

SOUTH AFRICA / JUDGMENT

Qurashi and Others v The State (1166/2018) [2022] ZASCA 118; [2022] 4 All SA 295 (SCA); 2022 (2) SACR 459 (SCA) (22 August 2022) [2022] ZASCA 118

COURT

Supreme Court of Appeal

BEFORE

Ponnan, Van der Merwe, Carelse, Makaula,
Phatshoane

CASE / FILE NUMBER

1166/2018

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1166/2018

In the matter between:

SALEEM QURASHI

FIRST APPELLANT

FARHAN ULLAH

SECOND APPELLANT

SHABBIR GULLAM

THIRD APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: Qurashi and Others v The State (Case no 1166/2018) [2022] ZASCA 118 (22 August 2022)

Coram:

PONNAN, VAN DER MERWE, and CARELSE JJA and MAKAULA and PHATSHOANE AJJA

Heard:

10 May 2022

Delivered: 22 August 2022

Summary: Criminal law and procedure – admission of evidence pursuant to search and seizure allegedly in violation of constitutional right to privacy and fair trial – distinction between real and self-incriminatory or conscriptive testimonial evidence – hearsay evidence – admissibility of extra-curial statements by a non-testifying witness.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Rampai J, sitting as court of first instance):

The appeal is dismissed.

Ponnan JA and Phatshoane AJA (Van der Merwe and Carelse JJA, and Makaula AJA concurring):

[1] The first, second and third appellants, Saleem Qurashi, Farhan Ullah and Shabber Ghulam, stood trial as accused 2, 5 and 6 respectively, together with four others, all Pakistani nationals,[1] before the Free State Division of the High Court, Bloemfontein. Eighteen charges were levelled against the first two and 17 against

the third. Counts 2, 3 and 7 were withdrawn at the commencement of the trial, and at the close of the State case, the prosecutor

intimated that counts 5, 6, 7 and 8 were not being persisted in. Eleven counts thus remained, namely: the contravention of s 9(1)(a) of the Prevention of Organised Crime Act 121 of 1998 (POCA) (count 1); two counts of robbery with aggravating circumstances (counts 9 and 16); five counts of murder (counts 10, 11, 12, 13 and 17); kidnapping (count 14); attempted extortion (count 15); and, a

contravention of s 18(2)(a) of the Riotous Assemblies Act 17 of 1956, being a conspiracy to commit kidnapping (count 18) – a charge that was not preferred

against the third appellant. In what follows, it may be convenient to refer to the appellants by their appellation before the trial court, namely accused 2, 5 and 6.

[2] Count 1 relates to the alleged participation of the accused in organised criminal gang activity in contravention of s 9 of POCA. And, that as part of a pattern of such activity, the accused either individually or collectively committed the various offences set out in the indictment.

The prosecution alleged that in November 2007, the four deceased in counts 10 to 13, Malik Yasser Awan, Amanullah Nusrullam, Shabodien Hussein and Majid Saleem, who were also Pakistani nationals, were lured to Clocolan in the Free State, where they were robbed of a BMW sedan motor vehicle, four Nokia cellphones and two firearms (count 9). They were then murdered and buried in a shallow grave (counts 10, 11, 12 and 13).

- [3] On 4 March 2008, the accused allegedly kidnapped Zia Khan and deprived him of his liberty at 6 Van der Spuy Avenue, in Bloemfontein (count 14). They then threatened to kill Zia Khan unless his relative, Rashid Anwari Khan, paid them R2 million (count 15). Zia Khan was also robbed of his Opel Corsa bakkie and a cellphone (count 16). Following the killing of Zia Khan (count 17), he was buried in a shallow grave at 6 Van der Spuy Avenue. The State further alleged that accused 1, 2 and 5 conspired with Ifthkar Ahmed to kidnap Rashid Khan (count 18).
- [4] Save for count 17, on which the appellants were convicted of culpable homicide instead of murder, the appellants were convicted as charged and each sentenced to imprisonment for life. The present appeal, with the leave of the trial court, is directed solely against conviction.

- [5] In *S v Hadebe and Others*, Marais JA had occasion to repeat what had previously been said by him in *Moshephi and Others v R* 1980-1984 LAC 57 at 59F- H, namely that:

‘The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees.’[2]

- [6] The approach which commended itself in *Moshephi* seems appropriate in the particular circumstances of this matter. This, all the more so, because the manner in which the evidence was presented was oftentimes haphazard and lacking in any logical coherence, resulting in a rather protracted trial that generated a record in excess of 2500 pages. Thus, to focus too intently upon each individual part on which the prosecution case rested, is likely to result in a judgment that would be indigestible. The mosaic as a whole lends inescapably to the factual foundation upon which the logical deduction must rest that each of the appellants are indeed guilty of the offences with which they have been charged. When viewed against the tapestry of all of the evidence, the claim by them that they were wrongly convicted by the trial court and that the appeal must consequently succeed cannot be sustained.

[7] It is not necessary to analyse the evidence adduced on behalf of the prosecution in granular detail, rather it would suffice to paint the evidence in broad strokes with a view to demonstrating that the broad hypothesis sought to be advanced by the prosecution finds compelling support in the evidence.

[8] The prosecution case rested, in the main, on:

- (a) the viva voce testimony of inter alia Ms Zainub Saleem, Ms Nazira Awan, Mr Rashid Khan, Mr Steven Musetsi Latela, Mr Ifthkar Ahmed, Mr Leon van Wyk Rossouw, Warrant Officer Eben van Zyl and Warrant Officer Linda Steyn;
- (b) the exhibits seized and the discovery of the body of the deceased in count 17, pursuant to a search at 6 Van der Spuy Avenue,

Bloemfontein;

- (c) the exhibits seized following upon the arrest of the various accused in Kestell and Pietermaritzburg; and
 - (d) the evidence of Ms Johanna Heyneke, the forensic liaison manager of Vodacom, relating to various cellphone numbers, pursuant to a subpoena issued in terms of s 205 of the Criminal Procedure Act 51 of 1977 (the Criminal Procedure Act); and
 - (e) several statements, as well as a pointing out by Mr Rehman Khan made to Captain Francois James Lux, which led to the discovery of the bodies of the four deceased in counts 10 to 13.
- [9] The evidence of each of Ms Zainub Saleem, Ms Nazira Awan and Mr Rashid Khan, in that order, may be a useful starting point. Ms Zainub Saleem (the wife of Saleem Majid, the deceased in count 13) testified that her husband had travelled from Cape Town, where they resided, to Johannesburg on 7 November 2007. She had daily telephonic contact with him over the following days, until Saturday 10 November 2007, when unable to reach him because his phone was apparently switched

off, she made contact with Amanullah Nusrullam (the deceased in count 11). Mr Nusrullam told her that he, her husband, Shabodien Hussein (the deceased in count 12) and Malik Yasser (the deceased in count

- 11) had travelled from Johannesburg to Clocolan (a place that she had not previously heard of) with a person named Qurashi. He informed her that her husband was in a meeting with Farhan and Shahid and that he will get him to return her call. The next day she spoke to her husband, who confirmed that he had travelled from Johannesburg to Clocolan with Saleem Qurashi; and, that he had concluded his business and would be returning to Cape Town either that evening or the day thereafter. That was the last time that she spoke to him.

