

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

REPORTABLE

CASE NO: CC25/2011

In the matter between:

THE STATE

And

XOLILE WELLINGTON MNGENI

Accused

Coram: HENNEY, J

Heard: 13 August – 5 December 2012

Delivered: 19 November 2012

Summary:
(Reportable paragraphs 103 – 116 of Judgment)



Republic of South Africa

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

Case No: CC25/2011

THE STATE

vs

XOLILE WELLINGTON MNGENI

Accused

JUDGMENT DELIVERED ON 19 NOVEMBER 2012

HENNEY, J

INTRODUCTION AND BACKGROUND

[1] This introduction and background is a summary of facts and circumstances which are not in dispute and which are mostly regarded as common cause.

[2] It will lay a foundation and set the tone as to how the court will deal with some of the evidence with regards to the summary and evaluation thereof.

[3] The State alleges in this matter that the deceased's husband, Shrien Dewani, together with Zola Tongo ("Tongo"), Monde Mbolombe ("Mbolombe"), Mziwamadodo Qwabe ("Qwabe") and the accused, conspired to murder the deceased in this matter Anni Dewani.

[4] Tongo was at the time of the commission of the crime during 12 November 2010 and 13 November 2010 responsible for the transport of guests at the Colosseum Protea Hotel in Century City where the deceased and her husband were guests. Mbolombo was a front desk clerk at this hotel. Tongo and Qwabe accepted responsibility for and had been convicted on a charge of murder of Anni Dewani. It needs to be mentioned at this stage that Mr Dewani has not yet been charged and not yet been found to be responsible for the commission of any of the crimes it is alleged that he was involved with. No direct evidence in this trial was presented about his involvement. This was based on hear-say evidence of Mbolombo and Qwabe as to what Tongo told them.

[5] In order to execute the conspiracy to murder the deceased, Tongo approached Mbolombo to find out whether he would be able to assist in acquiring the services of someone who would be able to kill the deceased. Mbolombo then sought the assistance of Qwabe, an acquaintance of him.

[6] The State alleges that this culminated in a meeting between Qwabe, Tongo and the accused, Mr Mngeni, on 13 November 2010, where they planned the manner in which the deceased would be killed.

[7] Tongo was the only person part of this "alleged" conspiracy who knew the deceased and her husband due to the fact that he was the driver who transported them whilst they were guests at the Colosseum Protea Hotel.

[8] It was decided at the meeting that Anni Dewani had to be murdered that night. It had to appear as if the vehicle driven by Tongo and in which the Dewani's were passengers was hijacked by Qwabe and it is alleged, the accused.

[9] As planned, later on the night of 13 November 2010 the vehicle a VW Sharan, driven by Tongo wherein the Dewani's were passengers was hijacked in Guguletu. Mr Dewani and Tongo were released by the hijackers. The attackers proceeded to drive to Khayelitsha with Anni Dewani in the vehicle. She was shot and killed and was further robbed of her possessions. Tongo had been dispossessed of his cellphone, a Nokia E90, which was handed in as Exhibit "2".

[10] On 14 November 2010 the vehicle was found abandoned in Sinqolamthi Street, Illitha Park, Khayelitsha, inside of which was a body of a woman who was later identified to be the deceased.

[11] After having found the abandoned vehicle with the body of the deceased therein the police started with its investigation. One of the first policemen on the scene was a crime scene and finger-print expert, Warrant Officer Hanekom. He arrived there between 09h05 – 12h15.

[12] The vehicle was removed to the South African Police Services Vehicle Storage Unit in Stikland. Finger prints and palm prints were taken from the vehicle. A left palm-print was lifted from the right fender and bonnet of this vehicle. This was later scanned into the police's Automatic Fingerprint Identification System (AFIS). This is a data base held by the police services of persons who had been in trouble with the law. It was found that this left palm-print could be linked to a person by the name of Xolile Mngeni, the accused.

[13] Although it was initially vehemently disputed on behalf of the accused during the evidence of Hanekom that this could be the palm-print of the accused before court, this fact was later conceded. It can therefore safely be accepted that this was the left palm-print of the accused.

[14] As a result of further investigation the accused before court was arrested on 16 November 2010. Thereafter Qwabe and Tongo were also arrested. The two of them were charged together with the accused with the murder of the deceased. It is, however, not clear whether they were charged with the same offences as the accused as set out in the indictment.

[15] Tongo and Qwabe respectively entered into a plea and sentence agreement with the State in terms of Section 105A of the Criminal Procedure Act 51 of 1977 ("the Act"). In relation to this matter, each of them is currently serving a period of imprisonment.

[16] **CHARGES AGAINST THE ACCUSED IN THIS INDICTMENT**

It is alleged by the State that the accused committed the following offences: Kidnapping, Robbery with aggravating circumstances, Murder as well as the Illegal possession of a firearm and ammunition in contravention of the Firearms Control Act, No 60 of 2000. The particulars of the charges are set out hereunder.

[17] Kidnapping in that the accused together with the persons mentioned in paragraph 3 and in the furtherance of a common purpose, unlawfully and intentionally deprived Anni Dewani of her liberty of by threatening her with a

firearm; forcing her to remain in the motor vehicle in which she was a passenger and took her against her will from NY112 Gugulethu to Sinqolamthi Street, Illitha Park, Khayelitsha.

Secondly, also at Gugulethu, Robbery with aggravating circumstances, in that the accused together with the abovementioned persons and in the furtherance of a common purpose, assaulted Anni Dewani and threatened her with a firearm and intentionally used such force to induce her into submission and thereafter stole the following items from her:

- a) A Giorgio Armani brace wrists watch;
- b) A white-gold diamond bracelet;
- c) A ladies handbag;
- d) A Blackberry cellular phone

All of this with an estimated value of R90 000, 00.

[18] Thirdly, Murder, committed also on 13 November 2010, at Sinqolamthi Street, Illitha Park, Khayelitsha, in that the accused, also together with the person(s) as mentioned at paragraph [3] in the furtherance of a common purpose unlawfully and intentionally killed Anni Dewani by shooting her with a firearm.

[19] Fourthly, a contravention of Section 3 read with various other provisions as set out in the indictment of the Firearms Control Act, 60 of 2000 and Section 250 of the Criminal Procedure Act 51 of 1977, in that the accused in the furtherance of a common purpose unlawfully possessed a 7,62 Norinco pistol, without being the holder of a licence, permit or authorization.

[20] Lastly, a Contravention of Section 90 read with various other provisions of the Firearms Control Act, 60 of 2000 and Section 250 of the Criminal Procedure Act, in that the accused, in the furtherance of a common purpose, unlawfully had in his possession at least one 9mm round of ammunition without him being a holder of a licence in respect of a firearm capable of discharging that ammunition.

[21] The State further alleges that in respect of count 1, count 2 and count 3 Section 51 (1) of the Criminal Law Amendment Act 105 of 1997 is applicable. In these respects the State alleges that count 1 is an offence of Kidnapping listed in Part IV of Schedule 2 of the Act, Count 2 is an offence of Robbery with aggravating circumstances listed in Part II of Schedule 2 and Count 3 is an offence of murder, planned or premeditated and committed by a person, group of persons or syndicate acting in the furtherance of a common purpose or conspiracy, and is listed in Part 1 of Schedule 2.

[22] **PLEA**

To all these charges the accused pleaded not guilty. He denied all the allegations against him and the prosecution was put to the proof thereof.

[23] **ADMISSIONS**

Formal admissions in terms of Section 220 of the Act were made by the accused during the course of the trial, and which I set out hereunder.

23.1 The injuries that the deceased had suffered were all as a result of the commission of the offence.

23.2 After Dr Jeanette Verster conducted a post-mortem examination it was found that the cause of the deceased's death was a gunshot wound to the neck.

