REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

In the matter between: Case No: CC 26/2016

THE STATE

And

CHRISTOPHER CONSTANTINOU PANAYIOTOU **Accused No. 1**

SIZWEZAKHE PRINCE VUMAZONKE **Accused No. 2**

SINETHEMBA NEMEMBE **Accused No. 3**

ZOLANI SIBEKO **Accused No. 4**

Coram: **Chetty J**

Heard: **11 October 2016 – 01 December 2016; 21 April 2017 – 05 May 2017; 12 June 2017 – 30 June 2017; 26 September 2017 – 29 September 2017; 16 October 2017 – 17 October 2017; 26 October 2017; 31 October 2017**

Delivered: **2 November 2017**

JUDGMENT

Chetty J:

[1] Uxoricide, an amalgam of the Latin ***Uxor***, meaning wife, and, conjoined by the suffix ***cide***, from ***caedere***, meaning ***"to cut"***, ***"to kill"*** is a word, aeons old, which connotes the murder of a wife by her husband. This is the quintessence of this trial in which *Christopher Constantinou Panayiotou* is principally charged with the murder of his spouse, the deceased, *Jayde Lyn Panayiotou*.

[2] The indictment cites four (4) persons as the accused viz,

Christopher Constantinou Panayiotou,	Accused No.1
Sizwezakhe Vumazonke,	Accused No. 2
Sinethemba Nemembe, and	Accused No. 3
Zolani Sibeko.	Accused No. 4

Prior to the commencement of the trial accused no. 2 died but his demise has however not precipitated an amendment to the enumeration of the individual accused. To aid the narrative, I shall, in the course of this judgment, refer to the remaining accused as per the citation, the deceased interchangeably as *Jayde* or the deceased and the witnesses by surname. The accused are charged on multiple counts, to wit, conspiracy to commit murder (in contravention of Section 18(2)(a) of the Riotous Assemblies Act, Act 17 of 1956) (count 1); robbery with aggravating circumstances as envisaged in section 1(1)(b) of Act 51 of 1977 (count 2);

kidnapping (count 3); murder (count 4); unlawful possession of a firearm (in contravention of Section 3 read with sections 1, 103, 117, 120(1)(a), and section 121, and also read with schedule 4 of the Firearms Act, Act 60 of 2000, and further read with section 250 of the Criminal Procedure Act, Act 51 of 1977) (count 5); unlawful possession of ammunition (in contravention of Section 90 read with sections 1, 103, 117, 120(1)(a), and section 121, and also read with schedule 4 of the Firearms Act, Act 60 of 2000, and further read with section 250 of the Criminal Procedure Act, Act 51 of 1977) (count 6). Accused no. 1 faces an additional charge (count 7) of defeating and obstructing the course of justice. The gravamen of the charges in respect of each count is tabulated as follows: -

Count 1 - WHEREAS the accused associated with each other, Luthando Siyoni, and other persons unknown to the State in a common design and/or enterprise to kill JAYDE LYN PANAYIOTOU, an adult female;

AND WHEREAS the accused so associated themselves with and/or joined in such conspiracy or enterprise at various places at or near Port Elizabeth and/ or Uitenhage in the districts of PORT ELIZABETH and/ or UITENHAGE and committed various crimes and/or acts or omissions in furtherance of the said conspiracy or enterprise

NOW THEREFORE the accused are guilty of the offence of contravening Section 18(2)(a) of Act 17 of 1956

In that during the period September 2014 to 21 April 2015, and at various places at or near Port Elizabeth and/ or Uitenhage in the districts of PORT ELIZABETH and UITENHAGE, the accused, the one, the other or all of them acting in concert and in the execution of a common purpose did unlawfully and intentionally conspire with each other and with others to kill JAYDE LYN PANAYIOTOU, an adult female.

Count 2 - In that, on or about 21 April 2015, and at Stellen Glen Complex, Deacon Road, Kabega Park, in the district of PORT ELIZABETH, the said accused, the one, the other or all of them acting in concert and in the execution of a common purpose, did, unlawfully and with intent to induce her to submit , do violence to JAYDE LYN PANAYIOTOU, an adult female , and then and there by means of such force and violence take and steal from out of her immediate care and possession, certain property, to wit

- A number of rings;
- A cellular phone;
- A bag containing a wallet with bank cards and/ or other credit cards;
- A laptop; and
- R3,500-00 in cash

the property of JAYDE LYN PANAYIOTOU, and/or in the lawful possession of JAYDE LYN PANAYIOTOU, and did rob her of the same.

Count 3 - In that, on or about 21 April 2015, and at Stellen Glen Complex, Deacon Road, Kabega Park, in the district of PORT ELIZABETH, the said accused, the one, the other or all of them acting in concert and in the execution of a common purpose did unlawfully and intentionally deprive JAYDE LYN PANAYIOTOU, an adult female, of her liberty by using force to place her in the trunk of a motor vehicle.

Count 4 - In that, on or about 21 April 2015, and in close proximity to the Rooihoogte Road, KwaNobuhle, in the district of UITENHAGE, the said accused, the one, the other or all of them acting in concert and in the execution of a common purpose did unlawfully and intentionally kill JAYDE LYN PANAYIOTOU, an adult female by shooting her with a firearm.

Count 5 - In that, on or about 21 April 2015, and at various places between Stellen Glen Complex, Deacon Road, Kabega Park, in the district of PORT ELIZABETH and the Rooihoogte area, KwaNobuhle, in the district of UITENHAGE, the accused did unlawfully have in their possession a 9mm semi-automatic pistol, without holding a

license, permit or authorization issued in terms of Act 60 of 2000 to possess the said firearm.

Count 6 - In that, on or about 21 April 2015, and at various places between Stellen Glen Complex, Deacon Road, Kabega Park, in the district of PORT ELIZABETH and the Rooihoogte area, KwaNobuhle, in the district of UITENHAGE, the accused did unlawfully have in their possession ammunition, to wit an unknown quantity of 9mm caliber rounds of ammunition, without being the holder of a license in respect of an arm capable of discharging the said ammunition; a permit to possess the said ammunition; a dealer's, manufacturer's or gunsmith's license; an import, export, in-transit or transporter's permit; or without being otherwise authorized to do so.

Count 7 - In that, on or about 29 April 2015, and at various places in the district of PORT ELIZABETH, accused 1 did unlawfully and with the intent to defeat or obstruct the course of justice:

- instruct and/ or encourage Luthando Siyoni to flee Port Elizabeth in order to evade being arrested by the South African Police Service for the murder of JAYDE LYN PANAYIOTOU;

- pay an amount of R4 450-00 to Luthando Siyoni in order to assist him fleeing from Port Elizabeth in order to evade being arrested by the South African Police Service for the murder of JAYDE LYN PANAYIOTOU;
- instruct and/ or encourage Luthando Siyoni to destroy evidential material to wit cellular phone sim-cards used in communications between certain of the accused and Luthando Siyoni;
- furnish the South African Police Service with false information regarding the whereabouts of Luthando Siyoni and/or withhold vital information from the South African Police Service regarding his contact with Luthando Siyoni; and in so doing accused 1 did defeat or obstruct the course of justice.

[3] The accused pleaded not guilty to the various counts. In amplification of his plea, accused no. 1 tendered a prolix document incorporating not only his defences to the charges, but his assessment of the state's anticipated testimony, hearsay, extracts from the case docket, a judgment, police standing order 252 and a collection of photographs of Mr *Luthando Siyoni* (*Siyoni*), the central figure of his plea *in limine* which he articulated thus: -

"I will request this Honourable Court to order a trial-within-a-trial on the basis that the evidence obtained following the removal of State witness Luthando Siyoni (LS) from Infinity Pub and Grub at approximately 20h15 on Monday 27 April 2015 is inadmissible. All the evidence following his removal and thereafter is tainted as a result of the police assaulting, intimidating and unlawfully pressurising LS to implicate me. Therefore the evidence obtained against me was unlawfully and unconstitutionally obtained by the State with the result that my right to a fair trial has been violated."[1]

His plea on the merits was enumerated as follows:-

"9.1 I deny the allegations that the State has made against me;

9.2 I deny specifically ever approaching (LS) and requesting / ordering/ asking him to find a hitman / hitmen to have my wife, the deceased, Jayde Panayiotou ("Jayde"), killed;

9.3 Jayde and I had been married for just over 2 years at that point in time and, as far as I was concerned, we were happily married;

9.4 I loved my wife, Jayde and, in February of 2015, we made a decision to buy a house in Lovemore Park for approximately R2.2 million in which we were going to move in together and hopefully spend the rest of our lives therein;

9.5 By the time this incident occurred, the necessary bond fees and deposit has already been paid and it was just a matter of the two of us moving in."[2]

[1] Exhibit "C1" at par 8
[2] Exhibit "C1" at par 9

Prologue

[4] *Jayde* and accused no. 1 were married to each other and resided in a gated town house complex situate at 19 Stellen Glen, Deacon Road, Kabega Park, Port Elizabeth. He was and is a businessman and, she, during her lifetime, a junior teacher at Riebeek College Girls High School in Uitenhage. *Jayde* and her colleague, Ms *Cherise Taylor Swanepoel* (Ms *Swanepoel*) were accustomed to travel together to Uitenhage each day by car, alternating between the usage of their respective motor vehicles weekly. Ms *Swanepoel* lived at 25 Ruth Street, Glen Hurd and each would be collected from their respective homes by the other. To facilitate *Jayde's* pick-up, Ms *Swanepoel* was accustomed to send her a text message when leaving her home and then collect her at the gate of the complex. This was the scheduled arrangement except that on 21 April 2015, Ms *Swanepoel* had texted *Jayde* to enquire whether, by reason of the inclement weather, she should not drive into the complex and collect her from her home. The reply received was that she would walk to the gate. On Ms *Swanepoel's* arrival at the entrance however, there was no sign of *Jayde* and her text message to announce her arrival went undelivered.

[5] The uncontroverted evidence is that the message was sent at 06h33. Perplexed thereby, Ms *Swanepoel* dialled *Jayde's* landline but it too went unanswered. Sensing that something was amiss, she telephoned accused no. 1 on his cell phone and, when he answered, enquired about *Jayde's* whereabouts. His riposte was that she had gone to work. The upshot of the conversation was that accused no. 1 opened the automated gate to let Ms *Swanepoel* in. It is furthermore common cause that accused no. 1 and Ms *Swanepoel* drove out of complex and

along its periphery to look for *Jayde* but to no avail. Fortuitously they encountered a police vehicle along the way and thus began the search for *Jayde*. A number of people including accused no. 1, participated in the hunt for *Jayde* in various locations within Port Elizabeth, Uitenhage and its environs that day. She however remained unaccounted for. Having widened the parameters of the search area the next day, a police tracking unit discovered her body later that morning on an open field close to a gravel road which dissects Wincanton Road on the outskirts of Uitenhage, The area was secured and a police forensic unit dispatched to the scene. The events which unfolded subsequent to *Jayde's* discovery was narrated by a number of witnesses. What follows is a précis and, where necessary, an appraisal of their testimony.

[6] Dr *Kevin Fourie* (*Fourie*), the head of the clinical unit, Forensic Pathology Services (PE), conducted a post-mortem examination on the cadaver on 23 April 2015 and concluded that the cause of death to be consistent with bullet wounds to the head and chest. His chief post-mortem findings were recorded on the medico-legal post-mortem report (exhibit "L") as follows: -

:" - Perforating bullet wound of the skull and brain

- Perforating bullet wound of the chest involving the left lung
- Perforating bullet wound of the chest involving the spinal column, spinal cord and the right lung. This wound track can be aligned to a bullet track through the right upper limb
- Bilateral haemothorax"

He recorded the external appearance of the body and condition of the limbs as:-

"4. EXTERNAL APPEARANCE OF THE BODY AND CONDITION OF THE LIMBS:

1. There is a 8mm circular penetrating lacerated wound with a 2mm collar of abrasion more prominent infero-laterally, over the left lateral head, 13cm from top of the head and 3,5cm from the tragus of the left ear.

2. There is a 1,5cmx2cm stellate penetrating laceration wound with everted wound edges over the right parieto-occipital region; 5cm from the top of the head.

3. Bilateral peri-orbital haematomas.

4. There is a 7mm circular penetrating lacerated wound with a 2mm collar of abrasion over the left posterior chest, 14cm from the midline and 10cm below the shoulder line

5. There is a 1,5cmx7mm irregular penetrating lacerated wound over the left anterior chest, 5cm from midline 11cm below the shoulder line.

6. There is a 6mm circular penetrating wound with a wide 5mm crescent of abrasion laterally over the left posterior chest; 4cm from midline and 11cm from the shoulder line.

7. There is a 20mmx10mm gaping penetrating lacerated wound in the right mid-axillary line 2cm below the axilla.

8. There is a 15mmx9mm penetrating lacerated wound with a wide collar of abrasion of the left upper limb anteriorly; 18cm above the right elbow. There is come confluent contusion of the right upper limb associated with this wound.

9. There is a 14mmx11mm irregular penetrating lacerated wound with everted wound edges over the right upper limb posteriorly, 12cm above the right elbow.

10. There is a 6mm laceration over the ring finger at the 2nd interphalangeal joint.

11. There is a 5mm laceration over the base of the right thumb anteriorly at the wrist.

12. There is a 3mm abrasion over the right wrist posteriorly, 26 cm below the elbow.

13. There are no ligature impression marks around the wrists or ankles."

[7] Captain *Gideon Olivier* (*Olivier*), a ballistic expert attached to the forensic services laboratory attended the scene prior to the removal of the cadaver on 22 April 2015 and again before the post-mortem examination on 23 April 2015. On the former occasion he retrieved three cartridge cases and on the latter, unearthed a spent bullet embedded in the ground directly below where he had observed the deceased's head. From his observations at the scene, the post-mortem examinations and the pathologist's findings, he concluded that - the first shot fired at *Jayde* entered her back and exited her chest; the second, that which lacerated the spinal cord and paralysed her from the waist down and the third, the shot to the head. *Olivier* opined that given the trajectory of the latter bullet tract, the shooter would have been standing on her left hand side with his arm outstretched pointed in the direction of her head when he fired. It is common cause that gun powder residue

was discovered on the deceased's hand and the inference can thus properly be made that in her final moments, *Jayde's* outstretched hand entreated mercy. That act of supplication however elicited a bullet to her head. The medical and ballistic findings compel the conclusion that this was an execution style murder.

[8] The discovery of *Jayde's* body and confirmation that she had been murdered reverberated far and wide and evoked a media frenzy. Brigadier *Gary Dale McLaren (McLaren),* the provincial head of the Eastern Cape Detective Services based in East London, recounted being contacted by an informant on the Wednesday following the discovery of *Jayde's* body. Although he could not recall the exact date it is clear that it was the very day upon which *Jayde* was discovered. He duly interviewed his snitch and, accompanied by Colonel *Rowan (Rowan),* left East London and proceeded to KwaNobuhle on further investigation prior to returning to East London. Fortified by the intelligence gathered, he returned to Port Elizabeth the same afternoon where he met with members of the Directorate for Priority Crime Investigation (DPCI) and established a task team under the leadership of Captain *Rhynhardt Swanepoel* (*Swanepoel*) to spearhead the investigation.

[9] The breakthrough in unmasking key figures to assist in the investigation occurred on Monday, 27 April 2015 when Captain *Willie Mayi* (*Mayi*), the head of the Vehicle Hijacking Division of the South African Police Services in Port Elizabeth, received a call from an informant. It is not in issue that *Mayi* was on investigative duties in Alice when he received the call. He hastened to Port Elizabeth to meet with his informer. This meeting provided the impetus for *Mayi* to search for *Siyoni* at his gym and, when he could not be located there, to the home of his girlfriend *Babalwa Breakfast (Breakfast)* and thence to the Infinity Club.

[10] *Siyoni's* involvement in the conspiracy to murder *Jayde* was extensively expounded upon in the summary of substantial facts which, juxtaposed alongside the plea explanation, establish that he is, paradoxically, the nucleus of accused no. 1's defence and a key witness for the state. Given his centrality to accused no. 1's defence, it is apposite to fully consider the legitimacy of the quest to have his testimony determined as a separate issue, colloquially referred to as a trial within a trial. The contention that it so be determined was vigorously pursued by both Mr *Price* and Mr *Daubermann* in argument before me. I interpolate to say that although counsel for the state was initially seduced by the superficial attractiveness of the proposed course, overnight deliberation exposed its flaws and he opposed the application. As I shall elaborate upon, it is unprecedented, an exercise in opportunism and a disingenuous attempt to exclude otherwise admissible testimony. I dismissed the application and indicated that my reasons would be incorporated in the judgment and these now follow.

[11] A trial within a trial, is as Streicher JA trenchantly alluded to in ***Director of Public Prosecutions, Transvaal v Viljoen***[3] – ***"a trial held while the main trial is in progress in order to determine a factual issue separately from the main issue"*** The factual issues contended for by the defence was the voluntariness of *Siyoni's* testimony inclusive of his extra curial statements and pointings out to various officers. The gravamen of their attack on its admissibility is the contention that *Siyoni's* fundamental rights were violated to such an extent that all the evidence consequentially procured is inadmissible against the accused. Leaving aside for a moment the question whether *Siyoni* was in fact ***"tortured"*** as alleged, a matter I shall in due course consider, the fallacy of the argument advanced is the conflation of

[3] 2005 (1) SACR 505 (SCA)

Siyoni and an accused person. *Siyoni* is, notwithstanding his designation as such by both Messrs *Price* and *Daubermann*, not an accused person. He is a state witness, whom counsel for the state intimated, when called to the witness stand, that he be warned pursuant to the provisions of s 204 of ***the Criminal Procedure Act*** (the Act).

