

SOUTH AFRICA / JUDGMENT

Mshudulu v S (A137/2013) [2014] ZAWCHC 163 (4 November 2014) [2014] ZAWCHC 163

COURT

Western Cape High Court, Cape Town

BEFORE

Rogers, Van Staden

CASE / FILE NUMBER

A137/2013

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

Case

No: A137/2013

DATE:04

NOVEMBER 2014

In the matter

between:

NANDIPHA
MSHUDULU.....APPELLANT
And
THE
STATE.....RESPONDENT
Coram: ROGERS J &
VAN STADEN AJ
Heard: 31 OCTOBER
2014
Delivered: 4
NOVEMBER 2014

JUDGMENT

Rogers J:

Introduction

[1] The appellant, who was the first accused in the court below, was charged with two others on various counts arising from the alleged kidnapping of Sisanda Ngcawuzele ('the complainant') in December 2006. The second and third accused were Luther Kwenana ('Kwenana') and Mzamatolo Tyuluba ('Tyuluba'). The appellant and her co-accused were separately represented at the trial which ran sporadically on a number of days over the period 4 November 2008 to 24 January 2013. The magistrate delivered judgment on 20 to February

2013. Sentence was passed on 9 April 2013.

[2] The appeal, which is with the leave of the magistrate, is against conviction and sentence.

[3] On the merits the State called the following witnesses in order: the complainant; Const Saunders; the complainant's father, Mzoli Mngeawuzele; Pamela Mntushe; Capt Jonker; Tusine Galo; W/O Engelbrecht and Col Viljoen. There was a trial-within-a-trial regarding an alleged confession made by the third accused, Tyuluba. The alleged confession was ruled inadmissible. The appellant testified in her own defence. Neither of her co-accused testified though Tyuluba called a witness, Julius Merele. I shall refer to the witnesses by their surnames.

[4] The accused faced five counts: kidnapping (count 1); robbery with aggravating circumstances, the stolen items being the complainant's

Peugeot, keys, two cellphones and her handbag and its contents (count 2); possession of dangerous weapons, namely a knife and an axe (count 3); fraud alternatively theft relating to the withdrawal of R9 000 from the complainant's bank accounts (count 4); and extortion (count 5). In regard to count 5, the state's case was that the accused attempted to extort R300 000 from the complainant's father though the attempt was unsuccessful.

[5] The appellant was convicted of kidnapping (count 1) and attempted extortion (count 5). Her co-accused were convicted on all counts (the conviction in respect of count 4 being the alternative of theft). The appellant was sentenced to five years' imprisonment on count 1 and two years' imprisonment on count 5 (an effective period of seven years). The second and third accused were sentenced to effective periods of 11 years' and 12 years' imprisonment respectively.

- [6] The appellant's defence at the trial was that she was unwittingly caught up in the events, that she was unaware of the plot to kidnap the complainant and extort money from her father, and that when she became aware that the complainant was being unlawfully held she confided in her friend Mntushe but was arrested before she could go to the police.
- [7] Although the second accused, Kwenana, did not testify, he made certain admissions pursuant to which a police statement was received into evidence. In this statement Kwenana implicated himself in the kidnapping but claimed to have been acting under duress from the third accused, Tyuluba. The magistrate correctly did not regard Kwenana's admissions and statement as being admissible evidence against the appellant or Tyuluba.
- [8] Tyuluba, who also declined to testify, caused his attorney to put to various State witnesses that the complainant had been complicit in her own staged kidnapping in order to get money from her father.
- [9] The magistrate rejected the appellant's claim to innocence; rejected Kwenana's attempt to excuse his involvement; and rejected Tyuluba's thesis of a staged kidnapping.

The State's case

- [10] Rather than setting out the evidence of each of the State witnesses, I shall summarise, as a narrative account, the version which the State asked the trial court to accept on the strength of the oral testimony and exhibits. I disregard detail which would only be admissible against Kwenana.
- [11] The complainant is the daughter of the proprietor of a well-known and successful butchery and restaurant in Gugulethu. As at December 2006 she was 20 years old. She resided with her parents. She was employed at a chemicals company. On weekends she worked at the butchery/restaurant. She also co-owned an events company called PST. Her partners in that business were Galo and one Dumelo Pudoema (also known as Tumi).
- [12] The appellant and Mntushe were close friends. They both lived in Parklands, the former in a flat, the latter in a house. The appellant worked as an accounts manager at a local radio station. Tyuluba was her boyfriend and was living with her. They had bought the Parklands flat shortly before the incident. The appellant knew Kwenana, who was a friend of Tyuluba.
- [13] The complainant was acquainted with Tyuluba, having met and chatted to him at a number of functions. The complainant did not know the appellant or Kwenana.
- [14] Tyuluba, who was the mastermind, conspired with the appellant, Kwenana and possibly others, to kidnap the complainant and extort money from her father.

