

ON 20 APRIL 2011

JUDGMENT

McLAREN J The accused was charged with kidnapping count 1, robbery with aggravating circumstances (count 2) and murder (count 3).

Count 1 relates to the alleged kidnapping of Gcobisa Yako at Izingolweni on 15 March 2003. Throughout the trial this lady was referred to as Gcobisa and I will so refer to her in this judgment.

Count 2 relates to the alleged robbing of Gcobisa on the date and at the place referred to in count 1 of a cellular telephone.

Count 3 relates to the alleged murder of Gcobisa on the said date and at the said place.

At all material times Mr Mcanyana appeared for the State. On 20 May 2009 the accused was represented by Mr Mvunu and he pleaded not guilty to all counts. The accused elected not to make any statement to elaborate on his pleas.

For reasons which are now irrelevant, the trial did not proceed on 20 May 2009, but was adjourned to 7 October 2009 at the request of the accused, who was on bail throughout the trial.

On 7 October 2009 Mr Mvunu did not appear for the accused, because he was not well. Mr Ntshulana is the attorney who previously instructed Mr Mvunu. On 7 October 2009 Mr Ntshulana withdrew as the attorney representing the accused. At the request of the accused the trial was adjourned to 12 April 2010.

On 12 April 2010 and since then Mr Ntshulana appeared for the accused during the trial.

On 12 April 2010 Mr Mcanyana said, as he had done nearly a year earlier, i.e. on 20 May 2009, that the State's first witness is Leon Postman. This witness was at court on 12 April 2010, but "disappeared". During the course of the trial Mr Mcanyana made various unsuccessful attempts to secure the presence of Postman at court. Eventually the State closed its case without calling this witness.

The trial proceeded before me from 12 to 16 April 2010, when it was adjourned for the period 27 September 2010 to 8 October 2010, i.e. for the entire Court recess.

On 24 August 2010 Mr Ntshulana requested me to agree that the trial would only proceed for the first week inasmuch as he had been invited to attend a lawyers' conference in Canada. Mr Mcanyana had agreed to this request and so did I. On 27 September 2010 the trial did not proceed, because Mr Ntshulana was not well. The trial ran from 28 September 2010 to 1 October 2010 and it was then adjourned to continue during the Court recess from 17 to 21 January 2011.

On 21 January 2011 I reserved judgment after I had heard argument and adjourned the trial to 20 April 2011 (once again during court recess) for judgment. It should be abundantly clear that I have done my utmost to finalise this matter as expeditiously as possible.

This complex matter was further complicated by the fact that the trial ran in fits and starts over an extended period of time. I will hereinafter briefly explain (and only to the extent that it is relevant) how it came about that the accused only stood trial during April 2009 (when he first appeared before me) for offences which had allegedly been committed 6 years earlier.

Mr C N Yako testified and his testimony on all material issues was unchallenged. He is the father of Gcobisa, who was employed at an educational college in Port Shepstone. Gcobisa had two children aged about 9 and 11 and was in charge of and lived at Yako's house in Umtentweni. The witness himself lived at Lusikisiki. Yako described Gcobisa as respectful, responsible and disciplined.

Yako last saw Gcobisa during the weekend which preceded Monday, 17 March 2003. Yako first became aware of Gcobisa's disappearance on 17 March 2003. On that day he and other persons went to the house of the accused, looking for Gcobisa. There information was obtained which lead the group of people to the place of employment of the accused, whom they met on the road. Yako introduced himself to the accused. I asked Yako to tell me about the discussion which he had with the accused. It is clearly implicit from his evidence that Yako must have enquired about the present whereabouts of Gcobisa. This is his testimony:

"His response was 'I do not know where that person is'.

His further response was that 'I last saw her last year, which is 2002'".

Just before cross-examination of Yako started he reiterated that the accused had said to him that he (the accused) had last seen Gcobisa the previous year. This evidence was not challenged in any manner whatsoever.

In **S v BOESAK** 2000 (1) SACR 633 (A) para 50 it was stated:

"It is clear law that a cross-examiner should put his defence on each and every aspect which he wishes to

place in issue, explicitly and unambiguously to the witness implicating his client”.

It is the duty of defence counsel to put the version of the accused to the State witnesses – **S v VAN AS** 1991 (2) SACR 74 (W) 108 C. See further the case referred to in **S v BOESAK**, supra, para 51.

Yako also testified about his visit to Sthombe Ngcobo in Westville Prison, where he was taken by the police at his request. Yako gave unchallenged evidence that this person (who was usually referred to as “Sthombe” during the trial) appeared to be happy to see Yako and Sthombe said to Yako that he (Sthombe) was “excited” and that it had been “a long time that I wanted to see you”. Of course Sthombe’s statements do not prove his alleged frame of mind.

Under cross-examination it was suggested to Yako (with which he agreed) that: “You went to Sthombe because you heard by (sic) the police that he’s been using your daughter’s cellphone”. My impression of Yako is that he is an honest and reliable witness, whose evidence was hardly challenged. Indeed, as I have indicated, very important aspects of his testimony were completely unchallenged.

During the course of the trial it became common cause that Exhibit 2 is the cellular telephone which Gcobisa used at about the time of her disappearance. In my view the State in any event proved this fact, about which there was never any dispute. I do not intent examining in the finest detail all the elements which proves this fact, because I think it will amount to a waste of time and energy.

By way of an example to demonstrate the fact that the use by

Gcobisa of Exhibit 2 at the time of her disappearance was never in dispute, I refer to the proposition which Mr Ntshulana put to Yako regarding the use of Gcobisa's cellular telephone. In the context of all the evidence it is clear beyond any doubt that Mr Ntshulana was referring to Exhibit 2 when he said "your daughter's cellphone". Nothing can possibly be plainer than this.

Goodman Ngcobo testified. He is Sthombe and I will so refer to him. Sthombe said that he had known the accused for a long time and that the accused used to repair vehicles at the home of Sthombe's brother. This brother is Sipho Ngcobo, who is most often refer to as Sipho during the trial. I will also refer to him as Sipho.

Sthombe gave direct and unchallenged evidence that he did not have any problem with the accused. The only possible relevance of that evidence can be to convey that the evidence of Sthombe, which implicates the accused, is not falsely fabricated as a result of the animosity between them. Sthombe said that he was arrested by the police in connection with another matter. According to him this happened on 6 October 2003. At that time the accused was also incarcerated. The police spoke to Sthombe and to the accused. When this happened Sthombe and the accused were spoken to separately. The next day the police spoke to him "in relation to Gcobisa Yako's matter".

Under cross-examination it was put to Sthombe that Captain Goldstone "told you that the cellphone you were using belongs to the deceased". The witness agreed. I accept that Mr Ntshulana incorrectly referred to Gcobisa as "the deceased". Sthombe said that Goldstone wanted to know how that cellular telephone had come into Sthombe's

possession. He told Goldstone that he had obtained the cellular telephone from Sipho. He said that he had borrowed the cellular telephone from Sipho, because on that day he was to take his own cellular telephone for repairs at Port Shepstone. Sthombe said that after this discussion with Goldstone he was taken back to the cells and there he informed the accused "that there was something like this". He explained further and said that he told the accused what he (Sthombe) and Goldstone had discussed. There is nothing improbable about this evidence.

It was common cause that the accused worked for Sipho and it is understandable that Sthombe (who had just been questioned by Goldstone about a matter for which he had not been arrested) would talk to the accused about it. Sthombe said that the response of the accused was that he had told Sipho to destroy the cellular telephone. According to Sthombe the accused then said that he had taken the cellular telephone from Gcobisa's "bottom" or "private parts" after he had shot and killed her. The accused continued and said that it had not been his intention to shoot Gcobisa, he had the firearm in a table drawer, Gcobisa opened the drawer and took out the firearm, they grappled over the firearm and "after shooting her" the accused put Gcobisa's body into a plastic bag, which was then put into a vehicle. Sthombe said that in the discussion with the accused "information did not come out as to who was with him at the time".

Under cross-examination Sthombe confirmed that he is in prison serving a life imprisonment and that he has other convictions as well. He was aware that the accused "was having this case at a regional court in Port Shepstone in 2003/2004". He was asked to explain why he did not

volunteer the relevant information to the police at that time. Sthombe said that he did not do so, because of what the police had done to him. There was a lot of mistrust and there was some kind of conspiracy against him by the police.

He then related the circumstances under which he had been arrested. He said that the police did not give him bail and that he “no longer had any trust in them”. He later said, referring to 2003, that “there was no co-operation or agreement between myself and the police at the time”. Sthombe denied that the police had made any offer of any kind to him.

Sthombe testified that he had informed Sipho that his (Sthombe) cellular telephone had a problem, after which Sipho gave him the cellular phone (it was common cause that this is Exhibit 2) and said it must be returned the next day, because it did not belong to Sipho.

Sthombe was also cross-examined about why in 2007 he made the disclosure to Yako about his 2003 discussion with the accused. He said this:

- “1. That if Yako did not come to see him, he (Sthombe) ‘would not have been associated with the Court like it is today’. In brief he would not have testified if Yako had not come to see him. He later said so expressly.
2. He carried on, referring to Yako, ‘when he came to me I got touched, because I’m also a parent myself’.
3. When Sthombe was questioned about the possibility that Yako may have offered him something to testify, he said: ‘I was seeing him for the first time, in actual fact

he never even promised me a thing. He just cried in front of me, after which I did the same thing and I told him the truth”.

All I say at this stage is that after more than 20 years on the bench, I know when a piece of evidence has that distinct and unmistakable ring of truth about it. This piece of evidence is not only highly probable, it has the reassuring ring of truth about it.

Sthombe was questioned whether the accused had said other things to him during their discussion. Sthombe said that the accused told him that the father of the accused or a senior family member had come to the accused and had said that the accused “must state exactly what his problem is”. And that the accused had told Sthombe that he (the accused) “eventually failed to divulge the information until his father went home”. The accused also said that he went to see a traditional healer by the name of Dlamini at Harding and that he had “dumped the body near Umzumbe next to the railway line”.

It seems to me that Sthombe furnished a considerable amount of detail in his evidence about what the accused had allegedly said to him. The statement by Sthombe to the police dated 5 October 2007 was then handed in as Exhibit C.

In order to properly follow the tenor of the cross-examination and to properly evaluate the cogency and consistency, or otherwise, of Sthombe’s evidence, I quote the so-called “body” of the statement, i.e. paragraphs 1 to 23 thereof as follows:

“1.

I, being of the above given particulars, submit this statement voluntarily to the effect that I know about the death of the girlfriend of Bafana Mthembu, whose name was Gcobisa Yako.

2.

It was on 2003-10-06 when I was arrested for this case of murder, for which I am now serving the life sentence.

3.

It was on the above said date when I met with Bafana Mthembu, who was also arrested on a charge of murder regarding his girlfriend by the name of Gcobisa Yako, who went missing. I thereafter happened to be in the same cell with Bafana Mthembu at Port Shepstone.

4.

Whilst I was in the same cell with Bafana Mthembu at Port Shepstone the police officials of which I can remember their names as Mr Crouse and Mr Goldstone from Murder and Robbery, came to the same cells in which both Bafana Mthembu and I were. It was on that day in question when I was taken out by the two said police officials. They took me to their offices which were situated at Shelly Beach in Port Shepstone.

5.

On arrival at Shelly Beach I was then informed that my SIM card of my cellphone had been used in the phone or cellphone of the girlfriend of Bafana Mthembu and that the same girlfriend of Bafana Mthembu was missing and suspected to have been killed.

6.

It was at that stage when I clearly explained as to how I happened to possess that cellphone. I told the police that my cellphone was not in working order, I took it for repairs at Port Shepstone. I further informed the police that I told the brother of mine by the name of Sipho Ngcobo that I did not have the cellphone and then he gave me the one that was suspected to be of the missing person. I was not aware at all about the missing person. Sipho Ngcobo only told me to bring the cellphone back on the following day and I thought that it was his.

7.

On the same day the same police officials brought me back to Port Shepstone in the cell in which Bafana Mthembu was. It was at that stage when I directly approached Bafana Mthembu asking him about what happened to his girlfriend. I further told Bafana Mthembu that I was told by the police that his girlfriend

is missing and suspected to have been murdered.

8.

Bafana Mthembu then informed me that the same cellphone that I was questioned about by the police was actually belonging to his girlfriend, who was accidentally shot at inside the house of which his intention was to kill her somewhere else not in the house.

9.

Bafana Mthembu further told me that he gave the cellphone to my brother by the name of Sipho Ngcobo and told him to destroy it. It was therefore clear to me that the cellphone was to be destroyed, because it was an exhibit.

10.

According to Bafana Mthembu the firearm, a 9 mm. pistol, was in the drawer of the cupboard in the bedroom. The same firearm was belonging to Sipho Ngcobo. He did not tell me as to when he got it from Sipho Ngcobo and the reason for keeping it in his room.

11.

He, Bafana Mthembu, further told me that his girlfriend (the deceased) pulled the drawer, saw the firearm and it was at that stage when the struggle started as he was trying to take the firearm from the deceased and the

gunshot went off and the bullet struck the victim on the head.

12.

The deceased fell down and it was at that stage when he (Bafana) took the cellphone from under the panty of the girlfriend and took it to Sipho Ngcobo. It was the same cellphone that was given to me by Sipho Ngcobo after having informed him that my cellphone was not in a working order and that it was at the repairs. The same cellphone did not have the Sim-card, therefore I used my Sim-card.

16.

As I was told by Sipho Ngcobo, I returned with the same cellphone back to his house on the following morning. Unfortunately that morning both Sipho Ngcobo and his wife were not present. I therefore continued using the cellphone for a few days.

17.

If I can remember well it was on the 20th day of March 2003 when I collected my own cellphone from the repairs in Port Shepstone. I again went to Sipho Ngcobo's house returning his cellphone, the make of which was a Nokia and which I kept with me as from the 16th day of March 2003 to the said 20th day of March 2003. What I cannot remember exactly is the exact

person as to who I handed the phone over on the day in question. Thereafter I continued using my own phone.

18.

According to his explanation Bafana Mthembu told me the deceased fell down inside the room. He further said that there was pool of blood on the carpet which he cleaned.

19.

Thereafter according to Bafana Mthembu he looked for a black plastic bag, which he found and put the deceased body therein. He further said that he pick up the body and loaded it in his minibus (taxi). Thereafter he conveyed the body from his house at Izingolweni to somewhere in South Port area where he dumped the body near the railway station.

20.

He, Bafana Mthembu, further said that he first drove to the opposite side of the railway station in South Port where he was disturbed by a certain person. He then turned to the direction of the railway station where he dumped the body in the bushes.

21.

Bafana Mthembu did not tell me as to who assisted him when the body was loaded in his taxi as well as when

he was dropping the body in South Port area.

22.

I am saying it without a doubt that Bafana Mthembu killed his girlfriend whose name was Gcobisa Yako. Bafana confessed to me and I believed that he trusted me because he is the best friend to my brother by the name of Sipho Ngcobo. I strongly believe that (my brother) Sipho Ngcobo, has the knowledge about the death of Gcobisa Yako, the reason being that Sipho Ngcobo kept the cellphone of the deceased, which he was told to destroy, according to the explanation to me.

23.

Bafana Mthembu further said that he even went to Mr Dlamini, a traditional healer in the Harding area, to get the muthi to clean himself after this incidence. That is all I can say in this statement".

Sthombe was cross-examined about the alleged difference in the names of the place where the accused said he allegedly dumped Gcobisa's body, i.e. Umzumbe (in his testimony) and Southport (in Exhibit C). In my judgment Sthombe adequately and convincingly explained this difference, which according to him does not in fact even exist.

Sthombe was asked if it is correct that he asked the accused to come and visit him in gaol. He denied this and denied that the accused ever visited him while he was in custody. It is a convenient point to note that it was not put to Sthombe that (as the accused later speculated) he falsely

testified against the accused, because he (Sthombe) was upset when the accused ceased visiting Sthombe in prison.

Sthombe was cross-examined about the reason why the accused related the information to him. This is what he said:

“The reason for him to tell me this it’s because we were in one place sharing – at the police station sharing the place, eating together. Eating together and sharing the cells at the police station doing everything together”.

Sthombe was asked who were present when the accused divulged the information to him. He said only the two of them were present. It was then put to him by Mr Ntshulana:

“I believe in the cells there’s more than two people”.