23.3 The photographs taken on 14 November 2010 depicting the crime scene where the vehicle and the deceased were found are admitted as correct.

23.4 On 14 November 2010 Captain Clifford Smith examined the VW Sharan vehicle with registration number CF 160 944 and retrieved a bullet from

the back cushion of the right back seat.

23.5 On 18 November 2010 a firearm was recovered by Colonel Theron of the South African Police Services in Site C, Khayelitsha. This was sealed and handed to Captain Paul Hendricks who in turn handed it to Captain Clifford Smith of the South African Police Services Provincial Crime Scene Investigations.

23.6 On 19 November 2010 at Sinqolamthi Street, Illitha Park, Khayelitsha, a cartridge was retrieved from a drain which had been pointed out to Warrant Officer Van Der Berg by Qwabe. It is further admitted that this cartridge was sealed and handed to the South African Police Services Ballistic Unit.

23.7 According to telephone records of the Colosseum Protea Hotel, various telephone calls were made on 12 and 13 November 2010 by Mbolombo to Tongo and Qwabe.

23.8 The Nokia E90 cellular telephone recovered by Captain Hendricks on 16 November 2010 at C394 Sidima Circle belongs to Tongo and this phone was handed in as Exhibit "2" before the Court.

23.9 The Armani ladies wrist watch and silver bracelet found by Alice Mcinga on 16 November 2010 at C394 Sidima Circle, Khayelitsha, was the property of the deceased, and these items were respectively handed in as Exhibits "3A" and "3B" before the Court.

23.10 The Blackberry 9700 cellular telephone which was recovered from Phumezo Nzotho that was handed in as Exhibit "4" before the court was the property of the deceased.

23.11 Information had been downloaded from a Nokia 2700 with cellular phone number 073 658 643, a ZTE – GS 308 cellular phone with cellular phone number 073 199 015 6 and a Nokia E90 cellular phone with cellular phone number 083 248 9081.

[24] **THE FACTS THAT ARE NOT IN DISPUTE**

Apart from the formal admissions the accused had made and the common cause facts the Accused only disputed the evidence of six State witnesses, excluding the nine witnesses who testified during the trial within a trial. The evidence of eleven witnesses was therefore not disputed. As such, the following evidence of the below-mentioned State witnesses is not in dispute:

- [24.1] Warrant Officer Hanekom testified that on 14 November 2010 he found the Accused's left palm print on the right front fender of Tongo's motor vehicle with registration CF 160944.
- [24.2] Phumeza Nzotho testified that on 14 November 2010 the accused sold Exhibit '4' to her for R500.00.
- [24.3] Alice Mcinga testified that on 16 November 2010 she found Exhibits '3A' and '3B' hidden on the inside of the roof in Likhaya Bacela's room at C394 Sidima Circle, Khayelitsha.
- [24.4] Vinod Hindocha, the father of the deceased, testified that his daughter Anni Dewani married Shrien Dewani on 28 October 2010 in India. He identified her body to Captain Luchtman on 16 November 2010 and on 5 December 2010 he identified Exhibit '3A' as belonging to the deceased. He also testified that Shrien Dewani's United Kingdom cellular telephone number was 447971578333.
- [24.5] Dr Verster testified that the deceased died as a result of a gunshot wound to the neck, that she was shot at a close range and that barrel of the weapon was 5 to 10 centimetres away from the

deceased when the shot was fired. She also testified that the deceased took a defensive posture when the shot was fired and that the gunshot wound tract was consistent with a single shot. Her post mortem findings, Exhibit 'E', were admitted as correct.

[24.6] Captain Smith testified that he examined Tongo's motor vehicle with registration CF 160944 and recovered a fired bullet from the right rear seat and that he found gunpowder residue in various parts of the vehicle.

[24.7] Warrant Officer Engelbrecht testified that he examined the fired bullet that Smith found, the cartridge recovered during Qwabe's pointing out and the 7,62mm Norinco pistol, Exhibit '1A', before Court, and found that the fired bullet and cartridge were discharged from Exhibit '1A'. During cross examination he provided the Court with his opinion on the location of the person in the motor vehicle who shot the deceased. He also testified about the distribution of gunpowder residue after a shot is fired.

[24.8] Petro Heynecke and Hilda Du Plessis gave evidence relating to cellular telephone data in relation to calls that were made between

the phone of Tongo and phones that belonged to Siyabonga Gwele ("Gwele") and Lukhaya Bacela ("Bacela").

[24.9] Dr Pieter Schmitz, an expert witness, compiled Exhibit 'X' and mapped out the various telephonic communications between the key role players.

[25] Monde Mbolombo ("Mbolombo"), in the main testified about the conspiracy between himself, Tongo and Qwabe to solicit a 'hitman' to kill a woman (who eventually turned out to be the deceased).

[26] The Accused, whilst disputing that he was Qwabe's accomplice, did not dispute Qwabe's evidence in respect of the following:

[26.1] that Tongo approached Mbolombo on 12 November 2010 to find a 'hitman';

[26.2] that Mbolombo put Tongo in touch with Qwabe;

[26.3] that on 12 November 2010 Qwabe was solicited by Tongo to kill a woman for R15000.00;

- [26.4] that Qwabe agreed to meet Tongo on Saturday, 13 November 2010, to discuss further details;
- [26.5] that Qwabe and Tongo were in telephonic contact during the afternoon to arrange their meeting;
- [26.6] that Qwabe met Tongo near Khaya Bazaar in Khayelitsha in Tongo's VW Sharan motor vehicle;
- [26.7] that Qwabe informed Tongo that he would be assisted by another person (his accomplice);
- [26.8] that Qwabe called his accomplice to find out where he was so that they could meet;
- [26.9] that Qwabe and Tongo drove to Sidima Circle, Khayelitsha, to meet their accomplice;
- [26.10] that Tongo drove the vehicle, Qwabe was in the front passenger seat and their accomplice joined them in the vehicle and was seated at the back;

[26.11] that during the afternoon meeting Tongo, Qwabe and their accomplice discussed and agreed on the following:

1. that Tongo would bring a couple into the township;
2. that the husband wanted the wife killed and that it had to look like a hijacking;
3. that Tongo and the husband had to be left unharmed;
4. that Tongo's cellular telephone would be taken during the robbery;
5. that the R15 000.00 that had been agreed on as payment would be left in the cubby hole of the vehicle; and
6. that the vehicle would be 'hijacked' in Gugulethu near to NY 112.

[26.12] that Qwabe, Tongo and Mbolombo were in constant telephonic contact on the Saturday evening;

[26.13] that Qwabe and his accomplice travelled to Gugulethu but were too late to meet Tongo at the place agreed by Tongo and Qwabe and had to return to Khayelitsha;

- [26.14] that Qwabe and his accomplice received a lift from Mawanda Vanda on the second occasion that they travelled from Khayelitsha to Gugulethu;
- [26.15] that Qwabe received a sms from Tongo shortly before the latter's vehicle arrived at NY 112 and NY 108 in Gugulethu;
- [26.16] that Qwabe and his accomplice hijacked Tongo's motor vehicle on the Saturday evening at Gugulethu, as had been agreed earlier;
- [26.17] that Tongo was in the motor vehicle with the deceased and her husband, as had been agreed earlier;
- [26.18] that Tongo and the husband were released from the vehicle as had been agreed earlier;
- [26.19] that Tongo's cellular telephone, Exhibit '2', was taken from him as had been agreed earlier;
- [26.20] that the deceased was shot and killed as had been agreed earlier;
- [26.21] that Qwabe and his accomplice received payment of R10 000.00 for killing the deceased;

[26.22] that Qwabe and his accomplice robbed the deceased of Exhibits '3A', '3B' and '4' as well as a ladies handbag; and

[26.23] that the following telephone numbers belonged to Monde, Qwabe, Tongo, Bacela and Gwele (also known as Varhi) respectively: 079 400 8255; 073 658 6434; 071 594 0967; 073 199 0156 and 076 506 1557.

