REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE only in respect of appellant 2 and 3
(accused 10 and 14)
Case number: 409/2002

In the matter between:

NUGALEN GOPAL PILLAY	1st Appellant
DEVAGIE RAJNARAIN	2nd Appellant
MUNJOO LUTCHMENARAIN	3rd Appellant
CLIVE RUBENDERAN GOUNDEN	4th Appellant

and

THE STATE	Respondent

CORAM: **MPATI DP, SCOTT JA and MOTATA AJA**

HEARD: **25 and 26 AUGUST 2003**

DELIVERED: **28 NOVEMBER 2003**

Summary: Appeals in respect of accused 10 and 14 – admissibility of derivative evidence unconstitutionally abstained.
As to accused 14 – court of appeal precluded from substituting verdict of guilty on count in respect of which appellant acquitted by trial court.

JUDGMENT

MPATI DP et MOTATA AJA:

[1] The four appellants were part of a contingent of 19 accused who stood trial before Galgut DJP and assessors in the Durban and Coast Local Division of the High Court. They were all charged with robbery with aggravating circumstances (count 1), with accused 1 to 8, 12 and 13 also being charged in the alternative to count 1, with contravening s 18(2)(a) of the Riotous Assemblies Act 17 of 1956 (conspiracy to commit robbery). Accused 13 to 19 were in addition charged with money laundering in contravention of s 28, read with ss 1, 2, 3 and 33 of the Proceeds of Crime Act 76 of 1996 (count 2). These latter accused were also charged with contravening s 29 (count 3) and s 30 (count 4) of the same Act.

[2] In his address after plea, counsel for the State informed the court that the State would seek a conviction on the main count (count 1) only against accused 1 to 8. As to the remaining accused, the State would seek a conviction on the competent verdict of being accessories after the fact to the main count.

[3] The four appellants were accused 9, 10, 14 and 7 respectively. We shall, for convenience, refer to them as in the court below. Accused 7 was convicted on count 1 and sentenced to 20 years' imprisonment. Accused 9, 10 and 14 were all convicted of being accessories after the fact to robbery. Accused 9 was sentenced to 5 years' imprisonment, accused 10 to 5 years' imprisonment in terms of s 276(1)(i) of Act 51 of 1977 and accused 14 to 4 years' imprisonment. Accused 14 was acquitted on counts 2, 3 and 4.

[4] All four accused were refused leave to appeal against their convictions and sentences. Accused 9, 10 and 14 are now before us with

leave of this Court. Accused 9 and 10 appeal against their convictions only while accused 14 appeals against both her conviction and sentence. With regard to accused 7 this Court directed that his application for leave to appeal against his conviction and sentence, together with his application for condonation for the late filing of his application for leave to appeal, be argued 'before the Court which hears the appeals of' accused 9, 10 and 14. In addition, accused 7 applied for leave to adduce fresh evidence. That application was also to be argued together with his application for leave to appeal.

[5] The charges against the accused (the four appellants and their co-accused) are a sequel to a robbery that was committed at the premises of the company SBV Services (SBV) in Durban during the early hours of 6 August 1996, when a sum of R31 million was stolen. SBV is an intermediary between the South African Reserve Bank and various local commercial banks. Its functions entail the receipt of money from the Reserve Bank which it delivers to the various local commercial banks. It also collects from local banks money which is then kept available at its premises for recirculation. If the money becomes redundant or damaged it is returned to the Reserve Bank. A certain Hanujayam Mayadevan (Mayadevan), who was a sergeant in the South African Police Service and attached to the Chatsworth police station, was one of a band of seven persons who committed the robbery with the assistance of two SBV's employees, accused 5 and 6, who were on duty on the night in question. Some time after the robbery (it appears in September 1998) Mayadevan was arrested and detained on an unrelated charge (murder). While in custody and through encouragement from members of his family he

confessed his part in the robbery to the investigating officer, Captain Hall. His confession resulted in extensive investigations by the police, which in turn led to the arrest of the 19 accused ultimately charged before the court below.

[6] It goes without saying that Mayadevan was the main witness for the State, particularly with regard to the robbery. In considering his evidence the trial court found him to be 'the sort who will lie when it suits him', that he was an accomplice with a possible motive to implicate the accused and that as such his testimony must be approached with the utmost care and circumspection. It held that it 'will accept his relevant evidence if it is suitably corroborated by other independent and acceptable evidence'.

[7] Against that background we now proceed to consider the appeals of the individual appellants.

ACCUSED 7

[8] According to Mayadevan, accused 7 was not involved in the robbery, nor in the planning of it. It is common cause, however, that accused 7 had previously been employed by SBV as a protection officer. In that capacity he accompanied vehicles which delivered or fetched money from commercial banks. He worked with Colin Nayager (accused 5) and Perumal Soobramoney Naidoo (accused 6), who were his friends, but was dismissed early in 1996 after he had been involved in an accident with one of the SBV vehicles. He knew the inner workings of the SBV premises, more especially the treasury room, where the money was stored.

[9] After his dismissal from SBV, accused 7 offered his services as a firearm instructor to a firearms business in Silverglen, Chatsworth. He converted one of two rooms on the ground floor of the building, where the

firearms business was situated, into a shooting range and the other into a lecture room. This process, according to accused 7, took approximately three months to complete, whereafter he commenced lecturing and giving instructions in the use of firearms.

[10] Accused 7 is implicated in the robbery by three state witnesses, namely, Samuel Anthony Naidoo, a 17 year old young man at the time of the trial (Naidoo), Andile Dominique Tiyo (Tiyo) and Ramesh Persadh (Persadh). Naidoo, who was described by the court *a quo* as a 'particularly unintelligent and inarticulate young man', testified that he first met accused 7 early in 1996 and was thereafter employed by him at the shooting range, where he did menial tasks. His version was that on a certain day in July 1996 he saw accused 5, 6 and 7 enter the lecture room. He became curious and went to sit on the stairs outside the lecture room, from where he eavesdropped on them through a slightly opened window. He saw and over-heard them discuss a sketch plan of the SBV premises and plan a robbery.

[11] Naidoo testified further that on 6 August 1996 he heard, over the news, that SBV had been robbed. Later that same evening, he said (he later said in the late afternoon), he received a telephone call from accused 7, who summoned him to the shooting range. On his arrival at the shooting range he noticed two vehicles parked there, one being that of accused 7. The other belonged to accused 6. Accused 5 and 6 were also present. Accused 7 made him carry four black bin bags out of the boot of his vehicle and into the target shooting room. Accused 7 gave him a spade and instructed him to dig a hole and bury the bin bags in the sand between the back wall of the target shooting room and a stack of motor vehicle tyres.

He had to climb over the tyres in order to dig the hole. In that process he discovered that the bin bags contained bundles of banknotes in R100 and R50 denominations. A few weeks or a few days thereafter he met accused 5 and 6 at the shooting range. They told him to keep his mouth shut about the black bags.

[12] Tiyo is unemployed and a self-confessed gangster. He admitted that he had been involved in a robbery that took place in May 1998, when R7.4 million was stolen. He was given an indemnity pursuant to his giving evidence against his accomplices in that robbery. He also took part, he said, in discussions on other possible robberies which in fact never took place. Tiyo testified that he knows accused 5, 6 and 7, whom he had all met late in 1997. He was first introduced to accused 6 by someone he referred to as 'KK' and thereafter he met accused 7 at a bus rank. He met accused 5 at Addington Beach, where accused 6 and 7 were also present. On several occasions thereafter he met the three accused 'in the vicinity of Addington Beach', and in a beachfront flat owned by a person named Derrick. He testified that with the exception of accused 7 the other two accused were his friends. At one meeting at Derrick's flat accused 6 told him that on the day of the robbery he was in the control room at SBV and opened the electronically controlled mechanism so that the robbers could gain entry. Accused 7 told him that he (accused 7) and certain other members of the police at the Chatsworth police station were involved in the robbery and that his share of the proceeds was buried behind tyres in the shooting range.

[13] Persadh was 30 years old at the time of the trial and held the degrees B Iuris and Bachelor of Laws. He testified that he knew accused 5, 6 and

7, whom he had met at the Majestic Casino in Chatsworth during December 1997. He used to frequent the Majestic Casino and consequently befriended accused 5, 6 and 7, who were employed there as security personnel. At that time the witness was a candidate attorney in Durban. He testified that he and accused 5, 6 and 7 sometimes met at the shooting range where accused 7 was employed. They met every day, sometimes more than once. In January 1998 he had an opportunity, he said, to discuss with accused 5 and 6 their roles in the robbery. This occurred at the foyer of the Majestic Casino. Accused 6 told him that he and accused 5 were involved in the robbery. Accused 5 nodded affirmatively while accused 7, who was some distance away but within earshot, never commented on the statement and showed no surprise. Persadh freely admitted that he had been involved in the R7.4 million robbery referred to above, that he was arrested in connection with it but after he had made a clean breast of it he agreed to testify against his accomplices.

[14] The evidence of accused 7 can be summarised as follows. He admits that he met Naidoo during December 1996 at his (accused 7's) sister-in-law's wedding. Prior to that he had seen him at accident scenes when he (accused 7) was the driver of a patrol van for the Chatsworth police station. He offered Naidoo employment at the shooting range. He testified that the tyres in the target shooting room were stacked from the floor right up to roof height. Behind the tyres were canvas bags filled with sand. A rubber mat hung from the roof in front of the tyres. No one, he said, could thus climb over the tyres and dig a hole in sand that was contained in canvas bags. He denies that he ever telephoned and

summoned Naidoo to the shooting range on 6 August 1996, because he had not even met him at the time. He denies ever having discussed a robbery and a plan of the SBV premises with accused 5 and 6 at his desk as alleged by Naidoo. He said that the window referred to by Naidoo and through which Naidoo allegedly saw the plan of the SBV premises could not even open. A white board on which he (accused 7) wrote down notes for lectures was fixed against part of the window, and his desk was directly below it. Further, the window was painted so as to avoid the reflection of the sunlight on the board.

[15] Accused 7 testified further that he met Tiyo when he (accused 7), as a security officer, assisted in controlling strikes at Engen petrol depots and at Clover Dairy, where Tiyo was one of the leaders of the strike. Tiyo approached him and introduced himself as a past student at the shooting range. He denies ever telling Tiyo that he was involved in the robbery. With regard to Persadh's version accused 7 admits that he was employed on a part-time basis at the Majestic Casino, but denies that he was present when Persadh had a discussion with accused 5 and 6 about the robbery.

[16] The version of accused 7 regarding the target shooting room is supported by his witness Rajgopal Naicker, a range officer with the South African Practical Shooting Association and an instructor with the National Firearm Training Association of South Africa (NAFTA). As range officer he had the responsibility of ensuring the safety of people who use firearms at a shooting range. He knows accused 7 and through him gave the owners of the shooting range advice on how to build an indoor shooting range. During 1996 he was asked by NAFTA to inspect the shooting range and observed that there were sandbags between the brick wall at the back of

the target shooting room and a stack of tyres that went up to the ceiling. In front of the tyres was a rubber mat. When confronted with Naidoo's evidence that there was loose sand behind the tyres the witness gave a perfectly logical answer that if that were so the loose sand would have seeped through between the tyres.

[17] Naicker did not produce any written report on his alleged inspection of the shooting range, an aspect on which the trial court criticised him. His evidence, however, was that he merely had to give his report telephonically. He said that he would otherwise not have passed the shooting range if it had not met the requirements, with which, in this case, he was satisfied.

[18] The trial court correctly, in our view, reasoned that the evidence of Naidoo could only be accepted if it were corroborated by other acceptable evidence. The learned trial judge found such corroboration in the evidence of Tiyo and Persadh. He held that the versions of Naidoo and Tiyo corroborate each other and that Persadh, whom the court regarded as 'perfectly reliable', corroborates both. As to Persadh's evidence, the trial court found that the fact that accused 7 showed no surprise when accused 6 said he and accused 5 were involved in the robbery, was significant because in his evidence he said that he had never known that accused 5 and 6, who were his friends, had been involved in the robbery. He freely admitted, so the trial court said, that had he heard what accused 6 was alleged to have said, he would have been extremely surprised.

[19] We do not agree with the trial court's conclusion regarding Persadh's evidence. We are prepared to accept, in spite of his denial, that accused 7 was present and within earshot when the discussion between Persadh and

accused 6 took place. But, that he was involved in the robbery is not the only reasonable inference that can be drawn from his lack of response to the discussion, in our view. He may very well not have been interested in what was being discussed and may not have heard the essence of the discussion. In any event, on Persadh's own version accused 6 did not mention that accused 7 was also involved in the robbery. Secondly, Persadh did not mention the name of accused 7 in his statement to the police. In our view, the trial court erred in its finding that there was corroboration for Naidoo and Tiyo in Persadh's evidence, at least in so far as accused 7 is concerned.

[20] With regard to Naicker's evidence the trial Court said the following:

'While Naicker has not been shown to be lying, we find it difficult to believe that Naidoo would lie in regard to the burying of the money, because he would have known that it was impossible to have buried the money and that his lie would inevitably have been found out. The probability, so it seems to us, is that Naicker is wrong in what he says, and in this regard, it is significant that not a single written record of his inspection was made when he allegedly reported to the body that allegedly instructed him to do the inspection.'

It is clear, from this, that the reason for the trial court's finding that Naicker's evidence was wrong was that it believed that Naidoo could not have lied about the fact of burying the money where he alleged he did. In our view, Naidoo's version is improbable for the following reasons. The evidence reveals that at the time that he was supposed to be at the shooting range on Naidoo's version accused 5 was being interrogated at the SBV premises and was later taken to hospital. It is also quite clear from the evidence that the money taken from the robbery had not as yet been divided by the time when Naidoo was supposedly asked by accused 7 to bury bin bags

containing the money in the sand at the shooting range. In his statement Naidoo did not mention that accused 5 and 6 were present when he was made to bury the money as he alleges. There is, in our view, no good reason to prefer the evidence of Naidoo to that of Naicker on the question of how the shooting range was built. There is no basis upon which Naicker's evidence could be rejected. And on his version Naidoo could not have buried the money where he says he did.