This question is clearly aimed at demonstrating the improbability that the accused would convey the information to Sthombe in the presence and hearing of other strangers. Sthombe said:

“Well, we were talking to each other other people were far away”.

What was not put to Sthombe is the version of the accused namely that the alleged discussion could not have taken place because they were never detained together. This version should have been put to Sthombe.

See, in addition to the cases referred to above, **SMALL v SMITH** 1954 (3) SA 434 (SWA) 438 E to H. If this version had been put, Sthombe could at least have responded thereto. More importantly the State would have known what the real answer of the accused was to the alleged conversation, namely that it was physically impossible for it to have taken

place. The State could then have investigated the matter and cell records, occurrence books, vehicle registers and so on could have been examined to determine whether the State produced evidence to gainsay the alleged physical impossibility. This did not happen.

When it was put to Sthombe that he was lying about the alleged discussion with the accused, he gave a telling and probable reply:

“It’s the truth and naked truth, because if I did not ask about the cellphone in relation to what Goldstone was doing with me, he would not have come out clear and divulge all the information to me, because I knew nothing about the whole of this story”.

To the extent that the cross-examination of Sthombe elicited hearsay evidence and was argumentative, I do not intend dealing therewith.

Sthombe’s evidence is in all material respects in accordance with the contents of his statement, Exhibit C. There is in my judgment no single contradiction of any substance whatsoever in Sthombe’s evidence, nor is there any such contradiction between his evidence and his statement. He gave a very detailed account of what the accused had allegedly told him.

By way of testing the probabilities one might ask where did he get all the information from? Did he make it all up? Any suggestion that the statement was made to protect Sipho is unfounded. The very tenor of the statement militates against such a submission. Sthombe was very clearly not a suspect in the disappearance of Gcobisa at the time when he made his statement.

It cannot therefore be suggested that it is a self-serving document,

the purpose of which was to shift the blame. This is so, because, as far as Sthombe was concerned, there was no blame to shift, certainly not during October 2007. The reason advanced by Sthombe for making the statement, i.e. compassion with Yako, is probable.

Sthombe was subjected to a lengthy and wide-ranging cross-examination. He in fact grew in confidence as the cross-examination proceeded. His demeanour in the witness-box was impressive. Most importantly I detected no bias or animosity against the accused on his part. He was a firm, confident and convincing witness. There are, after all, only two possibilities namely the truth or falsity. Either the accused gave him the information as set out in Exhibit C and testified to by him in court. Or Sthombe falsely made up the contents of Exhibit C and falsely testified in court. If he falsely testified he obviously knew that he was deliberately lying by saying that the accused had admitted to being present when Gcobisa was shot and killed and that he had admitted to taking the cellular telephone from her.

The purpose of cross-examination is to expose such false evidence. I watched Sthombe closely to detect in his demeanour any indication or tell-tell sign that he was lying. I found none. As I said, he became more confident as his testimony carried on. The easy and unanswerable death blow to his testimony is the alleged physical impossibility of the accused having made the alleged statement to him. One wonders why that conclusive answer was not put to Sthombe. This failure is all the more telling, because the very issues of the occupation of cells and the number of occupants were raised in cross-examination.

Having considered all the evidence, including that of the accused, I state my conclusion now, but before doing so and lest it be thought that I reached that conclusion by or through a process of piecemeal reasoning and a fragmented evaluation of the evidence, let me say this. I considered all the evidence in the light of the probabilities before I reached my conclusion regarding the failure to put to Sthombe that the conversation between him and the accused could not have taken place. I cannot write the whole judgment at once, i.e. in the blink of an eye. I have to start at the beginning and end at the end. I have to work my way through the evidence and the probabilities and then at the end answer the question whether the State proved its case beyond a reasonable doubt. But long before I get to the end I can and do state my conclusion regarding the failure to put to Sthombe the real defence regarding the origin of Exhibit C. It is this – the accused only thought out, i.e. fabricated, that answer later on. Put differently, the real defence was deliberately not put to Sthombe and through him, to the State. Why was the real defence not put to them? The answer is simple – it was not done because it was a false afterthought.

One further matter should be considered in relation to the alleged discussion between Sthombe and the accused. It is clear from Exhibit C and from Sthombe's evidence that the accused did not admit to Sthombe that he had murdered Gcobisa in order to rob her of her cellphone. I will hereinafter examine the evidence more carefully, but point out that there is an exculpatory tone to the information which Sthombe says the accused gave to him. This makes it probable that the accused would confide in Sthombe.

Put differently, the evidence of Sthombe that the accused admitted to him that Gcobisa died under the circumstances set out in his evidence is more probable than an admission by the accused that he had deliberately killed Gcobisa in order to rob her of her cellular telephone. This difference is readily apparent to lawyers. It is unlikely that Sthombe knows the difference. If he wanted to falsely implicate the accused, it would have simpler for him to say that the accused had admitted to him that the accused had deliberately shot Gcobisa and had then robbed her of her cellular telephone.

Mr Sibonelo Ngcongo testified that a relationship started between him and Gcobisa during November 2002. He also testified about an incident during which he visited Gcobisa at Umtentweni on 3 December 2002. While he was sitting in his parked motor vehicle with his cousin and Gcobisa, the accused emerged from a kombi taxi which was parked in front of the gate at Gcobisa's house. The accused approached Ngcongo's vehicle, opened the door, pulled Gcobisa out of the vehicle and assaulted Gcobisa by slapping her. Ngcongo intervened and got involved in a fight with the accused. During this fight the accused pulled out a knife and Ngcongo then drew his firearm. Gcobisa told Ngcongo not to shoot the accused, who then ran away.

The witness said that he had last seen Gcobisa on 15 March 2003, i.e. on the day when, according to Ngcongo, she disappeared. He still had a relationship with Gcobisa at that time and spent the evening of 14 March 2003 at her house. On the morning of 15 March 2003 Ngcongo left Gcobisa's home for work, but they had arranged to meet later on that day.

Late on that Saturday, 15 March 2003, Ngcongco tried to telephone Gcobisa, but could not do so as her telephone was switched off. The next morning, i.e. on the Sunday he again unsuccessfully tried to phone Gcobisa.

The witness was at work. At around 10:00 when he had a tea break he went to Gcobisa's house, but she was not there. That afternoon he went back to Gcobisa's house, but she was not there. Having obtained information from the lady at the house, he telephoned Gcobisa's sisters, but they did not know where she was.

He then asked a friend, who knew where the accused stayed in the Izingolweni area, to accompany him to the police station at Izingolweni. They went there and Ngcongco reported the matter to the police. It was not expressly stated on which day this happened, but in the context of his evidence, I think it can safely be assumed that Ngcongco reported Gcobisa's disappearance to the police at Izingolweni on Sunday, 16 March 2003.

Ngcongco's evidence was unchallenged. In ***PEZZUTTO v DREYER & OTHERS*** 1992 (3) SA 379 (A) at 391 E - F Smalberger JA said:

"It is true that it does not follow from the fact that if a witness' evidence is uncontradicted it must be accepted. It may be so lacking in probability as to justify its rejection. But where a witness' evidence is uncontradicted, plausible and unchallenged in any major respect, there is no justification for submitting it to an unduly critical analysis".

Ngcongco's evidence proves that the accused behaved in an extremely aggressive manner and attacked and assaulted Gcobisa in the

presence of Ngcongco and his cousin. I could have summarised Ngcongco's evidence regarding the events on 15 and 16 March 2003 by simply saying that he reported Gcobisa's disappearance to the police. I chose not to do so, because I wanted to draw attention to the steps which Ngcongco took when he could not get hold of Gcobisa late on 15 March 2003. As will become apparent hereinafter Ngcongco's actions stand in stark contrast to the accused's lack of interest and concern when he was informed of Gcobisa's disappearance by Yako on 17 March 2003.

Ms Msindwana is a cousin of Gcobisa. On or about 24 January 2003 Gcobisa arrived at the house of the witness by prior arrangement. She was accompanied by the accused. Msindwana's husband and the accused entered the house. Msindwana was pulled back a bit by Gcobisa, who was trembling and who wanted to cry. She made a report to Msindwana regarding the purpose of their visit. Msindwana and Gcobisa entered the house and Msindwana in the presence of the accused raised the matter which Gcobisa had reported to her on the verandah, namely that the accused had threatened to shoot Gcobisa. Msindwana's husband asked the accused if this was true. The accused admitted this. Her husband then posed this question to the accused: "What you have done, do you like it?" Msindwana was asked how the accused responded to this question. She said he apologised and stated that he had done this in anger. The witness said that her husband, who works at the prison, advised Gcobisa "to open an OB", which her husband explained should be done at the police station. Msindwana was asked how Gcobisa responded to this suggestion. She said Gcobisa appeared scared and said: "Let us not go to the police. You

are placing him under arrest now". She said the accused did not respond to this suggestion.

According to the witness Gcobisa said that she was no longer in love with the accused and she "asked us to allow" the accused to leave. Before the accused left the house on his own, he indicated that he did not accept Gcobisa's decision not to continue with their relationship inasmuch as he said "he was still going to negotiate and resolve this matter with Gcobisa" and "that they were going to resolve the matter of their relationship".

Msindwana also testified about the events when she, Yako and others (who travelled in two motor vehicles) met the accused on 17 March 2003. She said that in response to Yako's question regarding the whereabouts of Gcobisa, the accused said: "It's a long time I saw her, I don't know where she is".

Under cross-examination the witness was referred to certain evidence, which she had given in the regional court. It was put to her that she had said that a few days after the meeting at her house she met Gcobisa in town and that she suggested to Gcobisa to have an occurrence book entry made at the police station. She said she could not remember that. Even if that is what she said in the regional court, it does not materially detract from her testimony. If she said that it may be that she tried to persuade Gcobisa to have such an entry made despite her previous decision not to have it done. Without the record of the regional court case one cannot even determine whether there is in fact a contradiction in her evidence.

That this is so, is amply demonstrated when Msindwana was cross-examined about another alleged contradiction. In her evidence before me

she said that Gcobisa refused to leave her house with the accused. It was put to her that in the regional court she said it had been agreed that the accused and Gcobisa would not leave together. I said it depends on how the question was framed and asked the witness whether, at the end of the meeting everybody accepted that the accused and Gcobisa must not leave the meeting together. The witness said: "I confirm what the Court is saying and Bafana agreed, because Gcobisa was afraid of leaving with him and then my husband suggested that we take her home". They in fact took Gcobisa home.

It was put to the witness that at the meeting which took place at her house there was no discussion about the allegation that the accused had pointed a firearm at Gcobisa. It was further put to her that: "They only came for you to resolve their relationship". The witness denied these suggestions. Implicit in these suggestions is the following:

1.

The witness fabricated her evidence that Gcobisa was trembling and wanted to cry.

2.

This evidence was fabricated in order to lend credence to or to support the fabricated evidence referred to in paragraph 3 below.

3.

The witness fabricated the evidence about the report which Gcobisa had made to her on the verandah.

4.

The witness fabricated the evidence referred to in paragraph 3, above, in order to lay a foundation for the false evidence referred to in paragraph 5, below.

5.

The witness fabricated the evidence that she raised the issue of the allegation that the accused had pointed a firearm at Gcobisa.

6.

The witness fabricated her evidence about the admission by the accused that he had pointed a firearm at Gcobisa.

7.

The witness fabricated her evidence about the question which her husband put to the accused after his admission. This question, namely whether the accused was proud of what he had done, is an appropriate one. The evidence of the witness on this point is very convincing. On the hypothesis of the falsity of her evidence, the witness was quite cunning in fabricating this convincing piece of evidence.

8.

The witness fabricated her evidence about the apology by the accused and his statement that he acted in anger.

9.

The witness cunningly fabricated her convincing evidence regarding the suggestion that the matter should be reported to the police.

10.

Then, having fabricated the evidence referred to in paragraph 9, above, the witness had to fabricate further evidence, in effect to knock down the skittle which she had put up. In other words, she had to fabricate evidence to explain why no report was in fact made to the police. The witness then fabricated her evidence about Gcobisa's alleged response to the alleged suggestion.

On this footing, this cunning witness is stupid enough to introduce false evidence about the suggested occurrence book entry, but then she is cunning enough to get around the problem which could be created by the non-existence of such an entry by fabricating Gcobisa's response to the suggestion. Of course, the witness and her husband had to conspire to tell the same story, i.e. to give the same false evidence.

It is one thing to simply submit that Msindwana lied about the discussion at the meeting. As I demonstrated for that submission to stand, it must overcome the 10 points I referred to and it is implicit in the submission that Msindwana and her husband conspired to give false evidence against the accused. All this is extremely unlikely.

It is not incumbent upon an accused person to explain why or to advance reasons why a State witness would give false evidence against that

accused. I know that very well. But I also know that, generally speaking, people do not lie for no reason at all. Generally speaking therefore a witness will not, for no reason at all, falsely implicate an accused. It therefore helps me as the trial Judge and trier of the facts to assess the evidence of a State witness who, according to the accused, is lying, if that accused can suggest a possible reason why the witness could or would lie.

No reason was suggested to Msindwana why she would give false evidence against the accused. I obviously bear in mind the fact that she is related to Gcobisa.

The evidence of Msindwana regarding the events on 17 March 2003, particularly the statement made by the accused regarding the whereabouts of Gcobisa, was not challenged at all.

In my assessment, Msindwana was a good witness and no serious criticism can be levelled against her as a witness, nor against the content of her testimony.

Mr Sandla is employed by the Department of Correctional Services and he is Msindwana's husband. In my view a fair and accurate summary of his evidence is that he corroborates the evidence of his wife in every material respect. Of course, that is what one would expect from co-conspirators to falsely implicate the accused. At least as far as the evidence-in-chief is concerned. This is so because the purpose of cross-examination is to expose such a conspiracy.

During cross-examination it will then become apparent that the witnesses agreed to tell the same false story. And because their evidence is false, cracks will start to appear in their false story. That is how it works, we

all know that. In Sandla's evidence no crack at all appeared. He was an impressive and patently truthful witness.

I only draw attention to a few aspects of his evidence which, as I have said, corroborates the evidence of Msindwana in all material respects. He said that the complaint by Gcobisa was that the accused had pointed a firearm at her head, that Gcobisa was not happy about the treatment which she received at the homestead of the accused at Izingolweni, that the accused was not keen to accept the fact that Gcobisa was interested in terminating their relationship and that the accused promised never again to point a firearm at Gcobisa.

Regarding the events when the group of people went to Izingolweni to look for Gcobisa at the house of the accused, he also gave unchallenged evidence that the accused said: "It's the long time that I last saw her, I don't know where she is".

Under cross-examination the witness agreed that even after the meeting at his house the relationship between Gcobisa and the accused continued. Sandla further stated that when he saw the accused in March 2003, the accused did not ask from him or from Yako any information about Gcobisa's disappearance. This evidence was not challenged and, as will be seen hereinafter, such became common cause, also on the strength of the evidence of the accused. Sandla was asked if the accused offered any assistance to search for Gcobisa and he said: "I can only say he accompanied us when we went to the police station to report".

The next witness was Luyolo Yako, the brother of Gcobisa. Not to confuse this witness with his father, I will refer to him as Luyolo. This

witness testified principally about two matters. The first is an incident which occurred at the house where he was living with Gcobisa. The second is an incident which happened at his place of employment, which was the same place where Gcobisa was employed. According to the witness the first incident occurred during February 2003 and the second incident happened a week later. Luyolo determined the date as being February 2003 because he left for Pretoria to take up a position on 3 March 2003. Furthermore, he determined the date as being February 2003 because that was the last time he saw Gcobisa alive.

The first incident appeared to me to be similar to the incident about which Ngcongo testified, i.e. the one at Gcobisa's house on 3 December 2002. Luyolo was absolutely adamant that the incidents which he testified about occurred during February 2003. Luyolo, however, only made his statement to the police on 18 July 2004.

In order to clarify the matter I recalled Ngcongo, who again testified on 15 April 2010. Ngcongo said that there was no time during February 2003 when his motor vehicle and a kombi were both parked at Gcobisa's home at the same time. He suggested that Luyolo was confused with the dates.

During the course of argument Mr Mcanyana submitted that two incidents had occurred. Mr Ntshulana submitted that the fact of the incident involving Ngcongo is not in dispute, that there was only one such incident, that Luyolo and Ngcongo testified about the same incident and that Ngcongo's evidence about the date, i.e. 3 December 2002, should be accepted.