[27] **FACTS IN DISPUTE**

The accused disputed that he was in any way involved in the commission of the crime. He denied that he was involved in the planning of the incident on the 12 November 2010 and 13 November 2010 that led to the murder of the deceased.

SUMMARY OF THE EVIDENCE

[28] The State called 26 witnesses, 9 of which testified in the Trial within a Trial. Various documents, plans and photographs were handed in as exhibits, most of which were not disputed. During the trial 6 real exhibits were handed in. The following was the real evidence that was handed in:

Exhibit 1(a) – Firearm;

Exhibit 1(b) – Ammunition;

Exhibit 2 – Nokia E90 cellular phone;

Exhibit 3A – Ladies Georgio Armani watch;

Exhibit 3B – Ladies Bracelet;

Exhibit 4 – Blackberry cellular phone;

Exhibit 5 – CD

Exhibit 6 – DVD video of pointing out.

There is therefore no need to refer to all the evidence in summary and evaluation except where necessary.

[29] Monde Mbolombo was the first person to give evidence in this trial. Although he does not directly incriminate the accused, his evidence is important in completing the overall factual matrix of this case. He was the person who was approached on 12 November 2010 by Tongo to assist in acquiring the services of a person who would be able to kill the deceased. According to his evidence he thereafter elicited the assistance of Qwabe who was an old acquaintance of his.

[30] He gave the particulars of Qwabe to Tongo. On 13 November 2010 as from 18h00 there was communication between himself, Tongo and Qwabe as

to Tongo's movements, with the Dewanis that evening.

[31] On 14 November 2010, Qwabe came to his house. He asked Qwabe what happened and Qwabe told him that what needed to be done had been done and that it was all over the news. Qwabe was looking for Tongo at that stage and stated that Tongo still owed him an amount of R5 000,00, because they had agreed that they would be paid R15 000,00 yet they were only paid R10 000,00.

[32] Mziwamadoda Qwabe

He testified that he is a friend of the accused, and that at the time of him testifying in court he had known the accused for a period of 8 – 9 years. His house is about a 5 minute walk from the house where the accused stays. The witness testified that he is also known as Nono or Spra.

[33] He became involved in this incident on either the 12 November 2010 or 13 November 2010. This was after he had received a call from Mbolombo who said that "there is a job that needed to be done". Mbolombo did not give any details but told him that he would give his (Qwabe's) telephone number to one Zola, who was later identified as Zola Tongo ("Tongo"). Later at about 19h00 he received a call from Tongo. The accused, who he referred to as

Watti, was with him. Tongo said to him that there is a husband who wants his wife to be killed. Tongo asked him how much will it be to do this, whereupon he conferred with the accused who suggested an amount of R15 000,00. This was conveyed to Tongo. Arrangements were made with Tongo to get in touch with him the following day so that they could discuss what needed to be done.

[34] The next day, which was a Saturday (13 November 2010), Tongo called and they arranged to meet in Khayelitsha. They met at a place called Khaya Bazaar. Qwabe called the accused to find out where he was and the accused explained that he was in Sidima Circle at his friend Lukhaya's house in Sidima Circle, Khayelitsha. They drove to meet the accused there. They parked the car outside Lukhaya's house. The accused came out and got into the back of the vehicle. The witness testified that he was sitting in the front passenger seat.

[35] Tongo then proceeded to tell them that there is a husband who wanted his wife to be killed. It had to look like as if they were hijacked during which the killing had to take place. Tongo explained that the hijacking had to take place in Gugulethu because a well known tourist attraction, Mzolis Tavern was situated in that area. Tongo also discussed with them the route he would take and where they had to meet up with him. It was also agreed that Tongo would leave the money (R15 000,00) in the cubby-hole (glove compartment) of the

vehicle. It was also agreed that Tongo would call them as soon as he left the Hotel. There was, however, no specific discussion as to how the wife would be killed. As part of the plan Tongo's cellular phone would be taken as well.

[36] While they were in the vehicle, they were interrupted by an old lady who knew Tongo. He got out of the vehicle and spoke to her. Later that evening, after 20h00, Tongo called the witness and said he was on his way to Gugulethu. At that stage he and the accused arranged for transport to take them to Gugulethu. On their way to Gugulethu, however, Tongo called and he cancelled.

[37] They went back to Khayelitsha and he and the accused parted ways. Later that night between 22h00 – 23h00 he once again received a call from Tongo who said that they were on their way from Somerset West to Gugulethu. He went to Mwanda Vanda's place where he met the accused and he arranged transport with Vanda to take them to Gugulethu.

[38] The witness testified that he drove Vanda's vehicle to Gugulethu until they reached NY112. He and the accused got out of the vehicle. They agreed that they would meet each other on the corner of NY112 and NY108. He received a text message from Tongo that they were close by. Whilst he was busy relieving himself, the vehicle approached.

[39] The accused stopped the vehicle and pointed a firearm at the driver side. The accused instructed the driver to get into the back seat of the vehicle. The witness testified that he himself was not armed and he wore yellow kitchen gloves. The witness got behind the wheel and drove the vehicle. On the corner of NY1 and NY111, Qwabe stopped the vehicle and ordered Tongo to get out. Before he got out of the vehicle his cellular phone Exhibit "2" was taken from him and he (Tongo) said that the money was behind the front passenger seat.

[40] Thereafter the witness drove to Khayelitsha and near Nkanani informal settlement at Kuyasa they ordered the husband to get out of the vehicle and told him to go to one of the houses nearby. They drove to Ndlovini into Mew Way. While driving between Illitha Park and Ndlovini the witness heard a gunshot.

[41] Thereafter they drove into Illitha Park and parked the car onto the pavement. The accused at that stage got out and looked for the cartridge. The witness assisted him and found it on the mat of the vehicle. Qwabe testified that he threw this cartridge into a drain. After his arrest he pointed out to the police the place where he threw the cartridge. They subsequently left the vehicle and walked away. Thereafter they counted the money and found it was only R10 000,00 and not R15 000,00. The accused also had R4 000,00.

They shared the money amongst themselves. The accused also had in his possession a digital camera and three cellular phones, which included Tongo's phone.

[42] They saw each other again on the Sunday when the accused brought the firearm back to him. He was arrested later in that week following the incident. He told the police that he would co-operate with them after he had the opportunity to speak to the accused who had been arrested before him. He asked the accused if he told the police the truth and he said "yes". Thereafter he also told the police what happened and made a confession on 18 November 2010.

[43] When it was put to him in cross-examination that the accused denied that they were friends, the witness responded that he would not have had the accused's cellular phone number if they were not friends. He further stated that the accused knows him much better than the impression he is creating in court.

[44] He further denied that on the afternoon of 13 November 2010 he only by mere co-incidence saw the accused come out of Lukhaya's place. He denied that he had asked the accused to assist him in trying to find someone who would be interested to buy a cellular phone.

[45] In cross-examination it was put to him that he made a confession to the police after his arrest to the effect he did not receive the call from Tongo on 12 November 2010 after 19h00 that evening but at 12h00 that day. It was put to him that he did not inform the police that the accused was with him at that stage or that the accused advised him that they be given R15 000,00 to murder the deceased.

[46] The witness further testified that there was no plan about the way and manner which the deceased should be killed, but he knew the person had to be killed. He further stated that Tongo said only the wife had to be killed and that he (Tongo) should not be harmed. He further stated that Tongo and the accused both knew he had a firearm and he assumed that when they discussed the plan the accused knew that his (the witness') firearm would be used.

