

**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION)**

**Case no: 15/2014**

**THE STATE**

**versus**

**SHRIEN PRAKASH DEWANI**

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**THE STATE'S PRINCIPAL SUBMISSIONS IN OPPOSING THE  
SECTION 174 APPLICATION**

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**A. INTRODUCTION**

1. The accused is charged with the five offences (counts) listed in the Indictment, namely:
  - 1.1 Count 1 - Contravening Section 18(2)(A) of the Riotous Assembly Act, No. 17 of 1956 - conspiracy to commit kidnapping, robbery with aggravating circumstances and murder;
  - 1.2 Count 2 - kidnapping;
  - 1.3 Count 3 - robbery with aggravating circumstances;
  - 1.4 Count 4 - murder; and
  - 1.5 Count 5 - obstructing the administration of justice.

2. The State presented the evidence of 16 witnesses and closed its case.
3. The accused now applies for his discharge in terms of section 174 of the Criminal Procedure Act<sup>1</sup>.
4. The State opposes the application.

## **B. THE LEGAL FRAMEWORK**

5. The provisions of section 174 of the Criminal Procedure Act reads:

'If at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.'

6. The words 'no evidence' have been interpreted to mean no evidence upon which a reasonable man (court), acting carefully, may convict.

**SEE: S v Mpetha 1983 (4) SA 262 (C);**

**S v Swartz and Another 2001 (1) SACR 334 (W).**

7. It should be emphasized that the test is not **should** a reasonable man convict but **may** convict.

**SEE:** Du Toit *et al* – Commentary on the Criminal Procedure Act at 22-37F

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<sup>1</sup> Act 51 of 1977 as amended

8. In arriving at a decision whether an accused person could or may be discharged at the close of the state case it is accepted that the credibility of the state witnesses should be taken into account at this stage.

**SEE: S v Mpetha and Others** (supra)

9. In *S v Mpetha* (supra) Williamson J held at at 265E-G that credibility would play only a very limited role and the evidence ignored only if it was of such a poor quality that no reasonable person could possibly accept it:

“However, it must be remembered that it is only **a very limited role that can be played by credibility at this stage** of the proceedings. If a witness gives evidence which is relevant to the charges being considered by the Court then that evidence can only be ignored if it is of **such poor quality** that no reasonable person could possibly accept it. This would really only be in the **most exceptional case where the credibility of a witness is so utterly destroyed that no part of his material evidence can possibly be believed**. Before credibility can play a role at all it is **a very high degree of untrustworthiness** that **has to be shown**. It must not be overlooked that the triers of fact are entitled **“while rejecting one portion of the sworn testimony of a witness, to accept another portion”**. See *R v Kumalo* 1916 AD 480 at 484. Any lesser test than the very high one which, in my judgment, is demanded would run counter to both principle and the requirements of s 174.”

(Emphasis added)

10. Similarly in **S v Swartz and Another 2001 (1) SACR 334 (W)**, at 335 it was stated:

“Credibility, in an application for discharge under s 174, is one of the features to which a court can have regard but, as Williamson J points out, it plays 'only a very limited role'. It is one of the factors to which the court can have regard in the assessment of the quality of the evidence. The contextual scene, the evidence given in the case that conflicts with other evidence which renders such evidence irreconcilable and unacceptable, all go towards determining the quality of the evidence.”

11. It is accepted that whether or not to refuse or grant a discharge at this stage of the trial entails the exercise of a discretion by the trial court.
12. In deciding this question we acknowledge that the Honourable Court should also have regard to the following dictum of the Full Bench of the Supreme Court of Appeal in the matter of **S v Lubaxa 2001 (2) SASV 703 (SCA)** at 707d – 708b:

[18] I have no doubt that an accused person (whether or not he is represented) is entitled to be discharged at the close of the case for the prosecution if there is no possibility of a conviction other than if he enters the witness box and incriminates himself. The failure to discharge an accused in those circumstances, if necessary *mero motu*, is in my view a breach of the rights that are guaranteed by the Constitution and will ordinarily vitiate a conviction based exclusively upon his self-incriminatory evidence.

[19] The right to be discharged at that stage of the trial does not necessarily arise, in my view, from considerations relating to the burden of proof (or its concomitant, the

presumption of innocence) or the right of silence or the right not to testify, but arguably from a consideration that is of more general application. Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common law principle that there should be 'reasonable and probable' cause to believe that the accused is guilty of an offence before a prosecution is initiated (*Beckenstrater v Rottcher and Theunissen* 1955 I (1) SA 129 (A) at 135C - E), and the constitutional protection afforded to dignity and personal freedom (s 10 and s 12) seems to reinforce it. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold. That will pre-eminently be so where the prosecution has exhausted the evidence and a conviction is no longer possible except by self-incrimination. A fair trial, in my view, would at that stage be stopped, for it threatens thereafter to infringe other constitutional rights protected by s 10 and s 12.'

13. In **S v Agliotti 2011 (2) SACR 437 (GSJ)**, Justice Kgomo held at paragraph 457, that it is 'unwise to attempt to banish issues of credibility in the assessment of issues in terms of section 174 or to confine judicial discretion to musts or musts not.'
14. With regard to the question, at what stage does the Court consider the probabilities we refer to the matter of **S v Masondo: in re S v Mtembu and Others** 2011(2) SACR 286 (GSJ), where Justice Kgomo adopted the approach set out below:

[45] The evidence further, is such that it will have to be evaluated holistically, taking all probabilities and surrounding circumstances into account.

[46] Such a stage where probabilities come into reckoning in my view and finding has not yet been reached. That stage belongs at the end of the trial. The accused has every right to close his case on these counts if he believes the evidence thereon is of such a poor quality that a reasonable court, acting carefully, cannot convict thereon.

15. [47] Under those circumstances this Court would then evaluate the totality of the evidence led, that is, the entire State case and the entire defence case and then apply the probabilities and preponderances inherent therein or emanating therefrom.'

### **Evaluating the weight to be attached to discrepancies**

16. We respectfully submit that this Honourable Court will be guided by the following authorities regarding the approach Courts should have in evaluating the weight to be attached to discrepancies.
17. In the judgment of Horn AJ in *S v Bruiners en 'n Ander 1998 (2) SACR 432 (SE) on 437F*, the learned Judge states that:

"Ek is van mening dat ten einde 'n Staatsgetuie te diskrediteer sover dit sy getuieverklaring betref, dit steeds 'n vereiste is dat daar 'n wesenlike afwyking deur die getuie van sy getuieverklaring moet wees alvorens 'n negatiewe afleiding gemaak kan word. Nie-wesenlike afwykings in 'n getuieverklaring sal nie noodwendig afbreuk doen aan die gehalte van 'n Staatsgetuie se getuienis as 'n geheel nie. Die doel van 'n polisieverklaring

is om besonderhede van 'n misdaad te bekom sodat daar besluit kan word of die beskuldigde vervolgt moet word. Die getuieverklaring is nie om die getuie se getuienis in die hof vooruit te loop nie. Dit is vergesog om van 'n getuie te verwag om in sy getuieverklaring reeds presies dieselfde weergawe te verskaf as wat hy in die ope hof gaan getuig. Sien in dié opsig die uitspraak van Cloete R in Shabalala v Attorney - General, Transvaal and Another; Gumede and Others v Attorney - General, Transvaal 1995 (1) SA 608 (T) (1995 (1) SASV 88) op 625F-626A (SA) en 106b-g (SACR). Getuieverklarings bly nuttige ammunisie vir kruisondervraging, maar dan moet dit in konteks oorweeg word en sal die aard en omvang van die afwykings in geheel in ag geneem moet word alvorens dit gesê kan word dat 'n getuie se getuienis as gevolg van sulke afwykings verwerp moet word." (My underlinings)

18. The attention of this Honourable Court is also drawn on the article of Nicholas JA, Credibility of witnesses, Olive Schreiner Memorial Lecture (24/8/1984); 102 (1985) SALJ p 32:

"The argument is often advanced in the court that, because witnesses' accounts disagree, they lack veracity, and considerable time is spent in establishing, and basing argument on, contradictions and discrepancies. Such argument is fallacious....

It follows that an argument based only on a list of contradictions between witnesses leads nowhere so far as veracity is concerned. The argument must go further, and show that one of the witnesses is lying. It may be that the court is unable to say where the truth lies as between contradictory statements, and that may affect the question whether the onus of proof has been discharged: but that has nothing to do with the veracity of the witnesses." (on p 35 - 36 and my underlinings) And further on p 41: "In the light of experimental evidence, it is not surprising that eyewitness accounts are often not an accurate representation of reality, and that there are often profound differences in eyewitness accounts of the same event, even when it is observed by the witnesses under the same external conditions. This shows the futility of the exercise, frequently performed by cross-examiners, of raking at tedious length over the evidence of different eyewitnesses in order to uncover contradictions, variances, omissions, discrepancies, differences and inconsistencies. For the most part it shows no more than what is to be expected, namely, that eyewitnesses differ from one another in their accounts and are liable to error."

19. In **Mafaladiso en andere v S [2002] 4 All SA 74 (HHA) at 82h-i** the Court held that:

"Die juridiese benaderingswyse tot weersprekings tussen twee getuies en weersprekings tussen die weergawes van een en dieselfde getuie (soos oa tussen sy of haar *viva voce* getuienis en vorige verklaring) is, in beginsel (indien nie in graad nie) identies. Die doel is immers in geen geval om te bewys welke van die weergawes die korrekte een is nie, maar om oortuiging te bring dat die getuie kan fouteer, hetsy weens defektiewe rekolleksie of weens oneerlikheid."