I considered the evidence very carefully in the light of the probabilities and I also had regard to the demeanour of the two witnesses. I am in agreement with Mr Ntshulana's submissions. This does not involve an adverse credibility finding against Luyolo. Far from it. In my view he was simply mistaken about the date of the first incident.

It is improbable that two very similar incidents occurred and, most importantly, the evidence of Ngcongco, when he was recalled, strongly militates against the second incident in February 2003. The evidence of Ngcongco regarding the incident of 3 December 2002 was unchallenged. The evidence of Luyolo regarding the first incident corroborates the evidence of Ngcongco that the accused assaulted Gcobisa on that day. I therefore do not intend investigating Luyolo's evidence about that incident.

Luyolo said that he saw the accused about a week after the accused had assaulted Gcobisa. On that day the accused wanted to speak to Gcobisa, but she refused to speak to him and went into the offices of her employer. Luyolo said that the accused apologised for "his assault on Gcobisa as it happened the other day". This evidence is probable. Luyolo said that the accused stated that: "He had a problem with Gcobisa and her boyfriend", i.e. Ngcongco. This evidence is probable. Luyolo also testified that the accused said that he is: "Finding it difficult to accept that his relationship with Gcobisa had terminated".

It is not necessary for me to now investigate if the relationship between Gcobisa and the accused was ever terminated. And, if so, when that happened and whether it was a final end of the relationship. Luyolo gave unchallenged evidence that, at the time of her disappearance, Gcobisa

“had just started a relationship with” Ngcongo. Ngcongo himself gave unchallenged evidence that he got to know Gcobisa during 2002 and that by 3 December 2002 he already had a relationship with Gcobisa.

Msindwana gave unchallenged evidence that the meeting at her house occurred on 24 January 2003. Under all these circumstances, it is not improbable that the accused would have said to Luyolo, particularly after Gcobisa had refused to speak to the accused, that he found it difficult to accept that his relationship with Gcobisa had ended. Luyolo’s evidence that the accused had said this, was not challenged.

The question is not whether the relationship between the accused and Gcobisa had been finally terminated. The question is also not whether that relationship continued after 24 January 2003 – as Sandla said. The question is whether the accused made to Luyolo the statements about the relationship which Luyolo said he made.

As I have indicated all those statements are probable. Luyolo testified about them in a clear and logical manner. Luyolo then said: “As we were talking, he also indicated, he said at some stage he decided that he shoots Gcobisa and shoots himself”.

The cross-examination of Luyolo on these statements was done by way of reference to his police statement (Exhibit D) of which the relevant part was read to him:

“Approximately a week later Gcobisa and myself were at Ceed College about to go into the premises when Bafana met us. Gcobisa refused to speak to him and went up the stairs. He spoke to me and first

apologised for hitting Gcobisa. He also said he was not happy with Gcobisa having another boyfriend. He also mentioned an incident where he had threatened to shoot her. This was news to me. He said he could not accept that it was over between them and that he had wanted to kill her and then himself”.

It was pointed out, quite correctly, to Luyolo that he had not testified about the incident in which the accused had threatened to shoot Gcobisa. If the evidence of Msindwana and Sandla is accepted, such an incident is not improbable.

It was then put to Luyolo, clearly with reference to the above-quoted part of his statement:

“The accused will deny that he ever mentioned what I have read to you”.

Luyolo confirmed his testimony and said: “I stand by my statement”. Mr Ntshulana then cross-examined Luyolo about that part of his statement in which he said that the accused had threatened to shoot Gcobisa and then to commit suicide. It was put to Luyolo that he was lying and that: “The accused never told you those words”. Luyolo insisted that he was telling the truth.

When Luyolo was cross-examined about his failure to report the threat to “anybody”, he said that he went to Gcobisa to confirm whether the alleged incident (i.e. the occasion when the accused allegedly said that he had threatened to shoot Gcobisa) had taken place. Perhaps wisely, Luyolo was not asked what Gcobisa told him. Luyolo also said he discussed the

matter with his other two sisters.

In his argument Mr Ntshulana submitted that Luyolo lied when he said that the accused told him that the accused threatened to kill Gcobisa and then to commit suicide. Mr Ntshulana's main submission in this regard was that Luyolo's admitted failure to report the threat to the police and to his parents, is proof of the falsity of his evidence. It is, however, not quite so simple. It was put to Luyolo that everything which he said about the discussion between himself and the accused was false. This means that, according to the accused, Luyolo made up or fabricated the whole discussion.

I have demonstrated that some of the statements allegedly made to Luyolo by the accused, are probable. I am aware of the fact that Luyolo is the brother of Gcobisa and that he described their relationship as being very close. I also bear in mind that Luyolo made his statement more than a year after Gcobisa's disappearance. I do not lose sight of the fact that Luyolo did not report the threat to his parents or to the police.

If the evidence of Msindwana is to be accepted, we know that Gcobisa did not want to report to the police (not even by way of an occurrence book entry) the admitted pointing of a firearm by the accused. If Luyolo made up his evidence about the discussion which he had with the accused, he certainly fabricated that evidence in a good logical sequence. He also added the convincing touch to it of the jilted lover's threat of suicide. It has a ring of truth, which will then lend credence to the other fabricated parts thereof.

Luyolo is a young man, who testified in a confident, sincere and

relaxed manner.

The evidence of the next witness, Ms Nana Cele, was not challenged. She knew Gcobisa and the accused. On Saturday, 15 March 2003 she met Gcobisa in Port Shepstone at around 13h00 and they boarded a taxi to Izingolweni, where the witness as well as the accused stayed at the time. Cele alighted at her stop and Gcobisa proceeded with the taxi, as she “was supposed to do”.

On Monday, 17 March 2003, Cele received information that Gcobisa had disappeared. It is not clear on exactly which date Cele telephoned the accused. From the information the accused gave her (i.e. that the Yako family, accompanied by the police, had been to see him) it does appear that it was after the discussion on 17 March 2003 between Yako and the accused, about which Yako, Msindwana and Sandla testified. Cele asked the accused where Gcobisa was. He said: “I do not know where Gcobisa was”. He then gave the information to which I referred above. Cele continued: “He also added that he did not see her on that day”.

In the context of her evidence it seems to me to be quite clear that the reference by the witness to “that day” cannot be a reference to any day other than the day on which Gcobisa disappeared, i.e. 15 March 2003.

Ms Silangwe was the next State witness. She is the neighbour of the accused and she knew Gcobisa. On a certain day the accused came to her house and asked her to prepare lunch for him. She observed Gcobisa alight from a taxi and she then took a route which led to the Ngcobo home, where Gcobisa stopped as if she was communicating with somebody. From that point Gcobisa was coming in the direction of Silangwe's house.

Silangwe said to the accused: "Here is Gcobisa". The accused responded by saying: "I do not want her to see me". Gcobisa did not come to the Silangwe house, but went to and arrived at the house of the accused. Silangwe did not see Gcobisa later that day and indeed that was the last time that Silangwe saw Gcobisa.

Silangwe said that the accused then stood up "and went back to the Ngcobos where he was repairing vehicles". Thereafter she saw the accused go to his house. The witness was asked if she could say "what the year, month and date was" and she said she could only remember it was 2003. She said she could remember that she prepared food for the accused on a Saturday.

The witness was subjected to a lengthy cross-examination by Mr Ntshulana. In my view she was at all times relaxed and sure of herself. I did not detect any bias on her part. Once it was suggested to her that she had been told by the police and/or by somebody else what to say, I watched her very carefully to observe any sign or indication of animosity or that she had been "schooled" to give certain evidence. The witness was firm and convincing when she testified about her observations.

Leaving aside for the moment the day and date about which she testified, I am satisfied that there are only two possibilities. These are that she in fact observed and heard the events and statements about which she testified or that she fabricated her evidence. In other words, she could not be mistaken in her observations. She, for instance, quite firmly rejected the suggestion that she may have confused Gcobisa with somebody else. She said she had a good view of what was happening in the immediate vicinity of

her house and she was quite firm when it was put to her that a person, Thandazile Faith Zindela, who did not testify, had made a statement to the police that, after Gcobisa had alighted from the taxi in Izingolweni, that person observed Gcobisa entering a private vehicle in which there was a person Philile Mavundla. The witness said: "Gcobisa was never taken by anybody. That is not correct".

The main thrust of the attack on Silangwe's testimony was then that she had fabricated her evidence. It was put to her that: "The accused will also tell this Court that most of the things you have stated in this court you were told by the police". The witness denied this suggestion. The witness only made her statement to the police (Exhibit E) on 17 September 2007. In her statement the witness said that the events about which she testified happened on a Friday or a Saturday. In her evidence she said the events occurred on a Saturday. And she said that she was now sure about the day. She gave two reasons why she was now sure of the day. Firstly, her boyfriend at the time attended Varsity College on a Saturday. Secondly, she herself attended school on weekdays and on this day she did not attend school. These two reasons seem to me to be quite cogent.

She was asked why she did not remember the day at the time when she made the statement. Her reply does not make sense. She said: "It's because it's quite some time that this incident took place". Precisely. A far more likely explanation is that, at the time when she made her statement, the witness knew that the said events took place on a Friday or Saturday. At that time she was probably not required to be any more precise about the day of the week. Her statement refers to the "early months of the year

2003” and specifically records that she does not remember the month. In her evidence she also said that she could not remember the month.

But by reference to the unchallenged evidence of the other witnesses, we know that Gcobisa disappeared on Saturday, 15 March 2003. With reference to the unchallenged evidence of Silangwe one can also determine the date and the month to which she refers. This conclusion follows from the following unchallenged evidence of the witness:

Silangwe said she heard about Gcobisa’s disappearance on the Monday or the Tuesday following the Saturday on which she had prepared food for the accused. In that same week she and her sister confronted the accused and she asked him if he knew Gcobisa’s whereabouts. She said the accused did not know where Gcobisa was. This unchallenged evidence affords some corroboration for her evidence regarding the events on the day when she prepared food for the accused.

She said about five minutes after the accused had gone to the Ngcobo’s property she saw him going to his own house. Silangwe had seen Gcobisa going to this house after the accused had told Silangwe that he does not want Gcobisa to see him. A few days later it is reported that Gcobisa disappeared. This explains why she went to ask the accused about Gcobisa’s disappearance.

It was put to Silangwe that the accused would deny that he was at her home on the Saturday she spoke about. So, the accused knows very well about which Saturday the witness testified and his version is that he was not at her house. It was suggested to Silangwe that she may be confusing it with another day. The witness confidently denied this untenable suggestion,

which is irreconcilable with the other propositions which were put to the witness, namely that the police and/or somebody else had told her what to say. But why would the police and/or somebody else tell her to say that, when she alerted the accused to Gcobisa's approach or presence, he said that he does not want her to see him? It is such an unusual statement. Perhaps the person who told Silangwe what to say, cunningly introduced this piece of evidence to give her evidence a ring of truth. This is unlikely.

I evaluated her evidence in the light of all the evidence and in the light of the probabilities. She was a good witness. She was very clear on the facts that Gcobisa went to the house of the accused, that the accused did not want Gcobisa to see him and shortly thereafter the accused also came to his house. This happened on the Saturday before she heard of Gcobisa's disappearance on the Monday or the Tuesday. Her evidence is clear and convincing.

Before I refer to the evidence of the three State witnesses who testified regarding the various cellular telephone records, I should point out that it was common cause that the place where the accused lived and worked during March 2003, is called Ezingolweni or Ezingoleni. I think most of the lay witnesses referred to the place at Ezingolweni, but on Exhibit B.1 there is a name Ezinqoleni - it is the same place. Sometimes it is also spelt Ezinqoleni - for instance in Exhibit B.2. It may facilitate an understanding of the evidence of the said three witnesses if I attach to this judgment a copy of Exhibit B.1.

Attention is drawn to the positions of the areas marked Ezingoleni and Harding. I do not consider it necessary to examine all the technical

evidence of these three witnesses in minute detail. I say so because much of this evidence was not in dispute and because the import of the evidence is such, that the position from which a particular cellular telephone call was made, cannot be accurately pinpointed. Similarly, the position at which a particular telephone call was received, cannot be accurately pinpointed. This will all become clearer in my analysis of the relevant evidence.

During the course of the trial it became apparent that the accused relied on an alibi, in the sense that he claimed to have been in the Harding area on 15 March 2003, being the day on which Gcobisa disappeared. The State relied on the evidence of the said three witnesses in an attempt to disprove this alibi. The main thrust of the cross-examination was aimed at establishing that the said positions cannot be accurately pinpointed. After I carefully considered all the relevant evidence, I came to the conclusion that the said positions cannot be precisely determined. As will become apparent hereinafter, that conclusion does not even remotely suggest that the evidence of these three witnesses can be ignored.

Ms Heynecke is employed by Vodacom South Africa as a forensic liaison manager. She was requested by the Director of Public Prosecutions for information relating to certain cellular telephone numbers, including those of Sipho Ngcobo (0824379861) and the accused (0725769196). The information was requested for the period 12 March 2003 to 6 June 2003. As a result of this request she compiled Exhibit B. I should point out the following, lest there is any confusion. I marked the relevant Exhibit B1, B2 and B3. Exhibit B1 is the so-called Google document, i.e. the plan to which Heynecke referred, and which is attached hereto. Exhibit B3 is the

document which Heynecke prepared - it contains various sections marked A, B, C, D and E.

Exhibit B2 was prepared by Warrant Officer Reid, who is a data analyst in the South African Police Service. Captain Goldstone requested Reid to extract certain information from a "hard copy of a cellphone record, which is this Exhibit B3". The request was "to put it in an easier readable format for the Court". The request furthermore related only to the periods 12 to 17 March 2003 and 25 to 31 March 2003. Reid then set out the information in section A, B and C of Exhibit B3 in chronological and time sequence in a composite document, i.e. Exhibit B2. Exhibit B2 is certainly in a much "easier readable format" than sections A, B and C of Exhibit B3. This is particularly so if one wants to see, literally at a glance, in effect "who telephoned who" at any particular time. Of course, the cellular telephone records only show that a certain telephone call was made to or from a particular cellular telephone number and does not reflect the identity of the person who received or made the telephone call.

The accused did not say that on 15 March 2003 he did not have his cellular telephone with him or that he did not use it on that day or that he lent it to somebody or that it was stolen. On the contrary, he said that he used it early in the morning and the tenor of his evidence is that he was in possession of his cellular telephone on that day. But, as will be seen hereinafter, his version is that he spent most of the day in the Harding area working with Sipho.

I revert to the evidence of Heynecke. She referred to the four areas, which are marked in yellow on Exhibit B1, namely Umzimkulu, Harding, Port

Shepstone and Ezinqoleni. She said that the white circles or dots on Exhibit B1 represent the base transceiver stations, masts or towers along the N2 highway. Most often the witness referred to these “stations” as “base stations”. Each base station has a reference or identifying number. A telephone call to or from a cellular telephone is “serviced” or made possible by a specific base station. That base station will be the one which has the strongest signal at the time of the telephone call.

In her document (Exhibit B3) the base station which had the strongest signal and therefore serviced the particular telephone call, is identified with reference to the telephone number in the first column. And this is so, irrespective of whether the call was made to or received by a handset with that cellular telephone number. In other words, whether a call is made from or to a particular cellular telephone (the number of which is reflected in the said first column) the base station which serviced that call is the one with the strongest signal at that time.

According to Heynecke the maximum effective range of a base station is 34 kilometres. The ranges of base stations differ. By way of an example, Heynecke explained (with reference to the first line of section A of Exhibit B3) that it can be said that the person who made the telephone call (which was serviced by the Wilson’s Cutting Base Station) was closer to that base station than, for instance, to the Straalhoek Base Station, which is in the Umzimkulu area, shown near the top left of Exhibit B1. The area which is serviced by a particular base station, is called the “recipient area”. And it is called the recipient area regardless of whether the telephone call is made or received in that area.

Heynecke was cross-examined about the said Wilson's Cutting/Straalhoek example. This is what was put to her and how she replied:

"So if I understand it, it does not necessarily say closer, it's the station that serviced the call? --- Correct. One must be in the recipient's area of this Wilson's Cutting Base Station for the base station to service the call".

She later reiterated this evidence.

The statement in the last sentence of Heynecke's reply is in line with the general tenor of her evidence and was in my view not shown to be incorrect. It is also in keeping with her evidence that, all things being equal, the signal is stronger closer to a base station as opposed to further away from it. This unchallenged evidence also seems to explain why the signal from a base station has a maximum range. Such a maximum range can be a few hundred metres or it can be up to 34 kilometres.