[10] When, by 15 November 2007, Ms Saleem was still unable to get hold of her husband she travelled to Johannesburg. A case docket in respect of a missing person was opened at the Booysens' police station, whereafter she went to Clocolan. The Clocolan police took her to

what was described in the evidence as the A-frame house, ostensibly because Pakistani nationals lived there. At the A-frame house she encountered accused 4 (Ali Mamo Mazhir) and another person. Despite confronting him with the fact that she had knowledge that her blue BMW vehicle, in which her husband had travelled from Johannesburg to Clocolan, had been seen at the house, accused 4 was not forthcoming with any information.

- [11] The police then took her to another house in Andries Pretorius Street, in Clocolan, which appeared to be unoccupied and was locked. As they walked around the yard, they came upon a little shed behind the house, in which she recognised two CD covers, which according to her had been in the door of her BMW. She went back to Johannesburg that afternoon and returned the next day to Clocolan together with Nazira Awan, the wife of Malik Awan Yasser (the deceased in count 10). Accompanied by the police, they called on the house in Andries Pretorius Street. On this occasion they were able to gain access to the house with a key supplied by Mr Latela. Amongst the documents found inside the house, were an asylum seeker permit for accused 2 (Ejaz Ahmed) and Pakistani passports issued in the names of Afzal Hussein and accused 2. Some thirteen months later on 5 December 2008, she received news that four bodies – one of which she subsequently identified as being that of her husband – had been found. She later also had occasion to identify the blue BMW after it had been recovered.
- [12] Ms Awan testified that she had last seen her husband alive on Friday 9 November 2007, when he dropped her off that morning at the taxi rank so that she could make her way to work. She spent that night after work at her sister's home. The next day, when she phoned her husband to ask him to pick her up from her sister's place, he replied that he could not because he was on his way to Clocolan to visit Shahid. He informed her that he was with Majid, Amanullah, Shahab (an apparent reference to the deceased in counts 11, 12 and
- 13) and Saleem Qurashi. At around midnight she spoke to him again, when he intimated that he would see her the next day. The next morning he told her that he was going 'somewhere very far' and that she must 'look after herself'. Thereafter, she was unable to contact him telephonically because his phone appeared to have been switched off. She then reported to the police that he was missing. Having managed by means of a sim-swap, and with the assistance of Vodacom, to ascertain the last five numbers dialled from his cellphone, she called each of those numbers. The second number called was answered by someone who identified himself as Farhan. Subsequent attempts to contact that number, however, went unanswered. She testified that she had previously seen the deceased in count 11, Amanullah Nusrullam, who had come to her house with Saleem Majid (the deceased in count 13). Saleem Qurashi and Shahid (who she identified respectively as accused 2 and 1 before the trial

court) had also visited her home. For the rest, she confirmed the account of Ms Zainub Saleem.

[13] Mr Rashid Khan and the deceased in count 17, Zia Khan, were business partners in a supermarket in Lesotho, where they shared a house in Maputsoe. Accused 1 (Shahid Saeed), who was a friend of Zia Khan, together with accused 2 (Saleem Qurashi) and 6 (Shabber Ghulam) spent approximately one month at their house about three months before the disappearance of Zia. In that time, accused 4 and 5 (Farhan Ullah) also visited. On 3 March 2008, Zia Khan travelled to Maseru for business purposes. When he returned that afternoon, he was accompanied by accused 1, 2 and 6. After dinner that evening accused 1 left and 2 and 6 slept over. The next morning Zia Khan left home together with accused 2 and 6 in his black Corsa bakkie. He took R35 000 with him to meet a tax obligation with the revenue authorities in Maseru. He was accompanied by accused 2 and 6. Later that day, Rashid tried unsuccessfully to contact Zia telephonically. He then phoned accused 6 at about 3 pm that afternoon, who told him that Zia had returned to Maputsoe. Rashid was then unable to contact either Zia or accused 6 later that day. Zia's disappearance was

reported thereafter to the Maseru police.

[14] Eight days later, Rashid received a telephone call; he was told: 'Do you want your brother alive. You have to arrange R2 million'. He recognised the caller as accused 1. When he was contacted thereafter, he asked to speak to Zia. He was not put through to Zia, but heard a recorded message in Zia's voice saying 'Rashid, Rashid, Rashid'. Rashid managed to raise the R2 million and was contacted at regular intervals thereafter, but refused to undertake

delivery until he had spoken to Zia. A friend suggested that Rashid contact Mr Leon van Wyk Rossouw, a private investigator. They met in Ficksburg on 16 March 2008. Rossouw took possession of his cellphone and downloaded and analysed its call history. On the next day, Colonel Topkin called on, and interviewed, Rashid in Ficksburg. On 18 March, he was told by Rossouw that a body had been found, which he was asked to identify. He subsequently identified the body as that of Zia Khan. He was not contacted again about payment of the ransom. Rashid thereafter returned home to Pakistan. Whilst in Pakistan, he received three threatening calls. He recognised the caller, who was speaking Urdu, as accused 1. Rashid saved the three numbers on his phone.