[21] There are other aspects which, in our view, seriously affect the veracity of Naidoo's version. He testified that subsequent to his making a statement to the police after the arrest of accused 7 in January 1998, he was placed in a witness protection programme in Port Elizabeth from which he later escaped because, he said, he was lonely and feared for his parents' safety. At that stage accused 7 was in police custody. On his way to Durban from Port Elizabeth Naidoo telephoned accused 7's wife at least twice. Upon his arrival in Durban he spent three hours at his home and was thereafter picked up in the street by accused 7's wife, who was in the company of accused 7's two brothers. It is clear that this would have been arranged with him beforehand. He was placed in a hotel and the next morning he was taken to the Independent Complaints Directorate, where he retracted the statement he had made to the police. Accused 7's wife thereafter took him to an attorney where he made a further statement in which he said, *inter alia*, that he had been assaulted by a Captain Martin Hall and Tony Govindsamy and thus forced to implicate accused 7. Naidoo could not proffer any reason why he telephoned accused 7's house upon escaping from the witness protection programme instead of contacting his family. He did not attempt to escape from the hotel where he had been

placed so as to report to the police on what had happened to him. There is no evidence that he was guarded while he was at the hotel. He testified that he had been threatened and was forced by members of accused 7's family to retract the initial statement he had made to the police. He could not explain, however, why he did not tell his family about this. He admitted that what was contained in the statement that he made to the attorney was a version that he had simply made up; no one had told him what to say. He said that reference to the R7.4 million robbery in his statement was also made up.

[22] In view of the foregoing, there can be no justification for rejecting the evidence of the defence as false beyond a reasonable doubt. It cannot be held, as the trial court did, that the versions of Naidoo and Tiyo corroborate each other. It is so that accused 7 was an unimpressive witness, whose evidence was replete with discrepancies and inconsistencies. But as to how the shooting range was built, he has support from Naicker, whose evidence, as has been mentioned, cannot be rejected. No money was found on accused 7, nor was there any evidence to show that his estate had improved after the robbery. Of itself this is not determinative of the guilt or otherwise of accused 7, but it is a factor to be considered with all other factors. In our view, his appeal must succeed.

ACCUSED 9

[23] Accused 9 (the first appellant) is an attorney, who, at the time of the trial, had practised in Chatsworth for 12 years. Before that he had been a prosecutor in the Magistrates' Court for 2 years whereafter he did articles of clerkship for a further 2 years.

[24] The evidence shows that accused 9 and Mayadevan knew each

other before the robbery of SBV, the relationship, according to accused 9, being purely work related. He knew Mayadevan as a policeman attached to the Chatsworth police station. It is not in dispute that a few months after the robbery accused 9 facilitated the purchase, by Mayadevan, of a night club in Chatsworth (the Embassy Night Club) for a cash purchase price in excess of R1 000 000,00. The State's case was that accused 9 knew that the funds with which the night club was purchased formed part of the money taken in the robbery. The issue in the appeal of accused 9, then, is whether, by facilitating the laundering of illegally obtained funds by means of the purchase of the embassy Night Club accused 9 assisted the purchasers to evade justice, thereby making himself guilty as an accessory after the fact to robbery.

[25] Apart from Mayadevan the State called as witnesses in substantiation of its case Sivanathan Chetty, Julian Kasaval and Selvan Thambarin, who are all members of the close corporation that owned the Embassy Night Club prior to the sale. The other members were Manogaran Padayachee, Anesh Yegi and Leo Pillay, who held shares on behalf of Subramoney Naidoo, known as Gonnie.

[26] Mayadevan testified that a few weeks after the robbery he fortuitously met accused 9 at the Chatworth Magistrates' Court. Accused 9 asked him if he had been involved in the SBV robbery, to which he answered affirmatively. About a month later he again met accused 9 at the Chatsworth Magistrates' Court and accused 9 asked him if he was interested in purchasing the Embassy Night Club. When the witness showed interest in the proposition accused 9 undertook to facilitate the sale. It is common cause that on the night of 20 February 1997 (a

Thursday) a meeting took place at the Embassy Night Club between Mayadevan, with accused 9 acting as his attorney, and the six members of the close corporation.

[27] Sivanathan Chetty (Chetty) testified that he had decided during December 1996 to sell his 20% interest in the close corporation, and spread the word of his intentions. In the middle of February 1997 he was contacted by accused 9 who informed him that he (accused 9) had a buyer for the Embassy for R1 000 000,00. Accused 9 did not disclose the identity of the purchaser. Chetty thereafter spoke to the other members of the close corporation, who expressed an interest in selling the business. The members, however, could not reach consensus on the purchase price, the reason being that they had purchased equipment from a another nightclub, the Silver Slipper, in Chatsworth and owed R200 000,00 on the equipment. The owners of the Silver Slipper were Subramoney Naidoo, Monogaran Padayachee and accused 9.

[28] With regard to the meeting of 20 February 1997, Chetty's version is that the parties could not agree on the purchase price. Consequently, Mayadevan consulted three males who were in the pool room with whom he had arrived. He returned and said his mandate was to purchase the business for R1 000 000,00. In his evidence, however, Mayadevan denied that he had arrived at the embassy with others.

[29] It appears that both sides considered that an agreement could be reached and arranged to meet at the Club on Friday night, 21 February 1997. At this meeting an agreement was reached as to the purchase price, the deposit payable and the balance to be payable in three instalments. There was some difference as to the agreed purchase price, but Chetty

and Mayadevan both said the price agreed upon was R1,3 million. However, it was agreed that the deposit would be R600 000,00.

[30] Chetty and Julian Kasaval (Kasaval) testified that after agreement was reached on the purchase price and ancillary issues, accused 9 produced a typed purchase and sale agreement dated 21 February 1997 (exhibit 'Q1') to which was attached a typed authorisation (exhibit 'Q2'), in terms of which all the members of the close corporation would, on appending their signatures, give Chetty the power to sign the agreement on their behalf.

[31] The agreement contained three unsatisfactory aspects, viz:

(i) the purchase price was reflected as R250 000,00. The deposit was R50 000,00 with the balance to be paid in monthly instalments of R50 000,00 each;

(ii) the identity of the purchaser was left in blank; and

(iii) clause 5.1 of the agreement provided that the sale included a liquor licence, whereas the liquor licence had been applied for but not yet granted.

As to the first, Kasaval said accused 9 gave the assurance that the price did not matter because the sellers would be paid the full amount agreed upon. Even though in his evidence Chetty said the price would be sorted out later, when queried about the second point, he said the purchaser wished to remain anonymous. Kasaval testified that accused 9 said the name of the purchaser was not necessary and that his (accused 9's) own name could be used. Thereafter, according to Chetty, accused 9 altered the small errors in the document in his own handwriting. Exhibit 'Q2' was signed by all the members, except Naidoo. The agreement ('Q1') was

signed by Chetty on behalf of all the sellers. He also initialled each page as well as each of the alterations.

[32] From the evidence it is apparent that exhibit 'Q1' was intended to be the final agreement. Chetty testified that this was indeed the final document, but when cross-examined he conceded that he might have signed some other sale agreement when he went to accused 9's office the next day. Chetty was declared a hostile witness because he retracted certain allegations he had made in his statement, and also gave contradictory evidence in favour of accused 9. He testified that the sellers, on Friday night, wanted security for the balance of the purchase price in the form of an acknowledgement of debt. Mayadevan offered one but it was not accepted; they wanted one by accused 9. Consequently, Mayadevan and accused 9 conferred privately and accused 9 agreed to sign the acknowledgement of debt. This is also confirmed by the other witness, Selvan Thambarin.

[33] Mayadevan testified further that accused 9 asked him to provide him with the money to pay the sellers. He apparently did not know that a deposit had been agreed upon. Mayadevan believed that the balance of his share of the robbery money which he had kept in a flat he had hired was approximately R1 000 000,00. He telephoned one Nicki Moodley, who had keys to the flat and to the briefcase in which the money was kept, and instructed him to take the money to accused 9. It is not in dispute that Moodley delivered a briefcase which contained money to accused 9's office.

[34] It is also not in dispute that on the Saturday the sellers converged on accused 9's office. Accused 9 arrived after them and took a briefcase out

of the boot of his car. The briefcase contained bundles of R50 notes. The money was counted by the sellers whereafter they divided it amongst themselves. There is no agreement as to how much the money was. Chetty said it was R500 000,00 and the other two witnesses said it was R400 000,00. In any event it was not R600 000,00, which was the required deposit. The evidence was that accused 9 explained that he could do nothing more because that was all he had received.

[35] It is common cause or at least not in dispute that on that Saturday accused 9 produced a typed acknowledgement of debt (exhibit 'Q3'), which bore the previous day's date, ie 21 February 1997. It recorded the balance as R700 000,00 which was to be paid by accused 9 in instalments of R250 000,00 each on 7 March 1997 and 7 April 1997 and R200 000,00 on 7 May 1997. Chetty testified that accused 9 altered exhibit 'Q3' in his own handwriting to reflect the balance as R800 000,00 and changed the last instalment from R200 000,00 to R300 000,00. He signed it and handed it to him (Chetty).

[36] Richard Ernest Mayoss (Mayoss) testified as to accused 9's records and books of account. He is a chartered accountant with Deloitte and Touche who had been appointed by the Law Society to inspected accused 9's books of account. Earlier, whilst accused 9 was in Mauritius, the Law Society had inspected his books. Mayoss examined Accused 9's trust account and the file dealing with the sale of the Embassy Night Club. He compiled a report (exhibit 'TTT') on 21 October 1998 from the data he had gleaned from the trust account and the file. On advice he obtained from his advocate, accused 9 declined to answer questions from Mayoss pertaining to his books which called for an explanation.

[37] Mayoss's evidence, and his report (exhibit ‘TTT’), reflect that in Accused 9's file was a copy of an agreement of sale of the nightclub business (exhibit ‘UUU’). It was dated 21 February 1997. The agreement was complete. It showed that the purchaser was one Logan Chetty and the purchase price was R420 000,00, payable in full on or before 28 February 1997. It had been signed by both Logan Chetty as purchaser and Sivanathan Chetty on behalf of his co-members in the close corporation. Mayoss's evidence and report showed that accused 9 received three payments into his trust account which he credited to an account entitled 'Embassy Nite Club'. The receipts showed the following details:

(i) on 20 February 1997, cash in the sum of R249 050,00 from ‘Embassy Nite Club’;

(ii) on 24 February, cash in the sum of R169 850,00 from ‘Club Embassy’ being for fees; and

(iii) on 14 March 1997, cash from 'Embassy' for fees and disbursements in the sum of R1 200,00. These amounts total R420 000,00.

[38] Mayoss testified that accused 9’s books of account did not show that any money had been paid in cash to the sellers on Saturday morning, 22 February 1997.

[39] Accused 9 denied in evidence that he knew that Mayadevan had been involved in the robbery. He testified that he met Mayadevan by chance at the Magistrates' Court. Mayadevan broached the subject of the purchase of the Embassy Night Club because he knew that accused 9 knew certain members of the owner of the club. He said Mayadevan claimed that he had won a lot of money from gambling, that he (Mayadevan) and other persons (he did not disclose their names) were

interested in purchasing the Embassy Night Club. He told Mayadevan that he would contact Chetty, which he did, but Mayadevan did nothing further. About one and a half months later he again met Mayadevan at the Chatsworth Magistrates' Court and Mayadevan raised the subject once more. He said he contacted Chetty using his mobile phone and the meeting of Thursday night was set up. He told Mayadevan, he said, that for him to remain involved he wanted 'a substantial deposit', for his fees. What he had in mind was R20 000,00 to R30 000,00. Mayadevan telephoned him on the Thursday morning to tell him that he was sending R250 000,00. He said he assumed that R20 000,00 would be his deposit and that the balance would be payment on account of the purchase price. During the course of the day a man unknown to him, presumably Moodley, arrived with cash in a briefcase. He did not count the cash but sent the man with a staff member to deposit it into his trust account. He issued a trust receipt for R250 000,00 to the name of the Embassy Night Club before the money was taken to the bank. Later he was told that the cash amounted to R249 050,00 and he instructed his staff to alter his copy of the receipt accordingly. He placed the receipt in the file opened in the name of Embassy Nite Club.

[40] Accused 9 admitted that he attended the Thursday night meeting as Mayadevan's attorney. He said he did not know the three men consulted by Mayadevan during the negotiations. He agreed that everything was agreed upon except the purchase price. However, the parties were confident that when they met on the Friday night, the price would be settled. It was also agreed, he said, that the business would be handed over to the purchasers immediately the purchase price was agreed upon.

He said he was instructed, in anticipation of finality being reached, to draft two documents: the one a draft contract of sale and the other an authority by members in favour of Chetty giving him the power to sign the sale agreement on their behalf.

[41] He drafted the two documents. In regard to the sale agreement, he said he used a precedent which was stored in his computer. The price was agreed at R1,2 million with a deposit of R500 000,00. He testified that he told the parties that the draft sale agreement was nothing more than a draft. Later in the meeting the documents were handed back to him, signed. The members, with the exception of Pillay, signed the authorisation. Chetty signed the agreement after correcting minor spelling mistakes. On Friday night Mayadevan, accused 9 claimed, told him that Logan Chetty was to sign for the purchasers as a nominee.

[42] Accused 9 testified that Mayadevan said he would make the deposit of R500 000,00 available on the Saturday morning. Mayadevan told him that his personal contribution would be R420 000,00. As accused 9 understood it, the R420 000,00 would be made up of the R250 000,00 he had received in trust (less a shortfall of R950,00) plus a further amount of R170 000,00 (less a shortfall of R150,00). He said that on the Saturday morning he went to the Embassy Night Club to collect the money (the club having been handed over to Mayadevan the previous day as per the agreement). Mayadevan gave him a briefcase full of cash which he did not count. He took it to his office where he met the sellers. He gave the briefcase to the members to count the money and share it amongst themselves. Accused 9 said he did not at all times remain in the presence of the sellers whilst they counted the money. He left the room at times. He

was told, he said, after the money had been counted that it was only R150 000,00. He telephoned Mayadevan and told him of the shortfall of R100 000,00 and that the sellers wanted an acknowledgement of debt in respect of the balance. He said Mayadevan was surprised and told him that he would bring another R100 000,00 later that day. Mayadevan came to his (accused 9's) office and told him that he could not raise the R100 000,00. It was agreed with the sellers that the deposit would be reduced to R400 000,00. The balance was therefore R800 000,00.