[47] He said further that it was agreed between the two of them that after they hijacked the vehicle, that he would be doing the driving and that is why the accused had the firearm. He denied that he was the person who pointed the firearm at Tongo, when it was put to him that Tongo had said that in his statement. He said further that he could not recall at what stage during the evening he handed the firearm over to the accused. At that stage when he handed the firearm over to the accused, both of them knew it would be used

during the hijacking. He disagreed with a statement of Tongo that both he and the accused carried guns when they stopped the vehicle.

[48] He conceded that initially during his bail application he stated that he would plead "not guilty" but later on he realized that there was no way he could deny the allegations. He only understood at a later stage when he had instructed another attorney why he was charged with murder.

[49] He further conceded that a suggestion was made to him by the police that he might expect a more lenient sentence if he made a statement. He was told by the police upon his arrest that the accused told them that he was the one who killed a woman. He testified that even if he was told he would not get a lighter sentence, he would still have made a statement.

[50] He conceded that he may have become bitter towards the accused; because the accused had told the police that he was responsible for the shooting. He denied, however, that he falsely implicated the accused.

Mawanda Vanda

[51] He confirmed the evidence of Qwabe regarding the fact that on Saturday 13 November 2010 Qwabe and the accused used his vehicle, wherein he was

a passenger with other people. The evidence of this witness does not directly implicate the accused in the commission of the offence.

[52] It was suggested by the defence that he would give false evidence against the accused due to an altercation that occurred between the brother of the accused and this witness. Such an allegation in my view is far-fetched and can safely be rejected as non-sensical. There is therefore no reason not to believe his evidence.

Daisy Mpongwana

[53] Daisy Mpongwana testified that she was in Sidima Circle at approximately 15h30 on Saturday 13 November 2010, when she saw the accused as well as Tongo who were both known to her. They were both sitting in a vehicle.

The accused did not dispute her evidence that he is known to her. Mrs Mpongwana is an elderly person, who was simply going about her own business on this specific day, and there is no reason for this court to disbelieve her evidence that she did in fact see the accused in the vehicle that day.



[54] She was actually glad to see Tongo who used to stay in an area near her. She had subsequently moved to the area where the accused stayed. The reason the accused gives as to why she would falsely place him in the vehicle was because of a grudge she bore against him for something that had happened about 10 years ago. This is unconvincing.

Sipho Qakaza

[55] He confirmed the evidence of Qwabe and Mrs Mpongwana in that he said that on Saturday 13 November 2010 after 12h00 in the afternoon, he also saw the accused sitting in a vehicle in Sidima Circle, which vehicle was later identified as that of Tongo. He used to see Qwabe and the accused on a regular basis in each other's company in the area. The accused indicated to him that he should go in the direction of Lukhaya's ("Bacela") house, where he waited for him.

[56] A while thereafter, the accused came to Lukhaya's house with a plastic bag in his hand. From this bag he took out a gun, looked at it and placed it back into the bag. This occurred between 30minutes – 1 hour after Qakaza had seen him in the car. In court he recognized and pointed out Exhibit 1(A) as the gun that the accused had. Qakaza identified the gun he saw as that contained in Exhibit 1(A). The accused then decided to go home. He saw the

accused again the following day at about 12h00 noon in the street speaking to an opposite neighbour. When he joined them, he saw that the accused had a watch in his hand. It was a Prada watch with a rubber strap. The witness said that he held the watch in his hand. Mr Qakaza asked the accused to give him the watch. The accused did not want to, and left his company. At a later stage, he came back with another watch, a ladies Giorgio Armani watch. This watch he identified as Exhibit "3a". The accused wanted to sell this watch for R400,00. The witness described it as a small watch with a small strap. It was gold in the middle and silver on the side.

[57] Thereafter the accused returned to his shack, whilst this witness waited for him. When he saw him again he was wearing a pair of Lacoste takkies and a green Adidas golf T-shirt. They walked around in the area and whilst they were walking the accused took out a camera and two phones. He described the former as a small black or silver touch screen camera. Mr Qakaza testified that he handled the camera, switched it on and saw a married couple in one of the digital photographic images. The man was wearing a suit and the female was wearing wedding clothes. The accused requested him to delete the photographs. He saw similar photographs of the same people on television news afterwards about the tourist that was shot. The phones were a Blackberry and a Nokia. He identified the Blackberry as Exhibit "4" and Nokia Exhibit "2" in court.

[58] In cross-examination he testified that it was after 12h00 when he saw the accused sitting in the vehicle. When it was put to him that a previous witness testified that it was after 15h00, he answered that he could not dispute it, because it was after 12h00.

Lukhaya Bacela

[59] He testified that the accused has been a friend of his since childhood. On 14 November 2010 in the early hours of the morning, past midnight, the accused arrived at his house. He was in possession of a brown Nokia cellular phone. The witness further testified that the accused from time to time used his phone as well as the phone of "Varhi" also known as Siyabonga Gwele.

Bacela evidence was that the accused had his phone. He however, could not say if the accused used his phone during this time.

[60] The accused told him that he picked up the Nokia phone in Illitha Park. After the accused arrived at Bacela's place on the morning of 14 November 2010, they went to the accused's girlfriend's place. After they arrived there, the witness remained behind while the accused and his (accused) girlfriend went to the witness's place. Bacela slept there the whole night. He got up the next morning and he went back to his own shack where he saw the accused again.

[61] Thereafter they went to the Waterfront on the Sunday where the accused bought a pair of green Lacoste takkies and a jacket. They came back from the Waterfront and each one went their own way. At about 17h00 they met again in the street. While they were walking, the accused told him that he robbed and shot a woman in Illitha Park.

[62] On Monday 15 November 2010 the witness and the accused were also together. They slept at the witness's place. In the early hours of the Tuesday morning on 16 November 2010, the witness was arrested with the accused. During their arrest, the police found the Nokia phone which he pointed out as Exhibit "2" in court under a mattress on the side where the accused was laying. This was the same phone the accused had in his possession after midnight on 14 November 2010 when he arrived at the witness's place.

[63] Afterwards Bacela's aunt told him that she found other items of jewellery in the shack. His cellular number at that stage was 073 1990 156. Bacela testified that when the accused used his phone he entered Qwabe's number under Qwabe's nickname "Spra". The number was 073 6586 434.

[64] In cross-examination this witness denied that the accused had occasionally sold Tik, also known as methamphetamine, to him. He further denied that he would leave his phone with the accused in exchange for Tik.

He further disputed the evidence of Sipho Qakaza who said that he was at his (witness') place on 13 November 2010 and he further denied that the accused was at his place with a firearm. He also did not see Qwabe on 13 November 2010.

Siyabonga Gwele

[65] Siyabonga Gwele is the accused's neighbour and he is also known as Varhi, phonetically pronounced as "Waggie". They grew up together and are close friends. He testified that his cellular phone number was 076 5061 557. He further testified that as from 11 November 2010 until 15 November 2010 the accused had his phone. He himself during this time did not speak to Qwabe on any of the occasions that Qwabe called his number, more particularly on the afternoon and evening of 13 November 2010. He disputed an assertion made in cross-examination that the accused never kept his phone overnight. He further conceded that the accused could have downloaded some music onto his phone.

[66] The court admitted a statement the accused made to Captain Jonker on 16 November 2010 after his arrest. Evidence of a pointing out by the accused to Captain Ontong on 17 November 2010 was also admitted.

[67] I will now briefly deal with the evidence of the statement the accused made to Jonker and the evidence of the pointing out to Captain Ontong.

In the statement the accused made to Captain Jonker he admitted some involvement in this case. He admitted that he was transported in Vanda's vehicle with Qwabe to Gugulethu. He gives an account of how Tongo's vehicle was hijacked, he says that Qwabe was the person who had the firearm and hijacked the vehicle. That he saw Tongo and took away his phone. He also states that Qwabe gave him the firearm and he pointed it at the Dewanis. They were robbed of cellular phones and a camera. He says further in his statement that after they had asked Mr Dewani to leave the vehicle, they drove further to Khayelitsha where Qwabe took the firearm and killed the deceased.

