

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, NORTH EASTERN CIRCUIT
MTUBATUBA**

Case No: CC24/2023

In the matter between:

THE STATE

and

ZAKHELE VUSI GUMBI

FIRST ACCUSED

SIBUSISO VELENKOSINI MKHWANAZI

SECOND ACCUSED

PHILANI CARLOS MZIMELA

THIRD ACCUSED

SIYABONGA MICHAEL SANGWENI

FOURTH ACCUSED

JUDGMENT

MOSSOP J:

[1] This is an ex tempore judgment.

[2] Each of the four accused face the same 18 charges. Counts 1 to 7 encompass charges of robbery with aggravating circumstances, count 8 is a charge of theft, counts 9 to 14 are counts of attempted murder, count 15 is a charge of murder, counts 16 and 17 involve the unlawful possession of a prohibited firearm and a firearm respectively and count 18 alleges a count of unlawfully possessing ammunition.

[3] All of these charges are founded on events that occurred on 2 February 2022 at a store known as 'Beauty Zone' (the store), located in the Plaza Mall situated in the Zululand town of Mtubatuba. According to the summary of substantial facts attached to the indictment, the State alleges that on that date, the four accused were part of a group, acting with common purpose, who swept into the store late in the afternoon at around closing time with the fixed purpose of robbing it and anyone that they found within it. The South African SAPS Services (the SAPS) having been notified of the robbery then happening in the store, went there in force and trapped the gang in the store. There were then firefights and during the course thereof, according to the summary, accused one and two sustained gunshot wounds to their legs. I point out at this stage that this was incorrect: it was common cause at the trial that accuseds two and four were the persons who sustained gunshot wounds to their thighs. One of the gang members lost his life. The State further alleges in the summary of substantial facts that when the SAPS effected the arrest of the four accused, they found them hiding in the ceiling inside the store.

[4] At trial, accused one and two were represented by Mr. Ntuli and accused three and four were represented by Mr. Daniso. Both counsel are thanked for the assistance that they have provided to their clients and to the court during the duration of this trial.

[5] When the indictment was put to the accused each of them pleaded not guilty to all of the counts. Each of the accused delivered a written plea explanation in terms of section 115 of the Criminal Procedure Act 51 of 1977 (the Act):

(a) Accused number one explained that he was in the store on the day in question because he had gone there to purchase a face wash. He explained that two African males came into the store and told the occupants to lie down. The two African males were wearing balaclavas. He complied with these instructions and lay on the floor but was thereafter arrested by the members of the SAPS who attended the scene;

(b) Accused number two also admitted that he was in the store and that he, too, had gone there to purchase cosmetics. He also described how two African males

entered the store and told the occupants to lie down. The robbers noticed that he was in possession of a licensed firearm and shot him in his right thigh before robbing him

of his firearm. He also described the robbers as wearing balaclavas;

(c) Accused three pleaded that he had gone to the town of Mtubatuba in order to collect some traditional medicine from a traditional healer who was assisting him. The traditional healer asked him to go to the store to buy some cleansing water which he wished to mix with certain herbs that he was to give to accused three. Inside the store, accused three heard gunshots and saw that customers inside the store ran to the back room, as did he. Whilst hiding in the back room he was found by the SAPS members and was arrested; and

(d) Accused four stated that he had gone to the Plaza Mall, where he was to meet the mother of his minor child to give her some money for the maintenance of the child. He met up with her and gave her money and she went into the store to purchase something for the child while he waited outside. After a considerable time period waiting he called her on her cellular telephone but she did not answer it. He then entered the store himself and looked for her. As he was proceeding to the exit of the store, he heard gunshots and ran back inside the store. He then noticed that he had been shot on his leg and went to hide in one of the storerooms. He, too, was arrested when the SAPS arrived.

[6] The court inquired of the accused whether they were aware of the provisions of the Criminal Law Amendment Act 105 of 1997 which deals with minimum sentences and whether they understood the concept of competent verdicts. When it appeared that this was not known to the accused, the court gave the necessary explanation, which all of the accused then said that they understood.

[7] Having pleaded, each of the accused also made certain admissions in terms of section 220 of the Act. They each admitted the accuracy of the post mortem report prepared in respect of the deceased person and admitted that the deceased's body suffered no further injuries from the time of his death to the time of his post mortem examination. They also admitted a ballistic report prepared by an expert in the

employ of the SAPS and admitted the chain of evidence relating to the conveyance of firearms from the store to the forensic laboratory for analysis. Each of the accused also admitted the findings recorded on a J 88 form that was completed in respect of the victim on one of the counts of attempted murder. Finally, each of the accused admitted that the events inside the store had been recorded by video cameras onto a video tape or videos and none of them had any objection to the videotapes being received into evidence.

[8] Accused three and four included as part of their plea a section that dealt with admissions that they were prepared to make. In my view, a plea is not a place for such admissions. The admissions contained in the plea, in any event, appeared to be incorrect and a line was consequently drawn through them by the court. The section 220 admissions referred to in the preceding paragraph were thus not those admissions attached to the pleas of accused three and four, but were admissions recorded in separate documents prepared in respect of each of those accused respectively and handed in as exhibits.

[9] The post mortem referred to by the accused in their respective section 220 admissions related to the late Senzo Siphamandla Xulu (the deceased). The post mortem report prepared by the State pathologist found that the deceased's cause of death was gunshot wounds to the chest with massive blood loss.

[10] The first witness called by the State was Ms Nolwandle Immaculate Manqele, a specialist photographer, draftswoman and fingerprint expert employed by the Local Criminal Records Centre in Mtubatuba. She confirmed that she had attended the Plaza Mall after the SAPS had effected the arrest of the four accused. She took photographs of the scene and compiled an album of those photographs which was then received by the court. She also located certain cartridges and spent bullet heads at the scene of the crime, marked them in situ, photographed them, later retrieved them and packaged them and dispatched them to the ballistics laboratory for analysis. Finally, she also took certain biological samples in the form of swabs taken from the floor and the wall of the store of what she believed was human sweat and sent these swabs through to the forensic laboratory for analysis. Her evidence was uncontroversial and was unchallenged by the defence.

[11] The second state witness was Captain Steven Mandla Nkabinde (Capt Nkabinde), who has been a member of the SAPS for 29 years, 22 years of which have been spent as a detective. He was on duty on 22 February 2022 when he received reports of a robbery in progress at the Plaza Mall in Mtubatuba. He estimated the time of the report to be between 17h00 and 17h30 and it took him but minutes to proceed from the SAPS station in Mtubatuba to the Plaza Mall. He proceeded there with certain colleagues and upon arrival, they were directed to the store.

[12] When he arrived at the store, its roller door was rolled down. The roller door was made of perforated metal and the perforations permitted vision into the store that it protected. Capt Nkabinde rapped on the roller door and announced that the SAPS were now in attendance. At that stage it was considered a possibility that the employees and customers of the store may have been held as hostages by the robbers. After some time, a tall male person came to the roller door and attempted to lift it up from the closed position. He managed to get it half way up. As he was lifting it, he continuously looked over his shoulder and Capt Nkabinde then saw four males walking quickly towards the roller door from inside the store.

[13] Whilst Capt Nkabinde was in civilian attire, all of the other SAPS members who were in attendance were in uniform. There could, therefore, be no confusion as to who was standing outside the store. Capt Nkabinde again announced the presence of the SAPS and ordered everyone inside the store to lie down and put their hands in the air. He then noticed that two of the four men he had observed walking towards the roller door were armed: one had a revolver and one had a pistol similar to those issued by the SAPS to its members. The male who had attempted to lift the roller door then ran to the back of the store. Instead of the four men obeying Capt Nkabinde's order to lie down, the two men with firearms commenced firing at the SAPS members standing outside the store beyond the roller door. The SAPS retreated, took cover and opened fire on the people firing at them. During the course of the exchange of gunfire, the roller door rolled down from the half open position to the closed position and the four men in the store then retreated deeper into the store.

[14] Things went quiet for about 10 minutes. Suddenly, further gunfire was heard deeper in the store. Capt Nkabinde later ascertained that this was an attempt by the robbers to shoot off the padlock of a rear door that would have allowed them to exit the store. He estimated that about five shots were fired.

[15] The same man who had previously attempted to open the roller door then returned to the roller door with some women. Behind the women were approximately 5 or 6 men walking in the same direction as they were, towards the roller door. Capt Nkabinde ordered all the men to remain in the store and only the women were permitted to leave it. Whilst the women were not crying, it was clear to Capt Nkabinde that they were terrified. The man who had attempted to open the roller door kept walking with them and the woman then shouted to the SAPS members that he was the security guard employed in the store. He was consequently permitted to leave the store.

[16] Notwithstanding his instruction that all the men were to remain inside the store, the five or six men were reluctant to obey that order. Another man was then identified by the women who had left the store as a security guard employed in the store and he was also allowed to leave.

[17] Left inside the store were thus approximately five men. Accused two was observed to be in possession of a revolver. Capt Nkabinde shouted to the men that all firearms were to be put down. However, accused four, who was in possession of a pistol, again fired at the SAPS members and in turn the SAPS members fired a volley of shots back at them. The men, again, retreated deeper into the store.

[18] Capt Nkabinde noted that the men were initially wearing hats or caps but later, when arrested, were bareheaded. The photograph album has several photographs of hats and caps found discarded on the floor of the store.

[19] Capt Nkabinde could not categorically state that accused two had fired his revolver that he was seen to possess. He indicated that because a revolver does not eject its spent cartridges, it was difficult for him to be certain that it was being fired at the SAPS members. However, the pistol utilized by accused four did eject spent

cartridges and the ejection of the cartridge was a further indication to Capt Nkabinde that accused four was firing the firearm at the SAPS members.

[20] At this stage, even more security officials arrived at the scene: these were more members of the SAPS, supplemented by armed soldiers and further reinforced by members of the SAPS Technical Response Team (the TRT) under the leadership of Sgt Mthembu. The TRT was briefed on what was going on and it was confirmed that the robbers were still within the store. Sgt Msweli and Sgt Mthembu, both trained members of the TRT, then volunteered to go into the store to perform a 'sweep up' operation to ascertain whether the robbers, who by now had stopped firing, were still in the store or whether they had made good their escape. They accordingly entered the store, performed the sweep up operation and then returned to the entrance door, where all the other SAPS members were standing, and reported that they had found no one inside the store. However, they had seen a blood trail on one of the walls and it looked to them as though the robbers had taken flight by going upwards into the ceiling of the store.

[21] More members of the SAPS went into the store with the two members of the TRT, a ladder was produced and Sgt's Mthembu and Msweli proceeded to enter into the ceiling of the store in hunt of the robbers. Capt Nkabinde then heard shouting and instructions being given to people in the ceiling and he could hear the sound of footsteps on the ceiling boards. Dramatically, a ceiling board broke and a person dropped through the hole thus created and slammed onto the floor of the store. The fallen person was instructed to remain lying on the floor. Further instructions were then heard being given and eventually three more males came out of the ceiling. As they exited the ceiling, the ceiling began further disintegrating and falling apart. This is recorded in photographs contained within the photograph album. The four men who were thus taken out of the ceiling were the four accused in this matter.

[22] Capt Nkabinde noticed that accused number two and accused number four had been shot. Both were shot in their right thigh and were bleeding and were eventually taken to hospital. The SAPS discovered eight cellular telephones in the possession of the four accused, some of which belonged to the customers and employees who had been inside the store at the time of the robbery. An amount of

R760, comprised solely of R20 notes, was discovered in the underwear of accused number two, close to his testicles. A sum of R1 946 was found in a bag in the back of the store.

[23] Capt Nkabinde appears to have questioned most of the accused in the course of his duties. Accused one, who was not armed when arrested, stressed this fact when he was interviewed. He did not dispute that he had gone to the store to rob it. When he was asked why he was found hiding in the ceiling, he explained that he was trying to avoid being arrested by the SAPS. Capt Nkabinde indicated that he had not been able initially to specifically identify accused one as being part of the gang of robbers because he had been focusing almost exclusively on those who were armed and who were discharging their firearms in his direction. Accused three was, according to Capt Nkabinde, strikingly and memorably attired: he wore a maroon or brown jacket, and khaki coloured trousers. Accused three complained to Capt Nkabinde that he had been 'played'. He explained that he had been told that he could make easy money by robbing the store. He informed Capt Nkabinde that had there had initially been six members of the gang but he was unable to account for the other two members. The deceased person was unknown to accused number three, who only knew him by his name: Mqrbhula.

[24] Finally, Capt Nkabinde expressed the view that the deceased person had been shot by the SAPS whilst in the ceiling of the store. He conceded that he did not witness this, nor did he see the deceased fall from the ceiling to the floor, but he was found on the floor, alive and groaning, with a pistol next to him. This was recorded in a photograph, albeit after the deceased person had passed on.