[43] Accused 9 testified further that it was on Saturday morning for the first time, but before they knew that the deposit would be reduced to R400 000,00, that he and Mayadevan agreed, and the members of the close corporation accepted, that it would be accused 9 who would sign the acknowledgment of debt. He testified that it was only on Saturday that the undertaking was drafted. When Mayadevan told him that he could not raise the R100 000,00 the undertaking was altered by increasing the total from R700 000,00 to R800 000,00, and the final instalment from R200 000,00 to R300 000,00

[44] Accused 9 explained that on the same Saturday morning he gave his secretary the draft agreement (exhibit ‘Q1’), together with notes he had made dealing with alterations that had to be made for typing. He said that she produced the document, exhibit ‘UUU’, which was later found in the file by Mayoss. Accused 9 said the reflection of the price as R420 000,00 was a mistake which his secretary had made. She had made it, he surmised, because the same piece of paper on which he had written the necessary alterations, also recorded Mayadevan's undertaking to provide him with R420 000,00 and she had mistakenly assumed that the purchase

price was R420 000,00. He said that he told the members that the price reflected on the draft agreement (exhibit 'UUU') was a mistake, and he instructed his secretary to rectify it. That was done and the final agreement which reflected the correct purchase price as R1,2 million, with a deposit of R400 000,00 and a balance of R800 000,00 payable in instalments, was then signed. The original was signed by Chetty on behalf of the seller, and Logan Chetty as the purchaser, so accused 9's evidence proceeded.

[45] Accused 9 said that when Mayadevan and Logan Chetty left his office that morning, the members then and there shared out the R400 000,00 between themselves. The R400 000,00 was made up of R250 000,00 paid in on Tuesday morning (which was in fact R249 050,00) and R150 000,00 in cash given to him by Mayadevan that morning. The members distributed the latter amount between themselves, but said they would let him know in whose favour, and in what amounts, he was to make out trust cheques in so far as the R400 000,00 was concerned.

[46] Accused 9 said that on Monday, 24 February 1997, Mayadevan telephoned him and told him that he was sending R170 000,00 to his office to make up the R420 000,00 which he had promised to pay him. Once again an unknown person, but not the same one as before, arrived at his office with a briefcase full of notes. He did not count the money, but sent the man with a staff member to the bank to deposit it. He made a trust receipt out for R170 000,00 and indicated that it was for 'fees and disbursements'. Later that morning the members arrived at his office and at their insistence he made out trust cheques to the payees and in the amounts they instructed him to do, and that amount of R420 000,00 which he held for Mayadevan was paid to the members. He said an agreement

was reached with Mayadevan whereby Mayadevan would pay his fees. When he received the fees, he said he did not make a record of it because it was not received in trust, but as fees already earned.

[47] Accused 9's evidence was that each and every payment that was made towards the balance of R800 000,00 still owing was paid through him. Each time money was made available the members would come to his office to fetch it or he would distribute it. He did not record these as trust payments because he did not receive the money in the strict sense, but was merely acting as a conduit.

[48] Before accused 9 testified he had already given an explanation (exhibit 13) to the Law Society dated 13 January 1999 in respect of queries raised by it.

[49] The case advanced on behalf of the State was in essence that accused 9 was aware of the source of the money; that he knowingly arranged for the Embassy Night Club to be purchased in such a manner that there would be no written record of the identity of the purchaser, Mayadevan, and a deflated price would be reflected in the agreement of sale, and that he (accused 9) did this with the object of concealing Mayadevan's participation or role in the purchase. Accused 9, on the other hand, testified that he had no idea that the money came from the robbery and that it never occurred to him that the robbery could have been the source of the funds.

[50] Quite apart from Mayadevan's evidence that he told accused 9 that he was involved in the robbery when they fortuitously met at the Chatsworth Magistrate's Court, the circumstances were such that from the very beginning accused 9 must have entertained at least a suspicion that

the money came from the robbery. His evidence that this never occurred to him cannot be true. In this regard the following is not in dispute:

(i) Accused 9 was aware of the SBV robbery on 6 August 1996 (4 months before). It was one of the biggest ever in the country and was broadcast on the radio and received wide publicity in the press.

(ii) He was aware that a policeman from Chatsworth Police Station had been taken in for questioning. He knew some policemen very well.

(iii) He knew of the rumours circulating that the police stationed at Chatsworth were involved.

(iv) He knew Mayadevan was a policeman stationed at Chatsworth.

(v) He knew policemen are notoriously badly paid.

(vi) He knew Mayadevan was driving a new Nissan Sani.

(vii) He knew that the purchase price of the Embassy Night Club would be way beyond the reach of a policeman.

(viii) Thereafter, he participated either directly or indirectly in a transaction which involved the payment of R1 200 000,00 in large instalments, all made in cash. (He conceded he was alive to the danger of allowing his trust account to be used for purposes of laundering money.)

[51] The transaction was effected with the assistance and direction of accused 9 in such a manner that there was at the end of the day not a single record of Mayadevan or his 'backers' having purchased the night club. The suggested reason for the need for anonymity could never have justified this, namely that Mayadevan, as a policeman, was not permitted to engage in private business, and therefore until it was clear the deal would go through, he wanted to remain anonymous. Accused 9 himself conceded that his records were not available to public scrutiny. The manner in which

this anonymity was maintained requires consideration.

[52] Accused 9 identified three receipts which he said related to payments made by Mayadevan in respect of the purchase price and fees. The first payment was made in cash on Thursday morning, 20 February 1997 even prior to the first meeting. A trust receipt was issued, first in the amount of R250 000,00 and later altered to R249 050,00.

[53] Accused 9 agreed that it is imperative that the information on a trust receipt be 100% accurate. Also, it is quite clear that in the absence of a more sinister reason, the anonymity that would have been required by Mayadevan as a policeman would not have been such as to preclude him from being issued a receipt in proper form. The receipt for R249 050,00 was defective in two respects. First, it gave the payer's name as 'Embassy Night Club'. This was false. On Thursday morning not even the first meeting had been held. The payer was no more than a would-be purchaser of the Embassy Night Club. Second, the reason for the payment was left blank. (No proper explanation was advanced or could be advanced.) The second receipt, dated 24 February 1997 for R169 850,00 similarly stated the payer to be 'Club Embassy' but falsely stated the payment to be in respect of 'fees'. The subsequent receipt for R1 200,00, dated 14 March 1997, similarly states the payment to have been for fees. (Accused 9 tried to blame his staff, but only he could have instructed his staff to write what they did).

[54] Accused 9 said his fee in the sum of R20 000,00 was paid in cash. No entry was found in the books of the accused recording the payment to have been made by Mayadevan. The file relating to the transaction was opened in the name of Embassy Night Club, but it was opened before

accused 9's client had acquired the business.

[55] The payment of the instalments was not simply left to the parties, nor was payment made through accused 9 in the normal way, ie by way of a payment into a trust account and thereafter payment to the sellers. Instead, a bizarre procedure was adopted which involved the money being brought to accused 9's office *in cash* and then counted by, and divided up amongst, the sellers. Accused 9 issued no receipt to Mayadevan (the payer) but required the sellers to sign 'acknowledgements of receipt'.

[56] It is common cause that the agreement of sale made no reference to Mayadevan (we shall deal with this later) as purchaser. In one of the agreements referred to below the purchaser was named as Logan Chetty. According to accused 9, this was at the insistence of Mayadevan. But this was not put to Mayadevan in cross-examination. There would also have been no reason for it. Mayadevan, according to accused 9, was the spokesman; he had negotiated the sale. In the absence of some undisclosed motive, there was no reason for him not to have been the nominated purchaser. (We interpose that Mayadevan's version is that he paid a deposit of R500 000,00. It was never put to him in cross-examination that he had paid R249 050,00, R169 850,00 and a further R1 200 to make up the shortfall).

[57] We now come to the agreement of sale. The evidence of the state witnesses was that there was one agreement which was signed by Sivanathan Chetty on behalf of the sellers on Friday, 21 February 1997 (Exhibit ‘Q1’). The price reflected as R250 000,00 and the purchaser was unidentified. The sellers were told by accused 9 not to worry about the price stated in the agreement and that they would be paid the agreed price.

Sivanathan Chetty said accused 9 told them that he would 'sort it out' while Kasaval testified that accused 9 said it was not necessary for them to know the identity of the purchaser.

[58] Accused 9's evidence was that exhibit ‘Q1’ was merely a draft. He received some support for this from Sivanathan Chetty in the latter's cross-examination. Having testified in chief that he considered exhibit ‘Q1’ to have been the final document he conceded in cross-examination that he may have signed some other document of sale the next day and that exhibit ‘Q1’ may have been a draft. The court *a quo* characterised this piece of evidence as being 'doubtless untrue' and observed Sivanathan Chetty to have been either afraid to contradict accused 9 or to have been well-disposed towards him. In the event, Sivanathan Chetty was declared a hostile witness and we can see no reason for differing from the trial court's finding. The document (exhibit ‘Q3’) signed by the members authorising Chetty to sign on their behalf, moreover, did not authorise him to sign any agreement but the ‘agreement attached hereto’, viz exhibit ‘Q1’.

[59] The State's version is in any event supported by a number of factors which could not be controverted. Exhibit ‘Q1’ was signed by Sivanathan Chetty who, in addition, initialled every page and every alteration. He must have gone through the agreement with some care; minor spelling mistakes were corrected and initialled. In our view he would not have failed to observe that the price was wrongly reflected, but nonetheless did not correct it or cause it to be corrected as in the case of other errors in the agreement. Had there been no agreement to reflect a 'deflated' price in the agreement he would certainly have done so. If exhibit ‘Q1’ was intended as a mere draft, there would have been no reason for any price at all to be

inserted. Moreover, exhibit 'Q1' was the agreement which Kasaval, one of the members, retained in his possession for a period of about three years. It is unlikely that he would have done so had it been a draft.

[60] The failure of the agreement to reflect the true (higher) price and the identity of the purchaser is obviously consistent with an attempt to exclude any reference to Mayadevan and to conceal the large amount of money involved. But the agreement could not have prevailed as a subterfuge, at least as far as the price was concerned. The reason is that in the event of an audit the receipts of money would not be able to be reconciled with the purchase price of R250 000,00. The receipts in question are those referred to above.

[61] But, as we have said, accused 9's version was that Q1 was a draft only. He said that on Saturday morning, 22 February 1997 another draft, intended to be the final agreement, was prepared and signed by Sivanathan Chetty, as seller, and by Logan Chetty whom, he said, Mayadevan had proposed as a nominee purchaser. His version was that after this agreement had been read through and signed by both parties (who initialled the errors) he, accused 9, spotted that the purchase price had been wrongly stated to be R420 000,00 and to be payable by 28 February 1997. How the parties could have missed this important error is a question to which we shall return later. Significantly the R420 000,00 approximated the total of the amounts reflected in accused 9's books as having been received. Accused 9 said he immediately instructed his secretary to prepare a fresh agreement reflecting the price of R1 200 000,00, which was duly signed. A copy of the agreement reflecting a price of R420 000,00 was found by the Law Society when it inspected

accused 9's books which were given to Mr Mayoss, an accountant appointed by the Law Society. It was handed in as exhibit 'UUU'. The further agreement was never produced.

[62] Accused 9's explanation for the mistake was the following. He said that in the course of the meeting on Friday, 21 February 1997, Mayadevan told him that his contribution would be R420 000,00 and he would pay the balance before 28 February 1997. Accused 9 said that at the time he was making notes and recorded 'R420 000,00 before 28 February 1997', together with other information. The next day he instructed his secretary to prepare a final agreement for signature (exhibit ‘Q1’ being the first draft). He told her what the deposit was to be, ie R500 000,00 and instructed her to take the information requesting the payment of instalments from a draft undertaking that had been prepared. He also gave her his notes. He said he could only conclude that that is how she came to type the purchase price as R420 000,00 (ie less than the amount he had told her would be the deposit) which was to be paid on or before 28 February 1997.

[63] No doubt errors occur in typed documents as a result of misunderstandings or inadvertence. But it is wholly improbable that the purchase price of R420 000,00 was inserted in exhibit 'UUU' in consequence of such an error. In the first place, it is difficult to appreciate why Mayadevan should have been at pains to point out to accused 9 what his particular contribution was to be and to undertake to pay it to accused 9 in a manner that was inconsistent with the instalments provided for in the agreement and the undertaking which accused 9 subsequently signed. This information would have been of no relevance to accused 9. Indeed, he says he did not even know who the other purchasers were, let alone

what their particular contributions were to be. It is also significant that it was never put to Mayadevan in cross-examination that his share of the purchase price was R420 000,00. It is a curious error for accused 9's secretary to have made, especially after being told that the deposit was to be R500 000,00 and after being handed the written undertaking which made provision for instalments totalling R800 000,00.

[64] But most improbable of all is the failure of the parties signing the agreement, ie Logan Chetty and Sivanathan Chetty, to have noticed such a glaring error in perhaps the most important provision of all in the agreement. On the face of it both initialled each page and a number of what can be described as minute errors eg 'os' for 'of' and the misspelling of the word 'specific'. The third page differs from the others in that the spacing is such that the upper half of the page contains only five lines. The price, both in words and figures stands alone so that it cannot be missed. And yet, said accused 9, this is what the signatories did. What is more, they failed to spot the error and correct it when the main purpose of the new draft was to rectify the error in exhibit ‘Q1’ with regard to the price. In our view, this is so improbable as to justify the conclusion that it did not happen.