Thereafter they ran into bushes, where he hid the phones and the camera. During the pointing out, the accused went to point out the following places:

- 1) the road in Gugulethu where he says they hijacked the vehicle;
- 2) the place in Gugulethu where they dropped Tongo off.

From Gugulethu they drove to Khayelitsha where he pointed out:

- 1) Mew Way as the place where the deceased was shot;

- 2) Sinqolamthi Road where they abandoned the vehicle;
- 3) Spine Road, a bush opposite the look-out hill which they hid the phones and shared the money.

That concludes the summary of the evidence presented by the State.

[68] Defence's Case

The accused testified in his own defence and he also called his cousin, Nomtando Mngeni, and Nombulelo Mato to testify on his behalf.

The Accused

The accused Mr Mngeni testified that he stays at Sidima Crescent in Khayelitsha. He broadly denied the allegations of the State witnesses. He denied any involvement in a conspiracy or that he formed a common purpose to rob and kill the deceased.

[69] He said that he was not in the company of Qwabe on 12 November 2010 when Qwabe received a call from Mbolombo and said that Qwabe was lying if he was making such a claim. On 13 November 2010 at 15h00, when Qwabe said he was with him, he was going to a shop which is opposite Bacela's

house and he came across Qwabe who was sitting in a vehicle in the passenger seat. Qwabe enquired from him if he knew of any person who would want to buy a phone. The accused said he then told him he would find out and tell him the following day whether he had found someone. He denied that he ever got into the vehicle.

[70] He denied that he had contact or was in Qwabe's presence later in the day. He only saw Qwabe the next day when he had two cellular phones with him, a Nokia and a Blackberry. This was between 11h00 – 12h00. That is when he tried to sell the Blackberry to Ms Phumezo Nzotho. He confirmed that the other phone was the one that was found by the police at Bacela's place.

He further denied that he was in the company of Lukhaya Bacela or Sipho Qakaza on Saturday 13 November 2010.

[71] On Sunday 14 November 2010 on his way from his girlfriend he met Bacela. They agreed that they would meet each other again and they went to buy takkies and a jacket. The accused said that Bacela was lying if he said that he went to Bacela's shack in the early hours of the morning on 14 November 2010.

[72] He further denied that he used Bacela's cellular phone. He admitted to using Gwele's (Varhi) cellular phone, but only for the purpose of downloading music onto it. He did not use this cellular phone to contact Qwabe. He could not explain why Qwabe contacted him on Bacela's phone and why Bacela would say that he used his cellular phone. He further claimed that Bacela was once again lying if he said that he (accused) told Bacela that he shot and robbed a woman.

[73] He further claimed that Vanda was lying if he said that he was in his car. The accused said that the reason why Vanda was fabricating this story because he was involved in a fight with Vanda's brother in 1999 – 2000. Qakaza was also lying if he said that they were together on 14 November 2010. He only saw him on 15 November 2010, and he was lying if he said that he (accused) had two watches and a camera in his possession.

[74] He further testified that he was also not in any position to use a firearm because he had an operation on his elbow and lower arm.

The court will deal with the rest of his evidence in evaluation.

Nontando Mngeni

[75] The cousin of the accused testified that she stayed with him and their grandmother at C41 Sidima Crescent, Khayelitsha, during November 2010. On 12 November 2010 the accused was at home in the evening between 18h00 – 20h00. She saw him after 18h00 when he came to fetch his food past 18h00. She never saw him again on that evening.

Nombulelo Mato

[76] She testified that the accused is the boyfriend of a friend of hers, named Khuselwa. She last saw the accused on the Sunday morning (14 November 2010) before his arrest when he came out of a shack that was situated on the premises of the witness at Y60 Khayelitsha.

[77] The witness testified that he arrived at their place on the previous evening between 21h00 – 22h00 accompanied by one of his friends. They were all in each other's company until 1h30 the next morning. They were drinking and the accused's girlfriend Khuselwa asked if they could sleep in the shack. The following morning after 7h00, she saw him leaving their premises and walked away.

[78] Evaluation

The case against the accused is based on the following: firstly, direct evidence as presented by Qwabe who is an accomplice; secondly, on pieces of circumstantial evidence by the witnesses, Vanda, Mpongwana, Qakaza, Bacela and Gwele, and which evidence the State argues should also serve to strengthen the version of Qwabe; and thirdly, the statement made by the accused and the pointing out he made to Captain Ontong.

[79] Therefore, the evidence of the witnesses who either directly or indirectly implicate the accused should be placed under intense and vigorous scrutiny. This is especially so in the case of Qwabe. The State wants the court to accept the version of Qwabe, who says that the accused was directly involved in the killing of the deceased by shooting her.

[80] To this incident Qwabe is a single witness, because he was alone with the accused in the vehicle when the incident happened. He is also an accomplice who took part in the commission of the crime due to the fact that he formed a common purpose with the accused to rob and kill the deceased.

In **S v Van Vreden 1969 2 SA 524 (N) at 531 and 532**, Leon, J compiled a useful summary of the principles pertaining to the "cautionary rule" in the following terms:

- "(1) Caution in dealing with the evidence of an accomplice is imperative even where the requirements of sec. 257 have been satisfied.*
- (2) An accomplice is a person with a possible motive to tell lies about an innocent accused, for example to shield some other person or to obtain immunity for himself.*
- (3) Corroboration not implicating the accused but merely in regard to the details of the crime is no guarantee of the truthfulness of the accomplice. The very fact of him being an accomplice enables him to furnish the court with details of the crime which is apt to give the court, if unwary, the impression that he is in all respects a satisfactory witness.*
- (4) Accordingly, to satisfy the cautionary rule, if corroboration is sought it must be corroboration directly implicating the accused in the commission of the offence.*
- (5) Such corroboration may, however, be found in the evidence of another accomplice provided that the latter is a reliable witness.*
- (6) Where the corroboration of an accomplice is offered by another accomplice, the latter remains an accomplice and the court is not relieved of its duty to examine his evidence also with caution. He, like the other accomplice, has a possible motive to tell lies. He, like the other accomplice, because he is an accomplice is in a position to furnish the court with details of the crime which is apt to give the court, if unwary, the impression that he is a satisfactory witness in all respects.*
- (7) Where there is no such corroboration there must be some other assurance that the evidence of the accomplice is reliable.*
- (8) That assurance may be found, inter alia, where the accused is a lying witness or does not give evidence.*
- (9) In the absence of any of the aforementioned features it is competent for a court to convict on the evidence of an accomplice only where the court understands the peculiar danger inherent in accomplice evidence and appreciates that acceptance of the accomplice and rejection of the accused is only permissible where the merits*

of the accomplice and the demerits of the accused as witnesses are beyond question.

(10) When it is said that the merits of an accomplice as a witness must be 'beyond question' in order to be accepted as sufficient for a conviction, this does not mean that his evidence must be free from any defects".

[81] Having regard to the abovementioned principles as set out in *Van Vreden*, I will now deal with the evidence of Qwabe. Qwabe gave a clear and detailed version of the events leading up to and during the commission of the crime. It was precise and chronological. He also struck the Court as an intelligent person. He was severely criticised by the defence and subjected to long and tedious cross-examination; and notwithstanding this, he did not contradict himself whilst giving evidence in Court.

[82] As will be shown below, much of Qwabe's evidence was corroborated by other witnesses, and other evidence. This serves to strengthen Qwabe's version.

[83] The accused denied any initial involvement with Qwabe, including on the 12th November 2010. However, his evidence as to his alibi in respect of his whereabouts on the 12 November 2010 is not convincing. His version in these respects is contradicted by the cellular phone records that show that Qwabe had made contact with the accused. These calls were made to the cellular phone numbers of Gwele ("Varhi") and Bacela, both of whom said that during

this time the accused had possession of their cellular phones. Qwabe stated that he, the accused and Tongo had a meeting on 13 November 2010 in Tongo's vehicle in Sidima Crescent. Qwabe said that Tongo was sitting in the vehicle with them. This fact is also corroborated by Sipho Qakaza and Daisy Mpongwana. Both of them had no reason to falsely implicate the accused.