Heynecke said that a base station can become congested, i.e. "it is too full to take your call". According to her a "neighbouring base station will not take your call, you will get a call, saying 'network busy'". She also said that base stations that are next to one another or close to one another can "overlap".

The witness pointed out that two base stations were omitted from Exhibit B1 and she indicated their positions. They are Newlands Farm and Norwood. I drew them in on Exhibit B1.

Referring to the cellular telephone of the accused the witness said

that on 15 March 2003:

“So it is only Maguntia Store, Wilson’s Cutting and Newlands Farm, only the three base stations that is that – that covers the whole day”.

In my view this evidence is correct. It is easy to see from the following lines or numbers in Exhibit B2 that this evidence is correct: 189, 198, 200, 201, 202, 210, 211, 214, 225, 231, 232, 237 and 246. The first call (line or number 200) was an incoming call, i.e. to the cellular telephone of the accused at 06h28 and the last one (line or number 246) was also an incoming call at 18h58. Altogether 13 calls were made and received by the accused on 15 March 2003. I indicate which base stations serviced them:

Wilson’s Cutting : 4, namely 189, 198, 200 and 237

Newlands Farm : 1, namely 201

Maguntia Store : 8, namely 202, 210, 211, 214, 225, 231, 232 and 246.

I should point out that for some reason all the relevant information in respect of item or number 210 is not reflected in Exhibit B2. The call time is reflected as 11:06:48. The particulars of the call can however be found in Exhibit B3, page 16 of 90, in section A and it was serviced by the Maguntia Store base station.

It is clear from Exhibit B1 that the three base stations (Wilson’s Cutting, Newlands Farm and Maguntia Store) are close to each other and that they are in the Ezingolweni area. Exhibit B 1 is visibility a photograph of a part of our country - I do not need an expert from Google to tell me that and this was clearly the tenor of Heynecke’s unchallenged evidence on this issue. My common sense tells me that the three base stations are close to

each other and that they are in the Ezingolweni area. I can see that these three base stations are not in the Harding area.

I have already referred to Reid's evidence and I do not consider it necessary to elaborate on it.

Mr Prinsloo is the technical manager in the law enforcement agency of Vodacom. As I understand his evidence, it contradicts that of Heynecke on the issue of a congested base station. I do not think much, if anything, turns on it. Prinsloo said that if, for instance, the Wilson's Cutting base station is congested, one of its direct neighbours will service that area. He said that the base stations have an operational range with a radius of about 30 kilometres, but that it depends on the configuration at the time.

Under cross-examination Prinsloo said in response to a suggestion that he "cannot say for sure" where the person, making a particular call, is:

"Yes, we cannot say where the person is at that point, because it covers an area, so we can't pinpoint to say that he was 10 or 20 kilometres from the tower. The call records usually show that area".

I then put the following question to him and he responded as follows:

"Can you say that if a telephone call is traced as having been serviced by, for instance, the Wilson's Cutting tower, can you say for instance, that the person who made the call must have been in the vicinity of Wilson's Cutting or can that not be said? --- That can be said, M'Lord".

He confirmed that all he could say "is that the person must have been in the

vicinity” of the Wilson’s Cutting base station.

If I look at Exhibit B1 and if I bear in mind Heynecke’s evidence and Prinsloo’s evidence, I say that not one of the three base stations (Wilson’s Cutting, Newlands Farm and Maguntia Store) is in the vicinity of Harding - they are all in the vicinity of Izingolweni.

The witness Ms G Mavimbela was not cross-examined. Exhibit 2 was given to her by Sipho Ngcobo during March 2003 and it was recovered from her by Captain Goldstone. Exhibit 2 is the cellular telephone (with number 083940890) which Gcobisa was using at the time of her disappearance. From Exhibit B2 (line or number 126) it will be seen that at 09:06:06 on 14 March 2003 a telephone call was made to Gcobisa’s number from the cellular telephone of the accused. This call lasted six seconds. I record that Captain Goldstone gave unchallenged evidence and it was common cause that, at some stage, all the relevant cellular telephone records, i.e. the “whole cellular telephone evidence file” was lost. The MTN records relating to Exhibit 2 could not be reconstructed, because “only Vodacom was able to retrieve the archive material”.

Captain Nala testified about events which occurred during 2003 when she was a sergeant. On 19 March 2003 the witness went to the home of the accused as a result of information which he got from one Nana. This can only be the witness Cele. The accused accompanied Nala to the police station where she interviewed him. I pointed out to Mr Mcanyana that he had not laid any basis for the admissibility of any statement by the accused. I was then under the mistaken impression that the accused was a suspect. The witness then made it very plain that at the house of the accused she

said that she was “one of those investigating the issue of the disappearance of Gcobisa”. She also said that the accused was not arrested.

It is clear from the rest of her evidence that no crime was being investigated at that time and that the accused was not a suspect. She said that the accused told her that he had not seen Gcobisa on 15 March 2003 and that he was in at Umzimkulu on that day. She gave probable evidence that she took a so-called “witness statement” from the accused.

After she obtained information regarding the bank account of Gcobisa, she went to the bank to see if any recent withdrawal had been made from the account. It was last used on 28 February 2003.

On 25 March 2003 Nala got in touch with the Missing Persons Bureau in Durban to request that Gcobisa’s disappearance should be broadcast. The prescribed form SAP 55 was completed with particulars relating to Gcobisa as well as a photograph of her. The witness personally saw it broadcast on television during April 2003.

On 17 April 2003 the witness made enquiries at the Harding Mortuary to find out if there was perhaps the body of an unidentified female. The response was negative. On 29 May 2003 the docket was transferred to Captain Goldstone. The witness said that the accused did not offer any assistance in connection with her investigation.

Under cross-examination she conceded that the accused gave the IMEI number of Gcobisa’s cellular telephone to the police and that this number “assisted in tracing the calls that were made to this phone”. It was put to her that “this phone” is Exhibit G2. The record clearly incorrect - this phone is Exhibit 2. It was common cause that Gcobisa was using this

cellular telephone at the time of her disappearance.

After the cross-examination of the witness had been completed, Mr Ntshulana referred to "other evidence" which Nala had obtained from the accused and which, so Mr Ntshulana said, I "correctly noted that it (was) inadmissible at this stage". I replied thus:

"No, that was at a time when I was under the impression that he may have been treated as a suspect. She gave evidence, she said she obtained the witness statement from him".

As it happened the written statement was not handed in as an exhibit. That was the end of the matter - for the time being, at least.

Goldstone then testified. He said that he took over the investigation on 2 June 2003 and that on 19 March 2003 (i.e. when Nala interviewed the accused) it was being dealt with as a "missing person case". Goldstone was given an instruction to continue with the investigation of the matter. He and Nala then proceeded to interview all the witnesses who Nala had already interviewed. After Goldstone had obtained certain information, he decided to again interview the accused. He and Nala did so at Ezingolweni Police Station. At that stage there was a suspicion that the accused may have been involved in the disappearance of Gcobisa.

Goldstone said that he consequently advised the accused of his constitutional rights as a suspect. Thereafter at the request of the accused Nala read back to the accused the written statement which he had made to her on 19 March 2003. This was done line by line and the accused confirmed the statement. Goldstone then enquired from the accused if he

would be prepared to answer questions put to him by Goldstone. The accused agreed and a statement was obtained from him, which he signed.

Goldstone continued with his investigation. He made extensive enquiries with all the Government mortuaries and in the area where Gcobisa had allegedly disappeared. A reward of R100 000,00 was offered in the newspapers and on posters both in English and in Zulu, which were distributed in the Ezingolweni area. The reward was for any information relating to the disappearance of Gcobisa. There was no response.

Goldstone said that as the investigation proceeded, it appeared to him that Gcobisa had probably been murdered. He opened a docket relating to this case “and the missing person’s file became part of this investigation”.

Goldstone said he followed up the alibi of the accused, namely that on 15 March 2003, he was not in the Ezingolweni area, but in the Harding area. Sipho Ngcobo (to whom I will again refer to as “Sipho”) gave the same version to Goldstone. According to Goldstone the cellular telephone records of the accused and Sipho reflected that on 15 March 2003 they were not in the Harding area, but in the Ezingolweni area. He also noted that on 15 March 2003 Sipho and the accused were in telephonic contact with each other. Goldstone said that “people that are together with one another don’t normally phone one another”. Indeed.

I draw attention to the fact that Exhibit B2 reveals that a number of calls which were made between the cellular telephones of the accused and Sipho on 15 March 2003. The first one (line or number 207) was made at 11:06:48 and the last one (line or number 238) was made at 15:05:32. All

the calls were serviced (in the sense explained by Heynecke) by the Wilson's Cutting base station or the Maguntia Store base station.

When Goldstone again spoke to Sipho he had already recovered Exhibit 2 from Mavimbela. Goldstone said that Sipho's alibi changed completely in the sense that he now said he had been in Ezingolweni where he had bought Exhibit 2 from one Makhanya on 15 March 2003.

Goldstone gave unchallenged evidence (which is borne out by section E in Exhibit B3) that the number of Exhibit 2, i.e. the cellular telephone which Gcobisa used with number 0836940890, changed on 16 March 2003, i.e. on the day after her disappearance. This evidence and schedule E is consistent with the Sthombe's evidence regarding the dates when he borrowed the cellular telephone from Sipho and when he returned it to Sipho.

Under cross-examination a statement was made by Mr Ntshulana to the effect that the Newlands Farm base station is "right next to Harding". That statement is incorrect. I have Exhibit B1 in my possession. Mr Mcanyana said the Newlands Farm base station is between Wilson's Cutting base station and the Maguntia Store base station. That statement is correct and I agreed with it. Mr Ntshulana may have confused the position of the Newlands Farm base station and the Norwood base station, which is next to Harding.

Goldstone said that the distance between Harding and Ezingolweni is between 50 and 60 kilometres. I, therefore, reiterate that, referring to Exhibit B1, the base stations at Wilson's Cutting, Newlands Farm and Maguntia Store are not in the vicinity of Harding, but in the vicinity of

Ezingoleni. Goldstone said that he accepted that Sipho was in the Harding area on the morning of 15 March 2003, but that he returned to Ezingolweni. Goldstone said, with reference to Sipho, “one can actually see it with his movement of his cellphone”.

Goldstone confirmed that the alibi of the accused and the one initially relied on by the accused and Sipho, was the same one, namely that they were both in Harding the whole day and that they only returned “later in the afternoon”.

Goldstone explained in a convincing manner that it was purely coincidental that he saw Sthombe’s cellular telephone records, which had been obtained by Captain Crouse, the investigating officer in another murder case for which Sthombe was detained in custody. He said “on seeing those records the number rang a bell”. After I had recalled him, Goldstone said that when he saw Sthombe’s cellular telephone records, he “immediately realised that that’s also the number of one of the users in my profile”, i.e. section E of Exhibit B3. He then confronted Sthombe, who gave him information which led to Sipho.

I also questioned Goldstone about the interview which he had with the accused. He confirmed that he informed the accused of his constitutional rights and that the accused gave him certain information. Goldstone consulted his notes and read out certain questions and answers. It is now clear that Goldstone read from Exhibit H, the admissibility of which was later the subject of a trial-within-a-trial. I made a ruling that the statement was admissible and will hereinafter furnish my reasons for that ruling.

I will then quote the relevant part of Exhibit H. At the moment I only refer to Goldstone's evidence that the accused conveyed to him that, at some stage, the accused was in possession of Exhibit 2. Goldstone said this information was consistent with section E of Exhibit B3.

During the course of Goldstone's cross-examination Mr Ntshulana put to him that the accused would say that, during the course of the investigation he "was harassed severely" by the police when they came to interview him and when they visited his house. Goldstone denied that he harassed the accused. I said that this was a collateral issue and that Goldstone's answer was final.

Then he was questioned about a lie detector test which the accused took. I then stated:

"I can tell everybody now that evidence has been given about other cases, other charges. We are dealing with this case only. We are not investigating the admissibility of statements. We are not dealing with a trial-within-a-trial. We are not dealing with police assaults or harassments. We're dealing with this case only".

I referred Goldstone to the questions put to and answers given by the accused and then said that in order that I could have "the complete picture before me", the statement should be handed in as Exhibit H. This was done without any objection being raised to its admissibility.

I then put further questions to Goldstone about Exhibit H, starting off with the question whether there was any indication in it of the time when the

accused said he had gone to Harding. Goldstone said that there was no such indication and again said that:

“We first went over his statement he had made to Captain Nala and there the date and time is reflected”.

I said that:

“I did not understand at any stage that there was a challenge of the admissibility of that statement, but it will become very clear if there is and if necessary Captain Nala may have to be recalled about it”.

Goldstone said the accused confirmed that statement.

I unfortunately made errors in referring to the exhibits by their incorrect numbers - I think I probably forgot that Goldstone's statement is Exhibit I. The statement which the accused made to Sergeant Nala on 19 March 2003 is Exhibit K - whatever the record says. The statement which the accused made to Goldstone (and Nala) on 4 June 2003 is Exhibit H - whatever the record says.

Goldstone said that the departure time of the accused as reflected in Exhibit K is 09h00 on 15 March 2003 and the time of his return is given as 15h30.

Shortly thereafter Mr Ntshulana indicated that the admissibility of Exhibit K was in fact challenged. He also said that the issue had been raised in cross-examination and continued “it's the manner in which he was interviewed several times”.

I then said that Exhibit K should go back to and remain in the docket and indicated that there should be a trial-within-a-trial concerning its

admissibility.

Goldstone was then further cross-examined by Mr Ntshulana. The tenor of the cross-examination was to raise doubt about whether Sipho and the accused were in fact using their cellular telephones on 15 March 2003. The object of this cross-examination was clearly to avoid the sting of the evidence which placed the users of those cellular telephones in the vicinity of the three relevant base stations, i.e. Wilson's Cutting, Newlands Farm and Maguntia Store. Goldstone said that if any one of Sipho or the accused had said that he did not use his cellular telephone on 15 March 2003, he (Goldstone) would have investigated such a claim. This evidence is convincing, probable and was not challenged. Goldstone had cellular telephone records which indicated to him and which today indicate to me that on 15 March 2003, they (i.e. Sipho and the accused) were at Ezingolweni.

I digress briefly to explain a matter which may cause confusion. The alibi is that the accused was at Harding with Sipho. This appears from the Exhibit K. Goldstone established that the machine on which they allegedly worked belonged to Mr Mbuthuma who lives in Harding. Goldstone established that the machine, which had to be repaired, was in the Umzimkulu area. It is clear from Goldstone's evidence that he obtained information from Mr Mbuthuma. Goldstone also said that Sipho's alibi was that he had been in Umzimkulu.

I accept unequivocally that the alibi of the accused was, at all times, that he spent most of 15 March 2003 with Sipho in Harding where they worked on a machine. Because Sipho said he was in Umzimkulu and because Goldstone had information that the machine was in Umzimkulu,

Goldstone's evidence may, at times, erroneously convey that the alibi of the accused was that he had been in Umzimkulu. This was not his alibi. On the other hand I accept that Goldstone simply made an error when he referred to Umzimkulu in relation to the alibi of the accused.

I leave aside for the moment the cellular telephone records, which suggest, as Goldstone pointed out, that Sipho was in Harding in the morning.

I asked Mr Ntshulana, as I think I am entitled to do, whether it was the case of the accused that he in fact did not use his cellular telephone on 15 March 2003. I was told that the accused did not remember whether he used it or not.

Thereafter Mr Ntshulana proceeded to cross-examine Goldstone on the contents of his record of the interview with the accused, i.e. Exhibit H.

After Mr Ntshulana had completed his questioning of Goldstone, I suggested that we should start with the trial-within-a-trial immediately. I referred to the "document which was previously Exhibit I". There was no misunderstanding, because Mr Ntshulana said his understanding was that the trial-within-a-trial would relate to the statement which the accused made to Nala. But Goldstone also testified that the said statement was confirmed by the accused on 4 June 2003 after he had been informed of his constitutional rights.

The evidence of Goldstone was furthermore, that some questions were not put to the accused on 4 June 2003, because, so Goldstone said, he had confirmed his previous statement which, therefore, was in fact incorporated into the statement, Exhibit H. In my view, therefore, the admissibility of Exhibit K had to be considered on two bases, i.e. as a

statement to Nala on 19 March 2003 and as part of a statement to Goldstone on 4 June 2003.