(See also **S v Oosthuizen 1982 (3) SA 571 (T)** at 576c)

20. In **S v Booyen and Andere 2003 JDR 0546 (C)** Judge N Erasmus referring to Mafaladiso and Bruiners op cit held that:

"Die derde faktor wat in ag geneem moet word is dat die weersprekende weergawes steeds oorweeg en geëvalueer moet word op 'n holistiese basis: die omstandighede waaronder die weergawes gemaak is, die bewese redes vir die weersprekings, die werklike effek van die weersprekings, die effek van die weersprekings op die getuie se geloofwaardigheid of betroubaarheid, die getuie se verduideliking van weersprekings en die samehang van die weersprekings met die res van die getuie se getuienis moet in ag geneem en oorweeg word (*Mafaladiso en andere v S, supra*, op 83g; *S v Mkohle, supra*, op 98f-g; *S v Jochems 1991 (1) SASV 208 (A)* op 211f-j, en *S v Bruiners en 'n Ander, supra*, 437i-438a)

Daar is na ons oordeel, twee verdere faktore wat beklemtoon moet word. Eerstens, in *S v Mlumbi en 'n Ander 1991 (1) SASV 235 (A)* op 248a-b word daarop gewys dat polisieverklarings dikwels onvolledig is, soms selfs ten aansien van belangrike feite, en dat die omstandighede waaronder en die persoon aan wie 'n verklaring gemaak is, dikwels verantwoordelik is vir die onvolledigheid van die verklarings. In *S v Bruiners en 'n Ander, supra*, op 437h word beklemtoon dat die doel van 'n polisieverklaring is om besonderhede van 'n misdad te bekom sodat daar besluit kan word of die beskuldige vervolgd moet word. Dit is nie die doel van die getuieverklaring om - "... die getuie se getuienis in die hof vooruit te



loop nie, en dit is vergesog om van 'n getuie te verwag om in sy getuieverklaring reeds presies dieselfde weergawe te verskaf as wat hy in die ope hof gaan getuig."

21. The matter of **Olawale versus the State [2010]1 ALL SA 451 SCA** is also support for the following propositions regarding how the Court should approach discrepancies:

- in evaluating the evidence against the accused one must look at the reliability and credibility of the witnesses, consider if any anyone of them had a motive to falsely implicate the accused and further look at the probabilities of the State's version;
- in criminal cases discrepancies are bound to occur due to normal errors of observation, errors of memory due to lapse of time or due to mental disposition such as shock at the time of the occurrence;
- irrelevant details which do not erode the credibility of the witness cannot be labelled as contradictions or omissions ;
- human observation itself has its own imperfections. It is therefore not free from possibility of mistake; and
- contradictions and discrepancies are natural and inevitable in the testimony of even truthful witnesses.

### **The Court's approach to accomplice and section 204 witnesses**

22. It is common cause that the State's primary witnesses in respect of the conspiracy are accomplice witnesses.
23. A Court is entitled to convict an accused person on the single evidence of an accomplice where the offence has, by competent

evidence other than the single and unconfirmed evidence of the accomplice, been proved to be actually committed. However, caution in dealing with the evidence of an accomplice is still imperative.

**See: S v Avon Bottle Store (PTY) LTD 1963 (2) SA 389 (A)**

24. In **S v Van Vreden 1969 2 SA 524 (N) at 531**, Leon, J compiled a useful summary of the principles appertaining to the "cautionary rule" in the following terms:

- It is imperative that the cautionary rule is applied in dealing with evidence of an accomplice even where the requirements of s 257 have been satisfied. An accomplice is a self-interested person with a possible motive to tell lies about an innocent accused, eg, to shield some other person or to obtain immunity for him.
- Corroboration not implicating the accused but merely in regard to the details of the crime is guarantee of the truthfulness of the accomplice. The very fact of him being an accomplice enables him to furnish the court with details of the crime which are apt to give the court, if unwary, the impression that he is in all respects a satisfactory witness.
- To satisfy the cautionary rule, if corroboration is sought it must be corroboration directly implicating the accused in the commission of the offence.
- Such corroboration maybe found in the evidence of another accomplice provided the latter is a reliable witness.

- Where another accomplice offers the corroboration of an accomplice, the latter remains an accomplice and the court is not relieved of the duty to examine his evidence also with caution. He, like the other accomplice, has a possible motive to tell lies. He like the other accomplice, because he is an accomplice is in a position to furnish the court with details of the crime which are apt to give the court, if unwary, the impression that he is a satisfactory witness in all respects.
- If there is no such corroboration there must be some other assurance that the evidence of the accomplice is reliable.
- That assurance may be found, *inter alia*, where the accused is a lying witness or does not give evidence.
- In the absence of any of the aforementioned features it is competent for a court to convict on the evidence of an accomplice only where the court understands the peculiar danger inherent in the accomplice's evidence and appreciates that acceptance of the accomplice and rejection of the accused is only permissible where the merits of the accomplice and the demerits of the accused as witnesses are beyond question.
- When it is said that the merits of an accomplice as a witness must be "beyond question" in order to be accepted as sufficient for a conviction, this does not mean that his evidence must be free from any defects. In *S v Hlapezula* 1965 4 SA 439 (A) 440, Holmes, JA stated: "Where corroborative evidence implicating the accused in the commission of a crime is given by another accomplice, the latter's evidence if regarded as reliable, may, depending on

the circumstances, satisfactorily reduce the risk of a wrong conviction. This was the view of Botha, JA giving the judgment of this court in *S v Avon Bottle Store (Pty) Ltd* 1963 2 SA 389 (A) 393. The trial court will of course bear the cautionary rule in mind also in relation to the corroborating accomplice and will enquire as to the presence of some safeguard reducing the risk of a wrong conviction.

25. In the **State versus Nzama and another 2008 3 ALL SA 191 (N) at para 26** the court held that:

"It is trite law that in the decision-making process as to whether or not to accept the evidence of an accomplice who testifies under the auspices of **section 204**, it is not expected of the accomplice that his testimony is wholly truthful in all he says. His testimony would suffice if it is to a large extent truthful and sufficient corroboration thereof exists. Added to this, I am also alive to the extreme caution which has to be exercised in the examination of the veracity of an accomplice's evidence given the accomplice's peculiar position and knowledge. I refer in this regard to the dicta in *Rex v Kistensamy* 1945 AD 549; *S v Hlapezula and others* 1965 (4) SA 439 AD [also reported at **[1965] 2 All SA 9** (A) - Ed] and *S v Francis* 1991 (1) SACR 198 (A) [also reported at **[1991] 2 All SA 9** (C) - Ed]. I have also had regard to the case of *S v Nieuwoudt en andere* 1996 (4) All SA 242 (SE) at 243C."

26. The fact that a witness has shown to be have lied in some aspects of his testimony does not automatically lead to the rejection of the other aspects of his evidence. Nor does proof that a witness has contradicted himself or was contradicted by other witnesses lead to a complete rejection of the witness' entire testimony.

27. In **S v Walters [2001] 4 All SA 98 (Tk)**, the Court in fact held that

“After a careful consideration of Maqwazima’s evidence, I am not persuaded that it falls within the *most exceptional cases* where the credibility of the witness is “so utterly destroyed that no part of his material evidence can possibly be believed”. His evidence and indeed the testimony of other witnesses as well, must be assessed in the light of the defence raised by the accused and the issue of where the onus lies.”

28. In **S v Francis 1991(1) SACR 198 (A)**, the Court held that it is not necessarily expected of accomplice that he should be wholly consistent and wholly reliable or even wholly truthful – the ultimate test, after cautiously considering accomplice's evidence, is whether the Court is satisfied beyond reasonable doubt that in its essential features the story he tells is a true one.

29. In our respectful submission the Court is allowed to look at other factors other than the corroborative evidence in its determination whether there are indeed safeguards for accepting the evidence of the accomplices as well as the presence of safeguards in the absence of direct evidence implicating the accused.

30. In **R v Parish [1968] SCR 466**, Ritchie J held that even although the corroborating evidence need not be direct evidence that the accused committed the crime, circumstantial evidence being sufficient, it must nonetheless touch upon the accused’s connection with the crime.

31. In **South African Law** our Courts has also found that there is no rule of law or practice that requires that the Court find corroboration

implicating the accused. In this regard we refer to the matter of **S v V Mahlabathi And Another 1968(2) SA 48 (A)**, Potgieter AJ said the following regarding this aspect:

"I would like to emphasise that, as was pointed out by SCHREINER, J.A., in Ncanana's case, supra at p. 405, it is not a rule of law or practice that requires the Court to find corroboration implicating the accused, but what is required is that the Court should warn itself of the peculiar danger of convicting on the evidence of the accomplice and seek some safeguard reducing the risk of the wrong person being convicted, but such safeguard need not necessarily be corroboration. Once, however, the Court decides that in order to be so satisfied it requires corroboration, it would be pointless to look for corroboration other than corroboration implicating the accused."

### **C. THE EVIDENCE ADDUCED BY THE STATE**

32. The State led the evidence of 16 witnesses and the Accused made formal admissions in terms of Section 220 of the Criminal Procedure Act.
33. It is common cause that the only witnesses that testified about a conspiracy to kidnap, rob and murder the deceased are the three accomplice witnesses, Zola Tongo (Tongo), Mziwamadoda Qwabe (Qwabe) and Monde Mbolombo (Mbolombo).
34. Tongo and Qwabe pleaded guilty to charges of kidnapping, robbing and murdering the deceased as part of a conspiracy initiated by the Accused. Tongo received a sentence of 18 years imprisonment while Qwabe received a sentence of 25 years imprisonment. Qwabe will only be eligible for parole after he has served two thirds of his sentence.

35. In their guilty pleas, both Tongo and Qwabe admitted their involvement in a conspiracy to murder the deceased at the Accused's instance. Qwabe obviously had no contact with the Accused and acted on what Tongo relayed to him.

36. Mbolombo has testified in this Honourable Court, having been warned of the provisions of Section 204 of the Criminal Procedure Act.

37. In our respectful view the Court will find, in evaluating the Accused's section 174 application, that we are not dealing with a situation as described in the Mpetha matter.

38. While we acknowledge that there were deviations and contradictions we are of the respectful view, having regard to the evidence as a whole that the credibility of the three accomplice witnesses (Tongo, Qwabe and Mbolombo) is **not** such that the Court can dismiss their evidence and draw the proverbial line through it.

39. Before addressing the evidence of the accomplice witnesses, we highlight some of the undisputed facts in this matter.