[84] Regarding the direct involvement of the accused, Vanda testified that by means of his vehicle, the accused and Qwabe were transported to Gugulethu and dropped off on the corner of NY112 and NY114 Gugulethu. This corroborates the evidence of Qwabe that it was in this area of Gugulethu where they hijacked the vehicle. This was between 22h10 – 22h30.

[85] Later, just after midnight on 14 November 2010, the accused was seen in possession of the Nokia cellular phone which belonged to Tongo. This is further confirmed by Qakaza who said he saw the accused later in the day at about 12h00 with some of the deceased's items in his possession.

[86] All this evidence serves to strengthen the version of Qwabe that the accused was involved in the prior planning and the execution of the murder and robbery of the deceased.

[87] It was put to him (Qwabe) that he made a confession to the police after his arrest and therein he said that he did “not” receive the call from Tongo on 12 November 2010 after 19h00 that evening but at 12h00. In such confession he further failed to mention to the police that the accused was with him at that stage or that the accused advised him that they be given R15 000,00 to murder the deceased.

[88] Mr Qwabe was not a perfect witness. In my view, however, the contradictions between his confession and his statements in court are not of such significance that it affected his general credibility and consistency.

[89] It was also put to him that his evidence in Court was contradicted by what Tongo had said in a confession made to the police and what Tongo had stated in his Plea and Sentence agreement. The most important claim of Tongo that contradicts Qwabe’s evidence was that Qwabe also possessed a firearm during the hijacking. The witness in answer to this denied those aspects of Tongo’s version that were in conflict with his evidence. It should be noted that Tongo was not called as a witness and his evidence was not tested under oath. The Court therefore has to accept Qwabe’s version. It is also important to note that only certain selective parts of Tongo’s version were put to him. It must also be said that Qwabe’s version is anchored and reinforced by the evidence of other witnesses.

[90] In cross-examination, Qwabe was accused of dishonesty, that when initially when he stated during the bail proceedings that he is not guilty and consequently changed his mind. The Court also questioned him about this. It was put to him he changed his version to one in which he falsely implicated the accused because he was promised a more lenient sentence. In explanation of his decision to change his plea, he explained that it was only after consulting with other attorneys following his initial indication of how he would plead, that he understood why he was charged with murder.

[91] In my view this is a perfectly reasonable explanation considering that Qwabe is not schooled in law. In my view it may well be that a lay person would not be able to understand that one may be guilty of murder on the basis of conspiracy to murder and on the basis of having formed a common purpose with other people to murder. As such on the basis of such an understanding, however confused, Qwabe's understanding that he is not guilty to a charge of murder is perfectly understandable.

[92] Mr Qwabe was consistent right from the beginning about the precise role he played in furthering the crimes with which he had been charged. His explanation of his role at the stage when he initially indicated that he would plead not guilty to murder as he understood it, is consistent with the version he

had set out in his confession immediately after his arrest on the 18 November 2010 (see Exhibit "J2").

[93] It cannot therefore be regarded as a fabrication which he made up after he had been offered to enter into a plea and sentence agreement wherein he bargained for a lesser sentence.

Qwabe's evidence also differs from that of the accused where the accused in his statement he made to Jonker said that Qwabe was the one that killed the deceased and not him. This evidence cannot detract from the overall credibility of the evidence of Qwabe. The accused had in any event disavowed this statement. This evidence shows the accused rather than Qwabe who was being dishonest. Qwabe was consistent in his version throughout as shown earlier.

[94] The accused disputed the following aspects of Bacela's version:

- a) that the accused was in possession of the Nokia cellular phone just after midnight on 14 November 2012;

- b) that the accused used his cellular phone at some stage and that he (accused) entered Qwabe's cellular phone number 073 6586 434 on that phone when he used it under the nickname "Ta Spra"; and
- c) that the accused told him that he shot a woman and robbed her of her cellular phone.

[95] Under cross-examination, Bacela was severely criticised in respect of this evidence and it was even argued that he fabricated this evidence against the accused. These complaints against his evidence are without foundation and they can be safely dismissed. Bacela impressed the Court as an honest witness. Where it was put to him that his version of what happened on 13 November 2010 was contradicted by the version of Qakaza, he stuck to his version and did not in any way try to adapt his evidence to make it consistent with that of Qakaza.

[96] This brings me to Qakaza's version. His evidence that implicates the accused is the following:

- a) He saw the accused in the car with Tongo and Qwabe on 13 November 2010.

- b) He later saw the accused at Bacela's place where Bacela was cutting someone's hair and the accused at that stage had a firearm.
- c) He saw the accused the next day with a number of items in his possession, namely, two cellular phones, a Nokia and Blackberry, a Giorgio Armani watch and a digital camera.
- d) He saw the accused in the shack of Bacela with a firearm on the afternoon of the 13th November 2010, after the accused had indicated to him to go and wait at Bacela's place. This particular aspect of his version is contradicted by Qwabe who said that he only at a later stage during the evening of the 13th November 2010 before the commission of the crime, he had given the firearm to the accused. Qakaza could not explain this discrepancy. This however, does not detract from the fact that the firearm was used later to kill the deceased. It also does not do any damage to the overall credibility of Qakaza's evidence.

[97] Apart from this, this witness however, impressed the Court especially in the detailed manner he gave his evidence. He came across as very confident. The Court can find no reason why he would falsely implicate the accused.

[98] His version is also consistent with other independent circumstantial evidence given by other witnesses, like Qwabe, whom he barely knew. It is

further consistent with the evidence of Bacela in respect of the Nokia cellular phone it is alleged the accused had possessed, and with the fact that the items of jewellery belonging to the deceased which he says the accused had in his possession, especially the watch and bracelet, was found in the shack on 16 November 2010, where the accused was sleeping the night before. Further corroboration and support for his version can be found in the statement and pointing out the accused had made to the police, which I will deal with later.

[99] The Court can therefore, if regard is to be had to the overall qualities of his evidence and how it ties in with the overall factual matrix of this case, attach little weight to the contradictions between Qakaza's evidence that of Bacela and Qwabe. His overall version cannot be disregarded because of these contradictions, because his version ties in with other credible and acceptable evidence some which ultimately does not affect the overall weight of his evidence.

[100] *Nicholas J* dealt with such an issue in the oft quoted case of **S v Oosthuizen 1982 (3) SA 571 (T) at 576(A)** in which it was held that:

"There is no reason in logic why the mere fact of a contradiction, or of several contradictions, necessarily leads to the rejection of the whole of the evidence of a witness".

And further at **576 B - C** *Nicholas J* goes further by saying:

"Where the statements are made by different persons, the contradiction in itself proves only that one of them is erroneous: it does not prove which one. It follows that the mere fact of the contradiction does not support any conclusion as to the credibility of either person. It acquires probative value only if the contradicting witness is believed in preference to the first witness, that is, if the error of the first witness is established".

The Court goes on and says further on page **576 G – H**:

"Plainly it is not every error made by a witness which affects his credibility. In each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness's evidence".