[25] Under cross-examination by Mr Ntuli for accused one and two, accused two's version that he had never used the revolver that he had possessed was put to Capt Nkabinde. His version was that the robbers had seen that he was in possession of a revolver and had shot him in the leg and taken it from him at an early stage in the proceedings. Capt Nkabinde rejected that and said that he had seen accused two holding the revolver, he had pointed at the SAPS members and that he had never seen anyone else with it. He explained that when he questioned accused two, he had been told by him that the only time that the revolver had been fired was when

accused two was attempting to shoot the padlock off the alternative exit door. Capt Nkabinde was prepared to accept this as being correct because the cartridges recovered at the scene from this firearm were in the vicinity of the padlocked door. Arising out of this, Capt Nkabinde was not prepared to say that accused two had fired the weapon at the members of the SAPS. It was disputed that accused two was in possession of the multiple R20 notes but, again, Capt Nkabinde was adamant that accused two did possess that money. He explained that he was not the first SAPS official to search accused two but he had done so after seeing the notes protruding from his underpants as his trousers were torn. He had then discovered the R760.

[26] It was put to Capt Nkabinde by Mr Ntuli that accused one had not climbed into the ceiling. Capt Nkabinde's response was that the two members of the TRT had searched the floor area of the store but had found no one on it. If accused one had not got into the ceiling, then he would have been discovered by the TRT members or he should have made his presence known to the TRT members. The fact that he had not been found and had not come forward meant that he had to have been in the ceiling.

[27] In response to the proposition that accused one had gone to the store as a customer and not as a robber, Capt Nkabinde answered that he found this strange. He explained that the women who worked in the store had stated that there were only three women customers in the store before the robbery occurred. Because it was late in the day, the staff were limiting who came into the store as it was to close shortly. The women employees said they did not know the accused as customers. In any event, Capt Nkabinde pondered why a customer of the store would climb into the ceiling which is where he claimed accused one had been found. With regards to the proposition that there were two robbers who each wore balaclavas, Capt Nkabinde said that no balaclavas had been recovered from the scene: caps and hats had been recovered but not balaclavas. The discarded hats and caps feature in the photographic album but there are no photographs of discarded balaclavas. Capt Nkabinde also explained that he had watched the video recording of the robbery and noted that none of the participants in the robbery wore a balaclava.

[28] With regards to accused two, it was put to Capt Nkabinde by Mr Ntuli that he was, in fact, wearing a gray T-shirt. Capt Nkabinde was resolute in his evidence that accused two had worn a green top, but was prepared to accept that there may have been a gray T-shirt underneath that top. Commenting on the version of accused two that he had been dispossessed of his revolver by the robbers, Capt Nkabinde remarked that accused two had never opened a case of robbery against those robbers nor had he ever made complaint to the SAPS of himself also being a victim in the same robbery. Mr. Ntuli denied that either accused one or accused two had been found in the ceiling, but Capt Nkabinde was having none of it: he said that he could see from the door how the four men in the ceiling had been forced out of their hiding place. It was then put to Capt Nkabinde that accused one was never questioned at the SAPS station about his role in the robbery but was, instead, interrogated about his neighbour and his neighbour's motor vehicle. Capt Nkabinde said that he did not know what accused one was talking about as he, Capt Nkabinde, did not know where accused one lived, who his neighbour was, or what type of motor vehicle his neighbour possessed.

[29] Mr Daniso then cross-examined Capt Nkabinde on behalf of accused three and four. Capt Nkabinde was shown, and admitted, a statement that he had made of the events in which he was involved. The purpose of this was to demonstrate that Capt Nkabinde did not identify who was carrying a firearm in that statement. He admitted this and could offer no explanation as to why he had not identified who possessed the firearms. But, he did say that three firearms had been recovered on the day in question. A firearm had been found next to the deceased. Capt Nkabinde confirmed that he had not seen the deceased with the four accused. Mr Daniso put his clients' respective versions to Capt Nkabinde, who generally responded that this was all news to him.

[30] The third State witness was Sgt Sibusiso Saziso Mthembu, a member of the TRT with 17 years' service, of which 12 years had been spent in the TRT. He testified that on 2 February 2022, he and Sgt Msweli arrived at the store 10 minutes after receiving information that a robbery was in progress in the store. He estimated that the call had come through at about 17h20. At the store, he found Capt Nkabinde and other top brass of the local SAPS and he and Sgt Msweli were briefed by Capt

Nkabinde on what had transpired. He proposed that he and Sgt Msweli go into the store to perform a 'sweeping up' operation. This was agreed to and it took about 15 minutes for he and Sgt Msweli to prepare themselves to perform this dangerous operation. They were told that, notionally, the only people who would be in the store would be the robbers. They performed a thorough sweep through the store, which took about 15 minutes to perform. They found no one on the floor of the store. They did, however, notice blood on the wall and believed that the robbers had gone upwards into the ceiling.

[31] They returned to the door of the store and informed the officers there of what they had found and what they proposed to do, namely, to go into the ceiling to search for the robbers. This was agreed to and Sgt Xulu and Constable Sibiya were instructed to assist the TRT members inside the store. A stepladder was found inside the store and Warrant Officer Armstrong provided a light source with his torch. Sgt Msweli went up the ladder first and climbed into the ceiling and was then followed by Sgt Mthembu. Warrant Officer Armstrong climbed up the ladder so that the top half of his body went into the ceiling and he then used his torch to illuminate the void. Each member of the TRT in the ceiling was looking in a different direction and Sgt Msweli quickly spotted four men lying on the ceiling boards on his side of the ceiling. The members of the TRT had gained access to the ceiling not through a trapdoor but through a broken portion of the ceiling which had obviously been broken open by those climbing into the ceiling. When he saw the four men lying down, Sgt Msweli shouted at them and gave them instructions to get up, put their hands on their heads and then reverse towards him one by one so that they could be taken out of the ceiling via the same hole that they had broken open to gain access to the ceiling. The men were compliant but as the first person came towards Sgt Msweli, the ceiling board broke and he fell from the ceiling to the floor. One by one, the men came out of the ceiling and were taken into custody on the ground by Sgt Xulu and Cst Sibiya.

[32] According to Sgt Mthembu, a firearm was found on accused two. This was a revolver with one live round contained within it. Cst Sibiya also found a pistol on one of the accused: the witness believed it to have been found on accused one who, it transpired, he knew as being a young person living in the same area where he lived.

[33] Mr Ntuli put the respective versions of accused one and accused two to Sgt Mthembu. Sgt Mthembu confirmed that the ladder had been in the store and had not been fetched from elsewhere by Warrant Officer Armstrong. He also confirmed that no firearm had been recovered from either accused three or accused four but he remained adamant that a revolver had been discovered in the possession of accused two.

[34] Under cross-examination by Mr Daniso, Sgt Mthembu confirmed that he and Sgt Msweli had been given a description of what the robbers were wearing prior to venturing into the store. He confirmed that, in all, three firearms had been located in the store: two were found in the possession of the accused and the third was possessed by the deceased. He confirmed, further, that far from there only being four men in the ceiling as he had initially testified, there were, in fact, five men in the ceiling and the gang was comprised, in total, of some six members. The deceased and the four accused before the court accounted for five members and they had looked for the sixth member on the day of the robbery but had not been able to locate or apprehend him. Sgt Mthembu disputed that accused three and accused four had not been in the ceiling. He also confirmed that both accused two and accused four had been injured.

[35] The court then asked Sgt Mthembu some questions to try and account for the number of men found in the ceiling. He confirmed his evidence that when he and Sgt Msweli had gone up into the ceiling, four males were initially located in the ceiling. The first male to leave the ceiling, who had broken the ceiling board and fallen to the floor below, was, however, not the person who had ultimately died. The impression had been created that this had been the deceased. Sgt Mthembu said that this was not the case and then explained that one of the accused currently before court is the person who had fallen from the ceiling. After the four accused had been extracted from the ceiling, it had come to the attention of the SAPS members that there might be a fifth person hiding in the ceiling. The SAPS members then heard the sound of someone moving in the ceiling and the person in the ceiling had fired a shot downwards at the SAPS members. The SAPS members retaliated and fired back. It appears that the person in the ceiling was struck by a bullet from the SAPS members during this gunfire because he was heard to immediately cry out and moan. The

members of the SAPS had then gone into the ceiling and lowered the person who had been shot down to the ground. The person shot in the ceiling had been located approximately five minutes after the four accused had been taken from the ceiling.

[36] Under cross-examination from Mr Ntuli, Sgt Mthembu confirmed that he had not seen the deceased person fall from the ceiling, as had previously been described by Capt Nkabinde: on the contrary, the deceased person had been assisted from the ceiling to the ground. Sgt Mthembu, in response to a question from Mr Daniso, said that in his opinion the first shot had been fired from the ceiling towards the SAPS members beneath on the ground. Sgt Mthembu acknowledged that he was not an expert in this regard but that it seemed to him that the first shot fired had come from above.

[37] Sgt Mnelisiwe Ndoda Msweli was the next witness for the State. He, like Sgt Mthembu, is attached to the Empangeni TRT. He has 16 years' service in the SAPS and has spent 10 years in the TRT. He attended the scene with Sgt Mthembu and estimates that they received the call to attend the scene at either 16h55 or at 17h00 and that it took approximately 15 minutes for them to get to the store. On arrival, they were briefed about what to expect in the store and he and Sgt Mthembu then entered the store. They found no one on the floor of the store. They did, however, notice a hole in the ceiling and bloodstains on the wall which led them to believe that the robbers had gone up into the ceiling. They returned to the entrance door of the store and informed the officers waiting there of their findings and their suspicions. They were given permission to go in to the ceiling and whilst they were up in the ceiling they were to be assisted by Sgt Xulu and Cst Sibiya, who would wait on the floor of the store and who would control any people found to be in the ceiling. Sgt Msweli confirmed that Warrant Officer Armstrong had also assisted by holding a step ladder for them while they ascended and by directing his torch into the darkness in the void of the ceiling. Sgt Msweli stated that he entered the ceiling first, followed by Sgt Mthembu. Once in the ceiling, he went to the left and Sgt Mthembu went to the right.

[38] He noticed four males lying on the ceiling boards on his side of the ceiling. They were all lying side by side. He shouted that he was from the SAPS and

instructed them to put their hands on their heads and come down one at a time, moving in reverse. This was done for safety reasons. As the first person complied with his instruction, the ceiling board broke and the person found fell through the ceiling to the floor below. The three remaining in the ceiling then obeyed his instruction and exited the ceiling. Once on the floor of the store, they were instructed to lie down.

[39] Sgts Msweli and Mthembu then provided backup to the officers on the ground as they searched the accused. Sgt Msweli stated that Sgt Xulu recovered a firearm, namely a .38 revolver from accused two. Cst Sibiya found a second firearm, being a 9 mm pistol, on accused one. The revolver had one live round of ammunition in it.

[40] According to Sgt Msweli, he and Mthembu had initially been told that there were six robbers involved in the robbery. Four men had been extracted from the ceiling meaning that two were still at large. It was considered a possibility that one of these two men was still in the ceiling. The plan that was thus developed was to go back into the ceiling and to conduct a more thorough search. However, in attempting to scale the step ladder for second time, Sgt Msweli fell and cut his right wrist and twisted his knee. He had to leave the store in order to receive medical treatment from ambulance staff who were now in attendance. He played no further active part in the events.

[41] Sgt Msweli said that he and Sgt Mthembu had been given the descriptions of the clothing of the robbers. Two of them were wearing overall tops, one was in a black jacket and the other wore a brown jacket. The persons who had been taken from the ceiling were apparently wearing the same clothing. He confirmed that two of the accused were injured when taken from the ceiling.

[42] Mr Ntuli suggested to Sgt Msweli that his instructions were that accused one was unarmed as he was simply a customer in the store. This was disputed. Sgt Msweli was apprised of accused two's version, namely that he had been robbed of his revolver by the robbers who had shot him in robbing him. Sgt Msweli rather pithily replied that that may have occurred but that the robbers must then have given him the revolver back because accused two had it on him when he was searched after

being extracted from the ceiling. That led to a denial that either accused one or accused two had been in the ceiling. Sgt Msweli replied that he found no one on the floor when he and Sgt Mthembu did the initial sweep through the store and that the only persons arrested were those that were found in the ceiling. It was then suggested that there was a possibility that they may have missed someone on the floor when he and Sgt Mthembu did their initial search. The basis for this question was that it appeared that when the two TRT members had gone into the ceiling they had missed the fifth accused. Sgt Msweli said that that was not possible. The floor was clear and he pointed out that the search in the ceiling was far from over: it was the intention that they would go back into the ceiling to complete the search once they had dealt with the four males who they found.

[43] Mr Daniso, for accused three and four, got Sgt Msweli to confirm that nothing was found on accused three and accused four. He also asked Sgt Msweli how many firearms in total had been recovered and received the answer that Sgt Msweli did not know. Mr Daniso also denied that accused three and four formed part of the gang of robbers and asserted that they had been arrested in a back room and not in the ceiling. Sgt Msweli was quite confident that he had found accused three and accused four in the ceiling. In response to the suggestion that they had been found in the office, Sgt Msweli again pithily remarked that there was no office in the ceiling.

[44] In response to questions from the court, Sgt Msweli confirmed that he and Sgt Mthembu were in uniform and were quite easily identifiable as members of the SAPS. If there had been victims of the robbery at large on the floor of the store when they did their initial sweep through the store, there was every possibility that the victims would have made themselves known to them and sought their assistance. No one did that.