#### **The undisputed facts**

40. The following facts are not in dispute:

#### **Friday, 12 November 2010**

40.1 Tongo meets the Accused and the deceased at Cape Town International Airport and transports them to the Cape Grace Hotel;

- 40.2 Tongo and the Accused have a discussion for approximately 10 minutes after their arrival at the Cape Grace Hotel;
- 40.3 Tongo calls the Protea Hotel at 17h42 to enquire whether Mbolombo is at work;
- 40.4 Tongo travels to the Protea Hotel where he meets with Mbolombo and they have a discussion;
- 40.5 Mbolombo calls Qwabe at 18h04 from the Protea Hotel cordless phone and they speak for 174 seconds;
- 40.6 Mbolombo calls Qwabe at 18h09 and they speak for 126 seconds;
- 40.7 Tongo calls Qwabe at 18h41 and they speak for 80 seconds;
- 40.8 Mbolombo calls Qwabe at 19h37 for 15 seconds;
- 40.9 Tongo calls Qwabe at 19h43 for 41 seconds;
- 40.10 Mbolombo calls Tongo at 20h07 for 73 seconds;
- 40.11 Tongo sends the Accused a text message at 20h44;
- 40.12 The Accused sends Tongo a text message at 21h27;
- 40.13 The Accused calls Tongo at 21h27 for 326 seconds.



**Saturday, 14 November 2010**

40.14Tongo calls Mbolombo at 10h21 for 107 seconds;

40.15Mbolombo sends Qwabe text messages at 10h33 and 10h34;

40.16Qwabe calls Mbolombo at 10h34 for 51 seconds;

40.17Tongo arrives at the Cape Grace at 1h52 to collect the Accused to go to the money exchange;

40.18Tongo sends the Accused a text message at 11h52 and the Accused responds with a text message at 11h53;

40.19Tongo and the Accused travel to Golden Touch Jewellers to exchange foreign currency;

40.20Tongo drops the Accused off at the Cape Grace Hotel at 12h43;

40.21The Accused requests Julian Fritz at 13h44 to make a reservation at 96 Winery Road in the Somerset West/Stellenbosch area;

40.22Tongo calls Mbolombo at the following times:

40.22.1 14h05 for 31 seconds;

40.22.2 14h18 for 32 seconds;

40.22.3 14h26 for 20 seconds.

40.23Tongo meets Mbolombo at Site C in Khayelitsha and drives him to work at the Protea Hotel;

40.24Tongo and Mbolombo arrive at the Protea Hotel at 14h50;

40.25Tongo departs from the Protea Hotel to meet with Qwabe;

40.26Tongo calls Qwabe at the following times:

40.26.1 15h13 for 78 seconds;

40.26.2 15h34 for 14 seconds;

40.26.3 15h38 for 9 seconds.

40.27Tongo meets Qwabe near Khaya Bazaar in Khayelitsha;

40.28Qwabe calls Mngeni at 15h39 for 14 seconds;

40.29Tongo and Qwabe drive to Sidima Circle, Khayelitsha to meet Mngeni;

40.30Tongo, Qwabe and Mngeni meet in Tongo's VW Sharan at Sidima Circle in Khayelitsha – (they have a discussion that has a bearing on the events that will unfold later the evening);

40.31Tongo calls Vukile at 15h53 for 28 seconds;

40.32Mbolombo calls Tongo at 16h02 for 38 seconds;

40.33Mbolombo calls Tongo at 18h35 for 70 seconds;

40.34Mbolombo calls Qwabe at 18h37 for 55 seconds;

40.35Mbolombo calls Tongo at Tongo at 18h38 for 230 seconds;

40.36Tongo sends the Accused a text message at 19h19:17 and the latter responds at 19h19:50;

40.37The Accused calls Tongo at 19h45 for 16 seconds;

40.38The Accused sends Tongo a text message at 19h49;

40.39Tongo sends the Accused text messages at 19h50 and 19h53;

40.40Tongo arrives at the Cape Grace Hotel at 19h57;

40.41Tongo sends the Accused a text message at 20h00;

40.42Qwabe calls Mbolombo at 20h00 for 5 seconds;

40.43Tongo leaves the Cape Grace at 20h03 with the accused and deceased;

40.44Mbolombo calls Qwabe at 20h04 for 31 seconds;

40.45Tongo calls Qwabe at 20h09 for 13 seconds – Qwabe’s mobile phone triggers the Baphumalele tower (mobile mast) in Khayelitsha;

40.46Qwabe calls Mngeni at 20h10 for 18 seconds and at 20h11 for 15 seconds (the second call is to a number belonging to Mngeni’s friend, Likhaya);

40.47Tongo calls Qwabe at 21h01 for 46 seconds – Tongo’s mobile phone triggers a mast in Gugulethu; Qwabe’s

mobile phone triggers the Baphumalele tower (mobile mast) in Khayelitsha;

40.48Tongo drives through Gugulethu with the Accused and the deceased and shows them Mzoli's;

40.49Qwabe calls Tongo at 21h07 for 15 seconds - Qwabe's mobile phone triggers the Phillipi Cold Storage mast;

40.50Tongo calls Qwabe at 21h08 for 1 second;

40.51Qwabe calls Tongo at 21h08 for 41 seconds - Qwabe's mobile phone triggers the Phillipi Cold Storage and Nyanga Sports Field masts while Tongo's phone triggers the Airport WES mast;

40.52Qwabe and Mngeni travelled to Gugulethu but have to return to Khayelitsha since Tongo has already passed through Gugulethu;

40.53Mbolombo calls Qwabe at 21h10 for 45 seconds;

40.54Qwabe calls Mbolombo at 21h15 for 54 seconds;

40.55Mbolombo calls Qwabe at 21h31 for 126 seconds - Qwabe's mobile phone triggers the Baphumalele mast in Khayelitsha;

40.56Tongo arrives at the Surfside Restaurant at 21h33 with the deceased and accused;

40.57Tongo calls Mbolombo at 21h33 for 103 seconds;

40.58Tongo calls Qwabe at 21h36 for 124 seconds;

40.59Mbolombo calls Qwabe at 21h50 for 88 seconds;

40.60The Accused calls Tongo at 21h56 for 93 seconds;

40.61Tongo calls Qwabe at 21h59 for 102 seconds - Qwabe's mobile phone triggers the Baphumalele mast in Khayelitsha;

40.62Tongo sends the Accused a text message at 22h03;

40.63The Accused sends Tongo a text message at 22h06;

40.64Tongo sends the Accused a text message at 22h07;

40.65Qwabe calls Tongo at 22h07 for 11 seconds;

40.66The Accused sends Tongo a text message at 22h17;

40.67Tongo calls Qwabe at 22h18 for 15 seconds - Qwabe's mobile phone triggers the Baphumalele mast in Khayelitsha;

40.68Tongo calls Qwabe at 22h19 for 1 second - Qwabe's mobile phone triggers the Baphumalele mast in Khayelitsha;

40.69Tongo sends the Accused a text message at 22h40 while en route from Somerset West;

40.70The Accused sends Tongo a text message at 22h42;

40.71 Tongo sends Qwabe a text message at 22h47 - Qwabe's mobile phone triggers the mast in Gugulethu;

40.72 Qwabe and Mngeni take control of Tongo's VW Sharan shortly after the above sms is received by Qwabe;

40.73 Qwabe testified that when he made a call at 11h20 he and Mngeni had left the deceased in the vehicle at Sinqolamthi Street and were making their way home.<sup>2</sup>

41. The following undisputed facts are significant and require further elucidation:

41.1 Tongo had no relationship with Qwabe and met him during these events on 12 and 13 November 2010.

41.2 Mbolombo knew Qwabe from their time at the Pride of Table Mountain Project but they only reconnected on 1 November 2010 after a period of several years.

41.3 The mobile phone records of both Qwabe and Mbolombo confirm that they were at Monwabisi Beach on 1 November 2010.

41.4 After 1 November 2010 the only contact Mbolombo had with Qwabe related to a request for a bullet to perform a traditional ritual. The mobile phone records of Qwabe and Mbolombo confirm contact between the two of them in early November 2010. In fact the last contact prior to 12 November 2010 was on 7 November 2010.

41.5 It is also not in dispute that Qwabe and Mngeni travelled to Gugulethu on two occasions on the evening of 13 November

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<sup>2</sup> Record p. 170 (4) - 171 (8)

2010 and that on the first occasion they got to Gugulethu too late when Tongo had already passed through the township.

41.6 The missed opportunity therefore necessitated the need for a second visit to Gugulethu to ensure that the plan, to murder the deceased, is executed.

41.7 It is therefore important for the Honourable Court to have regard to the evidence regarding the explanation provided by the accused to explain this second visit to Gugulethu. We address this aspect later in our submission.

42 The pattern of communication represents, on the State case, an indication of how the various conspirators, including the Accused, actively communicated with one another to ensure that the desired outcome was achieved.

43 The Accused's exculpatory explanation of the communication which he tendered in his plea explanation is not evidence. This notwithstanding, we recognise that this Honourable Court cannot on the basis of the communication alone make a conclusive finding that it is corroboration for the State's thesis on the conspiracy.

44 The accused's *ipse dixit* immediately after the 'hijacking' and kidnapping of the deceased as well as subsequent to her death are however factors that the Court can have regard to when evaluating the evidence presented by the State. In this regard we refer to the explanation the accused provided for them (he and the deceased) going into Gugulethu late on that Saturday night. We address this aspect in paragraphs 172 to 176 of our submission.

45 We first set out the key features of Qwabe, Mbolombo and Tongo's evidence and we will also refer the Honourable Court to other relevant evidence to assist the Court in deciding the question of the discharge.

