

REPORTABLE

CASE NO: SA 10/2003

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

WILLY WINSTON VAN WYK

First Appellant

LESLEY BOOIS

Second Appellant

and

THE STATE

Respondent

Coram: SHIVUTE CJ, MARITZ JA and CHOMBA AJA

Heard: 6 October 2006

Delivered: 9 September 2015

APPEAL JUDGMENT

SHIVUTE CJ (MARITZ JA and CHOMBA AJA concurring):

Background

[1] This appeal is a sequel to an incident that occurred on 11 September 1998 involving a Coin Security Company vehicle that was contracted by a bank to transport money meant for the replenishing of the bank's Automatic Tellers Machines (ATMs) in

and around the City of Windhoek. When the vehicle stopped at the intersection of Mandume Ndemufayo Avenue and the Western Bypass on the outskirts of the city, the only guard on duty and the driver of the vehicle (the crew) were set upon by two armed men; assaulted and the security vehicle together with the amount of N\$1 020 000 taken from them. The following day the van was found abandoned. It was apparently set alight and almost completely destroyed in the ensuing inferno. Also found at the scene were empty money containers, seals that were used to seal those containers, padlocks that were used to lock them and burnt pieces of cloth. The unlawful appropriation of the custom-built Toyota Venture security vehicle codenamed 'Blackbird' and the money formed the subject matter of the charge of robbery with aggravating circumstances while the burning of the vehicle constituted the subject of a charge of malicious injury to property.

[2] The appellants were subsequently arrested and arraigned in the High Court on an indictment containing those two charges. At the commencement of the trial, each appellant pleaded not guilty on both counts, but in the end each was convicted and sentenced to 21 years imprisonment in respect of the robbery count and 5 years imprisonment on the count of malicious injury to property. The appellants' applications in the High Court for leave to appeal were refused but upon petition, leave to appeal was granted by this court.

[3] In the court *a quo* each appellant put in issue the identity of the perpetrators and relied on an alibi.

[4] The evidence establishes that the crew was working in conjunction with two bank officials who were responsible for the actual servicing of the ATMs. The established procedure was that the bank officials, who always drove in a separate vehicle, would drive in front and the security vehicle would follow. The witnesses were however candid in their testimonies that although this was the established procedure, the rules were more obeyed in breach than followed. On the way to a particular ATM the bank officials would decide the route to be taken on a given day and, for security reasons, the crew were not supposed to be informed in advance of their decision.

[5] The State set about to prove its case by calling many witnesses, including the two bank officials, to testify about the events leading to the incident. The witnesses, of course included the crew, namely Messrs Mukawa and Eiseb - the guard and driver respectively - whose testimonies centred on events leading to the incident as well as on what occurred during the incident itself. I have so far advisedly avoided the use of the word 'robbery' - except in the context of the expression 'robbery with aggravating circumstances' - in describing the offence committed by unlawfully appropriating the money. Instead, I have preferred to label it as an 'incident', for there are sharp differences of opinion amongst the protagonists in this appeal as to whether the taking of Blackbird and the money amounted to what colloquially may be called an 'inside job' giving rise in law to theft only rather than to robbery. This is the central issue for decision in this appeal and I shall advert to it after the presentation of a summary of the evidence tendered in the case.

[6] The principal contention of the appellants is that the trial judge erred in fact and in law in finding that the State's evidence proved the charges beyond reasonable doubt. This contention would require the consideration of the evidence presented at the trial. It would be best to commence such an analysis by presenting a summary of the evidence, starting with the evidence of the bank officials as I consider that their evidence had set the tone for the State's case. I shall presently advert to the summary of the pertinent evidence that emerged during the presentation of the State's case. The appeal record is quite voluminous, consisting of some 24 volumes. Consequently, although I will endeavour to summarise the evidence to the best of my ability, prolixity in a case of this magnitude appears to be unavoidable.

The State's evidence

[7] Although they differed in some minor details, the main thrust of the evidence of the two bank officials, Messrs Bezuidenhout and Strauss is similar. It may be summarised as follows: On the day in question the two bank officials at 05h00 started the morning shift to replenish the cash reserves of the bank's ATMs accompanied by two crew members of Coin Security, namely Mukawa and Eiseb, who were charged with the secure transportation of the money. They continued with the second shift later on that morning at 09h00. At about 09h45 the two officials departed from their workplace to reload ATMs on what is referred to as the 'outside route', meaning servicing ATMs situated at the outskirts of Windhoek. Another team was responsible for doing the 'inside route', replenishing the cash reserves of ATMs in the central

business area of the city. On that day a vehicle of another security company was parked at the garage in the loading area of the bank at the place where Mukawa and Eiseb's vehicle should have been parked. Furthermore, there was another Coin Security Company vehicle which had occupied the remaining garage, with the result that when the vehicle being driven by Eiseb arrived at the premises of the bank, Eiseb had no choice but to park his vehicle, backed in, in front of the Coin Security vehicle that had arrived there earlier. A row erupted between the two Coin Security Company teams over the choice of teams to accompany Bezuidenhout and Strauss. As the bickering between the two drivers continued, Mukawa started to enter the details of the money boxes to be transported into his own records, thus leaving the bank officials with no other choice but to continue working with him and Eiseb on that shift. Mr Bezuidenhout says he did not consider this verbal altercation to be significant since, according to him, crew members often competed for a place to work with the two bank officials as the two had apparently established a reputation among crews of being diligent and efficient, thereby ensuring the timely servicing of the ATMs and ultimately early knock off time for the crew.

[8] As stated earlier, the standing security arrangement was that the bank officials would drive in front with the Coin Security vehicle following them. According to Mr Bezuidenhout, this arrangement was followed to the letter when the teams drove to the shopping centres at Game and Tauben Glen where they successfully reloaded the ATMs. At Baines Shopping Centre, however, the Coin Security crew breached security procedures when they parked their vehicle in front of the shopping centre

instead of at the back of the building where security would have been much more enhanced because of the proximity of a police post to that location. Mr Bezuidenhout acknowledged that this was indeed irregular, but pointed out that other security company drivers had done the same in the past. The bank officials nevertheless regarded the breach to be so serious that they asked Mukawa for an explanation. He answered that it had been the decision of the driver. From Baines Shopping Centre the teams were supposed to drive to the Country Club via Academia suburb and the Western Bypass. The vehicle conveying the bank officials again took the lead but the officials soon noticed that the Coin Security vehicle was nowhere in sight. They nevertheless drove to Country Club where they waited for the Coin Security vehicle in vain. Unbeknown to them, the security crew decided to drive to Country Club via the road leading past the University of Namibia. That road joins the Western Bypass at an intersection with a road leading to the Kupferberg dump site. This was a risky route because it meant that to get to the Country Club the crew had to traverse a longer section of the Western Bypass, an area sparsely populated than the shorter and more secure route passing through the high density Academia suburb. When the bank officials realised that they had waited for far too long, they commenced with a search for the vehicle at other ATMs. When they realised that their search was in vain, they telephoned Coin Security control room to ask for the whereabouts of the Blackbird crew. They talked to Ms Binneman, the controller and supervisor of the movement of vehicles at the company at the time, who informed them that the Blackbird crew did not have a two-way radio with them and so no contact could be established. It was

only later that the bank officials learnt of the fate that had befallen the crew and their valuable cargo.

[9] There was also undisputed evidence that may conveniently be referred to at this stage. Although the driver of the security vehicle, Eiseb, was supposed to be in possession of a shotgun whilst on duty, he did not carry any firearm with him on that day. Only Mukawa, the guard accompanying him on the route, was armed with a pistol. Furthermore, when they commenced the early morning shift, Mukawa and Eiseb had a vehicle that had complied with security specifications, but for reasons that were not fully explained in the evidence, that vehicle was exchanged for the less secure Blackbird at a certain garage away from the Coin Security Company's base contrary to the established rules and procedures.

[10] Blackbird was fitted with armoured front and side windows and an armoured cabin in order to protect the crew against attempted hijackings. The cabin had sliding doors on the driver's side as well as on the passenger's side and once in a locked position, could not be opened from outside. The armour plate behind the front seats was fitted with a door to allow the crew direct access to the rear of the vehicle where the money containers were kept. According to the General Manager of Coin Security, Mr du Toit, the normal procedure with that kind of vehicle was that once the vehicle was carrying money, the armoured sliding doors should be in a locked position so that they could not be opened from outside.

[11]The swapping of the secure vehicle for the Blackbird meant that the crew had effectively given away the secure vehicle in exchange for a significantly less secure Blackbird. The latter had many security related defects, such as, a built-in two-way radio that was defective, an air-conditioner that was not in a working order thus necessitating the lowering of windows (contrary to company policy) to allow for ventilation especially in summer and, significantly, a bullet proof window that could not wind up. The situation was compounded by the crew's neglect to take a hand-held radio and additional firearm, apparently contrary to regulation.