[45] The next witness was Lucky Jabulani Sibiya, a constable in the SAPS stationed at KwaMsane. He confirmed that he assisted Sgts Mthembu and Msweli when they went into the ceiling of the store. Four people were taken out of the ceiling and he searched one of them. The person that he searched was the first accused, Mr. Gumbi. He found a 9 mm firearm in the front waistband of his trousers. He found nothing else. While he searched only one person, he watched the searches that

were occurring of the other men found in the ceiling. He saw Sgt Xulu recover a .38 revolver. To the best of his ability he recalled that the person who possessed the revolver was Mr Mkhwanazi, accused two. The 9 mm pistol that he had discovered had a magazine attached to it but the magazine was empty. Mr Ntuli denied on behalf of accused one that Cst Sibiya had searched him but this was refuted by Cst Sibiya. It was also denied that accused one possessed a firearm and that, too, was refuted by Cst Sibiya.

[46] The next witness called by the State was Sgt Nkosinathi Sibusiso Xulu, who is stationed at SAPS Mtubatuba, and who has 16 years of service. He assisted Sgts Mthembu and Msweli whilst they went up into the ceiling on the day in question. He and Cst Sibiya remained on the floor of the store while the exercise in the ceiling above was being carried out. He confirmed that four men had been found in the ceiling and had been forced down to the floor, where he was. He had searched accused two and found the .38 revolver containing one live round in the waistband of accused two's trousers. He also asked accused two about the firearm and received the reply that it was a licensed firearm but that accused two had lost the license. This witness confirmed that Cst Sibiya had found a 9 mm pistol on one of the other accused persons. Accused two was injured at the time of the search and this witness then left the scene and took his accused, and the firearm that he had discovered on accused two, to the SAPS station. He confirmed that he had seen another firearm next to the deceased later when he had returned to the scene. He was shown a photograph in the photograph album that depicted the deceased lying on his back on the floor but stated that was not how he had initially lain: he was lying initially on his side, with his head facing up and his legs folded. Mr Daniso put it to the witness that accused three and accused four had never been removed from the ceiling but this was roundly denied by the witness.

[47] Ms Philile Patience Nala is the manageress of the store known as 'Beauty Zone'. The store ordinarily opens at 08h00 and closes at 17h30. At approximately 17h15 on 2 February 2022 there were 11 employees in the store: seven female staff members, the witness herself, two male security guards, one of whom performed duties inside the store and one who performed duties outside the store, and a female promoter. As closing time approaches, it is the practice of the store to commence

rolling down the roller door until it is about half open so as to prevent more people coming into the store and to allow only those persons still in the store to be served and then to exit. On this day, the security guard had rolled down the roller door until it was a quarter open.

[48] At that time there were four customers in the store, all of whom were females. They were no male customers in the store. A customer had gone to the tellers, who are stationed in an elevated section at the front of the store. After the customer had paid, the roller door was opened a little to allow her to exit the store. At that moment, five males entered the store, squeezing under the roller door. They split up and some went to the till points and others went on to the floor of the store. Those who went to the till points told the staff members to leave the till points and those on the floor of the store closed the roller door. The staff members were taken to the storeroom at the rear of the store. The witness was standing next to till five when two of the robbers jumped over the counter to stand behind the tills. She was then taken to the office where she was ordered to take out money. She informed the robbers that she had no money but was accused of lying on this point. She responded by saying that they kept no keys as the store utilised a drop safe. She noticed that some of the men were armed with firearms and the three who were with her in the office all had firearms. The firearms were pointed at her and she was then told to open the drawers where the float was kept. She did so. She noted that two of the men wore navy workmen overall tops, one wore a hat, another wore a cap and all of them wore face masks on their faces. They took the float and put it into a backpack that they had arrived with. Her cellular telephones, one being a Huawei and the other a Nokia, were also taken. She was then forced to open the till drawers. She was not able to say how much money had been taken from the tills. She was, however, confident that approximately R6 000 in cash had been taken from the office. She was then taken to the back of the store to the storeroom where she found six female staff members, the two male security guards and three customers, all of whom were female. There were two robbers guarding them in the storeroom.

[49] At this point in her evidence, it was necessary for the court to adjourn due to the ravages of load shedding. When her evidence resumed the next day, it was heard in conjunction with a series of video films of the events of 2 February 2022 that

had been recorded by video cameras positioned at various points in the store. There were approximately 16 video cameras that were operational on the day of the robbery. Three principal locations were filmed: the front of the store showing the till points and roller door, the manageress' tiny office and the storeroom at the back of the store. Thus, from the camera stationed at the front of the store it was possible to observe five robbers enter the store shortly after 17h15. They could be seen rounding up the staff and those members of the public still within the store and herding them towards the back of the store. Whilst the video image was in colour and was remarkably crisp it was not possible to discern the facial features of the robbers because they wore some form of head gear and some wore clothing that is popularly known as a 'hoody', with the hood up. The video cameras did not capture the flight into the ceiling of the store by the robbers but they did offer two different camera angles of the storeroom, permitting a clear image of who was in the storeroom. As I shall explain later, the video footage was more notable not for what it showed but for what it did not show.

[50] Ms Nala indicated that she had revised her estimate of how much money had been taken from the store from R6 000, as she had testified to the day before, to R16,000. She also mentioned that she recovered both her cellular telephones although the one was damaged when she received it back. It is to be noted that the indictment makes no mention of the store being robbed but rather indicates that Ms Nala was robbed of her cellular telephones and cash, presumably because she is to be regarded as being in charge of, and possessing, the store's cash.

[51] Ms Nala was not cross-examined by Mr Ntuli for accused one and two. Under cross-examination from Mr Daniso, she stated that she could identify the robbers from their facial features but agreed that this was not obvious from the video footage. She also indicated that no males had been in the store that afternoon to purchase a product called isiWasho. When accused three's version was put to her, she denied it as she did when accused four's version was put to her.

[52] Stanley Mervin Armstrong is a Warrant Officer in the SAPS and has 33 years' service and is apparently a one-man satellite SAPS station at St Lucia. He testified that on 2 February 2022 he had heard the call for assistance on the radio in St Lucia

and even though he was on his day off rushed from St Lucia to Mtubatuba to assist his colleagues. His evidence largely contradicted the evidence of Sgts Mthembu and Msweli. It was, however, revealed that he had never deposed to a statement about the events and his evidence was led by the State without it being in possession of his statement. His name did not appear on the list of witnesses proposed to be called by the State.

[53] Warrant Officer Armstrong confirmed that he, and not the members of the TRT, had led the sweep up operation of the floor of the store and that he had found no one whatsoever on the floor of the store. However, he had noticed in the storeroom that there was a trail of blood splattering the shelving therein. There was also a hole in the ceiling which led him to believe that the robbers had gone upwards into the ceiling in their attempt to avoid being arrested. He had found a small step ladder in the store, climbed it, put his head through the broken ceiling board and had shone his torch, which was attached to his R5 rifle, into the roof void and found the four accused in the ceiling. He called them towards him and they complied with his instruction and walked face first towards him. The first person in the line, however, fell through the ceiling boards and landed inside the store. The others then exited the ceiling through the hole created by the person who had first fallen through it.

[54] Warrant Officer Armstrong confirmed that he had found no one in the store office. He said that neither Sgts Mthembu or Msweli had entered the ceiling: he was the one who had put his head through the hole and had found the four men. Due to his size, for he is a very large man, he did not enter the ceiling.

[55] Warrant Officer Armstrong was not cross-examined by Mr Ntuli. To Mr. Daniso, he stated that none of the persons he found in the ceiling who were armed had pointed their firearms at him so he did not use the rifle that he possessed. When Mr Daniso put accused three's version to Warrant Officer Armstrong, namely that he had been in the store as a customer when the robbery had occurred and he had then hidden in the back of the store where he had been arrested by a white male who told him to put his hands up, Warrant Officer Armstrong said that that could all be true except that the four men were found hiding in the ceiling and not in the storeroom.

[56] Xolile Nompumelelo Nhlangothi is employed at the store as a promoter of a brand of cleansing water. She was present during the robbery on 2 February 2022 and had been taken to the storeroom by the robbers where she was made to sit down on the floor. One of the robbers made her put her cellular telephone into a plastic packet that he was carrying. This was apparently a Beauty Zone packet. When she put her cellular telephone into the packet there were already other cellular telephones in it. She confirmed that an attempt was made by the men to escape from the back door of the store and she had heard some shots being fired in the passageway outside the back door. When the men went back into the store itself she heard another volley of shots and when they then returned to the storeroom she noticed that one of them had been wounded. Ultimately, she was part of the group that exited the store and as the security guard who was with him opened the roller door she had squeezed her way underneath it and made good her escape. She was not cross-examined by either of the legal representatives acting for the accused.

[57] Thabiso Mininhle Dube is a security guard employed at the store. He had not much experience in that capacity on 2 February 2022, having been employed there as a security guard for only a month. At about 17h15 on that day, the store was about to close and he was waiting for the last customers to leave. He rolled down the roller door at about that time. At that stage there were four customers in the store. When he closed the roller door there were no male customers in the store. Contrary to what the other witnesses said, he advised that there were actually three security guards employed by the store: himself, another security guard and a part-time security guard. One of the customers made to leave the store and he opened the roller door for her to leave. At that stage, two men sneaked into the store. He pointed out to them that the store was closing. Then another person came in behind him and, in all, he saw four males in the store. He was grabbed from behind by another male, thus he concluded that there were actually five male persons in the store. The person who grabbed him was armed and three or four of the other males were also carrying firearms, but he could not be certain of that. Everyone in the store was collected together and taken to the rear to the storeroom where they were made to sit down. The robbers moved in and out of the storeroom and at one stage took the manager out with them. He was also sent to check on what was happening at the front of the store and when he did so he saw that the SAPS were in attendance. He

was guarded by a firearm toting robber whilst he made his observations at the front of the store. When he returned to the storeroom, the robbers went into the body of the store and he then heard an exchange of gunfire. He, however, remained in the storeroom. When the robbers returned to the storeroom he noticed that two of them were now injured.

[58] The robbers then demanded his firearm from him, but he explained to them that he did not have a firearm when performing his duties. The person asking him for the firearm pointed his firearm at him and raised his voice and said that he felt like shooting him there on the spot. This interaction was recorded on the video footage and was dramatic in its effect: it certainly appeared that the witness was about to be shot. The robbers then went out into the passageway through the rear door in the storeroom and he then heard approximately three shots being fired. They then returned to the storeroom and said that they would leave the store via the front door and he was told to go and open the roller door. He complied with their instructions and went and opened the roller door and whilst he was doing so an SAPS member asked who he was and he replied that he was the security guard. When the door was open, he was told to lie down on the floor by the SAPS but ran away from the store towards another shop where he then fell to the ground. Some of the employees and the customers followed him out of the store. He testified that his cellular telephone was taken by the robbers and he has never received it back. He stated that cellular telephones were collected from all the people in the store and placed in a plastic bag.

[59] The witness was also shown the video footage of the robbery and gave helpful explanatory comments on certain aspects of the footage. He confirmed that he no longer was employed at the store, primarily because he had been very badly affected by his experience and decided that it would be better for him to take some time off to recover from his ordeal. He is now, again, employed as a security guard.

[60] Under cross-examination, Mr Ntuli asked him whether he would deny that there were other male customers in the store at the time of the robbery. His initial answer was that he would not deny that. The court then asked him whether there were any other male customers depicted in any of the video footage that he had

seen. He then conceded that there had been none in the video and nor had he seen any in the store. Mr Daniso, who appears for accused three and four, had no questions of this witness.

[61] Ntombi Gladys Mchunu was a customer in the store on the day of the robbery. She was not able to make her purchase because the robbery occurred and she was herded into the storeroom at the back of the store by the robbers. She did not count them, but estimated that there were approximately five or six robbers. Some had firearms. Her Samsung cellular telephone was taken from her by the robbers but she ultimately recovered it from the SAPS. She identified two other males as being in the store, both of whom were the store's security guards. She narrated that at a certain stage, one of the robbers had come back into the store room and was bleeding but she had no idea as to how he had become injured. Shots were fired at the back door as the robbers tried to get out into the passageway. She heard further gunfire from outside which appeared to be coming from the front of the store. She explained that the whole incident had terrified her. Under cross-examination from Mr Ntuli, Ms Mchunu rejected the notion that there were any male customers in the store at the time of the robbery.

[62] Col Nthokolozeni Mqobizwe Mpungose is the station commander of SAPS Mtubatuba. On the day of the robbery, as he drove to the scene he thought he saw Col Mdletshe's motor vehicle at a traffic light and telephoned him. He alerted him to the robbery at the Plaza Mall. Both then proceeded there and initially they went to the back of the store. There they were told that the robbers were still in the store and that there were other SAPS officials at the front entrance to the store. They then proceeded to the front of the store. Capt Nkabinde was present there and he ordered the robbers in the store to lie down. At that stage, the witness could only see two of the robbers in the store, one of whom had a handgun but he could not discern whether it was a pistol or a revolver. They did not obey Capt Nkabinde's order to lie down but instead opened fire at the SAPS officials standing outside the store. The SAPS members fired back.