[12] In his address, counsel for accused no. 1 was, given the excogitated nature of the application constrained to concede the absence of any authority for the submissions advanced. The *raison d'etre* for the dearth thereof is evident – it is a procedural device available only to an accused person and no other. A succinct exposition of its genealogy was articulated by Nicholas AJA in ***S v De Vries***[4] as follows: -

> "Section 217(1) of the Criminal Procedure Act 51 of 1977 provides for the admissibility of evidence of a confession made by any person in relation to the commission of any offence
>
> 'if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto...'.
>
> There had been similar provisions in s 273(1) of the Criminal Procedure and Evidence Act 1917 and in Act 56 of 1955. In *R v Gumede and Another* 1942 AD 398 at 412 - 13, Feetham JA mentioned that the provision first appeared in South African legislation as part of s 28 of Cape Ordinance 72 of 1830 and added:
>
> 'There can, I think, be no doubt that the proviso as included in the 1830 Ordinance was intended to apply to the Cape Colony the common law of England as then understood in regard to the burden of proof resting on the

[4] 1989 (1) SA 228 (A) at 232H-234A

prosecution when asking a criminal court to admit a confession alleged to have been made by an accused person.'

The rule of the English common law had by 1830 become well established and was of long standing. (See *Gumede's* case *supra* at 413 *in fin*.) It was described by Innes CJ in *R v Barlin* 1926 AD 459 at 462:

'... (T)he common law allows no statement by an accused person to be given in evidence against himself unless it is shown by the prosecution to have been freely and voluntarily made - in the sense that it has not been induced by any threat or promise proceeding from a person in authority.'

The rule is a rule of policy. In *Gumede's* case *supra* at 413 Feetham JA quoted from the judgment of Lord Sumner in *Ibrahim v R* [1914] AC 599 at 610:

'A confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape, when it is to be considered as evidence of guilt, that no credit ought to be given to it. *Rex v Warwickshall* (1783, 1 Leach 263). It is not that the law presumes such statements to be untrue, but, from the danger of receiving such evidence, Judges have thought it better to reject it for the due administration of justice. *Rex v Baldry* (1852 2 Den Cr C 430, at 445).'

If the policy is to be effectuated, it is of primary importance that an accused person should feel completely free to give evidence of any improper methods by which he alleges a confession or admission has been extracted from him. Unless he gives evidence himself he can rarely challenge its admissibility. (Cf *R v Brophy* [1982] AC 476 at 481.) See the judgment of Lord Hailsham of St Marylebone in the Privy Council case of *R v Wong Kam-ming* [1980] AC 247 (PC) at 261B - C:

'... (A)ny civilised system of criminal jurisprudence must accord to the judiciary some means of excluding confessions or admissions obtained by improper methods. This is not only because of the potential unreliability of such statements, but also, and perhaps mainly, because in a civilised society it is vital that persons in custody or charged with offences should not be subjected to ill-treatment or improper pressure in order to extract confessions. It is therefore of very great importance that the courts should continue to insist that before extra-judicial statements can be admitted in evidence the prosecution must be made to prove beyond reasonable doubt that the statement was not obtained in a manner which should be reprobated and was therefore in the truest sense voluntary. For this reason it is necessary that the defendant should be able and feel free either by his own testimony or by other means to challenge the voluntary character of the tendered statement.'

It is accordingly essential that the issue of voluntariness should be kept clearly distinct from the issue of guilt. This is achieved by insulating the inquiry into voluntariness in a compartment separate from the main trial. In England the enquiry into voluntariness is made at 'a trial on the *voir dire*', or, simply, the *voir dire*, which is held in the absence of the jury. In South Africa it is made at a so-called 'trial within the trial'. Where therefore the question of admissibility of a confession is clearly raised, an accused person has the right to have that question tried as a separate and distinct issue. At such trial, the accused can go into the witness-box on the issue of voluntariness without being exposed to general cross-examination on the issue of his guilt. (See *R v Dunga* 1934 AD 223 at 226.) The prosecution may not, as part of its case on the main issue, lead evidence regarding the testimony given by the defendant at the trial within the trial." (Emphasis added)

[13] It will be gleaned from the aforegoing and in particular the highlighted portion from the quoted judgment that the procedure is available only to an accused person. *Siyoni* is, despite assiduous clamour by the defence representatives not an accused person. The fact that he had been arrested and initially charged with *Jayde's* murder is entirely irrelevant – he was a state witness – *caedit quaestio*.

[14] Dismissive of my ruling that the proposed procedure was ill-conceived, Mr *Daubermann* nonetheless launched a fresh application the following morning contending that authority vouchsafed the granting of the application. Neither the cases nor the journal article cited establish the principle contended for and I dismissed the renewed application. The attempt to persuade me to revisit my earlier ruling was misguided and to be deprecated.

[15] The rationale for the concerted endeavour to exclude *Siyoni's* testimony from the conspectus of evidential material soon manifested itself. As presaged in the summary of substantial facts, the state's case was that *Siyoni* was intimately involved in securing the assassin and it was evident from the factual matrix encapsulated therein that it constituted, *inter alia,* a précis of his statement(s) to the police. Its acceptance, p*rima facie*, heralded dire consequences for the accused, and in particular accused no. 1 and the stratagem devised for its exclusion obviously required his collusion. The full extent of his connivance soon manifested itself as I shall advert to hereinafter. It is abundantly clear, notwithstanding the gratuitous imputations levelled against Mr *Stander*, that the latter had been deceived by *Siyoni* into believing that he would adhere to the content of his statements to the Investigating Officer, *Swanepoel*. This appears clearly from the concluding email from his attorney, Mr *Ngqeza (Ngqeza)*, to Mr *Stander* on 4 October 2016.

[16] The aforementioned email, and a raft of earlier missives, was introduced into the trial by Mr *Price* during his ostensible cross-examination of *Siyoni*. Although it is permissible to put leading questions during cross-examination, no weight whatsoever can be attached to any of *Siyoni's* affirmative responses. The cossetted questioning designed to establish that *Siyoni* was not the author of the content of the statements to *Swanepoel* which bore his signature and his acquiescence to the insinuation that counsel for the state had, notwithstanding, knowingly called him, established the extent of *Siyoni's* collusion with accused no. 1. As for *Ngqeza*, the least said about him, the better. His advice to *Siyoni* that he should not answer any incriminating questions is in direct conflict with legal precedent. As Ackermann J remarked in ***Nel v Le Roux NO and Others***[5]:-

> *"[4] In view of the transactional indemnity and use immunity provisions in s 204(2) and (4) respectively of the Criminal Procedure Act, the applicant could not validly (and did not) object to answering self-incriminating questions."*

[17] It is apparent from the last email from *Ngqeza* to counsel for the state (4 October 2016) wherein he stated ***"our client remains a s 204 witness and does not have any intention to deviate from such, unless your office reject him as such"***, that Mr *Stander* was thereby duped into believing that *Siyoni* would testify in conformity with the version chronicled in his statements. Subsequent events soon established the extent of the collusion not only between himself, *Breakfast* and those family members called to corroborate his version but it moreover compels the conclusion that *Ngqeza* was party to the deception practiced on the prosecution.

[5] 1996 (1) SACR 572 (CC)

[18] It is common cause that in consequence of information obtained, *Mayi*, after a fruitless search for *Siyoni* at his home and gym departed to *Breakfast's* home where, after interviewing her, she accompanied him and directed him to Infinity where *Siyoni* was taken into questioning prior to them being taken to the KwaNobuhle detective offices. Although *Breakfast* would later decry having deposed to written statements to *Mayi*, her denial is patently false. Her revelations to *Mayi* validated the information obtained from his snitch and I accept that when later confronted therewith, *Siyoni* admitted his complicity in the conspiracy to murder *Jayde*. *Mayi's* evidence concerning the amiable interaction between himself, *Breakfast* and *Siyoni* required remedial action to conform with the version advanced by accused no. 1 in his plea explanation and *Breakfast's* cross-examination by Mr *Price* was thus structured to achieve that result, as appears from the following extract from the transcript: - .

> "... On the 27th of April when the police came to your house, that was Captain Mayi and other police officers, correct? --- That is correct so.
>
> And you have told us that it was decided that one of your brothers will go with you and if I understand you correctly, it was to ensure that you were okay, that you were safe? --- That is correct so, M'Lord.
>
> And can I accept you wouldn't have been comfortable to go with these police officers if your brother wasn't allowed to go with you? --- Yes, M'Lord, because those people were unknown to me and I saw them for the first time that evening.
>
> Now, my understanding of your evidence is that you weren't asked to accompany them, you were ordered to accompany

them. --- They came in; they said they are looking for Babalwa.

Yes, listen carefully; I am not fighting with you, just listen carefully. I am saying to you they didn't ask you nicely if you would go with them; they told you come with us. --- My mother responded to them and then I got up.

Yes, I don't think you are listening to me. Would you have gone if they hadn't told you to go with them, let me ask you that? --- No, M'Lord.

You felt you were obliged to go with them? --- Because they said they wanted to ask me some questions [interrupted].

Listen carefully, listen carefully; you went because you, you didn't go because you wanted to go, you went because they told you to go? --- Yes, M'Lord."[6]

[19] It will be gleaned from the aforegoing that the assertions made to *Breakfast* and which were subsequently put as a fact to *Mayi* did not emanate from *Breakfast* at all. Her acquiesce in the propositions put to her by Mr *Price* clearly establishes her partisanship and compels the conclusion that she had been suborned to recant her police statements.

[20] As adverted to in the preceding paragraphs, during *Mayi's* cross-examination, this erroneous rendition of the true facts was perdured with by the following proposition put by Mr *Price*: –

"So, then you will not dispute her evidence in this court that she feared you and your group and it was a decision to take

[6] Record at p 645

her brother with so that he could look after her best interests."

And Later, "Now, could you just explain to me why you took Babalwa's brother back to the house before you went to KwaNobuhle? --- There was no reason; I just took him back home because we found Thando home, we went to look for him at Algoa Park.

Yes, but Babalwa was going to show you where Thando was, why did you take her brother back? --- Her brother had nothing to do with all this.

Of course except he might have been a witness to you beating people up and threatening people; that is why he was taken back. --- No, I don't think so. If we were aware that we would also require a statement from him, we would have taken him along but because he had nothing to do with the case at that stage; that is why he was dropped off at his home.

Well, Babalwa told this court that she wanted him there as protection for herself and that she was unhappy when you dropped him off back at the home; she wanted him to go with them to wherever you were going. --- I hear this for the first time here in court because she never ever requested her brother to be taken along to KwaNobuhle or display any discontent by the fact that he was dropped off at home.

It was your decision to drop him off. --- That is correct so; I did inform Babalwa we are going to drop off your brother

now."[7]

[21] It became clear during *Breakfast's* examination in chief that she had recanted her police statement, a fact confirmed by counsel for the state. Thus as a precursor to requesting that she be declared hostile, Mr *Stander*, having established that her signature was indeed appended to each of the two police statements, exhibits "V25" and "V26", proceeded to question her thereanent. In response to a question as to the circumstances under which she signed the statements, she proffered the answer that she was merely given a piece of paper to sign and duly complied with the instruction. To prove that she was indeed the author of the statement, Mr *Stander* proceeded to read the statement to her to elicit her confirmation. The regurgitation of the statement, sentence by sentence yielded the stock answer that its content did not emanate from her. I interpolate to say that *Mayi* was subsequently called to testify that he minuted both statements which she signed in his presence.

[22] The procedure adopted by Mr *Stander* finds legislative sanction in s 190 of the Act. It provides as follows: -

"**190 Impeachment or support of credibility of witness**

(1) Any party may in criminal proceedings impeach or support the credibility of any witness called against or on behalf of such party in any manner in which and by any evidence by which the credibility of such witness might on the thirtieth day of May, 1961, have been impeached or supported by such party.

[7] Record at pp 1519, 1539 and 1540

> (2) Any such party who has called a witness who has given evidence in any such proceedings (whether that witness is or is not, in the opinion of the court, adverse to the party calling him), may, after such party or the court has asked the witness whether he did or did not previously make a statement with which his evidence in the said proceedings is inconsistent, and after sufficient particulars of the alleged previous statement to designate the occasion when it was made have been given to the witness, prove that he previously made a statement with which such evidence is inconsistent."

[23] When counsel for the state solicited the details surrounding the money found in *Siyoni's* gym bag and which were encapsulated in exhibit "V25", it triggered a marked attitudinal change in *Breakfast* and, as the further questioning unfolded, her demeanour indicated open hostility towards the prosecution. The inference can properly be made that she had misled counsel for the state into believing that she would testify in conformity with her police statements. Her deception, attitude and behaviour demonstrated her implacability and a declaration of hostility seemed meet. I interpolate to say that the objection raised by Mr *Daubermann* to my declaration is without any merit whatsoever and requires no further elucidation. Under cross-examination by Mr *Stander*, it became abundantly clear that her denial of being the author of the statements' contents is patently false. I accept that she was the source of the information recorded in exhibits "V25" and "V26". I shall in due course, in conjunction with *Siyoni's* extra curial statements, determine their probative value, but proceed first to the aftermath of her revelations to *Mayi*.

[24] It is not in issue that *Siyoni* was interrogated at the KwaNobuhle detective offices by *Mayi*. In his evidence in chief *Siyoni* described the assault perpetrated

upon him by *Mayi* and a number of other policemen, as ***"torture"***. It is unnecessary to delineate the nature and extent of the alleged battering for the simple reason that his evidence thereanent is, upon a holistic appraisal of the evidence, a cocktail of lies, perjury and contrivances designed to advance accused no. 1's defence. Whilst it is correct that *Siyoni's* eye was swollen, I accept *Mayi's* testimony that the injury was sustained during the scuffle when *Siyoni* resisted being handcuffed. It is highly improbable, given the unprecedented outcry and media frenzy which accompanied *Jayde's* murder that *Mayi*, or any other member of the initial investigation team would have been so foolhardy to jeopardise the investigation by perpetrating an assault on *Siyoni*, particularly in light of the revelations by *Breakfast* of his direct involvement. The probabilities favour *Mayi's* version that after being confronted with *Breakfast's* revelations, *Siyoni* admitted his complicity in *Jayde's* murder and directed the police to various places where the money was eventually retrieved. In his address, Mr *Price* submitted that Sergeant *Mncedi Gcukumana* (*Gcukumana*) did not support Mayi's version and that an adverse inference should be drawn from the failure to call the policemen who were present on the night in question. The fact that *Gcukumana* was unable to recall having heard *Siyoni's* consenting to point out the money does not avail the defence. The import of his evidence fully corroborates *Mayi's* and there was accordingly no need for the state to call supererogatory witnesses.

[25] The fact that he thereafter exclaimed having been assaulted amounts to sheer opportunism and merely establishes his guile. The injury provided the visible manifestation of his claim and was a mechanism whereby he could subsequently impugn *Mayi's* credibility and seek to avoid the consequences of his admissions to him. A classic example of his penchant to prevaricate and lie occurred when

questioned about the money found in his gym bag later that evening. It elicited a convoluted prolix explanation that it was money entrusted to accused no. 1 for safekeeping which he had retrieved to recompense *Sizwezakhe Vumazonke (Vumazonke)* who had sourced weights for his gym.

[26] That account of its derivation corresponded in broad outline with *Breakfast's viva voce* explanation tendered prior to her being discredited and remarkably also broadly conforms to accused no. 1's plea explanation as to its source. At the conclusion of the hearing on that day, i.e. Friday, 11 November 2016, that remained his version.

[27] *Siyoni's* weekend sojourn at the awaiting trial cells had a profound effect on his powers of recollection. When he was recalled to the witness stand on Monday morning, 14 November 2016, he made a complete *volte-face* and stated that the money was the pilfered portion of the R80 000.00 he had received from accused no. 1 destined to *Vumazonke* as payment for *Jayde's* contract killing.

[28] This veracious account of the source of the R31 000. 000 accords with *Breakfast's* narrative in her police statements ("V25" and "V26") albeit that she had not, on her version, counted the money which she placed in the socks. Arithmetically, it amounted to R31 000.00.

[29] As I shall in due course further detail, *Siyoni's* evidence is, with one exception (i.e. the R80 000), fabricated and falls to be rejected. His malleability was most pronounced during his ostensible cross-examination by Mr *Price*. Having been suborned to recant his extra curial statements his acquiescence to the plethora of

leading questions put to him accentuates the deception whereby he inveigled the prosecution into calling him as a witness.

[30] This is best illustrated when, after being cajoled into validating *Breakfast's* claim to blindness, he readily assented to a multitude of propositions*, inter alia*, that he had not only been assaulted, browbeaten into submission, forced to accompany the police to search his home and the place where the R31 000.00 was recovered, ill-treated but forced to append his signature to prepared statements. Whilst it is correct that the right of full cross-examination includes the employment of leading questions, the weight of the evidence thus procured is minimal where, as here, *Siyoni's* partisanship is glaring. I accept that the true account of what transpired between accused no. 1 and *Siyoni* is the version encapsulated in the statement (exhibit "AY1") which he deposed to *Swanepoel* on 3 May 2015. The same considerations apply to *Breakfast's* statements made to *Mayi* on the evening of 27 April 2015. Notwithstanding the fact that the content of exhibit "AY1" was extensively covered with *Siyoni* when cross-examined by Mr *Stander* and the document handed in as an exhibit, an objection was raised when a portion of its content was canvassed with Ms *Chanelle Coutts (Coutts)* during her cross-examination. The contention that the statement had not been proved is spurious. When *Swanepoel* was led, he detailed the circumstances which led to him minuting the statement, adverted to the meeting between *Siyoni's* then attorney Mr *van der Spuy (van der Spuy)*, and the eventual signing of the statement by *Siyoni*. *Swanepoel's* evidence that *Siyoni* appended his signature to exhibit "AY1" proves that he made it.