[12] As previously stated, Mukawa and Eiseb also testified about what occurred prior to and during the alleged robbery. Although their evidence tallies in some aspects, it also differs in some material respects and it becomes necessary to present a summary of their respective evidence. I find the High Court's summary of the evidence of the two witnesses to be concise and thus convenient to reproduce it here. Staring with the evidence of Mukawa, the learned judge summarised it as follows (and I include some of the court *a quo*'s findings of fact):

'Mr Mukawa's evidence described his job as a crew man on Blackbird that day with Eiseb as driver. He confirmed what Strauss and Bezuidenhout said about the early shift at 05:00 and the subsequent shift about 09:00. He said afterwards he and Eiseb, after the first shift, went to Coin depot where they were told to go back to the same bank. This was about 09:00. He said on arrival they found that another Coin vehicle was already there, and parked in the garage. So they parked just behind it. Blackbird was partly in and partly outside that garage. Mukawa said Mr Straus asked them to come into the bank and attend to the boxes and the money in transit. This evidence was denied by the bank teller, Mr Straus, who made it clear that they would have

preferred to work with the other team and not Mukawa and Eiseb at that shift. Quite clearly therefore Mukawa must have been wrong in that statement. Mr Mukawa confirmed the argument between the crews from Coin Security Company. He said he flatly refused to change the route from the outer to the inner route. Because he said to his understanding all routes are fixed at the depot by the controller and are never to be changed in transit. He said he told the other crew that he had no intention of deviating from what he had been told.

Mr Mukawa said the bank officials told him to follow behind, but from Game to Tauben Glen the bank car led, and it led again to Baines. He confirmed the parking of Blackbird at the front at Baines. He said Eiseb had never done that before. He said afterwards the bank officials told them that the next stop would be the Country Club and they left. They followed the Mandume Ndemufayo road which they sometimes did use. Mukawa said that to his knowledge there was no specific instruction on this particular route.

He said as they proceeded just after they passed the University of Namibia he noticed a white car following behind at speed. As they approached the four way junction the white car overtook them then braked suddenly. He said at that time they had started to indicate a left turn towards the Country Club. They bumped into the white car. He saw two men rushing out of the passenger doors of the car. One went to his side and the other to the other side, the driver's side. The one who came to his side pointed a pistol at his neck. Mr Mukawa described this particular man as wearing a long sleeved blue jacket like a tracksuit or overalls. He said the man was taller, brown in complexion and above average build. The other man, who wore a black T-shirt, was darker, shorter and well-built with a broad chest. Mukawa said he tried to push the gun away, the man demanded money. Then Mukawa tried to reach for his gun, the man hit him on the head with the barrel of the gun. As Mukawa related the attack, he pointed to a visible but healed scar just on the hairline on his forehead. He said the man also grabbed his, Mukawa's, hand and seized the pistol. The attacker put his hand through the window, opened the door and pulled him out. He fell down; the man gave him a kick on the spine. He rolled on the ground, got up and ran away. When he stopped he noticed that the two vehicles were much nearer the junction than had been the case. He saw the

white Fox driving away towards Rocky Crest followed by the Coin vehicle. Just about that time he saw Eiseb, just before the vehicle moved away, opening the middle door and slipping into the back, to emerge from the back of the Coin vehicle.

After the vehicles got away the driver of a Government vehicle gave them a lift to the nearest police station, at Khomasdal. Mr Mukawa said after he was taken into detention he recognised one of his attackers in the cells. He said he didn't tell the police about this because the man was obviously already under arrest. But he said later on, when he made a statement to a woman Police Constable he told her. He said that he couldn't identify the man's face because the man wore a mask but he could identify him by his build.

As regards radios, which they normally should carry, Mukawa said they were given a hand radio but it didn't work, it only had one channel and you couldn't communicate. He said he told Ms Binneman at the time about this defect but as he mentioned this to her she was walking towards Eiseb, then went on to her offices. This explanation sounds plausible and, in any event it is consistent in part with what Ms Binneman later told the court.

As regards firearms, Mukawa said they take whatever is issued to them, a pistol or a shotgun or both. He said he didn't hear Ms Binneman telling them to take a shotgun. In regard to the windows of the vehicle, he said the bulletproof window couldn't wind up. He said he reported this condition to Ms Binneman who said there was nothing she could do. As regards the ordinary window Mukawa said he forgot to close it so it was half open.'

[13] The learned judge next turned to the evidence of Eiseb and summarised it as follows:

'Eiseb gave evidence and confirmed Mukawa's in the main, over the convoys and the shifts that day. He said that by the time they finished the morning round, the parade at the depot was over. Ms Binneman told them to remain on the same route. He

confirmed that a hand radio was handed to Mukawa who returned it to Ms Binneman and said something to her but he, Eiseb, didn't hear what was said. Eiseb said it was not unusual for them to operate without a radio. He said though that Mukawa had a pistol on him. With regard to the parking at Baines, he said he parked at the front because in his experience there was no rule one way or the other. He said the bank officials told them that the next stop was the Country Club. So as soon as they completed they made their way to the Country Club taking the Mandume Ndemufayo Road to the Western Bypass. Eiseb said he used that particular route frequently.

He said at the four way stop and just before he got to the stop, his car was blocked by a white car that overtook them at speed and stopped suddenly. They bumped into the vehicle. Eiseb said two men got out of the vehicle and approached them. One approached his side and the other went to the passenger side. He said the man who approached his side wore a grey shirt, long sleeved and blue trousers and had a balaclava on him. He seized him by the neck and face and pushed him back against the horizontal steel bar while pointing a firearm at him with the other. They struggled and he fell between the two front seats. By then the car was still idling. So when he was pushed backwards and his foot came off the clutch, the vehicle shot forward and then stopped. He crawled into the back of Blackbird, opened the rear door, jumped out and ran. As he did so he saw his attacker moving into his seat. Looking around he saw Mukawa at a distance ahead and ran towards him. Eiseb said Blackbird had no air conditioning so he had the windows open.

He said when the bank car led the way it travelled at great speed, so fast that he could not keep up with it. Of the route he took he said he used that which was used during his training. He said the bank cars also used the Mandume Ndemufayo road sometime. When he was asked how he knew which way to go he said although he fell behind, he always had the bank vehicle within sight, way ahead of him. Eiseb agreed that this was not the proper way or correct way to proceed when in convoy conveying money for security reasons; he said the two vehicles should stay close together. Eiseb agreed that later on they swapped cars after the early morning shift, and agreed this swap took place away from base. He said that was done at the request of a superior to him, a Mr Matongo, who was a controller at the time. So he just followed orders

even though he was aware that Blackbird was a less secure vehicle than the vehicle he was using that morning, its windows and doors were defective. He said they also had no shotgun in the morning because at the time of departure the custodian had not arrived. Later on they didn't pick one up because they didn't have enough time. They had to turn around very rapidly.'

[14] As alluded to when dealing with the evidence of Mukawa, both Mukawa and Eiseb were arrested as suspects and spent time in custody in connection with the incident.

[15] Ms Binneman was also called. She testified that after the crews had left on the morning of 11 September she radioed all the vehicles but got no reply from Blackbird. She then noticed that the radio that she had given to Blackbird's crew earlier had not been collected. Ms Binneman confirmed the evidence of Mukawa and Eiseb that they were late for the parade that morning. She stated that she was very busy when they arrived and did not tell them that their route had been changed. She asked Eiseb to take the shot gun along but the latter indicated that he did not need one. She said she had gone to make a telephone call and when she returned Mukawa and Eiseb had gone. As regards Blackbird, Ms Binneman said the doors of the vehicle were faulty in that contrary to standing rules, they could be opened from the outside. When she received the call that Blackbird was missing she contacted the Managing Director of Coin Security, Mr du Toit, who set out to search for the vehicle and crew. Later she got a call from Mukawa and Eiseb reporting the alleged robbery. In the course of that morning one Mr Jan de Klerk called at their offices and reported that his vehicle was involved in an accident with Blackbird. Mr de Klerk also reported that two men had

attacked the Coin crew who ran away following the attack. She said that she referred De Klerk to Du Toit. According to Ms Binneman, she did not know of the vehicle swap earlier that day as this had been done away from the base. She confirmed that the swapping of vehicles away from base was totally contrary to company rules.

[16] Mr du Toit also testified. He corroborated Ms Binneman's evidence that it was against the established policy to exchange vehicles outside the company premises. He confirmed having received the report of the robbery to which he responded by embarking upon an unsuccessful search for Blackbird. Upon his return to the office, he was approached by Mr Jan de Klerk who reported that he had witnessed the incident during which the crew were attacked by armed men. Mr de Klerk, who was also called as a State witness, reported that after the crew had fled the scene, the assailants got into Blackbird and drove away with it. The next day he received information that Blackbird had been found burnt out. Mr du Toit was asked about the order of the convoy when the crew and the bank officials transported money to various ATMs. He said there was no established procedure except when the controller on the day had given specific instructions about how the convoy should proceed.