- [15] On the morning of Saturday 9 December 2006 the appellant sent an sms to Mntushe to ask if she could do her laundry at Mntushe's house (she did not have a washing machine). Mntushe agreed but said she was going to George for two days (she had to return a vehicle to her uncle who lived there). She gave her house keys to the appellant on the understanding that she would collect them from the appellant upon her return. The appellant had access to Mntushe's house as from the afternoon of Saturday 9 December 2006.
- [16] On Sunday 10 December 2006 the complainant was working at the butchery/restaurant. In the early afternoon a woman identifying herself as Cindy from Eswene Media in Johannesburg, but who was in truth the appellant (this is common cause), phoned Galo to ask whether their business had a female member who could accompany her to a women's empowerment function that evening at the Waterfront. He answered in the affirmative and gave her the complainant's number. Galo phoned the complainant to advise her of the call.
- [17] Cindy left a lengthy message on the complainant's voicemail. When the complainant got home that afternoon she listened to the message but it was so long that she terminated the voicemail and contacted Galo to get Cindy's number. She phoned the number Galo gave. The lady identifying herself as Cindy said that she would like the appellant to attend a function with her at the Waterfront starting at 20h00. They arranged to meet outside a restaurant in Parklands. At some stage Cindy sent an sms to Galo to say she was at Spier in Stellenbosch and running a bit late for the meeting with the complainant. The complainant drove to the Parklands restaurant in her Peugeot. She waited for some time. When Cindy did not arrive, she sent a message to Cindy's phone (this was after 20h30). The latter returned the call and asked her rather to meet her at a house in Parklands. Cindy gave the complainant directions as she drove. The house to which Cindy directed her was Mntushe's house.
- [18] When the complainant arrived at Mntushe's house the door was opened by Kwenana. Tyuluba, who was masterminding the kidnapping, had arranged for Kwenana to perform this role, given that the complainant would have recognised Tyuluba. The complainant asked Kwenana if Cindy was there. He replied that she was but was in the shower. The complainant went inside. Kwenana, who produced a knife, was soon joined by another man who emerged from the garage with an axe. This man, who was wearing a balaclava, was Tyuluba. They tied her up and blindfolded her and put duct tape over her mouth. One of them took her keys and fetched her handbag, which she had left in the car. They found her bank cards. Kwenana extracted the PIN codes from her by getting her to nod or shake her head as he counted numbers.
- [19] The complainant said there were more voices than just Kwenana's and Tyuluba's but she could not say whether one of the others was a woman.
- [20] Later on the Sunday night her kidnappers moved her to a new location. They carried her out to a car (which was not hers) and drove her to the appellant's flat. She was taken to an upstairs room and tied to a chair. Throughout the ordeal she was blindfolded and had duct tape over her mouth (except when being fed).

- [21] In the meanwhile, Mntushe, having left her uncle's car in George and hitchhiked back, arrived in Cape Town on the Sunday evening – this was at about 21h00. Because she did not have her house keys, she arranged to be dropped off at the appellant's grandmother's home in Gugulethu. She phoned the appellant to advise of her expected time of arrival. On Mntushe's arrival in Gugulethu the appellant was not yet there. She phoned her. The appellant told her that her boyfriend (Tyuluba) had gone off in her car. Mntushe said that the appellant could use her car (a Polo Prior) and that the keys were on the kitchen table. The appellant arrived in Gugulethu in the Polo around 22h00. From there they visited several clubs in the city centre. At about 02h00 on the morning of Monday 11 December 2012 Mntushe dropped the appellant off at her Parkland's flat and returned to her house.
- [22] Having regard to the timeline of events, it is probable (on Mntushe's version) that (i) the complainant was being held at Mntushe's house at the time the appellant collected Mntushe's car keys and took her car in order to drive to Gugulethu; (ii) that the complainant was being held at the appellant's flat by the time the appellant was dropped off there at about 02h00. It may well be that the kidnappers decided to move the complainant when they did because Mntushe had arrived back and contacted the appellant.
- [23] In the early hours of the Monday morning amounts of R2 000 and R1 000 were withdrawn at ATM machines from the complainant's Standard Bank and Absa accounts. One of these withdrawals is reflected as having been made at 03h54.
- [24] At some stage during the course of Monday 11 December 2006 Tyuluba came into the room where the complainant was being held. It seems that her blindfold had moved somewhat so that she was able to see some of the features of the man. This is when she recognised him as Tyuluba. He removed the duct tape from her mouth and gave her some bread, cheese and orange juice. He re-secured her restraints and also tied a rope around her neck which he attached to a cupboard bar. He said he would strangle her if she caused any trouble. The only person of whose presence the complainant was aware on the Monday was Tyuluba.
- [25] At 14h38 on Monday 11 December 2006 the complainant's father received a telephone call from a man who did not identify himself but who, it is common cause, was Tyuluba. The man said that they were holding his daughter in Johannesburg and demanded R300 000 for her release. The same man phoned back after about ten minutes to say that complainant's father did not seem to be taking him seriously. He threatened to torture the complainant so that her father could hear that she was being held. He also warned the complainant's father not to go to the police. The complainant's father pleaded with them not to hurt her. The man said he would phone back with further instructions.
- [26] Notwithstanding the threats, the complainant's father decided to go to the police. He went to the SAPS offices in Bellville South where he spent a considerable amount of time until his daughter was found. The man who had phoned him earlier in the afternoon did not get back to him with further instructions.