Before the commencement of the trial-within-a-trial regarding the admissibility of Exhibit K, Mr Mcanyana (without any objection being raised by Mr Ntshulana) placed on record that the basis of the attack on its admissibility was that the accused had not been informed of his constitutional rights before the statement was taken. It was common cause that the accused was not so informed. The question is whether he should so have been informed.

Goldstone was the first witness in the trial-within-a-trial.

Before referring to his evidence, it is probably appropriate for me to record my impression of him as a witness in the main trial. I considered his evidence in the light of all the other evidence and the probabilities. His demeanour was excellent. He had a very good recollection of all the relevant events and facts. He was completely unbiased and in short, there is no doubt whatsoever that he was a truthful and reliable witness.

Goldstone confirmed his evidence in the main trial. At the time when Exhibit H was completed, the accused was a suspect and was informed of his constitutional rights. On 4 June 2003, Captain Nala acted as interpreter for the accused. Exhibit H records a request by the accused that his previous statement, i.e. Exhibit K, should be read out to the accused to refresh his memory. This was done and the accused confirmed Exhibit K. Goldstone speaks Zulu and he said that Nala interpreted correctly. Goldstone said that on 19 March 2003 the “matter was still a so-called missing person’s docket”. This evidence is probable. The evidence of Nala

in the main trial bears that out. Later she confirmed this evidence. Goldstone said that in March 2003 the matter was a “missing person enquiry”. Goldstone confirmed that by 4 June 2003 the accused was a potential suspect.

Under cross-examination this was put to Goldstone:

“The accused submits that at stages during the investigation of this matter, police will come to his house and he will be harassed and, later on on the following day he will meet you for interviews and at a certain stage you’ll force him to sign the interviews, the statement of the interview at the end”.

In view of the serious nature of these averments, I requested Goldstone to make available to Mr Ntshulana all his notes of all his interviews with the accused, so that the statement or statements which Goldstone forced the accused to sign could be identified.

Mr Ntshulana wanted to withdraw the question, because “the accused does not remember the exact dates the police had been coming”.

What was put to Goldstone is plainly false. Mr Ntshulana carried out the instructions of the accused and put to Goldstone and to the Court the false version of the accused that Goldstone had forced him to sign documents. This conclusion is unassailable and the record will demonstrate it. The accused made two other statements to Goldstone in which he exercised his right to remain silent.

Goldstone’s evidence in the trial-within-a-trial was of the same quality as his evidence in the main trial. The suggestion that he forced the

accused to sign Exhibit H or any other document is a scurrilous falsehood. That much will be amply demonstrated later in this judgment. After Goldstone's testimony the matter was adjourned to 17 January 2011.

On 17 January 2011 Mr Mcanyana recalled Prinsloo, but his further testimony does not take the matter any further.

The trial-within-a-trial was then resumed and Captain Nala was recalled. She testified with regard to the statement which she took from the accused on 19 March 2003. She said that on 4 June 2003 when Goldstone interviewed the accused, she acted as interpreter for him. On that occasion the constitutional rights of the accused were explained to him.

Under cross-examination she firmly denied that the accused was "at all material times a suspect". This evidence is materially corroborated by Goldstone's evidence on this point in the main trial. That evidence was probable. It was not challenged and he specifically confirmed in the trial-within-a-trial the evidence which he had given in the main trial.

Under re-examination Nala advanced cogent, probable and unchallenged reasons why on 19 March 2003, the accused was not a suspect. It is implicit in her evidence that on 19 March 2003 the police did not suspect that a crime had been committed.

After the State had closed its case in the trial-within-a-trial, I recorded the errors which I had made regarding the numbering of some of the exhibits.

The accused testified in the trial-within-a-trial. Regarding Exhibit K he said Nala asked him if he knew Gcobisa and when he last saw her. Then Sergeant Nala went out of her office, she returned to her office with a male, Captain Nala. Sergeant Nala then locked the accused into a small room

adjacent to her office. The male police officer entered and poured water over his body. Then this male hit him with an open hand on his back. This male further assaulted him by pushing him or hitting him against the wall. This male told the accused why he was assaulting the accused, namely that he wanted the accused to tell the truth about the disappearance of Gcobisa. Then the male told him to leave the little office and to go back to Sergeant Nala's office. The accused confirmed that it is his case that the male Captain Nala was fetched by Sergeant Nala to assault the accused after he had made the statement, Exhibit K, to her.

The accused said he also remembered being asked where Gcobisa was and where he (the accused) was "yesterday". He could not remember any other question which Sergeant Nala put to him. The accused said that Sergeant Nala said he could go home and that she would fetch him when they were going to Westville. After a few days Sergeant Nala and Captain Nala fetched him and took him to Westville for a polygraph test. At the place where the test was performed the accused said he was assaulted in the presence of the male Captain Nala.

The tenor of the questions which the accused said were put to him are perfectly reconcilable with Nala's probable evidence (corroborated by Goldstone) that on 19 March 2003 the accused was not a suspect and that a witness statement was obtained from him. It is extremely improbable that on 19 March 2003 Sergeant Nala would have stated to the accused that she would fetch him to go to Westville. Nothing about this alleged statement was put to her when she testified either in the main trial or in the trial-within-a-trial. Nothing about the alleged assault on the accused was put to her

when she testified either in the main trial or in the trial-within-a-trial. The evidence of the accused about the alleged assault on him by the male Captain Nala, seems improbable.

The accused then testified about the interview with Goldstone on 4 June 2003. Mr Ntshulana said that he regarded the admissibility of Exhibit H as being part of the trial-within-a-trial. The accused said that although Goldstone informed him of his rights, those rights were “not followed”. The accused said that he was forced to answer some of the questions which Goldstone put to him and that he was also threatened by Goldstone. The accused said that Goldstone did the following:

1.

Goldstone asked him (the accused) if he had ever involuntarily soiled himself with faeces. The accused said that this had never happened to him. The threat by Goldstone to him lay therein that Goldstone said that “if you do not do what I say, you will pass faeces”.

2.

Goldstone said he must answer all the questions and that there is no question which he will not answer.

3.

Goldstone said that he will get other police officers to come and assault the accused.

4.

Goldstone said that if the accused “speak something which is not there, even if he comes from court,

Goldstone will have a quarrel with him”.

Not one of these four so-called threats was put to Goldstone. When it was put to Goldstone that he forced the accused “to sign certain notes”, I insisted that Mr Ntshulana should be specific. He then wanted to withdraw the question. I said that he could not do so, because “this is an important and very serious matter”. I then, in effect, formulated a very wide definition of conduct, which would amount to harassment. Mr Ntshulana was invited to add any other reprehensible conduct to that definition. He did not suggest that anything should be added.

I asked Goldstone if he ever behaved in such a manner to the accused. He said he had not. Mr Ntshulana did not challenge that reply, yet each of the four threats which the accused said Goldstone made, falls squarely within my formulated description of harassment. The accused either deliberately failed to properly instruct Mr Ntshulana or he fabricated his evidence about the alleged threats. Given his mendacity, as demonstrated in the trial-within-a-trial, the latter is the more probable inference.

After the accused had closed his case in the trial-within-a-trial, Goldstone was recalled at the request of Mr Mcanyana, without any objection by Mr Ntshulana. Goldstone confirmed his evidence regarding the events which led to Exhibit H. He explained that the very first time he met the accused was at Ezingolweni Police Station. Goldstone had asked female Captain Nala (then Sergeant Nala) to arrange for the witnesses to be present so that he could interview them. He reiterated that this was the first occasion that he met the accused. This evidence is probable in the light of the unchallenged evidence of Nala regarding the date when Goldstone took

over the investigation (end of May 2003) and Goldstone's own evidence on that issue (beginning of June 2003).

The accused persisted in his version that Goldstone threatened him before Exhibit H was completed, i.e. before June 2003. Goldstone said it was impossible to threaten a person who he had not even met.

It was put to Goldstone that the version of the accused is that he (the accused) met Goldstone on several occasions before 4 June 2003. Goldstone said this was impossible. It is to be noted that the accused did not testify that he met Goldstone on several occasions before 4 June 2003. However, I accept that he gave those false instructions to Mr Ntshulana.

Goldstone again pointed out that after the accused was arrested for this case, Goldstone took two so-called warning statements from the accused, who then exercised his right to silence.

I heard submissions from Mr Mcanyana about the admissibility of Exhibit K, i.e. the statement dated 19 March 2003. In the main Mr Mcanyana's submissions were that the evidence established that the accused was not a suspect at the time and, therefore, there was no need to inform him of the constitutional rights of an arrested or detained person or a suspect. In the alternative he submitted that the evidence established the admissibility of Exhibit H, i.e. the statement dated 4 June 2003, and, inasmuch as Exhibit K was confirmed in Exhibit H, it is admissible. Mr Ntshulana submitted that the admissibility of Exhibit K and Exhibit H was in issue in the trial-within-a-trial. Regarding Exhibit K he submitted that the question "where were you on 15 March 2003" must have been put to the accused and that by itself, indicates that he was a suspect.

Mr Ntshulana relied on **S v MTHETWA** 2004 (1) SACR 449 E in support of his submission that the accused was entitled to and should have been informed of his constitutional rights before he made Exhibit K. Concerning Exhibit H Mr Ntshulana submitted that the version of the accused could reasonably possibly be true and that the State thus failed to prove that the statement was made freely and voluntarily.

After I had heard argument I directed that female Captain Nala should be recalled. She confirmed her evidence in the main trial and in the trial-within-a-trial. During the course of her evidence it transpired that she (Captain Nala) is married to Lieutenant Colonel Nala (who, during March 2003 was Captain Nala). For convenience, I will refer to Lieutenant Colonel Nala as “her husband”.

She said she did not think that anybody else was present in her office when she interviewed the accused. She did not remember her husband coming into the office. Her husband and the accused did not go into a small room adjoining her office. She explained that the parents of Gcobisa requested that the accused should undergo a polygraph test. This was requested after she had taken the statement, Exhibit K.

It seems to me that this evidence is probable. In any event it was not challenged. If this evidence is accepted (and I see no reason whatsoever to reject it) the evidence of the accused that Nala said to him on 19 March 2003 that she will come and fetch him at home to go to Westville cannot be correct. Nala said that she was asked by Gcobisa’s parents to find out from the accused if he was willing to undergo a polygraph test. There was no suggestion to her or by the accused that the polygraph test

was discussed at all on 19 March 2003. It is unlikely in the extreme that Nala would take the accused to Westville (as she later did) for a polygraph test without having obtained his prior consent. Nobody suggested that such consent was obtained on 19 March 2003. This also demonstrates the probability that Nala spoke to Gcobisa's parents after she had obtained Exhibit K.

The question now arises whether the accused was simply mistaken when he said that Nala told him on 19 March 2003 that she would fetch him to take him to Westville or was he being deliberately untruthful. Given the gross nature of his lies regarding Exhibit H, I think the probabilities favour the latter conclusion.

After Nala had testified, Mr Ntshulana indicated that he had no further witness to call in the trial-within-a-trial. Mr Mcanyana had no further submissions to make. Mr Ntshulana submitted that I must weigh up the versions of Nala and the accused against each other and that I should not simply accept her evidence on the issue of the alleged assault on the accused by her husband.

I never simply accept evidence. I consider all the evidence in the light of the probabilities inherent or otherwise. I have regard to the demeanour of witnesses. Nala was a good witness. The accused was an atrocious witness. Nala's evidence is probable. The version of the accused is improbable, particularly that part which relates to the alleged assault on him in the small room.

After I had heard Mr Ntshulana's closing submissions I made an order that Exhibit H and Exhibit K are admissible in evidence. I said I would

furnish my reasons in due course. I do so now.

EXHIBIT H

For the reasons set out in my analysis of the evidence for the witnesses in the trial-within-a-trial, I conclude that the State proved beyond reasonable doubt that Exhibit H was made freely and voluntarily.

EXHIBIT K

For the reasons set out in my analysis of the evidence of the witnesses in the trial-within-a-trial, I conclude that the State proved beyond a reasonable doubt that, at the time when Exhibit K was obtained, no crime was being investigated. It therefore follows that the State proved beyond reasonable doubt that on 19 March 2003 the accused was not a suspect in any one of the three offences in this case. It therefore follows that it was unnecessary for him to have been informed of the constitutional rights of arrested persons or detained persons or suspects - see the authorities referred to in **S v MTHETWA**, supra, particularly those on pages 453 and 454. In the alternative, I am of the view that the State, in any event, proved the admissibility of Exhibit K, which was incorporated into the admissible Exhibit H.

After I had made my said ruling, it was agreed and recorded that the proceedings in the trial-within-a-trial were incorporated into the main trial. Mr Mcanyana closed the State's case in the trial.

At the conclusion of the case and in the light of all the evidence, I reconsidered my ruling regarding the admissibility of Exhibit H and Exhibit K. I confirm that ruling. The reasons for confirming my said ruling appear from my analysis of the evidence in the trial-within-a-trial and from my analysis of

the evidence of the accused in the main trial.

In paragraph 1 of Exhibit K the accused describes himself as a mechanic, who is employed by Sipho Ngcobo's Panel Beaters at Ezingolweni. That was also the general tenor of what he told Goldstone. Paragraphs 2 - 6 of Exhibit K read as follows:

"2.

I would like to state that I was in love with Gcobisa Yako since 1997. Last year in November 2002 myself and Gcobisa had a fight and we discuss our differences and solve them. Gcobisa usually comes and visit me after that fight up until January where she stops visiting me and I can't recall the exact date but we used to phone each other.

3.

On 2003/03/02 I phoned Gcobisa and asked her to give back my cellphone, which she was using, and I was going to give her my other cellphone, which is Siemen. The reason I asked for that Nokia cellphone was that the Siemens battery was giving me problems and I don't have electricity to charge it every now and then. So Nokia was still new and it wasn't going to push me to charge it everyday. By that time I was phoning her I was going to Durban thinking that I was going to come back earlier and go to see her for that cellphone and I only came back very late from Durban and I couldn't

see her.

4.

After some days I send Gcobisa a message to say that if she gets time she must bring the cellphone to me and she never responded.

5.

On 2003/03/15 at approximately 09:00 I went with my employer Sipho Ngcobo to Harding to fix a tractor of Mr Mbuthuma and we came back at about 15:30. I then went home and I found Ye Zulu, who used to assist me at home by cleaning if I'm busy. By the time I came home, I found her on the way out and I stand and speak to her. But it was a short time and I went to the house to watch soccer. After I finished watching soccer I went back at work since there was a vehicle which was needed to be fixed. After finishing that work I went back home and it was plus/minus 18:30.

6.

On Saturday 2003/03/15 Gcobisa never phoned me and I didn't phone her either. On Sunday 2003/03/16 I was at home with my brother Philani Mthembu from Pietermaritzburg who came to visit me with my kid also from Pietermaritzburg when policemen came at home round about 22:00 and they were asking for Gcobisa

and told me that Gcobisa has gone on Saturday saying that she was visiting me. That is the only time I heard that Gcobisa was missing and I explained to them that I didn't see her. That is all I can state".

Page 3 of Exhibit H (in which the accused confirmed Exhibit K) appears to be the only relevant page and it reads thus:

"Q. When were you last in contact with Gcobisa?

A. Two weeks before this.

Q. What was the conversation?

A. About a fridge she had borrowed.

Q. Not about the cellphone?

A. Yes, but she started about the fridge. I asked her for my cellphone. I told her if she cannot bring it, I will fetch it from her in Port Shepstone.

Q. Were you still in love with her?

A. Yes.

Q. Any arrangement made to meet?

A. She said she would arrive anytime.

Q. Did you know about her other boyfriend?

A. No, I never knew.

Q. When last were you together?

A. Between January and February.

Q. Were you lovers?

A. Yes.

Q. Do you have other girlfriends?

A. Yes, the mother of my child, Zama, and Mazi and Lungi and Pienkie, the mother of my other child.

Q. Who were you intimate with?

A. All of them excluding Mazi.

Q. When last did you phone her or she phoned you?

A. That was on the 2nd March. I was in Durban if I remember. This was when we discussed the fridge and cellphone”.

The accused testified in his defence. For reasons which will clearly appear from my analysis of the evidence of the accused, I recalled Goldstone after the accused had testified. Thereafter the accused closed his case without calling any witness.

