

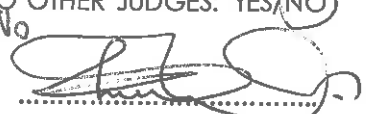
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IN THE HIGH COURT OF SOUTH AFRICA

(SOUTH GAUTENG HIGH COURT, JOHANNESBURG)

CASE NO: A244/2001

DATE: 2003-04-04

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES/ <u>NO</u>
(3)	REVISED. <u>No</u>
2016/08/30	
DATE	SIGNATURE

10 In the matter between

THE STATE

and

LUCKYJACOB NCUBE

Accused

J U D G M E N T

STEGMANN, J: With the leave of the court below the Regional Court

20 for Southern Transvaal held at Springs four appellants appealed against

their convictions and sentences in respect of various of thirteen counts

in the charge sheet in the trial court. Mr Myburgh has appeared on

behalf of three of the appellants, who at the trial were referred to

respectfully the 1st, 4th and 5th accused. Mr Tukwane has appeared on

25 behalf of the appellant who at the trial was referred to as the 2nd

accused.

Mr Schutte has opposed the appeals on behalf of the State. In as much as different documents have different headings referring to the appellants by different numbers there is danger of confusion and the system that has been adopted in the course of argument and that I shall
5 adopt in this judgment is to refer to each of the four appellants as they were referred to in the record and in the court below, that is as the 1st, 2nd, 4th and 5th accused respectively. They were indeed the only four accused at the trial, there were originally a 3rd and a 6th accused but the State withdrew the cases against them.

10 The State believe that it had given due notice of the set down of this appeal and called for heads of argument to be filed a month before the date of the appeal. That was not done. Application for condemnation was made however Mr Schutte has made an enquiries and established that the clerks in die DPP's office are unable to
15 demonstrate that the notice of set down was duly given. In these circumstances the appellants and their attorneys were put to undue inconvenience and it is not for them to obtain condemnation in the matter. Indeed it is fortunate that Mr Myburgh and Mr Tukwane have been able to be ready to deal with the matter today.

20 I turn to the merits of the appeal. The four appellants are Mr Lucky Jacob Ncube the 1st accused, Mr Vilape Sylvester Zwane the 2nd accused, Mr Howick William Motswatupe the 4th accused and Mr Sibisiswe Assention Tshabalala also known as London the 5th accused.

The thirteen charges arose out of six separate incidents during
25 the period from July to December 1999. Certain of the incidents had

interconnecting threats which assumed considerable importance in the reasoning of the trial Magistrate. All four of the accused pleaded not guilty to all of the charges. They were defended at their trial by Mr Hoffman.

5 26 July 1999 the first instant occurred at about 18:40 not long after darkness had fallen on the 26th of July 1999 at the house of Dr and Ms Montalbano, M-o-n-t-a-l-b-a-n-o, of number 5 Lead Street, Sunward Park, Boksburg. Dr and Ms Montalbano had returned home at the same moment but in separate cars. He driving a Mazda MX5 and she a
10 Landrover Freelander 4 x 4. When the garage doors had been opened the Mazda MX5 put into the garage and the Landrover standing in the driveway they were set upon by a gang of four robbers at least of whom carried guns. They were robbed of their two cars, of their possessions in the cars and the various possessions that were taken from their
15 persons.

 The possessions they lost in this way included Dr Montalbano's 9mm browning pistol C83197 complete with a magazine containing eleven rounds of ammunition and packed in a small case together with the pistol. A second magazine containing a further eleven rounds. This
20 case was contained in a briefcase that was in Dr Montalbano's car. The metal parts of the pistol had a silver colored finished and so did one of the magazines, the other magazine was black.

 This incident gave raise to three charges namely count 1 robbery with aggravating circumstances relating to the forcible taking of
25 Dr Montalbano's Mazda MX5 and various other of his possessions.

Count 2, unlawful possession of a firearm in contravention of Section 2 of the Arms and Ammunition Act 75 of 1969.

Count 3, robbery with aggravating circumstances relating to the forcible taking of Ms Montalbano's Landrover Freelander and various
5 other of her possession.

At the end of the trial the Magistrate held all four accused had been proved guilty on all three of these charges. He imposed the same sentences on each of them namely count 1, 15 years imprisonment. Count 2, 3 years imprisonment. Count 3, 15 years imprisonment.

10 12 August 1999 the second incident occurred at about 20:00 at the house of Mr and Mr Bell at 18 Constantia Road, Freeway Park, Boksburg. It was dark. They returned home with their daughter in Mr Bell's Toyota Prado Land Cruiser 4 x 4. They had just entered through the electrically controlled gate and were waiting in the driveway for the
15 gate to close behind them before getting out to open their second gate when they were set upon by a gang of four robbers.

Mr Bell saw one of them [indistinct] a handgun and using an unusual grip. He gripped the bud of the gun with both hands out stretched. What was unusual was that he did not hold the gun
20 vertically in the normal manner but twisted horizontally in aiming it at Mr Bell. Mr Bell got out of the bell and put up a show of resistance. The armed robber fired a warning shot into the ground near Mr Bell's feet. Mr Bell then fell back. A second shot was nevertheless directed at Mr Bell, it struck him and shattered the bones of his left hip. Mr PJ Fourie
25 lived across the street from Mr Bell. He had heard the first sounds of

the confrontation between Bell and his assailants and had realized at once that Bell was being robbed. Fourie had immediately taken out his own handgun, a CZ75 9mm pistol and had hurried to his own front door. He had heard the first shot fired at Bell.

5 When Fourie reached his own front door and had opened it the confrontation between the armed robber and Bell had taken place directly in front of him at a distance that he estimated at no more than 10 to 15m. The scene had been lit by a nearby streetlight. Fourie had seen the armed robber fire the second shot at Mr Bell and had seen Bell
10 fall to the ground. Then another of the robbers had jumped into the driver's seat of Bell's Toyota Prado and had started to reverse it down Bell's drive.

The robber who had shot Bell ran out of the driveway and turned to run down the street. Fourie had had the opportunity to take a steady
15 aim at him and he fired a shot at him. He believed that the shot must have struck the robber but it had not brought him down.

He had seen another man climb into the Toyota Prado. He had also seen a white hatchback car reverse into the street from the driveway of the Stols' two doors down the street from the Bell's house.

20 The robber whom Fourie believed that he had wounded had evidently escaped from the scene either in the white hatchback or in the Toyota Prado. Fourie was not able to identify any of the robbers.

Ms Stols also testified. She had seen the white hatchback turn into her driveway and stop. She had seen three men emerge and go
25 into the direction of Bell's property. She had seen that a fourth man had

remained in the driver's seat of the white hatchback. She had heard the shooting, then she had seen the white hatchback reverse out of her drive and seen it drive away together with Bell's Toyota Prado. She had not been able to identify any of the robbers however she was able to
5 say with certainty that a fourth robber had been involved.