- [27] The complainant's kidnapping was receiving media coverage. There were reports on the TV news.
- [28] While at work on Monday 11 December 2012, Mntushe was told by a friend about the complainant's kidnapping. Later in the day the appellant phoned Mntushe, who told her of the kidnapping. The appellant phoned her back a while later to say that there was something she wanted to tell Mntushe but could not talk about it over the phone. She asked Mntushe to come and fetch her after work. Mntushe collected the appellant at about 18h00. She saw Tyuluba at the appellant's flat and waved to him. Mntushe and the appellant went back to Mntushe's house. A friend of Mntushe's arrived before the appellant had confided anything to Mntushe. The three of them had supper and watched TV. There was a report on the news about the kidnapping. The appellant phoned Tyuluba to come and fetch her, which he did at about 20h00.
- [29] In the early hours of Tuesday 12 December 2006 the police found the complainant's Peugeot abandoned in Bree Street Cape Town.
- [30] During the course of the Tuesday Kwenana came into the room where the complainant was being held and asked if she was hungry. He fed her some custard and then left her. She remained bound, blindfolded and gagged. The complainant was not aware of anyone else being present in the flat on that day.
- [31] The appellant had further telephonic contact with Mntushe on the Tuesday. They arranged to meet during the day but the appellant did not keep the appointment. Later the appellant contacted Mntushe to say that she would spend the night at Mntushe's place. Again, however, she did not arrive. She phoned on the Wednesday to apologise – she had been running late at a function and had not wanted to waken Mntushe.
- [32] The appellant and Mntushe eventually met in Green Point around lunch time on the Wednesday. The appellant told Mntushe that she wanted to tell her something and that she must please not judge her or tell anyone else. She then confided that Tyuluba was involved in the complainant's kidnapping and that she (the appellant) had nothing to do with it but was afraid because the complainant was being held at her flat. Mntushe was shocked. She went back to work.
- [33] During the course of Wednesday 13 December 2006 the appellant came into the room where the complainant was being held. (On the appellant's version, this was after she had met with Mntushe at lunchtime. She testified that Mntushe had urged her that she go and see whether the complainant was still at the flat and, if so, how she was doing.) The complainant did not know the appellant but could see through the blindfold that it was a large-bodied woman wearing an orange top. She recognised the voice as being that of the Cindy with whom she had spoken on the Sunday. The appellant tightened the blindfold and other restraints. She told the complainant that she should not do anything and that she knows what 'that man' (an apparent reference to Tyuluba) will do. The complainant said in cross-examination that she did not regard this as a threat by the appellant.

- [34] After work the appellant met Mntushe at the latter's house. The appellant told Mntushe that Tyuluba had gone to Johannesburg but had said that two policemen (presumably meaning two corrupt policemen) would come to her flat to remove the complainant so that she need not worry. However, Tyuluba was now not answering his phone and she did not know what to do. She told Mntushe that she did not wish to report the matter to the police because Tyuluba 'can do something terrible to me'. They drove to Gugulethu in the appellant's car and spent time at a place called Gutu.
- [35] In the meanwhile an intensive police investigation had been underway. By the Wednesday evening the police had information that Kwenana was involved and would be found at his aunt's tavern in Elsie's River. They went there (this was after 20h00). He seems immediately to have admitted his involvement and to have given them further information. He led them to Mntushe's house. When the police (accompanied by Kwenana) got to Mntushe's house there was no one there. They made a forced entry. Kwenana told the police that the complainant had been moved to a flat in Parklands, that he did not know the address but thought he could recognise it if they drove around in the area.
- [36] While the police were still at Mntushe's house, the appellant and Mntushe arrived back at Mntushe's house from Gugulethu. Kwenana identified the appellant to the police as one of the accomplices. (Kwenana did not allege that Mntushe was involved and the latter testified that she had never seen Kwenana before that Wednesday night.) Both Engelbrecht and Jonker testified that on initial questioning the appellant denied that the complainant was at her flat. The senior officer on the scene was Viljoen. Engelbrecht drove him and the appellant to the latter's flat. Jonker was in another vehicle. The appellant pointed out her flat, and Engelbrecht and Jonker (who by now had the flat keys) went inside. As Engelbrecht and Jonker went into the flat, the appellant volunteered to Viljoen that the complainant was in her flat and had been alive when she had left her that morning. She did not offer anything more by way of explanation.
- [37] Engelbrecht and Jonker found the complainant in the upstairs room. A rope had been tied to the chair, then around her legs, over her right hand and around her neck up to the bar in the cupboard and then back down to the chair. She was blindfolded and there was duct tape over her mouth. Because she had been confined to a chair for several days, she was unable to walk when they freed her. The chair was wet from urine. They carried her out and took her to hospital. She was discharged on Friday 15 December
2006. A J88 report, recording the findings of a medical examination conducted on 14 December 2006, was handed in by agreement. Duct tape residue was observed on her wrists and cheeks. Her earrings had left an imprint where they had been pressed into her neck by the duct tape. Her ankles and knees were slightly swollen. There was minor bruising on the buttocks. There were ligature marks on both ankles and bruising on the left wrist. Pain was experienced on flexion and extension of the knees.

