette smoke. She could easily have embellished her evidence but, truthfully she replied that she did not smell any smoke on the person.

She impressed me with her honesty and I accept that she has told the truth. I am satisfied that she had sufficient opportunity to observe the accused's features, by virtue of her proximity to him and the length of time she was in his presence. The

lighting conditions were more than adequate to enable her to see the accused's face clearly and to take note of any distinguishing features such as the scar on his face, his complexion and the shape of his face. I am satisfied that her identification of the accused as the person who perpetrated the crimes in Counts 1, 2, 3 and 4 is reliable and trustworthy. I am satisfied, too that there is no reasonable possibility of her being mistaken in such identification.

The evidence of Mbuyiselo Bodla regarding his identification of the accused as his assailant is to be approached with caution. When he made a statement to the police some three months after the incident he stated that he would not be able to identify his assailant. In his testimony in this Court he asserted that subsequent thereto he was able to recall what the person looked like and had seen this person using a public telephone at the High Court. This individual he says, is the accused. I do not find this evidence persuasive or credible. He was a member of the police force for many years and yet, in spite of his experience, did not deem it necessary to inform the investigating officer or anyone else of this. It is clearly unsafe to rely on his identification of the accused and I do not do so. However, he had managed to dispossess the assailant of the firearm which this person had used to shoot him. This particular firearm, a 9 mm pistol with serial number 9311049, is the same firearm of which the deceased in Count 2 was robbed. Consequently, if the alibi of the accused is found to be false then it is clear that he is the person who shot Bodla.

The evidence of Thineka Hina also stands unchallenged. She was a truthful and

credible witness. Her identification of the accused as her rapist and the murderer of Wiseman Mtanase Tukute is both trustworthy and reliable. She was subjected to prolonged and searching cross-examination but this did not reveal any material contradictions or inconsistencies in her version of events or her evidence. I, accordingly, accept her evidence.

Nandipha Mnikelwa is similarly a truthful and credible witness whose evidence is also unchallenged. In her case, too, extensive and detailed cross-examination did not produce any material contradictions or inconsistencies in her account of what had occurred or in her testimony. I also accept her identification of the accused as trustworthy and reliable.

The evidence of Tanatu Elliot Keli is also unchallenged in regard to his premises being broken into and the theft of certain items of property. I accept his evidence as the truth.

In so far as the offences in Counts 20 to 26 are concerned, there is no suggestion by the defence that the testimony of the witnesses, Norman Mncedisi Mayeki, Ntombizanele Mnikelwa, Khumalo Maphathisa Mvambi, Lucas Zenzile and Monica Mnikelwa, cannot be accepted. The question which has to be determined though, as Mr Nxusani has correctly submitted, is whether the conduct of the assailant amounts to attempted murder, in respect of Counts 20 to 25, and robbery in respect of Count 26. Although Mr Sotenjwa has contended that it does, I do not agree that the evidence reveals that there was an intention to murder the

respective complainants. The possibility that the assailant fired the shots in order to get the individuals, whom he considered were assaulting or killing someone else, to cease therewith, cannot with reasonable certainty be excluded. In my view, the State has failed to prove that there was an intention to kill any of these complainants and the evidence cannot sustain a conviction for attempted murder in respect of Counts 22, 23, 24, and 25. There is no doubt, however, that two of the shots fired by the assailant did strike Norman Mncedisi Mayeki and Ntombizanele Mnikelwa, causing them to sustain serious injuries. The accused cannot, therefore, escape a conviction of assault with intent to commit grievous bodily harm in respect of Counts 20 and 21.

Similarly, in regard to Count 26, the evidence does not prove that the assailant fired the shot for the purpose of dispossessing Lucas Zenzile of his motor vehicle. The State has failed, therefore, to prove the intention to commit the crime of robbery. However, the evidence is more than sufficient to sustain a conviction for theft of the motor vehicle.