[63] Things then went quiet for a while. Later, Capt Nkabinde gave an instruction that all males in the store were to lie down on the floor, but the robbers mingled with

the employees and the customers who were in the store. Two males, however, came forward and were allowed to leave when they were identified as being security guards employed in the store. Backup was called for and the TRT arrived, as did Warrant Officer Armstrong. They went into the store but the witness remained outside.

[64] Ultimately, four men were removed from inside the store. It was later discovered that there were actually six men involved in the robbery and the TRT members went back into the store. Gunshots within the store were then heard and the witness was confident that a robber, who later died, had been shot by the members of the SAPS. The witness was able to identify the names of the four men arrested and stated that the accused in the dock were the robbers who had been arrested at the store. He did, however, comment on certain physical changes since then, such as the length of accused three's hair, which he referred to as an 'afro' and said that in February 2022 it had been much shorter.

[65] Mr. Ntuli informed the witness that accused two would testify that he told the witness that he was a customer at the time but this was denied. Mr Daniso elicited from the witness the fact that there had only been a single incident of shooting from the robbers inside the store. The witness candidly admitted that he did not know who had possessed the firearms found at the scene as he had not been present when they were arrested in the store. He mentioned that one of the accused that had a firearm wore blue workmen's overalls and remarked on the reflective strips on the knees of the trousers. Col Mpungose strongly rejected the notion that accused three and accused four could have been customers in the store. He could not deny that they might have been found in the storeroom. He explained that the robbers had attempted to come out of the store with the employees but had then returned back into the store, the inference being that had the two accused been customers they, too, would have left the store but they did not do so.

[66] The next witness to testify was Samuel Bhekumpukenyoni Mdletshe, who is a Colonel in the SAPS. He confirmed that the previous witness had called him as he was driving into the town of Mtubatuba and as a consequence he went to the Plaza Mall. At the scene, the roller door at the store was down but after he arrived it started

to go up. Capt. Nkabinde shouted that all persons should lie down and he noticed two people inside the store, between the aisles. One carried a revolver and was wearing blue overalls. He then noticed two other men closer to the roller door that he had not initially noticed. He noticed them when the shooting first began. The two men at the roller door had firearms and therefore together with the other armed man that he had seen, Col Mdletshe confirmed that there were three firearms amongst the robbers. As the shooting commenced, the men in the store began to move to the back of the store.

[67] Backup was called for, arrived and went in to the store. The witness had been injured in the first fusillade of shots, having suffered a glancing wound to his right elbow caused by a bullet that had caused his elbow to bleed. He stated that a bullet had creased his elbow, cutting him. He had to receive medical treatment from an ambulance that was summoned to the scene. When he went back to the store, he saw the four men being arrested and was able to identify them from their clothing as being the robbers. He confirmed that the SAPS had seized firearms from those inside the store. It was put to him by the State Advocate that accused three and four would say that they were customers in the store. The witness laughed, and said they had to be joking.

[68] Mr. Ntuli elected not to ask any questions of this witness. Mr. Daniso put it to the witness that accused three and four would say that they had been arrested in one of the storerooms as they had both been customers and had run into the storeroom to save their lives. The witness said that he could not dispute where they had been arrested as he had not been present when they were arrested but said that the two accused were not customers: he had seen them when the firing had occurred.

[69] The matter then stood down. When the court resumed, I placed on record that a meeting in my chambers had occurred regarding the number of storerooms in the store. The State had intended for another witness to be called to establish this fact, but I had suggested to the defence counsel that they take full instructions from their respective clients on the number of storerooms that their respective clients said

existed. Following this instruction, I was advised that it was now common cause that there was but a single storeroom in the store. This then was placed on record.

[70] The final witness for the State was Emmanuel Mehlenkosi Kubekha, a detective sergeant in the SAPS at Mtubatuba. He is the investigating officer in the matter. The sole purpose of his evidence was to introduce the three firearms discovered at the store. What should have been relatively simple evidence was rendered more complicated by the fact that there were, in reality, three ballistic reports but when the section 220 admissions were prepared at the beginning of the trial, those statements made reference only to a single ballistic report. However, any difficulties that this error may have presented were overcome when both counsel for the defence agreed that it had always been intended that the section 220 admissions that the accused made would also apply to these two ballistic reports. By consent, the additional ballistic reports were then received by the court.

[71] The three firearms recovered, being a LEW pistol, a Smith and Wesson .38 revolver and a Taurus 9 mm pistol were received as exhibits. The ballistics reports stated that each of the firearms was capable of discharging a bullet. Mr Ntuli admitted on behalf of accused two that the .38 revolver was his firearm, in respect of which he held a valid license. D/Sgt Kubekha confirmed this fact.

[72] The State then closed its case.

[73] The first accused, Zakhele Vusi Gumbi, elected to give evidence in his defence. He admitted that he had been present in the store at the time of the robbery but stated that he was there as a customer. He was not able, in the end result, to purchase anything from the store because of the occurrence of the robbery. He claimed not to have seen much but revealed, for the first time, that he, too, had been a victim in the robbery, having been robbed of R1 200 in cash by the robbers. He claimed to have been very terrified and to have obeyed all the instructions given to him by the robbers. He was told to lie on the floor and so he did so. He had been made to lie in one of the passageways at the back of the store, where he lay for a long time. It is at that very spot that he was arrested. He stated that he was lying next to the shelving but that he was not concealed by anything. He claimed that he

had wanted to leave the store with the other customers but when he heard the SAPS' instruction that all males were to lie down, he did so.

[74] He further explained that contrary to what the State witnesses had said, he had, indeed, been found by the TRT members when they did their sweep through the store. This was never put to the TRT members who were called to testify. Rather than assist him, they had assaulted him and had bound his hands with cable ties and had called him a 'criminal'. He denied at any stage being in the ceiling of the store. In essence, what he stated was that every fact advanced as implicating him in the events was a lie. At the SAPS station he was accused of possessing a firearm, which he denied doing, and had then suffered having a plastic bag being put over his face and being sprayed with pepper spray. He categorically denied being in possession of the Taurus pistol and he denied wearing workmen's overalls and said that he was wearing an Adidas navy blue top with blue stripes over the shoulder. He claimed not to have seen any of the robbers.

[75] Ms Ntsele for the State then cross examined accused one. He was obviously questioned about why he had never mentioned previously that he, too, had been a victim of the robbers. Accused one said that he had never mentioned it before because everyone assumed that he was a robber and he did not think that anyone would understand what he was saying. He added that he did not think anyone would believe him because he was seen as being one of the robbers. It was suggested to him that he was making things up as he went along and that he was not telling the truth. Later, he stated that he had not revealed the truth because he was confused. He was also asked about the assaults which he claimed to have experienced, this too not having previously been revealed. In particular, he alleged that Capt Nkabinde had assaulted him, yet that witness was never confronted with this allegation. The answer given was that accused one thought his counsel would put it to Capt Nkabinde. Ultimately, accused one conceded that this may have been an error on his part.

[76] Accused one was also challenged on why he had never put it to Cst Sibiya that he had only ever seen him at the SAPS station and had not been searched by him inside the store. The blame for this omission was laid at the feet of his counsel.

In a similar vein, it was pointed out that Sgt Msweli had also testified that accused one had been searched by Cst Sibiya, but had also never been challenged on this. The question had to be put a number of times before the witness responded and as a result the court felt constrained to caution accused one about the danger of being perceived as being an evasive witness.

[77] Accused one was asked what time he had arrived at the store and said at 16h45 and he knew that to be the time because he had looked at his watch. He had done so when he was opposite Shoprite, which is directly opposite the store. He explained that he had entered the store and looked for face wash, but had not been able to find the brand that he required. He estimated that he had looked for the product that he desired for approximately 30 minutes but had never asked any of the employees of the store to assist him in finding it. He later denied that he had said that he had looked for the product for 30 minutes. The court explained to him that whilst he had not said that figure, he had said that he entered the store at 16h45 and the videos shown to the court showed the robbers coming into the store at 17h15. This meant he had looked for 30 minutes. He said that he understood. He explained further that he was made to lie on the floor by the two robbers and he insisted that there were, in fact, only two robbers. He was later forced to concede that there were, in fact, five robbers as depicted in the videos but he could not say whether his two robbers formed part of the bigger group because he could not see their faces. He then explained that the two who had robbed him were wearing red and navy overalls. This was later clarified to mean that one wore red overalls and the other wore navy overalls. He confirmed that he was not able to identify the two robbers from the videos that were shown. Ms Ntsele then stated that it seemed as though accused one was describing a completely different robbery to the one that was captured on the videos.

[78] Accused one said that he had been made to lie on the floor for a long time but could not say for how long because he did not have a watch. When it was pointed out that he had previously said that he did have a watch, he stated that the watch was worn by a person with whom he was walking before entering the store and not by himself. This elicited a remark from the State Advocate that these proceedings appeared to be a joke to accused one. He explained that he had been arrested by

SAPS members wearing masks, a hitherto unrevealed fact. This was explained as being a mistake on his part. He claimed that he was viciously assaulted when he was discovered by the SAPS members. It was suggested to him that he would probably have been relieved when he realized that the SAPS were in attendance as he was now going to be saved from an awful predicament. The question had to be put three times before an answer was forthcoming. He was then asked whether he had not called out to the SAPS members and told them to come and find him because he, too, was a victim of the robbery. He said he had not done this. He confirmed that there were other people in the store but he had not counted them. There were both male and female persons that he observed. He did not, however, see Ms Mchunu nor any of the other State witnesses. He did not see the manageress but he had seen Mr. Dube, the security guard, when he had walked into the store. He never saw the promoter or any other staff members. The court asked how this could be possible considering that he had spent half an hour looking for the product he was intending to purchase before the robbery occurred. His first response was that he could not see them. When asked whether he had not seen the promoter who would have been in the aisle in which his product could be expected to have been found, he said that she was in the aisle dealing with washes and he was in the soap aisle. Asked whether he had not gone to her aisle as that was where the product that he was seeking would more likely be found, his response was that he had no answer to that question.

[79] Accused one also declined to comment on why he would have been left in an aisle whilst all the other occupants of the store had been taken to the storeroom at the back. In fact, he repeatedly declined to comment on this issue.

[80] Ms Ntsele put it to accused one that 32 bullets had been fired from the firearm that he possessed, but he responded that this was simply not so. He confirmed that some people had been injured but he did not know them. He had seen the other accused when they were brought to the SAPS van in which he was lodged but he had never seen them in the store prior to that. He confirmed that he saw some blood and said that that this was apparent on all three of the accused put in the SAPS van with him. The blood had been in the abdominal area of two of the men and running down the side of the head and left shoulder of the other. The one bleeding from the

head was accused three. None of the people in the van with him were the people who had robbed him.

[81] The court then requested clarity from accused one on a certain aspect. Given his plea explanation that he was on the verge of paying for his items when the robbery occurred, he was asked why he did not appear in the video when the robbers burst into the store. The angle of the camera showed the door and the till points. The only way that he could explain this was to suggest that the plea was incorrect and that he had not been on the point of paying when the robbery occurred.

[82] That was the end of the accused one's evidence. He had no other witnesses to call and closed his case.

[83] Accused two, Sibusiso Velenkosini Mkhwanazi, elected to testify. He explained that he was in the store on the day in question to purchase cosmetics. He had not, in fact, made any such purchase by the time that the robbery occurred. He was between the shelves when he was confronted by one of the robbers who noticed that he had a firearm on him. He was told to lie down and hand the firearm to the robber but he refused to do so. He was then shot in the right upper thigh by the robber who then took his firearm. He then lay down as instructed but shortly thereafter was shoved to the back of the store, but not into the storeroom. At the place that he was taken to, he could see there were some people already lying there but he could not say that accused one was one of them. He then lay on the floor, face down, groaning. From then on he did not notice anything but could hear things and eventually the SAPS arrived. He informed them that he was also a victim of the robbery but they did not agree with him.

[84] He denied wearing a green workman's overall and also denied that he was in possession of his revolver when he was arrested. He denied that he was part of the five robbers and reaffirmed that he had not got into the ceiling of the store. As regards the sweep of the store done by the TRT members, he said that he was lying face down and could hear people walking about but that was as far as his evidence on this point went. He denied that he had R760 in R20 notes in his underpants. He also complained of being assaulted when he was arrested and repeated that he had

been found at the back of the store. He had only seen his revolver at the SAPS station and not at the store after it had been taken off him by the two robbers.

[85] Under cross examination by Ms Ntsele, accused two stated that he had only been accosted by one robber in the store who was wearing a gray overall. He was, however, taken by that person to another of the robbers and then indicated that he was not sure whether the overall was gray or green in colour. He emphasized that the place that he was taken to was not the storeroom and there were other people that were lying down. He estimated there to be either three or four such persons and they were males. He had seen no females lying with the same group of people.

[86] When asked which firearm had been used to shoot him, the witness prevaricated but eventually said that it was a pistol. He confirmed that he had only seen the second robber when he had been taken to the back. His attention was then drawn to his plea explanation where he said he saw two robbers when they came into the store. He explained that the plea was incorrect and that his counsel had incorrectly recorded what he had been told. Pressed on this point because he had confirmed the statement as being correct by signing it, he explained that he had not noticed the error. He was then asked by Ms Ntsele why his plea explanation indicated that both robbers had noticed his firearm. He acknowledged that the plea differed from what he was now saying but, again, blamed counsel for the alleged error in his plea.