- [38] The police also took Mntushe in a separate vehicle to the appellant's flat. By that stage the appellant had been arrested and was handcuffed. Mntushe had been informed by the police that the complainant had initially been held in her house, something the appellant had not mentioned. She asked the appellant why she had said nothing about this. According to Mntushe, the appellant was crying and apologising but could not give an answer. (Several days later, at the police station, Mntushe again confronted the appellant, on which occasion the appellant gave a version broadly along the lines of her testimony in court, including that Tyuluba had wanted to use Mntushe's house for a business meeting and had asked her to contact the complainant but to pretend to be a woman called Cindy. The appellant had not mentioned these aspects of her version to Mntushe when they talked on the Wednesday. Mntushe, who herself was arrested, was very angry that the appellant had dragged her into the matter by abusing her access to Mntushe's house.)
- [39] During the course of the Wednesday further cash withdrawals were made from ATM machines. One of these withdrawals was at 06h13, the rest between 19h25 and 20h13. The accounts were frozen later that evening. It does not appear from the bank statements whether these withdrawals were made in Cape Town or Johannesburg.
- [40] Tyuluba, who had disappeared, was eventually tracked down to King William's Town in the Eastern Cape where he was arrested on 21 October 2007, more than 10 months after the kidnapping.
- [41] Mntushe and Galo were initially suspected of complicity but were not ultimately charged.

The appellant's version

- [42] The appellant's version was as follows. She and Tyuluba were involved in a relationship during 2001 to 2003. He was at times abusive and she regarded him as unstable. She ended the relationship. They resumed their relationship in July/August 2006. They bought the Parklands flat together. He was not violent or abusive during their second relationship though did sometimes behave irresponsibly.
- [43] Several weeks before the incident Tyuluba asked her to get Mntushe's permission for him to store computers in her garage, to which the latter agreed.
- [44] On the morning of Saturday 9 December 2006 she asked Mntushe whether she could do her laundry at Mntushe's house. Her version on this score was essentially the same as Mntushe's. The appellant claimed that this was a genuine request.
- [45] On the Saturday evening Tyuluba asked her to do him a favour. He wanted to set up a meeting with an events company (ie PST) and gave her a business card containing Galo's contact details. He had tried to set up a business meeting with this company but they were not taking him seriously. He thought that the appellant, being involved in the media, might sound more convincing. She was to phone the number on the business card and say that she was Cindy from Sound Promotions in Johannesburg and wanted to set up a meeting with a female representative of the company at the Waterfront on the Sunday evening. The

appellant thought (later she claimed to have been told by Tyuluba) that there was apparently a woman called Cindy from Johannesburg who was involved in promotions and that, if the appellant claimed to be Cindy, this might get PST's attention.