[65] In his report dated 21 October 1998, Mr Mayoss noted that he could not reconcile the price of R420 000,00 reflected in exhibit 'UUU' with the deposits and payments reflected in accused 9's books and requested an explanation from accused 9. This was not forthcoming until 13 January 1999 when accused 9 finally submitted a written explanation to the Law Society. Given his evidence as to the mistake and how it occurred, one would imagine that when asked for an explanation, accused 9 would have

immediately pointed out that the figure of R420 000,00 was an error and would have explained how it came about. But this is not what he did. In his letter to the Law Society he confirmed that the purchase price had been R420 000,00 and then proceeded to reconcile this amount with the receipts for R249 050,00, R169 850,00 and R1 200,00, pointing out that the additional R100,00 was a part payment for his fees. The letter also added, ambiguously, that the 'balance due in respect of the purchase price appears to have been settled between the sellers and the purchaser'. In his evidence accused 9 said that his reference to R420 000,00 was yet another mistake and that this was apparent from the words quoted. These do indeed imply that more was paid by the purchasers than the sum of the amounts reflected on the receipts. Nonetheless, what is unexplained is the attempt to reconcile the R420 000,00 with the receipts and it is difficult to imagine that accused 9 could have performed this exercise without realising that the figure of R420 000,00 was incorrect.

[66] As previously observed, it is therefore wholly improbable that the agreement, exhibit 'UUU' came to reflect a purchase price of R420 000,00 in the circumstances outlined by accused 9. If, for no other reason, this is so because the parties could not have signed exhibit 'UUU' without being aware of the error. There are two possibilities that arise from this. The one is that the parties to the agreement signed it knowing that the price reflected was not the true purchase price. In other words, exhibit 'UUU' was signed on the *same* basis as Sivanathan Chetty and Kasaval say that exhibit ‘Q1’ was signed. In that event, of course, exhibit 'UUU' would be no different from exhibit ‘Q1’ in its attempt to conceal the extent of the money involved. The only difference would be that the amount of R420 000,00

could be reconciled with the receipts that had been issued by accused 9.

[67] The other possibility, and the one favoured by counsel for the State, is that exhibit 'UUU' is a photostat of an agreement subsequently 'manufactured' by accused 9 from exhibit ‘Q1’ in order to reflect a purchase price reconcilable with the receipts referred to. It was contended that the only new pages of exhibit 'UUU' are the first page, setting forth the names of the parties, and the third page, on which the purchase price is recorded. As to the other pages, they are identical to exhibit ‘Q1’, says counsel, save that they have been initialled or signed by the 'purchaser', Logan Chetty, and then photostatted to give the appearance that the original was signed or initialled by both signatories at the same time. There is much to be said for counsel's contention. We have previously remarked on the somewhat unusual spacing on page 3. In the result all the remaining pages begin and end with precisely the same words as in the case of exhibit ‘Q1’. The corrected errors on exhibit ‘Q1’ are repeated on exhibit 'UUU'. The latter agreement is furthermore dated 21 February 1997 (in accused 9's handwriting) and not 22 February 1997 on which date, according to accused 9, it was signed. Accused 9's explanation that it was backdated because 21 February 1997 was the effective date, is not persuasive. The agreement could, for instance, have stated that the effective date was 21 February 1997. It is, however, unnecessary to decide which of the two possibilities is the correct one. In either event accused 9 would have been party to an attempt to conceal the true purchase price and indeed the identity of the purchaser who, but for the robbery, would have been a man of little means.

[68] As far as the alleged third and final agreement is concerned, the

inference that it did not exist is overwhelming. In the first place, it was never produced. If it had been drafted and signed by both parties on Saturday 22 February 1997 as accused 9 says it was, the obvious thing would have been for accused 9 to make and keep a copy. It would hardly have taken a minute and accused 9 would have been entitled to charge for doing so. His explanation that he was too busy is hardly plausible. But in any event the existence of the third agreement is dependent on the acceptance of accused 9's evidence that the purchase price of R420 000,00 reflected in exhibit 'UUU' was a mistake the signatories failed to observe before signing the agreement. As we have said, his version is so improbable that it cannot be accepted.

[69] Finally, it is necessary to refer to an undertaking signed by accused 9. Fundamental to his version was that at all times his role was no more than that of an attorney acting on behalf of Mayadevan in the ordinary course of his practice; in other words that his interest in the transaction was no more than that of a disinterested attorney. However, at the request of the sellers he signed an acknowledgement of debt personally guaranteeing the payment of the balance of the purchase price in the very substantial amount of R800 000,00. An obvious inference that arises is that he must have been extremely confident that the money would be forthcoming which, given Mayadevan's initial failure to come up with the agreed deposit, suggests that accused 9 was aware of its source.

[70] The explanation given by accused 9 was that he had agreed with Mayadevan that in the event of him having to pay the R800 000,00 or any part of it, he could take over the night club and that, said accused 9, was a very attractive proposition. The effect of this agreement was, of course,

that if accused 9 was called upon to pay the R800 000,00 or any portion of it, Mayadevan and his co-purchasers would in effect forfeit their entire contribution. But accused 9's version was that he had no knowledge of the identity of the other co-purchasers, let alone whether they had authorised Mayadevan to enter into such a far-reaching agreement with him or not. If this were the case, it is most improbable that accused 9 would have given such an undertaking or entered into the alleged agreement with Mayadevan unless he knew a great deal more about where the money was going to come from than he would have the trial court believe. In all the circumstances we are satisfied that the case against accused 9 was proved beyond reasonable doubt. His appeal must accordingly fail.

ACCUSED 10

[71] At the time of the robbery accused 10 lived with her husband, accused 11 (they divorced in September 1996), and their two children aged 19 and 21 years respectively, in a house at Sea Cow Lake, Durban, where she was the tenant. It is common cause that two weeks after the robbery, on 22 August 1996, a number of policemen entered her house and, with her co-operation, retrieved from the ceiling, 6 bin bags and a canvass kitbag containing bank notes amounting in total to just over R5 million. It is not in dispute that the money came from the robbery. It had been brought to her home during the previous evening by one Rajan Naidoo after a family friend, Yegan Naidoo, had made telephonic arrangements with her. Yegan Naidoo, according to Mayadevan was one of the seven persons who committed the robbery. Accused 10 testified, however, that she did not know that Yegan Naidoo had been involved in the robbery and that she thus had not known that the money came from the robbery. Her testimony

in this regard, and indeed on many other aspects, was rejected by the trial court as false beyond a reasonable doubt. Hence her conviction as an accessory after the fact to robbery.

[72] The finding that accused 10 knew that the money found in her house came from the robbery was not challenged on appeal, correctly so in our view. Accused 10 was a poor witness. Mr Naidu, who appeared on her behalf, advanced two main submissions before us. The first was based on an alleged undertaking given by the Deputy Director of Public Prosecutions not to prosecute accused 10 and members of her family in the event of any one of them testifying in the trial of Rajan and Yegan Naidoo, who were charged with the SBV robbery following their arrest after the finding of the money in her house. The factual background is the following. When the State was about to adduce evidence against accused 10 her legal representative and that of accused 11 applied for the discharge of the two accused on grounds of the alleged undertaking. The State and the defence then placed before the trial court a statement of agreed facts relating to the issue and asked the court to adjudicate thereon, the defence arguing that the State should be held to its undertaking. The statement of agreed facts reads:

'1. The State seeks to lead evidence pertaining to the alleged recovery of cash from the house of Accused nos. 10 and 11 on Thursday, 22 August 1996. For the purpose of the inside trial pertaining to the admissibility of such evidence, it has been agreed between the State and Accused Nos. 10 and 11 that the following facts are common cause:

1.1 On the evening of 22 August 1996, the police penetrated the house of Mrs and Mr Rajnarain, Accused 10 and 11, respectively, and their family in search of cash believed to be linked to the R31 million SBV robbery.

1.2 During the course of the search of the house, Supt. Havenga informed Accused No. 10 that it was the intention of the police that Accused No. 10 and her family would not be arrested but would be used as State witnesses.

1.3 Accused Nos. 10 and 11 and their two children, Trevor and Tracy were subsequently taken to the police station where they each deposed to a "witness statement".

1.4 The two Accused and their children were all subpoenaed as State witnesses in the trial of Rajan and Loghandheran Naidoo which commenced in June 1997.

1.5 Prior to the commencement of the trial, the two Accused informed the Deputy Attorney-General, Advocate Gey van Pittius S.C., that certain portions of their witness statements were factually incorrect. Through their Counsel, Advocate Y Moodley S.C, they presented the Deputy Attorney-General with a memorandum setting out their versions of what had transpired.

1.6 It was agreed between the Deputy Attorney-General and the legal representatives of the Accused that, provided one or more of Accused Nos. 10 and 11 and their two children were to testify in accordance with the versions set out in their witness statements, as amended by the abovesaid memorandum, they would not subsequently be prosecuted in connection with this case, notwithstanding the possibility that the Court in the abovementioned matter might refuse to indemnify any of those of them who testify in terms of Section 204 of Act 51 of 1977, because of the discrepancies between their original statements and their anticipated evidence. The number of the abovesaid members of the Rajnarain family to be called to testify was a matter solely within the discretion of the Attorney-General.

1.7 After the Court in the abovementioned case ruled against the State in the inside trial relating to the admissibility of evidence pertaining to phone taps, the State closed its case. Consequently neither of the two Accused

nor either of their two children was ever called as State witness at that trial.

1.8 It may be accepted in favour of the two Accused that they were willing to testify and had they been called as witnesses, would have given evidence in accordance with the agreed facts.'

[73] While admitting the undertaking, the State argued that it was entitled to prosecute the two accused. As can be seen from the statement of agreed facts, the undertaking was conditional upon accused 10 or any one of her family members giving evidence in the trial of Rajan and Yegan Naidoo. None was called as a witness although accused 10 and 11 were available and willing to testify. The trial court found that on the stated facts there was no obligation on the State to call the two accused or their children as witnesses and that by not calling any of them it 'did not breach the agreement'. The court found it unnecessary to go into the question whether or not the accused's right to a fair trial had been violated.

[74] It was argued before this Court that the trial court's approach constituted a misdirection in that the fairness or otherwise of the trial was not solely a question whether or not a contract had been breached. The trial of accused 10 can only be regarded as having been fair if it was fair to try her in the first place, so the argument proceeded. The conduct of the police and the nature of the agreement concluded between accused 10 and members of her family on the one hand and the Deputy Director of Public Prosecutions on the other had the effect that (a) the right of accused 10 not to make incriminating statements against herself was consciously and deliberately surrendered by her and (b) her right to be presumed innocent was compromised. The position on this issue has been that the State is entitled, in principle, to later prosecute a person whom it had

treated at first as a witness. But this Court said the following in *S v Coetzee* 1990 (2) SACR 534 (A) at 541 c-d:

'Sodanige optrede hou egter inherent sekere gevare vir 'n beskuldigde in, en wanneer die Staat so optree moet daar natuurlik sorg gedra word dat die beskuldigde, wat voorheen 'n potensiële getuie was, nie onbillik benadeel word deur sy rolverandering nie. So, bv om 'n uiterste voorbeeld te gebruik, as hy beïnvloed was om 'n verklaring te maak deur 'n belofte dat hy nie aangekla sou word nie maar as getuie gebruik sou word, sal so 'n verklaring nie later as getuienis teen hom toelaatbaar wees nie.'

The State, in the case of accused 10, did not seek to introduce any statement made by her and we are consequently not persuaded that the trial court misdirected itself in dismissing the application for the discharge of accused 10 and 11 on the grounds that it did.

[75] A further issue, however, which is the second argument advanced by Mr Naidu, is the admissibility of the evidence of the finding, by the police, of the stolen money in the ceiling of the home of accused 10. We proceed to consider that aspect.

[76] When the State sought to introduce, as evidence against accused 10 and 11, the evidence of the fact that money was found in accused 10's house (the impugned evidence), their legal representatives objected on the grounds that such evidence was inadmissible. The trial court accordingly embarked on a trial-within-a-trial to determine the issue. Two bases were raised in support of the objection. The first was that the police had gained knowledge of the fact that the money was possibly in the house of accused 10 by means of having illegally monitored telephone conversations of accused 10. Her telephone had been 'tapped' on the authority of a court order or direction obtained in terms of s 2(2) the Interception and Monitoring Prohibition Act 127 of 1992. Such direction was obtained by a

Captain Van der Vyver of the Priority Crime Unit, who had been asked to assist in the investigations. Because of the magnitude of the case, the investigating officer, Captain Neville Barnard Eva (Eva), had enlisted the assistance of members of the police attached to various units. The investigations had revealed that cellphones had been used in the area of the SBV premises during or around the time of the robbery. Following upon the securing of information pertaining to telephone numbers contacted through the cellphones before, during or after the robbery, Captain Van der Vyver applied for an order that certain telephone lines be monitored.

[77] The State accepted that the order granting permission to the police to monitor the telephone conversations of accused 10 was obtained on false information contained in the affidavit in support of the application for such order and that therefore the order concerned had been illegally sought and obtained. The subsequent acts of monitoring by the police had thus been illegal. The trial court accepted that the illegal monitoring of the telephone conversations of accused 10 was in breach of accused 10 and 11's right to privacy, but held that excluding the evidence concerned would bring the administration of justice into disrepute (s 35(5) of the Constitution Act 108 of 1996) (the Constitution).

[78] Before us it was submitted that the police would not have found the money had they not unlawfully monitored the telephone conversations of accused 10. It was argued further that the degree to which her rights (to privacy) were breached far outweighs her complicity in the offence. The case of accused 10 is distinguishable from that of Rajan and Yegan Naidoo, who were acquitted following the refusal by McCall J to admit

evidence of the telephone conversations between Yegan Naidoo and accused 10, by reason of the fact that the monitoring of the conversations was unlawful. (Rajan and Yegan Naidoo were arrested subsequent to the finding of the money in accused 10's house and charged with robbery.) What was found to be inadmissible in that case was evidence of what passed between Yegan Naidoo and accused 10, and which led to the search of the house of accused 10. By seeking the admission of the evidence of the conversations, the State intended to show the association of the two accused, Rajan and Yegan Naidoo, with the money found in the house of accused 10. What was sought to be admitted in the case of accused 10 in this case is the impugned evidence of the money, which is real evidence. (We deal with the concept of real evidence later in this judgment.) The judgment of McCall J is reported as *S v Naidoo and Another* 1998 (1) SACR 479 (N). The question, however, is whether, because the impugned evidence was procured as a result of an infringement of accused 10's right to privacy, it should be excluded on the basis that its admission will be detrimental to the administration of justice (s 35(5) of the Constitution). We shall return to this question later in the judgment.