The robbers made off with the Toyota Prado. The police who came to the scene soon afterwards found two empty 9mm cartridges and put them away carefully. As will be seen below the browning pistol C83197 that had been taken with Dr Montalbano's other possessions on
10 the 26th of July 1999 was recovered at a later stage in September 1999. Ballistic evidence established that one of the two cartridges found by the police at the Bell's premises on the 12th of August 1999 had been discharged by Dr or from Dr Montalbano's browning pistol that had been stolen in the robbery on the 26th of July 1999.

15 This incident at the Bell's house gave rise to a further four charges namely count 4, robbery with aggravating circumstances relating to the forcible taking of Bell's Toyota Prado and his cell phone and other possessions.

Count 5, the attempted murder of Mr Bell. Count 6, unlawful
20 possession of arms and count 7 unlawful possession of ammunition in contravention of Section 36 of Act 75 of 1969.

The Magistrate held that all four accused had been proved guilty on all four of these charges with one exception he imposed the same sentences on all of them namely count 4, 15 years imprisonment.
25 Count 5, 10 years imprisonment for the 1st, 2nd and 4th accused and 15

years imprisonment for the 5th accused because he was held to have fired the shot that wounded Mr Bell and represented the attempt to murder him. Count 6, 3 years imprisonment. Count 7, 1 year imprisonment.

5 26 August 1999 the third incident occurred sometime between 17:30 and 19:30 after dark on the 26th of August 1999 in the driveway of a property in Dinsley Road Freeway Park Boksburg. Mr MA Scruby together with his wife and two young children had just arrived there in their Volkswagen VL6 Jetta to have dinner with Mr Scruby's parents.

10 As Mr and Ms Scruby had stopped in the driveway and emerged from the front doors and were about to open the back doors to lift the children out three men quickly came up the driveway. Two of them were armed with silver colored pistols. The two armed men went to either side of the car. One pointed his pistol at Mr Scruby and took the car
15 keys from him. The other pointed his pistol at Ms Scruby and relieved her of her handbag. The third man also came up on the driver's side of the car, took over the car keys and climbed into the driver's seat.

 Mr and Ms Scruby had removed the two children from the backseat. At this stage the robbers took a number of their personal
20 possessions and also cash from their persons. When the children were out the two armed robbers got into the car and drove away steeling not only the car and the possessions and cash taken from the persons of Mr and Ms Scruby but also various possessions that had been carried in the car.

25 Mr and Ms Scruby were not able to identify any of the robbers

who had assailed them. This incident gave rise to a further two charges namely count 8, robbery with aggravating circumstances relating to the forcible taking of Ms Scruby's Volkswagen VL6 Jetta and the cash and various possessions taken from them and count 9 unlawful possession
5 of arms.

The Magistrate held that all four of the accused had been proved guilty on each of these counts. He imposed the same sentences on all of them namely count 8, 15 years imprisonment. Count 9, 3 years imprisonment.

10 28 September 1999 the fourth incident occurred sometime between 19:00 and 20:30 when it was dark on the 28th of September 1999. A radio message was broadcast over the police frequency asking police in the vicinity of Freeway Park to keep a lookout for a white Volkswagen GTi Golf with registration number FRK464GP. At that stage
15 Sergeant SJ Botha and Sergeant P Abdele of the East Rand Flying Squad of the SAPS were patrolling in a police car in or near Freeway Park. They received the radio message.

Not long afterwards they saw the white Volkswagen Golf in question coming towards them without lights. Sergeant Botha who was
20 driving the police car turned and followed the Volkswagen Golf and switched on the flashing blue lights of the police car with the view to stopping the car, however the Golf responded by increasing its speed in an obvious attempt to escape. Sergeant Botha gave chase.

The Golf raced past a stop sign without stopping and through a
25 number of red traffic lights and it also made a number of left and right

turns, however it was unable to shake off the pursuing police car. Eventually they came to what Sergeant Botha described as an S-bent where traffic had first to make a left turn followed within a short distance by a right turn. As the Gold entered the S-bent and made the left turn
5 both Sergeant Botha and Sergeant Abdele noticed two shining objects fly out of the left rear window of the Golf. The Golf then made the right turn and some 15m after completing the S-bent it suddenly stopped a distance of some 45 or 50m beyond the point where the shiny objects had been ejected.

10 Sergeant Botha stopped the police car 10m behind the Golf. He and Sergeant Abdele then approached the Golf carefully. They ordered the occupants of the Golf to get out one at a time. Accused 4 emerged from the driver's seat. It is common cause that the Golf which is to be seen in the photographs in EXHIBIT B, is accused 4's car. Accused 1
15 emerged from the front passenger seat. Accused 2 came out of the left rear seat beside the window out of which the shiny objects had been seen to fly. Accused 5 emerged from the right rear seat behind the driver's seat.

The Sergeants secured the scene evidently by satisfying
20 themselves that the four men were not armed and by making them lie face down on the ground at a distance from each other. Sergeant Botha then left Sergeant Abdele on guard over the four men while he went to see what shiny objects had apparently been thrown from the Golf.

At the spot in question he found a silver colored browning pistol
25 and two magazines one of which were silver colored and the other

black. Sergeant Botha asked the four occupants of the Golf about these objects, each of them denied all knowledge of them. He arrested the four men on a charge of unlawful possession of an arm and took them to the police station. A docket was opened.

5 The browning pistol was sent to the police laboratories for ballistics examination and tests. The charge on which the four accused had then been arrested was not pursued. Presumably it was not found feasible to prove joined possession of the pistol on the part of all four of them, nor could possession by any particular one of them be proved on
10 the available evidence. In any event the four accused were released.

 At a later stage patient and thorough police work for which in my view the investigating officer Sergeant GS Cloete of the Organized Crime Unit at Springs and the remainder of the team who contributed to it are to be commended, established further relevant facts about this
15 browning pistol. As a result of what they had established a number of admissions were made by defense in terms of Section 220 of Act 51 of 1977 and recorded in EXHIBIT D.

 The facts admitted include the following –

- 20 1. The silver colored 9mm browning pistol retrieved by Sergeant Botha on the 28th of September 1999 was number C83197 the property of Dr E Montalbano.
2. This pistol had been taken from the possession of Dr Montalbano in the course of an armed robbery on the 26th of June 1999. Note, having regard to the other evidence in the
25 matter the reference in EXHIBIT D to 26th of June 1999 is an

obvious error for 26th of July 1999.