The accused said that on the morning of 15 March 2003, Sipho telephoned him to summon him to go with Sipho to repair a tractor. They left and returned late in the afternoon. The next day, i.e. the Sunday, a policeman arrived at his house at night and said that the accused was hiding somebody's wife. This policeman searched the house, but did not say whose wife the accused was allegedly hiding.

On Monday, 17 March 2003, the accused said he “woke up and went to police station at Ezingolweni”. The police said to him there is nothing they could do to help him.

Under cross-examination the accused was questioned about when he first heard of Gcobisa's disappearance. He then referred to the incident involving the policeman on the Sunday evening. This conveyed the impression that he first learnt about Gcobisa's disappearance at that time.

The accused was asked why he mentioned the events on the Sunday evening, which did not appear to have anything to do with Gcobisa. He said the policeman mentioned Umtentweni and because he knew Gcobisa lived at Umtentweni, he assumed that the policeman must be referring to Gcobisa.

He was then asked how he knew the policeman was talking about the disappearance of Gcobisa. He said he did not know that the policeman spoke about Gcobisa's disappearance. But on his own version he inferred that the policeman was looking for Gcobisa.

The version of the accused regarding the events on Sunday night was not put to any State witness. That does not mean that the incident did not happen. The tenor of Sibonelo Ngcongo's evidence is that he and a friend went to report Gcobisa's disappearance at the Ezingolweni Police Station on the Sunday. It is unlikely that the accused fabricated this incident. If the incident in fact occurred, it means that the accused already knew on the evening of Sunday, 16 March 2003, that people were looking for Gcobisa. It also means that when Yako, Sandla and others met the accused on Monday, 17 March 2003, the accused did not inform them of the incident which happened on the Sunday night.

The accused testified about the visit to him by Yako and the others on that Monday afternoon. He said that Yako was aggressive and that Sandla had to restrain him. He was informed that they were looking for Gcobisa. The accused said that his response was "I do not know where she is. I have not seen her". The accused said that shortly thereafter Yako and the others returned accompanied by the police. From there they all went to the Ezingolweni Police Station, where Gcobisa's disappearance was

discussed in the presence of a policeman, one Mavundla. The accused said that in response to questions put to him by this policeman, he said that he and Gcobisa are in love, that he did not know where she was and that he never saw her on the day when she was alleged to have come to him, i.e. 15 March 2003.

This alleged visit to the police station was not put to anyone of the State witnesses who testified about the events on 17 March 2003 when Yako spoke to the accused. But it seems unlikely that the accused would have fabricated this incident involving, as it does, the name of a specific policeman. Sandla also said the accused accompanied them to the police station and probably referred to this incident. On his own version, however, the accused stated that he and Gcobisa were in love at that time. The improbability of this statement will be exposed during the course of my analysis of the evidence of the accused.

The accused responded to the evidence of Sthombe and, as I have already indicated, relied on the physical impossibility that he and Sthombe could have spoken to each other. It will be seen from his evidence-in-chief that the accused “introduced” this physical impossibility twice, i.e. in reply to two different questions. His replies are not appropriate replies to the two questions and to that extent they can be said to be evasive. It is clear that the accused was anxious to make the point and under cross-examination he in fact said that he had mentioned the fact that they were detained in different cells because “that means I did not communicate with him”.

The accused then set out a number of reasons why Sthombe may be lying. I deal with them *seriatim*.

1.

The first reason hints at a conspiracy between the police, Yako and Sthombe. This was raised in the cross-examination of Sthombe.

2.

Allied to the first reason is the surprise which the accused expressed about the delay between the alleged discussion between him and Sthombe and the statement which Sthombe made. This issue was also raised with Sthombe under cross-examination. Goldstone gave further evidence in this regard, when I recalled him at the end of the case.

3.

It was suggested that Sipho and the accused had a quarrel and that Sthombe is having his revenge on the accused. This is improbable, also in the light of the evidence of the accused that he never had a problem with Sthombe. This alleged reason was not put to Sthombe under cross-examination.

4.

The accused suspects that Yako may have paid Sthombe to give false evidence against the accused. This issue was raised with Sthombe under cross-examination, but not with Yako. In my view, the entire tenor of Sthombe's evidence militates against this so-

called reason. In this regard I also refer to Goldstone's further evidence.

5.

The accused also suspects that Sthombe is lying in order to protect Sipho. There is no substance in this suggestion. Sthombe may have lied to protect himself (and I am alive to that possibility) but the tenor of his evidence certainly does not protect Sipho.

6.

Sthombe is having his revenge, because, despite Sthombe's requests, the accused stopped visiting Sthombe in prison. The accused said he visited Sthombe in prison once. The issue was raised ever so obliquely in Sthombe's cross-examination. He was asked if the accused ever visited him in prison. He denied that this happened. The matter was left there.

The accused was questioned about his knowledge of the contents of Sthombe's statement, i.e. Exhibit C, and about when these various so-called reasons occurred to him and whether he drew the attention of Mr Ntshulana to those reasons. It is not my intention to examine in minute detail the evidence of the accused on these issues.

In summary, his evidence was evasive, contradictory and thoroughly unconvincing. The fact remains that some of the so-called reasons were not put to Sthombe at all or were not properly put to him. There was no application for Sthombe's recall to remedy the matter. The main point, i.e.

the impossibility that their alleged discussion could ever have taken place, was not put to Sthombe.

Under cross-examination the accused confirmed the obvious, namely that the case of the accused is that the entire Exhibit C and his evidence were fabricated by Sthombe. One wonders where Sthombe got the cunning idea from to say that Gcobisa's cellular telephone was taken not from her handbag, not from her person, but from her "bottom". Who was crafty enough to fabricate that piece of evidence, with its ring of truth?

The accused was reminded of the evidence of Silangwe. He was then asked whether from her house one can see the bus stop to which he referred. The answer is very clear: "Yes, the stop is visible. Not clearly". Whatever subsequent dilution or watering down of that reply there was, this evidence of the accused cannot raise any doubt about the ability of Silangwe to have observed what she claimed to have seen.

Under cross-examination the accused said that he knows Silangwe very well. He said that he analysed her evidence and tried to find a reason why she would lie. He could think of no such reason. So, one is left with what Mr Ntshulana put to Silangwe, namely that "the police or anybody" told her what to say. Or, of course, she is an unbiased neighbour who observed certain things and who heard an unusual remark made by the accused, shortly before Gcobisa disappeared.

Under cross-examination the accused confirmed that the person going from the bus stop to the house of the accused will be getting closer to Silangwe's house and will then pass Silangwe's house before reaching the house of the accused. That is also how I understood Silangwe's evidence.

The accused testified that he last saw Gcobisa about a week or two before 15 March 2003 and he added: "Because I moved from one place to the next". He explained that he did not mean that he changed his place of residence, but that he worked at different places.

He was then asked about his assistance in the search for Gcobisa. He said he gave to the police the IMEI number of Exhibit 2. Nala conceded this in her evidence. I point out, however, that, when Goldstone was recalled, he was very firm and said that the IMEI number of Exhibit 2 did not come from the accused. One cannot resolve this conflict by saying that Nala corroborates the version of the accused and, therefore, it must be accepted.

As far as reliability is concerned, I would have no hesitation in accepting Goldstone's evidence - he clearly knows his docket inside out. Goldstone's evidence how he tracked down Exhibit 2 is unchallenged. He physically recovered it from Mavimbela after he, by chance, had stumbled across and recognised a cellular telephone number in a discussion with Captain Crouse. Goldstone did not use the IMEI number of Exhibit 2 to find or recover it. He explained that one of his colleagues telephoned Mavimbela under some pretext and that Goldstone recovered Exhibit 2 from her on 12 September 2003.

Goldstone said that the police look at the so-called "end user" of a cellular telephone. In this case, Mavimbela was the end user of Exhibit 2. When Exhibit 2 was recovered, Goldstone (when he testified on 30 September 2010) agreed when I suggested that:

"On the strength of what had been put to Captain Nala,

the police would, by that time, have had the IMEI number of the handset”,

i.e. Exhibit 2. This evidence appears to be in conflict with what he later said, namely that the IMEI number was not furnished by the accused. On 30 September 2010 Goldstone was, however, asked by me whether the IMEI number “would put you on track of the handset”. He did not expressly disagree, but said:

“What Captain Nala actually did is basically confirmed what the accused said and that this was in fact the IMEI number that we were looking for”.

So, Exhibit 2 was traced to the end user by its cellular telephone number (which had been changed) and it was then confirmed by reference to its IMEI number that this was the cellular telephone of Gcobisa.

Heynecke said that each handset, i.e. each cellular telephone, has its own unique serial number. This is the International Mobile Equipment Identity number. The acronym is the IMEI number. When one lifts out the battery from a cellular telephone, she said there is “a sticker displayed with this IMEI number”. In any event, on the footing that the accused furnished to the police the IMEI number of Exhibit 2 and if one accepts Sthombe’s evidence, it must be borne in mind that Sthombe also said that the accused told him that the accused had said to Sipho to destroy the cellular telephone, i.e. Exhibit 2. If, and I repeat, if this instruction had been given to Sipho, the furnishing of the IMEI number to the police would have been of no assistance - provided Sipho carried out the instruction. And we know Exhibit 2 exists - with its IMEI number intact.

Of course, the thrust of the evidence of the accused that he furnished the IMEI number to the police is to demonstrate his innocence. And that was precisely the point which the accused wanted to make and did make in the very next sentence of his evidence-in-chief. He said that he even gave a photograph of Gcobisa to the police. He was asked to whom he had given the photograph. His reply was clear and unequivocal, namely to Goldstone. He reiterated this and later said that Goldstone took the photograph when he “fetched” the accused at home.

I was somewhat surprised by this evidence, which one would have expected to have heard about earlier during the trial. Goldstone emphatically denied having received any photograph from the accused. He said that the photograph of Gcobisa and other relevant information were obtained from the Yako family. This was done for the purpose of the television broadcast about which Nala testified. It had all been completed before Goldstone received the docket early in June 2003.

The accused said that he could not remember if he had his cellular telephone with him on 15 March 2003. I accept that statement. He also said that he does not usually leave his cellular telephone behind. That statement is probable and I accept it. The accused also said he does not remember making any call to Sipho on that day. If that really means that he does not remember, I accept that the statement is true. If it means that he did not make any call to Sipho, the evidence is contradicted by the cellular telephone records and is probably untrue.

Towards the end of the evidence-in-chief of the accused, Mr Ntshulana on two occasions asked the accused if he wished to add anything

to his testimony. The accused availed himself of each of those opportunities.

Firstly he asked me to take a closer look at how Exhibit 2 reached Mr Ngcobo – I assume this is a reference to Sthombe.

Secondly he said he would like to know what actually happened.

I will do my best to comply with these requests, which, lest the wrong impression is gained, were made with apparent sincerity. But looks can deceive, particularly when one assesses the demeanour of a witness who testifies through an interpreter – as the accused did.

The accused explained that he gave Exhibit 2 to Gcobisa immediately after he had bought it. This was not a gift and Gcobisa would have to return it to the accused if he asked for it.

Mr Mcanyana commenced his cross-examination of the accused on 19 January 2011 and concluded it on 20 January 2011.

SHORT ADJOURNMENT

ON RESUMPTION : APPEARANCES AS BEFORE

JUDGMENT (continued)

McLAREN J The accused said that on 15 March 2003 he and Gcobisa were still lovers and that their relationship was good. I will demonstrate with reference to his own statements and the probabilities that this evidence is false. It is a deliberate lie, the purpose of which can only be to establish the improbability of the accused killing Gcobisa.

The accused was asked if Yako asked him when last he (the accused) had seen Gcobisa. The accused said he did not remember if

Yako asked that, but he recall telling Yako that he did not see Gcobisa on the Saturday, i.e. on 15 March 2003. If Silangwe's evidence is accepted, the accused furnished false information to Yako.

It was pointed out to him that Yako testified that the accused had stated that he last saw Gcobisa "last year", i.e. during 2002. The accused said that Yako was making a mistake. But this evidence was unchallenged.

The evidence of Msindwana and Sandla on the same issue was unchallenged. Msindwana said that the accused was asked regarding the whereabouts of Gcobisa and Msindwana said the accused replied thus:

"It's a long time that I last saw her".

Sandla's unchallenged evidence is that the identical reply was given in response to Yako's question when last the accused saw Gcobisa. So, the probabilities and Sandla's direct evidence are that the accused was asked when he last saw Gcobisa.

The same question was put to the accused in his evidence-in-chief. Then he said it was a week or two before 15 March 2003. That is not what he said to Yako, Msindwana and Sandla. This is a simple matter, about which the accused cannot be mistaken. His beloved disappears - surely he must remember when he last saw her. And in his testimony he says it was a week or two before her disappearance. And he gives a reason why it was so long ago before Gcobisa's disappearance, namely because he moved from place to place. This evidence is completely irreconcilable with the unchallenged evidence of Yako, Msindwana and Sandla.

Before Mr Mcanyana continued with this cross-examination on 20 January 2011, I wanted to establish when Goldstone allegedly took the

photograph from the home of the accused. I tried to establish a time frame with reference to Exhibit H. During the course of his testimony now the accused clearly and unequivocally said that Goldstone had not forced him to make Exhibit H. Under re-examination Mr Ntshulana raised the matter again. He reminded the accused that he said that Goldstone had warned him of his rights, but during the interview Goldstone did not follow them. The accused now said he did not remember very well what had happened at Ezingolweni and at Port Shepstone.

I think I asked him if he spoke the truth during the trial-within-a-trial. He said some of his evidence was the truth. "Some of it I just said for the sake. I was forced". He then said he was forced by Goldstone in the manner testified to during the trial-within-a-trial.

The accused really did not seem to have an idea what the truth was as far as Exhibit H is concerned.

The accused said that having been informed by Yako of Gcobisa's disappearance, he did not enquire from Yako what was wrong or what had happened. Later on in his evidence he said that he did not ask Yako when Gcobisa disappeared nor did he enquire under what circumstances she had disappeared. This evidence appears to be totally irreconcilable with the other evidence of the accused that the relationship between him and Gcobisa was a normal and happy one until her disappearance. The absolute lack of alarm or even interest on the part of the accused concerning Gcobisa's disappearance, is very telling.

During the course of his cross-examination the accused was questioned about Exhibit K. It came about in this way. Mr Mcanyana asked

the accused whether, as a result of the frequent visits by the police to his house it occurred to him that he was becoming a suspect. He said it did occur to him that he was a suspect and he said he asked Nala whether, seeing that Gcobisa is nowhere to be found, they were suspecting that he took her away. He was quite clear that this was before he made the statement, Exhibit K. It is improbable that any such question could have been put to Nala after the police were "frequenting" the house of the accused, but nevertheless, before 19 March 2003 when Exhibit K was completed.

The issue regarding the admissibility of Exhibit K was whether on 19 March 2003 the accused was a suspect in a crime. This alleged discussion was never put to Nala. This highly improbable evidence of the accused does not affect my previous ruling regarding the admissibility of Exhibit K. If anything, it is further support therefor.

The accused was asked a very simply question by Mr Mcanyana, namely when was the last time he saw Gcobisa. The accused gave an evasive reply by enquiring whether the question related to speaking to her or seeing her. The question was repeated and the reply was February 2003.

In response to a question what the accused thought had happened to Gcobisa, he said:

"I do not know, because we no longer phoned each other because of the nature of my work, as I am not staying at home".

It is not clear to me how the nature of the work of the accused (which he did not say had changed) caused the cessation of telephone calls

between the accused and Gcobisa. A more probable explanation is that the calls ceased, because the relationship between Gcobisa and the accused had come to an end.

The accused said:

“I think she is no more in this earth”.

Later when his attention was drawn to the fact that Gcobisa has been missing for 8 years, he said he thought “she is no more”. He also said that during the 5 years of his relationship with Gcobisa she never just disappeared. He confirmed Yako’s evidence that Gcobisa was a responsible young woman.

The accused was asked whether Gcobisa stopped visiting him and he said it was not that she stopped, but “it was the issue of my work”. It was in 2002 that the nature of the work of the accused resulted therein that Gcobisa stopped visiting him. He did, however, see Gcobisa in February 2003 when he went to Port Shepstone to repair a motor vehicle.