[79] The second ground of objection to the admissibility of the evidence sought to be introduced was that the search in the home of accused 10 was in itself irregular and illegal because it was conducted without a search warrant and after entry into the house had been illegally obtained. Although this ground was raised in counsel's heads of argument, no further submissions were advanced before us, but it was not abandoned either.

[80] A third ground of objection raised on behalf of accused 10 was that

because the statement by accused 10 that the money was in the ceiling constitutes what was conceded by the State to be 'an inadmissible confession', the impugned evidence, which came into being as a result of the making of the statement, was likewise inadmissible. The evidence established that after the police had gained entry into her house accused 10 was interviewed by two senior officers, Superintendent Werner Havenga (Havenga) and Eva, in the kitchen and out of sight of the other members of her family. Accused 10 testified that one of the policemen gave her an undertaking that if she told them where the money was she and her family would not be prosecuted but would be used as State witnesses. Having satisfied herself that the two officers were indeed policemen (she was shown an appointment card by one of them) she obliged and told them that the money was in the ceiling. After the money was found she and the rest of her family were taken to the police offices where they made witness statements. At no stage was she warned that she was a suspect.

[81] In cross-examination of accused 10 Mr Steynberg, for the State, conceded that the undertaking was indeed given by the police. Both Havenga and Eva, however, testified that accused 10 was warned by Havenga 'in accordance with her rights', according to Eva, and 'in terms of the Interim Constitution', according to Havenga. Eva said that Havenga told accused 10 that he was treating her as a witness together with her family but that the ultimate decision on whether or not she would be prosecuted lay with the Attorney-General. Havenga, on the other hand, said that he informed accused 10 that if she co-operated with them there was a possibility that she would be used as a State witness, but that the final word rested with the Attorney-General. It was, however, never put to

accused 10 that she was told that the undertaking not to prosecute was conditional upon the final word of the Director of Public Prosecutions (Attorney-General). That they told her so is also not contained in their statements. Havenga explains the omission by saying that it is because accused 10 was a State witness, while Eva said he did not think it was necessary to record it.

[82] It seems clear, in our view, that Havenga never told accused 10 that the undertaking not to prosecute her and her family was subject to a final decision of the Director of Public Prosecutions. Their further conduct supports this view. Havenga suggested to accused 10 that she would be placed in a witness protection programme if she co-operated. He subsequently arranged for a person from the programme to consult with her, but she decided not to participate in it. Although it is accepted that the final decision whether or not to prosecute a person is solely that of the Director of Public Prosecutions, we are satisfied that Havenga never informed accused 10 of that fact.

[83] The trial court, in any event, concluded that the evidence of the finding of the money was admissible. Indeed, as the learned judge reasoned, s 218(1) of the Criminal Procedure Act makes provision therefor. It reads:

'Evidence may be admitted at criminal proceedings of any fact otherwise admissible in evidence, notwithstanding that the witness who gives evidence of such a fact, discovered such fact, or obtained knowledge of such fact only in consequence of information given by an accused appearing at such proceedings in any confession or statement which by law is not admissible in evidence against such accused at such proceedings, and notwithstanding that the fact was discovered or came to the knowledge of such witness against the wish or will of such accused.'

[84] As has been mentioned above, the State conceded in the court *a quo*, and so did counsel for the State in this Court, that evidence of the contents of accused 10's statement that led to the discovery of the money is inadmissible in view of the fact that accused 10 was induced by the promise that she would be used as a State witness and would not be prosecuted (for any offence, obviously) to say where the money was. The provisions of s 218(1) of the Criminal Procedure Act seem to point to the admissibility of the evidence of the discovery of the money, unless such evidence can be excluded on grounds of unfairness or on grounds that its admission would be detrimental to the administration of justice.

[85] Section 35(5) of the Constitution provides:

'Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.'

There is no doubt that the money found in the ceiling of the house of accused 10 was found as a result of a violation, first, of her constitutional right to privacy (s 14 of the Constitution) in that her private communications were illegally monitored following the unlawful tapping of her telephone line and, second, her right to remain silent and her right against self-incrimination (s 35 of the Constitution) in that she was induced to make the statement that led to the finding of the money in the ceiling of her house. As to the latter right, the statement by accused 10 was not accompanied by an exculpatory explanation and thus amounted to a statement that she had knowledge of relevant facts which *prima facie* operated to her disadvantage (Cf *S v Sheehama*, 1991 (2) SA 860 (A) 879 G-J). Such relevant facts would, for example, be knowledge of how the money came to be in her house and that it came from the robbery.

[86] Counsel for accused 10 contended in this Court that the inclusion of the evidence of the finding of the money operated unfairly against accused 10. Her right to a fair trial was thereby infringed because the evidence was obtained in a manner that violated her constitutional rights. Mr Steynberg, on the other hand, submitted that in the circumstances of this case the trial court was dealing with real evidence the inclusion of which did not render the trial of accused 10 unfair.

[87] The issue whether the admission of real (or derivative) evidence would render a trial unfair has been the subject of a number of cases in Canada under s 24 of the Canadian Charter of Rights and Freedoms (the Charter). Section 24(2) of the Charter, though not in the same terms as s 35(5) of the Constitution, provides that where evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by the Charter such evidence 'shall be excluded' if it is established that, having regard to all the circumstances, its admission would bring the administration of justice into disrepute. In *R v Collins* (1987), 28 C.R.R. 122 at 137, Lamer J (Dickson C.J.C., Wilson and LaForest JJ concurring) said:

'If the admission of the evidence in some way affects the fairness of the trial, then the admission of the evidence would *tend* to bring the administration of justice into disrepute and, subject to a consideration of the other factors, the evidence generally should be excluded.' (Emphasis in original.)

And further:

'Real evidence that was obtained in a manner that violated the *Charter* will rarely operate unfairly for that reason alone. The real evidence existed irrespective of the violation of the *Charter* and its use does not render the trial unfair.'

[88] In the later decision of *Thomson Newspapers Ltd et al v Director of*

Investigation and Research et al (1990) 67 DLR (4th) 161 at 256 *a-e*, La Forest J expressed himself in these terms:

'A breach of the Charter that forces the eventual accused to create evidence necessarily has the effect of providing the Crown with evidence it would not otherwise have had. It follows that the strength of its case against the accused is necessarily enhanced as a result of the breach. This is the very kind of prejudice that the right against self-incrimination, as well as rights such as that to counsel, are intended to prevent. In contrast, where the effect of a breach of the Charter is merely to locate or identify already existing evidence, the case of the ultimate strength of the Crown's case is not necessarily strengthened in this way. The fact that the evidence already existed means that it could have been discovered anyway. Where this is the case, the accused is not forced to confront any evidence at trial that he would not have been forced to confront if his Charter rights had been respected. In such circumstances, it would be the exclusion rather than the admission of evidence that would bring the administration of justice into disrepute.'

Mr Steynberg relied on this passage for his contention that the admission of the evidence of the finding of the money, being real evidence, did not render the trial of accused 10 unfair. However, the Canadian Supreme Court has since moved to a much stricter approach to the issue. In *Burlingham v The Queen* (Indexed as *R v Burlingham*) (1995) 28 C.R.R. (2d) 244 at 262, Iacobucci J (La Forest, Sopinka, Cory and Major JJ concurring) said:

'On the other hand, Lamer J. noted [in *R v Collins*] that the admission of real evidence obtained in a manner that violates the *Charter* will rarely operate unfairly for that reason alone. This conclusion militates against the exclusion of the gun in the case at bar. However, I find that, in jurisprudence subsequent to *R v Collins*, this court has consistently shied away from the differential treatment of real evidence. For example, in *R v Ross* (1989), 37 C.R.R. 369 at p. 379, … Lamer C.J.C. emphasized that the admissibility of evidence under s.24(2) depended ultimately not on its nature as real or

testimonial, but on whether or not it would only have been found with the compelled assistance of the accused:

"… the use of *any evidence* that could not have been obtained but for the participation of the accused in the construction of the evidence for the purposes of the trial would tend to render the trial process unfair."

(Emphasis added.)

These comments are apposite to the case at bar. Further, I draw attention to the conclusions of La Forest J. in *R. v. Colarusso* (1994), 19 C.R.R. (2d) 193 at p.216, … where it was noted that the mere fact that impugned evidence is classified as either real or conscriptive should not in and of itself be determinative.'

Iacobucci J goes further at p 263:

'I conclude my review of the pertinent jurisprudence with the recent decision of *R. v. S. (R.J.)* (1995), 26 C.R.R. (2d) 1, …. In that case it was recognized that, despite the fact that theoretically the onus rests on the accused to show that the impugned evidence would not have been found but for the unconstitutional conduct, in practice the burden will often fall on the Crown as it possesses superior knowledge. It was held at pp.69-70 C.R.R., p.553 S.C.R., that the "but-for" test will be met by the Crown when it satisfies the court on a balance of probabilities that the law enforcement authorities would have discovered the impugned derivative evidence regardless of the information arising from the unconstitutional conduct.'

(See also the concurring judgment of Sopinka J, especially at p 276.)

[89] In that case (*Burlingham*) the appellant was charged with murder. The investigators had succeeded in obtaining from him, in spite of his repeated insistence to first consult his legal representative, information regarding the place where the murder weapon, a gun, could be found. It was subsequently retrieved by police divers from the bottom of a frozen river. Iacobucci J found that 'the derivative real evidence, the gun, *would not* have been found but for the information improperly obtained' through the breach of the appellants' right to counsel (s 10(b) of the Charter).

(Emphasis in the original.) The result was that a retrial was ordered with the direction that certain evidence, *inter alia* the evidence of the finding of the gun in the river, be excluded. What emerges from this is that evidence derived (real or derivative evidence) from conscriptive evidence, ie self-incriminating evidence obtained through a violation of a Charter right, will be excluded on grounds of unfairness if it is found that but for the conscriptive evidence the derivative evidence would not have been discovered. In the present case the information sourced from the illegal monitoring of accused 10's telephone line, which ultimately led to the discovery of the robbery money in her house, was not conscriptive evidence.

[90] As to the undertaking not to prosecute, given to accused 10 by Havenga, it was argued on behalf of the State that the money would in any event have been discovered by the police even without the breach of accused 10's constitutional rights. Indeed that was the evidence tendered by the State before the trial court. We are prepared to accept that the police, armed with information gained from the illegal monitoring, would probably have searched the house, although they admittedly had no search warrant, and would have found the money. From photographs which were handed in as exhibits, the bags containing the money could be seen immediately upon the trap door in the ceiling being opened. The result is that the admission of the derivative evidence, ie the impugned evidence, 'while prejudicial to the [appellant] as evidence tendered by the [State] usually is' (*R v Collins, supra*, at 140) will not render the trial unfair.

[91] This brings us to the second leg of the enquiry, viz whether the impugned evidence should in any event be excluded on grounds that to

include it will be detrimental to the administration of justice. Although the wording of s 24(2) of the Charter differs from s 35(5) of the Constitution, it is again useful to consider the approach of the Canadian courts to the concept 'Bringing the administration of justice into disrepute'. The concept is not foreign to our law of evidence. Froneman J, for example, suggested in *S v Melane* 1995 (4) SA 412 (E) at 424 E-G; 1995 (2) SACR 141 (E) at 154 *b-d* that in cases of violation of a s 25(2)(a) right guaranteed by the Interim Constitution – which did not have a provision similar to s 35(5) of the Constitution - evidence obtained as a result of such violation should be excluded, unless to do so would bring the administration of justice into disrepute.

[92] Whether the admission of evidence will bring the administration of justice in disrepute requires a value judgement, which inevitably involves considerations of the interests of the public. In *R v Collins*, *supra*, at 134, Lamer J says that the applicable test is 'whether *the admission of evidence* would bring the administration of justice into disrepute'. (Emphasis in original.) Although police misconduct in the investigatory process often has some effect on the repute of the administration of justice, s 24(2) is not a remedy for police misconduct, says Lamer J, requiring the exclusion of the evidence if, because of this misconduct, the administration of justice was brought into disrepute. At p 135 of the *Collins* judgment Lamer J reasons that the concept of disrepute necessarily involves some element of community views and concludes that 'the determination of disrepute thus requires the judge to refer to what he conceives to be the views of the community at large'. Obviously, the views of the community will change from time to time and what may have been in the public interest at one

point might not be at some other point.

[93] Although s 35(5) of the Constitution does not direct a court, as s 24(2) of the Charter does, to consider 'all the circumstances' in determining whether the admission of evidence will bring the administration of justice into disrepute, it appears to us to be logical that all relevant circumstances should be considered. Lamer J, at p 137 of the *Collins* judgment, lists a number of factors to which the Canadian Courts have had regard and which are to be considered and balanced in the determination of whether the admission of evidence will bring the administration of justice into disrepute. It is not necessary to list those factors here, but some of them we have already considered, for example, the kind of evidence that was obtained, what constitutional right was infringed, was such infringement serious or merely of a technical nature and would the evidence have been obtained in any event. As to the seriousness of the infringement of the constitutional right Lamer J suggests (at p 138) that the availability of other investigatory techniques and the fact that the evidence could have been obtained without the infringement tend to render the violation of the right more serious. In the present case the infringement of accused 10's right to privacy through the illegal monitoring was quite serious when looked at from the point of view of how the direction to monitor was procured. It certainly was not merely technical. As has been mentioned above, it was conceded on behalf of the State before the trial court that the application for the direction contained false information. In his testimony Captain Van der Vyver, on being questioned on this issue, admitted 'that I made lots of mistakes in the application for the phone tapping, and Judge McCall did criticise me extensively'. The judicial criticism that he refers to is contained

in the judgment of McCall J on this very issue of the illegal monitoring of accused 10's telephone line in *S v Naidoo and Another, supra*. In that judgment (at 515g) McCall J characterised the application for the direction as containing information 'some of which is patently false, and some of which is downright misleading'. And it matters not, in our view, whether the officers who did the actual monitoring, and Eva and Havenga, who acted on the information gained from the illegal monitoring, were unaware of the fact that the direction was procured on false, misleading information. Captain Van der Vyver was part of the team of investigators and in all probability acted, in procuring the direction, on the instructions of Eva as investigating officer. That Eva and Havenga might not have known of the illegality of the monitoring does not make the infringement less serious. And for his part, Eva conceded before the trial court that other means of investigation were available to them, surveillance of the suspects' houses being one. Indeed, he testified that some houses had been kept under surveillance.