3. Of the two empty 9mm cartridge cases found by the police at the scene of the robbery and wounding Mr Bell on the 12th of August 1999 one had been discharged in the browning pistol C83197 as stated in the ballistics report EXHIBIT K made by Inspector G Kloppers in terms of Section 212(4)(a) and 212(8)(a) of Act 51 of 1977. Note, the admission made in EXHIBIT D is that both of the two cartridge cases found on the scene of Mr Bell's wounding had been discharged in the same pistol, however having regard to the contents of EXHIBIT K it is clear that another error was made in the admissions. The only admission that was justified was that the single 9mm Parabellum caliber cartridge found on the scene of the crime was established to have been discharged in Dr Montalbano's pistol. The other cartridge was not linked to any gun. This fourth incident did not give rise to any of the thirteen charges on which the four accused were triad.

1 November 1999 the fifth incident occurred at about 19:00 in the evening after dark on the 19th of November 1999, on the 1st of November 1999 at 16 Scribante Street, Libradeen Boksburg die home of Ms BJ Petersen. She has been referred to in the annexure to the charge sheet as Brenda Patterson. Ms Petersen had just arrived home in her BMW 325i. She had opened the garage door by hand and had switched on the florescent lights that illuminated the interior brightly and also the lights outside the garage. Then she had driven her car into the

garage.

Before she could get out of her car in the garage a man had appeared at the driver's window with a gun in his hand. He had threatened to shoot her. He had pulled her out of the car and put his
5 gun against the back of her head. A second man also with a gun had [indistinct] up against her back. Together they had pushed her to the front of the car. She had seen a third man in the garage, he had locked the door that lead from the garage to the house.

The two men with guns had pulled her gold chain she was
10 wearing over her head. Had taken her other jewelry her watch, "et cetera" a term that evidently included the car keys. Then they had forced her to the ground inside the garage. The first man to have accosted her had got into the driver's seat of her BMW. He had reversed out of the garage. The other two had evidentially also got in
15 and they had driven away with a number of Ms Petersen's possessions in the BMW.

This incident gave rise to a further two charges namely count 10, robbery with aggravating circumstances relating to the forcible taking of Ms Petersen's BMW 325i and other possessions and count 11, unlawful
20 possession of arms.

The trial Magistrate found that accused 1 and accused 4 had been proved guilty of both of these offences. He sentenced each of them to the same punishments namely count 10, 15 years imprisonment. Count 11, 3 years imprisonment.

25 6 December 1999 the sixth incident occurred at about 20:00

after dark during the evening of 6 December 1999 at 36 Overkruinstraat, Heidelberg the home of Mr Gerald John Pike. Mr Pike came home at that hour in his Toyota Prado Land Cruiser registration number 777SLYGP. He opened the electronic gate to the drive by remote
5 control, drove in, opened the electronic doors to the garage by remote control, drove into the garage and stopped.

Before he could get out of the car two men with handguns appeared in the driver's, on the driver's side and pointed their guns at him. One of them used an unusual two handed grip. He held his arms
10 out stretched with the handgun held in both hands and what was unusual was that he did not hold the pistol vertically in the normal manner but twisted his arms to hold it horizontally.

The two robbers ordered him to climb out of the car, not to look at them and to lie face down on the ground which he did, however he
15 had already had a good view of their faces. They then robbed Mr Pike of various possessions on his person. One of them got into the driver's seat of the Toyota Prado and reversed down the drive to the street while the other stood guard over Mr Pike. Then the guard ran down to the Toyota Prado and jumped in and they drove away.

20 This incident gave rise to a further two charges namely charge 12, robbery with aggravating circumstances relating to the forcible taking of Mr Pike's Toyota Prado and other of his possessions and count
13 unlawful possession of arms.

The Magistrate found that accused 4 and accused 5 had both
25 been proved guilty of each of these offences. He sentenced them to the

same punishments namely count 12, 15 years imprisonment. Count 13, 3 years imprisonment.

In the result the position of each of the four accused was the following.

- 5 1. Accused 1 was found guilty on each of counts 1 to 11 and not
 guilty on count 12 and 13. The sentences imposed on him if
 served successively would run for a total of 98 years. The
 Magistrate ordered that some of the sentences should run
 concurrently with others so that accused 1 will effectively serve a
10 term of 70 years imprisonment.
2. Accused 2 was found guilty on each of counts 1 to 9, not guilty on
 counts 10 to 13. The sentences imposed on him if served
 successively would run to a total of 80 years. The Magistrate
 ordered that some should run concurrently with others so that
15 accused 2 would effectively serve a total of 55 years
 imprisonment.
3. Accused 4 was found guilty on all 13 counts. His sentences
 totaled 116 years. The Magistrate ordered some to run
 concurrently with other so that the effective sentence became 85
20 years imprisonment.
4. Accused 5 was found guilty on counts 1 to 9 and counts 12 and
 13 and not guilty on counts 10 and 11. His sentences totaled 98
 years. The Magistrate ordered that some should run concurrently
 with others so that accused 5's effective sentence would total 75
25 years imprisonment.

I turn now to consider in the light of the arguments advanced on appeal by Mr Myburgh for accused 1, 4 and 5 and by Mr Tukwane for accused 2 and by Mr Schutte for the State to what extent if at all the evidence at the trial justified the various convictions.

5 There was no dispute about the fact that the robberies had all been committed. What is an issue is whether there were evidence that placed the identification of each of the four accused respectively as one of the robbers involved in each incident in respect of which he had been convicted. I proceed to sum up the relevant evidence on that aspect.

10 Almost immediately after the first incident which had occurred on the 26th of July 1999 at the Montalbano's house the police were alerted to a tracking signal being sent out from Dr Montalbano's red Mazda MX5. Inspector van Wyngaardt of the SAPS testified that he accompanied by a female Inspector Cronjé and Sergeant Timpit had
15 followed the signal. It had led them to house number 13539 in Seakwane Street, Kwatema and in particular to the garage of that house. A woman was living in the house. She had denied knowing how the Mazda had come to be in the garage.

 It is accused 2's case that he is a taxi owner and that he has two
20 houses one of which is number 13539 in Seakwane Street. However he testified that he had not been living at 13539 at the time because some alterations were being affected there. One of his girlfriends had been staying there.

 Accused 2 admitted that he had paid a visit to 13539 on the 26th
25 of July 1999 apparently shortly before the police had arrived there. He

had been surprised to find that a red Mazda was parked in the garage. He had no idea how it had come to be there. He had opened the door and got into the Mazda to look at it and to see if there were indications of whose it was. He accepts that he left fingerprints in the Mazda. In
5 terms of Section 220 of Act 51 of 1977 he admitted in EXHIBIT D that fingerprints found inside the Mazda were correctly identified as his own, however he denied all knowledge of the robbery.

According to the evidence of Inspector van Wyngaardt the keys of the Mazda were found in house 13539 on the 26th of July 1999 by
10 female Inspector Cronjé. The police drove the Mazda back to the police station at Boksburg North. There it was returned to its owner Dr Montalbano within about three hours of the robbery.

