

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

CASE NO. CC15/2014

In the matter between:

THE STATE

And

SHRIEN PRAKASH DEWANI

Accused

JUDGMENT: 8 DECEMBER 2014

TRAVERSO, DJP

[1] At the close of the case for the prosecution, Mr. Van Zyl, for the accused brought an application for the accused's discharge in terms of section 174 of the Criminal Procedure Act, No. 51 of 1977.

[2] The accused was charged with the following offences:

- (a) Conspiracy to commit the offences of kidnapping, robbery with aggravating circumstances and murder (count 1);
- (b) Kidnapping (count 2);
- (c) Robbery with aggravating circumstances (count 3);
- (d) Murder (count 4); and
- (e) Obstructing the administration of justice (count 5).

[3] In count 1 it is specifically alleged that the accused conspired with Zola Tongo ("Tongo"), Mziwamadoda Qwabe ("Qwabe") and Xolile Mngeni ("Mngeni") to commit the alleged offences:

"... by entering into an agreement with Tongo, in terms of which Tongo would procure the services of a person or persons to do one or more or all of the following:

- 2.1 simulate a hi-jacking of Tongo's motor vehicle;
- 2.2 simulate a kidnapping and robbery of Tongo and the accused; and/or
- 2.3 effect the kidnapping, robbery and murder of the deceased, Anni Dewani, and in that, according to the conspiracy agreement, the Accused would provide payment to the perpetrators as well as to Tongo for the kidnapping, robbery and murder of the deceased, Anni Dewani".

[4] Counts 2 to 4 contain the allegation that Tongo, Qwabe and Mngeni acted in the furtherance of a common purpose to kidnap the deceased, rob the deceased and kill the deceased. The other accomplice Monde Mbolombo was not charged as a co-conspirator.

[5] It follows that it is therefore crucial for the State's case to prove that the accused entered into an alleged conspiracy agreement with Tongo. Failing such proof, the accused cannot be convicted of any of the first four counts against him and accordingly also not on the fifth count.

The legal position

[6] Section 174 of the Criminal Procedure Act provides:

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

[7] It is well established that “no evidence” does not mean no evidence at all, but rather no evidence on which a reasonable court, acting carefully, might convict.¹

¹ R v Shein 1925 AD 6; Rex v Herholdt & Others 1956(2) SA 722 (W); S v Mpetha & Others 1983(4) SA 262; S v Shuping & Others 1983(2) SA 119 (B); S v Lubaxa 2001(2) SACR 703 (SCA)

[8] The question whether a court should grant a discharge at this stage is one which entails a discretion by the trial court. It is a discretion which must, self-evidently, be exercised judicially.

[9] The judicial pronouncements on the manner in which the trial court must exercise its discretion have over the years been contentious. I do not intend to give a full historical overview and will confine myself to a brief reference to those cases that helped to define the scope of the court's discretion in terms of section 174.

[10] In S v Shuping & Others, (*supra*), Hiemstra, CJ reviewed the case law history of discharge applications and formulated the test as follows at 120 *in fine* to 121 A :

“At the close of the State case, when discharge is considered, the first question is: (i) Is there evidence on which a reasonable man might convict; if not (ii) is there a reasonable possibility that the defence evidence might supplement the State case? If the answer to either question is yes, there should be no discharge and the accused should be placed on his defence.”

[11] The second part of the latter test did not always find favour. In S v Phuravhatha & Others, 1992 (2) SACR 544 (V), Du Toit, AJ stated the following:

“The presumption in favour of innocence, the fact that the *onus* rests on the State, as well as the dictates of justice in my view will normally require an exercise of the discretion under s 174 in favour of an accused person where the State case is virtually and basically non-existent. Strengthening or supplementation of a non-existent State case is a physical impossibility.”

[12] Since the inception of our Constitutional order, conflicting views arose as to whether or not the Constitution has impacted on the test to be applied by a court in an application in terms of section 174. These decisions culminated in the Supreme Court of Appeal finally deciding this issue in S v Lubaxa, 2001 (2) SACR 703 (SCA), *inter alia*, as follows:

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

[19] The right to be discharged at that stage of trial does not necessarily arise, in my view, from considerations relating to the burden of proof (or its concomitant, the presumption of innocence) or the right of silence or the right not to testify, but arguably from a consideration that is of more general application. Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common law principle that there should be ‘reasonable and probable’ cause to believe that the accused is guilty of an offence before a prosecution is initiated (*Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) at 135C-E), and the constitutional protection afforded to dignity and personal freedom (s 10 and s 12) seems to reinforce it. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should

it cease when the evidence finally falls below that threshold. That will pre-eminently be so where the prosecution has exhausted the evidence and a conviction is no longer possible except by self-incrimination. A fair trial, in my view, would at that stage be stopped, for it threatens thereafter to infringe other constitutional rights protected by s 10 and s 12.”

[13] It has been held that the credibility of State witnesses at this stage of the proceedings only play a very limited role. In S v. Mpetha (*supra*), Williamson, J held that relevant evidence can only be ignored if “it is of such poor quality that no reasonable person could possibly accept it”.

[14] This sentiment was also echoed and expanded on by Kgomo, J in S v Agliotti, 2011 (2) SACR 437 (GSJ), who stated the following at 456 *in fine* to 457b:

“[272] In *S v Lavhengwa* 1996 (2) SACR 453 (W) the view was expressed that the processes under s 174 translate into a statutorily granted capacity to depart discretionally, in certain specific and limited circumstances, from the usual course, to cut off the tail of a superfluous process. Such a capacity does not detract from either the right to silence or the protection against self-incrimination. If an acquittal flows at the end of the State case the opportunity or need to present evidence by the defence falls away. If discharge is refused, the accused still has the choice whether to testify or not. There is no obligation on him to testify. Once this court rules that there is no *prima facie* case against the accused, there also cannot be any negative consequences as a result of the accused’s silence in this context. ...

[273] I agree with the view that it is an exercise in futility to lay down rigid rules in advance for an infinite variety of factual situations which may or may not arise. It is thus, in my view, also ‘unwise to attempt to banish issues of credibility’ in the

assessment of issues in terms of s 174 or to 'confine judicial discretion' to 'musts' or 'must nots'."

[15] To therefore summarise the legal position regarding applications in terms of section 174:

- (a) An accused person is entitled to be discharged at the close of the case for the prosecution if there is no possibility of a conviction other than if he enters the witness box and incriminates himself;
- (b) In deciding whether an accused person is entitled to be discharged at the close of the State's case, the court may take into account the credibility of the State witnesses, even if only to a limited extent;
- (c) Where the evidence of the State witnesses implicating the accused is of such poor quality that it cannot safely relied upon, and there is accordingly no credible evidence on record upon which a court, acting carefully, may convict, an application for discharge should be granted.

[16] It is common cause that the only witness who could implicate the accused was Tongo (who was an accomplice witness).

[17] It is trite that a court should approach the evidence of an accomplice witness with caution. The duty of the court in this regard has been described as follows in Rex v Ncanana, 1948 (4) SA 399 (AD) at 405:

“The cautious Court or jury will often properly acquit in the absence of other evidence connecting the accused with the crime, but no rule of law or practice requires it to do so. What *is* required is that the trier of fact should warn himself, or, if the trier is a jury, that it should be warned, of the special danger of convicting on the evidence of an accomplice; for an accomplice is not merely a witness with a possible motive to tell lies about an innocent accused but is such a witness peculiarly equipped, by reason of his inside knowledge of the crime, to convince the unwary that his lies are the truth. This special danger is not met by corroboration of the accomplice in material respects not implicating the accused, or by proof *aliunde* that the crime charged was committed by someone; ... The risk that he will be convicted ... will be reduced, and in the most satisfactory way, if there is corroboration implicating the accused.”

[18] In S v Mhlabathi & Another, 1968 (2) SA 48 (A) at 50 G – 51 A, Potgieter, JA dealt with this question as follows:

“It is clear from the authorities if corroboration was required it had, for the purpose of the so-called cautionary rule, to be corroboration implicating the accused and not merely corroboration in a material respect or respects. ...”

Potgieter, JA confirmed the view of Schreiner, JA in the Ncanana case.

[19] In S v Gentle, 2005 (1) SACR 420 (SCA) at 430, Cloete, JA in dealing with the approach to be followed by a court when it is faced with a situation where a court should caution itself in analysing the evidence, said the following:

“It must be emphasised immediately that by corroboration is meant other evidence which supports the evidence of the complainant, and which renders the evidence of the accused less probable, *on the issues in dispute*.”

[20] In S v Scott-Crossley, 2008 (1) SACR 223 (SCA) at 234, the court stressed that:

“Matters which are common cause between the State and the accused cannot provide corroboration for matters in dispute – otherwise, for example, the fact that an accused in a rape case confirmed that he had had sexual intercourse with the complainant could be taken as corroboration of the latter’s version that he had done so without consent, which is plainly absurd.”

[21] Therefore the images in the CCTV footage (to which I will refer in more detail later) depicting:

- (a) The accused meeting with Tongo at the parking lot at the Cape Grace Hotel on Friday, 12 November 2010;
- (b) The accused being picked up by Tongo on Saturday morning, 13 November 2010 at the Cape Grace Hotel;

- (c) The accused being dropped off again by Tongo later on that Saturday morning at the Cape Grace Hotel;
- (d) The accused and the deceased being picked up by Tongo on Saturday evening at the Cape Grace Hotel;
- (e) The accused talking to Tongo after the incident on Sunday, 14 November 2010;
- (f) The accused paying Tongo R1 000,00 in the communications room on Tuesday, 16 November 2010; do not provide any corroboration for the version of Tongo where it differs from that of the accused set out in his plea explanation, as none of these events are in issue. It is what was said during those events that is in issue and for that there is only the version of Tongo.

[22] The same applies to the telephone communication between the accused and Tongo, and between Tongo and Mbolombo and Qwabe. This telephone communication does not in itself corroborate what was said during those calls, it merely confirms that communication took place.

[23] Against this legal background I will now proceed to analyse the evidence:

23.1 **Zola Tongo**

At the outset it needs to be repeated that Mr. Tongo is the only witness who testified that the alleged conspiracy agreement was entered into with the accused and what the terms of the agreement were. It is clear that Mr. Tongo, Mr. Qwabe and Mr. Mngeni (and Mr. Mbolombo) acted in execution of a common purpose to commit at least the offences of kidnapping and robbery and possibly also other offences. The only issue to determine is whether the evidence shows that the accused was part of that conspiracy.

Evidence in chief

- 23.1.1 Mr. Tongo testified that he was an executive taxi driver and on the day in question (12 November 2010) he was at Cape Town International Airport waiting for fares. He stated that the accused approached him and asked him where he could get transport to Town. Mr. Tongo responded that he could transport him to Town, and although there was a taxi rank to which he directed the accused, he told the accused that those taxis were generally more expensive. The accused informed him that he wanted to go to the Cape Grace Hotel and informed Mr. Tongo that he was not alone, and that his wife was with him. Mr. Tongo testified that while he was waiting he saw a “lady” come from inside the airport towards him. It is common cause that this woman was the deceased.

- 23.1.2 Mr. Tongo's car was parked on the lower level of the parking garage. On their way to the parking garage the deceased asked him why he was not parked where the other taxis were parked. He told her that he did not yet have a permit to park there. He testified that during the drive from the airport to the Cape Grace Hotel, he did all he could to market himself and his services to the couple.
- 23.1.3 It is common cause that Mr. Tongo was driving the Volkswagen Sharan in which the deceased's body was found.
- 23.1.4 On the way to the Cape Grace Hotel Mr. Tongo told the couple about Cape Town's beauty, about the squatter camps and the importance of the township Gugulethu which is right next to the squatter camps. He told them about the well-known tavern KwaMzoli in Gugulethu. He also told them about other tourist attractions such as the penguins at Boulders Beach. Mr. Tongo was hoping that the Dewanis would use his services while they were in Cape Town. Mr. Tongo testified that en route there was very little interaction between the couple and himself.
- 23.1.5 Upon their arrival at the Cape Grace Hotel the deceased accompanied a porter with their luggage into the reception area while the accused

remained behind at the car in order to pay Mr. Tongo his fare. At that stage Mr. Tongo gave him one of his business cards.