[94] In our view, to allow the impugned evidence derived as a result of a serious breach of accused 10's constitutional right to privacy might create an incentive for law enforcement agents to disregard accused persons' constitutional rights since, even in the case of an infringement of constitutional rights, the end result might be the admission of evidence that, ordinarily, the State would not have been able to locate. (Cf *R v Burlingham, supra*, at 265.) That result – of creating an incentive for the police to disregard accused persons' constitutional rights, particularly in cases like the present, where a judicial officer is misled – is highly undesirable and would, in our view, do more harm to the administration of

justice than enhance it.

[95] The violation of accused 10's constitutional rights did not end with the unlawful monitoring of her private telephone communications. Subsequently, a team of police officers, led by Eva and Havenga, forced their way into her house and thereafter persuaded her to tell them where the money was hidden, giving her an undertaking that she would not be prosecuted and would be used as a State witness in the event that she gave them the information they required. They probably sought her assistance because they realised that they had no search warrant. We have mentioned earlier in this judgment (para 68) that whether the admission of evidence will bring the administration of justice into disrepute requires a value judgment, which necessarily involves considerations of the interests of the public.

[96] What are the interests of the public? Our country is presently plagued by serious crime of which robbery, where large sums of money are stolen, appears to be too frequent an occurrence. It is therefore desirable in the public interest that crime should be detected and the perpetrators punished. Government Ministers responsible for safety and security and the justice system, together with leaders in the South African Police Service, have often commented from public platforms that the rampant crime rate in this country could be effectively reduced if the public was prepared to assist in the process. In the instant case the police were investigating what might have been the biggest robbery in the country ever. They were after the criminals who had perpetrated the robbery, of whom Yegan Naidoo would appear to have been a prime suspect. They required the assistance of accused 10 whom they knew had spoken to Yegan

Naidoo and with her evidence they were sure to arrest him (which they did) and possibly others. Can it ever be in the public interest, in a crime ridden society like ours, and where members of the public are urged to assist in combating crime by reporting it, to charge someone after having given him/her an undertaking that he or she would not be charged in the event of him or her disclosing a fact which, though prejudicial to him or her, will bring perpetrators of serious crime to book? We think not. In our view such conduct would be more harmful to the justice system than advance it. And what transpired in accused 10's house should not be considered in isolation, as if removed from the original violation of accused 10's right to privacy, ie the illegal monitoring of her telephone communications. There may well be cases of serious infringement of constitutionally guaranteed rights where the interests of the public would not be served by the exclusion of evidence obtained as a result of such infringement. The present is, however, not one of them. Each case will depend upon its own facts.

[97] Lamer J, in the *Collins* case (at 138), says the question under s 24(2) of the Charter is whether the system's repute will be better served by the admission or the exclusion of the evidence. Our view is that the same applies under s 35(5) of the Constitution. Although it may cause concern that a perpetrator such as accused 10 might go free as a result of the exclusion of evidence which would have secured her conviction, what needs to be born in mind is that the objective of seeking co-operation from such a person is to facilitate a conviction for an even more serious offence. The police, in behaving as they did, ie charging accused 10 in spite of the undertaking, and the courts sanctioning such behaviour, the objective

referred to will in future be well neigh impossible to achieve. To use the words of s 35(5) of the Constitution it will be detrimental to the administration of justice.

[98] Accordingly, and considering what has been said above, our view is that the derivative evidence sought to be admitted should be excluded on the grounds that its inclusion will bring the administration of justice into disrepute. The evidence of the finding of the money is the only evidence against accused 10 and its exclusion means there is no evidence upon which she could be convicted. Her appeal should accordingly succeed.

ACCUSED 14

[99] Accused 14 is an unmarried police officer who obtained the rank of captain in 1977. At the time of the trial she had been a member of the South African Police Service for a period of 12 years. She admitted that from July 1996 to June 1998 she had had an affair with accused 13, who was, at the time of the trial, a captain in the South African Police, stationed at the Cato Manor police station. Accused 14 was attached to the Sydenham Police Station, Durban.

[100] The allegations of robbery (the State sought a conviction on the competent verdict of being an accessory after the fact to robbery) and money laundering against accused 14 followed upon an investigation into her financial status and asset base by the witness Eric Stephen Burnett (Burnett), a qualified chartered accountant and a partner in KPMG, a firm of chartered accountants. KPMG had received instructions from the South African Police Service to provide forensic accounting services to the team involved in the investigation of the SBV robbery. The name of accused 14 was amongst a list of names of persons alleged to have been associated

with the original suspects in the robbery and whose financial affairs were to be investigated.

[101] Mayadevan testified that following the arrest of Yegan Naidoo shortly after the robbery, Sagren Soobramoney Nair, who was accused 3 and who was convicted on the main count, requested him to take his (accused 3's) share of the money from the robbery to accused 13 at Cato Manor for safe keeping. Accused 3 had apparently made the necessary arrangements with accused 13. Mayadevan testified further that on one occasion accused 13 informed him, during a conversation he had with him, that he (accused 13) had placed monies in the accounts of family members and accused 14. It appears that when he decided to confess his part in the robbery to the police, Mayadevan also passed on to them the information he had received from accused 13.

[102] From Burnett's report it appears (and this is not in dispute) that at the time of the robbery accused 14's net income after deductions, which included bond repayments, was approximately R2 500,00 per month. She held a special savings account with the Permanent Bank. As at 31 July 1996 the balance in that account was R9 146,94. It is common cause that accused 14 also held the following accounts: a Focus Save account issued on 16 April 1996, with a value of R675,00 as at 22 July 1996; a Blue Book account issued on 16 February 1995, with a balance of R9 849,32 as at 31 July 1996 and a Perm Term fixed deposit issued on 20 March 1996 with a value of R15 000,00. The Blue Book account matured on 3 February 1997 and the fixed deposit on 20 March 1997.

[103] Burnett's investigation of accused 14's banking transactions revealed that a large number of deposits of substantial sums were made into

accounts operated by accused 14 during the period August 1996 to January 1998. Most of these were cash deposits, many in R50 notes. The evidence tendered by the State in the trial was that the cash stolen from SBV was in the main in R50 note denominations. According to Burnett's report, accused 14 received and deposited funds in the total sum of R396 371,54 in the period investigated.

[104] Accused 14 conceded, and so did accused 13, that during the period in question approximately R300 000,00 of the money deposited into her banking accounts came from accused 13. This was effected by way of some ten separate deposits of amounts ranging from R5 000,00 to R80 000,00. No record was kept of what money belonged to accused 13. It was simply mixed with accused 14's who kept the interest that accrued. She said that she kept a mental recollection with accused 13 as to which monies were his. Some of the money was placed into fixed period investment accounts. In evidence accused 14 sought to explain that many of the deposits that make up the total of R396 371,54 were either unrelated to accused 13 or were monies that did not belong to him. Cash deposits on 1 November 1996 and 31 October 1997 of R6 500,00 and R5 000,00 respectively were, she said, birthday bonuses. Two cash deposits of R5 000,00 and R5 500,00 on 14 August 1996 and 3 April 1997 respectively were said to be contributions by her mother, who lived with her, towards the upkeep of the house. Three cash deposits of R5 000,00 on 21 January 1997, R6 000,00 on 5 March 1997 and R5 000,00 on 11 April 1997 were said to be repayments of a loan she had made to a colleague. A further deposit of R10 000,00 by cheque on 26 November 1996 was, according to her, part payment of a loan she had made to accused 13 and another

cheque deposit of R5 000,00 on 2 August 1997 was a repayment of a loan by accused 13.

[105] Further cash deposits of amounts received from accused 13 were made on 7 September 1996, 14 September 1996 and 3 October 1996, totalling R27 350,00. On 9 December 1996 the sum of R75 000,00 was deposited by cheque, followed by a cash deposit of R75 000,00 in R50 notes on 27 December 1996 and a further cash deposit of R70 000,00 on 20 January 1997. This means that in a space of five weeks she received a total of R220 000,00 from accused 13 to place into her accounts. On 9 June 1997 she deposited an amount of R80 796,56, on 5 November 1997 a cheque for R40 000,00 and on 7 January 1998 a further cheque for R50 000,00. She sought to explain the latter amount as a repayment of a loan she had made to accused 13 on 2 September 1997. Bearing in mind her financial status as at August 1996 she did not explain where she would have received the R50 000,00 that she allegedly loaned to accused 13.

[106] Accused 14 testified that when accused 13 asked her to keep money for him he explained that he wanted to purchase a house for his mother and did not want his wife to know about it. He did not say, however, whether he was going to make a single deposit of money or several, nor did she ask him. She also never asked him, as and when he gave her monies to deposit, where the money came from. She insisted that at no time did she even suspect that the money may have had an illegal source. When asked what she thought the source of accused 13's money was she testified that she knew accused 13 to be a wealthy man who carried large sums of money in his wallet, drove expensive cars and dressed differently to other policemen. She was aware that accused 13 had a milk formula

business which was a source of income.

[107] Accused 14 acknowledged herself to be an assertive person who had succeeded in attaining the rank of captain in what was essentially a man's world. Her assertion that she naïvely believed that accused 13 had acquired such vast sums of money legitimately was rejected by the trial court and, in our view, correctly so. First, accused 13 could have concealed his intentions from his wife by simply opening a separate account, or, at best for accused 14, he would have asked her to open a separate account and not merely allowed her to deposit large amounts of money into her own account and to appropriate the interest for herself. Second, it would have become clear to her that the money was not intended for the purchase of a house when accused 13 requested her, as early as December 1996, to make out a cheque in favour of the Old Mutual for R50 000,00. She later issued cheques at the request of accused 13 for substantial amounts which were quite clearly unrelated to the purchase of a house. On 11 June 1997 she issued a cheque for R100 000,00 in favour of an attorney, L Naidoo. This was at the time of the trial of Rajan and Yegan Naidoo and attorney Naidoo was acting on their behalf. On 17 July 1997, and at the request of accused 13 she issued a cheque for R125 000,00 in favour of the Old Mutual and, on the same date, a cheque for R25 000,00 payable to accused 16, who was accused 13's sister in-law.

[108] Accused 14's insistence that she never asked accused 13 where the money came from is highly improbable. It is similarly improbable that she would not have suspected that the money came from an illegal source. Accused 14 was a police women for 12 years and, as has been mentioned, rose through the ranks until the rank of captain. She simply could not have

believed, for example, that the sale of the milk formula could yield a total of R220 000,00 (three deposits of R75 000,00, R75 000,00 and R70 000,00) within a period of five weeks. Her assertion of a naïve belief in accused 13's innocence is made all the more improbable when one bears in mind that the greater amount of money given to her by accused 13 was in cash. Her lame excuse that accused 13 had always seemed wealthy and that his money possibly came from the sale of the milk formula, which he marketed in his spare time, is totally unconvincing.

[109] The court *a quo* found, and this was not disputed in this Court, that the money given to accused 14 by accused 13 was part of the money stolen in the SBV robbery. It found further that accused 14 must have asked accused 13, if not right at the start then at some stage before she received all of it, where the money came from. The trial court held further that there can only be one reason why accused 14 lied on the question and that is that accused 13 must have told her that the money was part of what was stolen in the robbery.

[110] We agree with the trial court that as a matter of probability accused 14 must have asked accused 13 what the source of the money was. However, we are not persuaded that the only reasonable inference to be drawn from her denial that she did is that accused 13 told her that the money was part of what was stolen in the robbery. It is so that after the arrest of Rajan and Yegan Naidoo accused 13 became involved in providing funding for their legal representation. It is also true that at some stage accused 14 came to know that Yegan Naidoo was accused 13's cousin, that he had been charged with the SBV robbery and that accused 13 was attending court on Yegan's appearances on a daily basis. But it

does not necessarily follow that accused 13 told her, nor that she suspected, that the money given to her by accused 13 came from the robbery. Yegan Naidoo's share from the robbery, or at least the major portion of it, had been confiscated by the police (it was found in the ceiling of accused 10's house). It follows that accused 14 was wrongly convicted of being an accessory after the fact to robbery.

[111] We are prepared to accept, however, that accused 14 must at least have realised that the money came from an illegal source. So much was conceded before us by Mr Naidu, who appeared on her behalf. Mr Naidu also conceded that accused 14 made herself guilty of money laundering and/or assisting another to benefit from the proceeds of crime in contravention of the provisions of the Proceeds of Crime Act 76 of 1996. He submitted, however, that because the trial court had acquitted accused 14 on counts 2, 3 and 4 this Court cannot, in the absence of an appeal by the State, substitute the trial court's verdict with one of guilty.

[112] In its judgment the trial court observed that on the evidence that had emerged during the trial 'it would amount to an unjustified duplication of charges' were the accused to be convicted on counts 2, 3 and 4 in addition to the main count or a competent verdict. It appears from the trial court's judgment that counsel for the State had indicated in argument that he sought convictions against accused 9 to 18 for being accessories after the fact to robbery and against accused 19 for having contravened s 28 of Act 76 of 1996 (count 2). It is for these reasons that the trial court returned a verdict of not guilty in respect accused 14 (and others) on counts 2, 3 and 4.

[113] In *R v Kaseke and Another* 1968 (2) SA 805 (R, AD), a matter in

which the second appellant had been convicted by a magistrate on counts 1 to 5 on the strength of a confession plus evidence *aliunde* confirming the confession or proving that the offences alleged in the counts had been committed, and acquitted on counts 6 to 9. The convictions on counts 1 to 5 were in fact wrong since there was no evidence against the second appellant to substantiate those counts. The confession and evidence *aliunde* related to counts 6 to 9. The Court of Appeal accordingly set aside the convictions on counts 1 to 5. It was argued on behalf of the Crown, however, that it was permissible to substitute for those convictions which had now been set aside a conviction on counts 6 to 9. Beadle CJ, with whom Davies AJA concurred, said (at 806H):

'This submission amounts to an appeal by the Crown against the acquittals on these counts and the substitution of a verdict of guilty in the place of that of not guilty. In the absence of clear statutory authority empowering the Court to adopt such a course, I cannot see how it can be followed as it cuts across all the fundamental principles related to the doctrine of *autrefois acquit*.'