The Landrover Freelander was said to have been recognized and recovered shortly afterwards either at Komatipoort or at Northern
15 Kwa-Zulu Natal near the Maputo border. It was returned to Ms Montalbano. Its recovery did not occur in circumstances that linked any of the accused to the robbery.

Shortly after this incident on the 26th of July 1999 Ms Montalbano assisted the police by putting together identikit pictures of
20 three of the four robbers that she had seen that day. These pictures became EXHIBITS A1, A2 and A3 at the trial. Ms Montalbano testified that EXHIBIT A1 was a picture giving a fair resemblance of the first accused although he had afterwards altered his appearance to an extent by shaving his head or having his hair cut very close to the scalp.
25 She also testified that EXHIBIT A2 was a good resemblance of accused

4. Sergeant Stevens testified that EXHIBIT A2 had enabled him to recognize accused 4. He stated further that when after accused 4's arrest he had shown EXHIBIT A to accused 4, accused 4 had voluntarily acknowledged that it was a picture of himself. These identikit pictures
5 played a further role that I shall mention later. It was in connection with the first accused's photographs of, of six persons including, five or six persons including all four of the accused.

Ms Montalbano testified that on the 2nd of August 1999 only a week after the robbery she had seen accused 4 a second time. She
10 had been driving and he too had been driving in his white Volkswagen Golf. At an intersection she had seen him drive into the intersection from the side. He has very distinctive facial features and a yellowish skin. She had recognized him at once with a shock.

The second incident and the robbery and shooting at Mr Bell
15 occurred on the 12th of August 1999. As already mentioned Mr Fourie testified that he had shot at and believed he had struck the robber whom he had seen fire at and wound Mr Bell. Three days later on Sunday the 15th of August 1999 Detective Sergeant Edge Siboya of the Murder and Robbery Squad of the SAPS at Germiston acting on
20 information he had received went to the house of accused 5.

He found the 5th accused at home with a pajama jacket over his upper body. Sergeant Siboya could see that the 5th accused was bandaged from his right shoulder and all around the upper part of his chest. He questioned the 5th accused about the robbery of Mr Bell on
25 the 12th of August 1999 and how the 5th accused had come to be

injured. The 5th accused made a statement that was reduced to writing the next day the 16th of August 1999 and it became EXHIBIT S at the trial. EXHIBIT S raises an alibi defense. The 5th accused is there said to be a taxi driver who [indistinct] routes from Kwatema to Springs
5 and Tsakane. The 5th accused knows denying where Freeway Park is. He claims that on the 12th of August 1999 he had worked in his taxi as usual from 05:30 in the morning to 19:30 in the evening and had then parked the taxi at his house at Tsakane.

Then he had gone out with his girlfriend Nxtehebo [indistinct].
10 They were walking to a bus stop. Two unknown men had come up from behind and tried to abduct Nxthebo. There was an altercation, Nxthebo ran away and the accused 5 was shot by one of the unknown men. A passing motorist whom he cannot identify took him to the Bopulong Medical Centre where he had been treated by Dr Moses and
15 discharged. The 5th accused did not report the incident to the police.

Detective Sergeant Siboya arrested the 5th accused on suspicion of involvement in the robbery on the 12th of August 1999 but there was insufficient evidence and the 5th accused was again released.

At a much later stage on the 7th of December 1999 the 5th
20 accused was again arrested. The investigating officer Sergeant Cloete took the 5th accused out to test the veracity of his alibi in EXHIBIT S. He testified that the 5th accused had been unable to put him in touch with the alleged girlfriend Nxthebo [indistinct], that Bopulong Medical Centre had no record of having treated the 5th accused as alleged or at
25 all and that enquiries at Bopulong Medical Centre indicated that there

was no Dr Moses there as alleged by the 5th accused. The 5th accused did not go into the witness box to defend his alibi.

The robbery of Mr Scruby occurred on the 26th of August 1999. He lost his Volkswagen VR6 and other possessions. I have mentioned
5 the incident on the 28th of September 1999 when all four accused were found in accused 4's Volkswagen Golf from which a pistol that was later identified as Dr Montalbano's had been thrown with two magazines. All four accused were then arrested but released. In the case of accused 5 this was his second arrest on suspicion and his second release for want
10 of sufficient evidence.

On the 1st of November 1999 Ms Petersen was robbed of her BMW 325i and other possessions. On the 3rd of November 1999 Sergeant Cloete discovered some important facts relevant both to the robbery of Mr Scruby on the 26th of August and the robbery of Ms
15 Petersen on the 1st of November 1999. His first discoveries related mainly to the robbery of Ms Petersen and the involvement of the first accused.

Sergeant Cloete acting on information received went in the early hours on the 3rd of November 1999 to 72 Cladvalley Street Kwatema
20 where he believed that the 1st accused lived. A man who identified himself as the 1st accused's father informed him that the 1st accused lived in an outside room. Sergeant Cloete knocked at the door of the room so indicated. It was opened by a woman who denied that the 1st accused was there. Sergeant Cloete found signs that the 1st accused
25 had very recently climbed out of the window and fled. His bed was

warm and there were footprints in soft earth outside the window. Condensational dust on the window had been disturbed.

In the 1st accused's room Sergeant Cloete found a number of items of importance. First he found two sets of BMW keys. One set
5 operated a BMW that was on the premises. The second set of keys operated a similar model of BMW that was found across the street at number 75 Cladvalley Street. Sergeant Cloete attached both BMWs, the one at 75 Cladvalley Street whose keys had been beside the 1st accused's bed was identified as the BMW stolen from Ms Petersen two
10 days earlier. It was restored to her.

Second Sergeant Cloete found two photographs in the 1st accused's room. One was a photograph of the 1st accused himself. This helped him to track the 1st accused down. The second photograph was a group of five men that was later found to include all four of the
15 accused. I refer above to the three identikit pictures EXHIBITS A1, A2 and A3 that Ms Montalbano had helped the police to prepare after the robbery on the 26th of July 1999.

Sergeant Cloete by comparing the identikit pictures with the photographs was he said able to identify the 1st accused and the 4th
20 accused as two of the persons in the group photograph. This helped him in tracking down both the 1st accused and the 4th accused.

Third Sergeant Cloete found men's watches and jewellery, rings and chains in a cupboard beside the 1st accused's bed. One of the watches was a "time" watch that Mr Scruby positively identified as a
25 watch taken from him during the robbery on the 26th of August 1999.

The strap had began to break and Mr Scruby had himself repaired it in a way that enabled him to say with complete certainty that the watch recovered from the 1st accused's room was his own.

At the trial the 1st accused went into the witness box and met
5 this evidence that at first sight linked him with the robberies of Mr Scruby on the 26th of August and Ms Petersen on the 1st of November with a denial that he had been the occupant of the room in which these articles including the keys to the stolen BMW had been found. Cross-examination revealed him to be a very unreliable witness and that his
10 attempts to distance himself from the articles found in the room could not reasonably possibly be true.