[15] According to Rossouw, he was provided with the cellphone number [...] by Rashid Khan, as the number that had been used by one of the alleged kidnappers to contact him. Although he did not have access to the data systems of any of the cellphone providers at that stage, he did have a program to process and analyse cellphone data. Rashid had also furnished him with the names of the three persons, namely accused 1, 2 and 6, who he allegedly suspected of being involved in Zia's kidnapping and their contact numbers. Rossouw had first approached W/O Van Zyl, who was at that stage part of a task team investigating vehicle theft, with regard to Zia's Corsa bakkie. He had also approached Captain Niemand of Crime Intelligence and Colonel Kruger. Captain Niemand informed him that he (Niemand) had established that the cellphone number [...] was active in the Olive

Hill area of Bloemfontein. Rossouw then called on estate agents in that area, which led him to 6 Van der Spuy Avenue, a property

situated in Olive Hill, Bloemfontein.

[16] Rossouw was evidently dissatisfied with the lack of progress on the part of the police in the investigation of Zia Khan's disappearance. At that stage, 6 Van der Spuy Avenue had only been observed for approximately two hours by the police, who reported that the place was unoccupied. Rossouw then contacted Warrant Officers Van Zyl and Steyn of organised crime, who were known to him. By the time he first approached them for assistance, he had already established that a person named Ejaz Ahmed, who had furnished one of his contact numbers as [...], had signed a lease agreement in respect of 6 Van der Spuy Avenue. He sought and obtained permission from Captain Niemand to secure a key from the letting agent for the premises.

Having received the key, he together with Warrant Officers Van Zyl and Steyn entered the premises. The evidence found at 6 Van der Spuy Avenue included: the body of Mr Zia Khan, which was buried in a shallow grave; Vodacom starter packs for Sim numbers [...] and [...] as well as an instruction manual for an Opel Astra vehicle. Rossouw recognised the latter number as the number that was used to contact Rashid Khan by one of Zia Khan's alleged kidnappers and was also reflected on the lease agreement for 6 Van Der Spuy Avenue as one of the contact numbers for the lessee, Ejaz Ahmed.

[17] The search at 6 Van der Spuy Avenue on 18 March 2008 was described by counsel for the appellants as a 'seminal moment in the investigation of the case'. Prior thereto, there was no information with regard to the whereabouts of Zia Khan and limited information as to the possible suspects. On 10 April 2008, and after having obtained information from Vodacom pursuant to a subpoena issued in terms of s 205 of the Criminal Procedure Act relating to the various cellphone numbers that the police then had to hand, Rossouw and Van Zyl set out to Howick (or more accurately the GPS co-ordinates obtained from Vodacom for the cellphones in question that pointed them in that direction). On their way, they received information which led them to Kestell, where they arrested accused 1, 2 and 5 as well as Tammy MacDonald and Iftkhar Ahmed, all of whom were seated in an Opel Astra.

[18] The evidence found at Kestell included: the passports of accused 1, 2 and 5 and a Vodaphone 125 cellphone bearing the sim number [...] in the possession of accused 5. The contact list on that Vodaphone 125 included the following: Shabber [...], Shahid2 [...] and Shahid4 [...] (as already pointed out this number had been used to contact Rashid Khan by one of Zia Khan's alleged kidnappers and appeared on the lease agreement for 6 Van Der Spuy Avenue). Also seized was a book containing contact names and numbers, which included the following: Farhan [...] (which Rossouw recognised as a number on one of the starter packs found at 6 Van Der Spuy); Ali [...]; Ejaz [...]; Rashid [...] (which Rossouw recognised as Rashid Khan's number); Zia [...] (this number was known to Rossouw as Zia Khan's number as furnished to him by Rashid Khan); and Iftkhar [...]. There was yet a further number

alongside the name Farhan on another page of the book, namely [...] (this was one of the numbers given to Rossouw at the commencement of his investigation into Zia Khan's kidnapping; as belonging to one of the persons last seen with Zia Khan). So too, was the number [...], which was listed alongside the name Shaber. Rossouw also recognised the number [...], which was listed alongside the name Mazhar, as one that was reflected on the lease agreement for 6 Van Der Spuy Avenue, as an alternative contact number for the lessee, Ejaz Ahmed.

- [19] Having received information from accused 5, Rossouw and Van Zyl made their way with him to Howick. Accused 5 was detained at the Howick Police cells and Rossouw and Van Zyl spent the night at the Howick Falls Hotel. The next morning, namely 11 April, and whilst at the hotel, Van Zyl interviewed Ms Alma Dixon, an employee of the hotel, who later testified that accused 1 arrived in a Black Corsa bakkie and spent the night of the 29 March 2008 at the hotel. He reflected his address as Maseru, Lesotho and telephone number as [...] in the guest registrar.
- [20] That afternoon, and again on the strength of information furnished to them by accused 5 the previous day, Van Zyl and Rossouw made their way to Pietermaritzburg; first to Bayat Street and then to Harvard Street. Accused 3, 4 and 6 were arrested at Bayat Street. The evidence found at Bayat Street included: the passport of accused 4; a Nokia 3410 (bearing an MTN Sim card with number [...]) and a copy of accused 3's passport. The evidence found at Harvard Street included: a box for the Vodaphone 125 cellphone found in the possession of accused 5 in Kestell; an invoice from B4U in the name of S Khan for that cellphone; an envelope addressed to Farhan with cellphone number [...] (one of the numbers which by this stage had come to feature quite prominently in the investigation); the passport of one Muhammed Ali and another envelope sent by Muhammed Ali addressed to Farhan Ullah. On his return to Bloemfontein from Pietermaritzburg, Rossouw was able to analyse the cellphones found on each of accused 3 and 5 and two sim cards allegedly belonging to accused 1 that was found in a black packet in the Opel Astra at the time of their arrest.
- [21] According to Steyn, after the discovery of the body of Zia Khan they received information that the persons involved in his death were also linked to a Booysens' docket pertaining to the disappearance of four Pakistani men. After attending on 6 Van Der Spuy Avenue with Rossouw and Van Zyl, she opened a docket at the Clocolan police station. Inspector Mokgotu was initially the investigating officer, however, when he took ill during June-July, she was appointed by Colonel Topkin to take over the investigation. At that stage, accused 1 to 6 had already been arrested. In December 2008, accused 7 (Ali Tanveer) and one Rehman Khan (a cousin of accused 5 and 7) were arrested after their photographs had been published in a local newspaper. Pursuant to a pointing out made by Rehman Khan to Captain Francois Laux on 4 December 2008, the bodies of the four deceased in counts 10 to 13 were discovered in a shallow grave approximately one metre deep in front of a chicken run some 10 metres from the back door of the house at 42 Andries Pretorius Street. Rehman Khan, who was 19 years old and afraid, was then placed in witness protection at his request, until

he apparently fled about one week before the commencement of the trial. In the course of her investigation, Steyn obtained several statements from Rehman Khan.