23.1.6 The accused then informed him that he has a job for him and that he must wait for him in the parking area of the hotel. Mr. Tongo went to park his car in the parking area and waited.

23.1.7 The accused then went inside the hotel to check in and after a while returned and got into Mr. Tongo's vehicle. The accused then informed him that the job that he had for Mr. Tongo would make his business grow because he, the accused, is from overseas and can refer other travellers to him who in turn would refer further travellers to him.

23.1.8 Shortly thereafter the accused told him that the real job that he, the accused, had for Mr. Tongo was that he wanted somebody to be "removed from the eyes". When Mr. Tongo asked him to explain what he meant, he stated that he wanted somebody to be killed. Mr. Tongo told the accused that he was not involved in such things, but informed him that he knew somebody who lives in the location who might know about people who would be prepared to do it. According to Mr. Tongo he was at all times informed by the accused that it was his "business partner" who would be arriving on the following day, that he wanted killed. Mr. Tongo knew that the person to be killed was a woman.

- 23.1.9 Mr. Tongo and the accused parted company on the basis that if Mr. Tongo should find somebody who would be prepared to do the job, he would contact the accused and inform him accordingly. The two gentlemen exchanged phone numbers. They also discussed the remuneration that would be paid for the job and the accused explained that he would be prepared to pay an amount of R15 000,00 when the job was done. Over and above the R15 000,00, Mr. Tongo would receive an amount of R5 000,00. The accused also stated that he had dollars and could pay in dollars.
- 23.1.10 Mr. Tongo thereafter left and immediately went to Century City, to the Protea Colloseum Hotel, where he met his friend, Mr. Monde Mbolombo, who worked as a receptionist at the hotel. Mr. Tongo explained that the reason why he approached Mr. Mbolombo, was because Mr. Mbolombo lives in the location and he “knows everything that happens in the location. ... I realised that there must be things that he is aware of, things that are happening in the locations, things that I am not aware of”.
- 23.1.11 Mr. Tongo explained to Mr. Mbolombo what he wanted. Mr. Mbolombo immediately informed him that there is a young man that he knows who might be prepared to do the job. Mr. Mbolombo therefore took his

phone and went outside with Mr. Tongo where they phoned this person and explained to him about the job. It is common cause that the person that he phoned was Mr. Qwabe. Mr. Tongo heard Mr. Mbolombo explain to Mr. Qwabe what he, Mr. Tongo, had explained to Mr. Mbolombo and asked whether it would be in order if the person who mandated this deal would make payment in dollars. Mr. Qwabe stated that “they” did not want dollars, it had to be South African rands. Mr. Qwabe stated that he still had to contact a friend. Mr. Tongo testified that while they were outside, he took the particulars of this person from Mr. Mbolombo. He could however not remember his name and accordingly listed him in his contact list on his phone under “H”. Mr. Tongo phoned Mr. Qwabe at a later stage in order to find out “how things were going”. Mr. Qwabe informed him that things were going just fine, but that he was still going to meet another man and he is “promising”.

- 23.1.12 Mr. Tongo testified that he spoke to the accused later that evening because the accused wanted to make sure that he had found the people who would “do the job”. He stated that, upon informing the accused about the fact that the assailants would not want to be paid in dollars, the accused asked him whether he was aware of a place where he could change his dollars. Mr. Tongo knew of such a place because whenever he was tipped by overseas visitors in dollars, that is where he would go and exchange them.

23.1.13 The accused and Mr. Tongo then arranged for a time to meet the following day so that Mr. Tongo could take the accused to the money changer. Mr. Tongo testified that he was slightly late. The accused phoned him and asked him whether he had forgotten to come and collect him and sounded agitated. Mr. Tongo told the accused that he had been delayed but was on his way to the Cape Grace Hotel from the Waterfront. When he arrived at the hotel, the accused immediately came out of the hotel and told Mr. Tongo that they must hurry because his wife was still in the shower or washing. Mr. Tongo stated that he did not know how much money the accused was going to change. While he was waiting for the accused he heard one of the women who works in the shop say “this is a lot of money that you are coming to exchange here”.

23.1.14 In the car on their way back to the Cape Grace Hotel from the money changer, the discussion about “the job” continued. On their arrival at the hotel Mr. Tongo parked his car and had further discussions with the accused about how the job was going to be done. It is during this discussion that the accused informed Mr. Tongo that he wanted the car to be hijacked, and that they must be robbed, whereafter Mr. Tongo must be dropped and then they must also drop him, the accused, along the way, and then they must kill the “business partner”. There was no

discussion as to how, where or when the “business partner” must be killed.

23.1.15 It was then agreed that Mr. Tongo would collect the Dewanis from the Cape Grace Hotel at 7:30 p.m. on the Saturday evening, that he would then show them the Waterfront and that they would then go to Gugulethu. Mr. Tongo then made an arrangement to meet with Mr. Mbolombo and Mr. Qwabe on the Saturday afternoon. All three of them could not meet as Mr. Tongo had business commitments.

23.1.16 Later an arrangement was made for Mr. Tongo to meet with Mr. Qwabe at the Khaya Bazaar. He later phoned Mr. Qwabe who told him to wait at a bus stop in Khayelitsha. Mr. Tongo did so. Mr. Qwabe arrived and introduced himself as “Spra” (which is his nickname) and informed Mr. Tongo that they must meet the other person who is going to work with them. They then drove to the other person, who later transpired to be Mr. Mngeni. Mr. Mngeni got into the car and introduced himself as Xolile. This was Mr. Tongo’s first encounter with Mr. Qwabe and Mr. Mngeni.

23.1.17 Mr. Qwabe asked Mr. Mngeni whether he remembered that he, Mr. Qwabe, had phoned him telling him about a job. He then told Mr. Mngeni that “here is the man”, with reference to Mr. Tongo. Mr. Tongo

then explained to them what the accused wanted done. He said the man wanted his business partner, who was going to arrive that day, killed. He wants it to look like a hijacking. Thereafter, they (the hijackers) must first drop Mr. Tongo, and after driving on, they must drop the accused, and then lastly they must kill the business partner. Mr. Tongo then explained that he was going to collect the Dewanis at the Cape Grace Hotel at 7:30 p.m. and would drive around in Town with them, from where he would go to Gugulethu where they would pass Mzoli's place. There is a T-junction in the road where it was arranged that the two young men would wait for Mr. Tongo.

23.1.18 Mr. Tongo testified that at one stage he phoned his friend, Ta Vuks and asked him whether he would not do the transfer for him. He wanted Ta Vuks to collect the Dewanis and then to take them where they wanted to go. The reason for this was that his "knees were shaking" and he was scared, but Ta Vuks could not accommodate him so he decided to do it himself, because he had already initiated it.

23.1.19 On the Saturday evening Mr. Tongo was running late for his arranged pick up time of the Dewanis. He received a phone call from the accused who asked him where he was. He told the accused that he was delayed but was on his way.

23.1.20 Mr. Tongo testified that on arriving at the Cape Grace Hotel, although he was late, he first cleaned his car and engaged the child locks on both rear doors before he collected the Dewanis. He then texted the accused to say that he was there and the accused came out with a woman. Mr. Tongo stated that the “lady” was not the same woman as the one with the accused on the previous day. He thought she was the “business partner”. The accused and the woman got into the car and they left the Cape Grace Hotel, drove around Cape Town and then to Gugulethu.

23.1.21 Upon their arrival in Gugulethu, Mr. Tongo could not see Mr. Qwabe and Mr. Mngeni at the place where he was supposed to meet them, and then suggested to the couple that he take them to Somerset West/Strand, where there is a restaurant on the beach. While on the N2 Mr. Tongo received a phone call from Mr. Qwabe who apologised for not being at the designated place at the agreed time, and stated that they were having difficulty with their transport. Mr. Tongo testified about his reasons for taking the couple to Somerset West:

“Firstly the reason was that we have decided, what we have decided did not happen. And secondly, I’m on my way facing in that direction. And thirdly, I would be able to communicate with this young man and find out, because here in the car I am looked at with big eyes.”

23.1.22 Mr. Tongo testified that when they arrived in Somerset West/Strand the accused asked him what had happened (because the hit did not take

place in Gugulethu as planned). Mr. Tongo then informed the accused that the young men were delayed because of transport problems. He stated that the accused then told him that he must make sure that everything is “going well”.

23.1.23 Mr. Tongo dropped them at the restaurant whereafter he went to fill his car with petrol, bought some airtime and went back where he waited for the couple. He contacted Mr. Qwabe and Mr. Mngeni and told them where he was. He wanted them to come to Somerset West, but they stated that they could not do so because Somerset West is “wet”. “Wet” is a term which indicates that there are many police officers around. Mr. Tongo said that he conveyed that message to the accused and stated that Mr. Qwabe and Mr. Mngeni would wait for them in Gugulethu at the designated place. Mr. Tongo then stated that he had a telephone conversation with the accused, who enquired whether everything was still going to happen as agreed, whereupon Mr. Tongo informed him that it was. They then proceeded along the N2 towards Gugulethu and Mr. Tongo said that he saw in his rear view mirror that the accused was looking directly at him with “wide open eyes”. He stated that his knees became weak.

23.1.24 Mr. Tongo explained that the money for Mr. Qwabe and Mr. Mngeni would be left in the car. In their earlier discussions it was agreed that the money would be placed in the cubbyhole of the vehicle. But Mr.

Tongo testified that the accused told him in the Somerset West/Strand that the money was in the pouch behind the left front passenger seat.

23.1.25 At all times it was agreed that the amount that had to be placed in the car was R15 000,00. Mr. Qwabe and Mr. Mbolombo both testified that only R10 000,00 was left in the car. Mr. Tongo testified that he had nothing to do with how the payment was going to take place as that was the responsibility of Mr. Qwabe and Mr. Mngeni. All he knew was that he would be paid R5 000,00 for his input – once the job was done.

23.1.26 They then left the Strand. Mr. Tongo turned off the highway into Gugulethu, and upon arrival at the designated place he noticed Mr. Qwabe and Mr. Mngeni waiting for them.

23.1.27 They were then hijacked by Mr. Qwabe and Mr. Mngeni, who were both armed with handguns. Mr. Tongo was forced to the rear seat next to the accused and the woman. Mr. Qwabe got behind the steering wheel and Mr. Mngeni got into the front passenger seat. Mr. Mngeni robbed the accused and the woman of their valuables and also took Mr. Tongo's cell phone.

23.1.28 Mr. Tongo testified that both Mr. Mngeni and Mr. Qwabe had firearms. The one he described as a 9mm and the other as a flywheel (a revolver). During the robbery Mr. Qwabe and Mr. Mngeni instructed everybody to hand over their telephones and everything that they had. Everybody, including Mr. Tongo, obliged. Mr. Tongo stated that he handed over his Nokia E90 because he knew that the robbery was part of the plan. He however had another phone which was a Blackberry which he retained.

23.1.29 Mr. Tongo stated that while all this was happening the deceased was crying, but he cannot remember whether she said anything. The accused was trying to console her, but he also cannot remember whether he said anything. Everybody was then told to put their heads down, which they did, until they arrived at a spot behind the Gugulethu police barracks where there is a stop sign. At the stop sign the back door of the vehicle was opened from the outside by Mr. Mngeni. He told Mr. Tongo to get out. Subsequently, Mr. Tongo went to the Gugulethu Police Station where he reported the matter. A statement was taken from him, but he concedes that he did not tell the truth in that statement.