### **MZIWAMADODA QWABE**

46 The salient parts of Mziwamadoda Qwabe's (Qwabe) evidence can be summarised as follows:

46.1 Qwabe testified that he was born on the 19 March 1985 and that he is currently 29 years old. He attended Oude Mole high school and obtained a N2 in electrical engineering in 2003 at the Western Province Technical College in Pinelands. After his studies he was formally employed up until April 2010, including being an assessor at an insurance company.<sup>3</sup>

46.2 He was arrested on 18 November 2010 on charges of murder relating to the death of the deceased in this matter, Anni Dewani.<sup>4</sup>

46.3 He made a confession the same day (18 November 2010) and did a pointing out on 19 November 2010.<sup>5</sup>

46.4 On 8 August 2012 he pleaded guilty to charges of kidnapping, robbery with aggravating circumstances, murder and the illegal possession of a firearm. He received an effective prison sentence of 25 (twenty five) years in terms of a Section 105A plea and sentence agreement.<sup>6</sup>

46.5 Qwabe testified that he received a call from Monde Mbolombo (Mbolombo) on the Friday, who told him that someone wanted a job to be done.<sup>7</sup>

46.6 He said Mbolombo should can give his telephone number to the person and 'let me speak to him'.<sup>8</sup>

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<sup>3</sup> Record p. 109 (23) – 110 (10)

<sup>4</sup> Record p. 110 (13–15)

<sup>5</sup> Record p. 110 (17–21)

<sup>6</sup> Record p. 110 (23) – 111 (1)

<sup>7</sup> Record p. 116 (15)



- 46.7 Tongo called him later advising that he had obtained his number from Monde and that he had a job that needed to be done. Someone needed to be killed and he wanted to know how much it would be (cost).<sup>9</sup>
- 46.8 Qwabe was with Mngeni when he received Tongo's call and either conveyed the message to Mngeni or gave him the phone.<sup>10</sup>
- 46.9 Mngeni said he would do it for R15 000, 00 and he agreed with Tongo that they would meet the following day and talk face to face.<sup>11</sup>
- 46.10 The following day (Saturday) he received a call from Tongo about arranging where to meet. They agreed to meet near Khaya Bazaar in Khayelitsha.<sup>12</sup>
- 46.11 Tongo described the car that he would be driving and kept calling right up until they met at Khaya Bazaar.<sup>13</sup>
- 46.12 Tongo said he would be driving a silver VW Sharan; Qwabe recognised the car, went to Tongo, got in and introduced himself as 'Spra' and Tongo introduced himself.<sup>14</sup>
- 46.13 Tongo said there was a husband that wanted the wife to be killed. He told Tongo to wait, he is not alone, they must go and meet the other guy who is also going to be involved.<sup>15</sup>
- 46.14 He phoned Xolile Mngeni (Mngeni) and he was directed to a house in Sidima Circle. Qwabe knew the house (since it was Mngeni's friend Likhaya's house) and they drove there. Mngeni joined them and introduced himself to Tongo.<sup>16</sup>
- 46.15 Tongo, Qwabe and Mngeni discussed the following in the VW Sharan:

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<sup>8</sup> Record p. 116 (18 - 19)

<sup>9</sup> Record p. 116 (25) - 117 (2)

<sup>10</sup> Record p. 117 (4 - 6)

<sup>11</sup> Record p. 117 (10 - 17)

<sup>12</sup> Record p. 117 (23) - 118 (1)

<sup>13</sup> Record p. 118 (8 - 10)

<sup>14</sup> Record p. 118 (13 - 16)

<sup>15</sup> Record p. 119 (3 - 9)

<sup>16</sup> Record p. 119 (9) - 120 (8)

- 46.15.1 Tongo told Qwabe and Mngeni that there was a husband that wanted 'the wife' to be killed;<sup>17</sup>
- 46.15.2 that it has to look like a hi-jacking;<sup>18</sup>
- 46.15.3 he told them he will be going into Gugulethu and which route he will be taking;<sup>19</sup>
- 46.15.4 they agreed the hi-jacking would take place at the corner of NY112 and NY108;<sup>20</sup>
- 46.15.5 they also agreed on the fee of R15 000 and told Tongo to leave the money in the cubbyhole;<sup>21</sup>
- 46.15.6 it was agreed that the lady would be killed and that nothing would happen to Tongo and her husband;<sup>22</sup>
- 46.15.7 that they would take Tongo's phone;<sup>23</sup>
- 46.15.8 Tongo told them that he would give them a call when he is leaving the hotel which would be around past seven.<sup>24</sup>

46.16 On Saturday evening Qwabe was waiting for Tongo's call but he only called him after 8:00 p.m. saying 'that they're only leaving the hotel then.'<sup>25</sup>

46.17 Qwabe phoned Mngeni but they struggled to get transport. On their way to Gugulethu Tongo phoned him and informed him that they had already left Gugulethu and that they were

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<sup>17</sup> Record p. 119 (9) - 120 (8)

<sup>18</sup> Record p. 119 (9) - 120 (8)

<sup>19</sup> Record p. 119 (9) - 120 (8)

<sup>20</sup> Record p. 119 (9) - 120 (8)

<sup>21</sup> Record p. 119 (9) - 120 (8)

<sup>22</sup> Record p. 119 (9) - 120 (8)

<sup>23</sup> Record p. 122 (14 - 15)

<sup>24</sup> Record p. 122 (19 - 21)

<sup>25</sup> Record p. 123 (20 - 23)

on their way to Somerset West. They agreed 'to let the matter stand for another time' and returned to Khayelitsha.<sup>26</sup>

46.18 Tongo phoned again later on, he is not sure of the time, and informed him that he is at a restaurant in Somerset and told him 'the job had to be done that same evening, the husband wanted the wife to be killed that same evening'.<sup>27</sup>

46.19 Tongo also informed him that he would be taking the same route to Gugulethu and that he and Mngeni should meet him there.<sup>28</sup>

46.20 Qwabe and Mngeni got a lift to Gugulethu with a friend of Qwabe's named Mawanda, who he dropped them in NY 112 in Gugulethu. Mngeni and Qwabe proceeded on foot to the agreed intersection.<sup>29</sup>

46.21 Mngeni was armed with Qwabe's pistol, while he (Qwabe) was unarmed. He was however wearing yellow kitchen gloves along to prevent leaving fingerprints.<sup>30</sup>

46.22 He received a text message from Tongo to say that they were close by. He saw Tongo's car approaching. As he approached the car, Mngeni was pointing the gun at them and the car stopped. He, Qwabe, got in behind the driver's side; Mngeni got into the front passenger seat while Tongo got into the back passenger seat.<sup>31</sup>

46.23 Qwabe drove the vehicle from the corner of NY 112 and NY 108 and stopped at NY111, the intersection near the police barracks. They ordered Tongo out of the car and as he was getting out he told them in Xhosa that the money is in the pouch behind the front passenger door (seat).<sup>32</sup>

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<sup>26</sup> Record p. 124 (12) - 125 (1)

<sup>27</sup> Record p. 125 (16 - 19)

<sup>28</sup> Record p. 125 (20 - 21)

<sup>29</sup> Record p. 127 (2 - 5)

<sup>30</sup> Record p. 127 (20) - 128 (10)

<sup>31</sup> Record p. 128 (23) - 130 (5)

<sup>32</sup> Record p. 131 (19) - 132 (5)

- 46.24 Qwabe testified that he drove to Khayelitsha and there was no exact plan.<sup>33</sup>
- 46.25 He then drove with the accused and the deceased onto the N2 in the direction of Khayelitsha. He took the Baden Powell turnoff and stopped between Harare and Kuyasa, where the accused was ordered out of the vehicle.<sup>34</sup>
- 46.26 After the husband was out of the vehicle he drove into Mew Way between Harare and Ndlovini.<sup>35</sup>
- 46.27 While driving down Mew Way between Ilitha Park and Ndlovini, he heard a gunshot. He was shocked at the gunshot and asked Mngeni what he had done. Mngeni replied that he had shot the lady. Qwabe took the first turnoff into Ilitha Park and stopped at the side of the road.<sup>36</sup>
- 46.28 While getting out he saw Mngeni looking for something in the back of the car. Mngeni told him that he was looking for the cartridge case. He helped Mngeni look and found it on the floor at the back of the car.<sup>37</sup>
- 46.29 Qwabe testified that he threw the cartridge case into a storm water drain and he threw the gloves away further from the crime scene.<sup>38</sup>
- 46.30 While he and Mngeni were walking in Ilitha Park, Mngeni showed him three mobile phones (two Blackberrys and a Nokia) as well as a silver digital camera. He recognised the Nokia as belonging to Tongo, since he saw it in his possession earlier that day.<sup>39</sup>
- 46.31 Mngeni then took out the money which he had taken from the pouch. Qwabe was not certain when Mngeni had removed the money from the pouch. They counted the

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<sup>33</sup> Record p. 133 (14 - 16)

<sup>34</sup> Record p. 133 (19) - 134 (2)

<sup>35</sup> Record p. 135 (8 - 11)

<sup>36</sup> Record p. 136 (21) - 137 (9)

<sup>37</sup> Record p. 137 (19) - 138 (10)

<sup>38</sup> Record p. 138 (14 - 17)

<sup>39</sup> Record p. 138 (18 - 25)

money and found that it was R10 000, 00 which they shared in equal parts.<sup>40</sup>

46.32 Mngeni then showed him a second stack of money that he said he got from the husband. This money came to four thousand something and they shared this money equally as well.<sup>41</sup>

46.33 On Sunday, he is not sure at what time, he called Mbolombo and also went to see Mbolombo because they were short-paid R10 000,00 instead of R15 000,00. Mbolombo undertook to sort it out with Tongo.<sup>42</sup>

46.34 Mngeni also returned his firearm on the Sunday.<sup>43</sup>

46.35 He further testified that he might have had contact with Mbolombo after that Sunday, he does not recall properly, but that would have been to find out how far Mbolombo got with the money that was short.<sup>44</sup> He was then arrested the Thursday in the early hours of the morning.<sup>45</sup>

46.36 He assisted the police to retrieve the cartridge case and one of the gloves he had thrown away.<sup>46</sup> He eventually pleaded guilty and admitted his involvement in the matter.<sup>47</sup>

46.37 He is not certain which door he opened to assist Mngeni to look for the cartridge case.<sup>48</sup> He also did not check to see whether the deceased was alive or dead.<sup>49</sup>

46.38 Qwabe looked for the cartridge case with his gloves on.<sup>50</sup>

46.39 Qwabe is not sure whether he looked for the cartridge at the left or right rear door.<sup>51</sup>

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<sup>40</sup> Record p. 139 (9 - 20)

<sup>41</sup> Record p. 139 (22 - 24)

<sup>42</sup> Record p. 142 (4 - 17)

<sup>43</sup> Record p. 143 (1 - 3)

<sup>44</sup> Record p. 143 (6 - 10)

<sup>45</sup> Record p. 143 (13 - 20)

<sup>46</sup> Record p. 146 (8 - 17)

<sup>47</sup> Record p. 146 (18 - 20)

<sup>48</sup> Record p. 156 (8 - 12)

<sup>49</sup> Record p. 155 (10 - 11)

<sup>50</sup> Record p. 155 (24) - 156 (1)

46.40 Qwabe deleted Tongo's number from his list of contacts after the incident.<sup>52</sup>

### **Evaluation of Qwabe's Evidence**

47 The defence have identified four primary areas of weakness in support of their contention that Qwabe is an unreliable and untruthful witness. These are his evidence relating to:

- 47.1 the shooting;
- 47.2 when the money was retrieved;
- 47.3 the fee agreed upon; and
- 47.4 explaining or defining Mbolombo's role.