One of the inconsistencies in his evidence was that the time watch which had been found in the room of which he had first denied being the occupant had nevertheless been given to him by his brother
15 Mandla who he said claimed to have bought it from an unidentified person in the street.

Sergeant Cloete's next important discovery also on the 3rd of November 1999 related to the involvement of the 2nd accused. On the strength of information from an informer and suspecting that the 2nd
20 accused had been concerned in the robbery of Ms Petersen on the 1st of November Sergeant Cloete went to the address of one of the 2nd accused's two houses namely the house at 13539 Seakwane Street in Kwatema. On this occasion the 2nd accused was at home.

Sergeant Cloete arrested him and searched the house. He
25 found certain items that he attached on suspicion that they were stolen

goods. They included,

1. A Casio digital camera.
2. What he described as an attorney's briefcase in the garage
and
- 5 3. Some jewellery.

After further investigation Sergeant Cloete concluded that he could not prove that the 2nd accused was linked with the robbery of Mr Petersen on the 1st of November. He therefore released the 2nd accused who had meanwhile been cooperative and had agreed to assist Sergeant Cloete
10 in his investigations.

Sergeant Cloete continued his investigations. What he then discovered was that the briefcase he had taken from the 2nd accused's house contained a pay slip from Coke Cola relating to Mr Scruby. Following up this lead he got into touch with Mr Scruby and established
15 from him that,

- a. He had been robbed of his Volkswagen Jetta VR6 and its contents on the 26th of August.
- b. That the contents that had disappeared with the car had included both the briefcase described by Mr Scruby as a pallets case and
20 the Casio digital camera both of which had been found at the 2nd accused's house and
- c. That on the same occasion Mr Scruby had been robbed of the time watch that Sergeant Cloete had found in the 1st accused's room and that Mr Scruby could positively identify as his own.

25 Mr Scruby also positively identified the pallets case and the digital

camera as his own. The camera had pictures of his family stored in its memory.

Although Sergeant Cloete had released the 2nd accused because he had not known of any link with the robbery of Scruby and
5 could not prove the suspected link with the robbery of Ms Petersen Scruby's information plainly established some link between the 2nd accused and the robbery of Scruby. In addition the 2nd accused having agreed to cooperate with Sergeant Cloete later provided some information that indicated that he had some knowledge of the Scruby
10 robbery. At a much later stage on the 22nd of December 1999 the 2nd accused informed Sergeant Cloete that the Volkswagen Jetta VR6 that had been stolen from Scruby on the 26th of August had been recovered by the police at Vryheid. Next day 23rd of December 1999 Sergeant Cloete accompanied Mr Scruby to Vryheid and Scruby there identified
15 his Volksagen Jetta. It was brought back to the Witwatersrand and eventually handed over to the insurance company that by then had rights to it.

On the ground of all these links Sergeant Cloete came to the conclusion that he had a strong case against the 2nd accused of
20 involvement in the robbery of Mr Scruby on the 26th of August. It now became necessary for him to find the 2nd accused again.

Meanwhile on the 6th of December 1999 Mr DG Pike had been robbed of his Toyota Prado and other possessions in Heidelberg. Sergeant Cloete received information that enabled him to send out
25 Sergeant Stevens and Sergeant Smith next day 7th December with

orders to look out for accused 4 whose appearance was known from Mr Montalbano's identikit EXHIBIT A2 and from the group photograph found in the 1st accused's bedroom on the 3rd of November.

It was also known to accused 4, it was also known that accused 5 4 would be driving on a particular route in his white Volkswagen Golf with registration number FAK464GP. With that information Sergeants Stevens and Smith were indeed able to stop and to arrest accused 4 that day on a charge of robbing Mr Pike of his Toyota Prado on the 6th of December.

10 In accused 4's possession, on his person they found a gold wedding ring with two diamonds in each of four rows, a gold watch, a gold chain and a Motorola cell phone. They attached these items as suspected stolen property.

According to the evidence of Sergeants Stevens and Smith 15 accused 4 although not admitting any involvement was quite cooperative. He voluntarily guided them to a house in Highlands in Kwatemba, house number Clacula Street where a Toyota Prado with registration number 777SLYGP was standing. Accused 4 so voluntarily pointed out who was involved in the robbery according to him. He took 20 Sergeants Stevens and Smith to the house of accused 5's father.

Accused 5 was found there and accused 4 identified him as London Tshabalala. They arrested accused 5 on a charge of robbing Mr Pike on the 6th of December. Accused 4 and accused 5 were then lodged at the cells at the Boksburg Police Station.

25 On the 8th or 9th December 1999 Mr Pike identified both his

Toyota Prado that had been recovered from 2239 Clacula Street Kwatamba and his personal possessions that Sergeants Stevens and Smith had found on the person of accused 4 namely the gold diamond ring, the gold watch, gold chain and the cell phone. These

5 identifications pointed to the conclusion that accused 4 had been one of the robbers who had assailed Mr Pike on the 6th of December 1999.

On the 14th of December 1999 according to the evidence of Sergeant Bester or on the 14th of January 2000 according to the evidence of Sergeant Cloete a police detachment of which they were
10 members acting on information received went to room 511 in the Europe Hotel in Claim Street Hillbrow and there found and arrested accused 1. They recognized him by Ms Montalbano's identikit and from his own photograph taken by Sergeant Cloete from his outside room at his father's house in Kwatamba on the 3rd of November.

15 On the 11th of January 2000 according to the evidence of Sergeant Cloete he received information that accused 2 was hiding at 972 Squareview Street Geluksdal. Next day 12th of January Sergeant Cloete went there, found accused 2 and arrested him. All four accused were now in custody.

20 Next day, 13th of January 2000 the first of two identification parades was held. If Sergeant Cloete's evidence was correct this was the very day of the arrest of the 1st accused in the early morning. The identification parade was held at 14:00 at the Boksburg Police Station.

EXHIBIT D purports to contain an admission by all four accused
25 in terms of Section 220 of Act 51 of 1977 that an identification parade

was held on the 1st of January 2000. This is an obvious error. Form SAP329 relating to the identification parade copies of which are EXHIBITS E, F and G and which had been admitted to be correct show that the first identification parade was held on the 13th of January 2000
5 at 14:00.

Each of the 1st, 2nd, 4th and 5th accused was on the parade. It involved a lineup of 32 men. In EXHIBIT D it is also being admitted by all four accused in terms of Section 220 that there was no irregularity in the conduct of the identification parade and that the results had been
10 correctly recorded. It is admitted that Mr N Bell who had been robbed on the 12th of August had pointed out only the 5th accused as one of the robbers. Mr Bell's evidence in court was that he had had a clear view of the 5th accused as the robber who had held his gun in the curious way already described and who had shot and wounded him.