[22] Mr Ifthkar Ahmed testified that he had initially met accused 1 and 2 through an acquaintance known as Shan. Thereafter he was contacted by Shan, who told him that accused 1 wanted to meet with him. He then received a phone call from the latter, who said that he required Ahmed's assistance to secure a property and proposed that they meet in Qwa Qwa. Ahmed suggested that they meet in Kestell instead. On Thursday 10 April 2008, Ahmed, who was accompanied by a friend, Tammy McDonald, drove to Kestell, where he met accused 1, 2 and 5 at the Excel garage. Whilst seated in a blue Opel Astra, which was being

driven by accused 2, Van Zyl and Rossouw arrived and they were arrested. At the Kestell police station, where he shared a cell with accused 1, the latter expressed the hope that the police would not find the BMW car or Opel Corsa Bakkie, which he stated were in Lesotho in the possession of a person by the name of Makara or the bodies of the 'four guys from Johannesburg'. The next day they were transported to the Bloemfontein police station, where he shared a cell with accused 2. Accused 2 told him that they had kidnapped four people from Johannesburg, 'with their own BMW, a blue car' and took them to Clocolan in the Free State. Accused 2 phoned Ejaz Zodah, who was then in Johannesburg and allegedly the gang leader, and told him 'minus 2'. Later, he phoned him again to tell him 'minus 4' – a reference, so it would seem, to the fact that initially two and thereafter all four had been killed. Ejaz Zodah sent accused 6 to confirm that the four individuals had indeed been killed. Accused 2 also said that all four, who had been shot, were buried in one grave.

[23] Accused 2 further told Ahmed that they had kidnapped Zia Khan and taken him to Bloemfontein, where a friend had organised a place for them. It was there that Zia Khan was killed. Although he was not present when Zia Khan was killed, when he arrived later that day he washed, dressed and then buried the body. As accused 2 described it, the killing of the four deceased, who were members of a rival gang, was because 'they want to put the gang down to come out on top', whilst the killing of Zia Khan was not gang-related, but 'for money'.

[24] It is against that broad factual backdrop that the appeal falls to be considered. The appeal rests upon four main foundations: first, the admission of evidence, which, so it is asserted, was obtained unconstitutionally and which infringed the appellants' right to privacy and to a fair trial; second, the admission of hearsay evidence and the prominent role that such evidence played in the conviction of the appellants; and, third, the credibility findings made by the trial court in favour of the prosecution witnesses and against the appellants.

As to the first:

[25] It is contended that the search of the premises and seizure of exhibits at 6 Van der Spuy Avenue in Bloemfontein violated the appellants' right to privacy. So too, the search of their persons, vehicles and houses upon their arrest. When Rossouw was testifying, counsel for the appellants raised the following objection:

'At this stage M'Lord, I would like to indicate my position that I have, I have a problem, I object against the admissibility of the evidence that the witness is going to tender in respect of exhibits which was found on this specific premises as well as his further evidence. M'Lord, the admissibility of that is attacked firstly on the basis that the evidence was obtained unlawfully by this specific witness that is currently testifying. His actions were not sanctioned by law and therefore I will propose to His Lordship that that evidence is inadmissible on that basis alone.

M'Lord, furthermore, secondly I would also propose to His Lordship that the evidence that was obtained was in breach of Section 14 of the Constitution which deals with the privacy rights of every citizen or every person. Now M'Lord, I am mindful of the fact that Section 35 of the Constitution, subsection 5 of that Section, provides that any evidence which was obtained unconstitutionally must be excluded unless it will not have the effect on the fairness of the trial of the accused or else if it would be in the interest of justice. So M'Lord, my submission would be that His Lordship does have discretion to allow evidence which was unconstitutionally obtained, if it does not affect the fairness of the trial or if it is in the interest of justice.

Now M'Lord, my submission in this effect is to determine that admissibility, M'Lord needs to have a trial within a trial. Now I am mindful of the fact that my learned friend will probably argue to His Lordship that the onus in respect of whether there is a constitutional infringement will obviously lie with the accused and if that is the argument I am in agreement with that, that is so, there is authority for that. However whether this information was obtained lawfully that is another question M'Lord and that I do not bear the onus, the State has the onus to show to His Lordship that that evidence was in fact obtained lawfully.

M'Lord, if I may assist my learned friend in that respect, I say it is unlawfully because as a private detective or a private person, the witness does not have the legal power to first of all enter a premises, to search a premises, to search a person found on a premises and to gather information at such a place, because of that M'Lord I submit that there is a need for a trial within a trial where that point is, admissibility must be determined first before His Lordship needs to hear the remainder of his evidence, as it pleases.'

[26] The prosecutor agreed with the contention that to determine whether or not the evidence in question (which was not identified by counsel for the accused) was admissible, a trial within a trial had to be held. And, the trial court was evidently persuaded to follow that course. In that, in my view, it was wrong. What is more, the trial court proceeded to do so without so much as even attempting to identify the evidence, the subject of the admissibility trial. Be that as it may, the starting point must be an appreciation that a notable feature of the Constitution's specific exclusionary provision (s 35(5)) is that it does not provide for the automatic exclusion of unconstitutionally obtained evidence. Evidence must be excluded

only if it (a) renders the trial unfair; or (b) is otherwise detrimental to the administration of justice. As no evidence was adduced on that score on behalf of the appellants, the trial court was simply unable to make that assessment. Moreover, in this regard it is perhaps important to recognise the distinction

between real and testimonial evidence, and that unfairness in the method of obtaining the evidence does not necessarily result in unfairness in the trial. Importantly, here we are not dealing with ‘self-incriminatory’ or ‘conscriptive’ evidence, where the so-called alleged constitutional infringement has resulted in the creation of evidence which would not otherwise exist. The appellants were not conscripted to create the evidence against themselves (such as for example a self-incriminating statement) upon which the prosecution now seeks to rely. Nor was the evidence found with the compelled assistance of any of the appellants.[3]

[27] Insofar as Rossouw’s role in the investigation is concerned, the evidence is clear that every stage of his involvement was at the behest of Van Zyl. All of the exhibits seized were handed to Van Zyl, who thereafter dealt with them in accordance with standard police procedure. There has been no challenge on behalf of the appellants either in this Court or the one below to the chain of custody of the various exhibits. The suggestion appears to be that Mr Rossouw’s

mere presence, without more, tainted the investigation in some or other undisclosed manner, thereby resulting in an unfair trial. That, merely has to be stated, to be rejected.