23.1.30 Mr. Tongo told the police that he had forgotten the names of his passengers but that he knew where they were staying. The police then took Mr. Tongo to the Cape Grace Hotel. He stated that upon arrival at

the Cape Grace Hotel, he noticed a police vehicle. Mr. Tongo stated that the accused came out, approached him and asked him whether he was “okay”. This discussion took place around midnight. Mr. Tongo stated that from the time that he arrived at the hotel the accused approached him every now and again to ask him whether he was okay, whether he was fine and whether he had heard anything.

23.1.31 At one stage Mr. Tongo went outside in the company of a police officer who was known to him as Mr. Blacks. Mr. Blacks questioned him and told him that he must not waste his time as he, Mr. Blacks, was of the view that Mr. Tongo knew what had happened. They had an argument and Mr. Tongo went back into the hotel.

23.1.32 A CCTV clip was then shown with the accused and Mr. Tongo on the terrace of the Cape Grace Hotel. A cleaner can be seen entering the area where the accused and Mr. Tongo were. He leaves after the accused had asked him to give them some privacy.

23.1.33 According to Mr. Tongo the accused continually kept asking him whether he was fine and also wanted to know whether the “job” had been done. Mr. Tongo replied that he did not know.

- 23.1.34 Mr. Tongo was thereafter taken back to the Gugulethu Police Station. Mr. Blacks accompanied him to the scene where the hijack took place. Mr. Blacks again questioned him and told him that he, Mr. Tongo, knew about the incident. Mr. Tongo got impatient with Mr. Blacks and phoned a friend to come and fetch him. Two of his friends arrived to come and fetch him at between 1:00 a.m. and 2:00 a.m.
- 23.1.35 Mr. Tongo then went to Vanguard Mall to do a sim swop. He retained his own number. He stated that journalists tried to get hold of him and ultimately did get hold of him and offered him money for the story. He stated that he had spoken to a certain "Mike" who was working for a newspaper in Britain.
- 23.1.36 On the Tuesday morning Mr. Tongo phoned Captain Lutchman and explained to him that the journalists were bothering him. Captain Lutchman was at the time in the presence of the accused. Captain Lutchman put the accused on the line to speak to Mr. Tongo. The first thing that the accused asked was whether he, Mr. Tongo, was fine. Mr. Tongo replied that he was not fine, but that he was still alive. The accused said to him that there is a number at which he was going to call Mr. Tongo, as he wanted to pay him the outstanding money. Mr. Tongo stated that the accused later phoned him to say that he must come and collect his money and arranged that they would meet at the bridge leading to the Waterfront, coming from the Cape Grace Hotel.

Mr. Tongo waited there but the accused did not show up. Mr. Tongo phoned the accused who informed him that he could not get out of the hotel because of all the journalists. He told Mr. Tongo to come to the hotel to collect his money. When Mr. Tongo entered the hotel he saw the accused standing at the beginning of the corridor. He said that the accused signalled to him that he had to follow him. They moved into the communications centre where the accused gave him an envelope in a plastic bag, whereafter he left. Mr. Tongo then went to the toilet where he opened the envelope and counted the money inside, and saw that it was only R1 000,00. He was very angry, folded the envelope and put it in his back pocket. He carried the plastic packet in his hand. As he left the toilet he looked down the passage on his right to see if he could not see the accused. He did not see the accused and left the hotel.

23.1.37 On either the Wednesday or the Thursday, Mr. Tongo was not quite sure, Captain Hendrickse contacted him and asked him to visit him at their offices in Bellville. Mr. Tongo stated that Captain Hendrickse begged him that if he knew anything, he had to tell him. He stated that he knew nothing and gave Captain Hendrickse a statement which was false.

23.1.38 On the Thursday, Mr. Tongo appointed an attorney, Mr. William de Gras, to represent him. He stated that he did this firstly because he

was scared, and secondly, because he knew that the police assaulted people.

23.1.39 On Saturday, 20 November 2010 Mr. de Gras informed Mr. Tongo that the police were looking for him. It was arranged that he would go to their offices where he handed himself over to Captain Hendrickse in the presence of Mr. de Gras. At that stage Mr. Tongo was aware that Mr. Qwabe and Mr. Mngeni had been arrested. Mr. Tongo entered into a plea and sentence agreement with the State, which was signed on 5 December 2010. On 7 December 2010 he was convicted and sentenced in accordance with the plea agreement by Judge President Hlophe. His sentence was one of 18 years imprisonment.

23.1.40 Mr. Tongo stated that he realised that the deceased was killed on the Sunday morning. That was also the first time that he found out that the deceased was in fact the wife of the accused.

23.1.41 Mr. Tongo stated that the accused never discussed a helicopter trip with him.

23.1.42 Mr. Tongo was thereafter questioned about the role of Mr. Mbolombo. Mr. Tongo was adamant that Mr. Mbolombo's only role was to connect Mr. Tongo with Mr. Qwabe and Mr. Mngeni. He stated that after the

incident Mr. Mbolombo contacted him because he wanted his money from Mr. Tongo, and Mr. Tongo said that he must get the money from Mr. Qwabe and Mr. Mngeni.

23.1.43 Mr. Tongo explained that he decided to co-operate with the police because he realised what he did was wrong, he was a fool and he was misled.

23.1.44 In terms of the plea agreement entered into by Mr. Tongo, he indicated his willingness to testify in any subsequent criminal trials instituted in regard to the alleged conspiracy. To this end a comprehensive affidavit was obtained from him by Lieutenant Colonel Barkhuizen. Mr. Tongo and his attorney, Mr. de Gras, who was also present throughout, were given the opportunity to consider the final typed document whereafter on 26 November 2010, thirteen days after the incident, Mr. Tongo signed the affidavit. The affidavit was handed in as an exhibit. Mr. Tongo's plea agreement, which was signed by him and his attorney on 5 December 2010 was also handed in as an exhibit.

Cross-examination

23.1.45 During cross-examination a slightly different picture emerged from the evidence of Mr. Tongo. Mr. Tongo's evidence was riddled with

contradictions. Some of these contradictions relate merely to peripheral issues and I will not deal with them in any great detail. However, others are far more fundamental. His evidence and the version of the events which he gave are also highly improbable. But having said that, it must be borne in mind at this stage of the proceedings, credibility plays a limited role. The shortcomings in his evidence must be carefully scrutinised to determine whether his evidence is so poor that the court can ignore it.

23.1.46 When Mr. Tongo was confronted with these contradictions and/or improbabilities, his refrain was either that he had “made a mistake” or that “as time went by” his memory about the events of the evening had improved.

23.1.47 It is self-evident that the circumstances under which the agreement which underlies this conspiracy was entered into, is material. In this regard Mr. Tongo testified that upon arrival at the Cape Grace Hotel on the Friday, and after the accused had paid him his fare, he handed the accused his business card. The accused then told him that he has a job for him and that he must wait for him for a few minutes whilst he goes to reception to check in. In cross-examination Mr. Tongo confirms that it was only after the accused had returned from the reception desk that he learned that the job entailed the killing of a person.

- 23.1.48 In his affidavit however, Mr. Tongo stated this discussion took place before the accused went to the reception area – therefore the accused asked Mr. Tongo to kill someone within minutes of arriving at the Cape Grace Hotel, having met Mr. Tongo, at most, 30 minutes earlier. Mr. Tongo, who is not a person with a criminal record, then told him that he does not associate himself with “such things” but immediately indicated that he could call somebody in the township who may know someone who associated himself with that type of life. That person we know is Mr. Mbolombo.
- 23.1.49 By pure co-incidence his friend, Mr. Mbolombo, immediately agreed to assist him, phoned Mr. Qwabe, who also quite co-incidentally was happy to oblige for a fee of R15 000,00. On their version, quite by chance Mr. Qwabe was in the company of Mr. Mngeni when the call from Mr. Tongo came through.
- 23.1.50 On Mr. Tongo’s own evidence, this was the first time in his life that he received a request to assist in the killing of a person, and, although the contradiction as to when this discussion actually took place may in itself not seem significant, when looked at in context, it becomes very significant. Mr. Tongo testified that when the accused returned to his vehicle from the reception, he told him that he has a job for him that will

make his business grow and because he is from overseas and can refer other travellers to Mr. Tongo. Thereafter the accused then said that there was somebody to be killed. The person to be killed was his business partner who would be arriving the next day. The accused said that he was prepared to pay R15 000,00 to have her killed, which amount would be payable after the job had been done. He also undertook to pay Mr. Tongo R5 000,00 after the job had been done. The accused therefore expanded on his initial request when he returned from the reception area.

23.1.51 Mr. Tongo was adamant throughout his evidence that what actually persuaded him to get involved in the commission of this crime, was the promise by the accused that he would make his business grow – rather than the R5 000,00 remuneration which he would receive.

23.1.52 In his affidavit however no mention whatsoever is made of the so-called promise by the accused to refer clients to him and to grow his business. When one considers that this was the main motivating factor why Mr. Tongo, who had never previously been involved in criminal activities, was prepared to get involved, it is indeed strange that he did not mention it in his statement. For this discrepancy Mr. Tongo blames Lieutenant Colonel Barkhuizen who took his statement.

23.1.53 Then there is the question of the identity of the person who had to be killed. In his statement Mr. Tongo stated “the person that had to be killed was a woman and that she was arriving later that evening”. In his plea agreement Mr. Tongo describes the person who must be killed as a “client” of the accused. In his evidence he testified that the accused explained that the person to be killed was “his business partner” who would be arriving the next day. Mr. Tongo even stated in his evidence quite categorically that the woman that he picked up at the hotel on the Saturday evening was not the deceased. However, in his statement he said that the “same lady” got into his car on the Saturday evening. When confronted with these startling contradictions, he once again blamed it on Lieutenant Colonel Barkhuizen.

23.1.54 Both in his plea explanation and in his affidavit, he stated that the accused had asked him if he knew of a place where he could exchange dollars for rands and where he did not have to produce his passport. This money was according to Mr. Tongo earmarked to pay the killers. In cross-examination it transpired that the accused never indicated that he did not want to produce his passport. His passport was, in fact, never mentioned. Mr. Tongo stated that that was just something that he (Mr. Tongo) thought. Mr. Tongo attributes the allegation in his affidavit in which he claimed that the accused did not want to produce his passport to a “mistake”. This is a serious mistake – because if in fact the accused deliberately wanted to act in a manner to hide the fact that he changed the money to pay the killers – it would certainly call for

an explanation from the accused. It is a further indication of how Mr. Tongo was prepared to lie in a way which creates an atmosphere of suspicion regarding the accused.

23.1.55 Mr. Tongo testified that he drove from the Cape Grace Hotel to the Protea Colloseum Hotel at Century City to see his friend Mr. Monde Mbolombo. He told Mr. Mbolombo that he had transported clients from the airport to the Cape Grace Hotel where the accused said that he had a job for him, and he proceeded to explain to Mr. Mbolombo what the job was, namely that the accused wants somebody, who would be arriving the next day, taken "out of sight". Mr. Mbolombo, who similarly does not have a criminal record, immediately said that there is a young man that he knows that he is going to phone and explain to him about the job. Mr. Mbolombo then phoned this person and explained to him exactly what Mr. Tongo had told him. According to Mr. Tongo, Mr. Mbolombo told the person on the other end of the phone (whom we now know to be Mr. Qwabe) that this person (presumably with reference to the accused) said that he wanted his business partner, who will be arriving the next day, killed and that he is prepared to pay R15 000,00 for the job. Mr. Mbolombo also enquired whether the person would be prepared to accept dollars as payment, but that he was informed that they wanted rands.