### **Qwabe's evidence regarding the shooting**

48 The defence has attacked Qwabe's credibility on the basis that he allegedly fired the shot that killed the deceased. In support of this proposition they advance the fact that his yellow glove tested positive for primer residue and that it would have been impossible for Mngeni to have fired the shot from the front passenger seat.

### **The yellow glove**

49 It is respectfully submitted that the positive primer residue result in itself is not indicative of the fact that Qwabe fired the shot.

50 Col Mlabateki testified that primer residue can be found on any exposed areas within a two meter radius when a shot is fired.<sup>53</sup>

51 Col Mlabateki also testified that one cannot deduce on the basis of where primer residue is found in a vehicle, where the firearm was

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<sup>51</sup> Record p. 156 (9 - 12)

<sup>52</sup> Record p. 165 (7 - 9)

<sup>53</sup> Record p. 1850 (9); 1851 (4 - 5)

positioned or located in the vehicle when the shot was fired. The nature of the surface as well as any movement in the vehicle also has a bearing on whether a positive result is achieved.<sup>54</sup>

- 52 Qwabe's evidence that he looked for and found the cartridge after the shot was fired was not challenged. Nor his evidence that he had the gloves on when he found the cartridge.<sup>55</sup>
- 53 Col Mlabateki's evidence that secondary transfer of primer residue can be brought about by handling a spent cartridge was also not challenged by the defence.<sup>56</sup>
- 54 The fact that the web area of the glove tested positive for primer residue, although likely to indicate that the person fired a shot, cannot in the circumstances of this case lead to that conclusion.
- 55 On Qwabe's version he was in close proximity to the weapon when it was discharged and the likelihood of the primer residue coming to rest on his left hand, which would be the hand closest to the weapon being discharged by Mngeni, cannot be excluded. Nor can the possibility of secondary transfer be excluded.
- 56 A further complicating factor is the discovery of the glove, six days after the incident, turned inside out. The process of turning the glove inside out may have caused the residue to come to rest on the web area or created the opportunity for the secondary transfer of residue onto the glove.
- 57 We respectfully submit that there are too many variables for this Honourable Court to make definitive findings.

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<sup>54</sup> Record p. 1851 (16 - 18); 1852 (2 - 7)

<sup>55</sup> Record p. 155 (24) - 156 (1)

<sup>56</sup> Record p. 1853 (18 - 23)

### **Mngeni's position as the shooter**

- 58 Two aspects of the evidence is used at the basis to discredit Qwabe's evidence that Mngeni fired the shot. Firstly, the nature of the wound on the deceased's left hand, which Dr Verster described as an angled/close contact wound as well as the defence proposition that he exit wound on the deceased 'back' is a shored exit wound.
- 59 The importance of the shored exit wound, on the defence proposition, is that the deceased must have had her back against the rear seat and in that position Mngeni would not have been able to achieve an angled/close contact shot.
- 60 We respectfully submit that there is no evidence to support the contention that the exit wound in question is a shored exit wound.
- 61 Dr. Verster's was emphatic that the wound did not have the 'hallmarks' of a shored exit wound and was of the strong opinion that the wound was **not** a shored exit wound.<sup>57</sup>
- 62 In support of her opinion she also testified that the position of the deceased's shoulder and the location of the wound made it difficult for the deceased's back to be pressed up firmly against an object at the back.<sup>58</sup>
- 63 Dr. Verster also discounted the presence of hair in the seat as the only indicator that the deceased's back was against the rear of the back seat when the shot was fired.<sup>59</sup>
- 64 Notwithstanding the fact that Qwabe located Mngeni in the front passenger seat it was apparent during his evidence that he could not provide the Court with an accurate description of Mngeni's position

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<sup>57</sup> Record p. 92 (3 - 15)

<sup>58</sup> Record p. 153 (10 - 12); 209 (15 - 25); 210 (3 - 4); 293 (6 - 14); 297 (8 - 13)

<sup>59</sup> Record p. 95 (7) - 96 (4)



when the shot was fired nor that of the deceased. His refrain in response to questions of Mngeni's position was 'I do not recall his position.'<sup>60</sup>

65 Qwabe's concession that Mngeni was seated in the front passenger seat when the shot was fired must therefore be viewed in that context

66 We respectfully submit that there is no basis, on the evidence before Court to make a finding as to the position of the deceased before she was shot, nor that of Mngeni.

67 At best, we can place the deceased along the bullet's 'flight path' and align her injuries with the defect in the rear seat. It is not possible to position the deceased in an exact place and the possibility that she was seated such that Mngeni could fire an angled or contact wound cannot be excluded.

68 In view of the above the Honourable Court cannot with respect make a finding that Qwabe's evidence that Mngeni fired the shot is false.

69 Similarly, the Honourable Court cannot in our respectful view, reject all of Qwabe's evidence if the Court is not entirely satisfied with his evidence on this aspect.

### **When the money was retrieved**

70 We concede that Qwabe was not able to recall when the money in the pouch was retrieved by Mngeni.

71 In his evidence in chief he was unable to provide a definitive answer and qualified his answer by stating that 'I'm not sure' and 'I'm not

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<sup>60</sup> Record p. 165 (7 - 9)

sure exactly when.’ He provided a similar qualification when asked this question in cross examination.<sup>61</sup>

72 We respectfully submit that this ‘unsatisfactory’ aspect of his evidence is not in itself indicative of untruthfulness.

### **Mbolombo’s role**

73 Qwabe’s evidence is also criticized on the basis of the role that he attributes to Mbolombo.

74 For the reasons advanced in paragraphs 83 and 84 below, we respectfully submit that this criticism is without foundation and cannot be a reason to dismiss Qwabe’s evidence as untruthful.

75 In fact Qwabe’s understanding and description of Mbolombo’s role is borne out by the submissions we make in paragraph 91 and 92 *infra*.

### **General observations regarding Qwabe’s testimony**

76 We concede that Qwabe did not make the best of impressions. He appeared nervous when he commenced his evidence and never seemed to settle, this despite the Court’s attempt to make him feel at ease.<sup>62</sup>

77 It was also apparent that Qwabe struggled to recall all of the events of 12 and 13 November 2010 and in a great number of instances he qualified his answer by stating ‘I don’t remember.’<sup>63</sup>

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<sup>61</sup> Record p. 139 (12 - 16); 203 (1 - 5)

<sup>62</sup> Record p. 115 (22 - 24)

<sup>63</sup> Record p. 147 (5); 153 (17); 222 ((6 - 7); 237 (24) - 238 (5); 274 (16 - 17); 286 (7 - 9); 288 (5 - 8); 289 (1 - 4); 318 ( 9 - 16); 321 (15); 321 (25) - 322 (1); 324 (1 - 3; 8 - 12); 327 (4)

- 78 The Honourable Court also attempted to understand his constant refrain 'it is possible' and he informed the Court that 'his memory is vague.'<sup>64</sup>
- 79 In view of the above, the State concedes that Qwabe did not make a good impression and that his evidence, particularly where it is contradicted by the other witnesses, Tongo and Mbolombo, must be considered with caution. In contrast to Qwabe, Tongo, notwithstanding the differences between his evidence and his statement made a much more favourable impression.
- 80 Any contradictions between Qwabe and Tongo in respect of material aspects of their evidence must therefore be resolved in Tongo's favour.
- 81 An example of such a contradiction is the question of who 'fixed' the price of R15000. Mbolombo testified that he conveyed the amount to Qwabe during their initial interaction (the second call made by Mbolombo with the cordless telephone). Tongo's version on this aspect, is consistent in the main with that of Mbolombo. Qwabe must therefore be mistaken about this aspect of his evidence; it is improbable and is consistent with him having a poor memory.
- 82 Qwabe's inability to recall is not, with respect, akin to him being untruthful. In fact he endeavours to assist the Court by recalling what has happened but is hamstrung by what he refers to as a 'vague memory.'
- 83 Qwabe's evidence regarding the discussion with Tongo in the vehicle is broadly supported by that of Tongo, except for his reference to the husband wanting the wife to be killed. It is apparent however on both Qwabe and Tongo's version of this discussion that the woman

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<sup>64</sup> Record p. 210 (21) – 211 (10)

occupant was identified as the target. This contradiction, in this context, is not material we respectfully submit.

- 84 Qwabe's evidence regarding his interaction with Mbolombo and Tongo supports the general tenor of the conspiracy that the State alleges was initiated by the Accused.
- 85 Importantly Qwabe dismisses alternate theories for why the events of 13 November 2010 took place, including the allegation that he shot the deceased accidentally.
- 86 If the Honourable Court has regard to the probabilities, notwithstanding our earlier submission, we would argue that the probabilities weigh against Qwabe pleading guilty to a contract killing when in fact, according to the alternate theory, a shot was discharged unintentionally and accidentally.
- 87 We respectfully submit that notwithstanding the 'vague memory' there is sufficient basis for the Honourable Court to attach sufficient weight to Qwabe's evidence, that he was approached and agreed to take part in the murder the deceased in exchange for payment of R15 000.00.