[28] It is so that 6 Van der Spuy Avenue was searched without a search warrant, but by that stage the property was to all intents and purposes abandoned. In any event, the search had been conducted with the permission of the letting agent, National Real Estate. The searches in Kestell and Pietermaritzburg followed upon the arrest of suspects and were conducted in terms of s 23 of the Criminal Procedure Act. In any event, none of the appellants testified during the course of the trial within a trial. The trial court was thus simply none the wiser as to whose privacy rights had been infringed, the extent and scope of such infringement and whether or not, as a consequence, it ought to exercise its discretion in favour of admitting such evidence.

[29] In *S v Magwaza* it was stated:

‘Although s 35(5) of the Constitution does not direct a court, as does s 24(2) of the [Canadian] Charter, to consider ‘all the circumstances’ in determining whether the admission of evidence will bring the administration of justice into disrepute, it appears to be logical that all relevant circumstances should be considered (Pillay at 433h). Collins lists a number of factors to be considered in the determination of whether the admission of evidence will bring the administration of justice into disrepute, such as, for example: the kind of evidence that was obtained; what constitutional right was infringed; was such infringement serious or merely of a technical nature and would the evidence have been obtained in any event. In Collins (at 282), Lamer J reasoned that the concept of disrepute necessarily involves some element of community views and ‘thus requires the Judge to refer to what he conceives to be the views of the community

at large'. Pillay (at 433d-e) accepted that whether the admission of evidence will bring the administration of justice into disrepute requires a value judgment, which inevitably involves considerations of the interests of the public.'[4]

So approached, no justification existed in this case for the exclusion of the evidence. The result is that at the conclusion of the trial within a trial, a sizeable body of exhibits came, quite correctly, to be admitted into evidence against the accused.

As to the second:

[30] During the course of the trial, some of the evidence relied upon by the prosecution was sought to be excluded by the defence on account of its hearsay nature, such as: (a) the evidence of Ms Saleem of her telephonic conversations with her husband and Amanullah Nusrullam;

(b) Ms Awan's evidence of her conversations with her husband;

(c) six sworn statements by Rehman Khan, made to three different police officers; and (d) the pointing out made by Rehman Khan to Captain Laux. The trial court ruled them admissible in terms of s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 (the Law of Evidence Act).

[31] Hearsay evidence has historically been recognised to tend to be unreliable. It has thus been said that a court should hesitate long in admitting or relying on hearsay evidence, which plays a decisive or even significant part in convicting an accused person, unless there are compelling justifications for doing so.[5] Hearsay is defined, in s 3(4) of the Law of Evidence Act, as statements either oral or written, whose probative value depends upon the credibility of another independent person not testifying before court. In *Seemela v S*, it was stated:

'For many years our law knew a rigid exclusionary rule which allowed specific exceptions but no relaxation. Now there is no exclusion as such. Hearsay evidence may now be accepted subject to the broad, almost limitless criteria set out in s 3(1). Of that section, Schutz JA (*s v Ramavhale* 1996 (1) SACR 639 (A) at 647d) had this to say:

"... it is necessary to emphasise ... that s 3(1) is an exclusionary subsection and that the touchstone of admissibility is the interest of justice, as is made clear by the words '... hearsay evidence shall not be admitted as evidence ... unless

- ... the court, having regard to (the considerations in ss (c)) is of the opinion that such evidence should be admitted in the interests of justice".'[6]

[32] The matters listed in s 3(1)(c) are: (i) the nature of the proceedings; (ii) the nature of the evidence; (iii) the purpose for which the evidence is tendered; (iv) the probative value of the evidence; (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends; (vi) any prejudice to a party which the admission of such evidence might entail; and (vii) any other factor which should in the opinion of the court be taken into account. Insofar as the evidence of Ms Saleem and Ms

Awan are concerned, counsel accepted that their 'evidence falls squarely within the ambit of s 3(1)(c)' and that the 'trial court gave a lengthy judgment and considered each factor mentioned in section 3(1)(c) (i - vii)'.

- [33] I may add that there is much in the other evidence that lends material support to the evidence of the two of them. First, independently of the other, the evidence of each establishes that: the four deceased were in the company of each other; their whereabouts and the other persons in whose presence they found themselves. Second, their evidence establishes that each of the deceased had cellphones with the following numbers: Saleem Majid [...]; Amanullah Nusrullah [...]; Shabodien Hussein [...] and Malik Yasser [...], which Ms Heyneke of Vodacom testified was active in Clocolan at the relevant time. Third, Ms Saleem identified her CD covers in a little shed behind the house at 42 Andries Pretorius Street in Clocolan, the very property on which the bodies of the four deceased were ultimately discovered. Fifth, Frank Opperman, who lived, and worked as a service provider of computers and accessories in Clocolan, recognised accused 1 as the driver of a blue BMW, which he identified from photographs taken after the vehicle had been recovered, as the vehicle that Ms Saleem testified belonged to her, which had been driven by her husband from Johannesburg to Clocolan. Support for this is also to be found in the evidence of Steven Latela, who testified that one morning after 9 November 2007, accused 1 came to fetch him in a blue BMW. There is therefore sufficient by way of safeguards in the evidence, if viewed holistically, that ought to satisfy a trier of fact as to the reliability of the hearsay evidence tendered by each of these witnesses.
- [34] Turning to the evidence of Rehman Khan. I cannot agree with the trial court that his various statements ought to have been admitted into evidence against the accused. In this regard it is important to recognise why hearsay evidence is in general inadmissible. A witness who testifies in open court does so under oath or affirmation and so the potential liability for perjury operates as a natural deterrent against false testimony. Also, the presence in court of the person against whom the evidence is tendered encourages circumspection on the part of the witness. Because of the adversarial nature of court proceedings, a person has the right to confront his or her accuser and to test by cross-examination the veracity of the witness's assertions. It must be remembered that cross-examination is a potent tool in the truth-finding exercise and discerning who is telling the truth is essential to the fact-finding role of the court. The court's ability to observe the demeanour of the witness contributes to a more reliable assessment of credibility. When hearsay evidence is admitted these important safeguards are lost. And so, historically the exclusion of hearsay evidence has been considered necessary to guard against the danger that the trier of fact might place undue weight on such evidence despite its inherent weaknesses.
- [35] As Schutz JA observed in *S v Ramavhale* '[a]n accused person usually has enough to contend with without expecting him also to engage in mortal combat with the absent

witness’.[7] Hence, the intuitive reluctance on the part of our courts to permit untested evidence to be used against an accused in a criminal case.[8] In support of the admission of Rashid Khan’s statements, the prosecution argued that he had repeatedly asked for protection and that he was not in attendance because he and his family in Pakistan had been threatened by the accused or persons acting on their behalf. Accordingly, so the argument went, because of the intimidation by or at the hands of the accused, the witness had disappeared and was not present to testify. Simply put, there is no factual foundation for that speculative and conjectural hypothesis.