In regard to Counts 28, 29 and 30 I find the testimony of the witnesses, Thozama Mvuyo, Mlungiseleli Qhayiso and Taruni Gonyela to be satisfactory and credible in respect of the shooting incident at the shebeen involving the accused. They were truthful witnesses and I accept their version of what transpired. But, the evidence does not reveal that the accused had the intention to kill Taruni Gonyela and, therefore, the crime of attempted murder has not been proved. There is no doubt though that the evidence proves that the shooting of Taruni Gonyela amounts to

assault with intent to commit grievous bodily harm.

The Accused's Defence

The accused's attempt to establish his alibi defence failed dismally. The evidence presented by him did not establish that he was either at work or at home on the dates and at the times as he claims. The documentary evidence, such as it was, did not substantiate his claim that he was employed by Pick 'n Pay during 1995 and was at work on the dates and at the times that the offences in Counts 1 to 27 were committed. His mother's evidence did not corroborate his testimony in any way. She contradicted him in material respects. She was clearly not at home on the dates the offences were committed nor could she, of her own knowledge, corroborate that the accused was employed by Pick 'n Pay.

While the accused does not bear the burden of proving that his alibi is true, the details thereof must be provided so that the Court may be able to assess on all the evidence whether there is a reasonable possibility of it being true. Should the accused produce evidence that he was somewhere else when the offences were committed then his alibi must be accepted as reasonably possibly true, thereby entitling him to be acquitted. See *R v Biya* 1952 (4) SA 514 (A), *R v Hlongwane* 1959 (3) SA 337(A) and *S v Mhlongo* 1991 (2) SACR 207 (A). However, the accused's claim that he was at work when these crimes occurred rests entirely on his word. He has not presented any acceptable evidence that he was employed by Pick 'n Pay or that he was at work on the particular dates. If he was at work, as he claims, proper documentary or verbal evidence thereof could have been

provided without much difficulty but he has failed to do. His claim that he was at home when the crimes in Counts 20 to 27 were being committed, also rests entirely on his word. He could easily have called his wife or his brothers to substantiate his presence at home but none of them were called as witnesses. Clearly, they could not, or were not prepared to, provide the necessary corroboration for his alibi and hence their failure to testify.

Although it had been put to witnesses that the accused would produce medical evidence to substantiate that the scar on his face was due to the assault at the shebeen on 21 May 1995, such evidence did not materialise. There should have been no difficulty in producing the relevant medical evidence, if his version was true, since he was treated at the hospital. His failure to do so exposes the lie to his claim that this injury arose from the assault on 21 May 1995. It is clear that he had this scar prior to the date of his arrest and it confirms that the witness who had stated that the scar existed prior to his arrest are telling the truth.

The accused was an unconvincing witness. He resorted to lying when it suited him. He knew he was not employed by Pick 'n Pay yet he persisted with this untruth even in the face of the document, he had asked his mother to produce, which showed that he was not so employed. It reflected that he was employed as an agent by a firm called Peaches and Cream Marketing and Promotions supposedly as a sales agent. Further, it only covers the period 17 January to 17 February 1995 which is prior to the commission of the offences set out in the indictment. He also claimed that he was at home with his family yet, as I have said, such

evidence was never produced. Indeed, his mother had to concede, albeit very reluctantly, that she was seldom at home as she slept at her place of employment. She tried to paint a picture of the accused as an individual who seldom went out and was always at home. Yet, her evidence clearly showed that she had no firsthand knowledge of this. She cut a rather pathetic figure in the witness box as she struggled to keep up with her own fabrications in an effort to protect the accused. Finally, this led to her being untruthful about how many children she had and who they were. What her evidence succeeded in doing, however, was to expose the accused's own lies regarding how many brothers he had and if they resided in the same house or not. More importantly, it failed to provide any corroboration for his alibi. In all the circumstances, I find that the accused's alibi is not reasonably possibly true and I reject same as being manifestly false.