[87] Accused two was asked what he was looking to purchase in the store. He said a lotion, soap, a roll on and a spray on. He had difficulty in explaining what these items were to be utilized for, particularly the spray on. He had walked up and down three aisles in selecting the products that he desired, which he placed in a basket that he was carrying. He then could do nothing further because he was accosted by the robber. He was then asked whether he saw the robber who stole his firearm from him on the video shown to the court. He said that he did not. The State Advocate then again repeated something that she had put to accused one, namely that it appeared that the court was trying a different case to the case that accused two was involved in. The surprising answer that she received to this proposition was that accused two could not dispute that. He confirmed that he had not seen accused

one being robbed and again it was pointed out that this appeared to be a further different robbery that occurred. The surprising response, again, was that this was clearly so. It was then put to him that three different robberies had happened in the same store at the same time and accused two again agreed with that proposition.

[88] At the request of the State Advocate, accused two stepped from the witness box and showed the court the bullet wound that he had sustained to his right thigh. The entrance wound was in the right inner thigh and it appeared to traverse across the front of his right thigh and exit on the side of his thigh. Both entry and exit wounds were discernible on his thigh. Had a line been drawn between the two wounds it would have run, more or less, parallel to the floor. As regards his evidence that he had not seen any of the State witnesses in the store, he said that he would not put it that way but would prefer to say that he had not noticed them. Asked why he would not have been put in the storeroom as the video showed the other occupants of the store had been, his only response was that someone had been guarding the people with whom he lay. The people who he lay with were not known to him and he confirmed that they did not testify in the trial. He did not notice whether the second robber possessed a firearm but the person who dispossessed him of his revolver already had a firearm and thus carried two firearms. He did not know whether his firearm had been used to fire any shots in the store.

[89] Tellingly, accused two acknowledged that he had been with accused one at the back of the store when the SAPS arrived. However, it was then put to him that accused one had said that he had first seen accused two at the van and not in the store. Accused two's answer to this proposition was difficult to understand. He was pressed severely on this point and was asked to explain why these two versions were different. The question was repeated and repeatedly avoided by accused two but, finally, he stated that he had first seen accused one when accused one was lying on the floor with other unknown males. It was then pointed out to him that accused one had said that he had lain on his own in one of the aisles of the store. Accused two then said that he was unable to comment further. The proposition was repeated by the court but ultimately only generated a long silence from accused two. His final answer to this was: 'I don't know what to say'.

[90] Ms Ntsele suggested to accused two that the ballistics reports indicated that his firearm had been used at the scene. Accused two said that he could not dispute that but that he never saw it being used. He confirmed that he had seen some of the SAPS witnesses at the store but not all of them. He explained that he could not say that they all were not there but merely that he simply did not notice them.

[91] Accused two said that he first saw accused three and accused four in the SAPS van. He had not seen them before that. He, accused three and accused four had all arrived at the van at the same time. Accused one was already in the van. He confirmed that he had not informed the SAPS that he had been robbed as he was in too much pain. His attention was then drawn to the video shown to the court by Ms Ntsele and it was suggested to him that he could clearly be identified in it and that he was limping in it as well. He denied that it was him.

[92] The court then asked him why, on his pleaded vision, he did not appear in any of the initial videos in which the robbers are depicted entering the store. His answers were largely irrelevant to the question asked of him. The court also asked him whether he came from the same residential area as accused three and accused four, as this is what was indicated in the preamble to the indictment. He, however, denied that was the case.

[93] Accused two had no witnesses to call and closed his case after he finished testifying.

[94] Philani Carlos Mzimela is the third accused in this matter. Like accused one and two, he chose to testify in his defence. Led by Mr Daniso, he confirmed that the plea that he had tendered at the commencement of the trial stood as his evidence in the matter. However, he stated to Mr Daniso that he was not one of the group of men who had approached Capt Nkabinde at the entrance of the store and was not one of the robbers.

[95] He was thereafter exposed to cross-examination by Ms Ntsele. He confirmed that he had been in Mtubatuba to meet with his traditional healer and was instructed to purchase a product referred to as isiWasho and a further product which was

described as being 'Ash for Indians'. He explained that he walked into the store and had gone to the back of it and whilst there had heard instructions being uttered for everyone to go to the back of the store. This had apparently been announced by people who had walked in armed with firearms. He did not notice how many of these people there were. He, however, estimated that there were perhaps two or three in number, of which one person had pointed at him. He had been engaged in looking for the products that he required and estimated that he had only been so engaged for about five minutes before the robbery occurred. He went into the storeroom and confirmed it was the same storeroom depicted in the video that the court had watched. He described there being many people in the storeroom, some of whom he had seen in the video. Some of them had even testified. He referred in this regard to Ms Mchunu, but he could not name anyone else because he had gone to hide between the boxes in the storeroom. He had seen the security guard, Mr. Dube, but did not see the manageress of the store. When he was asked why he had not put it to either of these witnesses that he, too, had been in the storeroom there was a long silence before he explained that he lacked the knowledge that he ought to have done so. He explained that he had hidden behind the boxes so that the robbers would not see him. This, too, had not been put to any of the State witnesses. Both the State Advocate and the court asked him what he was hiding from: the robbers knew that he was there because they had ordered him to go into the storeroom. What was the point of hiding? That question elicited the response that he saw a firearm, which did not address the question asked. He confirmed that he had remained hiding behind shelves in the storeroom for a long time, heard voices talking but observed nothing and later heard gunshots. He would not be drawn on how long he had actually been in hiding other than to say that it was a long time and that he was in shock.

[96] Having said that he could not hear what was being said, he remembered hearing the word 'key' being used. He ascribed his inability to be more precise to the fact that he was in shock. A further answer explaining this inability would be provided later in re-examination. He could not describe how many shots had been fired while he was hiding nor could he tell whether the shots were coming from inside or from outside the store. Whilst hiding, he confirmed that it got quiet for a while and then the lights went off and it became dark. At that stage, a white member of the SAPS had

found him in the storeroom and had taken him to the front of the store where he was made to lie down. He then stated that the others were brought to where he was but he could not see from where they had come. He and these other arrivals were searched and he was tied with cable ties and taken to an SAPS van. Those who went with him to the van were accused two and accused four, with accused one already being in the van.

[97] Accused three said that he did not see accused two or accused four in the store nor had he seen accused one. He was asked by Ms Ntsele whether accused two and accused four had been brought to the spot where he had been made to lie from inside the store. A series of questions had to be asked in this regard before it ultimately transpired that accused three agreed that accused two and accused four had come to his position from inside the store.

[98] The State Advocate then drew accused three's attention to paragraph seven of his plea explanation. Paragraph seven stated that he had been in the store and had heard gunshots and had run with other people to the storeroom to take cover. Before court, however, he made no mention of gunshots but made mention of being instructed by one of the robbers to go to the storeroom. He was asked to explain this difference. Firstly, he stated that the plea did not explain the situation correctly. Secondly, he stated that both the plea and his evidence were correct and explained how this could be by stating that he was going to explain everything when he testified. He was asked again to explain which version was correct which resulted in the witness falling into a long silence. Thirdly, a further answer was then tendered when he said that his plea was simply a summary and he would give the full version when he was going to testify. This was disputed by the State Advocate who said that it was not a summary but it was a different version. Accused three acknowledged that he could see that there was a mistake.

[99] Ms Ntsele then moved on to paragraph nine of his plea. In particular, the following sentence in that paragraph was concentrated upon by Ms Ntsele:

'Further that there was shooting which took place inside the shop.'

In his earlier evidence, accused three had said repeatedly that he could not determine whether any shots had been fired from inside the store. This conflicted with what was stated in paragraph nine of his plea. When this was pointed out, there was again a long silence before he stated that there had been gunshots but he could not tell from where they had been fired. The court then drew his attention to the fact that the plea stated that the shots had been from inside the store and asked what had changed from the time when the plea was drafted to him giving evidence before the court. Ultimately, accused three blamed his counsel and said that the problem lay with the author of his plea. However, this was disputed by the State who stated that he had confirmed the correctness of the plea when he had pleaded. This was conceded by accused three.

[100] Accused three repeated that whilst there may have been five robbers, he only saw one and that was the person wearing navy workmen's wear. He stated that he had contacted his traditional healer by telephone, meaning by way of his cellular telephone, just before he had gone to the store. Unlike the other victims of the robbery, he was never deprived of his cellular telephone by the robbers. He explained that this had not been taken from him because the robbers could not see him. It was pointed out to him that the robbers had seen him because they had told him to go to the storeroom. When he was asked why he had not used his cellular telephone to call for help from within the store he said that he had no airtime. He was asked why he did not use a free call or a call-back but simply gave the same reply. He confirmed that he had never contacted his traditional healer because of the lack of airtime nor had he spoken with him since. He could not telephone the traditional healer from the SAPS station because his cellular telephone had been taken from him and he had not known the number off by heart. He had asked the SAPS for his cellular telephone but they had not given it to him. Asked whether he intended to call the traditional healer, he said that he no longer had his cellular telephone number. Asked to provide the traditional healer's name, accused three simply said he was a Mr Cele and did not know his residential address. The traditional healer was due to meet him and cleanse him of his bad luck. It further transpired that this would require him being taken to the sea, something which had not previously been revealed.

[101] Considering that he had allegedly been arrested in the storeroom, the court asked accused three why he had not left the storeroom with the other customers and staff members who had also been held there. They had all ultimately exited the store but he had not. His initial response was that he was hiding. When it was pointed out that the other people in the storeroom had left, he explained that he did not see them leave as he was facing downwards.

[102] The court then asked him if the only reason for him being at the store was to buy the ingredients that his traditional healer required. He said that was not the case. He explained that he was meant to meet the traditional healer at the Spar store. When asked how the traditional healer knew he would be there he said that he had been told to meet him there. Asked how this information had been conveyed to him as he had no airtime, he said that the traditional healer had telephoned him whilst he was in a taxi on the way to Mtubatuba. The traditional healer had also telephoned him while he was standing outside the Spar store. The court pointed out that in paragraph six of his plea he had stated that he had called the traditional healer and asked how that had occurred if he had no airtime. Accused three explained that the information had not been recorded properly in his plea: he had sent the traditional healer a call-back message but he conceded that he was the one who had badly explained what had occurred.

[103] Under re-examination by Mr Daniso, he was asked to explain why he could not hear what had been said by the people in the storeroom while he was hiding there. For the first time, accused three revealed that he had been hiding with his hands over his ears.

[104] After concluding his testimony, accused three indicated that he wished to call the traditional healer, Mr Cele, to testify on his behalf. Mr Daniso requested an adjournment for this purpose but the court declined to grant such an adjournment. After a vigorous exchange of views between counsel and the court, Mr Daniso was instructed to obtain the necessary information from accused three so that it could be passed to the investigating officer, who was seated in court, and who would be requested to try and locate Mr Cele. Remarkably, given accused three's statement that he did not know the traditional healer's telephone number or address, a

telephone number purporting to be that of Mr Cele was written down on a piece of paper together with an address and was given to the investigating officer.

[105] In order to maximize the use of time, the evidence of the fourth accused, who wished to testify, was then interposed in the case of accused three. Siyabonga Michael Sangweni confirmed that he, too, had signed a section 115 statement and that its contents were to be regarded as his evidence in the matter. He, however, disputed that he had shot at the SAPS members and he denied that he had been in possession of a firearm and no firearm had been found on him when he was later searched. He indicated that he had something to add to his plea: when he had gone into the store the roller door was half open as the store was about to close. There was no security guard at the entrance to the store.

[106] Ms Ntsele then cross-examined him. He confirmed that he had entered the store at about 17h15. He had previously met the mother of his child, who for convenience sake I will refer to as his 'lady friend', and had given her money for the child. She had wanted to purchase some items from the store and asked him to come with her. He explained that he had stood long enough at work and he could not tolerate further standing in a queue. His lady friend accordingly went into the store alone and he went to the taxi rank to get a haircut. Having had his hair cut, he telephoned his lady friend to find out where she was but she did not answer the call. He explained that he had agreed to meet up with her after she had made her purchases in the store. He stated that she would find him at the place at which he had his hair cut. He confirmed that she had not seen him go to have a haircut and explained further that he had told her to find him there.

[107] When his lady friend did not come to the place where he had his hair cut, he went back to the store. He believed her to be within the store and 'sneaked' underneath the roller door and went in. He saw no one in the store and tried to telephone his lady friend again. He was about to leave when he heard a gunshot which seemed to come from the direction of the entrance door and he could hear people talking in that vicinity. He said that he thought that there were people in the store but not on his side of the store. When he heard gunshots, he concluded that there must be people in the store because those standing on the outside would not

have fired into the store without anyone being there. Having heard the gunshots, he got injured. He was unable to say whether the shots had come from within or without the store. He stated that things happened fast. He was again asked whether people had fired from inside the store and he responded by saying that the shots were nearby him on the left. He was asked again whether the shots had been fired from inside the store and he finally stated that they had been. He was not able to say who had fired first. His reason for not being able to do so was that he was allegedly still on the telephone. He did, however, concede that he was not talking on the telephone.