[17] Mr Malcom Kawejao was also called as an eyewitness. He stated that he approached Western Bypass from Mandume Ndemufayo Avenue on 11 September 1998 between 10h00 and 10h15 when he saw two men assaulting the Coin Security crew. He saw one of the men striking the driver with the barrel of a gun. The driver

jumped out of the vehicle and fled. Mr Kawejao described the attackers as 'well-built'. The one who approached the vehicle on the passenger side was light skinned and wore a balaclava over his head and face while the other, who attacked from the driver's side, was darker in complexion and shorter in stature. In addition to the Coin Security vehicle, there was a white vehicle parked slightly in front of the Coin vehicle. The Coin Security vehicle was moving slowly when the attackers struck and, when the driver of the Coin Security vehicle jumped out, the vehicle stopped suddenly. After the incident, both the Coin Security vehicle and the white vehicle proceeded in the same direction towards Rocky Crest residential area.

[18] One of the main witnesses called by the State was Mr Jan de Klerk. This witness, as the trial court later found, was an accomplice. He was accordingly warned in terms of s 204 of the Criminal Procedure Act 51 of 1977, which provides in full as follows:

'204 Incriminating evidence by witness for prosecution –

(1) Whenever the prosecutor at criminal proceedings informs the court that any person called as a witness on behalf of the prosecution will be required by the prosecution to answer questions which may incriminate such witness with regard to an offence specified by the prosecutor-

(a) the court, if satisfied that such witness is otherwise a competent witness for the prosecution, shall inform such witness-

(i) that he is obliged to give evidence at the proceedings in question;

- (ii) that questions may be put to him which may incriminate him with regard to the offence specified by the prosecutor;
 - (iii) that he will be obliged to answer any question put to him, whether by the prosecution, the accused or the court, notwithstanding that the answer may incriminate him with regard to the offence so specified or with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified;
 - (iv) that if he answers frankly and honestly all questions put to him, he shall be discharged from prosecution with regard to the offence so specified and with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified; and
- (b) such witness shall thereupon give evidence and answer any question put to him, whether by the prosecution, the accused or the court, notwithstanding that the reply thereto may incriminate him with regard to the offence so specified by the prosecutor or with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified.
- (2) If a witness referred to in subsection (1), in the opinion of the court, answers frankly and honestly all questions put to him-
- (a) such witness shall, subject to the provisions of subsection (3), be discharged from prosecution for the offence so specified by the prosecutor and for any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified; and

- (b) the court shall cause such discharge to be entered on the record of the proceedings in question.
- (3) The discharge referred to in subsection (2) shall be of no legal force or effect if it is given at preparatory examination proceedings and the witness concerned does not at any trial arising out of such preparatory examination, answer, in the opinion of the court, frankly and honestly all questions put to him at such trial, whether by the prosecution, the accused or the court.
- (4) (a) Where a witness gives evidence under this section and is not discharged from prosecution in respect of the offence in question, such evidence shall not be admissible in evidence against him at any trial in respect of such offence or any offence in respect of which a verdict of guilty is competent upon a charge relating to such offence.
- (b) The provisions of this subsection shall not apply with reference to a witness who is prosecuted for perjury arising from the giving of the evidence in question, or for a contravention of section 319(3) of the Criminal Procedure Act, 1955 (Act 56 of 1955), or, in the case of the territory, for a contravention of section 300(3) of the Criminal Procedure Ordinance, 1963 (Ordinance 34 of 1963), arising likewise.'

[19] De Klerk gave a lengthy testimony and not surprisingly, he was subjected to some equally lengthy and robust cross-examination. His evidence is vital to the State's case and requires some careful scrutiny. In order to give it such treatment, it becomes necessary to present a fairly detailed summary of this evidence for if his evidence is accepted; it sets out the *modus operandi* of the crimes and will help determine whether what occurred was a robbery or a simple theft.

[20] De Klerk gave an account of his acquaintanceship with the appellants and indicated that he came to know them through a policeman named Morkel, for whom he had worked as taxi driver. Morkel was a friend of the appellants. Frequently Morkel would come with the appellants to the taxi rank and ask him to take the appellants to destinations of their choice. This he did but on no occasion did the appellants pay for the service. As the time went on he refused to convey the appellants and he ultimately left Morkel's employment. His uncle helped him to buy a taxi of his own, a Volkswagen Fox, white in colour. One day he met the appellants near the taxi rank. The trial court continued with this part of De Klerk's evidence by way of summary and again I find it convenient to quote at length:

'They approached him and confronted him with an allegation that they had heard that he was spreading stories about them that they carried machine guns about with them. The two accused persons threatened him and said if he persists with those stories terrible things could happen to him or his family if the story got to the police. Not long after this conversation the two accused persons approached him one day while he was in his taxi and asked him to drop them at Khomasdal. On the way they bought some beers, and went and consumed it near Otjomuise. While they were drinking beers accused 1 told him that they had a job for him but he must not talk about it. They warned him that if he talked about it terrible things could happen to him. The accused also mentioned that they had friends in the police force, that it was easy for them to set him up in a criminal offence such as rape for instance. They told him that they would be in touch in due course when they needed him. He said about ten days before the Coin Security robbery he got a telephone call on his mobile phone to meet the accused at the Royal Hotel. They had a few drinks when they met and they went to his taxi. In the car accused 2 told them that they were interested in a bakkie that carried wages for Stocks and Stocks. They said they wanted De Klerk to drive them and follow that vehicle. The accused assured him that he would not be involved

in any criminality himself. All they wished to do was to ride in his car and follow the vehicle and then at an appropriate point board the other vehicle. They told him that everything had been arranged with the driver of the bakkie who was a nephew of accused 1. Accused 1 told him to return to the same place the following day at seven o'clock in the morning. He did, they waited in Tal Street across from the First National Bank in Ausspannplatz. He saw a Coin Security vehicle going past and almost immediately a white bakkie. They followed the vehicles to Game and parked in the street opposite. The vehicles left and they followed them to Tauben Glen, on to Baines and the Country Club. At the Country Club they watched the vehicle pull up near the door, then they left and went back to Ausspannplatz. The accused persons asked him again to wait for them the following day. The same procedure was adopted, but he said that on that occasion they waited a long time before the vehicle came. It was about two hours, a call came for accused 2 on De Klerk's cell phone. It was very short, as soon as that call came they left. He dropped them and went back to work. In the afternoon the accused persons phoned and asked him to come over to the same pick up point to drop them at a certain house in Windhoek North. When he dropped the two accused at the house in Windhoek North he was introduced to a man.'

[21] De Klerk went on to tell a tale of events spanning over a period of ten days on which he and the appellants as well a man named George allegedly went on surveillance missions trailing the white van, following more or less the same procedure they followed on the first two days as detailed above. His narration continued with the events of the third day.

[22] On that day they followed the van to Game and Tauben Glen. Then the appellants told him to drop them at a place near Pioneers Park Extension 1. At this point in time the appellants changed into overalls. They blackened their faces with eyebrow pencil, put on gloves and balaclavas. On all the occasions that he allegedly

drove the appellants, De Klerk noticed that they were carrying a tog bag, which he identified as the one that was produced as Exhibit 12 in court. In the tog bag there were handcuffs, bolt cutters and a pistol. He drove the appellants to Baines Shopping Centre where they watched the white van, following it up to the Country Club. When it pulled up at the Country Club, they drove away. In the afternoon the appellants asked him to drop them at an address in Windhoek North where the appellants met with a man De Klerk was introduced to earlier as Jacky. Jacky and the appellants had a conversation to which De Klerk was not privy. In the course of their surveillance, so De Klerk narrated, he once saw Jacky drive a Coin Security vehicle. From this meeting De Klerk drove the appellants to a house in Khomasdal. From Khomasdal he drove to Ausspannplatz where he dropped the appellants. He was told to come back the following day; and he did as told.

[23] The following day, the fourth day, he met the appellants in Tal Street. They waited until the van came out of the building, taking the usual route and they followed it. When they reached Tauben Glen, the appellants asked him to go to an open space at Pioneers Park. There the appellants went through the usual routine of blackening their faces and changing in overalls. The white van arrived and parked next to De Klerk's vehicle. When it pulled off they followed it up to the Country Club where it stopped. When it stopped, De Klerk drove to Ausspannplatz where he dropped the appellants off. On his way home the first appellant called him and asked to pick them up next to Independence Avenue. De Klerk duly obliged and took the appellants to an address in Windhoek North. There the two appellants were joined by Jacky and it

seemed as if the three persons were involved in an argument. When they finished talking De Klerk took them back to Ausspannplatz and agreed to pick them up the following day.

[24] On the fifth day in the sequence of days that they observed the van and the Coin Security vehicle, they met again and adopted the same procedure of following the vehicles. At Baines Shopping Centre the appellants asked De Klerk to take them to an open space opposite Baines. There they went through the procedure of disguising themselves and later went to sit in De Klerk's vehicle which was by then parked next to the van they had been following. They followed the van via Academia, and when the van entered the Country Club, they went back to the flat at Ausspannplatz. De Klerk was told by the first appellant to return that afternoon unless he was informed to the contrary. A call came at six o'clock and he went to pick them up outside the Royal Hotel and took them to Windhoek North. There Jacky joined them and they all went to Rocky Crest residential area where they were joined by George. De Klerk drove all four men to an open space in Otjomuise where they had a long discussion over some beers. As the four men were engaged in the discussion, De Klerk asked to be excused but he was told to wait. On the way back the appellants told Jacky and George that De Klerk was 'okay'. He dropped all his passengers at their addresses and went home.