- 23.1.56 Mr. Tongo did not mention anything in his evidence in chief regarding any possible payment to Mr. Mbolombo for his efforts. In cross-examination he stated that Mr. Mbolombo was going to be paid but not by him, but by the young men (meaning Mr. Qwabe and Mr. Mngeni). This, he testifies, is something that he “now” remembers.
- 23.1.57 Mr. Tongo further testified that he could not remember how much money Mr. Mbolombo was going to be paid by the young men, but that that was their concern. It had nothing to do with him. However, in his affidavit he stated that Mr. Mbolombo wanted R5 000,00 for organising the hitman (Mr. Qwabe) and that Mr. Mbolombo suggested that, “we should pay Qwabe only R10 000,00”. Mr. Tongo then explained that Mr. Mbolombo did say that he wanted R5 000,00, but that how much money he was going to earn really had nothing to do with him. He responded as follows, “Monde was going to get his share M'lady. Whether he was going to get R5 000,00, R2 000,00 or R1 000,00 I do not know”.
- 23.1.58 Thereafter he was confronted with his plea explanation, where he also stated, “Monde said he wanted R5 000,00 for organising the hitman and that we should pay the hitman R10 000,00”. To this Mr. Tongo once again replied that Mr. Mbolombo was at all times going to get his share, but how much his share was, he does not know, and then stated

that he does not remember that Mr. Mbolombo stated that he wanted R5 000,00.

23.1.59 His evidence in this regard is telling;

“Monde, according to what is written here, maybe I can't recall that very well. He wanted R5 000,00, if that is the case. My response to him was the young men are going to pay you.

So you remember that now he wanted R5 000,00 and that you told him that the young men would be paying him, do I understand you correctly --- That is correct Sir.

Why didn't you tell the police that in your statement --- Maybe that is just, was just forgotten but it is written here Sir.

That was forgotten but you did not forget twice to relay the fact that Monde wanted R5 000,00 and the hitman should get R10 000,00, is that correct --- I said everybody makes mistakes, as you also said I am ZH but I am ZR.”

23.1.60 This evidence is indicative of how Mr. Tongo could change his version under pressure of cross-examination without the slightest hesitation.

23.1.61 This aspect of Mr. Tongo's evidence raises a further important question. At all material times the accused only had dealings with Mr. Tongo. He had never even met Mr. Mbolombo, Mr. Qwabe or Mr. Mngeni. The only person with whom the accused could negotiate the payment of the various role players, was Mr. Tongo. There was no

evidence that Mr. Tongo had received any money from the accused which he could hand over to the “two young men” to pay Mr. Mbolombo. Nor was it ever suggested that the accused was instrumental in getting any money to them.

23.1.62 In addition, both Mr. Mbolombo and Mr. Qwabe contradict Mr. Tongo on just about every aspect of the interactions between the two of them on the Friday evening. Mr. Mbolombo testified that Mr. Tongo told him that there is something that he wanted to talk to him about. On his question as to what Mr. Tongo wanted to talk about, Mr. Tongo said to him, “is there no one that I know of who is a hitman”. Mr. Mbolombo then phoned Mr. Qwabe and told him that there is a person with him, whose name is Zola, who is looking for a hitman. Mr. Qwabe asked him whether he knew this person. He responded by saying that he does know Mr. Tongo, whereupon Mr. Qwabe enquired how much they would be paid if they agreed to do the job. Mr. Mbolombo did not know and called Mr. Tongo closer and switched off the phone to find out. He redialled Mr. Qwabe’s number and informed him that Mr. Tongo said that they would be earning R15 000,00. Mr. Qwabe then stated that they should not discuss the matter over the phone, but make arrangements to meet.

23.1.63 Mr. Mbolombo further testified that on hearing about the R15 000,00 he told Mr. Tongo that he should also get something, “even if it is

R5 000,00 for his involvement". According to Mr. Mbolombo, Mr. Tongo did not respond to this.

23.1.64 Mr. Mbolombo testified that on the Friday night he had no idea who the person was who had to be killed, and that he did not ask Mr. Tongo. This contradicts Mr. Tongo's evidence that he explained to Mr. Mbolombo that the accused wanted his business partner, who was arriving the next day, killed.

23.1.65 Mr. Qwabe stated that he has no recollection that there was any reference to dollars in his telephonic discussion with Mr. Mbolombo and stated that he would have remembered it if there was such a reference. He also denied any arrangement that he and Mr. Mngeni would have paid Mr. Mbolombo anything.

23.1.66 Accordingly, the evidence of Mr. Mbolombo, Mr. Qwabe and Mr. Tongo do not support each other.

23.1.67 Mr. Tongo testified that he phoned Mr. Qwabe later on the Friday evening as he wanted to know how things were going, whereupon Mr. Qwabe responded that everything was going fine, and that he was still going to meet with another man and "he is promising". Mr. Qwabe's

version of this telephonic discussion completely contradicts Mr. Tongo's testimony. According to Mr. Qwabe, Mr. Tongo told him that he needed somebody to be killed and asked him whether he knew of anybody that can do it. At that stage Mr. Qwabe testified that he was in Mr. Mngeni's company, who said that he would be prepared to do it. Mr. Tongo thereupon asked for what fee they would be prepared to do it, and Mr. Mngeni then responded by saying that he would do it for R15 000,00. They then agreed to meet the following day. During cross-examination Mr. Qwabe testified that Mr. Tongo had told him that there was a husband who wanted his wife (not a business partner) killed. Mr. Qwabe was at pains to stress that the amount of R15 000,00 was determined by Mr. Mngeni and not by Mr. Tongo. The two versions of what happened during this telephone conversation are clearly irreconcilable.

- 23.1.68 Mr. Tongo's evidence regarding the events of the Saturday morning was clearly tendered with an intention to create the impression that the accused had to change the dollars into rands to be able to pay the hitmen and that he was very anxious to do so. That is why Mr. Tongo testified that he had received a call from the accused in which the accused, in an agitated state, asked him whether he had forgotten about their appointment to go to the money changer. Mr. Tongo testified that he then rushed to the Cape Grace Hotel and when he arrived, the accused immediately came walking out of the door. The accused told him that they must hurry, as his wife was having a shower

or washing. This evidence was proved by the CCTV footage to be untrue. The CCTV footage shows that the accused and the deceased appeared from their bedroom shortly before 11:15 a.m. The accused was dressed in shorts, sandals and a grey Polo shirt and had his sunglasses on his head. The deceased was dressed in white trousers and a pink top also with sunglasses on her head. The Court was informed that there was CCTV footage available to show that they went for breakfast and that thereafter they went to the pool. This footage was not shown.

23.1.69 At 11:52:19 Mr. Tongo texted the accused and at 11:53 the accused replied in a text saying, "Okay, give me 10 minutes". The CCTV footage shows that the accused had changed from his pool clothes into trousers and a golf shirt. There is no record whatsoever of any telephone call made by the accused to Mr. Tongo on that Saturday morning. The CCTV footage belies the fact that the accused was in a hurry and desperate to go to the money changer. In fact, it seems apparent that the accused was late for the appointment and still had to go to his room to change to go to the money changer. Mr. Mopp conceded that Mr. Tongo exaggerated the haste with which the accused wanted the transaction done but states that this is not a deliberate falsehood, but understandable in view of the time that has lapsed since the incident. I do not agree. This evidence was clearly tendered with a view to create the impression that the accused was

extremely anxious to have the money changed with which he was due to pay the killers.

23.1.70 Mr. Tongo further testified that upon their return from the money changer, at the Cape Grace Hotel, he and the accused discussed how the job should be done. The accused said that he wanted the car hijacked, then they must be robbed, whereafter the hijackers must first drop Mr. Tongo and then himself whereafter they must kill the woman. The further details of the evening were also discussed. Mr. Tongo confirmed in cross-examination that this discussion took place after their arrival from the money changer whilst they were sitting in the parked car. However, he was then shown CCTV footage of them arriving from the money changer. The car had hardly stopped when the accused alighted and walked towards the hotel. On the CCTV footage one then sees the car leaving. It was therefore clearly a figment of Mr. Tongo's imagination that the discussion took place in the parking lot of the hotel. Once Mr. Tongo was caught out, he again changed tack with apparent ease and stated that the conversation actually took place in the motor vehicle while they were driving, once again he called this discrepancy a "mistake".

23.1.71 Mr. Tongo further testified that he told Mr. Qwabe and Mr. Mngeni that the R15 000,00 would be in the cubbyhole of his vehicle because that was what he had agreed with the accused that morning. Mr. Tongo

was then confronted with his statement in which he said, “the first man (Mr. Qwabe) said that we had to leave the R15 000,00 in the cubbyhole of my vehicle, as they wanted their payment available to them as soon as the job had been done”. In his evidence he told the court explicitly that it was the decision of Mr. Qwabe and Mr. Mngeni that the R15 000,00 had to be left in the cubbyhole. When it was put to him that his earlier evidence was that the accused agreed with him that morning that the money should be left in the cubbyhole, he suddenly could no longer remember whether the accused had said that. The one fact that is however of crucial importance is that Mr. Tongo knew, when he left the Cape Grace Hotel on the Saturday evening that there was no money whatsoever in the cubbyhole. There is also no suggestion that Mr. Tongo, before they left the hotel asked the accused for the money. He did not even know whether the accused had the money with him.

- 23.1.72 Questioned about what would happen to his motor vehicle after the woman had been killed, he testified that Mr. Qwabe and Mr. Mngeni had to abandon the car on the spot where they were going to kill the woman. Later he testified that he did not know where they were going to leave the motor vehicle. At yet a later stage he was confronted with an audio recording of a telephonic discussion which took place between him and Mr. Mbolombo at 18:38 on the Saturday evening during which Mr. Mbolombo said “Oh so the car should get there and get washed”. Mr. Tongo responded, “once this thing has been done,

Qwabe and Mngeni was to leave the car near the carwash that was ... close to Mbolombo's house in Khayelitsha". This discrepancy he could not explain. To expose his vehicle, which is his livelihood, to this kind of risk cannot be believed.

23.1.73 Mr. Tongo's evidence about whether he knew the identities of Mr. Qwabe and Mr. Mngeni is also strange. In his statement he refers to Mr. Qwabe as the first man and Mr. Mngeni as the second man. He also stated that he was never introduced to them. However, in his evidence in chief he testified that both Mr. Qwabe and Mr. Mngeni introduced themselves to him on the Saturday afternoon, even though he denied that he had known their names. First he tried to attribute this to the police taking down his evidence incorrectly. He then tried to say that he could not remember their names, and then he replied "let's say then that's a mistake that happened that I never mentioned but they did introduce themselves to me and I just forgot their names but as time went on I then remembered their names again".

23.1.74 The inference is irresistible that initially Mr. Tongo wanted to bring the investigating officers under the impression that he did not know the names of Mr. Qwabe and Mr. Mngeni.

23.1.75 It must be remembered that Mr. Tongo's affidavit was not just an ordinary police statement. It was taken down in anticipation of the accused entering into a plea and sentence agreement and in the presence of his attorney, Mr. de Gras. The final typed version of this affidavit was handed to Mr. de Gras and Mr. Tongo for consideration before it was signed. It was a statement taken by an extremely senior police officer. It cannot be equated with a "run of the mill" police statement. In fact Mr. Tongo confirms in this statement that:

"The facts contained in this affidavit are true to the best of my knowledge and belief. I am aware that I make myself liable to prosecution were I wilfully to state anything therein (sic) that I know to be false or do not believe to be true.

I have been informed that were anybody to be arrested and prosecuted in regard to any incident or fact that I refer to in this affidavit – I may be called as a witness to testify for the State. I have further been informed that were criminol (sic) proceedings to ensue – a copy of this affidavit may be made available to the accused and or / his legal council (sic) prior to the trial – to enable them to prepare his/her/their defence."