[108] As regards his injury, he explained that he was shot in the right thigh. He exited the witness box and showed the court the entrance and exit wounds on his right thigh. He was not able to say which of the wounds was the entrance wound and which was the exit wound. One wound was on the right outer thigh, more towards the front of the thigh, and the second wound was lower down but on the side of the thigh. As the court explained it at the time, had a line been drawn connecting the two wounds and dropped downwards it would have struck the floor and if it was taken upwards it would have hit the ceiling. The wounds were therefore unlike the wounds suffered by accused two where, as previously explained, had a line been drawn connecting the two wounds it would have been parallel to the floor. The wounds of accused four were virtually at a right angle to the floor. He could not say that he had been shot by the SAPS and he could not say from which direction the shot had come.

[109] Accused four stated that the lights had gone off and he had gone to the back of the store and saw the storeroom door opening. People were getting into the storeroom. He limped to the storeroom and went inside and hid in an area where there were boxes. As he was hiding, he saw a person in navy overalls and he heard voices. He confirmed that there were small groups of people in the storeroom. On his left were two or three ladies and to the right there were others comprising a male and some females. Having said he saw only one robber he then confirmed that he had seen another robber wearing workman's pants and a T-shirt. He then confirmed that he had seen three robbers. People then left the storeroom but returned less than five minutes later and he heard talk that the security guard must open the back door of

the storeroom. Having heard movement, he then heard gunshots from the inside of the store and then things went quiet. A few moments later he heard the SAPS talking and he came out and noticed that the people were gone. He was asked why he was hiding and he said that he was not hiding but that he had been shot. He explained he was not part of the robbers and he acknowledged seeing Capt Nkabinde and Warrant Officer Armstrong. He was then asked a series of questions to ascertain whether Warrant Officer Armstrong had arrested him. The question was put three or four times and each time elicited an indirect, inappropriate response. Ultimately, accused four agreed that Warrant Officer Armstrong had arrested him.

[110] At this point accused four misspoke, so he claims. If he did so, he misspoke repeatedly. He was asked how he had been taken out of the storeroom and he replied by saying that the SAPS had found:

‘us when we were hiding and took us out.’

He was asked who he was referring to when he used the word ‘us’. He said there were three people. As to who they were he said he did not see. He was again asked to whom he had been referring. He said ‘we’ were taken to the van. He was asked who ‘us’ was intended to refer to. He then said it was a mistake on his part. He had been alone. The court asked him whether he had seen accused three hiding as they seemed to be hiding in the same place and received the reply that he had seen him when he came out. He had not seen him while he was hiding.

[111] Accused four confirmed that he had seen some of the females in the store and was asked whether he had considered putting his version to them when they testified so that they could comment upon it. He said it had never crossed his mind. Considering that he had been shot, he was asked whether he had thought of asking any of the people in the storeroom for assistance. He said he did not think that he would get any help. Then he said that the people in the storeroom were terrified. Finally, he said he did not trust them as he did not know how he had been shot in the first place. The court suggested to him that he had not been shot by any of the people in the storeroom and he agreed with that proposition. Asked then why he had

not requested assistance from them he resorted to his previous answer, namely that they were terrified.

[112] Ms Ntsele then took accused four through his section 115 plea. His attention was directed to paragraph six thereof, where it was stated that he had told his lady friend that he would wait for her outside the store while she went inside. He, on his new version, had gone to have his haircut. He explained that he did wait outside the store but then thought to himself that he should go and get his hair cut. It was pointed out that there was no reference to his haircut in his plea. Asked why this was not mentioned, his unhelpful explanation was that when she went into the store he went to have a haircut.

[113] His explanation that he had gone into the store with the roller door half down drew a proposition from the State that if that is what occurred, then he was one of the robbers. There was no other way, due regard being had to the video, for him to have entered. Only the robbers entered while the roller door was half down. He denied that he was one of the robbers. The court asked him whether he had seen himself in the video and he indicated that he had not. In fact, he stated that he was not to be observed in any of the footage recorded by the video cameras. The State Advocate said that he was, in fact, recorded in the footage because he was one of the robbers.

[114] Accused four was then asked whether he had used his cellular telephone to call for help whilst in the storeroom. He said that he had not because it would have revealed him. Asked whether he had sent a message, he said the lights were off and the light on his cellular telephone would also have given him away if he had done this. It was then put to him that not one witness, other than accused three, had said that the lights had gone off. He also confirmed that not at any stage could it be observed in any of the videos that the lights had gone off. He was then asked if the lights had not gone off why he had not sent a message as the act of doing so would not have betrayed his position. He then said that he was scared.

[115] Reverting to the issue of his haircut, accused four agreed that his decision to go and have a haircut was a spur of the moment decision. He confirmed that his lady

friend did not know when she entered the store that he was going to do this. Asked then how he could have anticipated that she would meet him at the place where he had his haircut done, his only response was that he was going to telephone her and tell her where he was.

[116] Accused four had no witnesses to call and closed his case.

[117] The matter then stood down to the next day to allow the investigating officer to attempt to locate Mr Cele, the traditional healer that accused three wished to call as a witness. Mr Daniso, who appears for accused three, informed this court on resumption the next day that Mr Cele could not be located and that accused three dispensed with the necessity of him being called as a witness and closed his case.

[118] All the counsel involved in the matter then joined in a request that the matter stand to the following day to enable them to prepare argument. The court granted the request. The next day, the court was advised by the State that it was still not in a position to argue the matter and requested a further period of time to prepare for this. The matter was consequently argued yesterday

[119] Ms Ntsele called for the conviction of the accused on all of the charges that they face. When engaged by the court on whether evidence had been presented on each charge upon which a conviction was sought, there was a hesitation. It was then conceded that no evidence was led on count 8. But with regard to all the other charges, the State believed it had adduced evidence sufficient to convict the accused. By way of contradistinction, the two defence advocates called for accused one to four to be acquitted on all those charges.

[120] Before assessing the evidence, it is perhaps prudent, having mentioned the interaction with the State Advocate on whether evidence was led on each charge in respect of which she called for a conviction, to deal with those counts where, in the court's opinion, insufficient or no evidence has been led:

(a) Counts 1 to 7 are counts of robbery with aggravating circumstances. No evidence was led on count 4, count 6 and count 7 which deal with the robbery of

cellular telephones from Zandile Nkwanyana, Siphamandla Mthobisi Mhlanga and Silindile Ndwandwe respectively. The names of these witnesses were never mentioned during the evidence and the court simply has no idea whether they were even present in the store on the day in question. The accused are therefore entitled to be acquitted on those counts;

(b) Count 8 pertains to a charge of the theft of a cellular telephone from one Qiniso Bhekuyise Zikhali. As with counts 4, 6 and 7, no evidence was led to place this person at the scene or to explain the count of theft. As noted, Ms Ntsele appeared to concede that a conviction could not properly be claimed on this count. The accused are accordingly entitled to their acquittal on this count;

(c) Counts 9 to 14 encompass the offense of attempted murder. In count 9, it is alleged that the accused attempted to murder Siphamandla Mthobisi Mhlanga, in count 10 it is alleged that they attempted to murder Bongumusa Petros Mwelase and in count 11 it is alleged that they attempted to murder Titus Bhekuzalo Nsibande. I heard no evidence on either of these three counts and the accused are therefore also entitled to their acquittal on these three counts. Those orders will be made shortly.

[121] Thus the counts that remain alive for determination are the counts of robbery with aggravating circumstances framed in counts 1, 2, 3 and 5, the counts of attempted murder framed in counts 12, 13 and 14, count 15, being the count of murder and counts 16, 17 and 18 being the counts that relate to the unlawful possession of firearms and ammunition.

[122] I turn now to consider the quality of the evidence and of the witnesses that presented that evidence. On the remaining counts, the State has presented a formidable quantity of evidence. For the large part, the different witnesses called in support of the State case have presented a seamless narrative of the events on 2 February 2022. That evidence was given by witnesses who, generally, were entirely credible and related their experiences and observations without embellishment to the court. I was particularly impressed by the evidence of Capt Nkabinde and the evidence of the TRT members, Sgts Mthembu and Msweli. The majority of witnesses

who testified on behalf of the SAPS were experienced at their job and testified in a forthright manner. They dealt easily with the questions that were put to them by the defence and they were confident, without being overly so, of the version that they advanced to the court. The witnesses who were not members of the SAPS were no less impressive in their testimony. They endured a harrowing ordeal but were able to logically and clearly convey what they had seen and experienced to the court.

[123] Much of what the State witnesses testified to could be assessed against the videos that exist of the events in the store that afternoon. That provides a degree of certainty regarding the accuracy of their evidence and simply helps to cement their respective versions together. For example, several witnesses testified to the accused wearing caps or hats on their heads initially when they entered the store. This could be confirmed in the video, where the robbers were wearing various types of headgear. It appears that none were so attired when taken into custody. The photographic album is replete with hats and caps that were discovered at the scene after the arrest of the accused.

[124] The State witnesses were entirely fair in their evidence, none more so than Capt Nkabinde. He would not say that accused two fired his revolver, despite saying that accused two possessed the weapon and held it in a firing position. He would not, furthermore, testify to the accuracy of anything that he did not personally see, such as who first fell out of the ceiling into the store. When he made an error, and his evidence was by no means perfect, he was quick to acknowledge and own it. Ms Nala, the manageress, too, would not testify to things of which she was not sure. When a third robber joined the two who held her in her small office, she stated that she could not describe him.

[125] Having been impressed with the State's evidence, it must immediately be acknowledged that the State's case is not without its problems and its imperfections. That, in its own way, is strangely reassuring for it means that there has not been any attempt to get the State witnesses to adhere to a single, manufactured version. For example, the evidence of Warrant Officer Armstrong is at odds with all the other evidence that was led. The calling of this witness by the State perhaps demonstrates the obvious danger of calling a witness without first having obtained a statement

from him. He was called without the State having a statement of his observations. It could not have known what it was that he was going to say in his evidence and it must have been taken entirely by surprise with the version that he advanced to the court. That version marginalised the involvement of the TRT members and rather promoted Warrant Officer Armstrong as the dominant force at the scene of the crime. He came across as a gung ho, larger-than-life character and appears to be a man of action but not necessarily a man of deep reflection. Ms Ntsele described him in argument as having suffered from a 'heroism syndrome'. That may well be an accurate description of him. His evidence left the impression that he was trying to place himself at the centre of events to the exclusion of the others deployed to the store that evening. It seemed that he was trying to create the impression that the role that he played was more important than any of the other actors in this drama. Rather than have the TRT members as the people who discovered the four men in the ceiling, he claimed that glory for himself. He clearly has great confidence in his abilities and little regard to conventions: he came to court dressed in a pair of shorts and a short sleeve, open necked shirt and slippers. Admittedly, it was his day off but it would not have taken much effort for him to clothe himself adequately. It did not create the correct impression. Despite his evidence, I am satisfied that the thrust of the State case remains intact: the accused were found, not in a storeroom or someplace else on the floor of the store, but in the ceiling of the store.

[126] There are other difficulties in the State's case. As previously mentioned, the summary of substantial facts states that accuseds one and two were shot during the events in the store. In reality, accused two and accused four were the persons who sustained bullet wounds to their thighs. Ms Ntsele indicated that this would be cured by evidence, and, indeed, it was. In any event, accused two and accused four both testified that they were the two persons who were shot and accordingly the inaccuracy in the summary of substantial facts is of no moment.

[127] As a general proposition, the four accused were appalling witnesses. One is loath to make such generalizations but I am prepared to do so in this instance and to state that each one of them is an unmitigated liar. Each of them tendered a plea and it then appears that they each forgot what they had pleaded because none of them were able to adhere to the version contained in their respective pleas. They made

things up as they went along and ultimately virtually each one of them painted themselves into a corner from which they could not extract themselves. Each of them took the oath to tell the truth, but not one of them paid any heed to that oath. There are many weaknesses in the versions of the accused. For example, all of them were in the store but none of them admits to seeing the others. Two of them hid in the same place in the same small room but never saw each other. None of them were in the ceiling yet the ceiling was destroyed as the photographic album reveals. None of them knew each other yet three of them come from the same Macekane neighbourhood near Empangeni, according to the indictment.

[128] Ms Ntsele argued that none of the accused were comfortable in the witness box. She is entirely correct in this observation. The court made contemporaneous notes of the physical signs of their uncomfortableness:

- (a) Accused one constantly looked down when faced with difficult questions, and then would shift swiftly and repeatedly from side to side as he struggled to formulate his answer. From time to time he would drag his hands down his face or rub his face when pressurised by Ms Ntsele;
- (b) Accused two initially habitually spoke with his hand in front of his mouth, with a sullen expression on his face;
- (c) Accused three wiped his face with a cloth that he produced when he was placed under pressure by Ms Ntsele; and
- (d) Accused four rubbed his hands and then his face when contemplating difficult questions put to him.

In short, their physical conduct was not reassuring.