[36] That aside, in the trial court much store was placed on the judgment of this Court in *S v Ndhlovu*,^[9] which had come to represent a seismic shift in our law inasmuch as it jettisoned the common law rule that an extra-curial statement by an accused person is inadmissible against a co-accused. However, the correctness of *Ndhlovu* has since been reconsidered in *S v Litako*.^[10] The key findings in *Litako* were: the rule against the admission of hearsay evidence developed because of the inherent dangers of permitting the use of extra-curial

statements by one accused against another; such a statement has always been regarded as irrelevant insofar as a co-accused is concerned; the reliability of such evidence can never ever be properly tested, because an accused person cannot access the tools

traditionally employed for that very purpose; the rule appreciates that fair trial rights, including the right to fully challenge the prosecution case, may be hampered; and, consequently the right to challenge evidence enshrined in s 35(3)(i) of the Constitution may thereby be rendered nugatory.

[37] In *Mhlongo v S*; *Nkosi v S*,^[11] the Constitutional Court affirmed the correctness of *Litako*. Although *Litako*, like *Ndhlovu*, was concerned with extra-curial statements of co-accused persons and in particular the admissibility of an extra-curial statement by a non-testifying co-accused, the considerations that weighed in *Litako* must no doubt equally apply to a witness in the position of Rehman Khan.

[38] Unlike his extra-curial statements, however, the pointing out by Rehman Khan, stands on a different footing. The pointing out to Captain Laux on 4 December 2008 led to the discovery of the bodies of the four deceased in counts 10 to 13. In this regard, as earlier, the importance of the distinction between real and testimonial evidence looms large. Thus, whilst I have had no regard in my summation of the evidence to the content of each of Rehman Khan’s extra-curial statements, including his statements during the course of the pointing out, as recorded by Captain Laux, the fact of the discovery of the four bodies at 42 Andries Pretorius Street, cannot be left out of the reckoning.

As to the third:

[39] It is contended that the trial court erred in finding that Latela, Ahmed, Rossouw and Van Zyl were credible and reliable witnesses. It may be convenient to commence with the last two. As far as they are concerned, considerations of credibility and, even for that matter reliability, hardly arise. I have already alluded to the importance of the distinction between

real and testimonial evidence. As should be apparent from the evidence already summarised, the evidence of each related, in the main, to the former. Aside from the challenge to the admissibility of such evidence (which as I have shown is untenable), the fact of the existence or reliability of that evidence was not sought to be impugned in any way. It must thus follow that as

far as Van Zyl and Rossouw are concerned, credibility can therefore hardly feature in the equation and must recede into the background.

[40] Mr Steven Latela testified in relation to count 1, as well as 5, 6, 7 and 8; the last four of which were not persisted with by the prosecution. The relevance of Latela's evidence is thus restricted to count 1. I have not recounted his version, because having been warned in terms of s 204 of the Criminal Procedure Act, his evidence falls to be treated with caution and where it stands alone, I have chosen rather not to place any reliance upon it. He

stated, which was confirmed by accused 1, when the latter testified, that in 2006 he had been working part-time at a shop in Clocolan

belonging to a Mr Ghani, who had leased 42 Andries Pretorius Street to Mr Ejaz Basra (also known as Ejaz Zodah). When Basra left,

apparently because his wife was going to be having a baby, accused 1 remained at the house. Over time accused 1 came to be joined by the other accused.

[41] That accords with the version of accused 2. He stated that he used to go to 42 Andries Pretorius Street to visit his friend Basra in 2007. As he put it, he used to stay there 'sometimes two weeks, sometimes four weeks or sometimes three weeks'. After what appeared to have been a quarrel of some kind accused 4, 5 and 7 moved to the A-frame house. Later they were joined by Rehman Khan. Accused 2 and 6 remained at 42 Andries Pretorius Street, whilst accused 1 seemed to move between the two houses. Although accused 1 was of the view that some of the other accused were there to a far lesser extent

than testified to by Latela, it ultimately came to be undisputed that each of the accused had more than just a passing acquaintance with each other as well as 42 Andries Pretorius Street during 2006 and

2007. Latela, who was then still a scholar, was a daily visitor and had a fairly intimate knowledge of the goings on at both 42 Andries Pretorius Street and the A-frame house, so much so that he was entrusted with the key to the latter. That is how he was able to grant access to Ms Saleem, Ms Awan and the police, when they called on the second occasion.

[42] That leaves Mr Ifthkar Ahmed: his version finds material corroboration in the other evidence adduced by the prosecution. First, it is not in dispute that both accused 1 and 2 had contact with Ahmed. Both admitted to having spoken to him although each denied having shared any information about their involvement in the commission of any of the offences. Second, both the blue BMW and black Corsa bakkie were indeed recovered in Maseru,

Lesotho. They were then in the possession of a person named Lephoi Makara. Ms Saleem identified the BMW, once recovered, as hers. The Corsa Bakkie that was recovered from Makara was positively identified as Zia Khan's.

[43] Third, when asked in the course of his testimony if Malik Yasser was 'a popular guy and a gangster', accused 6 replied: 'the whole community knows that he was a gangster'. He added that the people were scared of Malik Yasser and Saleem Majid. He said: 'they used to bring guys from overseas, human trafficking'. His evidence then ran thus:

'If you say that he was involved in human trafficking, one of the ways of human trafficking is you get people illegally to a country and then you provide them with documentation, although they're not supposed to be here. That's one of the ways of human

trafficking? . . . Yes. I also came with the very same way.

. . .

And who arranged that for you? . . . Rajah Novazish

And Basra? . . . I met him after that.