The Court of Appeal accordingly refused to set aside the magistrate's verdict of an acquittal on counts 6 to 9.

[114] The powers of a court of appeal are derived from s 22 of the Supreme Court Act 59 of 1959 and s 322 of the Criminal Procedure Act 51 of 1979. Section 22 of the former reads:

'The appellate division or a provincial division, or a local division having appeal jurisdiction shall have power –

(a) …

(b) to confirm, amend or set aside the judgment or order <u>which is the subject of the appeal</u> and to give any judgment or make any order which the circumstances may require.' (Emphasis added.)

It is clear from this section that the power to confirm, amend or set aside a

judgment or order can only be exercised in respect of a judgment or order which is the subject of an appeal. In the instant case the order acquitting accused 14 on counts 2, 3 and 4 is not the subject of an appeal before us. Cf *Rex v Motala* 1927 AD 118.

[115] Section 322(1) of the Criminal Procedure Act is in the following terms –

'In the case of an appeal against a conviction or of any question of law reserved, the court of appeal may –

(a) allow the appeal if it thinks that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a failure of justice; or

(b) give such judgment as ought to have been given at the trial or impose such punishment as ought to have been imposed at the trial; or

(c) make such other order as justice may require.'

The subsection clearly deals with the powers a court of appeal may exercise in the instance of an appeal against a conviction or where a question of law has been reserved for its consideration. It does not give a court of appeal the power to alter an acquittal order or to substitute it with a finding of guilty. Mr Steynberg's submission that we do so cannot be entertained.

[116] We accordingly make the following order:

(a) Condonation is granted to accused 7 (4th appellant) for the late filing of his application for leave to appeal. His application for leave to appeal succeeds and such leave is granted.

(b) The appeals of accused 7, 10 and 14 succeed and their convictions and sentences are set aside.

(c) The appeal of accused 9 is dismissed.

L MPATI DP

N J MOTATA AJA

SCOTT JA:

[1] I have had the advantage of reading in draft form the judgment of my brothers Mpati and Motata. I agree that the appeals of accused 7 and 14 must be upheld and the appeal of accused 9 dismissed. I regret, however, that I am unable to agree that the appeal of accused 10 must be upheld. In my view she was correctly convicted. As this is a minority judgment I shall state the reasons for my conclusion as briefly as possible.

[2] On behalf of accused 10 it was argued that the State was precluded from prosecuting her by reason of an agreement concluded between her counsel and the Director of Public Prosecutions. It was also argued that by reason of an 'undertaking' previously made by the police to use her as a State witness, her subsequent trial was unfair. In my view neither contention has merit and I agree with the conclusion reached by Mpati DP and Motata AJA in so far as these are concerned. Subject to these contentions, however, it was common cause in this Court that whether accused 10 was correctly convicted or not depended solely on the admissibility of the evidence that on 22 August 1996, ie about two weeks after the robbery, some R5m in cash was found concealed in the roof of her house. Following a trial within a trial the Court *a quo* ruled that the evidence was admissible. In this Court the correctness of this ruling was attacked on two grounds. The first was that the money was discovered in consequence of an inadmissible statement made by accused 10. The second was that the discovery of the money was as a result of information gleaned by the police from the unlawful tapping of accused 10's telephone line and that as such it constituted inadmissible 'derivative evidence'. A third ground was raised in counsel's heads of argument, but not pursued. This was that the money had been discovered in the course of a search conducted without a search warrant. The evidence established, however, that the police had reason to believe that the money or other goods, including possibly firearms, taken in the robbery were about to be removed from accused 10's house and that any delay would have defeated the object of the search. In the event, the operation was supervised by a senior policeman, Superintendent Havenga with the knowledge and approval of his superior, Senior Superintendent Booysen. It was they who took the decision that the matter was sufficiently urgent to justify proceeding without a warrant. In passing, it is perhaps also worthy of note that both, by virtue of their rank, would ordinarily be entitled to issue search warrants. In all the circumstances counsel was in my view fully justified in not pursuing the point and it need not be considered further. I shall deal with each of the remaining grounds in turn.

[3] It was not in dispute that at about 9.30 pm on the night in question a group comprising some 12 policemen,

led by Superintendent Havenga and the investigating officer, Captain Eva, 'penetrated' the house of accused 10. This involved breaking open the front door suddenly and without warning. The reason for this, they said, was that not only did they suspect that the goods concealed in the house included firearms but that a few days previously a colleague, Captain Claasen, had been shot at through a door on which he had knocked when attempting to arrest a suspect. After ensuring that the occupants were unarmed Havenga and Eva spoke to accused 10 in the kitchen. What was said by the policemen was disputed. According to accused 10 they told her they were there to pick up the money and they assured her that if she gave them the money she would not be charged but would be used as a State witness. She said she thereupon told them that the money was hidden in the roof. According to Havenga and Eva, the former, in the presence of the latter, informed accused 10 of her rights in terms of the Interim Constitution but then went on to explain that it was their intention to use her as a State witness rather than charge her. He explained, however, that whether she was charged or not ultimately depended on the decision of the Attorney General. Accused 10, they said, immediately indicated her willingness to cooperate and told them where the money was hidden. I pause to observe that Havenga sought her assistance not, as has been suggested, because he had no search warrant, but for the obvious reason that he wished to use her as a witness to obtain a conviction against the persons he believed to be the main culprits. The Court *a quo* accepted the version of the policemen and rejected that of accused 10. It is true that neither Havenga nor Eva made mention in their statements of Havenga having warned accused 10 of her rights, but given the nature and extent of the events culminating in the discovery of the cash traversed in their statements, the omission of this detail is, in my view, of little significance. Accused 10, on the other hand, was clearly a poor witness. Her evidence as to how the police had behaved was not only at variance with her husband's evidence, but in important respects was shown to have been false by a video made at the time and subsequently viewed by the Court *a quo*. I can see no justification for interfering with the trial Court's finding. On either version, however, what was said by accused 10 was inadmissible as it was made in pursuance of an undertaking, albeit conditional, that she would be used as a State witness. This was common cause.

[4] It was argued on behalf of accused 10 that by reason of the undertaking not only was the evidence of her disclosure rendered inadmissible but so was the evidence of the discovery of the money. Section 218(1) of the Criminal Procedure Act 51 of 1977 reads as follows;

'(1) Evidence may be admitted at criminal proceedings of any fact otherwise admissible in

evidence, notwithstanding that the witness who gives evidence of such fact, discovered such fact or obtained knowledge of such fact only in consequence of information given by an accused appearing at such proceedings in any confession or statement which by law is not admissible in evidence against such accused at such proceedings, and notwithstanding that the fact was discovered or came to the knowledge of such witness against the wish or will of such accused.'

Two observations need to be made. The first is that the section permits the proof of the discovery of what is sometimes referred to as real evidence, but not proof of the link between that discovery and the accused. (*CF R v Tebetha* 1959 (2) SA 337 (A) at 343A-B.) In other words, the ambit of the section is confined to evidence which is obtained derivatively as a result of information given by the accused. In the present case the State sought to prove only the discovery of the money in the roof. Evidence of that discovery, and no more, is clearly evidence contemplated in s 218(1) and rendered admissible by its provisions. The second observation is that the section does no more than afford a court a discretion to admit such evidence. It follows that the constitutionality or otherwise of the section does not arise. In each case it will be for the court to ensure that the evidence tendered will meet the requirements of the Constitution. The essential inquiry will be whether the evidence, notwithstanding its derivative nature, would involve a violation of any of the accused's rights in the Bill of Rights and, if so, whether that evidence should nonetheless be admitted. In the context of counsel's first ground of objection it would appear on the facts that accused 10's right to a fair trial was the only such right that could possibly be jeopardized by the admission of the evidence of the discovery of the money in the roof. If the right was not violated, that of course would be the end of the inquiry and the evidence would be admissible. But whether the right was violated or not is a question which I shall deal with more fully in the context of the unlawful tapping of her telephone line. All that need be said at this stage is that both Eva and Havenga had reason to believe that money taken in the robbery was concealed in accused 10's house and it was clearly their intention to search for it if this proved necessary. Eva testified that when carrying out a search of this nature it was standard practice to look in the roof in the event of there being a trap door in the ceiling and that they therefore would have found the money whether accused 10 told them where it was or not. There is nothing improbable about this evidence. Indeed, I would have thought that the roof would be an obvious place to look. Eva's evidence in this regard was, in any event, not challenged in cross-examination and I can see no basis for rejecting it. (Compare the facts in *Burlingham v The Queen* (1995) 28 CRR (2^{nd}) 244 referred to in more

detail below.) In these circumstances, and for reasons which will become apparent, the fact of accused 10's disclosure of where the money was hidden would clearly not result in proof of its subsequent discovery rendering the trial unfair. In the event, the money was found with tags still attached identifying it as having come from the SBV.

[5] I turn now to the second ground. It is common cause that the telephone line of accused 10 was tapped shortly after the robbery following the granting of a direction in terms of s 2(2)(c) of the Interception and Monitoring Prohibition Act 127 of 1992 authorising the police to do so. The application was made by a captain Van der Vyver. It was said in evidence to have contained 'serious inaccuracies' and for this reason to have been declared invalid by the Court which tried Logandheran and Rajan Naidoo. (See *S v Naidoo and Another* 1998 (1) SACR 479 (N).) That trial was held sometime before the trial which is the subject of the present appeal. No attempt was made in the Court *a quo* to challenge the correctness of this ruling; it was simply accepted as being correct and the full extent of the 'inaccuracies' was not explored in evidence. Indeed, the trial proceeded on the basis that the direction was invalid and that the tapping of accused 10's telephone constituted a violation of her right to privacy in terms of s 14 of the Constitution. In the *Naidoo* case, the State sought to rely on evidence as to the content of the telephone conversations unlawfully monitored. That evidence was held to be inadmissible. I should add that following the judgment, the State closed its case and both accused were acquitted. In the Court *a quo* they were referred to in evidence, as Yegan and Rajan respectively and were heavily implicated in the commission of the robbery. As far as accused 10 is concerned, however, the State did not seek to rely on evidence as to what was said in the course of a monitored telephone conversation; it sought merely to rely on the evidence of the discovery of the money concealed above the ceiling in accused 10's house. That evidence, of course, constituted derivative evidence as Eva and Havenga had learned that the money or other goods taken at the time of the robbery were being kept at accused 10's house by listening to a tape recording of a monitored telephone conversation. It was not in dispute that Eva and Havenga had at all times acted in the *bona fide* belief that the direction authorising the tapping of accused 10's telephone line had been properly sought and was valid.

[6] Subject to certain notable exceptions, the general approach adopted in South Africa prior to 1994 was that relevant evidence was admissible regardless of whether it was illegally or improperly obtained. In the United States the courts went to the other extreme; subject only to the so-called 'reasonable mistake' exception, evidence obtained in violation of the constitution is excluded. The Interim Constitution contained no express provisions dealing with

the admissibility of evidence unconstitutionally obtained. Generally the courts adopted a flexible approach, applying neither an absolute exclusionary nor inclusionary rule. In some cases the emphasis was placed on the Court's discretion to admit such evidence. In others, the emphasis was placed on the requirement of a fair trial. In yet others, it was suggested that in each case the 'two-stage approach' embodied in s 33(1) of the Interim Constitution had to be applied. (For a useful resumé of these cases see *Naidoo*'s case, *supra* at 491b – 498b). However, this difference of approach is no longer relevant. The new Constitution deals expressly with the admissibility of evidence unconstitutionally obtained. Section 35(5) reads:

'Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise detrimental to the administration of justice.'

In adopting the approach they did, the drafters of the Constitution appear to have adopted a *via media* between the extreme approach adopted in the USA on the one hand and that formerly adopted in South Africa on the other. In doing so they have largely followed the example of Ireland, Australia, New Zealand and particularly Canada. (See generally *Fedics Group (Pty) Ltd and Another v Murphy and Others* 1998 (2) SA 617 (C) at 634B-635F.) Section 24(2) of the Canadian Charter requires evidence obtained in a manner that infringed guaranteed rights to be excluded if its admission 'would bring the administration of justice into disrepute'. It has been construed as meaning that the administration of justice would be brought into disrepute if the admission of the evidence in question would render the trial unfair. See *R v Jacay* (1989) 38 CRR 290 at 298. It follows that Canadian decisions can provide a useful guide when interpreting s 35(5) of our Constitution. Nonetheless, the greatest caution must be exercised when transporting those decisions to the South African context. (See in this regard the remarks of Ackermann J in *Ferreira v Levin NO and Others*; *Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) at 1065B-D (para 133).) It should also be borne in mind that by reason of the wide powers of the Canadian Supreme court to order a retrial, a decision by that Court to exclude evidence is less likely to result in the acquittal of a guilty person than a similar exclusion in South Africa.

[7] In the present case the real evidence, that is to say that the money was hidden in accused 10's roof, existed quite independently of any infringement of the Bill of Rights. As noted by Martland J in *The Queen v Wray* (1970) 11 DLR (3d) 673 at 691, there is a clear distinction between unfairness in the method of obtaining evidence and

unfairness in the actual trial. The former does not necessarily result in the latter. Where the infringement results in the creation of evidence which would not otherwise exist, eg a self incriminatory statement or, as it is some times called, conscriptive evidence, it is generally accepted that the admission of such evidence will affect the fairness of the trial. The reason, of course, is that without the infringement the evidence would not have come into existence. But where, as in the present case, the infringement results in the discovery of a fact, ie the presence of the money in the roof, which would have existed whether there was an infringement or not, the impact on the fairness of the trial, if any, is less obvious. In *Collins v The Queen* (1987) 38 DLR (4th) 508 at 526 Lamer J said:

'Real evidence that was obtained in a manner that violated the Charter will rarely operate unfairly for that reason alone. The real evidence existed irrespective of the violation of the Charter and its use does not render the trial unfair. However, the situation is very different with respect to cases where, after a violation of the Charter, the accused is conscripted against himself through a confession or other evidence emanating from him. The use of such evidence would render the trial unfair, for it did not exist prior to the violation and it strikes at one of the fundamental tenets of a fair trial, the right against self-incrimination.'