- [46] On Saturday she phoned Galo along the lines requested by Tyuluba, stating that she (Cindy) would like to meet a female representative of PST at the Waterfront on the following evening. Galo gave her the appellant's number. She phoned this number (this was after 14h00) and left a voice message. Later in the afternoon Tyuluba checked with her that she had set up the meeting.
- [47] Thereafter she got several calls from the complainant but did not want to answer because she did not know what to say. She contacted Tyuluba who said that she should tell the complainant that she was stuck in Stellenbosch and would meet her outside a restaurant in Parklands. Thereafter she and Tyuluba drove to Gugulethu where Tyuluba fetched Kwenana out of a tavern.
- [48] Tyuluba told the appellant that he now proposed to meet the complainant not at the Waterfront but at Mntushe's house because the people involved in the computer business wanted a meeting so that he would be at Mntushe's house in any event. She drove Tyuluba and Kwenana to Mntushe's house and dropped them off there, collecting her laundry and giving them the keys. She then went off to her grandmother's house in Gugulethu, having received Mntushe's message that she would be arriving there and wanted to go out clubbing.
- [49] She spoke with the complainant on the telephone, giving her directions to Mntushe's house.
- [50] She collected Mntushe from Gugulethu. Because Tyuluba wanted to borrow her (the appellant's) car, it was arranged that she and Mntushe would go back to Mntushe's house and collect the latter's car. They did so. Tyuluba had already taken Mntushe's car out of the garage. They swapped cars without going inside. She and Mntushe then went to several clubs. Mntushe dropped her off at the appellant's Parklands flat in the early hours of the Monday morning. She went straight to bed on the ground floor of the apartment. She did not know that the complainant was at that stage tied up in the upstairs spare room.
- [51] On the Monday morning she followed her usual routine and went to work. She testified that she then began to think about Tyuluba's unusual request that she should impersonate a woman called Cindy. She decided to phone Mntushe and told her that there was something she need to discuss but could not talk about it over the phone. They arranged to meet later in the day.
- [52] When she got home from work on the Monday afternoon, Tyuluba told her that the woman with whom she had arranged the meeting was being held upstairs. She told Tyuluba that she wanted the woman out of her flat. She testified that she was not interested in finding out the details.

- [53] Mntushe then fetched her and they went to the latter's house. A male friend of Mntushe's arrived before she could confide in the latter. They watched the news, and she saw a report about the kidnapping of the daughter of the proprietor of a well-known Gugulethu butchery/restaurant. She testified that this was when she made the connection between the woman being held in her flat and the kidnapping that was receiving media attention. She immediately phoned Tyuluba to fetch her, because she wanted to confront him.
- [54] After Tyuluba collected her, she confronted him and he 'admitted the whole thing'. He mentioned that other people, including several corrupt policemen, were part of the plot. He told her not to panic because the complainant was going to be moved out of her flat. They drove to Gugulethu and returned to their Parklands flat quite late. She had expected the complainant to have been removed by then but Tyuluba told her that the complainant was in fact still upstairs. They slept in the flat that night.
- [55] She went to work again on the Tuesday morning. Tyuluba phoned her mid-morning and told her that the plotters wanted to make it appear that the kidnapping had moved to another province. He asked her to find out when the next available flight was to Johannesburg. He assured her that by the time the appellant got home the complainant would have been removed. She checked on the flights and reverted to Tyuluba. As far as she is aware, he arranged his own flight and left for Johannesburg later that afternoon. She surmised in her testimony that Tyuluba had followed the strategy because he was starting to panic in the light of all the media coverage.
- [56] She attended a function that evening. She tried on several occasions to reach Tyuluba to get confirmation that the complainant had been moved. When she could not reach him, she decided not to go back to the Parklands flat but instead to sleep at her grandmother's house in Gugulethu. She got there just after 01h00 on the Wednesday morning. She had initially intended to spend the night at Mntushe's house but it became so late that she decided instead to go to Gugulethu.
- [57] When she got to work on the Wednesday morning she phoned Mntushe. They arranged to meet over lunchtime outside the Traffic Department in Green Point. When they met, she pointed to the news billboards about the kidnapping and told Mntushe that the kidnapped girl was at her flat and that she did not know whether Tyuluba had arranged for her to be moved yet. Mntushe said that she (the appellant) had to go and check whether the woman was still there and whether she was all right. They arranged to meet again after work.
- [58] After lunch the appellant had to attend a meeting at Montague Gardens. Thereafter she went back to her flat and went up to the spare room. The complainant's blindfold had slipped so she could see the appellant. The appellant removed the duct tape from the complainant's mouth. She asked the complainant whether she was alright and whether she was hungry. The complainant only wanted fluids, so the appellant gave her some water and then offered her some custard. She asked the complainant whether she would like to go to the toilet but the latter declined. The appellant left the complainant after re-securing the blindfold and

placing duct tape again over her mouth. She variously claimed to have done so because she did not want it to appear, when the police eventually came, that someone had ‘tampered with’ the complainant and because, if she had not re-secured the blindfold,

the complainant might have associated her with the kidnapping.

[59] She and Mntushe met again after work. They decided to drive to Gugulethu to see ‘how the atmosphere was there’ (this remark was not explained but presumably was intended to mean that they wanted to find out what people in Gugulethu was saying about the kidnapping). At some stage during the visit to Gugulethu Mntushe wanted to visit a friend. The appellant waited in the car because she was so scared. Afterwards they drove back to Mntushe’s house where they came across a large police contingent.

[60] It is unnecessary to set out the appellant’s version of the ensuing events. Broadly they accord with the State’s evidence except that, according to the appellant, she did not deny that the complainant was at her house. Her version was that Engelbrecht asked her where the complainant was but before she could answer Viljoen asked whether the complainant was still alive. She responded that the complainant had been alive the last time she saw her. She confirmed that she then guided the police to her flat where the complainant was found.