But you do agree that's one way of human trafficking. Getting people here, get them false documentation? . . . Yes

And there's a lot of money involved in that. Isn't it? The people who want to be illegally in the country, they pay for the people in order to provide them with either a place to stay, protection not to be caught by immigration and to get the

documentation, illegal? . . . Yes. I agree on it.

And is it also so that there are quite a lot of groups who arrange this human trafficking in South Africa? . . . Yes, I know some of the people they are doing this business.'

[44] Accused 6 added:

'M'lord, when I came in 2003, I heard from the community that Majid Saleem, they kill one woman and a girl. That's why they in jail.'

This finds support in the evidence of Ms Saleem. She confirmed that her husband and Amanullah Nusrullam had been arrested by the police in 2003 in connection with the murder of a woman and her daughter, both of whom were Pakistani nationals. She testified that in the ensuing trial they were found not guilty. In evidence, she was asked by counsel for the accused whether she was aware of 'the principle of an eye for an eye'.

[45] The relevance of this last exchange is illustrated in the following from the record:

'Did Basra at any stage talk to you about these killings? . . . No. Basra never told me.

And did accused number 1, 2, 3, 4, 5 and 7 at any stage talk about these killings of Basra's friends? . . . No

So, as far as you are concerned, those two persons who were killed, that's got nothing to do with this case? . . . I have no knowledge about that.

Let me try to make it more easy for you. You didn't talk to your attorney, to Mr Potgieter your advocate about the fact that Basra's friends were killed? . . . I didn't speak anything to my lawyer. But I did explain [to] him that Majid and Yasser Awan was gangsters.

That's all what you said? . . . Yes.

And as far as you know, not one of your co-accused told Mr Potgieter about the fact that Basra's friends were killed allegedly by Malik Yasser and Majid Saleem? . . . I'm not sure about it.

Because if you didn't tell him anything and if the rest of the accused who testified also denied that, I'd just like to know if you can assist us . . . why did he put to Zainub Saleem, the wife of Majid that there is a religious principle of an eye for an eye? . . . M'lord, I can say only about myself. I'm not sure about the other people what they are saying. But I am sitting here. I said nothing about that'.

The quoted excerpts whilst accused 6 was being cross-examined lend weighty support to Ahmed's version that he was told by accused 2 that the killing of the four deceased was gang-related. What was put by counsel to Ms Saleem is also telling. It accords with the foundational hypothesis sought to be advanced by the prosecution.

[46] Fourth, the police did indeed find the bodies of the 'four guys from Johannesburg' (as they were described) in Clocolan in the Free State. On that score, the key post mortem findings of Dr Robert Book, a specialist forensic pathologist, who examined the four, was that: they had been bound; had tape wrapped around their mouths; each had been shot in the back of the head; and, their bodies had been buried and were in an advanced state of decomposition. The discovery of the various different passports and execution style killing of the four deceased lends credence to the assertion of involvement in human trafficking and gang-related activity.

[47] Fifth, Rashid Khan did testify that after Zia Khan had been kidnapped he was contacted with a ransom demand of R2 million. In that he supports Ahmed's version that he was told by accused 2 that the killing of Zia Khan was 'for money'. Finally, it must be asked, where else, if not from accused 1 and 2, would Ahmed have obtained such information, which is entirely consistent with all the other proved facts. He could hardly have conjured up that information and, what is more, it would take tremendous guile and ingenuity for him to have pieced together such a coherent account. But even, were

it to have been possible for him to have pieced his version together, where would he have derived the information from? In short, his version has a ring of truth to it. If he did derive his information from accused 1 and 2, as it seems that he must have, then the more important question becomes, how would accused 1 and 2 have been privy to such details, unless they were intimately involved in the events described?

[48] Thus aside from Rehman Khan's extra-curial statements and to a lesser extent Latela's testimony, where it stood alone, no warrant exists for the exclusion of any of the other evidence adduced by the prosecution. It bears noting, however, that the exclusion of such evidence does not materially detract from the cogency of the prosecution case. Nor, for that matter, does the evidence of the accused, to which I now turn.

[49] Importantly, it came to be formally admitted that: (i) cellphone number [...] was used by accused 5 from time to time and cellphone number [...] was also his number; (ii) cellphone numbers [...] and [...]3 were accused 1's numbers; and (iii) the correctness of the cellphone data was not in dispute. As shall be demonstrated, the effect of these formal admissions, particularly that relating to the cellphone data, cannot be overstated.

[50] Accused 1, 2, 3, 5 and 6 testified. The other two did not, nor did they call any evidence in their defence. Accused 1 testified that during August 2006 to July – August 2007 he often stayed at the house in Andries Pretorius Street in Clocolan and that after Basra left he paid the rent. In July or August 2007, he rented the A-frame house although accused 5 paid the rent for it. In this regard he was unable to explain why it was put to Latela that accused 5 in fact stayed in Mpumulanga, where he had a shop. Accused 1 stated that whilst he did fetch Latela in a blue BMW, it was not the same vehicle

as that identified by Ms Saleem. Although he had met her husband fleetingly only once in Johannesburg, he was unable to explain her evidence that her husband had used her cellphone to call a number on 5 November 2007, which came to be admitted as his number.

Importantly, her evidence in this regard was not disputed when she testified.

[51] It is not in dispute that accused 1 visited 6 Van Der Spuy Avenue on 4 March 2008. This according to him was the first time that he visited there, which co-incidentally was the very day that Zia Khan went missing. It was also the place where his body was eventually found. It will be recalled that the day before, namely 3 March 2008, accused 2 and 6 left Zia Khan's house, having spent the night there, together with him in his Corsa bakkie. According to the cellphone data evidence, from 20 March to 9 April 2008, accused 1 was using Zia Khan's handset, with number [...]. That was also the contact number reflected on the register for the Howick Falls Hotel, where Ms Alma Dixon saw accused 1 with the black Corsa bakkie. Inside the Corsa bakkie, when it was ultimately recovered from Makara in Lesotho, were the original passports of accused 6 and Rehman Khan.

Accused 1 admitted to having called Rashid Khan in Pakistan, however, it was not to threaten him, but as he put it '[b]ecause I want to know from him why I am in prison'. This despite the fact that he knew that Rashid was a prosecution witness, with whom he ought not to have had any contact. Accused 1 also admitted that he was the owner of the book seized from the Opel Astra in Kestell containing the names and numbers of his contacts. The entry 'Farhan [...]', so he stated, was a reference to accused 5. That, it bears repeating, was the number on one of the starter packs found by Rossouw at 6 Van Der Spuy.