15 In the case of each identification of an accused the identifying witness was asked in the course of his evidence in chief to state the lighting conditions, his opportunity for observation and the features by which he claimed to be able to recognize the accused whom he identified as a robber. In each case the witness was closely cross-
20 examined on these particulars. I do not intent to repeat the particulars of each of these examinations other than to say that I am satisfied that they were conducted with due care and thoroughness in each case.

In the case of Mr Bell he was induced to concede in cross-examination that there was a possibility that he might be mistaken in his
25 identification of the 5th accused. The Magistrate was by no means

satisfied that this concession created a reasonable doubt as to whether the 5th accused had been one of the robbers. Mr Bell's concession was plainly made on the basis that anything is possible. A remote possibility is by no means sufficient to find a reasonable doubt. The Magistrate
5 found that Mr Bell's concession of possible error was made in such circumstances as not to create a reasonable doubt.

It is also admitted in EXHIBIT D that Ms P Petersen who had been robbed on the 1st of November had pointed out the 1st accused at the identification parade as one of her assailants. In her evidence at the
10 trial Ms Petersen stated that he had been the second of the two robbers who had accosted her with guns on the occasion in question. It is further being admitted in EXHIBIT D that Mr DG Pike who had been robbed on the 6th of December had pointed out both the 4th and the 5th accused at the identification parade as two of his assailants each of
15 whom had pointed a gun at him.

In his evidence in the trial he identified the 5th accused as the one who had first, who had at first been closest to his driver's window, who had held his gun with the same unusual twisted two handed grip that Mr Bell had described, who once he was lying down had kicked him
20 in the face and who had kept guard over him whilst the other robber had reversed the Toyota Prado out of the garage and into the street.

He identified the 4th accused as the robber who also pointed a gun at him, had warned him not to look at the robbers, had climbed into the driver's seat and reversed the Toyota into the street.

25 The second identification parade was held on the 2nd of June

2000 at 10:45 at Boksburg Police Station. Again all four accused were on the parade. In EXHIBIT D it is admitted that the accused, by the accused in terms of Section 220 that there were no irregularities in the conduct of this identification parade, that it was correctly recorded in
5 EXHIBIT J being form SAP329 duly completed and that the result had been that Ms Yvette Montalbano had pointed out accused 4 as one of the four assailants who had robbed her on the 26th of July 1999.

In her evidence at the trial Ms Montalbano stated that accused 4 had been the person she had first noticed in the garage with a gun in
10 his hand and who she had initially mistaken for a security guard until he had made it plain that he was a robber and had demanded her car keys. Accused 4 was also the person she had recognized a week later driving a white Volkswagen Golf.

A few days after the second identification parade had been held
15 the trial began in the Regional Court for the Southern Transvaal held at Boksburg. The four accused were all represented by Mr Hoffman, they all pleaded not guilty and tendered no plea explanation.

The evidence that I have summarized was placed before the Magistrate. It was expanded in two particular respects that should be
20 mentioned. Ms Montalbano who had not been present at the first identification parade and who had pointed out only accused 4 at the second identification parade testified that she had in fact seen the 1st accused at the second identification parade. As he had cut his hair very short she had decided not to point him out for fear that if she was
25 mistaken it would detract from the force of her identification of the 4th

accused of whose identity she was entirely certain. However when she saw the 1st accused in the dock she felt able to identify him with certainty.

The Magistrate considered that particularly in the light of the fact
5 that Ms Montalbano had been able to put together an identikit picture that bore sufficient resemblance to the 1st accused to be of assistance in the police enquiries he could give some weight to this dock identification of the 1st accused notwithstanding Ms Montalbano's failure to point him out at the identification parade.

10 Ms Petersen also testified that although when she had attended the first identification parade she had pointed out only the 1st accused. She had in fact recognized the 4th accused on that identification parade as the first armed assailant who had threatened to shoot her and had actually pulled her out of her car. When she had seen him at the
15 identification parade she had detected some frightening menace in his gaze and had been too intimidated to point him out. In the courtroom she felt bolder and identified him to the Magistrate as one of the robbers.

The Magistrate was not prepared to reject this dock identification
20 as carrying no weight, however he approached it with due caution. He considered that it was not sufficient on its own without some corroborative evidence to convict accused 4 on counts 10 and 11.

At the trial Dr Montalbano testified that he had been to the Boksburg Police Station on four occasions to attend an identification
25 parade and that on each occasion no identification parade had been

held. On the fifth occasion when an identification parade had indeed been held he had been detained in the operating theatre and had been unable to attend.

He identified the 1st accused as a robber who had first come up
5 to him on the 26th of July 1999 and had pushed a gun up against his stomach. He also identified the 5th accused as a robber who had put another gun to his left temple. Finally he identified the 4th accused as a robber who had pointed a gun at his wife. Whilst he was completely certain of his identifications of the 1st and 4th accused he conceded at
10 the outset that he could not say that he was 100% sure of his identification of the 5th accused.

The Magistrate characterized Dr Montalbano as an excellent and careful witness. He was impressed by the candor with which Dr Montalbano admitted a small measure of doubt about the 5th accused.
15 He considered that this entitled him to rely with greater certainty on Dr Montalbano's statement that there could be no room for error in his identification of the 1st and 4th accused even though it was an identification of them in the compromising situation of the accused persons in the dock. I find no fault with the Magistrate's approach to the
20 evaluation of Dr Montalbano's evidence.

The 1st accused testified in his own defense. He denied all knowledge of any of the robberies. He denied being the occupant of the outside room behind his father's house of which he was said to be the occupant and in which a number of articles stolen respectively from Ms
25 Peteresen, the BMW keys, Mr Scruby the time watch were found. He

failed badly in cross-examination. The Magistrate concluded that his evidence could not reasonably possibly be true and he rejected so much of it it was inconsistent with the acceptable evidence of the prosecution witnesses.

5 The 2nd accused also testified in his own defense. He too denied all knowledge of the robberies and other crimes with which he was charged. Denying that he have hidden from the police he claimed to have owned two houses for some time, one at 13539 Seakwane Street, Kwatema to which Dr Montalbano's Mazda MX5 had been traced
10 on the 26th of July and the other at 972 Squareview Street Geluksdal. He claimed to live in both houses. He denied that only the Kwatema house was furnished for living in and denied the police's evidence that the Geluksdal house where he was found was barely furnished.

 He too failed badly in cross-examination. The Magistrate
15 rejected his evidence as not reasonably possibly true where it conflicted with the acceptable evidence of the prosecution witnesses.

 The 4th accused chose not to testify. The 5th accused also chose not to testify. His version as to how he came to be wounded in a shooting incident on the 12th of August 1999 at about the time when the
20 robber who shot and wounded Mr Bell was himself shot and wounded by Mr Fourie was before the court in the form of his police statement EXHIBIT S. I have already dealt with Sergeant Cloete's attempt to verify the alibi set out in that exhibit.