### **MONDE MBOLOMBO**

- 88 The salient parts of Monde Mbolombo's (Mbolombo) evidence can be summarised as follows:

88.1 Tongo called him on 12 November 2010 while he was at work.

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88.2 Tongo arrived later and said that 'someone is looking for a hitman, do I know anybody.'<sup>66</sup>

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<sup>65</sup> Record p. 1490 (9 - 16)

- 88.3 Mbolombo called Qwabe from the Protea Hotel cordless phone and told him 'that Zola is looking for someone who can do a job; upon enquiry from Qwabe regarding the nature of the job he said he is looking for a hitman.'<sup>67</sup>
- 88.4 Qwabe wanted to know whether Mbolombo knew the person making the enquiries and he (Mbolombo) told Qwabe that he worked with Tongo. Qwabe also wanted to know how is going to be paid.<sup>68</sup>
- 88.5 Mbolombo called Tongo closer, ended the call. He called Qwabe back and asked Tongo how much would be paid to which he replied R15 000.00.<sup>69</sup>
- 88.6 Qwabe did not want to discuss the matter over the phone and said that they needed to make time to meet.<sup>70</sup>
- 88.7 Qwabe indicated that he would do the job, he had no problem.<sup>71</sup>
- 88.8 Mbolombo called Qwabe later and told him that he knew Tongo, that they have worked together for a long time and that Tongo could be trusted. Qwabe indicated that they should meet.<sup>72</sup>
- 88.9 On the Saturday morning Tongo called and wanted Mbolombo to accompany him to meet with Qwabe.<sup>73</sup>
- 88.10 Tongo ran late and eventually he met Mbolombo at Site C taxi rank. Mbolombo left the taxi and joined Tongo in his vehicle. In the vehicle Tongo told Mbolombo that there was a married couple and

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<sup>66</sup> Record p. 1491 (9 - 10)

<sup>67</sup> Record p. 1492 (3 - 7)

<sup>68</sup> Record p. 1493 (7 - 10)

<sup>69</sup> Record p. 1493 (13 - 20)

<sup>70</sup> Record p. 1493 (22 - 24)

<sup>71</sup> Record p. 1494 (1 - 3)

<sup>72</sup> Record p. 1494 (10 - 14)

<sup>73</sup> Record p. 1495 (8 - 13)

the husband wanted the wife to be killed.<sup>74</sup> He told Mbolombo that he met the people at the airport and it's the man who wanted the wife to be killed.<sup>75</sup>

88.11 Mbolombo testified that Tongo received a call and informed him that it was the person on the line. Mbolombo did not hear what the other person said and only heard Tongo responding 'I'm coming, I'm coming.'<sup>76</sup>

88.12 Tongo said that he had to go and meet the person to change dollars into rands to pay the killers.<sup>77</sup>

88.13 Tongo dropped Mbolombo at work and said he is going back to meet with Qwabe.<sup>78</sup>

88.14 Mbolombo described his role as having to 'make sure they meet and to see to it that this thing happens.'<sup>79</sup>

88.15 Mbolombo's involvement on the Saturday afternoon and evening related to various phone calls that he made to Tongo and Qwabe.<sup>80</sup>

88.16 Mbolombo was experiencing financial difficulties at the time and he only thought of the money not how precious the life of a person is.<sup>81</sup>

88.17 He admitted that he did not mention the R5000 in Exhibit P10 and that he lied about it in the Mngeni trial.<sup>82</sup>

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<sup>74</sup> Record p. 1496 (18 - 29)

<sup>75</sup> Record p. 1496 (22 - 24)

<sup>76</sup> Record p. 1497 (5 - 10)

<sup>77</sup> Record p. 1497 (14 - 17)

<sup>78</sup> Record p. 1499 (7 - 11)

<sup>79</sup> Record p. 1499 (22 - 25)

<sup>80</sup> Record p. 1500 (21 - 23)

<sup>81</sup> Record p. 1533 (10 - 15)

<sup>82</sup> Record p. 1540 (11 - 14); 1541 (7 - 24)

88.18 Mbolombo also admitted that he denied any knowledge of the R15000 price for the hitmen.

### **Evaluation of Mbolombo's Evidence**

89 It is common cause that Mbolombo was not truthful on the following occasions:

89.1 when he deposed to a warning statement on 18 November 2010 (Exhibit 'P5');

89.2 when he deposed to a 'section 204 statement' on 19 November 2010 (Exhibit 'P6'); and

89.3 when he testified before Justice Henney in the Mngeni matter.

90 Mbolombo has also admitted that he concealed his own involvement and knowledge on these previous occasions since he was fearful of what the repercussions for him would be.<sup>83</sup>

### **Mbolombo's supposed leadership role**

91 In an ironic twist Mbolombo moved from protecting himself at all costs to asserting that he played a leading role in the events of 12 and 13 November 2010.

92 We respectfully submit that the following facts and submissions negate this bold claim:

92.1 It is common cause that Mbolombo was not at the meeting on the Saturday afternoon where the events that were to unfold were planned;

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<sup>83</sup> Record p. 1483 (24) - 1484 (3)

92.2 He therefore did not have any direct knowledge of what was discussed and decided at the Khayelitsha meeting on Saturday afternoon;

92.3 Mbolombo had not been assigned any particular role in the execution of the conspiracy;

92.4 Mbolombo did not know that the hijacking was meant to happen during the first drive through Gugulethu;<sup>84</sup>

92.5 Mbolombo did not even know when the hijacking had to take place;<sup>85</sup>

92.6 This lack of knowledge on such important aspects of the plan demonstrates that Mbolombo was not completely in the know – in fact the 'leadership role' that he plays only comes about as a result of the initial failure;

92.7 But for the fact that Qwabe and Mngeni were late in arriving in Gugulethu, Mbolombo would have had no conceivable role to play in the events that were planned.

92.8 When Tongo contacted Mbolombo following the failure of Qwabe and Mngeni to hijack the vehicle at the designated spot, Mbolombo appears to fill an apparent void – ensuring that the initial breakdown of communication between Tongo and Qwabe is not repeated;

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<sup>84</sup> Record p. 1602 ( 24 – 25)

<sup>85</sup> Recor p. 1604 ( 12 – 18)



92.9 Mbolombo's industry is an obvious attempt on his part to make himself more relevant and in so doing more deserving of some reward for having 'saved the day';

92.10 Mbolombo's role can at best be described as the project manager, who assisted in achieving the predetermined outcome;

92.11 The obvious incentive for Mbolombo, who now actively involves himself in communicating with Tongo and Qwabe, is the prospect of a R5000 payment.

### **Failure to disclose the R15000 payment**

93 Mbolombo was also criticised for failing to disclose, in the Mngeni trial, his knowledge of the R15 000 payment for the hitmen on the basis that it did not implicate him. His initial denial is however consistent with the fear that he expressed that he did not want to implicate himself.

94 With respect, it is perfectly understandable that Mbolombo will shy away from any reference to the money and particularly the amount of R15 000 since that would make his demand for R5000, which he denied at that stage, more plausible.

95 Notwithstanding the fact that Mbolombo commences his evidence as a self-confessed liar, we respectfully submit that this Honourable Court cannot dismiss his evidence out of hand nor determine that he has not been truthful with this Court.

96 We now address the evidence of Zola Tongo, in particular the criticism levelled against him.

## **ZOLA TONGO (TONGO)**

97 The fulcrum on which the State's case rests is the evidence of Tongo, since he is the only conspirator who had direct contact with the Accused.

98 The accused alleges that Tongo is completely unreliable witness based on the following:

- His testimony is highly improbable;
- His testimony is riddled with contradictions on material aspects; and
- His evidence on material aspects and concerning the alleged conspiracy agreement with the accused is contradicted by his co conspirators.

99 We now address the criticism level against Tongo's evidence.

### **Alleged Major Improbabilities**

100 The defence submits that there are two (2) major improbabilities in the version of the State's case which impacts on Tongo:

- That the accused would request Tongo to find hit men to kill his wife within 30 minutes of meeting him; and
- That both Tongo and Mbolombo who were gainfully employed and didn't have a criminal past would agree to find hit men for a meagre R5000 and in Mbolombo's case without any promise of financial gain.

100.1 According to the evidence of Tongo he was quite persistent (the impression is created almost desperate) in marketing his services to the accused. In fact, Tongo testified that when the accused said he had a job he thought that "hunger was over."

100.2 It is therefore not improbable on his version that the accused saw from this persistent marketing the opportunity to illicit his services for unlawful purposes.

100.3 The level of comfort and rapport the accused built up with Tongo fairly quickly is evident from the fact that he was willing to meet with him in his vehicle in a parking lot and had a discussions for approximately 10 (ten) minutes.

100.4 The second submission flies in the face of the facts that eventually Tongo pleaded guilty to several charges including murder and is serving time in prison; whilst Mbolombo was made a witness in terms of Section 204 of the Criminal Procedure Act.

### **Alleged Material Contradictions**

101 The State's response identifies the specific paragraph in the defence submissions which it is directed at.

### **AD PARAGRAPHS 41 - 44**<sup>86</sup>

102 The defence submits that there are **material discrepancies** between the evidence of Tongo and that which is contained in his affidavit (exhibit P9) when he testified that the accused did not tell him about the details of the job before he checked in but afterwards.

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<sup>86</sup> Reference to the paragraph in the Defence Heads of Argument

102.1 The essence of what transpired and what was said when Tongo and the couple arrived at the Cape Grace Hotel remained the same. The only difference relates to **when** the accused elaborated on the details of the job.

102.2 Tongo explained his mental disposition at the time when he was arrested and when he made his various statements. He conceded that his statement contains a mistake.

102.3 The State will submit that the nature of the defect is minor and that it would serve Tongo no purpose to deliberately lie on this aspect.

103 The defence also submits that it is a material contradiction in Tongo's evidence when he omitted to tell the police that the accused wanted his **business partner** killed and in his plea agreement he refers to a **client of the accused**.

103.1 The State will submit that it is clear from both descriptions that Tongo was initially brought under the impression that it was not the wife of the accused that had to be killed.

103.2 The State submits that what is consistent with the probabilities of his version that he was not told that it was the wife of the accused that had to be killed is the fact that he never told the police at the outset that it is the wife that had to be killed. In his affidavit he said that the ***"person that had to be killed was a woman and that she was arriving later that evening"***, which could never had been a reference to the wife he dropped earlier the Friday afternoon.

## **AD PARAGRAPH 49**

104 The defence also submits that Tongo contradicted himself on when the accused undertook to pay him R5 000, 00 once the job was finished.

104.1 Tongo testified in examination in chief that he was told the Friday afternoon whilst his affidavit only mentions the agreement regarding payment when they came back from the money exchange.

104.2 The State will submit that Tongo's testimony from the start and which he stuck to was that he would be paid R5000 after the job was done and that the accused also made promises of referring overseas clients to him so that his business can expand.

104.3 The State will submit that it is in all likelihood improbable that Tongo would have accepted the request to find hit men for no payment based on his evidence that he marketed his services and was looking for work.

104.4 The State will further submit in all likelihood if there was a discussion about payment for the hit men that Friday night that it is improbable that there would have been no discussion regarding Tongo's remuneration.

104.5 The State will therefore submit that Tongo's response that he forgot to mention to the police about the payment on Friday is not improbable and its omission is not material.

### **AD PARAGRAPH 53**

105 The defence argues that there is material contradiction between the evidence in chief of Tongo and his evidence during cross examination regarding what he overheard Monde told Qwabe during the first call the Friday afternoon.