[25] On a Sunday he received a call from the second appellant and was asked to take the second appellant to an address in Pietersen Street. No surveillance operations were conducted on that day.

[26] On Monday, the sixth day of surveillance, he drove the appellants to Rocky Crest to pick up George. George brought the tog bag along. They next picked up Jacky and went to Tal Street. The van emerged followed by a Coin Security vehicle. It then occurred to De Klerk that the interest was the Coin Security vehicle. The Coin Security vehicle was followed by a white Toyota Conquest, which they followed half way before they proceeded to Tauben Glen where they waited for some time. The appellants instructed him to lift the bonnet of his car and pretend that the car had broken down. Eventually the vehicles they had followed arrived and he was directed to park near them at Baines Shopping Centre. There the second appellant changed into overalls and the first appellant put on a jacket. The second appellant helped George to blacken his face and they both put on balaclavas and gloves. The Coin Security crew got into their vehicle and headed for the Country Club. When the Coin Security vehicle stopped at the Country Club, De Klerk and his passengers drove away. In the afternoon he received a call from the first appellant telling him to meet him at the Post Office in the City Centre. De Klerk did as he was told and when he got there he was told by the appellants that the call was just to test his reliability or loyalty. He was further informed that he would be needed the following day.

[27] The following day, the seventh day of reconnaissance, De Klerk collected the appellants and then George before they all proceeded to the usual waiting place. The bank car emerged followed by a Coin Security vehicle. While the bank car went to the Country Club through Academia, the Coin Security vehicle took a longer route, via Mandume Ndemufayo Avenue to the Western Bypass. De Klerk drove towards the Country Club and they observed the vehicles' movements from a bridge. Then they left.

[28] On 9 September 1998 he was called to Tal Street and instructed to take along eyebrow pencils and phensydyl. He bought two bottles of phensydyl which he gave to the second appellant. The second appellant mixed it with beer and consumed it. No surveillance operations took place on that day. The following day he picked George up and went to Tal Street where he met up with the appellants. That day they waited for the vehicle they were monitoring for a long time but it never came. De Klerk again saw the appellants on 10 September 1998 when he picked them up and proceeded to Tal Street. The second appellant asked him to follow the usual routes, looking for the vehicles that they were monitoring. They did not find them and he later dropped them off at Ausspannplatz. The first appellant called him later the same day and asked him to pick them up, telling him that it was the last time they would trouble him. On the way the appellants told him that they had raised a second pistol. He took them to a house in Khomasdal and the appellants emerged from the house in the company of a Mr Diergaardt with whom he was acquainted. In the car the first appellant showed him

the pistol and a letter by Mr Diergaardt authorising the first appellant to possess the pistol.

[29] On the day of the incident, 11 September 1998, De Klerk picked George up. The latter gave him two different sets of false number plates to affix to his car. While waiting for the bank vehicle in Tal Street a mobile phone rang. The second appellant answered and said it was 'Oupatjie' on the line. The two appellants looked at each other and smiled, apparently delighted upon learning that Oupatjie was on the line. Shortly afterwards, a white Toyota Conquest emerged followed by the Coin Security vehicle. They followed the vehicles to Game Centre and Tauben Glen. At Tauben Glen, they went to an open space and waited. The second appellant put on a black polo neck and coloured his face black. The first appellant and George put blue jackets, balaclavas and gloves on. On their directions, he departed from there and parked behind Baines Centre. They saw the white Conquest there but not the Coin Security vehicle. They looked around and found it parked in front of the shopping centre. The two appellants told De Klerk not to stop but to drive to the four way junction in Mandume Ndemufayo Avenue instead. The first appellant said Oupatjie was driving the Coin Security vehicle. The two appellants took out handcuffs and alighted from his vehicle near the junction. He was instructed to return to where they had come from and to look for the Coin Security vehicle. He encountered it on the way and made a U-turn to follow it. He overtook it just before the junction and when his vehicle was about two car lengths in front of it, he suddenly stopped. This manoeuvre forced the driver of the other vehicle to stop behind his. As he indicated

that he was about to make a left turn at the junction, he suddenly felt that his vehicle was bumped at the rear. When he looked behind him, he saw the two appellants approaching the Coin Security vehicle.

[30] The second appellant approached the vehicle from the driver side while the first appellant was on the passenger side. George remained seated in De Klerk's car throughout the incident. Other vehicles arrived at the junction and stopped. He noticed at one stage that the second appellant was half onto the driver's seat and, soon thereafter, observed the vehicle passing his. He drove towards Academia and later dropped George off at Rocky Crest. Thereafter, he went to report the accident at Coin Security depot where he spoke to Mr du Toit, informing him that he was a mere witness to the robbery. He was eventually arrested and placed in custody. While in custody, he first spoke to Inspector Viljoen and maintained he was a mere bystander. After some days in custody, he decided to make a statement which was recorded by Inspector Kisting. He did not tell Inspector Kisting the details of the surveillance over the ten or so days because Kisting told him to keep it short and stick to the day of the robbery itself. Counsel for the State on the other hand told him to tell the court all the details, hence the difference between the details he gave in his confession and in evidence in court.

[31] De Klerk agreed in cross-examination that he made the confession because he wanted to gain his freedom. He added though that, upon telling inmates in custody about his predicament, he was advised to come clean and tell the authorities the

truth. He said that it was the two appellants who were involved in the criminal enterprise. He went along because he wanted to make money. He explained that although he felt threatened by the appellants initially, the situation changed once he became part of the inner circle: he became convinced that he could assist with the realisation of their plan. He testified that he was quite happy to play his designated role, knowing that he would be remunerated for his participation. When asked about the Coin Security connection, he said that the appellants had told him that they got Jacky a job as a security guard and later as driver at Coin Security. Jacky, therefore, owed them a debt of gratitude. He said that the appellants further told him that they had given his mobile number to Jacky so that the latter could fill them in about his movements. He was also cross-examined about evidence he had given in another case of robbery in which he had attributed certain utterances to the second appellant which, in this case, he maintained was made by the first appellant.

[32] The State next called a number of witnesses that were either family members or friends of the appellants. The court *a quo* characterised them as being torn between the need to tell the truth and the desire to lie to protect the appellants. One of these witnesses was Mr Diergaardt, a relative of the first appellant and a friend of the second appellant. Mr Diergaardt confirmed that he had given his pistol to the first appellant on 10 September 1998. According to his testimony, the first appellant had called at his house and expressed a desire to buy the pistol from him. He gave the pistol together with a letter authorising the first appellant to possess the weapon. The first appellant returned the pistol the following day at 09h00 and was given a lift by Mr

Diegaardt into town. Later that day the two appellants also called at Mr Diergaardt's house. The second appellant asked to use his telephone which he allowed. Mr Diergaardt could not say to whom he had spoken. Mr Diergaardt left shortly afterwards to fetch his wife from work, leaving the two appellants at his house. As he was leaving, he noticed a white Fox vehicle arriving at his yard.

[33] Ms Samatha Isaacs was a girlfriend of the first appellant. She told the court that on 11 September 1998 she arrived home from work at 18h15. A while later the first appellant arrived with his son. He stayed until 20h00 and then left. She saw him again the following morning and he told her that the second appellant had sustained burns at a barbeque. On 14 September 1998 she went to work as usual. She received a call from the first appellant later the day during which he informed her that he was on his way to Cape Town. She next saw him on 18 September 1998. On this day the first appellant gave her N\$800 in hundred dollar notes and a telephone number, telling her to call a person whom he had described to come and collect the money. The first appellant further explained to her that he had been locked up with De Klerk and that the latter had given him money to give to De Klerk's brother to buy necessities for De Klerk. She telephoned a person at that number and a man fitting the description given by the first appellant came and collected the money. She did not see the first appellant for a while after that visit and, when he eventually turned up, he told her that he had gone to Rehoboth to collect his N\$6000 from one Mr Eberenz. As to their household affairs, Ms Isaacs testified that she paid for household expenses and that the first appellant contributed occasionally. After the first appellant was

arrested, she was also detained. As a result, she decided to tell the police that she found it strange that the first appellant had been able to afford money for a trip to Cape Town. She claimed in court that what she had told the police was not true as the first appellant frequently travelled to Cape Town to buy cars for resale.

[34] Another witness called by the State was Ms Caroline Camm, a girlfriend of the second appellant. She told the court that on 11 September 1998, she went to work at 08h00, leaving the second appellant at home. She returned home at about 12h30 and found the second appellant there. She went back to work and when she knocked off at 17h00 she again found the second appellant at home. He, however, left at 22h00 without saying where he was going to and when she saw him the next day at 06h00 she noticed that he had burn wounds. She asked him what happened and he told her that he sustained burns at a braai when a gas bottle exploded. She took him to hospital where he got admitted. She telephoned the hospital on a Sunday and learnt that the second appellant had discharged himself from hospital. She next received a call from the second appellant saying that he was on a business trip to Cape Town. He also informed her that he had paid N\$4500 in her bank account. She said the second appellant was self-employed as a tiler and that in August 1998 he sold a car to Mr Eberenz for N\$15 500. Through cross-examination Ms Camm agreed that the second appellant often travelled to Cape Town to buy cars for resale and that this was one of the ways in which he made a living.