The approach on appeal

[61] The magistrate rejected the appellant’s exculpatory version as false beyond reasonable doubt. This court can only interfere with this finding if he committed a material misdirection or if we are convinced that the magistrate’s findings of fact are wrong (see, eg, *R v Dhlumayo* 1948 (2) SA 677 (A) at 705-706; *S v Hadebe & Others* 1997 (2) SACR 641 (SCA) at 645e-f; *S v Ndika & Others* 2002 (1) SACR 250 (SCA) para 15; *S v Naidoo* [2002] 4 All SA 710 (SCA) para 26). It is not enough that, after a careful trawling through the whole of the transcript and exhibits, we think we might have come to different factual conclusions. In the absence of material misdirection, we can only intervene if it is clear that, despite the advantages which the magistrate enjoyed of hearing the evidence as it unfolded and of observing the witnesses, he went wrong on the facts.

Assessment

[62] Mr Paries for the appellant was unable to point to any misdirection by the magistrate. The latter understood the onus resting on the State in a criminal matter. He approached the evidence of the complainant with the caution applicable to a single witness. I doubt whether the cautionary rule was applicable; the State’s case against the appellant did not rest on the single evidence of the complainant but on the inferences properly to be drawn from various sources of evidence. Be that as it may, the magistrate’s adoption of the cautionary rule was an approach which favoured the appellant.

[63] The appellant did not, either in the trial court or before us, embrace Tyuluba’s contention that the kidnapping was staged with the complainant’s complicity. Nevertheless, if Tyuluba’s contention could reasonably possibly have been true, the appellant would have been entitled

to an acquittal on the kidnapping charge (though not necessarily on the extortion charge) so I shall briefly deal with it. In my view the magistrate was fully justified in rejecting Tyuluba's contention. The magistrate made a positive credibility finding in favour of the complainant. He said that the complainant impressed her as a witness and that she never got the impression that she was trying falsely to implicate any of the accused. The complainant indignantly denied the proposition that she had conspired with Tyuluba and others in order to extort money from her father.

- [64] Furthermore, there are undisputed facts which utterly refute the notion of a staged kidnapping. If the complainant had been a willing participant in her own purported kidnapping, there would have been no need for her to be enticed to a meeting by a bogus telephone call from the appellant pretending to be Cindy. It is inconceivable that the complainant as a willing participant would have agreed to be tied up, blindfolded and gagged as she was over a period of three days.
- [65] The State thus proved beyond reasonable doubt that the complainant was kidnapped and that an attempt was thereafter made to extort money from her father. The question is whether the State proved beyond reasonable doubt that the appellant was complicit in these crimes.
- [66] Given the appellate deference shown to a trial court's factual findings and given the absence of any material misdirection in this case, we must ask ourselves whether it is clear from the record that the magistrate's rejection of the appellant's version as false beyond reasonable doubt was wrong. In my opinion there is no basis for concluding that the magistrate went wrong on the facts.
- [67] Since Kwenana and Tyuluba did not testify, there was no direct evidence of the appellant's knowing complicity in the kidnapping and extortion. However, the inherent probabilities and certain undisputed facts cumulatively created a very strong case against her.
- [68] The appellant was in an intimate relationship with Tyuluba. She did not claim that when they renewed their relationship in July/August 2006 he was violent or abusive towards her. She came nowhere close to showing that he subjected her to duress in respect of the relevant events.
- [69] The appellant's explanation for having phoned the complainant pretending to be Cindy was preposterous and not worthy of credence. On her own version, she was prepared to lie to the complainant during their several telephonic discussions on Sunday 10 December 2006. She claimed not to have questioned her boyfriend regarding his very peculiar request. Apart from the fact that he was asking her to be dishonest for no apparently convincing reason, the appellant was pretending to arrange a meeting between herself (as Cindy) and the complainant yet on her version she knew that neither she nor someone called Cindy was going to be meeting with the complainant and that it was Tyuluba who supposedly wanted to meet the complainant. If Tyuluba had previously tried without success to set up a meeting with PST, it would hardly help to entice a representative of that company to a meeting with

Tyuluba by telling falsehoods which would immediately be apparent when the representative arrived at the meeting.

[70] Furthermore, the appellant did not offer any explanation as to why she was specifically requested to ask to meet with a female representative of PST. As a fact, the complainant was the only female partner in the business and anyone who had made enquiries about the business would have been able to ascertain this. Effectively, therefore, her bogus request to Galo for a meeting with a female representative of PST was a request for a meeting with the complainant. If, as the appellant claimed to have understood, Tyuluba wanted to meet with PST in relation to some joint promotions in Cape Town (the details of which she claimed to know nothing), there would have been no particular reason for Tyuluba to insist on a female representative.