23.1.76 It was agreed in terms of the common cause facts that the accused and the deceased had a booking at a restaurant in Somerset West which was made by staff members of the Cape Grace Hotel. Mr. Tongo however testified that when Mr. Qwabe and Mr. Mngeni did not show up at the predetermined place in Gugulethu, it was he who

suggested to the Dewanis that he would take them to Somerset West. This was indeed a strange co-incidence.

23.1.77 Mr. Tongo's explanation as to why he engaged the child locks of both rear doors cannot be believed. He stated that he did not know on which side the accused would sit and on which side the deceased would sit. Seeing that this was part of a conspiracy with the accused in which the accused was going to be the second person to be dropped from the vehicle, it is simply not a credible explanation. How was the accused going to get out of the vehicle? The fact that he engaged the child locks was also not mentioned in his affidavit. But it appears that he decided to give this evidence only after he was confronted by the CCTV footage where this is shown.

23.1.78 It will be recalled that Mr. Tongo testified that it was agreed with Mr. Qwabe and Mr. Mngeni that the accused would leave the R15 000,00 for the killing in the cubbyhole of the vehicle. Mr. Tongo conceded that Mr. Qwabe and Mr. Mngeni were dangerous individuals. He knew that they would be armed. However, he drove to the agreed hijack spot with the deceased and the accused in the car, without the money being in the cubbyhole or without even establishing from the accused whether he had the money with him. It must further be remembered that according to Mr. Tongo the initial plan was that the hijack would take place when Mr. Tongo first drove into Gugulethu. At that stage

there was therefore no suggestion that they would drive to Somerset West, and Mr. Tongo knew that the money was not in the cubbyhole. Yet in his affidavit he stated that after he had picked up the accused and the deceased from the Cape Grace Hotel, “the accused instructed me to first drive around in town as he wanted to see what the City looked like at night and then through to Somerset West where they plan to have dinner”. This is irreconcilable with his evidence that it was his, Mr. Tongo’s decision to take the couple to Somerset West. When confronted with this, it was again a mistake.

23.1.79 Importantly, Mr. Tongo testified that when the hijack did not take place at the place and time initially agreed upon, he received a text message from the accused enquiring from him what is happening. When it was however pointed out to him that there was no such sms message on record, which was common cause between the parties, he stated that the records are wrong. This is yet a further untruth told by Mr. Tongo in an attempt to incriminate the accused.

23.1.80 Mr. Tongo also claimed that there was telephonic communication between him and the accused while they were underway from Gugulethu to the Strand. Once again he was confronted with the documentary evidence that there was no such communication indicated on the documentation. Once again Mr. Tongo stated that

there might be a problem with the records although they were agreed upon between the State and the defence.

23.1.81 As regards the events on the Saturday evening on their arrival at the Strand, Mr. Tongo testified that he and accused were walking ahead of the woman on their way to the restaurant. The accused then asked him softly what had happened. He explained to the accused that the men were delayed as a result of a problem with a motor vehicle, but that they were going to wait in Gugulethu. The accused then told him that he must make sure that everything is “going well”.

23.1.82 However, in his affidavit he states the following:

“Dewani and the lady first took a stroll on the beach and then I walked with them to restaurant. At the entrance the lady went in and Dewani turned around and spoke to me, he asked what is happening, he appeared to be stressed and then threatened me. He said if the job was not done that evening, he was going to kill me. I told him that I would call the man I had arranged for the job and ask him what was happening. I then went to my car while Dewani went into the restaurant to have supper.”

23.1.83 When confronted with this statement in his affidavit, he said that it was not the truth. The accused never said he was going to kill him. He stated that a mistake was made, “maybe the one who typed it, typed it wrong, maybe just a mistake”. He was then asked:

“Did you tell Colonel Barkhuizen in the presence of your attorney when this statement was taken down, that the accused at the Surfside Restaurant asked you what’s happened and then threatened you by saying if the job was not done that evening, he was going to kill you? Did you tell Colonel Barkhuizen that? – I never said that M’lady. I said he said that I must remember that I’m the one who is having the knowledge.

So Colonel Barkhuizen simply wrote this down although you never said it? – It’s the same as the mistake that he made by saying: oh ja ...”

23.1.84 This story about the accused threatening Mr. Tongo must be considered in view of the objective evidence, namely the audio recordings. They show that at 21:31:55 Mr. Mbolombo called Mr. Qwabe. In the course of this telephone discussion Mbolombo told Mr. Qwabe, “It’s that thing we were talking about it must happen today.”

23.1.85 It is common cause that Mr. Mbolombo had not spoken to Mr. Tongo since 18:38, and yet in the abovementioned telephone call he is clearly instructing Mr. Qwabe that the hijacking must take place that night. How could Mr. Mbolombo have known about the discussion and the threat between the accused and Mr. Tongo?

23.1.86 Mr. Tongo further testified that during the discussion between him and the accused whilst they were in Somerset West/Strand, the accused

told him that he had put the money in the pouch of the front passenger seat. He further testified that he conveyed this message to Mr. Qwabe and Mr. Mngeni. He cannot recall whether that this was done by means of a text.

23.1.87 After this evidence he was confronted with what he had stated in his affidavit, where he stated the following:

“Whilst I was driving, it was either on the way to Somerset West or after we had departed from Somerset West, I realised that Dewani had not discussed the money that was destined to be paid over to the men. I then sent him a text message ‘don’t forget the money!’ He then answered, also by text, informing me that the money was in an envelope in a pouch behind the front passenger seat.”

In other words at the original time that the hijack was supposed to take place the accused had not placed any money in the vehicle.

23.1.88 Mr. Tongo concedes that this paragraph reflects what he had told Lieutenant Colonel Barkhuizen, but states that it was not the truth. His explanation about this discrepancy mirrors a theme that came through throughout his evidence:

“It’s going back to what I said M’lady, as I said as time goes by or goes on, some of the things just resurface, and now I can remember some of the things much better or well.”

23.1.89 The accused, in his plea explanation, stated that after the attackers had hijacked the vehicle, there was a person with a gun in his hand next to him (the accused) on the seat. Mr. Tongo stated that that was a lie, because it was he, Mr. Tongo, that was forced into the rear seat next to the accused and he did not have a firearm. Once again, Mr. Tongo was confronted with the following statement in his affidavit:

“The first man got into the driver’s seat and pushed me over to the passenger seat. The second man got into the back of the vehicle with Dewani and the lady.”

23.1.90 Mr. Tongo found himself in the predicament that he had now placed himself in the back seat with the child locks engaged, he needed to explain how he left the vehicle. His evidence in this regard is virtually incomprehensible, and is totally irreconcilable with his affidavit in which he stated, “the driver (Mr. Qwabe) put his firearm against my head and ordered me out of the vehicle”. Once again he stated that this allegation that the driver put a firearm against his head was yet another mistake.

23.1.91 A CCTV clip was shown in which the accused and Mr. Tongo were on the terrace of the Cape Grace Hotel. According to Mr. Tongo the accused continually kept asking him whether he was fine, and he also wanted to know from him whether the “job” had been done. Mr. Tongo

replied that he did not know. The accused also asked whether Mr. Tongo had any information as to whether the men really did what they were supposed to do. This was obviously a vitally important discussion. Yet, in Mr. Tongo's affidavit, not a word is mentioned about it. It is appropriate to quote from his affidavit:

"The police then took me through to the Cape Grace Hotel. When we arrived there was a marked police vehicle from the Harare Police Station, also parked there. When we got to the reception I saw another two policemen standing with Dewani in the reception area. I then pointed out Dewani to them. Dewani spoke to me briefly and enquired whether I was okay. The policemen then had a discussion while I sat on the couch. Then I heard the policemen referring to the lady as Dewani's wife. This was the first time that I realised that the lady that Dewani wanted us to murder was his wife. Dewani then went with the police to another office."

23.1.92 It is clear that Mr. Tongo's evidence that the accused wanted to know whether the job had been done, or whether the young men had done what they were supposed to do, was something that he had made up to incriminate the accused after he had viewed the CCTV footage.

23.1.93 It is also common cause that Mr. Tongo never during the course of all these discussions asked the accused for his R5 000,00.

23.1.94 It will be recalled that Mr. Tongo testified that the accused handed him an envelope with R1 000,00 in it on Tuesday, 16 November 2010. However, in his affidavit he makes no mention whatsoever of having received any money from the accused. He makes mention of this for the first time in a statement dated 22 December 2010, most probably after he was confronted with the CCTV footage. In that statement he states that he was scared to admit that he had received money because he believed that it would have increased his participation in the offence. In his evidence however, he had a different explanation for not disclosing this:

“The reason for that, the reason for me to admit that with them, and I did not admit that from the beginning or on the beginning, it’s because I was scared, M’lady, for such a big job that I have done, then now I only get an amount of R1 000,00.”

23.1.95 It appears far more probable that Mr. Tongo did not reveal this because if he had revealed to the police that he had received R1 000,00 from the accused, it would have flown in the face of his entire story.

23.1.96 Another very strange aspect of his evidence is the fact that he did not throw away the empty plastic bag while he was in the toilet. He rather left the hotel carrying the plastic bag, which on his own version was empty at the time, by the handles.

23.1.97 During a viewing of the CCTV footage it was pointed out to the court that there is a shadow of something inside the plastic bag and that the manner in which Mr. Tongo was carrying the bag also indicated that there was something inside. The purpose of this evidence was that it was put to Mr. Tongo that there was a thank you card from the accused in the envelope with the R1 000,00. Mr. Tongo denied this.

23.1.98 In cross-examination Mr. Tongo deals with this as follows:

“That’s not true M’lady. That plastic bag is little bit hard. If you are holding it correctly on the top side, that’s now where the handles are, it might appear that there is something inside the plastic bag whereas its empty and with nothing inside. It might appear to you as if there is something inside whereas there is actually nothing inside.”

This answer speaks for itself.

23.1.99 As stated above, Mr. Tongo was clear that the only role that Mr. Mbolombo played was that of a go-between between him, Mr. Qwabe and Mr. Mngeni. As he was cross-examined, the thread of his evidence that “as time goes by he can remember more and more”, continued. He could then remember that he phoned Mr. Mbolombo on his way to Somerset West because he wanted to know from Mr. Mbolombo why the young men did not do the job. Eventually he

conceded that Mr. Mbolombo's role included assisting him (Mr. Tongo) "to make sure that everything just happens".

23.1.100 When Mr. Tongo was confronted with the various audio recordings of telephone calls which make it clear that Mr. Mbolombo played a much bigger role than simply being the link or an assistant to Mr. Tongo, he kept on protecting Mr. Mbolombo by sticking to his version that he was merely an assistant. Mr. Mbolombo was forced to concede during cross-examination that he was the person who was actually in control of the events on that Saturday night. The contents of the audio recordings in this regard become significant. I quote from an audio recording of a call from Mr. Mbolombo to Mr. Tongo from the Protea Hotel cordless handset. This is a call that was made at 18:38 on Saturday, 13 November 2010:

"No there's two of them.

Yes.

Huh?

There's five of us, remember.

So you will leave him/her with ... It is what?

...

Oh so the car should get there and get washed.

No then I hear you 'grootman'

At that place."

- 23.1.101 Mr. Tongo tried to explain that the five people that Mr. Mbolombo was referring to was himself, Mr. Mbolombo, Mr. Qwabe, Mr. Mngeni and the accused. However, Mr. Mbolombo did not testify that he ever counted the accused in as one of the five.
- 23.1.102 From the foregoing it is clear that Mr. Tongo contradicted his affidavit made to Lieutenant Colonel Barkhuizen in virtually every material respect. His evidence is also inherently contradictory. In some instances it makes no sense, and in others, his explanations are laughable.
- 23.1.103 His evidence is contradicted on material points by his accomplices, Mr. Qwabe and Mr. Mbolombo. But, apart from the contradictions, the entire story as told by Mr. Tongo is highly improbable. I say this for the following reasons:
- 23.1.103.1 The accused met Mr. Tongo at the airport when he was looking for a taxi to take him and his wife to the Cape Grace Hotel. Mr. Tongo was a shuttle operator, he was neatly dressed and his car was in a good condition. It was never suggested that the meeting between the accused and Mr. Tongo was pre-arranged. In other words, the accused simply approached Mr. Tongo because he was the first taxi driver he came across as he walked out of the airport.