 To sum up the evidence before the trial court provided the
25 following connections between the four accused and the various

incidents and charges. 26 July 1999 counts 1, 2 and 3 a gang of four robbers were seen to execute the robbery. The 1st accused was positively identified in the dock by Dr Montalbano at the trial and seen to hold an point a gun at the scene of the crime. Shortly after the robbery

5 Ms Montalbano made up an identikit that helped in tracing accused 1. Ms Montalbano failed to point out accused 1 at the identification parade on the 2nd of June 2000 and gave the explanation that she, that he had altered his appearance by cutting his hair close to the scalp. Mr Montalbano nevertheless identified accused 1 in the dock at the trial.

10 2nd Accused owned the house and garage in which the Mazda MX5 stolen from Dr Montalbano was found by Inspector van Wyngaardt very shortly after the robbery. The 2nd accused's fingerprints were found in the Mazda. The 2nd accused's explanation of how this had occurred was rightly rejected and not reasonably possibly true. The inference

15 that the 2nd accused was one of the robbers is irresistible, however there is no evidence that the 2nd accused was in possession of a gun as alleged in count 2. There was no justification for his conviction on count 2.

The 4th accused was positively identified by Ms Montalbano at

20 the identification parade on the 2nd of June 2000 and again at the trial. He was also identified in the dock by Dr Montalbano. Both witnesses testified that he had pointed a gun at Ms Montalbano.

The 5th accused has pointed a gun at Dr Montalbano's left temple and was seen by Dr Montalbano face to face at a distance of

25 about 40cm in good light. Dr Montalbano identified him in the dock at

the trial and conceded that he was no 100% sure.

On this occasion one of the articles stolen from Dr Montalbano was the browning pistol. That pistol was proved to have been used to shoot Mr Bell on the 15th of August 1999. Mr Bell who identified the
5 person who had shot him as the 5th accused. Mr Bell's identification was made both at the identification parade held on the 11th of January 2000 and at the trial.

Dr Montalbano's pistol was retrieved on the 28th of September 1999 after it had been thrown from the 4th accused's white Volkswagen
10 Golf in which the 1st, 2nd, 4th and 5th accused were travelling together. That the 1st, 2nd, 4th and 5th accused were good friends was established by the photograph showing them together found in the 1st accused's room on the 3rd of November.

In the absence of evidence to the contrary that might reasonably
15 possibly be true the Magistrate was in my view correct to conclude that on all the evidence relevant to counts 1, 2 and 3 all four accused were guilty as charged with a single exception. There was no evidence to justify the conviction of accused 2 on count 2.

12th of August 1999 counts 4, 5, 6 and 7 the robbery and
20 attempted murder of Mr Bell. A gang of four robbers were seen to execute this crime. Accused 5 was positively identified at the identification parade held on the 11th of January 2000 by Mr Bell as the robbery who had shot him on the 12th of August 1999. Mr Bell described the highly unusual grip that accused 5 used to hold and point
25 the gun.

A robber who held and pointed the gun with exactly the same [indistinct] grip was described by Mr DG Pike who was robbed on the 6th of December 1999. At the identification parade a month later Mr Pike identified accused 5 as the robber who had held the gun in that strange way. There was no other direct evidence to link any of the other accused with this crime. The Magistrate considered the other evidence that showed that the four accused were friendly and on occasion operated as a gang of robbers were sufficient to justify the inference that beyond reasonable doubt they did so on the 12th of August 1999.

10 This approach was defended by Mr Schutte in argument today. There is certainly some logic in the Magistrate's conclusion however in my judgment it cannot be said to establish beyond reasonable doubt that accused 1, accused 2 and accused 4 were all implicated in counts 4, 5, 6 and 7. I consider that the appeals of accused 1, 2 and 4 against
15 the convictions on these counts must be upheld.

27th of August 1999 counts 8 and 9 the robbery of Mr and Ms Scruby. Three robbers were seen to participate in this robbery. Owing to bad light neither Mr nor Ms Scruby considered themselves able to identify any of the robbers however at the trial Ms Scruby seeing all four
20 accused in the dock had a sudden insight and believed that she was now able to recognize accused 2 after all. The Magistrate very correctly declined to attach any weight to this identification.

On the 3rd of November 1999 some of the articles stolen on the robbery came to light. Mr Scruby's time watch was found beside the 1st
25 accused's bed, Mr Scruby's briefcase containing one of his pay slips

and his digital camera containing pictures of his family was found in the 2nd accused's house. In addition while the 2nd accused was cooperating with the accused up to a point he informed Sergeant Cloete that Mr Scruby's Volkswagen Jetta had been recovered by the police at Vryheid.

5 This showed that the 2nd accused had some knowledge about the stolen vehicle.

In the absence of explanations by the 1st and 2nd accused that might reasonably possibly be true the question arises whether the inference that the 1st and 2nd accused were two of the robbers or were

10 the two robbers was correctly drawn by the Magistrate. Indeed the Magistrate went even further, he speculated that there must also have been a fourth robber driving a getaway car and because of the close association of the 4th accused and the fact that they had on other occasions committed robberies as a gang of four he concluded that all

15 four had taken part in this particular robbery.

In my judgment despite a measure of logic in the Magistrate's propositions these inferences cannot be said to be the only reasonable inferences consistent with the proved facts. Mr Myburgh argued on behalf of the 1st accused and Mr Tukwane also argued on behalf of the

20 2nd accused that the so called doctrine of recent possession could not properly be applied in the circumstances of this case. Mr Scruby was robbed of his time watch, digital camera and briefcase on the 16th of August 1999. Two months and a few days elapsed before these items were found in the possession of the 1st and 2nd accused respectively.

25 These are movable articles that are bought and sold regularly and can

change hands rapidly.

Neither the 1st nor the 2nd accused gave truthful evidence. Nevertheless it seems to me that there is room for a doubt that is indeed a reasonable doubt as to whether the 1st or 2nd accused were
5 participants in the robbery of Mr Scruby. There was no evidence to link accused 4 or accused 5 with the robbery in any way. Therefore in my judgment the convictions of all four accused on counts 8 and 9 must be set aside.

1st of November 1999 counts 10 and 11 the robbery of Ms P
10 Petersen. Three robbers were seen to take part in this robbery. Two days of the robbery the keys of Ms Petersen's BMW are found beside the 1st accused's bed. The BMW itself was found in the premises of the house across the road. The evidence showed that work was under way to disguise Ms Petersen's BMW as a similar BMW on the 1st accused's
15 premises the engine of which was giving trouble.