[71] On the appellant's version, she did not only tell Galo and the complainant the lie which Tyuluba had first asked her to tell. She also supposedly acceded to his request to lie again to the complainant by telling her that she was stuck in Stellenbosch and would meet her at a designated venue in Parklands and later by telling her that she was rather going to meet her at a residential

address in Parklands, to which she guided the complainant. On her version, she was guiding the complainant to a house where the latter would expect to find her ('Cindy'). It must have been obvious that the elaborate deception would immediately have been apparent to the complainant on her arrival at Mntushe's house. It is beyond belief that the appellant could seriously have thought that a business meeting between the complainant and Tyuluba could succeed against such a background.

[72] Then there is the fact that the appellant had, fortuitously on her version, acquired access to Mntushe's house on the Saturday and that it was to that very house that the complainant was first taken on the Sunday. On the appellant's own version, she had not sought Mntushe's permission to let Kwenana and Tyuluba use the house for their own purposes; the only arrangement was that she could do her laundry there. On any reckoning, she abused Mntushe's trust by giving her co-accused access to the house.

[73] Kwenana clearly knew of the appellant's involvement. When the complainant arrived at Mntushe's house and asked for Cindy, Kwenana was able to deceive her by saying that Cindy was busy in the shower. It is plain that Kwenana knew that the appellant had acted as Cindy in deceiving the complainant into going to Mntushe's house.

[74] The next odd feature of the appellant's version is that she slept at her Parklands flat on the Sunday night at a time when the complainant was already being held in her spare room upstairs yet she claimed to have been unaware of her presence. This requires one to find not only that she failed to observe or hear anything unusual but that her boyfriend, Tyuluba, thought that he could keep a hostage upstairs without his girlfriend finding out.

- [75] Furthermore, the appellant testified that she had not asked her boyfriend how the meeting with the complainant had gone. One would have thought that she would have been particularly anxious to know, given that the complainant would have arrived at the meeting expecting to see Cindy and would in all likelihood have been outraged at the deception played on her. Also, she was in an intimate relationship with Tyuluba and would have had a natural interest in the success of his business ventures, if they were genuine.
- [76] The appellant testified that while she was at work on the Monday morning she began to think about Tyuluba's strange request to her to pretend to be Cindy. On her version, this was the matter she initially wanted to discuss face-to-face with Mntushe. It is most unlikely, however, that the strangeness of the request would only have begun to play on the appellant's mind on the Monday; it would already have been obvious on the Saturday. And if this was the matter she initially wanted to discuss with Mntushe, it does not strike one as something which was so confidential that it could not be discussed over the phone. It is far more likely that the appellant knew of the kidnapping and was starting to panic.
- [77] The appellant testified that she only learnt that the complainant was being held in her flat when she got home from work on the Monday afternoon. On her own version, she did not, over the next two days, take the opportunities which undoubtedly were available to her to report the matter to the police, whether personally or anonymously. I also find it difficult to believe that she could not have found the chance at least to confide in Mntushe on the Monday evening. Mntushe had come to fetch her in her car. She could have told her close friend as soon as they were together in the car. It is far-fetched to suppose that there was no opportunity for confiding prior to the arrival of Mntushe's friend at the house.
- [78] Furthermore, the appellant's conduct on the Tuesday did not, even on her own version, exhibit the slightest concern for the complainant's plight. The appellant claims that Tyuluba told her that the kidnappers wanted to give the appearance that the kidnapping had shifted to another province. To this end, the appellant assisted Tyuluba by ascertaining the next available flight to Johannesburg.
- [79] Having assisted Tyuluba in this way, the appellant went about her ordinary working day and attended a function late into the night. She alleged that she did not sleep at her flat that evening because she could not contact Tyuluba to find out whether the complainant had been moved. That may be true and she may indeed not have wanted to spend time at the flat alone while the complainant was still being held there but that is far from showing that she was not complicit in the kidnapping.
- [80] It was only around lunch time on the Wednesday that the appellant told Mntushe what she had supposedly been wanting to confide in her since Monday or Tuesday morning. Once again, the fact that she did so does not point to her innocence. Her own belief, in retrospect, was that Tyuluba himself had begun to panic because of the media coverage. It is entirely plausible that the appellant was becoming extremely worried. She may not even have been aware, when the complainant was initially kidnapped, that the complainant was the

daughter of a prominent businessman and that the kidnapping would receive wide publicity.