[52] When accused 3 testified, he admitted that it was his name on the lease agreement and that he had in fact concluded the lease agreement in respect of 6 Van Der Spuy Avenue. He said that he was initially asked by one Rajah to lease a property for him in Bloemfontein, but refused. Thereafter he was asked by Basra, who is his first cousin, and he agreed. Although he signed the lease agreement, 'they took responsibility to do everything, the rest' including, so he states, the payment of the rent. Accused 5 testified that he came to 42 Andries Pretorius Street in Clocolan in about June 2007 to see his relative, accused 1. He lived there until 'about the end of July or first week of August and then we rent our own house'.

Accused 5 also admitted that the envelope found at Harvard Street in Pietermaritzburg was addressed to him and bore his cellphone number [...].

[53] Saleem Majid last spoke to his wife on 9 November 2007. Thereafter she was unable to contact him telephonically. The evidence pertaining to the cellphone data established that accused 1's SIM card with number [...] was used in Saleem Majid's handset with number [...] in the period 9 November to 11 November 2007. That handset was then not active until 30 December 2007, when from 12:07 on that day until 13:12 on 8 March 2008 it was used with accused 5's SIM card bearing number [...]. In that period a total of 270 calls were made, 263 of which were successful.

[54] Accused 5's other number, [...], came to be used in Saleem Majid's handset during the period 30 December 2007 to 9 January 2008; in which time 13 successful calls were made on that SIM card. Accused 5's number [...] was also used in the handset of the deceased, Shabodien Hussein, from 1 to 4 January 2008. In that period 111 successful calls were made. The number [...], which was reflected on the contact list of the Vodaphone 125 phone found on accused 5 at Kestell next to the name Shabber, was also used in Shabodien Hussein's handset in the period 30 December 2007 to 3 January 2008. Some 50 successful calls were made on that number using that handset in that period. That SIM card was also used in Saleem Majid's handset in the period 1 January to 4 March 2008.

[55] As should be apparent, I have restricted my analysis to the evidence that is, by and large, either common cause or undisputed. The overall picture that emerges when the different pieces are stitched together and the seemingly disparate threads tightened is pretty damning. To borrow from Davis AJA n R v De Villiers:

'As stated by Best, Evidence (5th ed. sec 298): -

“Not to speak of greater numbers; even two articles of circumstantial evidence – though each taken by itself weigh but as a feather – join them together, you will find them pressing on the delinquent with the weight of a milestone. It is of the utmost importance to bear in mind that, where a number of independent circumstances point to the same conclusion the

probability of the justness of that conclusion is not the sum of the simple probabilities of those circumstances, but is the compound

result of them.”[12]

Indeed, as stated in *S v Reddy*:

‘In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality.’[13]

[56] Accordingly, little value would be served in traversing the evidence of each of the accused in any greater detail. For the most part, the attempt to distance themselves from each other, 42 Andries Pretorius Street and 4 Van Der Spuy Avenue and the incriminating exhibits, bordered on the ridiculous. So too, the disavowal of what was put by counsel on their behalf to the different prosecution witnesses, as well as the feigned ignorance or contrived explanations for the various seized exhibits and the movement of their cellphone handsets and SIM cards as testified to by Ms Heyneke. As Nugent J pointed out

in *S v Van der Meyden*:

‘Evidence which incriminates the accused, and evidence which exculpates him, cannot both be true – there is not even a possibility that both might be true – the one is possibly true only if there is an equivalent possibility that the other is untrue. There will be cases where the State evidence is so convincing and conclusive as to exclude the reasonable possibility that the accused might be innocent, no matter that his evidence might suggest the contrary when viewed in isolation.’[14]

[57] Nor is it necessary for me to deal with the individual role played by each of the accused, because as Moseneke J observed in *S v Thebus* in summing up the requirements for common purpose liability: ‘[t]he liability arises from an active association and participation in a common criminal design with the requisite blameworthy state of mind’.[15] Here not only does the evidence show a clear association between the accused to each other, but also links each of them by means of several different pieces of evidence to all five deceased and the two properties where their bodies were buried.

[58] It follows that the points raised on appeal, when viewed either individually or collectively, can hardly tip the scales in favour of the accused, meaning that the appeal must fail.

[59] In the result, the appeal is dismissed.

VM PONNAN

JUDGE OF APPEAL

MV PHATSHOANE

ACTING JUDGE OF APPEAL

Appearances:

For appellants: J Nel SC with J Potgieter

Instructed by:

Jacobs Fourie Inc, Bloemfontein

For respondent: A Simpson

Instructed by:

Director of Public Prosecutions, Bloemfontein

[1] The fact that the accused and several of the witnesses were Pakistani nationals would appear to have resulted in names not always being consistently spelt. For example, whilst the name of appellant 3 is reflected in the indictment as Shabir Gullam, the evidence seems to suggest that he is known as Shabber Ghulam.

[2] S v Hadebe and Others 1998

(1) SACR 422 (SCA) at 426E-H.

[3] See generally Magwaza v S [2015] ZASCA 36; [2015] 2 All SA 280 (SCA); 2016 (1) SACR 53 (SCA) and the cases there cited.

[4] Magwaza fn 3 above para 15.

[5] Seemela v S [2015] ZASCA 41; 2016 (2) SACR 125 (SCA).

[6] Ibid para 12.

[7] S v Ramavhale 1996 (1) SACR 639 (A) at 648A.

[8] Metadad v National Employers' General Insurance Co Ltd 1992 (1) SA 494 (W).

[9] S v Ndhlovu and Others 2002

(2) SACR 325 (SCA).

[10] Litako & Others v S [2014] ZASCA 54; 2014 (2) SACR 431 (SCA); [2014] 3 All SA 138 (SCA); 2015 (3) SA 287 (SCA).

[11] Mhlongo v S; Nkosi v S

[2015] ZACC 19; 2015 (2) SACR 323 (CC); 2015 (8) BCLR 887 (CC).

[12] R v De Villiers 1944 AD 493 at 508.

[13] S v Reddy and Others 1996

(2) SACR 1 (A) at 8-9.

[14] S v Van der Meyden 1999 (2) SA 79 (W) at 81F–G.

[15] Thebus and Another v S [2003] ZACC 12; 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC) para 19.

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