[35] The next witness called by the State was Ms Irene Boois, a sister of the second appellant. She is also a girlfriend of Christie Jason, another State witness. Ms Boois narrated that she was approached by the investigating officer of the case, Sgt Asino, who told her that he was interested in the sum of N\$3000 paid into her account by Jason in Cape Town. Ms Boois told the court that Jason had told her that he had borrowed the money from the second appellant. She said it was the first time that they had received a loan from the second appellant. Ms Boois testified that Jason was unemployed at the time. She also said that she was aware that her brother, the second appellant, had sold a car during August 1998.

[36] As mentioned above, Mr Christie Jason also gave evidence on behalf of the State. He said he had known both appellants for some time. On a Sunday he met Ms Camm in town. She told him that the second appellant was in hospital. He and Ms Camm went to visit him. Jason spoke to the second appellant about the cause of the injuries and the second appellant told him that he sustained burns at a braai when someone poured too much spirit on the fire. He subsequently visited the second appellant in hospital later the afternoon and again the following Monday morning. He then enquired whether the second appellant would be going to Cape Town and asked if he could go along because he was unemployed and bored at home. When he visited the second appellant on Monday morning, he met the first appellant in the waiting room. When he entered the second appellant's room he found that the nurses were dressing his wounds and so he waited outside. The second appellant emerged from the room shortly afterwards and the three of them got into a BMW vehicle that

had been parked outside by Ms Camm. According to Jason, Ms Camm had told him earlier that she would leave the car on Monday at the hospital and walk back home. She would then leave the keys at the flat. On the basis of this arrangement, Jason collected the keys to the second appellant's flat on Sunday so that he could fetch the car keys from there the following morning. Accordingly, he called at the second appellant's flat and collected the car keys. The second appellant paid for fuel throughout their journey to Cape Town.

[37] Jason testified that the two appellants paid for accommodation at the hotel in Cape Town, including his own bill. After an outing the following day, the first appellant indicated that business was bad in Cape Town and that he would return to Windhoek later the same day. Jason and the second appellant drove the first appellant to an airport where the first appellant bought a ticket to Windhoek. While at the airport, the second appellant changed N\$18 700 into South African currency. The money so exchanged was all in N\$100 notes. Later the second appellant bought himself a cell phone for N\$3100. Jason borrowed N\$3000 from the second appellant and paid the money into the bank account of Ms Boois, his girlfriend. The second appellant later returned to Cape Town but Jason decided to return to Namibia. He borrowed money for an Inter Cape bus service ticket from the second appellant.

[38] Mr Peter Eiseb was next called and stated that during September 1998 he was detained in police cells with the first appellant. One day he told the first appellant that he needed to borrow about N\$6000 for his defence and offered to give his expensive

camera as security for the repayment thereof. The camera was valued at N\$27 000. The first appellant indicated that he could lend him the money. It was put to the witness in cross-examination, a proposition the witness readily accepted, that the first appellant said he could help with the loan because it would not be difficult to sell a camera of such high value for a mere N\$6000.

[39] Dr Weder was the doctor who treated the second appellant. He told the court that on admission at the Roman Catholic Hospital on 12 September 1998, the second appellant was in a serious condition. He had first and second degree burns. The second appellant told him that he was a tour guide and that he had sustained burns while preparing food for tourists. Although the second appellant was walking and talking prior to and during the examination, it was clear that he was in shock and severe pain. Dr Weder prescribed painkillers and intravenous fluids to help restore lost fluids. He said he saw the second appellant on Saturday and again on Sunday morning and evening. On Monday he established that the second appellant had left hospital. It was Dr Weder's opinion that the second appellant needed at least seven to ten days of treatment in hospital. Accordingly, he would not have discharged the second appellant at the time he left the hospital. According to Dr Weder, nurses had no authority to discharge a patient without the treating doctor's instruction. He said that when he later read about the robbery and the burning of the Coin Security vehicle, he 'put two and two together' about his patient and telephoned the police to give them details.

[40] Ms Dauses, a registered nurse at the Roman Catholic Hospital gave evidence of the second appellant's admission on 12 September 1998 for the treatment for the burns under the care of Dr Weder. She referred to his file which was kept at the hospital. The file showed that the second appellant was treated at Medi City Clinic where he had been given pain killers and eye drops and morphine that had to be administered every four hours. She testified that on 14 September 1998 the second appellant refused to have a drip administered on him as prescribed by Dr Weder. On the same day she changed the second appellant's dressing and carried on with her other duties elsewhere. When she checked later on the second appellant, she found that he had gone. There was no authority for the second appellant's discharge. She confirmed that nurses have no authority to discharge a patient except when ordered to do so by a doctor.

[41] The investigating officer, Sgt Asino, was also called as a witness. He informed the court that he had interviewed the Blackbird crew, Mukawa and Eiseb. They gave different versions of where their assailants came from. Mukawa said they had alighted from the white Fox whereas Eiseb said they had come from the bushes. The two men were detained as suspects. Later, when De Klerk went to the police station, he too was detained. The police obtained the names of the other suspects and went to search for them. They were not found at their residences. The police obtained the keys to Ms Camm's flat where the second appellant was staying. On their way from Ms Camm's work place they encountered the first appellant. He was carrying a lot of shopping and new clothes and had N\$780 in cash on him. They took him to his flat

and searched it. There they found a letter from Mr Diergaardt authorising possession of the pistol, bank receipts from Cape Town for the exchange of N\$3200 as well as the first appellant's passport indicating exit from Namibia and re-entry on 14 September and 15 September 1998 respectively. The first appellant was released on 18 September 1998. When he was rearrested a few days later, entries in his passport showed that he had left for Cape Town and returned to Namibia after the initial release from custody. The police also searched the second appellant's flat and there they found receipts for Medi City Clinic as well as for the Roman Catholic Hospital.

[42] When the first appellant was rearrested Sgt Asino asked for the first appellant's wallet which he had previously seen with money in it. The first appellant replied that he had left the wallet in South Africa. Sgt Asino searched the flat and found the wallet on top of the wardrobe with N\$5800 in it.

[43] The second appellant was arrested by the South African police and was escorted to the border where Sgt Asino met him and arrested him. The South African police handed him two sets of car number plates that had been used in Cape Town by the second appellant. On questioning the second appellant about the burns, Sgt Asino said the second appellant explained that he sustained burns accidentally in the process of burning copper wire with petrol from his car at a rubbish dump in Khomasdal.

[44] Sgt Asino stated that De Klerk told the police during his interrogation that the assailants emerged from the bushes. He was locked up and after a few days in custody he told the police that he knew something about the incident. He was then interviewed and an initial statement was taken by Inspector Kisting. He was later taken to court but the charges against him were withdrawn. Many statements were subsequently taken from him as the police discovered something new as the investigation proceeded. Following the information given by De Klerk, a number of houses were searched, including the house in Rocky Crest where a tog bag mentioned by De Klerk was found. The tog bag contained two different sets of car number plates which De Klerk said they used on the day of the incident. Sgt Asino said he never traced 'George', who was referred to in De Klerk's statement.

[45] Inspector Lochner of the South African Police Service testified about the arrest of the appellants at a branch of the First National Bank in Cape Town on 21 September 1998. He said that after their arrest, he searched their vehicle and found a number of documents including Holiday Inn receipts, City Park Hospital receipts, Vodacom receipts in respect of a cell phone transaction. Inspector Lochner seized N\$6200 from the second appellant in the bank. The money was in crisp notes in numerical sequence. He also found two sets of number plates on the vehicle of the appellants. The genuine number plate, a CC number, was placed below the false CY number plate. When the second appellant was asked about the number plates, the second appellant did not provide any answer. When asked how he sustained burns, the second appellant responded that these were sustained at a braai.

[46] Ms Ronel le Grange an MTC employee testified about the list of calls made between cell phone numbers which she prepared at the request of the police. The list shows the details of calls made on 11 September 1998 to De Klerk's cell phone number from Mr Diergaardt's house which confirms De Klerk's evidence that calls were made to his cell phone.

[47] A few other witnesses were also called but, as their evidence does not have a bearing on the outcome of the appeal, it is not necessary to recount their testimonies. This brings me to the presentation of the summary of defence evidence.