[129] While their physical conduct was unimpressive, their demeanour in dealing with questions posed of them was, if anything, worse. Each of them was evasive and would not answer certain questions. Accused one was cautioned about his evasiveness by the court. Questions had to be repeated several times for his benefit

before a relevant answer was forthcoming. Accused two's evidence was peppered with long silences when he was asked probing questions by the State. Accused three was evasive when asked where accused two and accused four came from when he was taken to the front of the store and the question had to be repeated three times before he conceded that they had been brought from within the store. For people who claimed not to know each other, they seemed to do their level best not to implicate or incriminate each other.

[130] The content of their evidence was also far from satisfactory and all of them at some stage contradicted themselves or introduced facts that had previously not seen the light of day:

(a) Accused one claimed to have looked at his watch at one stage and then later said that he did not have a watch. He also claimed that he was robbed of R1 200 by the two robbers that he claimed executed the robbery, a fact that went unmentioned in his plea and which was never put to any of the State witnesses;

(b) Accused two contradicted himself when he testified that he had only seen the second robber when taken to the back of the store: in his plea he said that he saw two males enter the store;

(c) Accused three contradicted himself when he stated that he was ordered to go to the back of the store by a robber. In his plea he said that he had heard a gunshot and had fled to the back of the store to take cover, never suggesting for a moment that he had seen who had discharged the shot or that he had been ordered into the storeroom; and

(d) Accused four contradicted himself regarding his testimony over going for a haircut and also when he said that he had seen one robber, then changed it to two and then to three.

[131] Not only did they contradict themselves, but some of the accused also contradicted each other. Accused one said that he had been forced by the robbers to lie down in an aisle of the store by himself. Accused two stated that he had

encountered accused one at the rear of the store where he was lying with other people.

[132] Earlier in this judgment I mentioned that the significance of the videos is not so much what they reveal but what they do not show. What they do not depict is the versions of the accused. The videos, in reality, sound a death knell for the accuseds' version of events. The evidence of the State witnesses is compelling but the existence of the videos is a reassurance of the accuracy of their recall of the events. Despite all of the accused claiming to be customers of the store, none of them appear in any of the videos as customers. They deny that they are the robbers and therefore, despite admittedly being in the store, none of them allegedly appear in the videos. Their version of events is simply not recorded in any of the videos: on the contrary, the State's version is. According to accused one and accused two, there were only two robbers, but the videos show unequivocally that there were five robbers in the store. Despite accused one and two claiming that the two robbers wore balaclavas, none of the robbers (whatever the number who were involved in the robbery) can be observed wearing them on the videos. While photographs were taken of the discarded headgear once the accused were arrested, there are no photographs of discarded balaclavas in the photographic album.

[133] There is the suggestion by the State that the accused may be observed in the videos as they were the robbers. I am not able to say so with any great certainty given the fact that the facial features of the persons recorded on the videos are difficult to discern on the videos, for the reasons previously explained, notwithstanding the otherwise clear, crisp images that comprise the videos. That having been said, there is a single instance recorded in the storeroom, where it is apparent that the person appearing on the video is accused two. I am, however, satisfied that the notwithstanding the lack of clarity of the videos, that the accused are the robbers.

[134] While the videos do not permit us to view the accused as customers, the fact that they purport to have been customers is finally destroyed by them being apprehended in the ceiling. That fact on its own demonstrates the falsity of their version of being innocent shoppers.

[135] Accused one and accused two roughly have the same type of defence and accused three and accused four, more or less, adhere to each other's version of events. That perhaps explains why they are represented by different defence counsel. Neither accused one nor accused two identified the two robbers who accosted them as forming part of the five robbers that were demonstrably robbing the store in the videos. That could mean that there were actually seven robbers in the store, comprised of the five robbers depicted in the videos and the two robbers who robbed accused one and accused two. When the version of accused three and accused four is considered, they also did not identify the persons who they say robbed them as forming part of the five robbers robbing the store. Thus, there could be another two robbers in the store. The likelihood of there being three separate groups of robbers, numbering up to nine people, robbing the same store at the same time on the same day occurs only in French farces and not in real life.

[136] From the evidence led, it is apparent that the robbers were unable to get out of the store once the SAPS had arrived at the scene. This can be accepted by virtue of the fact that they attempted to get out through the back door but could not shoot the padlock off, they could not go through the front door because the SAPS were there armed and waiting for them and they tried to go through the ceiling but could not find a way out that way either. Thus, it is safe to assume that once the SAPS arrived at the store, the robbers were trapped inside. If that reasoning is sound, then what the accused propose is that the SAPS let the robbers, all of whom were male, whether five, seven or nine in number, leave the store while at least two of them wore balaclavas, or at least had them in their possession, and chose to rather arrest bona fide customers innocently in the store to make purchases. The proposition merely has to be stated to be rejected. How this could have occurred when there is overwhelming evidence that there were no male customers in the store at the time of the robbery is unexplained.

[137] In all of the circumstances, I am satisfied that the State's version is the correct version of events and that the accuseds' explanation for their presence in the store can safely be rejected. They were accordingly not law abiding shoppers but law breaking robbers. I must thus find, as I do, that the accused were part of a group of

robbers who armed themselves with the purpose of robbing the store. The agreement to achieve this goal, aided by the use of firearms, must mean that they formed a common purpose to rob the store and any person that they found within the store. As Ms Ntsele points out in her heads of argument, common purpose is to be found when two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number which falls within their common design. The conduct of each of them in the execution of their common goal is thus imputed to all. The fact that accused two, three and four all come from the same area suggests a prior agreement to arm themselves and proceed to the store on the day in question. Where charges put to the accused rely on the existence of such common purpose, I find that it has been established.

.

[138] The fact that I have disbelieved the accuseds' versions and found the existence of common purpose does not mean that the accused must automatically be convicted on the remaining charges. I turn now to deal with the specific charges that remain alive. I shall deal with those charges in the sequence in which they are mentioned in the indictment.

[139] Counts 1, 2, 3 and 5 are counts of robbery with aggravating circumstances. In terms of section 1 of the Act, aggravating circumstances are defined as follows: 'aggravating circumstances', in relation to –

(a)

(b) robbery or attempted robbery, means –

(i) the wielding of a fire-arm or any other dangerous weapon;

(ii) the infliction of grievous bodily harm; or

(iii) a threat to inflict grievous bodily harm,

by the offender or an accomplice on the occasion when the offence is committed, whether before or during or after the commission of the offence;'

[140] The group of which the four accused were members armed themselves with firearms which are before the court as exhibits 1, 2 and 3 respectively. The State witnesses testified that the robbers were armed and they may be observed wielding those firearms on the videos. The robbers deprived the store of cash money and its customers and staff members of their cellular telephones using those self-same firearms to force compliance from the victims of the robbery. On the one video recorded in the stockroom there is a moment when the deceased demanded a firearm from Mr Dube (which he did not possess) and when he discovered that he had no firearm, the deceased pointed his pistol at him and it seemed entirely inevitable that Mr Dube was to be shot. Thankfully, he was not. But there was in the clearest of terms a real threat to inflict serious bodily harm on Mr Dube as contemplated by the definition of aggravating circumstances referred to above. The accused are therefore to be convicted of robbery with aggravating circumstances on counts 1, 2, 3 and 5.

[141] Counts 12, 13 and 14 are counts of attempted murder where the victims are the high ranking SAPS officials standing outside the store. In *S v Ndlovu*,¹ Joubert JA stated the following about attempted murder:

'Die bestanddele van poging tot moord wat *per se* 'n misdaad is, is wederregtelikheid, opset en 'n pogingshandeling. Die strafbedreiging is gerig teen die wederregtelike opsetlike bedreiging van die lewe van 'n mens. Die beskermde regsbelang is die lewe van 'n mens. 'n Geykte voorbeeld van voltooide poging tot moord is waar A sy vuurwapen op B rig met die bedoeling om hom te dood, en die skoot afvuur wat B mis of verwond sodat B die wederregtelike aanslag op sy lewe oorleef. A het alles van sy kant gedoen om B te vermoor maar die moord is onvoltooid. Die opset om die slagoffer te vermoor kan afgelei word uit die pogingshandeling asook ander aanvaarbare bewysmateriaal. Die

¹ *S v Ndlovu* 1984 (3) SA 23 (A) at page 26I-27.

wederrregtelikheid van die pogingshandeling is geleë in die bedreiging van 'n regsbelang, naamlik die lewe van 'n mens'.

[142] Thus a person is guilty of attempting to commit a crime if, intending to commit that crime, he unlawfully engages in conduct that is not merely preparatory but has reached at least the commencement of the execution of the intended crime. An attempt is completed where the criminal has done everything he can to commit the crime, but for some reason the crime is not completed, such as where the criminal shoots at his victim but misses.

[143] Applying that understanding, in this matter the four accused were part of a bigger group of six persons who armed themselves as best as they could with firearms and must have reconciled themselves with the fact that the firearms that they had might, at some stage, have to be employed to achieve their goal of committing robbery. The indictment alleges a common purpose on this count and I have already found that common purpose to exist. Once the SAPS were in attendance at the scene and it became obvious to the accused that flight would be difficult, they discharged those firearms at the SAPS members standing outside the main entrance to the store. That could only have been done as a mechanism to allow them to escape. The firearm possessed by accused one fired some 32 bullets in all. In discharging their firearms in the direction of the SAPS members, they must have further reconciled themselves with the fact that the bullets expelled from their firearm.s might hit, injure or kill anyone standing outside the store. Nonetheless, they proceeded and fired at the SAPS members. Col Mdletshe was struck by a bullet thus fired. He was, fortunately, only grazed by the projectile but that is due more to good luck than good planning. There can be little doubt that in conducting themselves as aforesaid, all four accused, whether or not they were one of the persons who discharged a firearm or not at the SAPS, are by virtue of common purpose guilty of the offense of attempted murder and they are there are accordingly all found guilty on counts 12, 13 and 14.

[144] Count 15 is a count of murder. The deceased on this count was not a member of the public or of the staff of the store nor a member of the SAPS but one of the robbers forming part of the gang that had robbed the store. He was not mistakenly

shot by the accused in the fury of a wild gunfight: it is conceded by the State that he was killed by a member of the SAPS, apparently acting in self-defence, when the deceased fired at them from his position in the ceiling. It is common cause that the deceased died from a firearm wound. There is no ballistic or forensic evidence relating to which firearm was responsible for his death. There is no evidence from the State as to which of the members of the SAPS fired the shot that killed the deceased. The only witness who directly deals with this aspect in his evidence is Sgt Mthembu.

[145] The evidence establishes that five persons were in the ceiling of the store. Four of them, being the four accused, were discovered at the same time. Despite accused one and accused two being armed, they did not offer any resistance when discovered and decided, as the sergeant said in 'Brave New World',² to 'come quietly'. In other words, they surrendered peacefully knowing that they had run out of tarmac. They were extracted from the ceiling, cable tied, removed from the store, and placed in an SAPS van. Whilst all of this occurred, the fifth robber remained alone in the ceiling. Thus, when the deceased met his fate, the accused were not within the store.

[146] These facts are narrated again in the light of the authority relied upon by the State in seeking the conviction of the accused on the count of murdering the deceased. The case is *Nkosi v The State*.³ In that matter, the appellant was a member of a gang that attempted to rob the owner of a business. During the course of the attempted robbery, the owner of the business drew a firearm and began shooting at the robbers. During that gunfire, a member of the gang was killed. The appellant was convicted of murder despite the fact that he was not the person who fired the shot that killed his fellow gang member. The matter was taken on appeal to the Supreme Court of Appeal, which held that he had been correctly convicted. The appellant had argued that the deceased had embarked on a frolic of his own which caused his own death and that the State had failed to prove that the appellant had the requisite intent to commit murder. The finding of guilty in the court a quo appeared to have been based upon the concept of *dolus eventualis*, which also

² Aldous Huxley *Brave New World*, 1932.

³ *Nkosi v The State* [2015] ZASCA 125.

appears to be the case in this matter. The Supreme Court of Appeal found that the robbers reasonably foresaw the likelihood of resistance and the possibility of a shootout and accordingly armed themselves with loaded firearms. The shootout occurred in the same room where the robbery was being perpetrated and during the course of that robbery. The conviction was accordingly in order and the appeal failed.

[147] In *Nkosi*, reference was made to the case of *S v Molimi and another*,⁴ a case relied on heavily by the appellant in his appeal in *Nkosi*. In *Molimi*, during the course of an armed robbery at a shopping mall, one of the robbers took a young man hostage inside the store. A bystander fired at the robber but struck the hostage instead, killing him. The robbery itself had been completed, albeit not without complications. One of the charges against the appellant was in respect of the murder of the hostage. The primary contention of the defence in *Molimi* was that the death of the hostage was not foreseeably part of the common purpose to perpetrate the armed robbery. The Supreme Court of Appeal upheld this contention and Cachalia JA in so doing stated the following:

‘Once all the participants in the common purpose foresaw the possibility that anybody in the immediate vicinity of the scene could be killed by cross-fire, whether from a law enforcement official or a private citizen, which in the circumstances of this case they must have done, *dolus eventualis* was proved.