At first blush this would seem self evident so that whether such evidence was admissible or not would depend on the second leg of the inquiry, ie whether its admission would be detrimental to the administration of justice. Subsequently, however, the Canadian Supreme Court has adopted a stricter approach with regard to the admission of evidence affecting the fairness of the trial. In *Burlingham v The Queen* (1995) 28 CRR (2nd) 244 evidence of the discovery of the murder weapon at the bottom of a frozen river was excluded on the basis that its discovery resulted from a compelled disclosure made by the accused in circumstances involving a breach of the Charter. Iacobucci J, with whom the majority of the court concurred, expressed the view that the mere fact that impugned evidence is classified as either real or conscriptive should not in and of itself be determinative and that whether independently 'existing evidence' affected the fairness of the trial or not depended on whether it would have been found without the compelled assistance of the accused (at 262 to 263). In the *Burlingham* case the murder weapon would clearly not have been discovered without such assistance. It was accordingly held that evidence of its discovery would render the trial unfair.

[8] A rigid application of this approach could lead to some startling results. I would imagine, for example, that most fair minded people, certainly in South Africa with its high crime rate, would baulk at the idea of a murderer being acquitted because evidence of the discovery of the victim's concealed body would render the trial unfair. In *S v Zuma and Others* 1995 (2) SA 642 CC it was said at 652A-D that the right to a fair trial 'embraces a concept of substantive fairness' and that it is for the criminal courts hearing criminal trials or appeals 'to give content' to the notions of basic fairness and justice which underpin a fair trial. With regard, in particular, to derivative evidence arising from compelled self-incrimination, Ackermann J, in the context of the interim Constitution, had the following to say in *Ferreira v Levin NO and Others*; *Vryenhoek v Powell NO and Others, supra,* at para 153:

'A compulsion to give self-incriminating evidence, coupled with only a direct use immunity along the lines indicated above, and subject to a judicial discretion to exclude derivative evidence at the criminal trial, would not negate the essential content of ….. the s 25(3) right to a fair trial. …… As far as s 25(3) is concerned, the trial Judge is obliged to ensure a "fair trial", if necessary by his or her discretion to exclude, in the appropriate case, derivative evidence. Ultimately this is a question of fairness to the accused and is an issue which has to be decided on the facts of each case. The trial Judge is the person best placed to take that decision. The development of the law of evidence in this regard is a matter for the Supreme Court. The essential content of the right is therefore not even touched.'

(See also *Key v Attorney-General, Cape Provincial Division, and Another* 1996 (4) 187 (CC) at 196A-C (para 13).) It follows that the Constitutional Court has refrained from laying down hard and fast rules as to the effect of derivative evidence on the fairness of a criminal trial.

[9] Reverting to the *Burlington* decision, its rationale appears to have been that if conscriptive evidence renders a trial unfair, evidence derived from it should likewise render the trial unfair. The reasoning being presumably that because the former only comes into existence by reason of the infringement, the latter being derived from it, should similarly be seen as affecting the fairness of the trial. But implicit in this reasoning is the requirement that the original infringement involves the creation of evidence that would otherwise not have existed, ie an infringement

involving self-incrimination. If it does not, then evidence derived from it similarly will not affect the fairness of the trial. Whether in such circumstances the derivative evidence is to be excluded or not, will then depend on the answer to the second leg of the inquiry, ie whether its admission would be detrimental to the administration of justice. Subsequently, in *R v Stillman* (1997) 42 CRR (2nd) 189 a distinction was drawn between conscriptive and non-conscriptive evidence. At 219 Cory J said the following:

'If the accused was not compelled to participate in the creation or discovery of the evidence (ie, the evidence existed independently of the *Charter* breach in a form useable by the state), the evidence will be classified as non-conscriptive. The admission of evidence which falls into this category will, as stated in *Collins*, *supra*, rarely operate to render the trial unfair. If the evidence has been classified as non-conscriptive the court should move on to consider the second and third of the *Collins* factors, namely, the seriousness of the *Charter* violation and the effect of the exclusion on the repute of the administration of justice.'

However, Cory J went on to include in the category of conscriptive evidence, evidence which was real evidence in the sense that it had an independent existence but which, as he put it, came into existence 'in a useable form' in breach of the Canadian Charter. The issue in that case was whether evidence relating to the analysis of hair samples and teeth impressions forcibly taken rendered the trial unfair. The admission of real evidence, depending on the circumstances, may well have a detrimental effect on the administration of justice. But save in circumstances involving some form of compulsion or, on the strength of *Burlingham*'s case, when derived from an infringement giving rise to self-incriminatory evidence which would not otherwise have existed, it is difficult to see how real evidence having an independent existence can ever be said to render the trial unfair. (*Cf S v M* 2002 (2) SACR 411 (SCA) at 432 (para 31).) The real evidence admitted by the Court *a quo* in the present case was the discovery of the money concealed in the roof. That discovery would not have been made but for the monitoring of the telephone conversation. But the telephone conversation would have taken place whether it was monitored or not. It was not created by the infringement, nor was there any question of compulsion. A conversation in such circumstances may result in a form of` self-incrimination, but no more so than any other conduct of an accused subsequent to the commission of the offence which may point to the latter's guilt. To hold that the derivative evidence, ie the

discovery of the money in the roof, would render the trial unfair in such circumstances would be to extend the application of the reasoning in the *Burlingham* case simply too far. In any event, such an approach, if adopted as an invariable rule, would be in conflict with the decisions of the Constitutional Court referred to in para 124 above. I am satisfied therefore that the admission of the evidence of the discovery of the money in the roof did not in any way render accused 10's trial unfair.

[10] I turn to the second leg of the inquiry, namely whether the evidence would be detrimental to the administration of justice. This involves essentially a value judgment. In *S v Mphala and Another* 1998 (1) SACR 654 (W) at 657g-h, Cloete J formulated the approach to be adopted as follows:

'So far as the administration of justice is concerned, there must be a balance between, on the one hand, respect (particularly by law enforcement agencies) for the Bill of Rights and, on the other, respect (particularly by the man in the street) for the judicial process. Overemphasis of the former would lead to acquittals on what would be perceived by the public as technicalities, whilst overemphasis of the latter would lead at best to a dilution of the Bill of Rights and at worst to its provisions being negated.'

In *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at 430I -432C (paras 87 - 88) Chaskalson P warned of the dangers of relying on public opinion. That was in the context of the constitutionality of the death penalty. It seems to me, however, that the very nature of the second leg of the inquiry postulated in s 35(5) of the Constitution contemplates a reference to public opinion. It must, at the least, therefore constitute an important element of the inquiry. In *R v Collins*, *supra*, at 524 the test adopted was that of 'the reasonable man, dispassionate and fully apprised of the circumstances of the case.' Although the inquiry in Canada is somewhat different, *ie* whether the admission of the infringing evidence 'would bring the administration of justice into disrepute', the test adopted strikes me as more apt than a simple reference to public opinion, subject as it frequently is to 'the shifting winds of passion'. The only refinement I would add is that the reference must be understood as not to an individual but to the reasonable and dispassionate members of society.

[11] In some cases the admission of derivative evidence, however relevant and vital for ascertaining the truth, would be undeniably detrimental to the administration of justice, *eg* derivative evidence obtained as a result of

torture. At the other end of the scale the refusal to admit derivative evidence on the grounds of some technical infringement of little consequence, would be no less detrimental to the administration of justice. As always, the difficulty lies in the grey area between these two extremes. The monitoring of a private telephone call is a serious infringement of the right to privacy. Nonetheless, in the interest of solving serious crime or protecting the security of the State, the need to monitor telephone communications in limited circumstances is recognised not only in South Africa, (see the Interception and Monitoring Prohibition Act 127 of 1992) but also in countries such as the United States and Canada (see *Naidoo*'s case, *supra*, at 503b-d).

[12] The robbery in the instant case was one of the biggest, if not the biggest, ever committed in South Africa. It was highly organised and involved a daring plan to penetrate a series of security barriers which most would regard as impregnable. In the event, over R31 million was taken. The manner in which the robbers gained access to the money gave rise to a suspicion that they had enjoyed the assistance of certain employees of the SBV. But more was required than mere suspicion to bring the culprits to book. One lead which presented itself was the observation by employees at the SBV that certain of the robbers had used mobile telephones in the course of the robbery. By reason of the lateness of the hour and the area in which these mobile telephones were used, the police were able to ascertain the identity of the subscribers from the service provider. (The admissibility of this evidence was challenged in the Court *a quo*, but not in this Court.) Once this was known and other information obtained, the next step was to apply for a direction authorising the interception of certain telecommunication lines in terms of s 2(2) of the Interception and Monitoring Prohibition Act. Because, no doubt, of the magnitude of the crime a number of senior policemen were engaged to help solve it, with different policemen being allocated to different tasks.

[13] The task of attending to the direction referred to above was allocated to Captain Van der Vyver of the Crime Intelligence Unit. He readily conceded in evidence that his affidavit contained a number of 'mistakes' and that he had been severely criticised by the judge in the *Naidoo* case, *supra*. He insisted, however, that he had not consciously intended to mislead the judge to whom the application was made and pointed out that the judge in the *Naidoo* case accepted this to be so. It would seem therefore that the thrust of the criticism directed at his affidavit related essentially to the use of imprecise language and poor draftsmanship rather than guile. This was illustrated in the course of Van der Vyver's cross-examination in the Court below. One of his 'mistakes' was put to him by counsel who presumably singled it out as being one of the more serious 'mistakes' contained in the affidavit. It was this: information to the effect that the money was to be moved out of the province was stated in the affidavit to be

'reliable information from a reliable source'; the alleged 'reliability', however, was based on the fact that tip-offs to the same effect had been received from more than one anonymous source. In other words, the one corroborated the other. 'Reliability' in this context is, of course, largely a question of degree. What is regarded as reliable by one might not be regarded as reliable by another. Had the affidavit set out with precision the true nature of the source rather than contain the somewhat vague and non-specific phrase 'reliable information from a reliable source', there could be no criticism. But had it done so, I am inclined to think that it would not have made any difference to the outcome of the application.

[14] Be all that as it may, neither Eva nor Havenga played any part in this aspect of the investigation; neither had sight of the application and the affidavits made in support of it until shortly before the trial of the two Naidoos. At all times while listening to the tape recordings of the telephone conversations and acting on the information obtained, they were *bona fide* in their belief that a valid monitoring order had been granted authorising them to proceed as they did. Given the magnitude and the circumstances of the robbery, that belief can not be categorised as unreasonable.

[15] As a result of the action taken by Eva and Havenga over R5 million of the stolen money was recovered. This does not mean that the end justified the means. But it does show that the need for the police to have acted swiftly and expeditiously was justified. It is no doubt true that once the identity of the subscribers was known the police could have placed the suspects under surveillance or searched their homes rather than apply for a direction to monitor their telephone calls. But whether the former course would have produced results is doubtful. It is unlikely that a series of house-searches would have helped. After the first, the robbers and their accomplices would soon have become aware of what the police were about. Even if the police had the resources to implement a simultaneous search of the houses of all the suspects, it would have been difficult to organise such an operation without the suspects becoming aware of it. The investigating officer realised very soon that information was being leaked from the ranks of the police to the suspects. Indeed, it was for this reason that the unit that 'penetrated' the house of accused 10 on the 22 August 1996 assembled at a rugby stadium rather than at the police station. It is true that apart from accused 10, and for that matter the two Naidoos, the arrest and conviction of the robbers and their accomplices was not brought about as a result of information gleaned from the telephone monitoring. But their arrest was largely fortuitous. Long after the acquittal of the two Naidoos one of the robbers, Mayadevan, was arrested on some other charge. While in custody he ultimately decided to make a statement in which he disclosed his part, and that of the

others, in the robbery. It was largely this, coupled with a forensic examination of the financial affairs of some of the suspects, that resulted in a successful prosecution. But for the fortuitous event referred to above, the robbers and those who subsequently helped to conceal their crime would probably have escaped scot-free.

[16] To sum up, therefore, the monitoring of the telephone calls in breach of the Interception and Monitoring Prohibition Act was a serious violation of accused 10's right to privacy and the inaccuracies contained in the application for a direction in terms of that Act are deserving of censure. On the other hand, Eva and Havenga acted in the *bona fide* and reasonable belief that they were authorised to do what they did. At the time, the following up on the use of the mobile phones and the tapping of the lines, if perhaps not the only possible course, was certainly the most expeditious course to solve one of the most successful and daring robberies in South Africa. Unlike the *Naidoo* case, the evidence sought to be adduced was not the content of what was said but the subsequent discovery of the money. The fact that the money was concealed in the roof is a fact that existed independently of the violation and was not created by it. The admission of the evidence did not affect the fairness of the trial. Although accused 10 was in effect charged with the crime of being an accessory after the fact rather than with participation in the robbery itself, her crime remains a serious one. The evidence in question was essential to substantiate the charge. It was common cause that without it, the conviction could not stand; with it, the conviction was correct and the appeal had to fail. This means in effect that if the evidence were excluded a guilty person would go free.

[17] Whether the admission of the evidence and the resultant conviction of accused 10 would be detrimental to the administration of justice involves first, I think, an inquiry whether an acquittal would be likely to bring about a loss of respect for the judicial process in the eyes of reasonable and dispassionate members of society and, conversely, whether a conviction would be likely to result in a loss of respect for the Bill of Rights. This, of course, involves a weighing up of the various factors referred to above. But these cannot simply be considered in isolation. They must, I think, be looked at in the light of the high crime rate in South Africa and in particular the prevalence of armed robberies, many of which result in no arrests. (*Cf Ferreira v Levin and Others*, *supra* at 1077D.) In all the circumstances, it seems to me that the esteem with which the Bill of Rights is held, or ought to be held, is unlikely to be lowered in the eyes of those members of society to which I have referred in the event of a conviction. On the contrary, it is more likely that the exclusion of the evidence and a resultant acquittal would result in a loss of respect for not only the judicial process but the Bill of Rights itself. Finally, I can see no basis in the circumstances of the present case for departing from what I perceive to be the way in which reasonable and dispassionate members of

society would see the administration of justice being affected by the admission or otherwise of the evidence in question.

[18] It follows that in my view the evidence of the discovery of the money in accused 10's roof was correctly admitted. It follows, too, that I would dismiss accused 10's appeal.

D G SCOTT
JUDGE OF APPEAL