[31] The question whether the contents of the aforementioned statements, which, as I have adverted to, were disavowed by both *Siyoni* and *Breakfast* when they were

called to testify, constitute admissible evidence, has received the imprimatur of the Supreme Court of Appeal in ***S v Rathumba***[8]. Such evidence is, as the court correctly categorised, hearsay evidence. Its reception is regulated by s 3 (1) of the ***Law of Evidence Amendment Act***[9] which provides as follows: -

> "(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-
>
> *(a)* each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
>
> *(b)* the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
>
> *(c)* the court, having regard to-
>
> (i) the nature of the proceedings;
>
> (ii) the nature of the evidence;
>
> (iii) the purpose for which the evidence is tendered;
>
> (iv) the probative value of the evidence;
>
> (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
>
> (vi) any prejudice to a party which the admission of such evidence might entail; and
>
> (vii) any other factor which should in the opinion of the court be taken into account,
>
> is of the opinion that such evidence should be admitted in the interests of justice."

[8] 2012 (2) SACR 219 (SCA) at para [10].
[9] Act No, 45 of 1988

[32] In holding that the evidence of the witnesses who had disavowed their police statements had been properly admitted in evidence by the trial court, the Court of Appeal reasoned as follows: -

> "[10] Section 3 enjoins a court, in determining whether it is in the interests of justice to admit hearsay evidence, to have regard to every factor that should be taken into account and, more specifically, to have regard to the factors mentioned in s 3(1)*(c)*. This court in *S v Ndhlovu and Others* 2002 (2) SACR 325 (SCA) (2002 (6) SA 305; [2002] 3 All SA 760) considered the provision of s 3 and at para 31 held that:
>
> 'The probative value of the hearsay evidence depends primarily on the credibility of the declarant at the time of the declaration, and the central question is whether the interests of justice require that the prior statement be admitted notwithstanding its later disavowal or non-affirmation. And though the witness's disavowal of or inability to affirm the prior statement may bear on the question of the statement's reliability at the time it was made, it does not change the nature of the essential inquiry, which is whether the interests of justice require its admission.'
>
> In amplification, in para 33, it was stated that:
>
> 'The probative value of the accused's statements to the police did not depend on their credibility at the time of the trial — which the Court rightly found totally lacking — but on their credibility at the time of their arrest. And the admissibility of those statements depended not on the happenstance of whether they chose to testify but on the interests of justice.'"

[33] This is precisely the type of case where the interests of justice imperatively call for the admission and the substantive use of the statements of both *Siyoni* and *Breakfast* as admissible evidence. In her first statement to *Mayi* (exhibit "V25") *Breakfast* recounted the events as follows: -

> "Somewhere between January and February 2015 I was at Thando's place and we were in his room that is situated outside the main house. While we were in the room Thando informed me that he has been approached by his employer called Chris.
>
> According to Thando Chris wanted him to kill his wife (Chris' wife) and that he told him that he can not do that but he can organise people that can do that for him.
>
> Soon after that Thando told me that he tried to organise people from Zwide and New Brighton but they all failed him. In April, but I am not sure of the date, Thando has again informed me that he has found a guy that he called Sizwe who told him that he will kill the said lady for him.
>
> According to Thando the person that would successfully do the job for Chris would be paid an amount of fifty (R50 000-00) thousand rand. I did not see the said Sizwe that promised to kill the lady for Thando and Chris. The said lady was said to be the wife to Chris but I did not know or was never told as to what the reason of killing her was.
>
> On Monday night 2015-04-20 I am not sure of the time, I was at Thando room with him when he received a call on his phone. The called told him that "we have finished this and we want our money". After that call Thando waked up and went outside. As I was hearing what was being said I then decided to

take his phone to see as to who was phoning him. On paging the phone I noticed that the caller was Sizwe who was saved on his phone as Sizwe.

After that he came back and joined me on the bed. After that Chris, the employer of Thando arrive there driving a double cab bakkie, I think that the colour is silver grey and that he did not come into the house but Thando went out to attend him.

After that Thando came back telling me that I must phone my brothers Mabhuti and Toto to come and fetch me at his place. Thando and Chris have then left me there waiting for my brothers. At about 23:00 my two brothers arrived and we walked home.

I then met Thando the following morning when he came to my place. He phoned me to meet him outside. On meeting him he told me that he did get the money from Chris to pay Sizwe.

I would like to state that on arrival of Chris first before he went out with Thando, Thando came back from Chris and have a black bag that had money in it, he then requested me that while waiting for my brothers I must please count fifty thousand rand (R50 000-00) out of the money in the bag I did not count it. I then placed the said fifty thousand rands in the bag and kept the other one aside. I was then told by Thando that I must take the bag with the fifty thousand rand with and I did that.

Whilst I was sleeping at home Thando phoned me to meet him outside with the money. I then took the bag and went outside. It is then that I noticed that he was driving with Sizwe in Sizwe's white car that he use to drive. I then went to bed again. That is all that I know of this incident."

[34] At the time *Mayi* minuted the statement from *Breakfast* there was a dearth of information surrounding the death of the deceased and the suggestion that *Mayi* was the author of exhibit "V25's" content is nonsensical. The attention to detail and identification of key players attests to *Breakfast's* truthfulness at the time of making the statement. It is apparent from the aforegoing detailed factual exposition that *Siyoni*, having been appraised of *Breakfast's* revelations to *Mayi* would, as *Mayi* testified, have realised the quandary he was in and set in motion a process to broker a deal with the police and prosecuting authority. In his s 204 statement he narrated the circumstances under which he began employment with accused no. 1 and the approach made to him by the latter to find an assassin and his attempts to do so. He then narrated its *sequelae* as follows: -

> "Later that year round about August, September, October 2014 while I was on duty Chris asked to me accompany him to his vehicle. As we were nearby his vehicle he asked me if you (me) knew someone who can and then he man a sign with this hands across his throught which meant to me that if I knew someone whom can kill someone. I remember that this conversation could not took place next to the car or inside the car as Chanelle was already sitting in the car. I reply that I will look for someone. Nothing further was discussed. I do not know at that stage who was to be killed.
>
> I then started to look for someone. I was interested in this plan as I believed that there was financial gain for me in it. I first went to a guy that I know by the name of Lama of Motherwell. I believed that Lama himself would not kill the person but was hoping that he would know someone. I told Lama that my boss was doing the request. I was not suppose to tell Lama that it was my boss as Chris request me not to do so as he wanted to protect his identity. Lama requested a meeting with Chris. A few days later I introduced Chris to

Lama. We met nearby the Dan Qeqo Stadium in the parking area of Nqabane tavern. I was not allowed to listen to the conversation as Chris instructed me to wait outside the car. Lama was evading me after this meeting and I did not spoke to him afterwards. Nothing came from this Lama/Chris meeting. Chris then started to put me under pressure to find someone else.

I then went to another person I knew "Trompie". I also know "Trompie" as a person whom would not kill the person himself but would get someone to do the job. "Trompie" was interest in the proposal. He also requested to met with Chris. I arrange a meeting between them and they met at Infinity. I was not present when the discussion took place. This meeting with Trompie took place about two weeks after the meeting with Lama. The result was about the same as with Lama. Nothing came from it. Chris was putting me under more pressure now. This was the first time that he told me that the person he wanted to be killed was indeed his wife. He told me that it must happen before the school holidays because once the school holidays begun it would not be so easy as his wife would not be so easy to be found. The only reason he explain to me was that his wife spent too much money while he that is Chris must work long hours for his money. He furthermore told me that a vehicle he had, a Renault Megane, he had to sell because of financial problems. He told me furthermore that he then had to fix the double cab bakkie and then sell it. He said he then sold it for R50 000 and paid the money to the bank. Therefore this who vehicle deal thing resulted in a huge financial loss for him. Furthermore he told me either his parents or his wifes parents was forcing him to buy a home when he did not want to do so. He became more adement by the day to find someone to do the killing of his wife.

I then tried another person by the name of Andile of Ace. He just came out of prison at the time. I met him and he coloured friends. But nothing came from this just as in the case of Lama, Trompie. The school holidays had long since past until February this year (2015) I met a person Sizwe Vumazonke I knew in Gqoko's Tavern. I knew Sizwe from club 9 Yards. I knew that he know people who could do the job. He as approached in the same way I approached the other people. He said that he was interested in the job and we exchanged numbers. He would then contacted me later. A few days later he contacted me. We met at Infinity a few days later. I was suppose to show him the places where he could find Chris's wife. Sizwe told me that he would come tomorrow. He did came that tomorrow. At that time Chris had already shown me where he stayed. The next day Sizwe did turn up and I went to show him. It was going now towards March. Sizwe disappeared. I was back to square one now. I started looking for other persons again at this time Chris was almost panicking.

I made contact with my neighbour at my gym, a guy called "Touch". He introduced me to colourds. However nothing came from this again as a result of finance. I contacted Sizwe on facebook and informs him that the prize for the hit was not R40 000. He replied that I must SMS my number to him which I did. A few days later Sizwe pitch up at my gym. He requested me that I must informed the two persons what was going on I did just that. The persons wanted a rented car to do the job. I then phoned Nthando's car hire. I phoned on my phone and the amount was R6000 for a rented vehicle. I borrowed money of R1500, and gave R1500 of my own money and Chris eventually came and drop R3000 at the gym. I then handed the R6000 to Sizwe. This was early April 2015 just before the schools open. The vehicle was a white Toyota small car. A plan was put in motion. The plan was for Chris to bring his wife for a Sunday Dinner to Infinity in her car. I would have

been at the place where I would then show the vehicle a Fiesta white in colour to Sizwe and his friends from where they would then followed her as they could not kill her in front of the club. The plan was however cancelled as the wife did not want to come to Infinity. Chris then decided to show me another possibility where she could be taken out. The possibility he showed me was the friend's home with whom she was driving. The school opened the Monday after the holiday. I learnt from Sizwe that they wanted to do the job that one of the mornings and followed her. As it was raining and was bad weather they did not succeed. By that time a already shown Sizwe one night where the lady friend stayed. I also provided Sizwe with the vehicles of her registration number which I got from Chris. The information that she was driving I got from Chris.

Because Sizwe did not succeed that week Sizwe came back to me requesting that I must asked Chris to let him into the complex and the home. Chris replied that he could not do that as the complex were to secured and that a policeman was staying opposite him in any case. He would not be able to answer all the questions. Chris insisted that it must look like a robbery outside the gate or a hijacking. As Sizwe's plan could not work according to Chris he told that he will make another plan. He told me that on the Monday during the day on the Tuesday morning to eight I got a call from Sizwe telling me that the job was done and that he wants his money. I then went on foot to Infinity. The arrangement that stood from the previous week with regards to the money was that I would collect it from the office. There was an arrangement that Chris would leave money with Knox. When I got to Knox there was no money. I did not phone Chris was I did not want any telephonic link with him. While I was with Knox the news broke on facebook that Chris's wife was missing. I went outside and phoned Sizwe informing him that I could see what he told me was true. I also informed him that I was looking

for the money from Chris. That whole day I received only one call from Chris. He was using Infinity's landline number, he did not say much as you could hear that he was with people. I eventually went home. That night I went to sleep with my girlfriend at my home. That night very late I got a call from Chris. He asked me I stayed and I met him in Ntongeni Road. I got into his car, his white Golf. Once inside the Golf he asked me where the guys put her. I could not answer that question. He gave me a plastic bag containing money when we were in front of my house. I went inside my house. I gave my girlfriend the plastic bag and left again. I got into Chris's car and we drove. We at like we were driving around looking for possible suspects. We met with some of his family friends at KFC Njoli Square. He took me to Babalwa's (my girlfriend) house. I have instructed earlier for Tato (Babalwa's brother) to fetch Babalwa and we would then meet at Babalwa's house. We then counted the money for Sizwe. It was R40 000. The time now about was to 01:00 on Wednesday morning. I told him that he can come and fetch his money. I left the money with Babalwa and walk home. Minutes later Sizwe stop at my home. He hooted for me and I went outside. I saw that it was Sizwe. I got into the car and we drove to Babalwa's house.

At Babalwa's house I knock and she opens the door. At the time Sizwe was standing at the back of me. Babalwa brought the money to the kitchen door. Sizwe greeted Babalwa. Myself and Sizwe then drove KFC Njoli square where I bought KFC. He then took me home. Sizwe told me earlier that he did not do the job with the people I met with him earlier. Sizwe informed me therefore that should I met with those guys I should tell them Sizwe did not went ahead with the job. On the Friday Sizwe called me telling me that the people whom did the job wanted more money. He was now driving another car. Not the white Toyota anymore. I conveyed that message to Chris. Chris later told me to get rid of my cell phone and simcard. He gave me R1000 to

replace my cellphone and simcard. I took the money but did not destroy the cellphone and simcard.

On Sunday the 26th of April 2015 I was arrested and made a confession. It became clear to me that I was in deep trouble and decided to co-operate with the police. On request I made a few telephone calls to Chris which resulted in a meeting in a vehicle that I was told would been recorded. This statement was made in the presence of my lawyer. This is all I can declare." (*sic*)[10]

[35] The lawyer referred to in the penultimate paragraph of the aforementioned statement was *van der Spuy*, an attorney attached to the local Justice Centre. During the course of this trial his integrity was assailed by Mr *Price*. The besmirchment of his character is scandalous and merits this court's opprobrium. I accept *Swanepoel's* testimony that he enlisted *van der Spuy's* professional assistance to assist *Siyoni* and that the latter's disavowal of having been properly advised by him is false.

[36] *Siyoni's* admission that accused no. 1 had orchestrated *Jayde's* murder finds further corroboration from the most unlikely source, accused no. 1 himself. In the antepenultimate paragraph of his s 204 statement, *Siyoni* adverted to a meeting in a vehicle with accused no. 1. It is common cause that it took place during the evening of 29 April 2015 outside a Steers fast food outlet in an unmarked police vehicle equipped with listening and filming devices and that their conversation and interaction had been recorded in both audio and video format. This activity finds legislative sanction in s 252A of the Act. Under the rubric, ***"Authority to make use***

[10] Exhibit "AY1"

of traps and undercover operations and admissibility of evidence so obtained", it provides as follows:-

> "(1) Any law enforcement officer, official of the State or any other person authorised thereto for such purpose (hereinafter referred to in this section as an official or his or her agent) may make use of a trap or engage in an undercover operation in order to detect, investigate or uncover the commission of an offence, or to prevent the commission of any offence, and the evidence so obtained shall be admissible if that conduct does not go beyond providing an opportunity to commit an offence: Provided that where the conduct goes beyond providing an opportunity to commit an offence a court may admit evidence so obtained subject to subsection (3)."

Subsection (3) in turn provides that: -

> "(3)*(a)* If a court in any criminal proceedings finds that in the setting of a trap or the engaging in an undercover operation the conduct goes beyond providing an opportunity to commit an offence, the court may refuse to allow such evidence to be tendered or may refuse to allow such evidence already tendered, to stand, if the evidence was obtained in an improper or unfair manner and that the admission of such evidence would render the trial unfair or would otherwise be detrimental to the administration of justice.
>
> *(b)* When considering the admissibility of the evidence the court shall weigh up the public interest against the personal interest of the accused, having regard to the following factors, if applicable:
>
> (i) The nature and seriousness of the offence, including-

(aa) whether it is of such a nature and of such an extent that the security of the State, the safety of the public, the maintenance of public order or the national economy is seriously threatened thereby;

(bb) whether, in the absence of the use of a trap or an undercover operation, it would be difficult to detect, investigate, uncover or prevent its commission;

(cc) whether it is so frequently committed that special measures are required to detect, investigate or uncover it or to prevent its commission; or

(dd) whether it is so indecent or serious that the setting of a trap or the engaging of an undercover operation was justified;

(ii) the extent of the effect of the trap or undercover operation upon the interests of the accused, if regard is had to-

(aa) the deliberate disregard, if at all, of the accused's rights or any applicable legal and statutory requirements;

(bb) the facility, or otherwise, with which such requirements could have been complied with, having regard to the circumstances in which the offence was committed; or

(cc) the prejudice to the accused resulting from any improper or unfair conduct;

(iii) the nature and seriousness of any infringement of any fundamental right contained in the Constitution;

(iv) whether in the setting of a trap or the engagement of an undercover operation the means used was proportional to the seriousness of the offence; and

(v) any other factor which in the opinion of the court ought to be taken into account."

[37] Thus, as a precursor to adducing testimony to prove the admissibility of the evidence so obtained, Mr *Stander* requested that I order that a trial within a trial be held to determine the issue as provided for in ss (7). Mr *Price*, whilst of the view that he was ***"not entirely ad idem as exactly what the grounds are for the trial within a trial"***, was constrained to concede that in terms of the directory language of s 252A (7) of the Act, it would be ***"preferable to determine the issue in a trial within a trial".*** The subsection provides as follows: -

"(7) The question whether evidence should be excluded in terms of subsection (3) may, on application by the accused or the prosecution, or by order of the court of its own accord be adjudicated as a separate issue in dispute."