Defence evidence

[48] The first appellant elected to testify and called no witnesses. He denied having committed any of the crimes contained in the indictment. He acknowledged having known De Klerk for a long time. However, he claimed that De Klerk had a grudge against the appellants because they had caused their friend, Constable Morkel, to dismiss De Klerk for cheating him on the fares collected while driving Morkel's taxi. De Klerk allegedly threatened them by saying in effect that something would happen to them. As to the source of the money he was found with and his movements on the date of the incident, the first appellant said that between 1 and 11 September 1998 he was doing renovations at a house of a Mr Hoblicht. When he completed the work Mr Hoblicht paid him N\$2500. He gave his assistant one Johannes, whom he had not seen since, N\$500 and kept the rest. He admitted that he had gone to Mr Diergaardt's

house by taxi, but not that of De Klerk, on 10 September 1998 and that he had obtained a pistol from Mr Diergaardt. This he did in line with his previous expression of interest to buy a pistol for his parents. Mr Diergaardt gave him a letter of authority to possess the pistol. He returned the pistol the following day because he could not afford it. The first appellant admitted that the letter authorising possession of the fire arm was found at his flat by Sgt Asino.

[49] He stated that after he had returned the pistol to Mr Diergaardt, he went to town and at about 09h00 he arrived at a restaurant called Le Bistro. At about 10h30 the second appellant joined him at Le Bistro and left at 11h00. It was put to the first appellant that the evidence of the second appellant's girlfriend was that the second appellant did not leave home between 09h30 and 12h30. After an unconvincing explanation and upon being pressed for an answer, the first appellant said that Ms Camm lied when she maintained that the second appellant never left home until 12h30. The first appellant continued narrating that he left Le Bistro at 12h00 and never saw the second appellant again that day. When confronted with Mr Diergaardt's evidence that the two appellants had been together at his residence at about 16h45, the first appellant maintained that he had forgotten about that meeting. The trial court later remarked in its judgment that this reply was unconvincing.

[50] The first appellant explained his stay in Cape Town and his subsequent return to Namibia by saying that he paid for the hotel accommodation in Cape Town with the money given to him by the second appellant. The following morning he and the

second appellant went out to look for cars but, as there was not much business, he decided to return to Namibia that day. He agreed he was arrested in Windhoek and that he was found with N\$780 cash as well as new clothes. After his initial release from custody on 18 September 1998, he returned to Cape Town. He testified that Warrant Officer Platt had asked him to accompany him there and to assist with the driving. In Cape Town they stayed at a house of a passenger that they had given a lift to and he invited the second appellant to join them there. The second appellant informed him of his plans to buy cheap clothes for resale in Namibia and he decided to do likewise. On 21 September they went to the bank for the second appellant to exchange the Namibian currency for the Rand. He went along to assist the second appellant as he understood that the transaction was limited to N\$3000 per person.

[51] It is worth mentioning that during his testimony in the bail application, the first appellant denied having gone to exchange money at a bank in Cape Town. It was only after he had been reminded at the trial of the evidence in the bail proceedings and the video showing him at the bank that he conceded that he had been at the bank, adding that he only went there to assist the second appellant who, due to his burns, was uncomfortable waiting in a long queue. While transacting in the bank the police arrived and arrested them. He was later released and he then decided to fly back to Windhoek. His mother assisted him with the money to buy the ticket. However, he was reminded that his parents testified during the bail application in the Magistrate's Court that they were pensioners who were dependent on the State's

social pensions. The trial court later observed that 'there was no meaningful answer' to this proposition as it was clear that the first appellant was lying on this score.

[52] The first appellant continued to state that on 27 September 1998 he met a Constable le Roux who told him that a warrant for his arrest had been issued. The appellant then asked Warrant Officer Platt to take him to Rehoboth to collect N\$6000 that he had previously lent to his friend Mr Eberenz. It was put to the first appellant that in the Magistrate's Court proceedings, Sgt Asino informed the court that the first appellant had told him that he had gone to Rehoboth to borrow money from Mr Eberenz. Again, the first appellant could not provide a convincing answer. He was asked about the source of the N\$6000 he had allegedly lent to Mr Eberenz and he said that part of the money was a loan of N\$2000 given to him by his mother. The first appellant denied that he and the second appellant had called for De Klerk to come and collect them from Mr Diergaardt's house on 11 September 1998. He agreed however that the second appellant made a telephone call but that he did not know to whom.

[53] He was confronted with Ms Camm's evidence that he had asked her to give N\$800 to a man to buy necessities for De Klerk. Although he agreed that he gave the money and instructions to call a certain number for its collection, he denied that he told Ms Camm that the money was to buy De Klerk necessities, insisting that Ms Camm lied if she said that this is what he had told her. He was asked about how he was earning a living and he answered that his main occupation was to buy and sell

cars. Asked for how long he had been in this business, he replied that it had been for 6 to 8 months. He was reminded that in the bail proceedings he said he was in the business for years and was well known for it. He eventually maintained that he was in the business of selling cars for 5 years. When asked why his bank account showed only N\$10 000 paid into it in five years, he responded that he never bought cars and only acted as a middle man paid on commission. The first appellant was questioned about his evidence in the Magistrate's Court that he had offered to sell Mr Peter Eiseb's camera for N\$6000. He denied that he had testified to that effect.

[54] The second appellant also testified and called two witnesses. He denied not only his alleged involvement in the crimes but also that he was involved in the surveillance as described by De Klerk. Like the first appellant, the second appellant asserted that De Klerk had scores to settle over his dismissal by policeman Morkel. To illustrate the alleged grudge, the second appellant referred to De Klerk's evidence in a previous trial where he told court that he had overheard the two appellants discussing a robbery that they were allegedly involved in at a pharmacy in Eros, emphasising that the court acquitted them after rejecting De Klerk's evidence. He testified about his admission to the Roman Catholic Hospital and explained that he sustained burns accidentally while trying to light a fire with some spirit. At the hospital he was initially put on a drip. He was told by Dr Weder that the drip may come off the following day. On Monday he asked when the doctor would come and was told that he may come late or only the following day. Upon hearing this he decided to discharge himself. He travelled to Cape Town where he received further treatment,

but he said he went to hospital there only on 17 September and not on 15 September 1998.

[55] He agreed that he placed false number plates on his car while in Cape Town but he said he did so upon the advice of a friend who told him that cars with foreign number plates attracted hijackers. He also agreed that he exchanged Namibian Dollar cash to Rand in Cape Town; that the first appellant assisted him in exchanging N\$3000 and that on his arrest in Cape Town, the South African Police seized N\$6200 crisp new notes in numerical sequence. He explained the source of the money he had as follows: N\$15 500 was the proceeds of the sale of a vehicle to Mr Eberenz on 9 September 1998; N\$8000 was a repayment of a loan to his sister in August 1998, and part of the money came from the sale of clothing that he bought from a Chinese shop near his parents' home. He said that on 11 September 1998 he went to Le Bistro restaurant at 10h30 where he met the first appellant. That night he went to his girlfriend's place where he had the accident wherein he got burnt. Upon being asked about the car he said he had sold to Mr Eberenz, the second appellant stated that he could not provide details and proof of its registration as he never transferred the ownership of the vehicle into his name after he bought it and it was still not in his name when he sold it. The second appellant said that he had N\$28 000 on him in Cape Town. He denied he had been travelling in De Klerk's taxi for some days as he said he had his own vehicle.

[56] The second appellant called Mr Eberenz as a witness. Mr Eberenz stated that he was a friend to both appellants. He bought the car from the second appellant for N\$15 000. The agreement was reached on 7 September 1998. He signed it and so did his wife. The first appellant witnessed it. On 9 September 1998 he paid the full sum to the second appellant. On 22 August 1998 he repaid the loan in the amount of N\$6000 to the first appellant which the first appellant had advanced to him. Mr Eberenz was quizzed about the sales agreement which he supposedly signed with the second appellant. It was pointed out that in the statement he had made to the police he had stated that the agreement he made with the second appellant was half complete. He agreed that he made a statement to that effect but added that he had gone to the second appellant while in custody to collect the agreement so that he could sell the vehicle. When pressed further, he said that at the time he signed the statement he had taken some medication and that he had mentioned this to the police officer recording his statement and that he could not remember clearly. He was asked why he stated in the police statement that the purchase price for the car was N\$13 500. He replied that he was confused when he made the statement. He was also asked why he said in the statement that he had paid the full purchase amount the same day he signed the agreement. He responded that what he stated in the statement was wrong because he paid only on 9 September 1998. When queried about which version is the truth he came around and said what he said in the police statement was the truth and not what he told the court.

[57] The last witness for the defence was Ms Haugk, a sister of the second appellant. She stated that in August 1998, she repaid a loan in the amount of N\$8000 which the second appellant had advanced to her. She testified that she had raised the money through her savings and then kept it in a safe at home. She claimed that the second appellant never asked for security for the loan. Upon being reminded that the second appellant testified that he took security in the form of the car which he held until the loan was paid, Ms Haugk agreed that there was in fact an arrangement for security as testified about by the second appellant.

Findings of the trial court

[58] The trial court found correctly in my respectful view that the identity of the perpetrators had been established beyond reasonable. As to the evidence of De Klerk who is the key witness in relation to the identity of the attackers, he was rightly found to be an accomplice. The trial court found nevertheless that although his evidence was not free from criticism, it was on the whole reliable at least to the extent that it implicated the appellants as the perpetrators. The court singled out two aspects of De Klerk's account of the alleged robbery which the court found to be false, namely the part where he said that he had dropped the appellants in the bush beforehand from which the attackers emerged to commit the crimes and his evidence that after the attack he drove his vehicle towards the Country Club and onto Academia.