When Mr Mcanyana put to the accused that his relationship with Gcobisa came to an end in 2002, the accused said it never ended. It was then suggested to him that only the visiting ended, but the accused said that this also had not stopped. He agreed with Mr Mcanyana’s suggestion that at the time of Gcobisa’s disappearance nothing had changed in his relationship with Gcobisa. The accused was referred to paragraph 2 of Exhibit K and he clearly and unambiguously said that that the fight referred to therein was “about Sibonelo”. Before the question was put the whole paragraph had been interpreted to the accused and he said he understood it. I got the impression that the accused immediately wanted to change his

answer. The question was now put what the fight was about. The accused said it was about the fridge and the cellular telephone.

In response to a question whether the accused wanted Exhibit 2 back, he said, as I understood it, by way of an explanation that Gcobisa did not answer the telephone, but children did. In any event the accused wanted Exhibit 2 back as well as the fridge, which he said he needed. Neither the cellular telephone nor the fridge was returned. The accused agreed that the impression is correct, namely that there was a civil discussion between two lovers, there was no dispute and Gcobisa agreed to return the items.

The accused was then asked why this discussion was referred to as a fight in Exhibit K. He said:

“We did not fight. I only pushed her”.

He explained that he did this, because Gcobisa did not want him to leave. He said the fight was about Gcobisa not wanting him to leave. The accused then said that there was only a misunderstanding, not a fight between him and Gcobisa.

According to the accused that misunderstanding was not about Sibonelo Ngcongo, nor about the return of Exhibit 2, nor about the return of the fridge, nor is it linked or connected to Gcobisa stopping to visit the accused.

The accused was then asked if Gcobisa stopped visiting him in January 2003. He said she never stopped visiting him, but that he was saying that “she was no longer coming most of the time and she could not find me at home”.

It is clear how the accused was shifting his ground. A fight with Gcobisa (referred to in Exhibit K) over Sibonelo Ngcongo was changed to a fight over Exhibit 2 and the fridge and was then watered down to a misunderstanding about the accused wanting to leave, which misunderstanding had nothing to do with Sibonelo Ngcongo or Exhibit 2 or the fridge or Gcobisa stopping to visit him, but not really stopping, only no longer coming most of the time. This is the very minor misunderstanding, which caused the accused to push Gcobisa.

In my judgment the accused could see the way in which things were going for him and he constantly shifted his ground. I know Exhibit K is not a comprehensive statement and that it was not drafted by a lawyer. But the truth remains the truth - whether elegantly presented in lawyers' parlance or whether drafted by a police officer in the Community Service Centre. I know those things. But I also know that the accused changed his story as he went along and the last thing he wanted to admit (which he unambiguously did) is that he had a fight with Gcobisa over Sibonelo Ngcongo. He also did not want to admit (which he unambiguously did) that he had a fight with Gcobisa over Exhibit 2 and the fridge. And that explains why the accused deliberately and falsely shifted his ground.

The cross-examination of the accused continued. We were now at the point (as it was correctly put to the accused) that there was no fight and that Gcobisa agreed to return Exhibit 2. The question was why did he not take it back. He said he realised that there was no way in which he could locate Gcobisa if he needed her. But this is so obvious that he must have been aware of it all along. It could not suddenly have dawned upon him.

The accused was questioned about his statement to Goldstone in Exhibit H, namely that he last made or received a telephone call from Gcobisa on 2 March 2003. The accused could not dispute line or number 16 in Exhibit B2, which shows that he telephoned Gcobisa at 14:23:06 on 12 March 2003. He also could not dispute line or number 126 in Exhibit B2, which was his last outgoing call to Gcobisa on Exhibit 2 at 09:06:06 on 14 March 2003. He was asked whether this was his last call to her, but he said he could not remember. That I can fully understand, but on 4 June 2003, when he made Exhibit H, he could remember his last call to or from Gcobisa as having been made on 2 March 2003. Why did he not then remember the telephone calls to her which are reflected in Exhibit B2, even if she did not answer herself?

The accused was questioned whether he attempted to telephone Gcobisa after her disappearance. Of course, once the SIM-card and consequently the telephone number of Exhibit 2 changed on 16 March 2003 (as explained by Heynecke, Goldstone and Sthombe and borne out by section E of Exhibit B3) the accused could not reach Gcobisa on her cellular telephone number. The accused was asked whether he used his cellulated telephone when he so attempted to get hold of Gcobisa. No, he did not. For this purpose he borrowed a cellular telephone from the people he worked with. And nearly 8 years after the event he remembered that he did this. But he used his cellular telephone to telephone Gcobisa on 12 and 14 March 2003.

The accused was questioned about this relationship with Sandla and he says it was good. He confirmed that he and Gcobisa went to Sandla as

an elder. That is in accordance with the impression I got. The accused was reminded of Sandla's evidence that Gcobisa has indicated that she is no longer interested in their relationship. This is what Sandla said. That probable evidence was unchallenged, yet the accused said Sandla lied on this point. Exactly the same applies to Msindwana - her probable evidence on these points was not challenged.

The accused suggested that they may have lied in order to get him into trouble. So, the proposition is that two respectable people who were approached by the accused and Gcobisa about a problem or problems in their relationship conspired to falsely testify against the accused. And they do so in order to get him into trouble. This is just so much nonsense.

The accused was asked why he and Gcobisa went to Sandla in the first place. He said they had their own problems. Mr Mcanyana insisted on particularity. The accused said:

"We had a disagreement regarding the fridge and the cellphone and the issue of money was also on the agenda".

Msindwana gave unchallenged evidence that the meeting at her home took place on 24 January 2003. At that time the disagreement was serious enough to enlist the intervention of elders to resolve it. Indeed, the accused himself said that this was not the first occasion on which he and Gcobisa had quarrelled over or had a disagreement regarding Exhibit 2 and the fridge.

It is clear from the evidence of the accused himself that there was an ongoing dispute between him and Gcobisa concerning at least Exhibit 2 and the fridge. Those items were his; he claimed them back; they were never

returned to him. These facts only have to be stated (and they are not in dispute at all) to demonstrate conclusively that the problem concerning those items had not been resolved by 15 March 2003. Nothing can be plainer.

Mr Mcanyana then put to the accused “that leads to the incident at Gcobisa’s on 23 February 2003”. The accused agreed. In fairness to the accused I record that I do not construe his evidence in any way so as to amount to a concession that the incident involving Luyolo Yako occurred on 23 February 2003, nor to a concession that there were two incidents involving Luyolo and Sibonelo Ngcongo.

I am satisfied that, as Mr Ntshulana submitted, there was only one incident (and that it occurred on 3 December 2002). For the reasons I have already set out, it simply means Luyolo got his dates wrong. We are talking about the same incident viewed by different persons at different times. But what is undisputed about this incident is that the accused assaulted Gcobisa.

It is, therefore, understandable that the accused remembered telling Luyolo that he (the accused) was “sorry about what happened the other day”.

The accused was asked whether he said to Luyolo that he found it difficult to accept that Gcobisa had another boyfriend. The accused gave an argumentative reply and said that he did not say that to Luyolo, because he (the accused) did not know that Gcobisa had another boyfriend. Luyolo cannot possibly be mistaken about what the accused had said to him. There is simply no room for error. Either the accused said this or Luyolo is fabricating his evidence.

Of course, Luyolo could fabricate the evidence in order to avenge the

disappearance of Gcobisa or to falsely implicate the accused, because the Yako family may believe that the accused killed Gcobisa. But Luyolo gave his evidence in a calm and convincing manner. The discussion between him and the accused took place – that is common cause. The accused assaulted Gcobisa at her home while Sibonelo Ngcongo, his cousin and Luyolo were at the premises - that is common cause. Ngcongo and the accused had a fight at Gcobisa's house, during the course of which Ngcongo pointed a firearm at the accused - that is common cause. The accused apologised to Luyolo for assaulting Gcobisa - that is common cause. Now, Luyolo, on the version of the accused, introduces the false parts of his evidence by saying:

Firstly, and to lay the ground for the second part, that the accused said to him that the accused finds it difficult to accept that Gcobisa has another boyfriend.

Secondly, that the accused said he thought of shooting Gcobisa and then himself.

Thirdly, by saying that the accused said that he had pointed a firearm at Gcobisa.

The probabilities in this case are that the accused in fact knew that Gcobisa had another boyfriend. Furthermore the evidence clearly demonstrates the violent nature of the accused. Consider the apparently unprovoked, vicious and humiliating attack (and it was nothing less than that) on Gcobisa at her home when she was dragged out of Ngcongo's vehicle and slapped. Consider the admitted "pushing" of Gcobisa by the accused during the course of an allegedly civil discussion. Consider the admitted

pointing of a firearm at Gcobisa by the accused -this was the evidence of Sandla and Msindwana.

It does not matter when the accused pointed this firearm at Gcobisa - the time of the incident is not the point under consideration. I am pointing out the overwhelming evidence which proves the violent disposition of the accused.

There is nothing improbable in Luyolo's evidence concerning any one of the three statements which he attributes to the accused. Indeed, the probabilities are strongly in favour of the said statements having been made to him. This is all the more so because there is no dispute about the fact that the accused admitted to Sandla and Msindwana that he had pointed a firearm at Gcobisa.

The accused claimed that his first thought after Gcobisa had disappeared was that people who had pointed firearms at him were the people who were up to mischief. In other words, the accused suspected that Ngcongo and his cousin were involved in Gcobisa's disappearance. This was so, despite the fact that Gcobisa afterwards told him that these persons were her friends. Yet, the accused did not tell Yako about this suspicion, nor did he tell Nala, nor Goldstone. It is patently false evidence.

The accused was an evasive and most unimpressive witness. He simply has no regard for the truth. His mendacity was apparent during the trial-within-a-trial and in the main trial. I will hereinafter refer to further aspects of his statements, Exhibit K and Exhibit H, which further expose his untruthfulness.

I have no hesitation in rejecting every single piece of his evidence

which has not been admitted by a State witness or which is in conflict with the evidence of any State witness. The accused is an unmitigated liar.

I wanted to obtain from Goldstone certain information regarding the alleged photograph; the outcome of the prosecution of Sipho Ngcobo; the delay in the prosecution of the accused and the circumstances under which Yako met Sthombe. I, therefore, recalled him. His further evidence was unchallenged and I summarise it as follows:

1.

As I understood Goldstone, the Director of Public Prosecutions was “not keen to prosecute as a result of the absence of case law in similar cases”.

2.

The charges in this case were withdrawn against Sipho Ngcobo on 7 September 2004. He faced no other charges in relation to this matter.

3.

The charges in this case were, likewise, withdrawn against the accused on 7 September 2004, but he faced certain other charges. I can only assume that those charges featured in the Regional Court case to which Mr Ntshulana referred during the trial. At least now I know what happened.

4.

The statement, Exhibit C, was obtained from Sthombe on 5 October 2007. Goldstone then personally took

the docket to the Director of Public Prosecutions.

5.

On 7 November 2007 the Director of Public Prosecutions instructed that the accused should be charged in this case.

6.

Goldstone said he was summoned to Umzinto Prison by Sthombe, who made a report to him. Goldstone asked Sthombe if he would be willing to make a written statement, but he was not. This was a few months before Yako visited Sthombe in prison. At that time Sthombe was awaiting trial in another matter and he did not want to give a statement until his own case was finalised. Goldstone did nothing further about the matter, but reported the development to Yako, who was conducting his own enquiry and assisting the police. Then, after Sthombe had been sentence in his matter, Yako enquired whether it would be possible for him to visit Sthombe. Goldstone said to Yako that he (Goldstone) could not stop Yako from visiting Sthombe. Because Yako did not know Westville Prison, he requested a policeman to accompany him. Goldstone arranged this and Inspector Mgwazi accompanied Yako to Westville Prison. Yako reported to Goldstone after he had seen Sthombe. Then Goldstone instructed

Mgwazi to obtain a written statement from Sthombe.

This was done on 5 October 2007. So, there is nothing whatsoever sinister or suspicious about how Exhibit C was obtained.

I had the benefit of comprehensive argument being addressed to me by Mr Mcanyana and Mr Ntshulana. During the course of my judgment I have already referred to some of those submissions. Hereinafter I will do so again. In my view there is no point whatsoever in setting out and dealing with every submission which was made. As a result of my fairly extensive review of the evidence, this judgment is already a lengthy one. In considering the legal and factual issues in this case I will bear in mind the various submissions which were made by the legal representatives.

At the outset I should indicate that Mr Mcanyana did not ask for a conviction on count 1 and at the end of this judgment the accused will be found not guilty and he will be discharged on count 1.

It is not my intention to again set out or summarise all the relevant evidence in this part of my judgment. I will motivate my conclusions as succinctly as possible.

THE DEATH OF GCOBISA

The question which arises for decision is whether the State proved the death of Gcobisa beyond a reasonable doubt. I think this issue must be decided first, because if it is not decided in the State's favour there cannot be a conviction on count 3 and I may unnecessarily waste a lot of time and effort in dealing with other issues, which have to be determined in relation to count

3 and, for that matter, count 2.

Mr Ntshulana submitted that Gcobisa may, for instance, have been abducted by criminals who operate a prostitution syndicate. Of course it is possible. The fact that it is notionally possible does not mean that the State, therefore, cannot prove beyond a reasonable doubt that she is dead. Mr Ntshulana also submitted that the statement by the accused that Gcobisa is no longer on this earth is not to be construed as an admission that she is dead. I do not construe the evidence of the accused as an admission.

The accused told Sthombe that Gcobisa died as a result of being shot on 15 March 2003. That statement accords with all the other indications that Gcobisa is dead. Those indications, which all point to the fact that Gcobisa is probably dead, appear from my analysis of the evidence of Yako, Nala, Goldstone and the accused. As I said the statement by the accused to Sthombe that Gcobisa is dead is supported by the other evidence, which points the same way.

The fact that I do not have a medico-legal *post-mortem* examination report, which tells me that Gcobisa is dead and which sets out the cause of death, is on the facts of this case, totally irrelevant.

I find that the State proved that Gcobisa died on 15 March 2003 as a result of a gunshot wound. Of course, this finding does not remotely mean that the accused is guilty of murder, it only means that he may be found guilty of murder.

THE MENDACITY OF THE ACCUSED

I deal with this issue at the outset to make it clear that it does not

necessarily follow that because the accused is an untruthful witness, he must or should be found guilty. He is not to be punished for his mendacity.

In assessing the evidence of the accused, whom I found to be an untruthful witness and I am guided by the principles which have been authoritatively laid down in the following cases:

S v STEYNBERG 1983 (3) SA 140 (A) 146 A - H

S v MTSWENI 1985 (1) SA 590 (A) 593 I - 594 E

S v SHABALALA 1986 (4) SA 734 (A) 751B – D

S v KOOPMAN (2005) All SA 539 (SCA) par. 35

S v M 2006 (1) SACR 135 (SCA) par. 64

S v BURGER & OTHERS 2010 (2) SACR 1 (SCA) par.

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THE VIOLENT NATURE OF THE ACCUSED

The evidence demonstrates quite clearly that the accused has a violent disposition. We know of the following incidents which prove his violent nature. The assault on Gcobisa on 3 December 2003; the fight with Ngcongco on 3 December 2003 (during the course of which the accused drew a knife); the assault on Gcobisa when he pushed her and the pointing of a firearm at Gcobisa, which he admitted to Msindwana, Sandla and Luyolo.

THE THREAT BY THE ACCUSED TO KILL GCOBISA

In the light of all the evidence, the evidence of Luyolo about this threat is highly probable. This conclusion is so plain that there is no need whatsoever to elaborate on my reasons therefore.

THE NATURE OF THE RELATIONSHIP BETWEEN THE ACCUSED AND GCOBISA

I know that, according to the accused, he had a relationship with Gcobisa for about 5 years. I do not intend dealing with that whole period, but restrict myself to the time from December 2002 to January 2003 (“the relevant time”). The evidence establishes that during the relevant time the relationship between Gcobisa and the accused was not a good, happy or normal relationship. The contrary evidence of the accused is false and he deliberately lied about it. The reason why the accused lied, is that he wanted to be able to rely on the improbability that, if their relationship was good, happy and normal on 15 March 2003, he would kill Gcobisa.

If one considers the violent nature of the accused and the facts that he pointed a firearm at Gcobisa and that he threatened to kill her and that their relationship was not good, the probabilities favour the conclusion that the accused would kill Gcobisa.

WHEN LAST DID THE ACCUSED SPEAK TO GCOBISA TELEPHONICALLY AND WHEN LAST DID HE SEE HER BEFORE 15 MARCH 2003?