[38] Notwithstanding the ambivalent stance adopted by Mr *Price* regarding the procedural device for determining the admissibility of the evidence uncovered during the undercover operation, it is implicit from the terms of the section, however much its directory language, that where such evidence is sought to be excluded, the appropriate avenue to determine admissibility is the procedure contemplated by subsection (7). This approach was specifically endorsed by the Supreme Court of Appeal in ***S v Matsabu***[11]as follows: -

[11] 2009 (1) SACR 513 (SCA)

"[8] Some point was made in the heads of argument about the magistrate's refusal to hold a trial-within-a-trial when his legal representative twice objected to the admissibility of the trap evidence and asked that admissibility be tried as a separate issue. During argument reliance on that ground was all but abandoned. Such uncertainty as remains should be dispersed. Our courts have long accepted that it is both desirable and necessary, to the end of achieving a fair trial, to try issues of the voluntariness of extra-curial statements or conduct of accused persons separate from the merits of the case: *R v Dunga* 1934 AD 223. When a ruling is made without hearing the defence evidence, the defence is entitled to withhold its further testimony where that could only be given on terms which may prejudice the trial of the merits: ibid at 227. See also *S v De Vries* 1989 (1) SA 228 (A) at 232G - 234E; *S v Yengeni and Others (3)* 1991 (1) SACR 387 (C) at 391*b* - 392*a*; *S v Ntzweli* 2001 (2) SACR 361 (C) ([2001] 2 All SA 184 at 362*i* - 365*c*. In general terms s 252A is also concerned with voluntariness of conduct as the measure of whether an accused's conduct is induced by the circumstances of or methods employed in the operation rather than resulting from his own desire to commit the offence. In principle I do not think that there is any material distinction between the accepted categories of cases where the separation of admissibility and merits is insisted upon and s 252A. Both enquiries seem to take account of and provide for the same inherent risks, such as discouraging an accused from speaking openly when the trial of the merits may be influenced if he does so and the likelihood that failure to deal with admissibility properly and promptly will leave an accused in limbo in relation to the vital questions of whether he needs to testify and the substance of the case that he has to answer. So also the prosecutor must know the limits of his case both for the purpose of leading further evidence and for cross-examination of the accused. For all these reasons the holding of

a trial-within-a-trial will usually be appropriate to decide admissibility under s 252A." (emphasis added)

[39] Consequently, where a trial within a trial is so ordered, the proviso to ss (6) obliges an accused person, in peremptory terms, to ***"furnish the grounds on which the admissibility of the evidence is challenged. . ."*** In response to a direct question by me hereanent, Mr *Price* stated as follows: -

"M'Lord, it is difficult for me to address you on that but particularly because it is not our view that Section 252A is applicable here but in short, M'Lord, I think if you look at our plea explanation, what we have said all along, we say that our client's right to a fair trial was decimated *ab initio* and this is just part of that decimation. In other words, we are, I think that is about as clear as I can put it to Your Lordship. We are relying very strongly, M'Lord, as you know on the Mthembu and the Tandwa cases."[12]

[40] This nuanced response limited the admissibility challenge to the alleged assault on *Siyoni* and, a fortiori, a violation of the accused's fair trial rights. After the adduction of evidence by the state, the accused elected not to testify but called three witnesses, *Siyoni's* mother, brother and the mother of *Breakfast*. It was however agreed upon by the state and the defence that in determining admissibility I could have regard to the testimony of *Siyoni* and *Breakfast*. It is trite law that during a trial within a trial, a court is entitled to have regard to evidence already led in the main trial. See ***S v Muchindu*** *2000 (2) SACR 313 (W)* at (a)-(c). After hearing argument, I

[12] Record at p 1683

ruled that the video and audio recording between accused no. 1 and *Siyoni* was admissible as evidence against accused no. 1 and intimated that my reasons would be incorporated in the judgment. These now follow.

[41] The decision to engage in the undercover operation was engendered by the interview *Swanepoel* had with *Siyoni* on 28 April 2015 at the Directorate for Priority Crimes' (the unit's) offices. It is common cause that by then *Swanepoel* was in possession of *Siyoni's* confession made to the magistrate the previous day. The state's version of the events which unfolded during and after the interviews he had with *Siyoni* on 28 and 29 April 2015 is, on an appraisal of the evidence adduced, the only credible factual account of the circumstances which ultimately led to the meeting between accused no. 1 and *Siyoni* on the evening of 29 April 2015. *Swanepoel's* testimony is corroborated in all material respects by his underlings, Warrant Officer *Shane Bosch* (*Bosch*), Warrant Officer *Leon Eksteen* (*Eksteen*), Sergeant *Aldre Koen* (*Koen*), and the unit's head, Brigadier *Till*. Accused no. 1's version, on the other hand, was confined to the concurring affirmations by *Siyoni* to a raft of propositions put to him by Mr *Price*. This appears clearly from the following exchanges where Mr *Price*, with reference to the transcript of the recorded conversations between *Siyoni,* accused no. 1 and the members of the unit during 28 and 29 April 2015, (exhibit "BG5"), put the following scenarios to *Siyoni*: -

[A] "Now, I am just going to summarise very quickly what our case is on the 28th, what happened at Organised Crime on the 28th and we are going to show it is true by reference to documents. Based on our instructions and the documents that we are going to refer His Lordship to, you were forced, you were threatened, you were insulted and to put it very simply, you were overwhelmingly pressurised

to phone Christopher and try and implicate him. Is that correct? --- That is correct so.

You didn't phone Christopher of your own accord. --- That is correct so, M'Lord.

And in fact, the allegations, which undoubtedly will come out when the police come that you actually volunteered to phone Christopher because you said you didn't want to fall, you didn't want to sit for his crimes; that is rubbish. --- Yes, that is a lie.

And your instructions, and we will show that shortly, were unequivocal if you do not succeed in getting Christopher to implicate himself, you are going to go to jail for the rest of your life or for a long period of time; that was said to you, not so? --- Yes, that is correct so.

In fact, I am going to argue, I am going to show you, that they were so cold hearted that one hour after Christopher buried Jayde, they got you to phone him. And in fact, Christopher in that call said to you Thando, I have just buried my wife. Do you remember that? --- Yes, he said that. "[13]

[B] "Can I then accept, to move off the 29th of April, that when you went to Algoa Park to meet Christopher, firstly that was an idea put into your head by the police, it had nothing to do with Christopher's decision? --- That is correct so.

And up until then, if we look at that telephone conversation, that recorded conversation that we have been looking at, Christopher had not made any admission or even suggested that he knew what you were talking about when

[13] Record at p1421 line 23 – p 1422 line 23

you said the police were after you; am I right? --- No, he was not even aware what I was talking about."[14]

And

[C] "And amazingly after you had done the recording with Chris, suddenly you get a lawyer. Now, I want to put something to you; it appears to me that your request for lawyers fell on deaf ears because they realised that if you used a lawyer, you would not cooperate with them, am I right? --- That is correct so because at the stage that I was at Kabega Park, I already asked for the assistance of an attorney then they said to me there is nothing that I will be able to do.

I am going to take it further. You repeatedly asked for an attorney and you were told you will not get an attorney until you implicate Chris. --- That is correct so.

And after the meeting in the car, suddenly you got your lawyer. --- That is correct so."[15]

[42] The aforegoing excerpts mirror the technique employed throughout *Siyoni's* questioning by Mr *Price* – the answers upheld the proposition. A moment's reflection on his responses establish *Siyoni's* partisanship to accused no. 1's cause, and the exercise conducted hardly passes muster as cross-examination. It constitutes a plethora of leading questions designed to elicit affirmative answers from a suborned, compliant witness and the answers furnished have, in my judgment, no evidential

[14] Record at p 1443
[15] Record at p 1446

value whatsoever. I unreservedly accept the state's evidence that at the outset of his interrogation at the unit's offices, *Siyoni*, mindful of the dilemma he found himself in, expressed a willingness to fully cooperate with the police and entreated *Swanepoel* to facilitate an audience with accused no. 1, for obvious reasons, viz. to ameliorate the consequences of his own actions. In considering the admissibility of the recorded conversation between *Siyoni* and accused no. 1, the former's concocted version must be disregarded and the matter determined solely on the evidence adduced by the state, to which I now turn. I interpolate to say that the evidence adduced from his mother, brother and *Breakfast's* mother that he had been assaulted, is in conformity with his own, a complete and utter fabrication and falls to be rejected.

[43] It is common cause that the exchanges between *Siyoni* and the unit's members concerning the attempts to telephone accused no. 1 and the actual conversations between him and accused no. 1 were recorded. The transcript was, as adverted to hereinbefore introduced into the proceedings as exhibit "BG5" and featured prominently in the cross-examination of *Swanepoel* and the unit members.

[44] As adumbrated hereinbefore, the sole ground initially advanced by Mr *Price* for the exclusion of the video and audio footage was the alleged ill-treatment of *Siyoni* by the unit and the police members involved in his earlier interrogation. During the course of *Bosch's* cross-examination however, the exclusionary ground was suddenly widened to now include the scenario postulated by s 252 A (2) (e). It was put to *Bosch* and later to *Swanepoel* that the plethora of telephone calls to accused no. 1 on the 28th and 29th of April 2015 inexorably induced him to succumb and meet with *Siyoni* and that this degree of persistence fell foul of the provisions of s 252 A. During *Swanepoel's* cross-examination, the ambit of the challenge was further

extended to now include the scenario postulated by ss (h). It was put to him that the calls made exploited accused no. 1's emotional state to such an extent that he was impelled to meet with *Siyoni*. It is indeed so that several calls were made to accused no. 1 but it is common cause that only a few were answered. In any event, accused no. 1 is the only person who could have told us what effect the calls had on him. Notwithstanding the protection afforded to an accused person by the trial within a trial procedure, accused no. 1 chose not to give evidence. That conscious decision has consequences. As Leach JA remarked in ***Hohne v Super Store Mining (Pty) Ltd*** at [49][16]:-

> "Moreover, there is no evidence that the appellant in fact acted under duress. Objectively viewed, in the light of what I have said above, there is no threat of any unlawful evil being done to him if he did not co-operate with the respondent. His Counsel had stated in cross-examination of the respondent's witnesses that the appellant would deny that he had made the admissions freely and voluntarily, and would testify that during breaks in the recording he had been further threatened and told that his and his family's lives, including those of his parents who were employed by the respondent, would be destroyed, and that if he did not admit to provide the information required he would be imprisoned for life. However, notwithstanding this and despite the unusual protection afforded by the trial-within-a-trial procedure that was adopted, the appellant failed to give evidence. That, too, was a decision he was entitled to take. But actions have consequences, and one of the consequences that flows from the respondent's failure to testify is the inference that his evidence was likely to damage his case."

[16] [2017] 1 ALL SA 681 (SCA)

[45] The reliance on the content of exhibit "BG5" as evidencing impermissible conduct on the part of *Swanepoel* and his team is entirely misplaced and an exercise in opportunism. An objective analysis of exhibit "BG5" establishes not only that *Siyoni* was willing and cooperative but that the decision to meet rested with accused no. 1. His pre-meeting utterances to *Siyoni* indicate quite clearly that he recognised that the cat was almost out of the bag and the decision to meet was to ensure that it remained inside. As adumbrated hereinbefore, accused no. 1 elected not to testify during the trial within a trial. Mr *Price* nonetheless submitted that such omission was of no consequence whatever. Given the assertions made to *Siyoni* and referred to in paragraph [41] hereinbefore, the submission is an astounding one. I say so for two reasons, - firstly, during ***Swanepoel's*** cross-examination he was referred to the provisions of s 252(A)(2)(e) and (h) of the Act and the point was sought to be made that accused no. 1 succumbed to the incessant telephone calls and met with *Siyoni*. Up until then it was never accused no. 1's case that the decision to meet with *Siyoni* was in any way actuated by the calls made to him. When I initially invited Mr *Price* to indicate the grounds upon which the admissibility of the evidence was being challenged, no reference whatsoever to the circumstances enumerated in sub-paragraphs (a) to (m) of s 252 A (2) was made. The challenge was, as adumbrated hereinbefore, limited to the generalised defence *ex facie* the s 115 statement. Secondly, what I was asked to do was to infer that accused no. 1 in fact succumbed to the incessancy of the calls made to him and met with *Siyoni.* The invitation to do so must be declined for it is based entirely on conjecture. As Boshoff, J, pertinently pointed out in ***S v Cooper and Others***[17]

[17] 1976 (2) SA 875 (T) at 889A-C

> "There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture: *Caswell* v. *Powell Duffryn Associated Collieries Ltd*., 1940 A.C. 152 at p. 169; (1939) 3 All E.R. 722 at p. 733. As pointed out by DENNING, L.J., in *Smithwick* v. *The National Coal Board*, (1950) 2 K.B. 335 at pp. 351 and 352, the dividing line between conjecture and inference is often a very difficult one to draw, but it is just the same as the line between some evidence and no evidence. One often gets cases where the facts proved in evidence - the primary facts - are such that the tribunal of fact can legitimately draw from them an inference one way or the other, or, equally legitimately refuse to draw any inference at all. But that does not mean that when it does draw an inference it is making a guess. It is only making a guess if it draws an inference which cannot legitimately be drawn; that is to say, if it is an inference which no reasonable man could draw."

[46] The "***facts***" which Mr *Price* relies upon in support of his submission is the contrived version of *Siyoni*. The real reasons appear clearly from "BG5". All that *Siyoni* told accused no. 1 was that he was extremely worried because the police were looking for him, he wanted an audience with him and he needed money. The argument advanced conveniently ignores the import of exhibit "BG5" from which it is apparent that accused no. 1 met with *Siyoni* of his own volition and with his own agenda. Although the heads of argument are replete with suggestions that *Siyoni*

was coerced into influencing accused no. 1 ***"to implicate himself in Jayde's murder"*** a plain reading of exhibit "BG5" establishes the inexactitude of the insinuation.

[47] It is not in issue that exhibit "BG5" is an accurate memorial not only of the telephonic interaction between accused no. 1 and *Siyoni* on 28 and 29 April 2015 but moreover the exchanges between *Siyoni* and members of the unit. It was put to the unit's members that exhibit "BG5" establishes that *Siyoni* was browbeaten into initiating telephonic contact with accused no. 1, and that the latter was induced to meet with *Siyoni* and incriminate himself. It is indeed so that *ex facie* exhibit "BG5" *Eksteen* told *Siyoni* that St Albans prison was no bed of roses and that he faced a possible sentence of 25 years imprisonment. It was put to both *Eksteen* and *Swanepoel* that such intimation constituted a threat and coerced *Siyoni* into making the calls. The assertion made is devoid of all merit and the utterance by *Eksteen*, contextually read, amounts to no more than a reminder to *Siyoni* of the seriousness of the situation he found himself in.

[48] An objective analysis of exhibit "BG5" establishes that *Siyoni* was not only the initiator, but a willing and active participant in the undercover operation. This appears clearly from call 5 on 28 April 2015 and the exchanges between him and the unit members after call 7 when *Siyoni*, of his own accord reminds them, ***"you don't understand, Chris is clever."*** *Siyoni's* aforementioned categorisation of accused no. 1 finds corroboration in the exchange between the latter and *Eksteen* during the afternoon of 29 April 2015, where, during the course of their discussion, accused no. 1, on several occasions, expressed his anxiety at being called by *Siyoni* and begs

the question why. This show of reticence was feigned and his conduct dramatized to induce *Eksteen* to believe that there was no connectivity between himself and *Siyoni*.

[49] A holistic appraisal of the evidence adduced and the content of exhibit "BG5" establishes that accused no. 1's reluctance to initially either return *Siyoni's* calls or to engage fully in conversation with him on 28 April 2015 was actuated by his belief that *Siyoni* had in fact been arrested by the police and was calling him at their instigation. *Eksteen's* uncontroverted evidence was that whilst at the unit's offices in Shirley Street, he received a telephone call from accused no. 1 to meet, agreed thereto and that a discussion took place in his own office at 3rd Avenue, Newton Park. It is common cause that *Eksteen* recorded this conversation, as appears from "my recording 13" on page 25 of exhibit "BG5". It is apparent therefrom that accused no. 1's primary motive for the meeting was to establish whether *Siyoni* had been arrested. The inference can thus properly be made that fortified by *Eksteen's* deception that he had not, he initiated further telephonic contact with *Siyoni* during the course of 29 April 2015 which eventuated into the meeting between them later that evening. Exhibit "BG5" furthermore establishes, not only that the choice of venue emanated from accused no. 1 but that he proceeded thence with money to hand to *Siyoni*, and later, blatantly lied to *Koen* concerning *Siyoni's* intended destination.

[50] During *Swanepoel's* cross-examination, the ambit of the challenge to the admissibility of the recorded conversation between accused no. 1 and *Siyoni* was once more widened to now include the scenario postulated by ss 2(a) of s 252A. It was put to him, quite erroneously, that *Bosch* had testified that accused no. 1 had been entrapped and that under those circumstances permission would have had to

be obtained from the Director of Public Prosecutions. The assertion made is misleading in the extreme. The only mention of entrapment by *Bosch* occurred in the following exchange between himself and Mr *Price*, where, in response to the question, ***"Now, the section 17, you know what section 17 is?"*** he answered, ***"Is that with regard to the entrapment?"*** *Bosch's* rhetorical answer was then elevated to an admission that *Siyoni* had been used as a trap. This appears clearly from the following question put to him, ***"Bosch, when he testified, said that the purpose was to entrap Panayiotou; I am using his own words. Is that correct? --- There would have been conversations between the two, M'Lord; we didn't know what to expect, we were just hoping for what to expect.***

Nee, dit verstaan ek; ek dink nie u verstaan my vraag nie. Look, you have already obtained permission to make the calls, now you phone him again; was that call's purpose only to go a step further to now record him in the car? --- That is correct, M'Lord.