[59] The court reasoned that apart from the evidence of De Klerk, there is independent evidence establishing the identity of the attackers and therefore

corroborating De Klerk's evidence. They were described by Mukawa, Eiseb and an independent witness Mr Kawejao as the one being lighter skinned and the other as dark skinned as well as shorter. Their description tallies with their activities at the bank in Cape Town as depicted in a video that was shown to the trial court, evidence that went unchallenged. The court found that the appellants had come into large sums of money in Namibia Dollars which they sought to exchange in Cape Town. The trial court rejected the appellants' explanations of the sources of the funds, reasoning that if the money was legitimately acquired in Namibia, it would not have been difficult for the appellants to exchange it in Namibia. Moreover, so the court below reasoned, the money recovered from the second appellant in South Africa was in the form of new crisp notes in numerical sequence, which would be at odds with the sources of the money described by the appellants and the defence witnesses.

[60] Mr Kawejao's description of the clothes worn by the attackers as well as his testimony that they covered their faces with balaclavas correspond with De Klerk's evidence that the appellants wore tracksuit like pants and had used such coverings to conceal their identity. De Klerk's evidence that he was given false number plates; that he received a call on his mobile phone about the time he mentioned; that he had gone to Mr Diergaardt's house to pick up the appellants, and that a firearm and a letter of authority had been procured from Mr Diergaardt had all been corroborated by objective evidence.

[61] On the allegation that De Klerk bore a grudge against the appellants and was falsely implicating them in revenge, the court rejected this evidence on two bases. The first is that De Klerk was arrested after he was called by the first appellant to meet him at an agreed spot in the city centre. De Klerk promptly answered the call. Unbeknown to De Klerk, the first appellant was in the company of police officers. The second was that while in custody the first appellant had given money to his girlfriend to be handed over to a man to buy necessities for De Klerk. Both instances demonstrated that the relationship between De Klerk and the appellants was cordial contrary to the evidence of enmity peddled by the appellants.

[62] The court *a quo* rejected the arguments advanced by the defence that the deviation from the normal procedures by the Blackbird crew evidence a conspiracy amongst certain employees of Coin Security and the appellants to steal the money and that the taking of the vehicle and the money constitute theft rather than robbery. Counsel for the appellants advanced the same arguments in this court based on what counsel characterises as major deviations by the Blackbird crew. I will deal with this aspect of the appeal later on in this judgment.

[63] On the issue of the parking of the vehicle at the front of the Baines Centre as opposed to the usual and more secure back of the building, the court held that although this was unusual, it had happened in the past that vehicles carrying money parked at the front of the shopping centre and that there was nothing sinister for the Blackbird crew doing the same. As to the decision of the Blackbird crew to use the

Western Bypass route on the way to the Country Club, it was reasoned that although the bank officials were adamant that they never used that route because it was isolated and longer, this did not rule out the possibility that other crews and bank officials acted otherwise. This could be the case because Eiseb testified that that was the route he used while in training and Mr du Toit indicated that there was no hard and fast rule about how to get to the Country Club.

[64] As to the crew's failure to carry a shotgun, the court accepted Mukawa's evidence that they left in a hurry and at the time Ms Binneman who was supposed to issue the firearm was busy with something else. Regarding the crew's failure to take along a working hand held radio, the trial court again accepted Mukawa's version that they were given a radio that only had one working channel and that since it did not work properly he handed it back. This in contradistinction to Ms Binneman's account that Eiseb flatly refused to take the radio with the words: 'The radio is not necessary'. The court found Ms Binneman to be an unreliable witness. On the swapping of the more secure vehicle with the defective Blackbird away from the crew's base, while acknowledging that such action was never allowed the court expressly accepted Eiseb's evidence that he was 'ordered or requested' to change over vehicles by his superior, Mr Matongo. The court nevertheless found Eiseb not to have been 'always a satisfactory witness'. He was further described as being 'evasive in part and hesitant when dealing with the order or procedure with the convoy'. However, the court found that this was not due to his involvement or complicity in the crime. On the contrary,

the court held that Eiseb's account of what happened at the scene was supported by the evidence of Mr Kawejao.

[65] The court furthermore rejected the evidence seeking to establish alibi on the part of the appellants and concluded that it was the two appellants in complicity with De Klerk who committed the crimes and accordingly convicted them as charged.

The applicable legal principles

[66] The general principles of a court of appeal's approach to a matter before it were set out by the Appeal Court of South Africa in *R v Dhlumayo* 1948 (2) SA 677 (A). These principles have been aptly and succinctly summarised in *Hiemstra's Criminal Procedure* (2008 : LexisNexis) at 30-45 as follows:

'The court of appeal must bear in mind that the trial court saw the witnesses in person and could assess their demeanour. If there was no misdirection of facts by the trial court, the point of departure is that its conclusion is correct. The court of appeal will only reject the trial court's assessment of the evidence if it is convinced that the assessment is wrong. If the court is in doubt, the trial court's judgement must remain in place (*S v Robinson* 1968 (1) SA 666 (A) at 675H). The court of appeal does not zealously look for points upon which to contradict the trial court's conclusions, and the fact that something has not been mentioned does not necessarily mean that it has been overlooked.'

[67] As to the evidence of accomplices, being complicity to the crime there is a danger that an accomplice may be motivated for whatever reason to substitute the accused for the real perpetrator. To guard against such a pitfall, courts have

developed a cautionary rule of practice requiring a court to be aware of the inherent danger in the evidence of an accomplice or a single witness. The rule requires furthermore, that there ought to be in existence some safeguards reducing the risk of a wrong conviction such as corroboration or the absence of evidence contradicting that of the accomplice.¹ Ultimately what is required is the determination of the question whether, in the light of all the evidence, the guilt of the appellants has been proved beyond reasonable doubt.² It has often been stressed, however, that in the process of scrutinising and weighing the evidence of accomplices and single witnesses generally, the exercise of caution should not be allowed to displace the exercise of common sense.³

Identity of the perpetrators

[68] The appeal primarily concerns the question of whether the State has proved the charges of robbery and malicious damage to property beyond reasonable doubt. I respectfully agree with the findings of the trial court that the identity of the attackers has been established and the alibi has been disproved beyond reasonable doubt. As an accomplice, De Klerk's evidence has to be treated with caution. The court *a quo* was alive to the inherent danger of relying on De Klerk's testimony. It correctly pointed out the unsatisfactory aspects of his evidence and the fact that, being an accomplice, De Klerk sought to minimise the extent of his own involvement in the crimes. It nevertheless came to the conclusion that despite those defects, his evidence as to what happened at the scene and the identity of the perpetrators was corroborated by

¹*S v Snyman* 1968 (2) SA 582 (AD) at 585D-F

²*S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645h

³*R v J* 1966 (1) SA 88 (SR) at 90.

a considerable body of independent and material evidence. I respectfully agree with the trial court's finding in this regard. As was explained by the South African Appeal Court in *S v Snyman*⁴ at 586H-587A, if the evidence of other witnesses has furnished material from which an inference corroborating the evidence of a witness to an incident that only he or she testifies about could be drawn, such a witness can no longer be regarded as a single witness. The trial court was correct in its finding that Mukawa, Eiseb and Kawejao all corroborated De Klerk's evidence on the general description of the appellants and on some aspects of the manner in which the attackers had approached the Coin Security crew. This evidence undoubtedly places the appellants at the scene of the crime and is not simply evidence emanating from a single witness.

[69] The court below was also correct in my view in its rejection of the allegation and contention that De Klerk was falsely implicating the appellants. It is evident that he and the appellants were still on good terms while in custody as exemplified by the money that the first appellant gave to his girlfriend for onward transmission to a man to buy necessities for De Klerk. As to the evidence implicating the appellants quite apart from De Klerk's evidence, it was common cause that the appellants travelled together to South Africa. While in Cape Town they both went to the bank where the second appellant exchanged Namibia Dollars for Rand notes. The second appellant sustained burns more or less at the time Blackbird was burnt out and his explanation of how he came about the injuries had not been at all consistent. He discharged

⁴fn 1 above.

himself from hospital in Windhoek where he was being treated for the injuries when news of the discovery of the burnt out Blackbird was carried in newspapers. It is clear that at the time he had not recovered from the injuries which the treating doctor described as serious. The fact that he was treated in a hospital in Cape Town a day after he unceremoniously left the hospital is a sure confirmation, if one was needed, that his wounds had not healed by the time.

[70] The second appellant had new crisp money with serial numbers running consecutively, an impossible state of affairs if the money he was found with came from the sales at a tuck shop or the sale of items of clothing or money that had been saved over time and stored in a safe as he explained those instances to be the sources of the money he had on him. It was not disputed that about N\$950 000 of the stolen money was in N\$100-bill denominations. The trial court was correct in its finding that the appellants had large amounts of money on them when they travelled to Cape Town. Over a period between 16 and 21 September 1998 the appellants exchanged or deposited some N\$14 900 while in Cape Town and a further N\$6200 was recovered from the second appellant by the South African Police. Further amounts were spent, amongst others, on fuel expenses, hotel accommodation, buying air tickets, purchasing a cellphone, medical expenses and a loan to Christie Jason. If the money in the Namibian currency was legitimately acquired, the appellants could have easily exchanged it in Namibia where they did not need to pay any commission as the Rand was and remains legal tender here and the two currencies trade one-to-one. Clearly the money was illicitly acquired.