[101] This point of view was reinforced in the *dictum* of **S v Koopman**

[2005] 1 SA 539 (SCA) at **para [35]** the following was said:

"Die beregting van 'n feitegeskil behels nie die getel van teenstrydighede, waar die gedingsparty met die meeste punte as oorwinnaar uit die kryt tree nie. Die doel van die verhoor is om te probeer vasstel wat op 'n bepaalde tydstip in die verlede gebeur het. Die hof is dáárvoor op getuienis aangewese. Aangesien daar slegs een waarheid is, behoort betroubare getuies se weergawes logiesgesproke 100% ooreen te stem. Dit werk ongelukkig nie so in die praktyk nie: twee of meer geloofwaardige getuies kan heeltmal van mekaar verskil. Weersprekings tussen ooggetuies in hul onderskeie beskrywings van 'n voorval beteken geensins dat die een of die ander van hulle noodwendig leuenagtig was nie, nog minder dat albei leuens verkondig het. Foutiewe herinnering van besonderhede is 'n algemene menslike tekortkoming waarvan 'n hof kennis moet neem alvorens getuies as meinedig afgemaak word. Die inagneming van weersprekings het wel 'n plek in die beoordeling van die getuies se

geloofwaardigheid, maar met versigtigheid en toepassing van gesonde oordeel. Die aard van die teenstrydighede moet in aanmerking geneem word: hul kan wesenlik of onbeduidend van aard wees – met oneindige graadverskille tussen die twee pole; weersprekings op sydelingse aspekte is selde van veel waarde”.

[102] The difference therefore in Bacela's, Qakaza's and Qwabe's version does not affect the overall quality of their evidence.

Reason for admitting statement of the accused and the pointing out

[103] The State in its arsenal of evidence unleashed against the accused, presented evidence of a statement the accused had made after his arrest to Captain Jonker and a pointing out made to Captain Ontong on 17 November 2010. The accused disputed the admissibility of such evidence. I made a ruling admitting such evidence, without giving reasons on 26 September 2012.

I will now give the reasons for my ruling. The principal witnesses who testified during the “Trial within a Trial” were Captain Jonker, Lt Colonel Kwinana, Constable Mbali, Warrant Officer Pharo, Captain Hendrikse and the main witness during the pointing out was Captain Ontong. The evidence of a video recording of the accused making the statement as well as the pointing out was also presented.

[104] The accused attacked the admissibility of the statement and the pointing out the accused made on a number of grounds. It was alleged that both were not made freely and voluntarily and that they were made under undue influence. In particular, it was alleged that the accused was severely beaten and tortured at the hands of the police from the moment of his arrest until after he appeared in Court. He alleged that even though his constitutional rights were explained he was not given an opportunity to consult with a lawyer when he made such a request.

[105] The accused further alleged that even during the time when he made the statement to Captain Jonker and Captain Ontong the proceedings were interrupted and he was beaten. He alleged where this was not shown on the video footage, the recording was tampered with. He later abandoned this complaint.

[106] All the witnesses for the State denied the allegations of assault at the hands of the police. The defence did not present any evidence during the "Trial within a Trial" and the accused did not himself testify. The evidence during the "Trial within a Trial" overwhelmingly showed that the accused was not ill-treated let alone assaulted by the police.

[107] The statement he made to Captain Jonker as well as the pointing out he made were captured on video. In both instances he is clearly seen and heard to say he was not assaulted or ill-treated by the police and he decided out of own free will that he wanted to talk. How the accused thought in the light of the overwhelming evidence against him he could have convinced the court that he did not make the statement or the pointing out freely and voluntarily, is puzzling. I therefore find that the pointing out and the statement were made freely and voluntarily and without any undue influence.

[108] I wish to now deal with the accused's allegation that his right to legal representation was infringed in that when he elected to obtain legal representation he was denied the opportunity. I wish to first precisely set out the facts.

[109] Before the accused made the statement he asked Jonker if it was wise to make a statement without a lawyer present. Jonker said to the accused that it was up to him if he wanted a lawyer present. He was further informed that if he wanted a lawyer present, that he (Jonker) would stop the proceedings and then he had to first consult with a lawyer before proceedings could again proceed.

[110] The accused said to Jonker that he felt that he needed to speak to his grandmother to see if she could get a lawyer. Then Jonker explained to him that the state could provide him with Legal Aid and then they would stop with the taking of his statement and arrange for a lawyer. The accused answered that he felt "lost" but he also wanted to give a statement.

[111] Once again Jonker explained to him that it was his right to have a lawyer present. The accused then told Jonker that he would get a lawyer at Court and he did not want to waste time and have to wait for a lawyer. Once again it was explained to him that it was his right to have a lawyer present and he must not feel forced or be influenced to make a statement and that he could have his lawyer present. The accused then answered that he would proceed to make a statement without his lawyer.

[112] The question that needs to be decided is whether, in the above circumstances, there was a duty on Captain Jonker to go further than merely explaining to the accused his right to legal representation. Should Jonker have stopped the proceedings notwithstanding the fact that the accused said he wanted to proceed without a lawyer after Jonker had on more than one occasion explained to him that he could stop the proceedings should the accused elect to consult a legal representative.

[113] In terms of the Constitution of the Republic of South Africa Act 108 of 1996, it is the duty of an arresting officer as well as a police officer, usually a more senior commissioned officer, who is tasked with the taking of a statement against an accused person, to inform him or her of his or her rights. What is further expected of them is to make sure that an accused person understands their rights.

Section 35(1) of the Constitution of the Republic of South Africa Act 108 of 1996 reads:

"Arrested, detained and accused persons

(1) Everyone who is arrested for allegedly committing an offence has the right-

(a) to remain silent;

(b) to be informed promptly-

(i) of the right to remain silent; and

(ii) of the consequences of not remaining silent;

(c) not to be compelled to make any confession or admission that could be used in evidence against that person".

Section 35(2) of the Constitution of the Republic of South Africa, Act 108 of 1996, as far as it is applicable, reads:

"(2) Everyone who is detained, including every sentenced prisoner, has the right- ...

(b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;

(c) to have a legal practitioner assigned to the detained person by the state and at

state expense, if substantial injustice would otherwise result, and to be informed of this right promptly; . . .”

[114] It is not expected of the police officer taking a confession or statement to offer an accused person any legal advice as to how best to exercise his or her rights. There is no duty on the police to provide any further assistance than what is required and set out in the Constitution as long as the process is fair and the accused is not deliberately set up in such a manner that he or she would be forced against his or her will not to exercise his or her rights in terms of the Constitution.

[115] I am further in agreement with the view expressed by the Court in **S v Vumase 2000 (2) SACR 579 (W)** at 581 c - e where it was held:

“The Constitution requires that an accused person should be advised of his rights in such a way that he is made aware of the contents thereof in a meaningful way. The Constitution does not require that an accused person be further advised on the best way to exercise such rights”.

And further at 581g – h:

“Both the duties of the police and the duties of the presiding officer at a trial require to be carried out in a fair way. But those duties are not the same. The fact that a judicial officer may in certain cases be obliged to advise an accused person that he should avail himself of legal representation in order that the accused person be afforded a fair trial does not mean that the police officer taking a statement has, in order to be fair, to advise an accused person to obtain the services of a legal

representative before he makes a statement. The giving of a statement by an accused person to the police often serves to facilitate a police enquiry. An accused's statement is an important investigative tool, of which the police are entitled to avail themselves. Unlike the position of a judicial officer, who is an umpire who oversees the fairness of the proceedings before him, the police are in an adversarial position vis-à-vis an accused and as such the rules of fairness differ. A balancing of the rights of the State against the rights of an arrested person must be achieved in a way that is fair to both sides. In my opinion if a police officer is satisfied on reasonable grounds that the accused understands his rights fully, he does not have to go further to advise him to obtain the services of a legal representative”.

[116] If regard is to be had to the evidence presented in this case during the “Trial within a Trial”, the police as from the moment of the arrest of the accused, acted with utmost professionalism and fairness. Jonker repeatedly advised the accused of his rights, the accused fully understood his rights when they were explained, and nothing more could have been expected of Jonker. It is clear from the evidence that the accused wanted to co-operate right from the beginning. There was no need for the police to have done anything untoward. For these reasons the statement made by the accused as well as the pointing out were admitted into evidence against him.