The first part of the heading to this part of the judgment should really be along the lines of a question which Goldstone put to the accused at the time when Exhibit H was completed, i.e. on 14 June 2003. The question is when last did the accused telephone Gcobisa or when last did Gcobisa telephone him? In other words, when did they last communicate

telephonically? The answer was 2 March. The answer was not “about 2 March” or “I think it was 2 March”. In the context of the statement the reference is obviously to the year 2003.

This evidence must be considered in the light of the following lines or numbers of Exhibit B2, which reflect that from 12 - 14 March 2003 there were eight occasions on which there was “telephonic contact” between the cellular telephones of the accused and Gcobisa: 16, 18, 19, 25, 27, 28, 80 and 126. I say “telephonic contact” because some of the lines or numbers reflect “SMS out” – as to which, see the definition in Exhibit F. The calls were all of an extremely short duration, either .00 second or .01 second or .06 second. It may be that children answered Gcobisa’s telephone or that, for some other reason or reasons, the calls were of a very short duration.

The evidence of the accused should also be considered in the light of his reply to this question which Goldstone put to him, namely:

“When were you last in contact with Gcobisa?”

The answer was:

“Two weeks before this”.

The word “this” appears to refer to the disappearance of Gcobisa on 15 March 2003.

It is not clear whether this “contact” refers to the telephone conversation on 2 March 2003. In any event, the contents of Exhibit H seem to be consistent with the evidence of the accused, namely that he last saw Gcobisa in February 2003. This was when he was on his way to Port Shepstone to repair a motor vehicle. The accused had no difficulty in recalling that visit.

But why did the accused then say to Yako on 17 March 2003 that he last saw Gcobisa in 2002? And why did Msindwana and Sandla both understand the accused to say on 17 March 2003 that he had last seen Gcobisa a long time ago? In this regard I point out that Msindwana and Sandla both testified about their meeting with the accused and Gcobisa during January 2003. Msindwana said it happened towards the end of January 2003. Under these circumstances and bearing in mind that they were present when Yako spoke to the accused on 17 March 2003, it seems unlikely that the accused would have said that he last saw Gcobisa “last year”, i.e. 2002.

But what the accused clearly conveyed to all of them is that he had not seen Gcobisa for a long time. He did not convey to them that he had last seen Gcobisa a week or two ago, as he said in his evidence-in-chief. I pointed out that under cross-examination the accused first gave an evasive reply to the question and then said that he last saw Gcobisa in February 2003.

The point of all this is that the accused was untruthful about the time when he last saw Gcobisa and the last day on which the accused saw Gcobisa is a very important issue in this case.

THE CELLULAR TELEPHONE (EXHIBIT 2) AND THE FRIDGE

From the evidence of the accused it is clear that he wanted Exhibit 2 and the fridge back. Before he changed his evidence further, he said that the fight referred to in paragraph 2 of Exhibit K was over the cellular telephone and the fridge. That was the misunderstanding during which the

accused pushed Gcobisa.

In passing, I should point out that during the course of the trial, Mr Ntshulana indicated that there was no dispute about the contents of Exhibit K, but that its admissibility was challenged only on the basis that the accused had not been informed of his constitutional rights before he made the statement. It will also be recalled that the accused initially said that the fight was over Sibonelo Ngcongo. All the indications are that the fight was in fact just that, i.e. a fight – as it is described in Exhibit K.

The evidence also clearly establishes that, for at least some time, the accused wanted back Exhibit 2 and the fridge. His evidence is that he did not get back these items. Gcobisa's refusal or failure (it does not matter which) to return these items which belonged to the accused could only have exacerbated the problems which they experienced in their relationship. This is so as a matter of strong probability. Support for this conclusion also comes from Exhibit K, particularly paragraphs 3 and 4 thereof.

DID THE ACCUSED SEE GCOBISA ON 15 MARCH 2003?

The accused told Yako, Msindwana, Sandla and Cele that he did not see Gcobisa on 15 March 2003. From the evidence of the accused it also follows that he said the same to the policeman Mavundla on 17 March 2003.

It was also put to Silangwe that the accused did not visit her house on that day and that she fabricated the evidence that he was there; that she made him aware that Gcobisa was approaching and that the accused said that he did not want Gcobisa to see him. By the accused saying that he was not there at Silangwe's house, he is in effect relying on the same alibi as the

one he raised with Nala in Exhibit K and with Goldstone in Exhibit H, i.e. when he confirmed the contents of Exhibit K.

Although the cellular telephone records (Exhibit B) and the evidence of Heyneckke and Prinsloo cannot pinpoint the exact place where the cellular telephone of the accused was when telephone calls were made to and from it on 15 March 2003, the probabilities are that those telephone calls (which were all serviced by the three base stations at Wilson's Cutting, Newlands Farm and Maguntia Store) were made and received while the accused was in the vicinity of Ezingolweni, rather than in the vicinity of Harding.

Those records and that evidence do not stand alone. There is the direct evidence of Silangwe that the accused was at her home on the day of Gcobisa's disappearance. And there is her unchallenged evidence that before the end of the next week she spoke to the accused concerning Gcobisa's whereabouts. The tenor of her evidence is clearly that she did this as a result of what she had seen and heard on the day when she last saw Gcobisa. That was the day when she prepared food for the accused.

There is, thus, very strong evidence to the effect that the accused in fact saw Gcobisa on 15 March 2003. For the moment I am not even considering Sthombe's evidence about what the accused told him.

In my judgment the accused in fact saw Gcobisa on 15 March 2003 and he lied to Yako, Msindwana, Sandla, Cele and Mavundla when he said that he had not seen her on that day.

The question is why did he lie about this? After all, on his version nothing had changed in his relationship with Gcobisa and on 15 March 2003 that relationship was good. Why then lie to her family, friends and to the

policeman and falsely claim not to have seen Gcobisa on 15 March 2003? But maybe this lie should be considered in the light of the complete indifference and lack of interest which the accused displayed when he first learnt of Gcobisa's disappearance. He said this happened on Monday, 17 March 2003. Yet, his evidence regarding the search by the policeman for Gcobisa at the house of the accused cannot be ignored.

He said this happened on Sunday night, 16 March 2003. If this happened the accused's lack of interest in Gcobisa's disappearance is even more bizarre. He does not even say something like this to Yako – "But you know, last night a policeman came looking for Gcobisa at my home. That policeman said I am hiding somebody's wife. Although he did not mention Gcobisa's name, he said it was a woman from Umtentweni. And so I assumed it must have been Gcobisa he referred to. Maybe the person who sent this policeman to my house knows something about Gcobisa's disappearance".

On his version the accused had information concerning Gcobisa's disappearance on 16 March 2003. Not only does the accused fail to disclose that information to Yako and the other three witnesses who testified about the discussion on 17 March 2003, but he deliberately lies to them and tells them that he had not seen Gcobisa on 15 March 2003.

Further support for the confusion that the incident on the Sunday evening in fact occurred, is found in paragraph 6 of Exhibit K. So, when Nala saw the accused on 19 March 2003, he lied to her about not having seen Gcobisa on 15 March 2003, but he realised the relevance of the incident on Sunday night, 16 March 2003. At that time it would have been

easy to establish whether a policeman or police officers had gone to look for Gcobisa at the house of the accused on Sunday, 16 March 2003.

DID THE ACCUSED POSSESS OR HAVE ACCESS TO A FIREARM?

On the strength of the evidence of Msindwana, Sandla and Luyolo, the question must be and is answered in the affirmative.

STHOMBE'S EVIDENCE

My analysis of the evidence and the various conclusions which I reached in that part of my judgment which has specific rubrics (i.e. starting with "The death of Gcobisa") up to the paragraph immediately preceding this one, will demonstrate that there are a number of safeguards which support the conclusion that Sthombe's evidence was not fabricated but consists of an accurate account of what the accused himself told Sthombe.

WHERE DO ALL THE AFORESAID CONCLUSIONS LEAD TO?

To answer this question one must look at what the State has to prove in order to secure the conviction of the accused on counts 2 and 3 and how that has to be proved. I briefly set out the relevant principles:

1.

The alibi of the accused must not be viewed in isolation, but in the light of all the evidence and, as always, the probabilities. Compare **R v HLONGWANE** 1959 (3) SA 337 (AD) 340 (H).

2.

In my view the State proved the falsity of the alibi of the accused beyond a reasonable doubt.

3.

Caution must be exercised in attaching too much weight to the mendacity of the accused, but, in view of the fact that I reject the alibi of the accused as false, he is in the same position as if he had given no evidence on the merits – **S v SHABALALA** 1986 (4) SA 734 (A) 751 B - D.

4.

I am aware of the possibility that the accused may have lied, on 17 March 2003, for a number of reasons, more particularly those of the nature envisaged by Smalberger AJA in paragraphs (c) and (d) in his judgment in **S v MTSWENI** 1985 (1) SA 590 (A) 594 C – D.

5.

The State must prove the guilt of the accused beyond a reasonable doubt – not beyond any doubt whatsoever - **S v NTSELE** 1998 (2) SACR 178 (A) 182 b and **S v BOESAK** 2000 (1) SACR 633 (A) para 13.

6.

The evidence must be considered in its totality. The guilt of the accused is to be inferred from the cumulative effect of all the facts and it is not necessary

that each individual piece of evidence must be proved beyond a reasonable doubt – **R v HLONGWANE** supra 340 A and **S v NTSELE** supra 182 e.

7.

In **S v MTSWENI** supra 594 E – F Smalberger AJA said this:

“Voordat ‘n skuldigbevinding aan moord kan geskied moet daar bewese feite wees wat by wyse van afleiding die appellant aan die dood van die oorledene koppel. By ontstentenis daarvan bestaan daar nie ‘n **prima facie** saak teen die appellant nie, en kan sy leuenagtige getuienis, net soos in die geval waar hy nie getuig nie, nie die leemtes in die Staat se saak aanvul en ‘n gevolgtrekking van skuld regverdig nie”.

In my view there are sufficient proven facts, including the statement which the accused made to Sthombe which links or connects the accused with the death of Gcobisa. This finding, however, still only means that the accused may be found guilty of murder.

8.

“It is trite law that a Court is entitled to find that the State has proved a fact beyond reasonable doubt if a **prima facie** case has been established and the accused fails to gainsay it But one of the main and acknowledged instances where it can be said that a

prima facie case becomes conclusive in the absence of rebuttal, is where it lies exclusively within the power of the other party to show what the true facts were and he or she fails to give an acceptable explanation The State is not required to plug every loophole, counter every speculative argument and parry every defence which can be conceded by imaginative counsel without a scrap of evidence to substantiate it” - **S v BOESAK** supra paras 46 – 48. Compare **S v THERON** 1968 (4) SA 61 (T) 63 H – 64 C, bearing in mind **S v SHABALALA** supra.

9.

In **R v MLAMBO** 1957 (4) 727 (A) 738 A – D it was said by Malan JA that:

“There is no obligation on the Crown to close every avenue of escape which may be open to an accused”. I may convict the accused if I am “morally certain of his guilt”.

The learned Judge on appeal continued:

“Moreover, if an accused deliberately takes the risk of giving false evidence in the hope of being convicted of a less serious crime or even, perchance, escaping conviction altogether and his evidence is declared to be false and irreconcilable with the proved facts, a Court will, in suitable cases, be fully justified in rejecting an

argument that, notwithstanding that the accused did not avail himself of the opportunity to mitigate the gravity of the offence, he should nevertheless receive the same benefits as if he had done so”.

See also **S v STEYNBERG** 1983 (3) SA 140 (A) 146 F – H.

10.

Finally, it is not for the Court to speculate about possible explanations not advanced by the accused himself - **S v MKHIZE** 1999 (2) SACR 632 (W) 639 d – e.

THE ULTIMATE QUESTION

Is this a case in which it is safe to conclude that the lies of the accused (including the falsity of his alibi) together with other acceptable evidence proves the guilt of the accused beyond a reasonable doubt (as explained above) on count 2 and/or count 3 – **S v BURGER & OTHERS** (2010) 3 All SA 394 (SCA) par 30?

For reasons which will soon become apparent I am satisfied that the answer is in the affirmative.

THE EVIDENCE

1.

It was proved beyond a reasonable doubt that Gcobisa died as a result of a gunshot wound which she

sustained on 15 March 2003 at the house of the accused.

2.

The accused told Sthombe that Gcobisa took out the firearm from the drawer and that he and Gcobisa grappled or fought over it.

3.

The accused did not say to Sthombe that a shot accidentally went off during the course of the struggle.

4.

The accused told Sthombe that he “actually shot” Gcobisa, but that he did not intend to shoot her.

5.

The accused said to Sthombe that he then took Exhibit 2 “from her bottom”, (indicating or referring to Gcobisa’s private parts) after he had killed her, i.e. after he had shot her.

6.

The accused said to Sthombe that he then placed Gcobisa’s body in a plastic bag, which he loaded into a vehicle and thereafter dumped it near a railway line.

7.

The accused also said to Sthombe that he had told Sipho to destroy Exhibit 2.

I have already found as a fact that the accused told Sthombe how

Gcobisa died. It is clear to a lawyer that there may have been available to the accused the defence that he acted in private defence. If the State failed to disprove that defence, the accused would have been found not guilty of the murder of Gcobisa and possibly guilty of theft of Exhibit 2. At worst for the accused he would have been found guilty of culpable homicide on count 3. It is not necessary to consider matters such a putative private defence, etc.

Put simply, if the accused claimed that he shot Gcobisa in self-defence of that the shot accidentally went off during their struggle for possession of the firearm, the case would have proceeded on a completely different basis. The accused chose the defence of an alibi. It was proved to be false.

After the accused was charged again during or about October/November 2007, he persisted with his alibi defence. I may not think up a defence for him. The accused may continue to protest his innocence - that is his right. But I cannot foist a defence on him by in effect saying that I find that he shot and killed Gcobisa, but he did so in private defence or that he did so negligently.

The defence of the accused is that he was at Harding. That defence is false. He shot and killed Gcobisa in his house at Ezingolweni on 15 March 2003.

In any event, there are at least four factors which conclusively point to the deliberate shooting of Gcobisa.

1.

The background history, including the assaults on

Gcobisa by the accused; the admitted pointing of a firearm at Gcobisa by the accused; the threat by the accused to kill Gcobisa and the problems which arose from Gcobisa's failure to return Exhibit 2 and the fridge to the accused.

2.

The failure by the accused to give any exculpatory statement to Sthombe about the shooting incident, other than to say, in general terms, that it was not the intention of the accused to shoot Gcobisa. If the accused shot Gcobisa accidentally or in private defence, he would have said that to Sthombe. Obviously, this would not have been done in legal parlance, but in layman's language.

3.

The accused concealed Gcobisa's body.

4.

The most damning pieces of evidence, however, are that the accused took Exhibit 2 from Gcobisa's private parts and that he told Sipho to destroy Exhibit 2. These actions are utterly irreconcilable with an accidental shooting of Gcobisa or of her being shot in private defence. These actions are only compatible with the murder and robbery of Gcobisa.

I think I have fairly comprehensively and fully explained to the

accused and to his family and to the family of Gcobisa what really happened and how Sthombe got Exhibit 2.

To sum up: The accused murdered Gcobisa and robbed her of her cellular telephone (Exhibit 2) which he gave to Sipho with the instruction that Sipho should destroy it, which Sipho failed to do and he lent it to Sthombe and then gave it to Mavimbela and this led to the eventual recovery thereof by Goldstone.

For these reasons:

- 1. YOU ARE FOUND NOT GUILTY AND DISCHARGED ON COUNT 1.**
- 2. YOU ARE FOUND GUILTY AS CHARGED ON COUNTS 2 AND 3.**

CERTIFICATE/...

TRANSCRIBER'S CERTIFICATE

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ADRI CROSS (transcriber)

APPEARANCES :

FOR THE STATE

MR S MCANYANA

ON BEHALF OF ACCUSED

MR NTSHULANA
(INSTRUCTED BY LEGAL AID BOARD)

INTERPRETER

MR ??

DRAFT

REPORTABLE/ NOT REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

CASE NO: CC 163/2008

PIETERMARITZBURG

DATE TYPED: 05.05.2011

In the matter between:

STATE

versus

BENEGNUS KHUPHELA KWAKHE MTHEMBU

BEFORE

THE HONOURABLE MR JUSTICE McLAREN

HEARD AT RAMSGATE:

JUDGMENT DELIVERED ON 20 APRIL 2011

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