105.1 Tongo testified in his examination in chief that:

- The gentleman wants this person to be taken out of sight;
- The person is his business partner;
- The person is going to arrive the next day;
- The gentleman was prepared to pay an amount of R15 000;
- The gentleman wants to pay in dollars which they didn't want.

105.2 Tongo testified during cross examination that:

- There is a job from another man that wants someone to be killed; and
- The man wants to pay R15 000 but wants to pay in dollars.

106 The defence now argues that the failure to mention that person is the gentleman's business partner who arrives the next day makes his evidence "entirely different".

107 The State will submit the failure to mention these two aspects doesn't make his evidence "entirely different" and the omission in the context of his evidence in totality is not material.

### **AD PARAGRAPHS 55-59**

108 What is clear from both Tongo and Mbolombo's evidence is that there was **no agreement** between Tongo and Mbolombo regarding the amount of money Mbolombo was going to be paid for his efforts.

109 On Friday Mbolombo is the one that **suggests/proposes** to Tongo that he gets **R5 000** and that the hit men be paid **R10 000**. There is no evidence on record from both Tongo and Mbolombo that Tongo in fact acceded to this proposal or secondly that there was any agreement as to how much Mbolombo was going to be paid.

110 In fact , Tongo testifies that the ***"fact that Monde says to me that he wants R5000,00 is the concern of the three of them and I am saying as to how he's going to get his money has nothing to do with me."***<sup>87</sup>

111 That is why Tongo is adamant that what amount he eventually is going to be paid has nothing to do with him. Tongo's testimony was and remained constant right throughout that Mbolombo had to make the arrangements with the hit men for his share whether it is R5000, R2000 or R1000. See the following two extracts of his evidence:

"And I repeat that again, I say that again as to how much Monde was going to be paid, doesn't concern me, don't have anything to do with me."<sup>88</sup>

"That's why I say even if he says here that he said to me he wants an amount of R1000, that has nothing to do with me"<sup>89</sup>

112 Thirdly, Tongo testified that **he can't remember** Mbolombo asking for R5000 but was willing to concede that it was possible based on what was written in his statement. See the following extract of his evidence:

***"I repeat again, Monde was going to get his share, as to how much money his share was, I don't know. That's why I even said in my explanation and my response; I don't know***

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<sup>87</sup> Record p. 1111 ( 24 - 25); 1112 (1 - 2)

<sup>88</sup> Record p. 1125 ( 6 - 8)

<sup>89</sup> Record p. 1125 (24) - 1126 (1)

**anything about his money. I can't remember him saying that he wants R5 000, 00.**"<sup>90</sup>

113 When confronted with his statement (exhibit P9) he testified that **"Monde, according to what is written here, maybe I can't recall that very well, he wanted R5 000, 00, if that is the case. My response to him was the young men are going to pay you."**<sup>91</sup>

114 Whereupon the defence put it to Tongo **"So you remember that now that he wanted R5 000, 00 and that you told him that the young men would be paying him, do I understand you correctly? --- That is correct, sir. Why didn't you tell the police that in your statement? --- Maybe that was just forgotten, but it is written down here, sir. That was forgotten, but you did not forget twice to relate the fact that Monde wanted R5 000, 00 and that the hit man should only be paid R10 000, 00, is that correct? --- I said everybody makes mistakes, as you also said that I'm Z H, but I'm Z R."**<sup>92</sup>

115 Tongo made it clear that he has forgotten and his concession that Mbolombo wanted R5000, 00 was based on the fact that he refreshed his memory from his statement. It is therefore incorrect to assert that it is firstly, contradictory evidence and secondly, that it is "insightful to see how quickly Tongo can change his version under the pressure of cross examination."

#### **AD PARAGRAPHS 60-65**

116 The defence submitted that the evidence of Mbolombo and Qwabe do not not support Tongo's evidence as to what had been discussed between them at the Protea Hotel.

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<sup>90</sup> Record p. 1129 (8 - 12)

<sup>91</sup> Record p. 1130 (24) - 1131 (2)

<sup>92</sup> Record p. 1131 (2 - 13)



117 The State will submit that there are differences in respect of the version of the events of the Friday as described by Mbolombo, Qwabe and Tongo.

118 In essence what all three (3) witnesses is *ad idem* about is that someone wanted a person killed and that the amount of R15 000 was going to be paid for the hit.

119 The discrepancies relate to whether Tongo told Mbolombo who had to be killed; whether details of the money were discussed with Qwabe during the first call and whether dollars were mentioned.

120 The witnesses testified that over a period of two days they were engaged in various conversations relating to the incident as is evident from the telephone records.

121 It would be unfair to expect the witnesses to remember every minute detail regarding every conversation they had over this period of time. Persons differ with regard to their powers of observation; attention to detail; strength of memory and facility of description.

122 We respectfully submit that it is therefore natural that discrepancies of this nature could occur between the testimonies of witnesses as a result of these differences.

#### **AD PARAGRAPHS 66-69**

123 The defence submits that there are two major irreconcilable differences in the evidence of Qwabe and Tongo regarding their telephonic contact on the Friday night:

- Qwabe testified that Mngene suggested that they be paid R15 000 and not Tongo.
- Qwabe testified that Tongo told him that there was a husband that wanted a wife to be killed.

124 Tongo and Mbolombo corroborated one another on the fact that the payment of R15 000 was offered by the person who wanted the person killed.

125 Tongo also told the police from the outset it was a person other than the wife of the accused by stating that in his affidavit that the **"person that had to be killed was a woman and that she was arriving later that evening"**.

126 This matter was widely publicized and received a lot of media. At the time when Mbolombo and Qwabe made their statements it was already publicly known that the deceased was the wife of the accused.

127 We have also made submissions at paragraph 81 *supra* regarding the improbabilities of Qwabe's version on this aspect

#### **AD PARAGRAPH 70**

128 The defence submits that there is a complete contradiction of Tongo's evidence in chief and cross examination. The defence submitted that in cross-examination Tongo stated that he had phoned the man Mbolombo had spoken to (Qwabe) later that evening. Qwabe agreed, meaning that he is prepared to kill the person for R15 000, 00, but he must also speak to another person.

129 The State will respectfully submit submit that the there isn't any contradiction.

130 The witness responded to a question regarding his knowledge of whether the **"person that was contacted, at the time when you left the hotel, did you have any indication as to whether this person was going to do the job or not?"** His response was that

there was some hope but that the person still has to contact another friend of his.<sup>93</sup>

131 During cross examination the question pertained to his discussion later that evening with Qwabe. His response then was that Qwabe agreed but that he is going to get in touch with another young man.<sup>94</sup> Tongo also indicated that the word 'promising' meant that that was an agreement that he will do the job for R15 000.<sup>95</sup>

### **AD PARAGRAPH 71**

132 The State will concede that Tongo only mentions that the accused arranged for the dollars to be exchanged the Friday night after he spoke to Monde at the Protea Collosseum Hotel.

### **AD PARAGRAPHS 72-79**

133 The defence submits that Tongo wanted to create the impression that the accused had to change Dollars into Rands to be able to pay the hit men and that he was anxious to do so.

134 The defence also submits that the video surveillance clearly shows that Tongo blatantly lied when he said the discussion how the job should be done happened on their arrival back at the Cape Grace Hotel from the money exchange.

135 The State will concede that Tongo appears to exaggerate the haste with which the accused wanted the transaction to be done. However, with regard to the second aspect, the State will submit that it is clear that Tongo has made a mistake since his affidavit (P9 paragraph 14)

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<sup>93</sup> Record p. 909 (9 - 14)

<sup>94</sup> Record p. 1138 (9 - 13)

<sup>95</sup> Record p. 1140 (8 - 11)

makes mention that this discussion took place while they were on their way to the hotel.

136 The State will submit that this is not a deliberate falsehood but understandable in light of the elapsed time period between the incident and Tongo's testimony in court.

137 The State will submit what remained consistent is that this discussion took place after the money exchange.

### **AD PARAGRAPHS 80-91**

138 The defence submitted that there are major contradictions in the evidence of Qwabe and Tongo regarding the meeting in Khayelitsha the Saturday afternoon.

139 It was submitted that the discrepancies relate to:

- Whether Qwabe and Mngene decided that the money must be left in the cubbyhole or was that a decision made between Tongo and the accused.
- How Mbolombo could have told the young men already the Friday what were expected of them.
- Why would Tongo allow the young men to abandon his vehicle possibly causing him more financial damage?
- Why he told the police Qwabe and Mngene didn't introduce themselves which contradicts his testimony in chief.

140 Tongo conceded that he might have made a mistake as to who wanted the money to be left in the cubbyhole. He reiterated that he could be confused and that at time of making his affidavit he was in a very critical state.

141 This aspect was however not taken further in cross examination. The testimony of Mbolombo was that he had subsequent discussions with

Qwabe that Friday evening and that he at least knew that a person had to be killed. Since this aspect was left open ended it cannot be assumed anything else except what was testified to.

142 Although Tongo referred to the 1<sup>st</sup> man and 2<sup>nd</sup> man in his affidavit, it is unfair to submit that Tongo deliberately brought the investigating officers under the impression that he did not know the names of Qwabe and Mngeni.

143 We submit that Tongo did not deliberately bring the investigating officers under the impression that he did not know the names of Qwabe and Mngeni since he told the police in his affidavit at paragraph 43 that on Monday the 22<sup>nd</sup> of November 2010 he appeared in court and was transported to court in vehicle with man he recognised as the man he referred to as the 1<sup>st</sup> man and also "H". He has since heard that he is Mziwamadoda QWABE @ Spra.

#### **AD PARAGRAPHS 92-111**

144 The defence submits that Tongo is clearly lying when he testified that it was his suggestion that they must go to the restaurant in Somerset as he knew that the accused would support him. Tongo also testified that they never discussed going to a restaurant in Somerset West. This was not discussed with the accused before the time and he had no knowledge of the reservation at 96 Winery.

145 Tongo is clearly mistaken since the objective facts show that the accused had booked a table at 96 Winery Road Restaurant in the Somerset West area for two (2) people at 21h30 furthermore, Tongo in his affidavit (P9) stated in paragraph 22 thereof that after he had picked the accused and the deceased up from the Cape Grace Hotel, the accused ***"instructed me to first drive around in town as he***

***wanted to see what the city looked like at night and then through to Somerset West where they planned to have dinner".***

Mbolombo also testified that Tongo had told him that he would be taking the couple to a restaurant in Somerset West where they would have something to eat for the evening.