- [81] Even at this late stage the appellant did not go to the police. She attended a business meeting and then on her version went back to the flat. Her conduct on this occasion, for a supposedly innocent person, was extraordinary. After feeding the complainant some fluids, she put duct tape over her mouth and secured her blindfold. On the complainant's evidence, which the magistrate accepted, the appellant also tightened the ropes by which the complainant was bound to the chair and the cupboard bar. The explanation which the appellant gave for this conduct is utterly implausible. On her version, she had had more than a day to contemplate her dilemma. If she was innocent, the obvious course would have been to explain the whole matter to the complainant and to let her go.
- [82] On the complainant's evidence, the appellant on this occasion also warned her (to procure her submission), saying that she must not cause any trouble because she knows what 'this man' (Tyuluba) will do. The appellant knew, however, that Tyuluba was in Johannesburg. Furthermore, Tyuluba had not, even on the appellant's version, told her that he intended physically to harm the complainant.
- [83] We also know that, having again restrained, gagged and blindfolded the complainant, the appellant in the evening accompanied Mntushe to Gugulethu, only returning to Mntushe's house quite late that night – all the while knowing that the complainant was tied up, gagged and blindfolded in her flat. She did not testify that, even then, she had a firm plan to go to the police. She evidently had not asked Mntushe to go with her to her apartment to see how the complainant was doing and to release her. Instead they drove to Mntushe's house.
- [84] On being confronted by the police, the appellant even on her own version did not volunteer that the complainant was at her flat, saying only that when she had last seen the complainant she was alive. On the evidence of two policemen, Engelbrecht and Jonker, she positively denied that the complainant was at her flat. This is consistent with Viljoen's testimony who said that it was only when they arrived at the appellant's flat, and Engelbrecht and Jonker had gone to search the flat, that the appellant volunteered that the complainant was in her flat and had been alive when she last saw her. Viljoen's evidence read particularly well and he was a manifestly fair and honest witness.
- [85] The circumstances, in their totality, constituted a very powerful case against the appellant. In assessing credibility, the inherent probabilities are vitally important. The inherent probabilities were very strongly against the appellant. I find it difficult to imagine that any witness, however convincing, could have explained all these matters away. The transcript of her evidence certainly does not come across as particularly convincing. But importantly, the magistrate had the opportunity of seeing and hearing her, an opportunity which we have not enjoyed. The magistrate clearly did not believe the appellant and thought her version false beyond reasonable doubt. There were ample grounds for him to reach that conclusion. I certainly cannot say that it is obvious that the magistrate went wrong on the facts. This was a case where the magistrate was entitled to find not merely that the appellant's version was

improbable but that it was so improbable that it could not reasonably possibly be true (S v Shackwell 2001 (4) SA 1 (SCA) para 30).

- [86] The appellant's conduct in eventually confiding in Mntushe but claiming not to be involved is as consistent with her guilt as with her innocence and is thus not a point in her favour. When things went wrong in the kidnapping, it is entirely likely that the appellant would have tried to think up an exculpatory excuse. She was also placed in a predicament when Tyuluba went off to Johannesburg, leaving the complainant in her flat.
- [87] I am perfectly willing to accept that Tyuluba, as the mastermind, told her that he would arrange for the complainant to be removed from the flat (though the appellant did not explain when or how the persons who were to remove the complainant would get access to her flat, given that Tyuluba himself was going to Johannesburg). This does not mean that the appellant was not complicit in the kidnapping, only that she did not want to be stuck with the complainant when Tyuluba went off to Johannesburg.
- [88] If by Wednesday the appellant was fearful or panicky (as I think likely), that was because the kidnapping plan was unravelling and she would potentially be left in the firing line. The fact that the appellant came across to Mntushe as fearful and uncertain is thus entirely plausible. Mntushe, who it must be remembered was at the time a very close friend of the appellant despite the fact that she subsequently testified for the State, would not have known the true reason for the appellant's condition.
- [89] I must say that, even on the appellant's version, I think she was guilty of kidnapping at least from the time she visited the complainant on the Wednesday afternoon and re-secured the restraints and tightened the blindfold. However, if that were the limited extent of her involvement in the kidnapping, it would have materially influenced the sentence imposed. And of course, a conviction for kidnapping on that limited basis would not have justified the inference that the appellant also participated in the extortion. But I think the magistrate was right to reject the appellant's version as false beyond reasonable doubt.
- [90] Once the magistrate found, as he was entitled to do, that the appellant was complicit in the kidnapping and that her exculpatory version was false beyond reasonable doubt, the further finding that she participated in the kidnapping with a view to extortion was also justified. She offered no other explanation for the kidnapping, and we know as a fact that an attempt to extort money from the complainant's father was made.

Sentence

- [91] There is nothing in the appeal against sentence. The crimes were serious and the appellant's participation therein material. The appropriate sentence was in the discretion of the magistrate. It has not been shown that he misdirected himself and the sentence does not induce a sense of shock.

Conclusion

[92] It follows that the appeal must be dismissed.

Van Staden AJ:

[93] I concur.

ROGERS J

VAN STADEN AJ

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