Mr Bosch referred to that as the entrapment of Mr Panayiotou; do you agree? --- If that is the wording of Mr Bosch; that is his. Mine is that we were going to get permission to record Panayiotou.

You realise that if the court were to find that this was an entrapment then you would have first got the permission under Section 252A?".

As a matter of law, s 252A placed no such obligation on *Swanepoel*. As Wallis AJA remarked in ***S v Kotze***[18]: -

[18] 2010 (1) SACR 100 (SCA) at [22] - [26]

"[22] The section deals with both traps and undercover operations. Whilst these usually go together there will be cases where an undercover operation may involve no element of a trap. Thus, for example, the infiltration of an undercover agent into a gang planning a bank robbery, a cash-in-transit heist or the overthrow of the government will not necessarily involve any element of a trap, but may merely be an exercise in obtaining information. Nonetheless it may involve infringements of rights to privacy - as with the use of a telephone tap or some other form of listening device - and could potentially be subject to constitutional challenge. The section explicitly addresses that situation and provides that such actions are permissible. It also recognises that undercover operations may have elements of a trap and hence treats the two together. The present case is a classic instance of an undercover operation that also involves the use of a trap.

[23] The section lays down two approaches to the admissibility of evidence obtained as a result of the use of a trap. Evidence is automatically admissible if the conduct of the person concerned goes no further than providing an opportunity to commit the offence. If the conduct goes beyond that the court must enquire into the methods by which the evidence was obtained and the impact that its admission would have on the fairness of the trial and the administration of justice in order to determine whether it should be admitted.

[24] It must be stressed that the fact that the undercover operation or trap goes beyond providing the accused person with an opportunity to commit the crime does not render that conduct improper or imply that some taint attaches to the evidence obtained thereby. All that it does is create the necessity for the trial court to proceed to the enquiry mentioned in the previous paragraph. I stress this because there was a misconception in this regard at the trial. At various places in the cross-examination of Terblanche it

was put to him that the section imposes constraints upon what may be done pursuant to a trap and this suggestion is repeated before us in the heads of argument for Kotzè. In summarising the argument in his practice note counsel said: 'Die getuienis van die lokvink behoort as ontoelaatbaar gereël te word aangesien die optrede van die lokvink verder gegaan het as die blote skepping van geleentheid om misdryf te pleeg .' This is a misconception as to the effect of s 252A(1) and it is as well therefore to lay it to rest. Section 252A(1) does not purport to prescribe the manner in which undercover operations or traps are to be conducted by the police. It merely distinguishes, on the basis of the manner in which the trap is conducted, between instances where the evidence thereby obtained is automatically admissible and instances where a further enquiry is called for before the question of admissibility can be determined.

[25] Section 252A(1) prescribes a factual enquiry into whether the conduct of the trap goes beyond providing an opportunity to commit an offence. Section 252A(2) describes a number of features that may indicate to a trial court that the undercover operation or trap went beyond providing an opportunity to commit an offence. It was conceded by the prosecution and held by both the magistrate and the court below that the conduct of Terblanche and this undercover operation went beyond merely providing the opportunity for the commission of the offence. Unfortunately the findings of both courts on this aspect were not fully reasoned. A closer examination of the provisions of sections 252A(1) and (2) is therefore desirable.

[26] The starting point is that, in each case where the evidence of a trap is tendered and its admissibility challenged, the trial court must first determine as a question of fact whether the conduct of the trap went beyond providing an opportunity to commit an offence. It does that by giving the expression its

> ordinary meaning and makes its decision in the light of the factors set out in ss (2). I accept that if one simply peers at the language of s 252A(2) there appears to be an anomaly arising from the fact that some matters logically anterior to the conduct of the trap itself are to be taken into account in considering whether it went beyond providing an opportunity to commit an offence. However, there are always dangers in such a linguistic analysis removed from the context of the section as a whole and the potential anomaly may on closer examination be more apparent than real. Thus the fact that the trap was set without the authority of the Director of Public Prosecutions or that the conditions set by the Director were disregarded may well indicate that the trap went beyond providing an opportunity to commit an offence. Otherwise they will be irrelevant. The fact that the offence in question is of a minor nature may indicate that the effect of the trap is to place disproportionate temptation in the path of the accused, so that it went beyond providing an opportunity to commit an offence."

[51] In considering the question whether the unit's conduct went beyond providing an opportunity to commit an offence a court is enjoined to have regard to the raft of features adumbrated in s 252A(2) (a) to (n) where applicable. It is apposite, given the confusion surrounding the first of the features enumerated in the subsection, to dispel the notion that the authority of the Director of Public Prosecutions is a prerequisite for engaging in an undercover operation by a law enforcement officer. The Act imposes no such duty, *caedit question*. As adverted to earlier, S 252A, did not oblige *Swanepoel* to obtain the Director Public Prosecutions' consent to conduct the undercover operation.

[52] There is furthermore no suggestion that other techniques were available to unmask *Jayde's* murderer. It is common cause that *Jayde's* murder had unleashed a media frenzy. It, together with the informant's revelations and confirmed by *Siyoni*, impelled the adoption of the strategy employed by the unit and their *modus operandi* is not open to critique. An objective assessment of exhibit "BG5" establishes that accused no. 1 was not induced into meeting with *Siyoni*. It was his own self-preservation which caused him to make the calls which in fact precipitated the meeting. The mere fact that the initial calls were made at the instance of the unit is entirely irrelevant. The fact of the matter is that the majority went unanswered, and, when regard is had to the import of the actual conversation between accused no. 1 and *Siyoni* prior to the actual meeting, it is clear that no exploitation as envisaged in ss 2(h) in fact occurred. It is furthermore clear that the evidence procured established accused no. 1's complicity in *Jayde's* murder and there is no room to contend that the unit acted in bad faith. I am satisfied that the unit's conduct did not go beyond providing an opportunity to commit an offence.

[53] But even on the assumption that it could conceivably, upon an entirely subjective critique of the unit's conduct be contended that it went beyond providing an opportunity to commit an offence, the evidence garnered would in my view nonetheless be admissible for its admission is neither unfair nor detrimental to the administration of justice – rather, its effacement would be inimical to the interests of justice. The aforegoing constitutes my reasons for ruling the audio and video recordings (exhibit "CB") admissible in evidence.

[54] During his final address however, Mr *Price* entreated me to revisit my ruling, contending that evidence adduced during the defence case justified its

reconsideration. It is indeed so, given the interlocutory nature of rulings on the admissibility of evidence, that a court is entitled to reconsider its earlier rulings, but the argument advanced is spurious, proceeding as it does from the misconception concerning a law enforcement official's power to engage in an undercover operation. As adumbrated hereinbefore, S 252A imposes no obligation on a police officer to obtain the Director of Public Prosecutions' consent to engage in such activity, and the adduction of testimony by advocates *Gounden* and *Goberdan* from the office of the Director of Public Prosecutions was, despite the fanfare, entirely irrelevant, and so too the guidelines. Whilst these may apply to members of the prosecutorial services, they are clearly not binding upon members of the South African Police Services.

[55] The import of the aforementioned dialogue between *Siyoni* and accused no. 1 establishes his complicity in *Jayde's* murder beyond all reasonable doubt. Its admission into the smorgasbord of testimony against accused no. 1 nonetheless evoked an assault on the authenticity of both the video presentation and the transcript of the recording. Warrant Officer *Kellemane*, attached to the electronic surveillance unit of the South African Police Services was responsible for downloading the video recording from the SD card onto his computer. He burned a dvd, received in evidence as exhibit "CB", and the transcript of the conversation as exhibit "CB1". During cross-examination by Mr *Price*, it was suggested to him that both the video and the audio presentations could have been manipulated. Whilst it is correct that *Kellemane* assented to this speculative hypothesis, the attack soon dissipated and was abandoned. Nonetheless the attempt to impugn its genuineness was imprudent and symptomatic of the malaise which afflicts the defence case.

[56] The video and audio recording provides a graphic account of the interaction between *Siyoni* and accused no. 1 and posits the latter as the pre-eminent villain. The transcript is unsusceptible to paraphrase and its reproduction into this judgment is imperatively called for particularly in light of accused no. 1's disavowal of any complicity in *Jayde's* murder and the unwarranted and scurrilous imputations of dishonesty directed by the defence against several witnesses called by the state. It reads as follows:

- *""TS (referring to accused 1) – Things aren't right now.*
- *CP (referring to the applicant) – Why?*
- *TS - Babalwa called me and said the police was there at my house. Everything is changing now.*
- *CP – But why are the police after you?*
- *TS – I don't know. I think here is an informer somewhere, somehow.*
- *CP – Did these guys blit?*
- *TS – Which ones?*
- *CP – Your friend.*
- *TS – Sizwe.*
- *CP – Did they tell anything?*
- *TS – No, even them they are on the run.*
- *CP – Oh.*
- *TS – I told them they must not be here.*

- *CP – Where they going to?*
- *TS – They didn't tell me. I changed my sim-card.*
- *CP – Yes, but you need to change it again now.*
- *TS – After this we ……..I'm going to call you.*
- *CP – What.*
- *TS – I'm going to call you on my new number.*
- *CP – No you are not. You just missed call me. Don't phone me or sms me.*
- *TS – What's going on boss?*
- *CP – I don't know bru.*
- *TS – Hey, this thing I didn't see it was going to be like this.*
- *CP – Here.*
- *TS – What is this?*
- *CP - Plus minus 5 (reference to R5,000-00). Where are you going to now?*
- *TS – I'm going back to Jeffreysbay. I'm worried about my family. Boss this thing I did't know it was going to be like this. I thought it was going to be easy.*
- *CP – Yes but why did they say to you when they fetched you the other day.*
- *TS – They fetched me and then they asked me questions.*

- *CP – And…What did they ask you?*
- *TS – Fucking questions.*
- *CP – Hey ….*
- *TS – Nothing serious boss.*
- *CP - Tell me. Did they ask you if you were involved.*
- *TS – Yes sort of something like that.*
- *CP – So what did you say.*
- *TS - ……those are the stupid ones.*
- *CP – So where did they take you?*
- *TS – They took me me the police station and there they took my statement, but in my mind …. You mos told me we will be investigated.*
- *CP – Yes.*
- *TS - So I was ready for that, but I was not ready.*
- *CP – So why are you running away?*
- *TS – They keep coming to my house.*
- *CP – Did you take your phone anywhere?*
- *TS – Ja.*
- *CP – No, your other phone.*
- *TS – I destroyed it.*

- *CP - Did you?*
- *TS – I told them to destroy it and then I destroyed it.*
- *CP – Yeah and the sim-card and everything. Did you throw it away?*
- *TS – Yes. I'm not using the old number. I'm using this number.*
- *CP – OK. So they didn't ask anything about me?*
- *TS – No.*
- *CP – Or if I'm involved with anything?*
- *TS – No. Ja… but haven't they asked you?*
- *CP – Yes they have asked me, but now, but now you've been phoning me all day and they have been tracing my phone.*
- *TS – The thing is, who could I call? I had no-one to call.*
- *CP – I know, but now you have to destroy that phone. I have to tell them that you phoned me otherwise they are going to think that I am involved.*
- *TS – Ja.*
- *CP – So you need to destroy that phone now. The phone and the sim-card my boy, both.*
- *TS – Ja."*

I interpolate to say that at this juncture the video shows accused no. 1, seated on the front seat of the vehicle, turning around and frisking *Siyoni*.

- *"TS – "I don't trust you now.*
- *CP – I'm just checking.*
- *TS – Even me I'm not trusting you now, just the thing of the police that are coming to my house.*
- *CP – I swear on my life I didn't say anything, but they are obviously seeing who I have been phoning. They are taping my phone and my every number I phone, they are investigating my family too.*
- *TS – ……..*
- *CP – Somebody said something.*
- *TS – Ja, because it's like murder thing now it's not like a robbery or something.*
- *CP – But that's what I said to you. It became kidnapping and and a murder instead of just making it a robbery outside the house.*
- *TS - …… I think about my family now. I think about Siyanda. I think about the two little girls. I think about my gym.*
- *CP – They went to search you house says Siyanda.*
- *TS – Siyanda says so? You see.*
- *CP – But there's nothing there about it so stop stressing.*

- *TS - ……. You know why I'm actually stressing. I'm not safe anymore, because I have to run away even from Sizwe because I told you mos what Sizwe said. That money was too little because now they running away too.*
- *CP – Yes, but it is because of them Thando. They made it the way they did. They made it so big, but they have run away hey? How many of them?*
- *TS – I don't know. I only know Sizwe.*
- *CP – Is it black guys or coloured guys.*
- *TS – Sizwe is a black guy.*
- *CP – And the others?*
- *TS – I don't know if hmm…the others, but I know Sizwe. I was communicating with Sizwe.*
- *CP – Hmm.*
- *TS – But I don't know if Sizwe was walking alone.*
- *CP – OK. Listen to me. I am going to report that you phoned me now.*
- *TS – And then you going to call me?*
- *CP – No, but you are going to destroy the phone.*
- *TS – So you are going to give them my number.*
- *CP – Hmm, yes, I have to tell them. They investigating me. If I lie to them they going to take me in. So I'm telling you. In half an hour I am going to phone the investigating officer. He was at my house now now,*

that's why I can't talk to you all the time, and my uncle is all around me. So I'm going to tell them, hmm, that you came to see me wanting to borrow money because people took you for questioning for steroids. You need to go and hide in Jeffreys for a while and keep quiet.

- *TS –…….. Siyanda …… and what about the rent for the gym.*
- *CP – Yes, but I can't do anything because I'm under investigation so I can't just give over money all the time, so don't worry me and Siyanda will talk.*
- *TS – Yeah.*
- *CP – OK. Are you going to hide out that side in Jeffreys.*
- *TS – Yeah I'm going to stay a while there or maybe some ……*
- *CP – OK so I'm going to say, you must destroy your phone now and the sim-card, and I'm going to say you said you going to East London.*
- *TS – ….. OK…..*
- *CP – Yeah I am going to be OK as long as they never know about us Thando. I never ever, I only ever helped you with the gym, I never did anything with you. I'll sort out your family, you hide low OK.*
- *TS - …..*
- *CP – You need to be gone for a few months till this thing calms down.*
- *TS – If I need you I will missed call you.*
- *CP – No! Not on this number.*
- *TS – On what number.*

- *CP – You going to missed call me once and then you are going to wait until I get another phone and sim-card.*
- *TS – Ja.*
- *CP – OK. Allright. OK. There is about five there you sort yourself out.*
- *TS – Yes.*
- *CP – OK, because I am all out now. This thing has cost me a lot of money. The family is also looking at me.*
- *TS – Serious?*
- *CP – Yes. OK.*
- *TS – This thing is not right now.*
- *CP – No, these boys made it big. I told you to let them do it outside the house and take the bags and the rings and then they didn't take the watch or anything.*
- *TS – They just left.*
- *CP – They just left everything there. You see, so it looks like a hit now. So they are after me, and that's why I can't just meet you in front of people like this Thando.*
- *TS – OK.*
- *CP – OK. Don't phone me and don't sms, they are watching the sms's because you said.*
- *TS – Ja, but I sms you and you don't reply, me at the other side I'm hiding and then.*

- *CP – No, but you need to give me time. So from now you just give me one missed call on this number first time and never again. Don't ever phone me or sms me to this number because they are listening to us.*
- *TS – Even now?*
- *CP – Well yes, but I put it off. When you are talking on the phone they are listening that's why I have to report this now. OK. Allright. I am going to say you are going to East London.*
- *TS – OK. …..*
- *CP – OK. OK cheers.*
- *TS – So I need to missed call you.*
- *CP – Yes, but then you wait for me to phone you back. "*[19]

[57] It will be gleaned from the aforegoing and the video footage that after accused no. 1 frisked *Siyoni*, there is a discernable attitudinal change in the interaction between them. His initial circumspection all but vanishes and the intricacies of their murderous conspiracy are laid bare by accused no. 1's forewarning, - ***"Somebody said something. Ja because it's a murder thing now, it's not like a robbery or something . . . it became a kidnapping and a murder instead of just making it a robbery outside the house."*** The aforegoing unsolicited utterances and admissions by accused no. 1 vouchsafe the truthfulness of the narrative in both *Breakfast* and *Siyoni's* police statements and demystifies his concocted defence. Particularly telling

[19] Exhibit "CB1"

is accused no. 1's comment ***". . . I told you to let them do it outside the house and take the bags and the rings and they they didn't take the watch or anything."*** It is not in dispute that when *Jayde's* body was discovered in the veld, her watch was still on her left wrist (slide 45, exhibit "A1") and her bracelet on her right wrist (slide 54, exhibit "A1"). The presence of these items of jewellery no doubt perturbed accused no. 1 hence his earlier comment, ***"because . . . its not like a robbery or something."*** His language usage clearly imparts his displeasure at their modus operandi for, as he remarked, ***"its like murder thing now."*** An analysis of the conversation furthermore establishes that accused no. 1 had direct knowledge of *Vumazonke's* involvement in *Jayde's* murder. This is evident from *Siyoni's* comment – ***". . . because I told you mos what Sizwe said. That money was too little . . ."*** Whilst it is correct that they were not privy to the identity of *Vumazonke's* fellow villains, accused no. 1 was acutely aware that *Vumazonke* had not acted alone.