[36] But the taking of the hostage by accused 1 falls into a different category. It is probable that at the time he took the hostage, his co-robbers had escaped through the exit of the shopping complex. He was therefore on his own when he took the hostage while seeking refuge from the man who was pursuing him. By taking a hostage he had, in my view, embarked on a frolic of his own. These actions could hardly have been foreseeable by the other participants in the common purpose. To hold otherwise, as the court *a quo* did, would render the concept of foreseeability so dangerously elastic as to deprive it of any utility. To put it another way, the common purpose doctrine does not require each participant to know or foresee every detail of

⁴ *S v Molimi and another* [2006] ZASCA 3; 2006 (2) SACR 8 (SCA).

the way in which the unlawful result is brought about. But neither does it require each participant to anticipate every unlawful act in which each of the participants may conceivably engage in pursuit of the objectives of the common purpose. It is apparent that the unlawful act of hostage taking by accused 1, in the circumstances of this case, was so unusual and so far removed from what was foreseeable in the execution of the common purpose that it cannot be imputed to the appellants. The convictions relating to the kidnapping and murder of the hostage (counts 7 and 3) can therefore not stand.'

[148] The first part of that extract fortifies me in my finding that the accused are, at least, guilty of the offences of attempted murder, as already previously found. In this matter, all of the robbers who went into the store were found in the ceiling. The four accused surrendered without further violence, a fact that must have been known to the deceased who was present in the ceiling with them when that occurred. The robbery had been completed but there was no possibility of escape for the participants. The accused were removed from the store and were not present when the deceased allegedly discharged a shot from his firearm from the ceiling at the SAPS members on the floor of the store. This was done not in the course of the robbery and was done at a time when the deceased was on his own. His decision to fire at the SAPS was, in my view, to use Cachalia JA's word, a 'frolic' of his own that the accused could not have anticipated might occur.

[149] In my view, given their peaceful surrender, it was not reasonably foreseeable by the accused that the deceased would conduct himself in the fashion that he did. As Cachalia JA says in *Molimi*, it is not necessary for each participant in an unlawful exercise to anticipate every unlawful act in which each of the participants may conceivably engage in pursuit of the objectives of the common purpose.

[150] In my view, the facts in *Nkosi* are distinguishable from the facts in this case. The facts in this case relate more to those found in *Molimi*. The death of the deceased was occasioned not during the course of the robbery, but in its aftermath. It did not happen in the same room as the robbery, but above it. The accused were not present at the time the deceased met his death and the deceased was on his own at the time that he made a decision to shoot at the SAPS. I accordingly find that

it was not reasonably foreseeable by the accused that this event would occur. In those circumstances, their guilt has not been established on the count of murder and they are entitled to the benefit of any doubt that may exist. They are therefore acquitted on count 15, being the charge of murder.

[151] Count 16 relates to the unlawful possession of a prohibited firearm, namely a Taurus pistol, found in the physical possession of accused one. Count 17 relates to the unlawful possession of the .38 Smith and Wesson revolver, and count 18 relates to the unlawful possession of one round of ammunition for the revolver.

[152] A firearm is said to be a prohibited firearm if it falls within the definition of prohibited firearms that may not be possessed in terms of section 4 of the Fire Arms Control Act 60 of 2000. Section 4(1)(f)(iv) thereof reads as follows:

‘(1) The following firearms and devices are prohibited firearms and may not be possessed or licensed in terms of this Act, except as provided for in sections 17, 18(5), 19 and 20(1)(b):

(f) any firearm –

...

(iv) the serial number or any other identifying mark of which has been changed or removed without the written permission of the Registrar.’

There is no suggestion that any of the provisos apply to the facts of this case.

[153] There was evidence that the Taurus pistol lacked the serial number that it once had. It had been obliterated from the weapon. It is thus a prohibited firearm as contemplated by the Firearms Control Act.

[154] It is important to acknowledge that the unlawful possession of a firearm is a ‘circumstance crime’, not a ‘consequence crime’, and the doctrine of common

purpose does not apply to the crime of unlawful possession. This is explained in *S v Makhubela & another*⁵ as follows:

‘. . . the application of the doctrine of common purpose differs in relation to “consequence crimes”, such as murder, and in relation to “circumstance crimes”, such as possession. Burchell in *Principles of Criminal Law* differentiates between the two as follows:

“The common-purpose rule is invoked in the context of consequence crimes in order to overcome prosecutorial problems of proving the normal causal contribution between the conduct of each and every participant and the unlawful consequence. Strictly speaking, the rule has no application in the context of criminal conduct consisting only of circumstances.”

[155] There is, therefore, no question of the concept of common purpose being employed to found a conviction for the unlawful possession of the two firearms and the ammunition.

[156] It is, however, possible for there to be a joint possession of firearms. The State in argument indicated that it relies on joint possession of both the Taurus pistol and the .38 Smith and Wesson revolver. If that is the case, I do not understand why the accused were not also jointly charged with possessing the deceased’s firearm, a LEW 9mm pistol.

[157] Be that as it may, the test for joint possession of an illegal firearm and ammunition was set out in *S v Nkosi*,⁶ where the court stated that it must be possible to properly infer from the established facts that:

‘(a) the group had the intention (*animus*) to exercise possession of the guns through the actual detentor and

(b) the actual detentors had the intention to hold the guns on behalf of the group.

⁵ *S v Makhubela & another* 2017 (2) SACR 665 (CC).

⁶ *S v Nkosi* 1998 (1) SACR 284 (W) 286H-I.

Only if both requirements are fulfilled can there be joint possession involving the group as a whole and the detentors . . . to possess all the guns.’

[158] The Constitutional Cour, in *S v Makhubela & another*,⁷ confirmed the test in *S v Nkosi*. In *Leshilo v S*,⁸ the court held that:

‘[t]he mere fact that the accused participated in a robbery where his co-perpetrators possessed firearms does not sustain beyond reasonable doubt, the inference that the accused possessed the firearms jointly with them’.

[159] In *S v Mbuli*,⁹ the court pointed out that where the offence is ‘possession’ of a firearm, or, as in that case, a hand grenade, a conviction of joint possession can only be competent if more than one person possesses the firearm. The Constitutional Court, in *Makhubela v S*,¹⁰ observed that there will be few factual scenarios which meet the requirements of joint possession where there has been no actual physical possession.¹¹ This is due to the difficulty inherent in proving that the possessor had the intention of possessing the firearm on behalf of the entire group, bearing in mind that being aware of, and even acquiescing to, the possession of the firearm by one member of the group, does not translate into a guilty verdict for the others.

[160] In this instance, as correctly pointed out by Ms Ntsele in argument, and illustrated by the video taken in the storeroom, there is evidence of one firearm being handled by multiple accused persons. It is noted that one person holds the firearm when exiting the storeroom to try and find a way out from the store via the passage at the rear of the store and when the group returns to the storeroom, the original possessor of the firearm no longer has it but another does. It is not possible to determine which accused these are. There is, however, evidence that accused four was seen to fire a firearm during the robbery but he did not possess it when ultimately arrested. It seems to me that save for one accused, there was a general handling of the firearms taken to the store by the accused on 2 February 2022.

⁷ *S v Makhubela & another* 2017 (2) SACR 665 (CC), para 46.

⁸ *Leshilo v S* [2020] ZASCA 98, para 11.

⁹ *S v Mbuli* 2003 (1) SACR 97 (SCA).

¹⁰ *Makhubela v S, Matjeke v S* [2017] ZACC 36; 2017(2) SACR 665 (CC).

¹¹ *Makhubela v S supra* para 55.

[161] That exception is accused two. Captain Nkabinde, who was in all respects an impressive and reliable witness, made a telling statement when he said that he never saw anyone else in possession of the .38 Smith and Wesson revolver. I have already accepted that evidence. If that is the case, then accused two was not part of any agreement to jointly possess the other firearms: he possessed only his firearm. The other accused may be observed alternately being in possession of a firearm. They fall to be convicted on count 16 and accused two must be acquitted.

[162] On counts 17 and 18, accused two, who was found in possession of the .38 revolver, cannot be convicted of its unlawful possession or the associated charge of possession of one round of live ammunition capable of being discharged from that weapon because he was lawfully entitled to possess both as he was licenced to do so. So much was conceded by D/Sgt Kubekha when he testified. Given that I have found that only he possessed that firearm, it follows that there can be no prospect of convicting the other accused of jointly possessing that firearm and its ammunition. All the accused are consequently to be acquitted on counts 17 and 18.

[163] In the circumstances, I arrive at the following verdict:

1. All the accused are acquitted on:
 - (a) Count 4, being the count of robbery with aggravating circumstances of Zandile Nkwanyana;
 - (b) Count 6, being the count of robbery with aggravating circumstances of Siphamandla Mthobisi Mhlana;
 - (c) Count 7, being the count of robbery with aggravating circumstances of Silindile Ndwandwe;
 - (d) Count 8, being the count of theft from Qiniso Bhekuyise Zikhali;

- (e) Count 9, being the attempted murder of Siphamandla Mthobisi Mhlanga;
- (f) Count 10, being the count of attempted murder of Bongamusa Petros Mwelase;
- (g) Count 11, being the count of attempted murder of Titus Bhekuzalo Nsibande;
- (h) Count 15, being the count of murder of Senzo Siphamandla Xulu;
- (i) Count 17, being the count of the unlawful possession of the Smith and Wesson .38 revolver; and
- (j) Count 18, being the unlawful possession of 1 round of ammunition capable of being discharged from the aforesaid Smith and Wesson .38 revolver.

2. Accused one is convicted on:

- (a) Count 1, being the count of robbery with aggravating circumstances of Philile Patience Nala;
- (b) Count 2, being the count of robbery with aggravating circumstances of Thabiso Minenhle Dube;
- (c) Count 3, being the count of robbery with aggravating circumstances of Xolile Nompumelelo Nhlangothi;
- (d) Count 5, being the count of robbery with aggravating circumstances of Ntombi Mchunu;
- (e) Count 12, being the count of the attempted murder of Steven Mandla Nkabinde;

- (f) Count 13, being the count of attempted murder of Mthokozeleni Nqobizwe Mpungose;
- (g) Count 14, being the attempted murder of Samuel Bhekumpukunyoni Mdletshe; and
- (h) Count 16, being the unlawful possession of a prohibited firearm, namely the Taurus 9mm pistol.

3. Accused two is convicted on:

- (a) Count 1, being the count of robbery with aggravating circumstances of Philile Patience Nala;
- (b) Count 2, being the count of robbery with aggravating circumstances of Thabiso Minenhle Dube;
- (c) Count 3, being the count of robbery with aggravating circumstances of Xolile Nompumelelo Nhlangoti;
- (d) Count 5, being the count of robbery with aggravating circumstances of Ntombi Mchunu;
- (e) Count 12, being the count of the attempted murder of Steven Mandla Nkabinde;
- (f) Count 13, being the count of attempted murder of Mthokozeleni Nqobizwe Mpungose; and
- (g) Count 14, being the attempted murder of Samuel Bhekumpukunyoni Mdletshe.

4. Accused two is acquitted on count 16, being the unlawful possession of a prohibited firearm, namely the Taurus 9mm pistol.
5. Accused three is convicted on:
 - (a) Count 1, being the count of robbery with aggravating circumstances of Philile Patience Nala;
 - (b) Count 2, being the count of robbery with aggravating circumstances of Thabiso Minenhle Dube;
 - (c) Count 3, being the count of robbery with aggravating circumstances of Xolile Nompumelelo Nhlangoti;
 - (d) Count 5, being the count of robbery with aggravating circumstances of Ntombi Mchunu;
 - (e) Count 12, being the count of the attempted murder of Steven Mandla Nkabinde;
 - (f) Count 13, being the count of attempted murder of Mthokozeleni Nqobizwe Mpungose;
 - (g) Count 14, being the attempted murder of Samuel Bhekumpukunyoni Mdletshe; and
 - (h) Count 16, being the unlawful possession of a prohibited firearm, namely the Taurus 9mm pistol.
6. Accused four is convicted on:
 - (a) Count 1, being the count of robbery with aggravating circumstances of Philile Patience Nala;

- (b) Count 2, being the count of robbery with aggravating circumstances of Thabiso Minenhle Dube;
- (c) Count 3, being the count of robbery with aggravating circumstances of Xolile Nompumelelo Nhlangoti;
- (d) Count 5, being the count of robbery with aggravating circumstances of Ntombi Mchunu;
- (e) Count 12, being the count of the attempted murder of Steven Mandla Nkabinde;
- (f) Count 13, being the count of attempted murder of Mthokozeleni Nqobizwe Mpungose;
- (g) Count 14, being the attempted murder of Samuel Bhekumpukunyoni Mdletshe; and
- (h) Count 16, being the unlawful possession of a prohibited firearm, namely the Taurus 9mm pistol.

MOSSOP J

APPEARANCES

Counsel for the State : Ms T P Ntsele

Instructed by: : Director of Public Prosecutions,
Pietermaritzburg

Counsel for accused one and two : Mr M R Ntuli

Instructed by : Legal Aid
Durban

Counsel for accused three and four : Mr P Daniso

Instructed by : Legal Aid
Durban

Date of Hearing : 23, 26, 29, 30, 31 May 2023, 1, 2, 5,
6, 7, 8, 9, 12, 13 June 2023

Date of Judgment : 13 June 2023