23.1.103.2 On their way to the Cape Grace Hotel Mr. Tongo attempted to sell his services as a guide to the accused and his wife, offering to show them around Cape Town. There could have been no indication to the accused that Mr. Tongo was anything other than a law abiding shuttle operator and a guide. Can this court, without some credible corroboration, for one moment accept that the accused, after he had been in Mr. Tongo's company for approximately 30 minutes, would without more approach him with a request that he find somebody to kill his "business partner".

23.1.103.3 It is even more improbable that Mr. Tongo, who says he has never been involved in any criminal activity, would virtually immediately agree to contact his friend Mr. Mbolombo to obtain the services of a hitman. Even if one accepts that he was offered R5 000,00 at this stage, it must be kept in mind that Mr. Tongo testified that in a good month he earned between R30 000,00 and R40 000,00 per month. Again the question arises: would such a person risk his vehicle, his income, his future and his freedom for a mere R5 000,00? It is equally strange that Mr. Tongo immediately approaches Mr. Mbolombo, who is a hotel receptionist, who on his own evidence, has the wherewithal to contact people telephonically because he works as a receptionist in a hotel. It is even stranger that Mr. Mbolombo, without any promise of financial gain, almost immediately agrees to assist by phoning Mr. Qwabe.

23.1.104 Clearly aware of these problems, Mr. Mopp argued with reference to S. v. Francis, 1991 (1) SACR 198 (A), that it is not necessarily expected of an accomplice that he should be wholly consistent and wholly reliable or even wholly truthful – the ultimate test, after cautiously considering accomplices’ evidence is whether the court is satisfied beyond reasonable doubt that in its essential features the story he tells is true. The passage upon which Mr. Mopp relies must however be looked at in context. At 205 e – g Smalberger, JA stated:

“In my view D’s evidence has not been shown to be substantially flawed. There are no material contradictions or inconsistencies in his evidence. Nor are there improbabilities in his evidence of such a degree as to render his veracity suspect. He has not been shown to have been a deliberately untruthful witness. At best for accused No 5 it can be said that D was not a perfect witness who gave unblemished evidence. It is not necessarily expected of an accomplice, before his evidence can be accepted, that he should be wholly consistent and wholly reliable, or even wholly truthful, in all that he says. The ultimate test is whether, after due consideration of the accomplice’s evidence with the caution which the law enjoins, the Court is satisfied beyond all reasonable doubt that in its essential features the story that he tells is a true one. “

23.1.105 By contrast, in Mr. Tongo’s case, there were manifest material contradictions and inconsistencies in his evidence. And, as pointed out, there are a number of improbabilities of such a degree as to render his evidence suspect.

23.1.106 In my view, Mr. Tongo's evidence is of a very poor quality. It was conceded by Mr. Mopp that there were "deviations" and contradictions, but he argued that his evidence was not of such poor quality that the court can draw a proverbial line through it. But that is not the test. The test is whether, approached with the required caution, I can find that the evidence is such that a reasonable court, acting carefully, might convict.

23.1.107 There are undoubtedly aspects of Mr. Tongo's evidence which implicate the accused. But his evidence is of such a poor quality that one simply does not know where the lies end and the truth begins or vice versa. A court should not under those circumstances cherry pick certain parts of his evidence which can possibly be accepted and others which should be rejected. Reliable corroboration is required in such circumstances.

23.1.108 However, by sharp contrast, and when his evidence is considered with that of Mr. Qwabe and Mr. Mbolombo – the picture becomes even bleaker for the State's case.

[24] I will now proceed to discuss the evidence of the two other accomplice witnesses, Mr. Qwabe and Mr. Mbolombo.

24.1 **Mr. Qwabe**

24.1.1 Mr. Qwabe's evidence in chief was that he received a call from Mr. Mbolombo on the Friday evening, who told him there was a job that needed to be done. He agreed that Mr. Mbolombo could give his telephone number to the person who wants the job done.

24.1.2 He testified that Mr. Tongo called him later and told him that he obtained his number from Mr. Mbolombo and that he had a job that needed to be done, namely somebody needed to be killed. Mr. Tongo also enquired how much it would cost. At the time Mr. Qwabe was with Mr. Mngeni and asked Mr. Mngeni whether he would be prepared to partake, and what he would charge. Mr. Mngeni said that he would do it for R15 000,00. It was then agreed with Mr. Tongo that they would meet the following day to discuss the matter.

24.1.3 On Saturday Mr. Qwabe received a call from Mr. Tongo and they arranged to meet at the Khaya Bazaar in Khayelitsha. Mr. Tongo described the motor vehicle that he would be driving. Mr. Qwabe waited for him at the place agreed upon and when Mr. Tongo arrived, he recognised his car. Mr. Qwabe introduced himself as "Spra" (which is his nickname). Mr. Tongo told him that there was a husband who wanted his wife killed. He told Mr. Tongo to wait because he is not in this alone, and that they must go to his friend's house, who transpired

to be Mr. Mngeni. Mr. Mngeni joined them and introduced himself to Mr. Tongo as “Xolile”. Mr. Tongo then told Mr. Qwabe and Mr. Mngeni that there was a husband who wanted the wife killed, and that it had to look like a hijacking. Mr. Tongo told them which route he would be taking and he explained that he would drive to Gugulethu near Mzoli’s and they agreed on where the hijacking would take place, which was at the corner of NY112 and NY108. They also agreed on the remuneration of R15 000,00 and told Mr. Tongo to leave the money in the cubbyhole. It was agreed that the woman would be killed, but that nothing would happen to Mr. Tongo and the accused. Mr. Tongo told them that he would give them a call when he left, which would be some time “past seven” on the Saturday.

24.1.4 On the Saturday evening Mr. Tongo called Mr. Qwabe saying that they were now leaving the hotel. Mr. Qwabe phoned Mr. Mngeni but they struggled to get transport. On their way Mr. Tongo phoned them and informed that he had already left Gugulethu and that he was on his way to Somerset West with the accused and the deceased. They agreed “to let the matter stand over for another time”.

24.1.5 Mr. Tongo again phoned Mr. Qwabe at a later stage and informed him that he was at a restaurant in Somerset West/Strand and told him that “the job had to be done the same evening, the husband wanted his wife killed the same evening”. Mr. Tongo also informed him that he

would be taking the same route to Gugulethu and that he and Mr. Mngeni should meet him at the place agreed upon.

24.1.6 Mr. Qwabe and Mr. Mngeni got a lift to Gugulethu. Mr. Mngeni had Mr. Qwabe's Norinco pistol. Mr. Qwabe was unarmed but took yellow kitchen gloves along to prevent fingerprints.

24.1.7 Mr. Qwabe received a text message from Mr. Tongo to say that he was close by. They saw Mr. Tongo's car approaching. Mr. Mngeni stopped Mr. Tongo's car by pointing his firearm at the occupants. Mr. Qwabe got in behind the steering wheel and Mr. Mngeni got into the front passenger seat, while Mr. Tongo got into the back seat.

24.1.8 Mr. Qwabe stopped at the intersection near to the police barracks, where Mr. Tongo was ordered out of the car. As Mr. Tongo was getting out, he told them in Xhosa that the money was in the pouch behind the front passenger seat.

24.1.9 Mr. Qwabe then drove with the accused and the deceased along the N2 in the direction of Khayelitsha. They had no plan as to what they would do. He took the Baden Powell turnoff and stopped between Harare and Kuyasa, where the accused was ordered out of the vehicle.

He then drove further with the deceased and Mr. Mngeni in the car into Mew Way between Harare and Mdlovini, an informal settlement. While driving down Mew Way, between Ilitha Park and Mdlovini, Mr. Qwabe heard a gunshot. He was shocked at the gunshot and asked Mr. Mngeni what he had done. Mr. Mngeni replied that he had shot the woman. He then took the first turnoff into Ilitha Park and stopped at the side of the road.

24.1.10 Mr. Qwabe testified that when he got out of the vehicle he noticed that Mr. Mngeni was looking for something in the back of the vehicle. He informed Mr. Qwabe that he was looking for the cartridge case. Mr. Qwabe assisted him to look for it, found it and they left the car. Mr. Qwabe threw the cartridge case in a storm water drain and a little further away, he threw away the gloves that he had been wearing. Mr. Mngeni then took out the money which was in the pouch. Mr. Qwabe was not certain when Mr. Mngeni removed the money from the pouch although he thinks it was shortly after Mr. Tongo had told them where the money was. They counted the money and found that it was R10 000,00. They shared it between them and Mr. Qwabe then went home.

24.1.11 On the Sunday he called Mr. Mbolombo. He wanted to see Mr. Mbolombo because they were short paid in that they were paid

R10 000,00 instead of the R15 000,00 agreed upon. Mr. Mbolombo apparently undertook to sort it out with Mr. Tongo.

24.1.12 Mr. Mngeni returned Mr. Qwabe's firearm.

24.1.13 Mr. Qwabe testified that he thinks he had further contact with Mr. Mbolombo to find out how far Mr. Mbolombo got to recover the money that was short.

24.1.14 Mr. Qwabe assisted the police to retrieve the cartridge and one of the gloves that he had thrown away.

24.1.15 He eventually pleaded guilty and admitted his involvement in the matter.

24.1.16 He explained that Mr. Tongo's number does not appear on his list of contacts on his cell phone as he had deleted it after the incident.

Cross-examination

24.1.17 During cross-examination it soon appeared that Mr. Qwabe was a self-confessed liar. He had to concede that after his arrest he applied for bail and testified, under oath, in the bail application that he had an alibi defence to the charges against him. This, he maintained for a period of almost two years before he decided to plead guilty.

24.1.18 There are various aspects of his evidence which are unsatisfactory. There are two aspects that stand out and require particular scrutiny.

Mr. Mbolombo's role

24.1.19 Mr. Qwabe was questioned about Mr. Mbolombo's role, and testified as follows:

"As far as you are aware, apart from Monde phoning you and giving Zola your telephone number, did Monde have anything further to do with this incident up until the Sunday? --- I think maybe he would have asked have we met with the guy, something like that. So we might have communicated. I'm not sure.

So he might have asked whether you have met. --- Yes Sir.

Yes. --- Yes.

But he was not actively involved in arranging things, giving messages, talking to you, that sort of thing --- No Sir.

Not at all? --- No."

24.1.20 When questioned more specifically about Mr. Mbolombo's role in the events, he testified as follows:

"What was his role in this affair? --- He's the one that put me in contact with Zola.

Yes, no, I understand that according to you he put you in contact with Zola. --- Yes.

Did he have any other role to play? --- Not that I know of. He was the link between me and Zola.

Ja. --- Yes Sir.

And then that's all he did and then he was out of it is that right? --- He was the link Sir.

I said that's all he did, he linked you with Zola and for the rest he was out of it? --- Yes Sir."

24.1.21 When he was asked whether he spoke to Mr. Mbolombo on the Saturday, he replied that he could have spoken to him. He then testified:

"For what purpose Sir? --- Maybe if Zola didn't come just to confirm, you know things like that.

No why would you phone him if Zola didn't come to confirm that, what does that mean, why would you do that? --- (No answer)

I'm waiting for a reply --- I don't know Sir.

Was Monde Mblomobo not deeply involved in what happened that Saturday when the accused and his wife were hijacked? --- Deeply

involved would be a strong word Sir because he was only the contact between me and Zola, he wasn't even at the meeting Sir.