[58] The aforegoing startling admissions of accused no. 1's complicity in *Jayde's* murder held dire consequences for him and a strategy had accordingly to be devised. Into this breach stepped ***Mthembu***[20], the case referred to in accused no. 1's plea explanation. However, in order to successfully raise the defence adverted to in ***Mthembu***, a victim of torture had to be sourced and *Siyoni*, a nefarious individual who bore the mark of an ostensible assault, was earmarked as the ideal candidate to be moulded into the battered victim of torture in ***Mthembu***. It is no surprise therefore that when *Siyoni* was led, his description of the alleged assault on him was "***I was tortured***". Accused no. 1's entire case is predicated upon *Siyoni's* alleged torture and during the course of the trial and in argument I was regaled with sonorous accounts of the decimation of his fundamental rights. This vituperative assault on the

[20] S v Mthembu *2008 (2) SACR 407 (SCA)*

integrity of the police officials and the prosecutor was to be expected given the absence of any valid defence to the charge. As adumbrated hereinbefore, *Siyoni* is an unadulterated liar and the salutary remarks enunciated in ***Mthembu*** find no application in this matter.

[59] At an earlier stage of this judgment I referred to *Siyoni's volte face* concerning the origins of the R31 000. 00 which the police found in his gym bag and his demure admission that it constituted the balance of the R80 000. 00 which he had received from accused no. 1 destined to *Vumazonke* for the contract killing. In exhibit "AY1" *Siyoni* recounted a visit from accused no. 1 late the evening when the latter handed him a bag containing money. In exhibit 'V25" *Breakfast* likewise narrated the circumstances under which *Siyoni* came into the house and asked her to count the money. It is common cause that accused no. 1 went to *Siyoni's* home during the late evening of 22 April 2015. The exculpatory assertions made apropos this nocturnal visit are nonsensical – its purpose, first and foremost was to deliver the money demanded by *Vumazonke*.

[60] A substantial portion of the trial was devoted to establishing the origins of the money but once the debris is removed, it is clear that accused no. 1 retrieved it from his business premises at the time he disabled the alarm system. It is thus wholly unnecessary to embark upon an evaluation of the evidence of the host of witnesses who were called hereanent. *Siyoni's* sanitised version of its source and destination renders that exercise unnecessary. *Siyoni's* evidence hereanent was, given its earlier non-incriminatory character, a shot out of the blue. In his revised version of the circumstances under which he came into possession of the R31 000. 00, he recounted going to his place of employment with *Vumazonke* and whilst the latter

remained behind in the vehicle. He entered the premises and then narrated how accused no. 1 came into Infinity at some unspecified time, sent *Vuyokazi* to call him and then handed him the money with instructions to hand to *Vumazonke*. This shocking revelation was inimical to accused no. 1's claim to innocence but, as the adage goes – even liars tell the truth sometimes.

[61] *Siyoni's* disclosures, not unexpectedly, raised the ire of Mr *Price* who sought its expungement on the grounds of hearsay but I allowed the evidence to stand. During his cross-examination, Mr *Price* was thus constrained to exercise damage control which he sought to achieve by the following assertion – ***"I am not saying you are lying please. I am saying you are making a mistake when you say that Christopher gave you R80 000.00 at O.K. Grocer to give to Vumazonke."*** *Siyoni's* riposte was *"**I am not making a mistake**."*

[62] In evaluating the revised version of the source and destination of the R80 000, 00, it is apposite to refer to exhibit "AY1" where *Siyoni* recounted having received the money whilst in a car outside his home on the evening of *Jayde's* murder. In exhibit "V25", *Breakfast* confirmed that when *Siyoni* entered the house after meeting accused no. 1 outside, he had a bag of money and asked her to count it and leave R50 000, 00 in the bag and the balance to one side. *Siyoni's viva voce* evidence thus provides substantial corroboration for the content of both exhibits "V25" and "AY1" and proves beyond any reasonable doubt that accused no. 1 knew who the recipient of the money was. Further corroboration is to be found in the conversation between accused no. 1 and *Siyoni* on the evening of 29 April 2015 where he says: -

- *"TS - ……. You know why I'm actually stressing. I'm not safe anymore, because I have to run away even from Sizwe because I told you mos*

what Sizwe said. That money was too little because now they running away too.

- *CP – Yes, but it is because of them Thando. They made it the way they did. They made it so big, but they have run away hey? How many of them?"*[21]

[63] It is difficult to conceive of a situation where *Siyoni* could be mistaken about the source and the destination of the R80 000. 00. It was never put to him that he was being deliberately untruthful and yet, other witnesses had been castigated as liars for their testimony concerning money left at O.K. Grocer. The underlying reason for Mr *Price's* mild mannered disposition towards *Siyoni* is self-evident. He was complicit in accused no. 1's concocted defence and could accordingly not be rebuked for his *faux pas* concerning the R80 000. 00. As adumbrated hereinbefore this is the only aspect of *Siyoni's* evidence which I accept as truthful and it, coupled to the absence of any rebutting evidence by accused no. 1, perfects the mosaic of the state's case against him.

[64] There is no dispute concerning the precise location where the deceased's body was discovered. That she had been conveyed there in a vehicle from her home in Port Elizabeth however admits of no doubt. The evidence adduced by the state, and detailed hereafter conclusively establishes that prior to 21 April 2015 *Jayde* and her colleague, Ms *Swanepoel's* movements, places of abode and employment had been monitored and kept under surveillance as from 9 April 2015. As I shall in due course detail, the data retrieved from the Cartrack tracking device installed in a white

[21] Exhibit "CB1"

Toyota Etios (the Etios) bearing the registration letters and numbers FYM 661 EC provide irrefutable proof that it was the instrument whence the monitoring and surveillance referred to was conducted and wherein the kidnapping and ferrying of the deceased on 21 April 2015 was effected.

[65] The first inkling that the Etios had been used to transport the deceased arose quite fortuitously when Warrant Officer *Johannes Jacobus Botes (Botes)*, one of the members of the unit, interviewed the owners of the vehicle. Before I analyse and evaluate that evidence however it is apposite to dispel the notion that testimony incriminating the erstwhile accused no. 2, *Sizwe Vumazonke* with the offences preferred against the accused was inadmissible. Prior to the resumption of *Botes'* evidence in chief vis-à-vis the movement of the Etios on the morning of the deceased's disappearance, both Mr *Price* and Mr *Daubermann* objected to the reception of such testimony. The objection by Mr *Price* was formulated thus:-

> "MR PRICE M'Lord, since yesterday we have been taking instructions from the family and we have spoken to very senior counsel throughout the country because something has been worrying us from the word go and I need to address it with Your Lordship right now. M'Lord, we feel that we are being ambushed; I am not talking about ambushed in the sense that we are getting very poor statements. I am not referring to that at all. But from the word go, apart from Mr Ndedwa, M'Lord, we have just had witness after witness after witness testifying about Sizwe Vumazonke's role in this case. M'Lord, Sizwe Vumazonke is not before you and what makes it exceptionally difficult for us representing Mr Panayiotou here, Mr Daubermann can speak for himself, is we are feeling obliged to ask questions about a witness who is not before this court, about a witness from whom we

cannot take instructions. Now, Ms Bakker and his attorney, we have obviously consulted with them and they have very strong and at times in my opinion pretty good instructions to challenge various witnesses, for example the cell phone expert etcetera but we are not in that position, M'Lord. And what is happening there is that we are being forced to defend Vumazonke when he is not before this court and when we cannot defend him. Now, M'Lord, my instructions are to ask Your Lordship one of two things. One, that this evidence relating to Vumazonke and any further evidence relating to Vumazonke's role in this matter should be disallowed; he is not before this court, he is not an accused. If that [interrupted]."[22]

Aligning himself with the objection raised Mr *Daubermann* submitted that: -

"The difficulty, M'Lord, is that the State is going to seek to rely on evidence against an erstwhile co-accused who is not before the court, which I am basically not able to test properly during the trial. The State relies on the doctrine of common purpose and also alleges a conspiracy with that particular accused who is no longer before you, M'Lord, and who is not represented here. So, in essence, accused no. 3 and accused no. 4 basically just have to accept whatever evidence is placed before Your Lordship in relation to that accused. We simply are unable to test the evidence and we have to face that evidence blindly. So, in those circumstances, the question arises whether that evidence should be ruled admissible or not, M'Lord, and just for the sake of formality, I am going to object to that evidence being adduced, the evidence relating to accused no. 2, M'Lord. And I am going to ask Your Lordship to make a ruling now on that issue, whether that evidence should be

[22] Record at p 513

allowed. So, I note my objection, M'Lord, on that basis; as Your Lordship pleases."

[66] I overruled the objection and allowed the further adduction of *Botes'* testimony. The general rule is that all relevant testimony is admissible unless excluded by a specific rule in the law of evidence. This inclusionary aspect of the relevant criterion was explained by Innes C.J almost a century ago in ***R v Trapedo***[23] as follows –

"The general rule is that all facts relevant to the issue in legal proceedings may be proved. Much of the law of evidence is concerned with exceptions to the operation of this general principle, as for example the exclusion of testimony on grounds of hearsay and remoteness. But where its operation is not so excluded it must remain as the fundamental test of admissibility."

[67] One of the myriad of issues which fall for adjudication in this matter relates to the question how *Jayde*, destined to be driven by Ms *Swanepoel* from her home in Deacon Street in Port Elizabeth to Riebeek College in Uitenhage ended up in the veld on the outskirts of KwaNobuhle. The evidence which the state adduced initially by *Botes* was directed at establishing that she had been transported thence in the Etios which had been hired from Zems. *Botes* had established from Mrs *Zulfa McCarthy (McCarthy)*, Zems' owner, that *Vumazonke* had hired that vehicle. Such evidence was clearly admissible, and as I shall in due course elaborate upon, crucial. The objections raised, with much hullabaloo to obfuscate the real issue, had, as its object, the suppression of such testimony. I know of no exclusionary rule that

[23] 1920 A.D 58 @ p62.

where more than one accused person is charged and, prior to the commencement of the trial one dies, testimony implicating him/her in the commission of the offence(s) charged is thereby rendered inadmissible and to be excluded from the conspectus of evidential material.

[68] It is not in issue that the manhunt for *Vumazonke* was triggered by the revelations made by *Siyoni* whereafter a tracking team which included Sergeant *Thapelo Mabija* (*Mabija*), *Siyabulela Manakaza* (*Manakaza*), and *Botes* set off on a fruitless search of him to Cape Town. It is apparent from their testimony that *Vumazonke* had however been forewarned of the police's hot pursuit and had returned to Port Elizabeth. The tracking team followed certain leads and observed him at a party in KwaNobuhle. *Vumazonke* left and proceeded to a tavern surreptitiously followed by the tracking unit. *Mabija* recounted that he (*Vumazonke*) stopped, alighted and spoke to an unidentified person who ran away when the tracking unit's members approached his vehicle. *Vumazonke*, who at that stage was seated in the vehicle, opened the door in an attempt to flee and in the process of them trying to prevent his escape, he hit his head against the side floor panel. *Vumazonke* was arrested and transported to the Kabega Park police station. His possessions, including three cell phones found in the vehicle, were booked into the SAP13 to wit, a Blackberry 8520 model, IMEI No. 361257045459562, a battery, MTN sim card, no. 2869929960, a 26B micro SD card, a white Samsung cell phone, IMEI No. 353420063290590, one battery and a Cell C sim card no. 892707601141067634 and an Ipad with serial no FSWLFYOAF196. *Mabija* recalled that the vehicle which *Vumazonke* had been driving was a Silver Grey VW Polo sedan bearing the registration letters and numbers [….] The thrust of *Mabija's* cross-examination by Mr *Price* related to the injury sustained by *Vumazonke* and the alleged violation of his

rights. Its aim was to establish a pattern of conduct by the police to corroborate *Siyoni's* evidence that he had been assaulted. The remainder of his testimony went unchallenged.

[69] It is not in issue that the unidentified male who fled the scene immediately prior to *Mabija* and the tracking team descending upon *Vumazonke's* vehicle was his distant relative one, Mr *Ntsikelelo Leon Gqirana (Gqirana)*. During the course of that evening he had borrowed the vehicle from *Vumazonke* and had plugged his cell phone charger and cell phone in the cigarette lighter portal. When he eventually met with *Vumazonke* and left the SK2 tavern with *Vumazonke* and his girlfriend, *Vumazonke* had surreptitiously, and for reasons not germane to this judgement, handed his cell phone to him. When the vehicle stopped and shots rang out which caused him to flee the scene, he did so whilst still in possession of *Vumazonke's* cell phone. As I shall in due course advert to, this is the very phone which *Vumazonke* accused the police of having stolen after his arrival at the Kabega Park police station. *Gqirana's* evidence concerning the circumstances in which he came to be in possession of *Vumazonke's* cell phone was assailed by Mr *Daubermann* as untruthful but the criticism is unfounded and borne of desperation. *Gqirana's* testimony establishes that the number of the cell phone handed to him by *Vumazonke* was 0832 691 1994. Its relevance will in due course crystallise.

[70] *Mabija's* testimony concerning the futile manhunt for *Vumazonke* in Cape Town was corroborated by *Botes*, who had been assigned to the tracking team by Brigadier *McLaren*, the Provincial Head of the Detectives Services in the Eastern Cape. *Botes* narrated that he first saw *Vumazonke* at approximately 3 a.m. on 3 May 2014 and observed that his right eye was swollen. In his evidence in chief, he

adverted to his role in returning the VW Polo to its owners during the course of that afternoon. *Botes* had already established that the vehicle had been hired from Zems Car Hire on 21 April 2014. During that telephonic discussion he had arranged that he would deliver the vehicle to them and duly did. *McLaren*, though not physically present at the scene of *Vumazonke's* arrest, was in the area and it was to him that the tracking team proceeded on the arrest of *Vumazonke*.

[71] *Botes* narrated that during the discussion with *McCarthy*, the owner of Zems, he, perhaps presciently, asked her whether *Vumazonke* had not previously hired vehicles from her. A perusal of the records (exhibit "U") revealed that *Vumazonke* had hired a white Toyota Etios bearing the registration letters and numbers FYM 661 EC for an initial period of 2 days but subsequently extended until 23 April 2015. Upon being appraised that that vehicle had been fitted with a tracking device *Botes* asked her whether she would be able to retrieve the data relating to the vehicle's movements on 21 April 2015. *Botes'* account of the data displayed on the computer screen and which would later be corroborated in all material respects by *McCarthy* was as follows: -

> "Then I requested her to switch on her computers for me. I also informed her she is not compelled to show me that and then we switched on the tracker record of that vehicle, [….], we switched that on, the tracking record of the 21st, the day on which Mrs Panayiotou was murdered and that was just from after 06h00. Then we followed the record of the tracker from KwaNobuhle, that was to KwaZakhele, now we did it live, the short distances that he was driving and it showed us pieces and bit by bit but it did not show anywhere where he stopped for a long time. Then at the residence of the

deceased, it was red lines as he was driving around in that area. He did not drive away directly from the residence but it was in the vicinity, within the area of her residence.

Now, if I can just interrupt you, at that stage you were aware where the deceased was residing, is that correct so? --- Yes, M'Lord.

Goed en van daar af? --- Now, where they allegedly picked up the deceased, they drove around a road that went through the back; that is through Rocklands. Then Mrs Skonara said to me perhaps he is going to turn into the right in KwaNobuhle. Then I said to her no. Then we followed the route further up to the first gravel road where he turned into, to the left. And Mrs Skonara at that stage got very emotional. Then at the farm where the deceased was murdered, I said now he is going to turn into, right. Mrs Skonara started crying at that stage, saying that my car has been used to murder the deceased. Then I tried to calm her down and I said ma'am, just please come on, it is just plus minus 400 to 500 metres and then we will be done. Then we followed the red line and precisely where the deceased was murdered, there were two yellow spots; that was where the car made a turn.

You are also aware as to where the deceased was found? --- Yes, I was aware, M'Lord.

And is that the place where the vehicle came to a standstill? --- I cannot say precisely because that is from a GPS card that I followed, I cannot say with precision where it stopped but it was just according to the knowledge to my avail that I said that it was going to follow 400 to 500 metres before it turned around and according to me that is where the car turned back.

So, was that sufficient information at your avail to draw the inference that the car was used in committing the murder? --- Yes, M'Lord."

[72] That answer concluded *Botes'* evidence in chief and Mr *Price* was then called upon to cross-examine him. It failed to materialise on that day and the first salvo was fired of what was to become a constant lament throughout the trial viz., that ***"this is a trial by ambush"***. It is apposite at this juncture to state that this constant and repeated complaint is without any substance whatsoever and a deliberate ploy to obfuscate the issue.

[73] The cartrack data referred to above was introduced into the proceedings by Mr *Lorenz Stoger (Stoger)*, an employee of Cartrack. During his prefatory testimony in chief, he adverted to his experience in the tracking industry for the preceding twenty years and knowledge of tracking devices. He identified the installation certificate of the tracking device installed in the Etios (exhibit "AB") and described its operating system as follows -

> "The fleet management unit fitted to this vehicle uses what we call GPS technology to accurate pinpoint the position of the vehicle. The product type of the unit will be prompted to position from the time that the vehicle's ignition is turned on up until the time the vehicle's ignition is switched off. The phone ware on the unit will update at a series of events, which we call a trip; this information is calculated at every five degree direction turn of the vehicle every three kilometres in a straight line and lastly, in the event of an exception. An exception is generated through the accelerometer which is fitted to the unit. These exceptions allow us to manage driver behaviour; these measure G-forces. Typically, you would notice exceptions such as harsh braking, acceleration and turning. I would also at this time like to make it clear for the court how this technology is used to accurately pinpoint the position of a vehicle. GPS or global positioning system is a worldwide recognised technology. The technology was developed by the United States

> Military back in the seventies and the purpose therefor was to manage and monitor their assets around the globe. In the nineties, I think it was the late nineties; this technology was released to the public, which allows us, anybody today with a smartphone or a GPS device to track your position and navigate your way around. This positioning is achieved via a process of trilaterisation.
>
> MR INTERPRETER Repeat again.
>
> MR STANDER Trilaterisation. --- Yes. Basically, at any given point there are 30 satellites circumnavigating the globe and the GPS receiver will lock onto a minimum of three satellites to accurately position the vehicle or smartphone or TomTom or Garmin device or any device that is fitted with a GPS receiver."