146 The State will submit that this not a material discrepancy and can be attributed to an error.

147 With regard to the child locks, Tongo testified that he put the child locks on both rear doors since he didn't know where the business partner would sit.

148 This is not improbable and provides a plausible explanation for both child locks in light of the fact that he had to do this before the couple entered the vehicle.

149 The defence further submitted that Tongo drove to the agreed hi-jack place with the deceased and the accused in the car without the money being in the cubbyhole and without even establishing from the accused whether he had the money with him. The defence submitted that it is simply unbelievable that Tongo, knowing that Qwabe and Mngeni are dangerous people.

150 It is clear from the evidence that the conspiracy to commit this crime was done in a very amateurish manner. There were for example no detailed discussions regarding how and when the murder should take place. Tongo was continuously late and it appears that Qwabe was even unable to arrange proper transport.

151 It took two attempts to get the plan off the ground and there clearly was no checklist of what to do for the participants to tick off as they went along. Sadly, all of the participants were drawn by the lure of

money, including Tongo who expected his business to grow with the support of the Accused.

152 The State will therefore submit that even the problem with the money and its location is consistent with how this conspiracy unfolded.

153 The State will submit that the discrepancy between Qwabe and Tongo regarding whether "to let the matter stand over for another time" or not is a minor discrepancy. The fact is that Qwabe and Mngeni returned to Khayelitsha and only returned to Gugulethu subsequent to further discussions with Tongo and Mbolombo.

154 Similarly the State will submit that the discrepancy whether it was Mbolombo or Qwabe that told him that Somerset West was 'wet' is a minor discrepancy.

#### **AD PARAGRAPHS 112 -120**

155 The defence further submitted that Tongo's evidence was unreliable based on the following discrepancies:

- Tongo conceded that a mistake was made in his affidavit as he never told Lt Col Barkhuizen that the accused threatened to kill him. The accused only told him that he must remember that he (Tongo) was the one who is having the knowledge; and
- Tongo contradicted his evidence by testifying that the lady walked at the back of him and the accused whilst in his statement he said she was walking in front of them.

156 The State will submit that this discrepancy is a minor one. Tongo did not deviate from his evidence that the accused spoke to him and whether she walked in front or the back doesn't impact on his

credibility. It was even evident from the video surveillance of the surf side restaurant that the deceased walked a distance behind Tongo and the accused.

157 Tongo refused to comment on the conversation Mbolombo had with Qwabe about the thing that "must happen today".

158 The State will submit it is unfair to expect the witness to comment on a conversation between two other witnesses without a proper context to the conversation and based on an assumption that clearly Qwabe is being instructed that the hijacking must take place tonight.

159 Tongo conceded that the accused did not send him a text message while driving to Somerset West or from Somerset West regarding the money which was in an envelope in a pouch.

#### **AD PARAGRAPHS 121-123**

160 The State concedes that there is a discrepancy between the evidence in chief of Tongo and his affidavit (P9) regarding where he was seated after the hijacking.

#### **AD PARAGRAPHS 124-127**

161 The State will submit that the meeting with the accused on the terrace on Sunday morning is not mentioned in his affidavit (P9).

162 The State will however submit that the objective evidence of the meeting as well as Tongo's explanation of what transpired during this encounter is before Court.



### **AD PARAGRAPHS 128-145**

163 Regarding the meeting between Tongo and the accused on Tuesday, the 16<sup>th</sup> of November, the defence submits the following:

- That Tongo initially didn't tell the police about the R1000 and gift card he received from the accused as that would have flown in the face of his whole story about the conspiracy.
- That the CCTV footage shows that there was something inside the carrier bag Tongo had in his hand when he exited.
- That Tongo lied when he told the court that he didn't move his head when he exited the hotel.

164 The State submits that it is more probable that Tongo didn't fully disclose to the police about the money he received since it would solidify and increase his participation.

165 The State submits in light of the fact that the picture of the item is not very clear that there is nothing to else to gainsay the evidence of Tongo regarding the alleged card handed to him by the accused.

166 The State submits that it is not improbable that Tongo felt that he was a fool after counting the money and decidedly angry exited the hotel.

### **AD PARAGRAPH 146**

167 The State will submit that there is nothing improbable about the version of the events that Mbolombo described at Monwabisi Beach and his perceptions he formulated about the company Qwabe kept.

168 This perception was further solidified by the bullet Qwabe handed Mbolombo.

## **EVALUATION OF TONGO'S EVIDENCE**

169 The State submits that Tongo's evidence is not free from mistakes and there are certain contradictions and discrepancies in his evidence.

170 The State will however submit that these contradictions and discrepancies may flow from natural defects of observation; mistakes of memory and as Tongo testified his state of mind at the time, the possibility of elaboration and distortion of the facts perceived and the lapse of time between the incident and testimony.

171 The State will submit that Tongo despite vigorous cross examination over periods of seven days he never strayed from the crux of his evidence which was the conspiracy agreement between him and the accused and Qwabe, Mngene and Mbolombo.

## **GENERAL SUBMISSIONS**

### **The Accused's explanation for their presence in Gugulethu on 13 November 2010**

172 The state presented the evidence of Sgt Mellet, Warrant Officer Stephanus, captain Lutchman and Captain Hendrikse all of whom testified that the Accused explained their presence in Gugulethu on the evening of 13 November 2010, indicating that the deceased wanted to/insisted to see nightlife in the township.

173 On this construction it is clear that the Tongo did not take the detour into Gugulethu of his own accord. In fact, it was never put to Tongo that he drove into Gugulethu without any discussion with the Accused and the deceased.

174 The explanation provided by the Accused was exculpatory in nature, in respect of any suspicion being cast on Tongo's conduct.

175 This Honourable Court is asked to believe that it is completely fortuitous that the deceased asked to see the nightlife in the township at the very same time that Qwabe and Mngeni were lying in wait to murder her.

176 It is respectfully submitted that the Accused's statement to the police, exhibit 'N1' and Exhibit 'N2' provide corroboration for Tongo's evidence that the purpose of entering Gugulethu on the second occasion was for more sinister purposes than mere sight seeing.

#### **The Accused's version of events given to the Hindocha Family**

177 The State also presented evidence of a family meeting held on 22 November 2010 in which the Accused provided the Hindocha family and indeed his own with an explanation of the events leading to the deceased's death.

178 The recording of that meeting is exhibit 6 before Court and the transcript extract is **Exhibit 'S2.'**

179 On page 3 of **Exhibit 'S2'** the Accused told the family that when Tongo dropped them at the Cape Grace he took his number in case they were going to do anything, 'then he left and we went to check in.'<sup>96</sup>

180 The Accused does not mention the fact that he met with Tongo in the latter's vehicle and that they had a lengthy discussion. Neither does

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<sup>96</sup> Record p. 531 (4 - 16)

he disclose the contact that he had with Tongo that evening, namely the sms exchange as well as the 5 minute.<sup>97</sup>

181 In fact in response to a question from his brother the Accused denies having spoken to Tongo on the Friday evening.

**SEE: Exhibit 'S2'** page 5 (four paragraphs from the bottom)

'PREYEN: So this guy, you haven't spoken to him again that night?

SHRIEN: No uh, uh, Zola we'd uh, he left us when he dropped us at six and that was it. Yeah!'

182 Furthermore the Accused does not disclose the trip to the money exchange and in fact conceals it from the family when he states that his first contact with Tongo on the Saturday was around midday when he called Tongo to make arrangements for the Saturday evening.<sup>98</sup>

**SEE: Exhibit 'S2'** page 6

'Then when we got back from the walk in the afternoon at lunch time we said what are we going to do for dinner? So we got reception to book this 96 Winery Road. We asked them for a romantic restaurant and they had like a, the vegetarian menu was not great, but they game on the menu and they said it was old South African cottage style, so we booked that, that's when I called or texted Zola, but I can't remember whether I called him or texted him first to say come in the evening.'

AND ALSO **Exhibit 'S2'** at page 7:

'PREYEN: Sorry, you called him at what time?

SHRIEN: Around lunch time.

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<sup>97</sup> Exhibit S2, p.3 of 16 (last two sentences of the third paragraph)

<sup>98</sup> Exhibit S2

PREYEN: Okay, so the earliest that he knew that he was going to be used by you was lunch time?

SHRIEN: Yes, or just before lunch time. Yeah, must have been around midday, because that's when we first had breakfast, sat by the pool and then decided what we were going to do at night, it must have been twelve, one o'clock.'

183 The only version of what the Accused told the family is the content of Exhibit 'S2.' There is no other evidence before Court to explain the Accused's falsehoods, since what was put to the witnesses does not constitute evidence. The Accused's explanation has not been tested and does not constitute evidence before the Court.

### **CONCLUDING SUBMISSION**

184 In view of all of the submissions we respectfully submit that the Honourable Court dismiss the application for the Accused's discharge in terms of section 174.

  
A MOPP

COUNSEL FOR THE STATE

  
S RILEY

COUNSEL FOR THE STATE

21 November 2014

## List of Authorities

1. R v Parish [1968] SCR 466
2. S v Agliotti 2011 (2) SACR 437 (GSJ)
3. S v Avon Bottle Store (Pty) Ltd and Others 1963 (2) SA 389 (A)
4. S v Booysen and Andere 2003 JDR 0546 (C)
5. S v Bruiners en `n Ander 1998 (2) SACR 432 (SE)
6. S v Francis 1991(1) SACR 198 (A)
7. S v Mpetla and Others 1983 (4) SA 262
8. S v Lubaxa 2001 (2) SACR 703 (SCA)
9. S v Masondo: in re S v Mtembu and Others 2011 (2) SACR 286 (GSJ)
10. S v Mahlabathi and Another 1968 (2) SA 48 (A)
11. Mafaladiso en andere v S [2002] 4 All SA 74 (HHA)
12. S v Ndlangamandla and Another 1999 (1) SACR 391 (WLD)
13. S v Ncanana 1948 (4) SA 399 (AD)
14. S v Nzama and another 2008 3 ALL SA 191 (N)
15. S v Oosthuizen 1982 (3) SA 571 (T)
16. Olawale versus the State [2010]1 ALL SA 451 SCA
17. S v Swartz and Another 2001 (1) SACR 334 (W)
18. S v Van Vreden 1969 2 SA 524 (N)
19. S v Walters [2001] 4 All SA 98 (Tk)