There would be no reason for him to discuss this matter with you at all that Saturday afternoon and evening is that what you are saying? --- The only time I recall discussing the job was the Friday with Monde."

24.1.22 He persisted with this attitude. Even when he was confronted with the audio recordings of a phone call from Mr. Mbolombo to him in which Mr. Mbolombo told him "its that thing we were talking about, it must happen today". He replied that he did not recall that call and reiterated that Mr. Mbolombo was only the link. He could however not explain why, if Mr. Mbolombo was merely a link, there were so many calls made between him and Mr. Mbolombo, and between Mr. Mbolombo and Mr. Tongo during the course of the Saturday.

24.1.23 There can be no question that Mr. Qwabe was at all times aware of the role that Mr. Mbolombo was playing, particularly if one has regard to the contents of the audio recordings of the telephone conversations and the number of calls and attempted calls made by Mr. Mbolombo on the Saturday night to Mr. Qwabe and Mr. Tongo.

The shooting of the deceased

- 24.1.24 Mr. Qwabe testified that Mr. Mngeni shot the deceased while he was sitting in the left front passenger seat with the firearm in his left hand pointing at the deceased who was sitting on the back seat. He had his right shoulder to the back and his left shoulder was turned with the firearm pointing at the deceased.
- 24.1.25 Dr. Verster testified that the single shot that killed the deceased was an angled contact shot. She further testified that the shot would immediately have rendered the deceased paralysed. It is clear from the photographs of the deceased's position in the vehicle after the incident that she was very close to the back rest of the rear seat. According to Dr. Verster, the deceased's left hand would have been against, or very close to her chest when the shot was fired. In fact, the State's ballistic expert, Warrant Officer Engelbrecht, conceded that it would have been impossible for Mr. Mngeni to have shot the deceased from the position in which he claimed he was.
- 24.1.26 Mr. Qwabe's explanation as to how the deceased was shot also does not explain the marks of a right hand found on her left lower leg by Dr. Verster.

- 24.1.27 Mr. Qwabe's evidence as to how this incident took place, and how Mr. Mngeni shot the deceased, can, with reference to the objective facts, simply not be correct. I say this for the following reasons:
- 24.1.27.1 On the State's case, Mr. Mngeni could not have shot the deceased whilst he was seated on the left front passenger seat.
- 24.1.27.2 His explanation does not cater for the marks on the deceased's left lower leg. Dr. Verster's evidence is that these bruises were caused by fingertips and were sustained before she died. She would have been immediately paralysed after the shot, and would have died virtually instantly. These marks undoubtedly indicate some form of struggle – which is irreconcilable with Mr. Qwabe's evidence.
- 24.1.27.3 Primer residue was found on the web of the glove that Mr. Qwabe wore, between the thumb and the forefinger. Although, according to Lieutenant Colonel Mlabateki, this could have been the result of Mr. Qwabe being in close proximity of where the shot was fired. It must be borne in mind that the primer residue was found where one would expect to find it, if a firearm was fired by a person with that hand.

24.1.27.4 It is common cause that glove marks corresponding with Mr. Qwabe's type of glove was found on the outside left rear door by a fingerprint expert. Mr. Qwabe tried to explain this by stating it might have happened when he opened the door to look for the cartridge case. But his evidence then disintegrated into a garbled mess.

24.1.27.5 According to Lieutenant Colonel Mlabateki's evidence, primer residue can be transferred from, for instance, a glove contaminated with primer residue to surfaces coming into contact with the glove. In this regard it is important to note that primer residue was found to be present on the inside handle area of the driver's door. No primer residue was found to be present in the area around the left front passenger seat where Mr. Mngeni were supposed to have been sitting.

24.1.28 There are other questionable aspects of Mr. Qwabe's evidence. According to the State's case, Mr. Qwabe and Mr. Mngeni were to shoot and kill the deceased after they had dropped the accused. Yet, after they had dropped the accused, they did not go to the nearby bushy areas, but instead drove back into the residential area, down Mew Way, which is one of the major roads in that area, in the direction of the N2. When Mr. Qwabe was questioned about this, and asked where they were going, he stated that they were going to no specific place. He could also not give a reason as to why they decided to drive back into a residential area if they knew that they now had to kill the deceased.

This evidence should be looked at carefully against the reference to a fifth person in Mr. Mbolombo's telephonic conversation with Mr. Tongo on the Saturday evening.

24.1.29 Mr. Qwabe's evidence, of course, contradicted the evidence of both Mr. Mbolombo and Mr. Tongo as far as their discussions on the Friday evening. I have dealt with these aspects, and I am not going to repeat them.

24.1.29 Mr. Qwabe also contradicted Tongo's evidence that he was not aware that the person that had to be killed was the accused's wife, but the accused's business partner, who would be arriving on the Saturday. Mr. Qwabe persisted that when Mr. Tongo phoned him on the Friday night he told him that there was a husband and wanted a wife killed.

24.1.30 Mr. Qwabe also testified that the remuneration of R15 000,00 was a price determined by Mr. Mngeni and not Mr. Tongo as he stated in his evidence.

24.2 **Mr. Monde Mbolombo**

- 24.2.1 Mr. Mbolombo was also an accomplice witness and was warned in terms of section 204 of the Criminal Procedure Act in respect of all five charges.
- 24.2.2 Mr. Mbolombo testified that Mr. Tongo telephoned him at his work place on the afternoon of 12 November 2010, and he informed him that he was on his way to the hotel where he worked. Upon his arrival, Mr. Tongo asked him whether he knew of anyone who was a hitman. They then moved to outside the lobby of the Protea Hotel. Mr. Mbolombo told him that he did not socialise with criminals. However, he could make enquiries from a person whom he called Abongile. It is common cause that Abongile is a reference to Mr. Qwabe.
- 24.2.3 Mr. Mbolombo and Mr. Qwabe had previously worked together on a project called "The Pride of Table Mountain". They last had contact in 2006, but purely by chance, on 1 November 2010, they met at Monwabezi Beach. On that occasion Mr. Qwabe was apparently in the company of people who looked like criminals. During the course of the conversation, Mr. Qwabe asked him, Mr. Mbolombo, whether he had any people bothering him, or worrying him, and that if he had, he must just phone Mr. Qwabe. They exchanged phone numbers.

- 24.2.4 Shortly thereafter Mr. Mbolombo's son fell ill, and he approached Mr. Qwabe to obtain a bullet from him in order to use the powder thereof on the advice of a traditional healer.
- 24.2.5 Mr. Mbolombo explained that it was because Mr. Qwabe could supply him with a bullet that he decided to approach him pursuant to Mr. Tongo's request to find a hitman. Mr. Mbolombo stated that he told Mr. Qwabe that there is a person called Zola, and told him about the job and the nature thereof. He told Mr. Qwabe that he knew Mr. Tongo and that Mr. Tongo would pay R15 000,00 for the job. Mr. Qwabe at one stage during the conversation indicated that they should not discuss the matter over the phone, but that they should rather meet. According to Mr. Mbolombo, Mr. Qwabe indicated that he would have no problem to do the job. After Mr. Tongo had left, Mr. Mbolombo telephoned Mr. Qwabe in order to reassure him that he knew Mr. Tongo, and that he could be trusted.
- 24.2.6 Mr. Mbolombo then testified that he received a call from Mr. Tongo on the morning of 13 November 2010, who requested that he accompany him to a meeting with Mr. Qwabe in order to discuss "how to go about in doing this". Mr. Mbolombo contacted Mr. Qwabe and informed him that Mr. Tongo would be coming to Khayelitsha.

24.2.7 Mr. Mbolombo said that he waited for Mr. Tongo to meet him at his home in Khayelitsha. Mr. Tongo was aware that Mr. Mbolombo's shift at the Protea Hotel started at 15h00. Mr. Tongo did not arrive and Mr. Mbolombo went back to the taxi rank at Site C but shortly after his arrival there, Mr. Tongo contacted him and said he was on his way. Mr. Mbolombo then got into Mr. Tongo's vehicle. Mr. Tongo gave him a lift to work. In the vehicle Mr. Mbolombo enquired from Mr. Tongo why he was looking for a hitman. Mr. Tongo informed him that there was a married couple and that the husband wants the woman to be killed. Mr. Mbolombo then wanted to know which woman and how had he met these people. Mr. Tongo informed him that he met them at the airport and that "it is the man who wants his wife to be killed".

24.2.8 Mr. Mbolombo testified that while he and Mr. Tongo were driving towards Mr. Mbolombo's work, Mr. Tongo received a phone call and then said, "here is the gentleman that we are talking about, the man who wants his wife to be killed". Mr. Tongo then spoke on the phone and all Mr. Mbolombo heard Mr. Tongo saying is, "I'm coming, I'm coming". Mr. Tongo thereupon put the phone down and said that the gentleman does not trust him. Mr. Tongo then informed him that he had to go and take the accused to change his dollars into rands so that he can pay the killers. He added that the accused did not want to go to a "legitimate" place where the dollars are being changed for rands because he, the accused, did not want to be charged for tax. Mr. Tongo also informed Mr. Mbolombo that the couple was from overseas

and that it is not the first time that the accused had done “this”, that he has been in South Africa before, done “this” before, and he wants to do it again, but it should appear to be a fake hijacking. Upon arrival at the Protea Hotel, Mr. Tongo said to Mr. Mbolombo that he had to rush to Khayelitsha to meet with Mr. Qwabe.

24.2.9 During his evidence in chief, Mr. Mbolombo described his role as follows:

“To make sure that Zola and Abongile meet, and to see to it that this thing happens.”

24.2.10 Later, he elaborated by stating that the reason why he had further telephonic contact with Mr. Qwabe was “(T)o get things into order and to make sure that things go according to how they were planned”.

24.2.11 Mr. Mbolombo testified that he knew that the persons involved was a married couple and that Mr. Tongo was going to drive them to a restaurant in Somerset West where they would have dinner.

24.2.12 Mr. Qwabe telephoned Mr. Mbolombo at approximately 19h00 that evening and informed him that he was looking for Mr. Tongo but that Mr. Tongo’s phone was switched off. Mr. Mbolombo eventually got

hold of Mr. Tongo and informed him that “these guys are looking for gloves”. He explained that this related to an earlier request from Mr. Qwabe on the Saturday morning to inform him that they wanted gloves so as not to leave any fingerprints behind.

24.2.13 Mr. Mbolombo stated that when he heard that the person who had mandated this killing was going to pay R15 000,00, he indicated that he would also have to be paid for all his effort in the matter, “even if it was R5 000,00”. There was however no firm agreement on the amount he would be paid.

24.2.14 Mr. Mbolombo testified that during a telephone conversation on the Saturday afternoon with Mr. Tongo, Mr. Tongo informed him that he was going to place the money in the cubbyhole of the vehicle. Mr. Mbolombo stated that Mr. Tongo was supposed to have met with Mr. Qwabe to give him the money, but they could not meet.

24.2.15 Mr. Mbolombo also enquired from Mr. Tongo during this same telephone discussion whether he managed to get the gloves they earlier spoke about.

- 24.2.16 Mr. Mbolombo testified that it was after this conversation with Mr. Tongo that Mr. Qwabe telephoned him looking for Mr. Tongo and informed him that they were supposed to have met.
- 24.2.17 When Mr. Mbolombo finally got hold of Mr. Tongo, Mr. Tongo informed him that his phone was switched off as he was “with the people (the Dewanis) at a table” and that was the reason why he could not answer the phone.
- 24.2.18 Shortly thereafter Mr. Mbolombo received a phone call from Mr. Tongo who informed him that they were leaving the restaurant and that they were on their way to Gugulethu.
- 24.2.19 According to Mr. Mbolombo, he did not know exactly where in Gugulethu this thing would happen, only that it would happen in Gugulethu.
- 24.2.20 Mr. Mbolombo testified that Mr. Qwabe informed him that, as the people were coming to Gugulethu, they will take the vehicle and then go to Khayelitsha. They will then drop off Mr. Tongo as well as the husband, and then they will drive on with the wife.