Its reliability and integrity is, despite initial hubbub, not open to challenge and clearly admissible. It is not in issue that the raw data recovered from the fleet management unit is reflected on exhibit "AA", a detailed travel report of the movement of the Etios from 13h25:05 on 9 April 2015 to 25 April 2015.

[74] At the conclusion of *Stoger's* examination in chief both Messrs *Price* and *Daubermann* sought leave to consult their own experts as a precursor to cross-examining the witness. When he was recalled for that purpose, Mr *Daubermann* raised an objection to the evidence tendered by him in chief on the basis that, ". . . *he has not been qualified properly as an expert and that my learned friend was therefore not entitled to lead that evidence, which, the opinion evidence, which is irrelevant and not admissible in those circumstances."* I overruled the objection and counsel for the state sought leave to put further questions to him concerning the unit's accuracy. This request elicited a further objection, ostensibly on the supposition that *Stoger*

would now expand upon his expertise. Mr *Stander* however refrained from any further examination in chief.

[75] The objection raised to the admissibility of *Stoger's* testimony is entirely without merit. It is abundantly clear, both from his prefatory discourse and evidence adduced concerning the operating system of the unit that he is eminently qualified to express an opinion. As Mthiyane JA adverted to in ***S v Mlimo***[24]:

> "In my view a qualification is not a sine qua non for the evidence of a witness to qualify as an expert. All will depend on the facts of the particular case. The court may be satisfied that despite the lack of such a qualification the witness has sufficient qualification to express an expert opinion on the point in issue. It has been said:
>
> It is the function of the judge [including a magistrate] to decide whether the witness has sufficient qualifications to be able to give assistance. The court must be satisfied that the witness possesses sufficient skill, training or experience to assist it. His or her qualifications have to be measured against the evidence he or she has to give in order to determine whether they are sufficient to enable him or her to give relevant evidence. It is not always necessary that the witnesses's skill or knowledge be acquired in the course of his or her profession - it depends on the topic. Thus, in R v Silverlock it was said that a solicitor who had made a study of handwriting could give expert evidence on the subject even if he had not made any professional use of his accomplishments. (See DT Zeffertt, AP Paizes & A St Q Skeen The South African Law of A Evidence (2003) at 302; see also Lirieka Meintjies-Van der Walt, 'Science friction: The nature of expert evidence in general and scientific evidence in particular' (2000) 117 SALJ 771 at 773 - 4.)"

[24] 2008 (2) SACR 48 at para [13]

[76] In my view, the evidence adduced conclusively establishes that the vehicle used during *Jayde's* kidnapping and conveyance was the Etios. It had been hired from *McCarthy*, the owner of Zems on 9 April 2015 for an initial period of 2 days and thereafter extended until it was finally returned on 22 April 2015. It had been rented from her by *Vumazonke* and paid for by him for both the initial and subsequent periods. I interpolate to say that the suggestion made that a white Opel Corsa could have been the vehicle in which *Jayde* had been ferried from her home is clearly based upon an erroneous description of the vehicle by Ms *Smith* and speculative in the extreme.

[77] Warrant Officer *Phillip Rudolph Bekker* (*Bekker*), attached to the Provincial Crime Scene Investigating Unit, is an undoubted expert in his discipline with over 25 years' experience. The preponderance of his testimony went unchallenged, the cross-examination by Mr *Daubermann* being confined, in the main, to assertions that the data retrieved from Cartrack's computing systems could have been tampered with. This speculative hypothesis has no factual basis and can readily be discounted. The evidence adduced established its inviolability. Utilising the GPS coordinates which he himself had taken and the cartrack data, exhibit "AA", *Bekker* connected the various waypoints and compiled a trip map (exhibit "AG"). The picture which emerges from these maps prepared by *Bekker* establish a plethora of reconnaissance missions to *Jayde's* house, that of her colleague and her workplace. It is apparent from exhibit "AG" that the mapped journey which commenced at 05:24:46 on 21 April 2015 is the precise route which *Botes* and *McCarthy* viewed.

[78] It is evident from the exchange between accused no. 1 and *Siyoni* as reflected in exhibit "CB1", although both were aware that *Vumazonke* had recruited others to assist him in the reconnaissance of and the eventual murder of the deceased, the identities of his collaborators was not known. Their uncloaking was achieved through a painstaking analysis of cell phone billings, cellular extractions, sms messages and cellular phone plotting. Prior to the inception of the trial the state sought admissions from accused no.'s 3 and 4 that they used cell phones with numbers 060 406 6117, and 078 298 6192 respectively. That request was denied for reasons which will become obvious in due course. The quest to prove that accused no. 3 used the number 060 406 6117 commenced with the evidence of Captain *Stephanus de Bruin (de Bruin),* who, in an entirely unrelated matter, interviewed accused no. 3's father as to his whereabouts and telephonic connectivity. The information sought to be elicited, viz accused no. 3's cellular number, was objected to on the basis that it constituted hearsay. I ruled that the evidence sought to be adduced was admissible in terms of s 3(1)(c) of the ***Law of Evidence Amendment Act***[25] i.e. that its reception was in the interests of justice.

[79] The attempt to prove that the number furnished was indeed that of accused no. 3 was once more thwarted when objection was taken to the evidence of Mr *Sameer September (September)*, the manager of Student Records at the Nelson Mandela University. The objection to the divulgence of accused no. 3's personal details captured on the Universities' data base by *September* proceeded from the assumption that, in as much as the subpoena had been issued to *September's* understudy, Ms *Beverley Brickells (Brickells)*, accused no. 3's constitutional rights to

[25] Act No, 51 of 1997

privacy would be infringed should *September* produce the requested information. The objection raised was spurious, and, once more, a blatant attempt to suppress otherwise admissible evidence. *September* was called as a witness, appeared of his own accord and not pursuant to any subpoena. As adumbrated hereinbefore he was the person in charge of Student Records in the Universities administration and as such entitled to access such information. The privacy contended for was that because the subpoena had not been directed at him, he was not authorised to disclose the information sought. The argument advanced is simplistic and untenable.

[80] It is in any event clear from the terms of the subpoena that the information sought, *inter alia*, accused no. 3's contact details, including any documentation wherein he had furnished the number 060 406 6117 was sought to be elicited from the University, and *Brickells* was merely its proxy. The information had in any event, in compliance with the subpoena, been furnished to the investigating officer. The underlying import of s 205 is to vest the state with machinery to pursue its legitimate interest in investigating and preventing crime and where, as in *casu*, the information sought by the police is voluntarily produced, it is admissible in evidence.

[81] The task of identifying an individual with the cell number of interest, 078 986 6192 was assigned to *Bosch* by *Swanepoel*. By the simple expedient of dialling the number and informing the answerer that the number had been randomly chosen in a competition to win R500. 00 the recipient furnished his name as *Zolani Sibeko* and his address as 19 Manase Street, Zwide. *Bosch's* enquiries at the address the following morning led him to 12 Romulus Street in Greenbushes where *Bosch* introduced himself and enquired about accused no. 4's whereabouts. He sought permission to search the premises, and, armed with the requisite authority, he

searched the house and found a male person in a main en suite bedroom who identified himself as *Zolani Sibeko*. Having ascertained his name, *Bosch* informed him of his rights and asked him where his cell phone was. It could not be found. It appears from his testimony that one of the occupants, having eavesdropped on their conversation, had secreted the phone on her person. Its attempted concealment however failed when *Swanepoel*, having dialled the number, observed the lit up screen through accused no. 4's abettor's clothing and retrieved it from her.

[82] *Bosch's* evidence that the name furnished by the answerer viz, *Zolani Sibeko* (*Sibeko*) was challenged on the basis that it constituted hearsay evidence and should accordingly be ruled to be inadmissible. It is evident from *Bosch's* evidence that the spontaneous declaration by accused no. 4 of his personal particulars was triggered by the euphoria of his windfall and to contend that such evidence is inadmissible is simply untenable. The further submission, that it had not been proved that the secreted phone was that of accused no. 4 proceeds from an entirely skewed appraisal of the evidence. It is not in dispute that when the police enquired about accused no. 4's whereabouts, it yielded the answer from his mother that she did not allow him at her house. His discovery in the bedroom thereafter establishes her deceit and explains the conduct of the person who secreted the phone. It is not correct to submit, as Mr *Daubermann* did that *Bosch* did not search for a phone. It is apposite to refer to that evidence: -

> "I searched the premises and then found Mr Sibeko standing in the main bedroom en-suite, M'Lord. I identified myself to him and warned him of his rights. I then requested him to allow me to search him, as I was looking for a cellphone, M'Lord; I could not find a cellphone on his possession and he informed me that he had left his phone in the bedroom that he was sleeping

> in. When I got to the bedroom, M'Lord, there was an elderly lady busy making up the bed in the room, M'Lord. I did not find any cellphones in that room, M'Lord. I then requested Captain Swanepoel to phone the number so that we could see where this phone is. As Captain Swanepoel was phoning the number, M'Lord, the Xhosa lady attempted to leave the room. I asked her where she is going to, M'Lord; she then turned around, she had a gown on, M'Lord. She turned around and opened the gown like this, showing us that she has got nothing in her possession. As she opened the gown, M'Lord, you could see a cellphone's face lighting up in her gown pocket. That phone was then handed over to us, M'Lord, and we identified it as the phone that we were looking for that Mr Sibeko was using at the time."

A cursory examination of the aforegoing tittle of evidence establishes the want of the submission.

[83] As presaged in the further particulars furnished to accused no.'s 3 and 4, the state's case against them is based upon cellular phone billing and plotting and the car track data. Thus in order to establish that there was contact between the cellular numbers of accused no.'s 3 and 4 and *Vumazonke*, the state called Mr *Dharmesh Kanti* (*Kanti*), a manager in the Law Enforcement Agency Liaison Services of MTN. *Kanti* had deposed to an affidavit pursuant to the provisions of s 15(3) and (4) of the ***Electronic Communications and Transactions Act*** (***ECTA***)[26] and, when referred thereto in chief, confirmed its correctness and expanded thereon with reference to certain cell phone towers. His cross-examination by Mr *Daubermann* stood over to afford the latter to consult his own experts and when the matter resumed the next

[26] Act No, 25 of 2002

day he sought a declaration that s 15(4) of ***ECTA*** was unconstitutional by reason of what he termed were its reverse onus provisions. After hearing the parties I handed down a written judgment, dismissing the application by reason of its procedural deficiencies.

[84] The ruling precipitated a further challenge to the admissibility of the cell phone records on the basis that ***"there is no authority in s 205 which authorises a person who is prohibited from divulging merely because that person has been subpoenaed in terms of s 205 . . ."*** Finding succour in the judgment of the Constitutional Court in ***Nel v Le Roux N.O. and Others***[27] and the provisions of the ***Regulation of the Interception of Communications and Provision of Communications Related Information Act[28](RICA)***, he submitted that neither *Kanti* nor any other proxy of a cell phone service provider had authority to divulge the contemplated information. The submissions advanced misconstrue entirely the judgment in ***Nel***, the non-applicability of ***RICA*** to the issue raised and ignores the express provisions of ***ECTA*** which regulates the admissibility and evidential weight of data messages.

[85] Section 15 of ***ECTA*** provides as follows: -

> **"15 Admissibility and evidential weight of data messages**
>
> (1) In any legal proceedings, the rules of evidence must not be applied so as to deny the admissibility of a data message, in evidence-
>
> *(a)* on the mere grounds that it is constituted by a data message; or

[27] 1996 (1) SACR 572 (CC)
[28] Act No, 70 of 2002

(b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.

(2) Information in the form of a data message must be given due evidential weight.

(3) In assessing the evidential weight of a data message, regard must be had to-

(a) the reliability of the manner in which the data message was generated, stored or communicated;

(b) the reliability of the manner in which the integrity of the data message was maintained;

(c) the manner in which its originator was identified; and

(d) any other relevant factor.

(4) A data message made by a person in the ordinary course of business, or a copy or printout of or an extract from such data message certified to be correct by an officer in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self regulatory organisation or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract."

and it is against this backdrop that the evidence to which I have hitherto adverted is to be assessed. Although various propositions had been put to *Kanti*, *Johanna Petronella Heynecke (Heynecke)* and *Hilda Du Plessis* (*Du Plessis*), concerning the range of the towers and transmitters, the accuracy of the information gathered thereby and the maps generated utilising such information, their testimony stands uncontroverted.

[86] The aforegoing testimony ushered in Ms *Thereza Heather May Botha* (*Botha*), an investigative analyst who compiled a comprehensive report detailing her analysis of the communications between the key figures involved. Her report, exhibit "EB" contains copious references to cell phone towers depicted on a raft of maps. The precise location of MNT and Vodacom base stations and towers respectively was adverted to by *Kanti* and *Heynecke* with reference to further maps (exhibits "DQ" and "DR") and the import of their evidence was that there is no overlapping of base stations – connectivity is dependent upon proximity thereto. Under cross-examination by Mr *Price*, *Kanti's* riposte to the proposition purportedly emanating from an expert that ***"we are at present We are at present using a cellphone expert who has testified all over and she tells us that it does make a difference. If Tower A which is the nearest tower doesn't pick up a call and the next nearest is Tower B, is it your evidence that Tower A cannot pick it up for whatever reason, Tower B will pick it up?--- It will not pick up that Tower B because we don't; we have now stopped the overlapping of base stations.***

I am not sure what you are saying. --- Okay, back in 2007 we had 5274 base stations countrywide; today we have 159 000 base stations countrywide, so hence the coverage area, if a base station goes down, you are not going to pick up signal, it is not going to move or bounce over to the next nearest base station to give you a connection. You have to be closer to that base station, Base Station B, in order to connect to that base station. If you are in the strongest coverage area of Base Station A, you are not going to pick up coverage if that Base Station A is down.

How long has this been like this? --- We have now stopped it since 2011.

There is a reported court case in America which I am going to put before this court, it is a murder of a person where the American cellphone expert, and I can assure you, far more qualified than you are, made calls that one of the calls was picked up by a tower a hundred miles from where he was phoning. On your version, is that impossible? --- I cannot comment on the way the base stations are set up in America.

But in this country it wouldn't happen like that? --- It wouldn't happen like that."

[87] *Heynecke's* evidence hereanent mirrored that of *Kanti* and her cross-examination by Mr *Daubermann* was directed at establishing the possibility of overlap. Given the argument advanced it is perhaps apposite to reproduce the relevant extracts from the record, where, in response to the question ***"Do tower coverage areas not sometimes overlap?"*** she responded as follows: - ***"They do, M'Lord, indeed; that is why you are able to hand a call over from one footprint to another footprint.***

So, what would happen if you are in such an area and your cellphone can't connect to the closest tower, what happens; won't it connect to the other tower? --- Your call will be dropped, M'Lord.

No, but if you are not getting a signal from the one tower, even though it is within that tower's area but you are receiving a signal from another tower in an overlapping area, what will happen? --- No, M'Lord, if you are in transit and you move from one, out of the range of one base station, your signal will be handed over to the neighbouring station but it is not a question if you are trying to make a call and this base station cannot cater for your call that the

neighbour will be so kind to take the call for you; that does not happen. If you are in an area, a recipience area, or the circumference of a base station and you are not able to make a call due to any technical reason, congestion or whatever, you will not be able to make a call."

[88] The response was anathema to accused no.'s 3 and 4's case and her cross-examination stood down to enable Mr *Price* and Mr *Daubermann* to consult their own experts, no doubt to dispute her evidence. The end result of this exercise was the somewhat belated acknowledgement at a later stage of the proceedings, after her cross-examination stood over, that her further attendance was wholly unnecessary. It would appear that whatever experts were consulted, their opinions were in harmony with that expressed by *Kanti, Heynecke and du Plessis*. That this is so is exemplified by the conscious decision by Messrs *Price* and *Daubermann* not to cross-examine *Du Plessis* who had provided corroborative evidence.

[89] Notwithstanding the abandonment as aforesaid, at the inception of his address Mr *Daubermann* handed up from the bar a bound volume, entitled ***"Accused No. 3 and 4's Bundle"*** incorporating a bibliography of two papers by Professor R.P. Coutts and Shelby and a book by one Larry Daniel. In developing his argument that the evidence adduced by the state from *Kanti*, *Heynecke* and *du Plessis* carried no evidential weight whatsoever he quoted extensively therefrom notwithstanding the fact that none of the cited passages had been put to any of the witnesses. The

articles and book are not evidence before me and its introduction, through the backdoor cannot be countenanced. As Steyn CJ remarked in ***R v Harris***[29]: -

> "The contention raised in this Court is that, the whole of the article not being in evidence, it was an irregularity to rely on passages therein not approved or assented to by any witness, in arriving at a conclusion unfavourable to Prof. Hurst's views, and to do so without affording him an opportunity of dealing with them.
>
> In my opinion there is no answer to this contention. Its correctness has to be conceded. The present case appears to be indistinguishable in principle from R v Mofokeng and Another, 1928 AD 132. In that case the allegation was that the accused had strangled the deceased. The district surgeon, however, had found no signs of violence whatsoever on the body of the deceased and expressed the opinion that the death of the deceased could not have been caused in that way. A passage from Taylor on Medical Jurisprudence was put to him. The passage was to the effect that there is nothing to justify a witness in saying death has proceeded from strangulation if there is no appearance of lividity or other violence about the neck. He agreed with this. In his summing up to the jury the presiding Judge, after stating that counsel for the defence had represented Taylor to the district surgeon as an authority and that the latter had accepted him as such, mentioned another passage in the same book to the effect that it is possible that strangulation may leave no visible signs of violence. That passage had not been put to any witness. This Court held that what the presiding Judge had done was undoubtedly irregular. STRATFORD, J.A., remarked (at p. 136):
>
> 'The opinion of this writer on this subject or on any subject was not and could not be evidence in the case. It is only possible to read such opinions to

[29] 1965 (2) SA 340 (A) at p 344 D-H.