[117] That brings me to the evidence of the accused. The accused did not take the Court into his confidence during the course of the trial. The only answer he could give against the mountain of evidence against him ranges from a bare denial of the allegations, a rather late revelation of an alibi which

proved to be unconvincing, to the completely unfounded claim that the police, together with witnesses who testified, had conspired to fabricate the evidence against him. I will now deal with the version the accused had put up in his defence.

[118] In his evidence and in response to Qwabe's claim that the accused was with him at about 19h00 on Friday 12 November 2010 when he received a call from Tongo, the accused claimed firstly that he was at his girlfriend's house as from 18h00 that Friday evening. Shortly thereafter, he changed his version and said he was at home on Friday the 12th November 2010. He stated that he left his girlfriend in his shack and he was with his friends playing soccer in the street between 18h00 – 20h00 whereafter he returned to his house. He then went to fetch his food and he thereafter went to sleep. His cousin Nontando Mngeni contradicted his evidence when she testified that the accused came into the house at 18h00 to fetch his food. His version is further contradicted by the evidence of the accused's second witness, Nombulelo Mato, who testified that she saw the accused at approximately 20h00 in Y Section near the house of his girlfriend Khuselwa.

[119] His evidence about his whereabouts on the Saturday evening 13 November 2010 is also inconsistent. Initially he said he went to his girlfriend's (Khuselwa) place, arrived there at 20h00 and thereafter together they went to

the home of Mato, also known as Smallie. They arrived there between 20h00 – 20h30. He said that when they arrived there, he went to sleep immediately.

[120] Thereafter he changed his version and said he and his girlfriend were socializing with Mato and her boyfriend and that he went to sleep between 21h00 – 22h00. The accused's version was further contradicted by the testimony of Mato. She said that the accused did not come with Khuselwa (his girlfriend) to her house, because she was already there. He was accompanied by a friend of his. She said further that he arrived there between 21h00 – 22h00. She further stated that the accused and persons were drinking until 01h30 the next morning and his girlfriend then only requested that he sleep there, because he was too drunk to go home.

[121] In dealing with the defence of an alibi, the approach of a Court should be to consider the alibi in the light of the totality of the evidence in the case, and the court's impression of the witnesses. This approach was laid down in the oft quoted case of **R v Hlongwane 1959 (3) SA 337 (A)** at 341 A. Having regard to the quality of the alibi evidence presented by the defence, weighed up against the totality of the evidence against the accused, the alibi of the accused can be safely rejected.

[122] The version of the accused is further riddled with improbabilities inconsistencies and untruths. The following stands out.

[123] The accused, when asked how the items of jewellery belonging to the deceased were found in the ceiling of the shack of Bacela, in which the accused had slept the night before his arrest (15 November 2010) he was unable to give an acceptable explanation. It must be borne in mind that it is accepted that Bacela and the other persons who were with him in the shack were not involved in the robbery and murder of the deceased. Mr Diyamani on behalf of the accused argued and gave a highly unlikely, far-fetched and speculative response that Qwabe could have placed it there. The probability that anyone other than the accused could have placed it there is very remote, that the court can safely reject any such possibility.

[124] A further aspect of the accused's version that the Court finds improbable is the accused's claim that Qwabe had on 13 November 2010 requested him to sell 2 cellphones on his behalf, and that he would give them to him the next day. His evidence about this aspect was very vague and he had difficulty in explaining to the Court how they would meet each other the next day and he claimed that it was by mere co-incidence that they met up on 14 November 2010 when Qwabe gave him the cellphones. Once again, this explanation is highly unlikely. It is therefore highly improbable that Qwabe could have

requested him to sell phones on his behalf which he (Qwabe) did not have on the day before the incident, which incidentally was the cellular phones that was robbed from the deceased and Tongo during the murder of Anni Dewani.

[125] His further evidence to the effect that he did not use the cellular phones of Bacela and Gwele (Varhi) to communicate with Qwabe, is also not convincing. Such witnesses according to their evidence, which was not disputed, had no business or contact with Qwabe during the period 12 November 2010 to 14 November 2010. It is improbable in the light of Bacela and Gwele's evidence that someone else other than the accused could have used their phones to contact Qwabe.

[126] The accused could also offer no plausible explanation why Qwabe would falsely incriminate him and drag him into this whole affair. It is difficult to understand therefore why Qwabe, if he was the only person involved with Tongo in the killing of the deceased which he admitted, would say that the accused was also involved in the planning and later, shooting of the deceased, if there was no need for him to do so. Qwabe had already owned up and taken responsibility for the role he played in the murder of the deceased. It would therefore have not been in his interest or have made any difference to his position to have implicated the accused in this case.

[127] He further lied to the Court where he said that he was not involved in any way in the commission of the offence, whereas in a statement he made to Jonker, albeit exculpatory he said he was in the vehicle when the deceased was killed and that he had partaken in the robbery of the deceased.

[128] In the evidence relating to the pointing out, he also pointed out where the vehicle was hijacked; where Mr Tongo was dropped off; where Mr Dewani was dropped off; where the deceased was shot and where they hid the stolen items. How could he have done this if he was not involved. This once again showed that the accused was dishonest and his evidence is not to be believed.

For these reasons, and others as borne out by the evidence, the version of the accused is rejected as false. It is not reasonably possibly true.

[129] The Court finds that the State had proven the case against the accused beyond reasonable doubt, as borne out by the totality of the strong evidence against him, including the statement he had made where he had incriminated himself and the pointing out. The case against the accused is therefore overwhelming and the accused could barely avoid the avalanche of evidence proven by the State to come crashing upon him.

[130] I find that the accused together with the persons as mentioned in the evidence formed a common purpose to murder the deceased, Anni Dewani, after they had conspired to do so. I find that the accused had made himself available at a price upon payment of R15 000,00, to be shared between himself and Qwabe, to execute the deceased. In the process a plan was devised in which it would appear that the vehicle in which the deceased and her husband were passengers was hijacked. During this incident, the deceased was shot once through the neck by the accused, as a result of which she died. Thereafter she was robbed of her property as stated in the indictment.

[131] I am satisfied that the accused had committed the crime of murder in the manner as set out in the indictment. I am however not satisfied that the accused has formed a separate intention to kidnap the deceased. The evidence shows that in order to commit the murder, the deceased had to be kidnapped in the process. There was therefore one single intent to commit murder and not also to commit the crime of kidnapping. It would therefore amount to a duplication of convictions should the Court find on the evidence presented that the deceased was also kidnapped. I am however satisfied that the accused had committed the other offences with which he was charged as set out in the indictment. In the result therefore I find the accused guilty on the following charges:

Count 2 – Robbery with aggravating circumstances of Anni Dewani;

Count 3 – Premeditated murder of Anni Dewani;

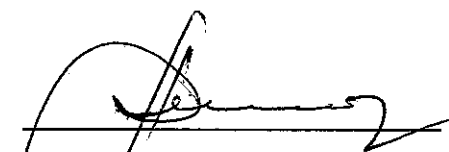
Count 4 – Contravening Section 3 of the Firearms Control Act 60 of 2000 in that he was in possession of a firearm without being the holder of a licence or permit to possess such a firearm;

Count 5 – Contravention of Section 90 of the Firearms Control Act 60 of 2000 the unlawful possession of ammunition without being the lawful owner of a firearm from which such ammunition can be discharged.

On count 1 the charge of kidnapping the accused is acquitted.

[132] After having received representations from the members of the media with regards to the Order I made in terms of Section 153 (2) of the Criminal Procedure Act 51 of 1977 whereby it was ordered that the names of certain witnesses not be published. I hereby rescind that Order in respect of the publication of the names of the following witnesses:

1. Monde Mbolombo;
2. Sipho Qakaza;
3. Likhaya Bacela.



HENNEY, J
Judge of the High Court