- 24.2.21 Mr. Qwabe also informed Mr. Mbolombo that they were going to stop the people, take the vehicle and then take it to Khayelitsha.
- 24.2.22 Mr. Mbolombo testified that he did not know exactly where in Khayelitsha they were going to do this, only that it was going to take place in Khayelitsha and that they were going to leave the vehicle there, and thereafter wash the vehicle.
- 24.2.23 On Sunday, 14 November 2010 Mr. Mbolombo was at home and tried to call Mr. Tongo but could not get hold of him. Mr. Mbolombo said that Mr. Qwabe arrived at his home on the Sunday morning at about 10:00 o'clock and informed him that the money that Mr. Tongo gave him was short by R5 000,00. Mr. Mbolombo testified that at that stage Mr. Qwabe was so angry that he did not ask Mr. Qwabe about whether he, Mr. Mbolombo, would be paid. Mr. Qwabe wanted to know where Mr. Tongo was, and Mr. Mbolombo informed him that he did not know.
- 24.3.25 Mr. Mbolombo then asked Mr. Qwabe what had happened and Mr. Qwabe told him that he should not ask a lot of things and whether he did not see on TV what had happened. Mr. Qwabe also requested Mr. Mbolombo to inform Mr. Tongo that Mr. Qwabe wanted his R5 000,00.

- 24.3.26 On his arrival at work on 15 November 2010, Mr. Mbolombo read about the incident in the newspaper. He then realised that they had really killed the woman.
- 24.3.27 On Wednesday, 17 November 2010, Mr. Mbolombo was contacted by Mr. Tongo who informed him that he was phoning from his girlfriend's telephone. Mr. Tongo informed him that the police contacted him about the shooting incident, that he did not tell them the truth, and that he just told the police that he does not know anything. Mr. Mbolombo then informed him that Mr. Qwabe was looking for him. Mr. Tongo then warned him, Mr. Mbolombo, to get away from those guys "as they were very dangerous".
- 24.3.28 Mr. Mbolombo was arrested on 18 November 2010. He made a warning statement to Lieutenant Colonel Barkhuizen. Thereafter he was interviewed and he was advised that police were going to take down a statement in terms of section 204 of the Criminal Procedure Act. That statement was made on 19 November 2010, again to Lieutenant Colonel Barkhuizen.
- 24.3.29 Mr. Mbolombo was released after he had made the two statements.

- 24.3.30 At the beginning of his evidence, Mr. Mbolombo admitted that he had lied in his warning statement and in his statement to the police in terms of section 204 of the Criminal Procedure Act. He also admitted that he had lied during his evidence in the Mngeni trial. He however testified that his lies were limited to down-playing the extent of his involvement in this matter.
- 24.3.31 Mr. Mbolombo testified that the provisions of section 204 were not only explained to him on two occasions, but that he understood what they meant.
- 24.3.32 Shortly before the commencement of this trial, Mr. Mbolombo made yet another statement correcting certain errors and/or lies in his previous statements. He stated that after a lengthy consultation with the prosecution team, and after having been given the opportunity to view the CCTV footage and listen to the audio recordings, he realised that he could no longer “hide” and that he had to open up and be honest.
- 24.3.33 Before Mr. Mbolombo proceeded with his evidence, he delivered a pre-prepared speech which, from the record, appears to be virtually identical to a similarly emotive speech which he gave the court in the Mngeni trial, before blatantly lying about material aspects. Those aspects had nothing to do with hiding his involvement in the matter.

- 24.3.34 Be that as it may, Mr. Mbolombo's evidence unravelled during cross-examination. He started to contradict himself on each and every material aspect of his earlier evidence.
- 24.3.35 I do not intend to deal with all these contradictions. Mr. Mbolombo is a self-confessed liar, who admitted in court that he lied when he deposed to his warning statement on 18 November 2010. He lied when he deposed to his section 204 statement on 19 November 2010. He lied when he testified before Justice Henney in the Mngeni matter. And he also admitted that he had concealed his own involvement and knowledge on these previous occasions since he was fearful of what the repercussions would be.
- 24.3.36 As his evidence progressed it became more and more clear that he was deeply involved in this entire incident and played a very important role. I mention but one example.
- 24.3.37 Mr. Mbolombo testified that the accused telephoned Mr. Tongo in his presence shortly before 3:00 p.m. on the Saturday afternoon on their way to the Protea Hotel. Mr. Tongo told him that he had to take the accused to exchange dollars into rands in order to be able to pay the killers. It is common cause that no such telephone call ever took place.

It is further common cause that by that time Mr. Tongo had already taken the accused to exchange the money. Mr. Mbolombo testified about a further call which was supposed to have taken place between him and Mr. Tongo at 19h30 on the Saturday evening when Mr. Tongo explained to him that the reason why he could not answer his phone was because he was “sitting at the table with the couple”. Similarly, it is common cause that no such call between Mr. Tongo and Mr. Mbolombo ever took place and that Mr. Tongo was never inside the restaurant with the accused and the deceased.

24.3.38 In addition to this, there are stark contradictions between the evidence of Mr. Mbolombo, Mr. Tongo and Mr. Qwabe on material aspects of their evidence.

24.3.39 Mr. Mopp argued that Mr. Mbolombo in an “ironic twist” moved from protecting himself at all costs to asserting that he played a leading role in the events of 12 and 13 November 2010.

24.3.40 This is hardly an “ironic twist”. His leading role is supported by clear objective facts such as the phone records and the audio recordings. I cannot agree with Mr. Mopp’s argument that the incentive for Mr. Mbolombo to now actively involve himself in communicating with Mr. Tongo and Mr. Qwabe, is the prospect of receiving R5 000,00

payment. This submission by Mr. Mopp only has to be made to be rejected.

24.4 To summarise, Mr. Tongo, who was the only witness who could link the accused to this conspiracy, gave evidence to the court which is so improbable and contains so many mistakes, lies and inconsistencies that one simply cannot know where the lies end and the truth begins. I accept that at this stage of the proceedings the credibility of a witness plays a limited role. But, in my view, the evidence of these witnesses is so replete with fundamental contradictions on the key components of the State case that I can all but ignore it. In making this finding, I take into account that all three witnesses, Mr. Tongo, Mr. Mbolombo and Mr. Qwabe are intelligent people, and therefore more than capable of attempting to twist their version to implicate the accused.

24.4.1 Mr. Tongo obtained Grade 12 at the Malibu High School in Blue Downs. Thereafter he became an insurance consultant. Then he became a VIP taxi driver with Platinum Escapes, and then started his own shuttle services in 2010.

24.4.2 Mr. Mbolombo matriculated from Modderdam High School. Thereafter he was employed until 2000 at The Pride of Table Mountain. He thereafter did a two year course as an assistant educational officer,

presented by the Department of Environmental Affairs. He thereafter worked as a security guard, and since 2007 was working at the Protea Colloseum Hotel, where he was dismissed as a result of his involvement in this matter.

24.4.3 Mr Qwabe attended Oude Molen High School, and obtained a N2 in electrical engineering in 2003 at the Western Province Technical College in Pinelands. After his studies he was formally employed until 2010, *inter alia*, as an assessor at an insurance company.

24.4.4 These men are not typical of the criminal elements which one encounters. Each one of them impressed me as intelligent and bright, but, calculated. They may have been amateurs in arranging a hit on a person's life, but I do not believe that any one of them would be so stupid as to take part in this crime for just a few thousand rand. On Mr. Tongo's own saying he was earning between R30 000,00 and R40 000,00 per month. Mr. Mbolombo had a job, and Mr. Qwabe was formally employed until April 2010, and thereafter assisted his mother in her business.

24.4.5 The inference is inescapable that they anticipated that there would be much more in it for them than the R15 000,00 which they testified about.

- 24.5 Mr. Mopp argued that but for the tragic consequences of this case, the conduct of the three co-conspirators would have been comical. He said I must look at the evidence of Mr. Tongo, Mr. Qwabe and Mr. Mbolombo in the light that they are not the “A team” of hijackers. I, however, cannot ignore the fact that these are three intelligent men who testified, and that each one of them was a self-confessed liar, who continued lying in this court.
- 24.6 On the question of whether I should grant Mr. Mbolombo indemnity from prosecution I think I have said enough about his evidence, to justify a refusal to grant him indemnity. I therefore refuse to grant him indemnity.
- 24.7 As pointed out above, Mr. Tongo is a single witness who is also an accomplice witness. As I have noted earlier, in these circumstances the court must look for corroboration of his evidence. On the cases referred to above it is clear that such corroboration must be corroboration implicating the accused. Mr. Mopp attempted to persuade me that I could find corroboration in the circumstantial evidence. This evidence, such as it is, he was constrained to concede does not implicate the accused. Regrettably, there are many unanswered questions about what exactly happened on the fateful

night. I realise that there is a strong public opinion that the accused should be placed on his defence. I have taken note of that. I have also taken note of the plight of the Hindochas. I have however taken an oath of office to uphold the rule of law and to administer justice without fear, favour or prejudice. That I cannot do if I permit public opinion to influence my application of the law. If any court permitted public opinion, which has no legal basis to influence their judgments, it will lead to anarchy. I am obliged to follow the established legal principles regarding a discharge at the close of the State case. In the light of the analysis of the State case there is no evidence upon which a reasonable court, acting carefully, can convict the accused, and I am obliged to follow the established legal principles regarding a discharge. The law is clear: the evidence of the accused – if he does not incriminate himself can never strengthen the State's case. Even if the accused is therefore a wholly unsatisfactory witness – I will still be left with a weak State case which cannot on any basis pass legal muster.

24.8 At this stage of the proceedings I have a discretion as to whether to grant or refuse the application in terms of Section 174. This is a discretion that must be exercised judicially.

24.9 Having regard to the fact that I have already found that there is insufficient evidence upon which a reasonable court, acting carefully, might convict, the only possible reason for refusing the application at

this stage can be the hope that the accused will implicate himself during his evidence. To do so will be a manifest misdirection (S. v. Lubaxa, *supra*).

[25] Mr. Mopp argued that the evidence of Sergeant Mellet, Warrant Officer Stephanus, Captain Lutchman and Captain Hendrickse, all testified that the accused informed them the deceased wanted to see the nightlife in the township and that it was at her request that they drove into Gugulethu. This shows that Mr. Tongo did not take the detour into Gugulethu of his own accord. This submission cannot be sustained. The entire hijacking and killing was planned to take place in Gugulethu and Khayelitsha. But in any event – these issues raised by Mr. Mopp can only be answered in favour of the State if the accused incriminates himself.

[26] The same applies to Mr. Mopp's submissions regarding the accused's version that he gave to the Hindocha family about the deceased's killing. These statements do not bolster the State's case – on the contrary – without the accused taking the witness stand and incriminating himself, they take the matter no further. This case, in my view, falls squarely within the ambit of the following *dictum* of Nugent, JA in Lubaxa, *supra* at 707h – 708b (which, for the sake of completeness, I repeat):

“Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common law principle that there should be ‘reasonable and probable’ cause to believe that the accused is guilty of an offence before a prosecution is initiated

(*Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) at 135C-E), and the constitutional protection afforded to dignity and personal freedom (s 10 and s 12) seems to reinforce it. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold.”

The evidence presented by the State in this case falls far below this threshold.

[27] In the circumstances I make the following order:

27.1 The application in terms of section 174 of the Criminal Procedure Act is granted.

27.2 The accused is found not guilty and discharged.

27.3 Mr. Mbolombo is not granted indemnity from prosecution.

TRAVERSO, DJP