In the result, I find that the State has proved beyond a reasonable doubt that the accused is guilty of the following crimes:

- (a) On Count 1 of the murder of Khululekile Jonisele;
- (b) On Count 2 of the robbery of Khululekile Jonisele of his 9 mm pistol, with serial no. 9311049, and I find that aggravating circumstances as defined in s 1 of Act 51 of 1977 are present as the accused used a firearm in the commission of the offence;
- (c) On Count 3 of the robbery of Khululekile Jonisele of his Ford Cortina bakkie, registration no. CE 9790, and I find that aggravating circumstances as defined in s 1 of Act 51 of 1977 are present as the accused used a firearm in the commission of the offence;

- (d) On Count 4 of the rape of Nombulelo Eunice Mbande;
- (e) On Count 5 of the attempted murder of Mbuyiselo Bodla;
- (f) On Count 6 of the attempted robbery of Mbuyiselo Bodla of his 9 mm firearm, with serial no. 335031, and I find aggravating circumstances as defined in s 1 of Act 51 of 1977 are present as the accused used a firearm in the commission of the offence;
- (g) On Count 8 of the unlawful possession of a firearm, to wit, a 9 mm pistol with serial no. 9311049, without a licence;
- (h) On Count 9 of the unlawful possession of ammunition without being in lawful possession of a firearm capable of firing such ammunition;
- (i) On Count 10 of housebreaking with intent to commit theft and theft of a 9,45 mm pistol with serial no. BO9725 and other property;
- (j) On Count 11 of the murder of Wiseman Mtanase Tukute;
- (k) On Count 12 of the robbery of Wiseman Mtanase Tukute of his 7,65 mm firearm with serial no. WR224145, and I find aggravating circumstances as defined in s 1 of Act 51 of 1977 are present as the accused used a firearm in the commission of the offence;
- (l) On Count 13 of the robbery of Wiseman Mtanase Tukute of his Toyota Venture motor vehicle, registration no. GCE 16289, and I find aggravating circumstances as defined in s 1 of Act 51 of 1977 are present as the accused used a firearm in the commission of the offence;
- (m) On Count 14 of the rape of Thineka Hina;
- (n) On Count 15 of the rape of Thineka Hina;
- (o) On Count 16 of the rape of Thineka Hina;

- (p) On Count 17 of the theft of R30 and a wallet from Wiseman Mtanase Tukute;
- (q) On Count 18 of malicious injury to property;
- (r) On Count 19 of unlawfully and negligently discharging a firearm;
- (s) On Count 20 of the assault of Mncedisi Norman Mayeki with the intent to commit grievous bodily harm;
- (t) On Count 21 of the assault of Ntombizanele Mnikelwa with the intent to commit grievous bodily harm;
- (u) On Count 26 of the theft of the Ford Cortina motor vehicle of Lucas Zenzile;
- (v) On Count 27 of the rape of Nandipha Mnikelwa;
- (w) On Count 28 of the assault of Taruni Gonyela with the intention to commit grievous bodily harm;
- (x) On Count 29 of the unlawful possession of a firearm to wit, a 7,65 mm pistol with serial no. WR224145 without a licence and
- (y) On Count 30 of the unlawful possession of ammunition without being in lawful possession of a firearm capable of firing such ammunition.

The accused is, accordingly, convicted on all of the aforesaid counts.

As I have stated earlier the evidence does not reach the necessary standard of proof to sustain a conviction on Counts 7, 22, 23, 24 and 25 and the accused is, accordingly, acquitted on these charges.


 Y EBRAHIM
 JUDGE OF THE HIGH COURT (BISHO)

8 and 9 December 1997

Heard on the : 22/4/97, 5/5/97, 6/5/97, 7/5/97, 19/5/97,
 20/5/97, 21/5/97, 22/5/97, 23/5/97, 26/5/97,
 27/5/97, 28/5/97, 9/6/97, 11/8/97, 12/8/97,
 13/8/97, 14/8/97, 15/8/97, 20/8/97, 21/8/97,
 22/8/97, 26/8/97, 27/8/97, 28/8/97, 29/8/97,
 1/9/97, 2/9/97, 15/9/97, 16/9/97, 17/9/97,
 18/9/97, 20/9/97, 24/9/97, 3/11/97, 25/11/97

 Judgment delivered on : 8 and 9 December 1997

 Counsel for the State : Adv M P Z Sotenjwa

 Counsel for the Accused : Adv J Nxusani