Ms Petersen who is trained as an artist and is observant of facial features prepared identikits of the three robbers. These have been lost. At the identification parade held on the 11th of January 2000 Ms Petersen positively identified the 1st accused. She also saw the 4th
20 accused but felt too intimidated to point him out. She identified them both in the dock at the trial and testified that each had pointed a gun at her. She said that the third robber was neither on the identification parade nor an accused in court.

The Magistrate convicted the 1st and 4th accused on counts 10
25 and 11 as charged. In my judgment no grounds to interfere with that

verdict have been established.

6 December 1999 counts 12 and 13, the robbery of Mr DG Pike. Two robbers were seen to participate in this robbery. The day after the robbery accused 4 was arrested. He was found in possession of the
5 gold wedding ring and other personal possessions that had been robbed from Mr Pike the previous day.

Accused 4 at no time gave any explanation of his possession of these stolen items. They could reasonably possibly point to his innocence of the robbery itself. He pointed out the Toyota Prado that
10 had been robbed from Mr Pike to the police. He also pointed out accused 5 to them and accused 5 was arrested.

At the identification parade on the 11th of January 2000 Mr Pike pointed out both accused 4 and accused 5. He also identified them at court as the robbers each of whom had pointed a gun at him.

15 The Magistrate convicted each of accused 4 and accused 5 on counts 12 and 13. There is no reason to interfere with this verdict.

In as much as some of the convictions and sentences of each of the four accused ought to be set aside this court must reconsider the sentences that were [indistinct] and in particular must consider whether
20 the remaining sentences should be made to run concurrently to any extent.

As something of an afterthought Mr Myburgh drew attention to the provisions of Section 51(4) of Act 105 of 1997. It reads as follows,

25 "51(4) Any sentence contemplated in this section shall be calculated from the date of sentence. "

The Afrikaans term used for the word calculated is *bereken*. Mr Myburgh submitted that what this meant was that each of the sentences of 15 years imposed by the Magistrate as the minimum sentences for, on the counts of robbery with aggravating circumstances had to start
5 being served on the day on which the sentence was pronounced. This was a submission that Mr Schutte had had no notice to prepare to meet and he was unable to deal with the argument. It is a submission that on the face of it, it seems unlikely to have been the intention of the Legislator in any event it gives rise to a further difficult and puzzling
10 question which may be posed as follows. After committing the robbery with aggravating circumstances on the 26th of July 1999 at the Montalbano's residence for which minimum sentences had to be impose did each of the four accused remain first offenders for the purposes of Section 51(2) of Act 105 of 1997 or when accused 5 went on to commit
15 a second robbery with aggravating circumstances on the 12th of August 1999 at the residence of Mr Bell had he then become a second offender for the purposes of Section 51(2) liable to be sentences to a minimum sentence of 20 years imprisonment?

And when accused 5 committed a third robbery with aggravating
20 circumstances on the 6th of December 1999 was he then a third offender for the purposes of Section 51(2) liable to be sentenced to a minimum sentence of 25 years?

These questions have not been fully inquired into or argued and I do not propose to attempt to resolve them. It seems to me that
25 Section 51(4) may very well mean no more than this when a court

contemplates a sentence of imprisonment of for example 10 years it very often takes account of the period during which the accused has been an awaiting trial prisoner. If for example the accused has been awaiting trial for 18 months the court intending that he should be
5 punished with a sentence of 10 years will then impose a sentence of eight and a half years that will run from the date of the sentence.

It seems to me that what the Legislator was doing in Section 51(4) may well be simply to indicate that this minimum sentencing provision does not admit of any such adjustment, the minimum
10 sentence must be calculated from the date of the imposition of the sentence. The verb calculated has that significance. Mr Myburgh's argument seems to attribute to it some other meaning such as that the sentence must be served from the date in question.

Without attempting finally to resolve these questions I proceed
15 on the same basis as the Magistrate did namely that the sentences are liable to be served consecutively save in so far as the court may have ordered that they should run concurrently.

In this regard I consider that after the erroneous convictions have been set aside the sentences imposed by the Magistrate in
20 respect of the remaining convictions and the extent to which the Magistrate ordered that they should run concurrently were and that they still remain appropriate. In these circumstances I consider that the following orders should be made.

ORDER

25 1. The convictions of the 1st accused on counts 4, 5, 6, 7, 8 and 9

are set aside and a verdict of not guilty is entered.

2. The 1st accused existing sentences on count 1, 15 years count 2, 3 years, count 3, 15 years count 10, 15 years count 11, 3 years totaling 51 years imprisonment are confirmed.

5 3. The 1st accused's sentences on counts 2 and 3 totaling 18 years are to run concurrently with the sentence on count 1, 15 years.

4. The 1st accused's sentences on count 11, 3 years is to run concurrently with the sentence on count 10, 15 years.

10 5. The effective sentence to be served by the 1st accused is therefore 33 years imprisonment.

6. The convictions of the 2nd accused on counts 2, 4, 5, 6, 7, 8 and 9 are set aside and a verdict of not guilty is entered.

7. The 2nd accused's existing sentences on counts 1, 15 years and 3, 15 years totaling 30 years are confirmed.

15 8. The 2nd accused's sentence on count 1, 15 years is to run concurrently with his sentence on count 3, 15 years leaving the 2nd accused with an effective sentence of 15 years imprisonment.

9. The convictions of the 4th accused on counts 4, 5, 6, 7, 8 and 9 are set aside and a verdict of not guilty is entered.

20 10. The 4th accused's existing sentences on counts 1, 15 years 2, 13 years 3, 15 years 10, 15 years 11, 3 years 12, 15 years 13, 3 years totaling 69 years imprisonment are confirmed.

25 11. The 4th accused's sentence on count 1, 15 years is to run concurrently with this sentences on counts 2 and 3 totaling 18 years.

12.The 4th accused's sentence on count 11, 3 years is to run concurrently with his sentence on count 10, 15 years.

13.The 4th accused's sentence on count 13, 3 years is to run concurrently with this sentence on count 12, 15 years.

5 14.The 4th accused effective sentence is therefore one of 48 years imprisonment.

15.The convictions of the 5th accused on the counts 8 and 9 are to be set aside and verdicts of not guilty are to be entered on those counts.

10 16.The 5th accused's existing sentences on counts 1, 15 years 2, 3 years 3, 15 years 4, 15 years 5, 15 years 6, 3 years 7, 1 year 12, 15 years 13, 3 years totaling 85 years imprisonment are confirmed.

15 17.The 5th accused's sentence on count 1, 15 years is to run concurrently with this sentences on counts 2 and 3 totaling 18 years.

18.The 5th accused's sentences on counts 6 and 7 together 4 years are to run concurrently with the sentence on count 4, 15 years.

20 19.The 5th accused's sentence on count 13, 3 years is to run concurrently with this sentence on count 12, 15 years.

20.The 5th accused's effective sentence is therefore one of 63 years imprisonment.

It is so ordered.