[71] I turn next to consider the question whether the unlawful appropriation of the money on 11 September 1998 was robbery or theft. It will be recalled that the incident on the date in question was preceded by a series of incidents where the appellants and De Klerk trailed the Coin Security vehicle transporting the money to various ATMs in and around the city with the intention to steal the money. On a number of occasions the appellants were ready to strike but the attack was aborted because things did not appear to have gone according to plan. On the date of the incident, the Blackbird crew was involved in a series of incidents of their own where there was a systemic failure to comply with the basic security procedures and company policies. The failure to comply with safety procedures was not confined to the Blackbird crew only; it extended to some middle ranked administrative personnel. In my respectful view, the trial court placed insufficient weight on the cumulative effect of the deviations from the established rules and procedures by the Blackbird crew and some of its supervisors such as Ms Binneman and a Mr Matongo on the date of the incident. In this respect, the court below misdirected itself in accepting the various explanations offered for the violation of the rules and procedures. This misdirection led the court to convict the appellants, wrongly, of robbery on the first count.

[72] In my opinion there is a reasonable possibility that the alleged robbers acted in concert with co-conspirators to steal the money and to dispose of the property to conceal the evidence. There are indications that what happened was theft rather than robbery. There is a reasonable possibility that the perpetrators had prior knowledge of

the movement of the Coin Security vehicle from a source within Coin Security that the vehicle had security defects. Had the perpetrators not have had this knowledge the manner in which they approached the crew, namely to pounce on it with hand guns while the crew was in a vehicle with armoured windows that would have been secured (should they have been locked from inside) would have been completely ineffectual.

[73] It was common knowledge that the appellants had connections not only within Coin Security but also contacts with some unscrupulous elements in the Police Force about which they openly bragged to De Klerk. There was a certain Jacky who was a Coin Security driver and who was said to have been doing the bidding for the appellants and then of course police officers, including Warrant Officer Morkel who travelled with the first appellant to Cape Town after the commission of the crimes, Constable Platt who allegedly drove the first appellant to Rehoboth after the first appellant had been tipped off by another police officer, Le Roux, of his impending arrest. Moreover, the following incidents are also consistent with a staged event rather than a spontaneous robbery:

- (a) The swapping of cars for the less secure vehicle outside base contrary to company policy. It seems to me that the trial court erred in uncritically accepting Eiseb's explanation that he simply obeyed orders when he accepted a less secure Blackbird outside the company premises contrary to strict company policy. He should have queried Matongo's orders in this

respect. Eiseb accepted the proposition put to him by counsel for the defence that it was company policy that a driver had the right to refuse to drive an insecure vehicle and to demand a secured one and yet he agreed to let go of a secure vehicle. If his supposed acceptance of the order that appears to be unlawful is considered in light of additional transgressions below, it becomes patently clear that the change of vehicles was not an isolated incident but rather part of a pattern of incidents indicative of a conspiracy involving some Coin Security employees and the appellants to steal the money.

- (b) The Blackbird crew leaving behind a shot gun on the pretext that they were in a rush to start with their shift and Ms Binneman was busy doing something else.
- (c) Leaving behind a hand-held radio for the reason that they did not need one (on the evidence of Ms Binneman) or that one channel was not working (on the evidence of Mukawa).
- (d) Mukawa leaving one of the windows of Blackbird half open on the explanation that he forgot to close it (note that he does not say that he left it half open because the inside of the cabin was hot as Eiseb asserted) and offering no meaningful resistance despite the fact that he was armed with a firearm. In his statement of 13 September 1998, Mukawa displays a clear

recollection of what happened just before the collision. He says the car came from behind at high speed, overtook and cut in. Such a dangerous incident would have aroused suspicion in someone in charge of such valuable cargo who would have then taken basic steps to confront the imminent danger. Yet Mukawa did nothing. Instead, he sought in the statement to blame the driver for not taking evasive action to avoid the collision. He says in this regard: 'I saw a white vehicle coming from behind at a very high speed and pass our vehicle and come in front and stopped immediately. My driver bumped this vehicle. I also noticed that my driver did not attempt to swerve to the right to avoid the accident nor did he attempt to apply brakes'. (Emphasis added.)

- (e) Eiseb not taking any defensive steps after the white Fox cut in, in Mukawa's words 'to swerve to the right to avoid the accident' or to apply brakes. It is not surprising that after he was released from custody he never went back to work. In the words of the Coin Security General Manager, Mr du Toit, he deserted.
- (f) Eiseb driving with an open bullet proof window contrary to company regulation of which he was fully aware.
- (g) The crew deviating from the normal route on their way to the Country Club. Eiseb said that he was aware of the order of the convoy and that he did not

lose sight of the bank car on its way to the Country Club, yet he deviated from the order of the convoy and took the longer and risky route, because that is the route he used when under training. The bank officials were on the other hand adamant that the route was a no go area. The trial court resolved the issue by holding effectively that the bank officials were entitled to their opinion but that it did not mean that other crews did not use the route.

- (h) The perpetrators knowing in advance and in effect expressing delight that 'Oupatjie' was on the wheel of Blackbird. It was common cause that 'Oupatjie' is Eiseb's other name. It is worth noting that Eiseb was generally defensive and evasive when cross-examined on the issue of the order of the convoy and his responsibilities as the driver.

[74] The trial court's assessment of the evidence on the aspect of the deviation from the established rules and procedures was done in a piecemeal fashion. In this connection, the eloquent observations of *Best on Evidence* regarding the approach to circumstantial evidence (as quoted by Zulman AJA in *S v Reddy* 1996 (2) SACR 1 (A) at 8c)) are apposite. There it is said:

'Not to speak of greater numbers, even two articles of circumstantial evidence, though each taken by itself weigh but as feather, join them together, and you will find pressing on a delinquent with the weight of a mill-stone.'

[75] The cumulative effect of all the above incidents and other evidence is that in all probabilities the alleged robbery was a simulation. The crew, again in the words of Mr du Toit, 'created an opportunity for the alleged robbers to rob that particular vehicle'. That the appellants sought to conceal their identity during the incident should not at all negate the finding that the robbery was contrived. Obviously, they had to disguise themselves to avoid possible identification, for example, by passers-by. They also had to give a semblance of a real robbery, including assaulting the crew or otherwise they might have given the game away.

Conclusion

[76] In the result, I have found that the trial court was correct in its assessment of the evidence establishing the identity of the perpetrators and negating the defence of alibi. I have found nevertheless that it has placed insufficient weight on the cumulative effect of the circumstantial evidence, including the violations of established rules and procedures that are indications of a conspiracy involving some employees of Coin Security and the appellants to stage a robbery in order, so it would appear, to conceal the involvement of the employees. Such a machination amounts in law to theft only. I am therefore of the view that the verdict of robbery on the first count should be set aside and be substituted for the conviction of theft. The conviction on the second count should be confirmed.

Sentence

[77] The theft was well-planned and was committed on a grand scale. It involved substantial amounts of money. Only N\$6200 out of N\$1 020 000 was recovered. Theft of money in transit was relatively prevalent at the time. On the personal circumstances of the appellants, although they had previous convictions, the court below was correct in treating these as old enough to be ignored. In light of the fact the appellants will be convicted of theft, the sentence of 21 years imprisonment imposed on them in respect of the first count will have to be substituted for an appropriate sentence. I would accordingly propose the imposition of a sentence of 18 years imprisonment on each appellant. The proposed sentence is appropriate given the amount stolen and the fact that a large portion thereof has never been recovered. The element of the force used (according to the evidence of 'robbery' accepted by the High Court) was minimal and reflects the difference between the sentence proposed and the one imposed.

[78] In respect of the count of malicious injury to property, although the vehicle was part of the property stolen, the action of setting it alight was a separate criminal conduct aimed at destroying the evidence. The vehicle was undoubtedly a valuable asset that was permanently lost to the owner. I consider the sentence of five years imprisonment imposed by the court *a quo* to be adequate and reasonable and would not disturb it.

Order

[79] The following order is accordingly made:

1. The conviction of robbery with aggravating circumstances is set aside and substituted for a conviction of theft.
2. The conviction of malicious injury to property is confirmed.
3. The sentence of 21 years imprisonment imposed on each of the appellants is set aside and there is substituted for the sentence of 18 years imprisonment each.
4. The sentence of five years imprisonment on the charge of malicious injury to property is confirmed.
5. The sentence in paragraph 3 above is antedated to 4 October 2002.

SHIVUTE CJ

MARITZ JA

CHOMBA AJA

APPEARANCES

APPELLANTS:

H Barnard

Instructed by H Barnard

RESPONDENT:

A Lategan

For the State