> a witness and to ask him whether he agrees or disagrees with it. If he does the opinion becomes the evidence of the witness. If he does not, there is no evidence before the jury supporting the opinion. This is trite law stated in the text-books on the subject.'"

[90] It is against this backdrop that the evidence adduced against accused no.'s 3 and 4 falls to be assessed. The cell phone records establish that prior to 7 April 2015, there was no communication whatsoever between *Vumazonke*, accused no.'s 3 and 4. As adverted to earlier, the video and audio footage demonstrates quite unequivocally that it was in the contemplation of accused no. 1 that *Vumazonke* would solicit support to execute his mandate. After hiring the Etios from Zems on 9 April 2015, there are no fewer than five (5) communications between *Vumazonke* and accused no. 4, eight (8) communications between him and *Khusta* and four (4) communications with accused no. 3. The inference can thus properly be made that this was the assemblage to execute the diabolical plan. Thereafter a pattern of reconnaissance and surveillance emerges, commencing with the trail from *Vumazonke's* residence in KwaNobuhle to Ms *Swanepoel's* residence in Ruth Street on 13 April 2015. The Etios leaves *Vumazonke's* residence at 05:11 en route to Ms *Swanepoel's* residence. *Vumazonke* communicates with accused no. 4 on no fewer than five (5) occasions between 05:28 and 05:53. The reason for the reconnaissance thence is apparent from exhibit "AY1" where *Siyoni* narrates having pointed out Ms *Swanepoel's* residence to *Vumazonke* as a possible locale where the deceased could be executed. It was, on the evidence adduced, one of several possibilities where she could be killed.

[91] 14 April 2015 – The undisputed evidence establishes that accused no. 4 phoned *Vumazonke* on no fewer than five (5) occasions and received two (2) calls from him. This collaborative effort, now with the inclusion of *Siyoni* appears clearly from *Siyoni's* cell phone records. The data extracted from the cell phone records and the car track data pertaining to 14 April 2015, demonstrates the collusive nature of the relationship between *Vumazonke*, accused no. 4 and *Siyoni*. The car track data reveals that the Etios stopped outside *Siyoni's* gym in Tonjeni Street, New Brighton at 09:52. At 10:01 it leaves New Brighton and at 10:09 turns into Deacon Street. At 10:56 it is positioned in North Street, where *Jayde* taught at Riebeek College. *Siyoni's* cell phone records establish that he was in the Etios. Between 10 and 11 that very morning, *Vumazonke* communicated with accused no. 4 and the purpose could only have been to keep him abreast of the reconnaissance.

[92] 15 April 2015 commences with no fewer than nine (9) communications between *Vumazonke* and accused no. 4, the first in the early hours of the morning i.e. 04:33, whilst *Vumazonke* was still at his residence in KwaNobuhle. After the Etios leaves at 04:54, *Vumazonke* communicates with accused no. 4 on five (5) occasions and once with accused no. 3. The billings establish that the three (3) calls between 04:33 and 05:01 was made by accused no. 4 to *Vumazonke*. What happens thereafter is illuminating. The car track data shows the Etios leaving *Vumazonke's* residence at 04:54. At 05:23 it stops and the ignition is switched off at Njoli Street, Port Elizabeth. The cell phone data establishes that at that time both *Vumazonke* and accused no. 4 received reception from the Elundi towers. At the time of the cell phone communication between accused no. 4 and *Vumazonke* at 06:22, the Etios is in Van der Stel Street, in close proximity to *Jayde's* home.

Immediately after his call, the car track data records the Etios' speed at 74 km/h followed by heavy braking and turning into Deacon Street. It then travels to Ms *Swanepoel's* residence in Glen Hurd and thence to Riebeek College. The absence of any cell phone communications between accused no. 4 and *Vumazonke* impel the inference, as the only reasonable one, that after 06:20 and until 08:47, they were co-occupants of the Etios.

[93] The aforementioned data establishes a similar pattern on 16 April 2015. The Etios departs from *Vumazonke's* residence at 04:11. It arrives at *Siyoni's* gym at 05:15, departs and returns a short while later before leaving New Brighton and travelling to the deceased's home. On its journey between 04:26 and 05:11 there are no less than twenty (20) communications between accused no. 4 and *Vumazonke*. At 06:20 both their phones received reception from the Linton Grange tower and a call is made *inter partes*. The inference may properly be drawn that accused no. 4 entered the Etios whilst in that reception area and was an occupant throughout the evening's events. Immediately thereafter, the Etios starts up, travels to Deacon Road and thence to Ruth Street where it arrives at 06:29 before returning to Deacon Street. The Etios then travels to Maqanda Street and, lo and behold, accused no. 4 receives a call whilst in the reception area of the Maqanda tower. The irresistible inference is that accused no. 4 travelled thence in the Etios.

[94] Although the car track data establishes that the Etios was not in the vicinity of the deceased's house on 17, 18 or 19 April 2015, its previous sojourns in the immediate environs is suggestive of the fact that the surveillance had yielded the required information as to the deceased's precise movements and the intelligence garnered set the stage for the *coup de grace* on 21 April 2015.

[95] The fact that the data does not establish that accused no. 4 was present on 21 April 2015, does not inure to his benefit nor does the absence of any direct evidence implicating him in those events avail him. In the preceding paragraphs I have adverted to the circumstantial evidence against him and it is apposite to restate the proper approach to its evaluation, articulated thus in ***S v Reddy and Others***[30]: -

> "In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oft-quoted dictum in R v Blom 1939 AD 188 at 202-3, where reference is made to two cardinal rules of logic which cannot be ignored. These are, firstly, that the inference sought to be drawn must be consistent with all the proved facts and, secondly, the proved facts should be such 'that they exclude every reasonable inference from them save the one sought to be drawn'. The matter is well put in the following remarks of Davis AJA in R v De Villiers 1944 AD 493 at 508-9:
>
> 'The Court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way; the Crown must satisfy the Court, not that each separate fact is inconsistent with the innocence of the accused, but that the

[30] 1996 (2) SACR 1 (AD) at p 8 (c) to p 9 (e)

evidence as a whole is beyond reasonable doubt inconsistent with such innocence.'

Best on Evidence 10th ed 297 at 261 puts the matter thus:

'The elements, or links, which compose a chain of presumptive proof, are certain moral and physical coincidences, which individually indicate the principal fact; and the probative force of the whole depends on the number, weight, independence, and consistency of those elementary circumstances.

A number of circumstances, each individually very slight, may so tally with and confirm each other as to leave no room for doubt of the fact which they tend to establish. . . . Not to speak of greater numbers, even two articles of circumstantial evidence, though each taken by itself weigh but as a feather, join them together, you will find them pressing on a delinquent with the weight of a mill-stone. . . . Thus, on an indictment for uttering a bank-note, knowing it to be counterfeit, proof that the accused uttered a counterfeit note amounts to nothing or next to nothing; any person might innocently have a counterfeit note in his possession, and offer it in payment. But suppose further proof to be adduced that, shortly before the transaction in question, he had in another place, and to another person, offered in payment another counterfeit note of the same manufacture, the presumption of guilty knowledge becomes strong. . . .'

Lord Coleridge, in R v Dickman (Newcastle Summer Assizes, 1910 - referred to in Wills on Circumstantial Evidence 7th ed at 46 and 452-60), made the following observations concerning the proper approach to circumstantial evidence:

'It is perfectly true that this is a case of circumstantial evidence and circumstantial evidence alone. Now circumstantial evidence varies infinitely in

its strength in proportion to the character, the variety, the cogency, the independence, one of another, of the circumstances. I think one might describe it as a network of facts cast around the accused man. That network may be a mere gossamer thread, as light and as unsubstantial as the air itself. It may vanish at a touch. It may be that, strong as it is in part, it leaves great gaps and rents through which the accused is entitled to pass in safety. It may be so close, so stringent, so coherent in its texture, that no efforts on the part of the accused can break through. It may come to nothing - on the other hand it may be absolutely convincing. . . . The law does not demand that you should act upon certainties alone. . . . In our lives, in our acts, in our thoughts we do not deal with certainties; we ought to act upon just and reasonable convictions founded upon just and reasonable grounds. . . . The law asks for no more and the law demands no less.'"

[96] Accused no. 4 chose not to testify and his failure to do so must redound to his detriment. As adumbrated hereinbefore, the evidence adduced establishes beyond any reasonable doubt that in order to execute his mandate *Vumazonke* was perforce obliged to recruit others. Thus count 1 alleged a conspiracy to commit murder in contravention of s 18(2)(a) of the ***Riotous Assemblies Act***[31]. It is therefore instructive to emphasize its essential terms, succinctly articulated by Boshoff J in ***S v Cooper and Others***[32]as follows: -

[31] Act No, 17 of 1956
[32] 1976 (2) SACR 875 (T) at p879B-H

"A conspiracy normally involves an agreement, express or implied, to commit an unlawful act. It has three stages, namely, (1) making or formation, (2) performance or implementation and (3) discharge or termination. When the conspiratorial agreement has been made, the offence of conspiracy is complete, it has been committed and the conspirators can be prosecuted even though no performance has taken place. But the fact that the offence of conspiracy is complete at that stage does not mean that the conspiratorial agreement is finished with. It is not dead. If it is being performed, it is very much alive. So long as performance continues, it is operating, it is being carried out by the conspirators, and it is governing or at any rate influencing their conduct. The conspiratorial agreement continues in operation and therefore in existence until it is discharged (terminated) by completion of performance or by abandonment or frustration or whatever it may be; per Lord PEARSON in Director of Public Prosecutions v. Doot and Others, (1973) 1 All E.R. 940 (H.L.) at p. 951. While the conspiratorial agreement is in existence it may be joined by others and some may leave it. The person who joins it is equally guilty; R. v. Murphy, (1837) 8 C. & P. 297 at p. 311 (173 E.R. 502 at p. 508). Although the common design is the root of a conspiracy, it is not necessary to prove that the conspirators came together and actually agreed in terms to have the common design and to pursue it by common means and so carry it into execution. The agreement may be shown like any other fact by circumstantial evidence. The detached acts of the different persons accused, including their written correspondence, entries made by them, and other documents in their possession, relative to the main design, will sometimes of necessity be admitted as steps to establish the conspiracy itself. It is generally a matter of inference deduced from certain acts of the parties concerned, done in pursuance of a criminal purpose in common between them. R. v. Briscoe and Scott, (1803) 4 East 164 at p. 171 (102 E.R.

> 792 at p. 795). If the conspirators pursued, by their acts, the same object, often by the same means, some performing one part of the act and others another part of the same act, so as to complete it with a view to the attainment of the object which they were pursuing, the conclusion may be justified that they have been engaged in a conspiracy to effect that object. The question to be answered is, had they a common design and did they pursue it by a common means? R. v. H Murphy, (1837) 8 C. & P. 297 at p. 310 (173 E.R. 502 at p. 508); R. v Blake, (1844)6 Q.B. 126 (66 R.R. 311) (115 E.R. 49); Mulcahy v. R., (1868) L.R. 3 H.L. 306 at p. 317; R. v. Whitaker, (1914) 3 K.B. 1283 (10 Cr. App. R. 245); R. v. Meyrick, R. v. Ribuffi, (1929) 21 Cr. App. R. 95 at pp. 99 and 101. It is to be noted, however, that, when the object of the conspiracy has been agreed upon, it is not necessary that any particular means or devices for attaining the object be agreed upon; R. v. Gill and Henry, (1818) 2 B. & Ald. 204 (106 E.R. 341); R. v. Kenrick, (1843) 5 Q.B. 49 (114 E.R. 1166); R. v."

[97] The data to which I have adverted establishes a course of conduct directed to the achievement and pursuance of one criminal design. The sheer audaciousness of their mandate required a collaborative effort and their presence in and about the deceased's home and places frequented by her attest to the common purpose shared by them, viz to kill the deceased. Accused no. 4's continued presence with *Vumazonke* over the three (3) days ineluctably compels the conclusion as the only reasonable one, that he was privy to the conspiracy, had reconciled himself therewith and shared in the common design. The fact that there is a dearth of evidence proving that he was at *Jayde's* place of execution is entirely irrelevant – the

offence of conspiracy continues and is in existence until the common design is discharged.

[98] Mr *Stander* however submitted that given the common design of the collaborators, the proper verdict should be one of murder. The case[33] cited by him in support of his submission however provides no authority for the proposition advanced. The facts are wholly distinguishable. The fact that it cannot be proved that accused no. 4 was present during the shooting is however entirely irrelevant. Count 1 encompasses a charge of conspiracy to murder and, as I have alluded to, the facts objectively establish the conspiratorial agreement to found a conviction on count 1.

[99] The car track data establishes that the Etios left *Vumazonke's* home at 05:24 on 21 April 2015 and travelled to New Brighton in close proximity to accused no. 3's residence. This was no mere coincidence. At 05:24 *Siyoni* and *Vumazonke* were in telephonic contact. During the course of the previous evening there was communication between *Vumazonke* and accused no. 3 and thereafter *Khusta*. After leaving New Brighton, the Etios travels towards the deceased's residence and circles the complex three (3) times. Between 06:13 and 06:17 *Vumazonke* communicates with *Khusta* on five (5) occasions and at 06:26 and 06:27 there are two (2) further communications between accused no. 3 and *Vumazonke*, the latter calling the former. At the exact time of the call, when both receive reception from the Linton Grange tower, the Etios is in Oscar Street. It then travels to Deacon Street where, on the probabilities, the deceased was bundled into the vehicle before it sped off.

[100] The only reasonable inference to be drawn from the data is that *Vumazonke* alighted from the vehicle whilst accused no. 3 drove off, no doubt not to arouse suspicion. The turning and braking of the vehicle shortly thereafter and the increase

[33] S v Nduli and Others *1993 (2) SACR 501 (A)*

in speed to Deacon Street attests to *Vumazonke* observing the deceased hence the call to accused no. 3 to return to the complex. Accused no. 3's presence in the vehicle is furthermore established by the reception received from the Rocklands Hatchery tower vis-à-vis the call at 07:04. The aforegoing negates any suggestion that accused no. 3 was not on the scene when the deceased was shot. The evidence furthermore establishes that he was at KwaNobuhle when money was withdrawn from *Jayde's* account and that he returned to Port Elizabeth in the Etios, leaving *Vumazonke* behind in KwaNobuhle.

[101] Vumazonke's detailed billing establishes that he remained behind in KwaNobuhle and this finds corroboration from his aunt, *Zoleka Zekani (Zekani)*, who narrated the circumstances surrounding his arrival at her home on the morning of 21 April 2015. The cell phone billings furthermore establish that between 11:04 and 11:24, accused no. 3's phone received reception from the Kwazakhele Dect tower whilst the car track data establishes that the Etios travelled from KwaNobuhle to New Brighton where it stopped at Boqo Street and the ignition switched off. The data further records that at 11:24 the Etios was switched off in Parliament Street, in close proximity to the Spilkin Building tower whence accused no. 3 received a call at 11:33 a.m. The data thus conclusively establishes not only his association but occupation of the Etios at all relevant times after leaving the scene of *Jayde's* murder. The aforegoing analysis of the data, extrapolated from the tracking unit and the cell phone billings prove accused no. 3's complicity in *Jayde's* murder beyond any reasonable doubt. *Zekani's* evidence that accused no. 4 resided at 35 Mxenge Street, KwaNobuhle was sought to be excluded on the basis that I had ruled her entire body of evidence to be inadmissible. This misconception requires correction. What was ruled inadmissible was that portion of *Zekani's* testimony relating to the

actual words conveyed to her by *Vumazonke* which the state had sought to have admitted in terms of s 3 of the Act. Her remaining evidence including that relating to accused no. 2's residential address was not disputed and stands.

[102] The methodology employed to arrive at the verdict has obviated the need to consider and evaluate the testimony of the majority of the witnesses called by the state. It is however incumbent upon me to record that whilst the effluxion of time may, in certain instances have jaded their memories, I have no reason to doubt either their honesty and accept that they gave a truthful account of matters within their province.

[103] Before I conclude this judgment it behoves me to commend the investigating team for their meticulous efforts in unmasking *Jayde's* murderers. The criticism directed at them and the prosecutor is unfounded.

[104] Mr *Stander* has properly not sought a conviction on all the counts preferred against the accused and. In summation, I am satisfied that the evidence adduced proves the guilt of the accused on the charge(s) specified hereunder beyond any reasonable doubt.

Accused no. 1 is found guilty of murder on count 4 and not guilty on the remaining counts.

Accused no. 3 is found guilty of robbery with aggravating circumstances on count 2, guilty of murder on count 4 and not guilty on the remaining counts.

Accused no. 4 is found guilty of conspiracy to murder on count 1 and not guilty on the remaining counts.

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D.CHETTY

JUDGE OF THE HIGH COURT

Obo the State:	*Adv M. Stander*
	National Director of Public Prosecution
	North End, Port Elizabeth
Obo Accused No. 1:	*Adv T.N. Price SC*
Obo Accused No.'s 3 and 4:	*Mr P. Daubermann*