

SOUTH AFRICA / JUDGMENT

S v Mtsholotsholo and Others (CC01/2018) [2023] ZAWCHC 340 (26 May 2023)

[2023] ZAWCHC 340**COURT**

Western Cape High Court, Cape Town

BEFORE

P A Myburgh

CASE / FILE NUMBER

CC01/2018

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

Case No: CC01/2018**In****the matter between:**

THE
STATE
and
THEMBELA
MTSHOLOTSHOLO
First
Accused
SIKHOKELE
SK MBANA
Second
Accused
SIHLE
CHINA MANANA
Third
Accused
ABONGILE
ROOI SHOBA
Fourth
Accused
NKOSIPHENDULE
PETROS MKUNYANYA
Fifth
Accused

SINOXOLO
WHITEY MBONISWA
Sixth
Accused

JUDGMENT

Heard: Various dates from 14 August 2019 to 29 March 2023

Delivered: 26 May 2023

A.

INTRODUCTION

1. Early in the morning, on 8 June 2017, Ms Akhona Williams (“Williams”), whilst waiting for a taxi in Nyanga, fell victim to a cell phone theft perpetrated by Nzukiso Pangwa (“Pangwa”). After a brief tussle with Williams, Pangwa ran into the Europe squatter camp with four men in pursuit who had responded to her cry for help. These four men were identified as Accused 2, 4, 5 and 6 (“Mbana”, “Shoba”, “Mkunyanya” and “Mboniswa”). They were not able to retrieve the cell phone as Luntu Mrwebi (“Mrwebi”) came to Pangwa’s aid and the two of them managed to escape with the cell phone.
2. This act of criminality set in motion a chain of events that culminated in violent acts of vigilantism. When there is inadequate policing, people, driven by desperation and frustration, and perhaps a measure of opportunism, resort to vigilantism. Mbatha AJ, in the minority judgment in *Makhi Kapa v The State*[1] commented that:
“Vigilantism is alarmingly common in South Africa due to, among others, inadequate policing in low-income communities. This lack of State support leads to self-help by residents. This Court has said ‘self-help ... is inimical to a society in which the rule of law prevails ... Respect for the rule of law is crucial for a defensible and sustainable democracy.’[2] Self-help cannot be condoned by our courts, but even in these circumstances, it remains important to ensure that fair trial rights are upheld.”
3. It is unfortunate that the events on the night were perpetrated in response to a crime by people who suffer from high levels of criminality and inadequate policing. However, as much as one has sympathy for those who find themselves in this situation, self-help cannot be condoned and does not inform the determination as to the guilt or otherwise of an Accused.
4. While the exact nature and sequence of events, and the identities of the people involved was contested, it was common cause that on the same evening of 8 May 2017 (“the night”), Thembela Mtsholotsholo (“Mtsholotsholo”), with a man identified as “Siphamandla”, forced Pangwa, Mrwebi and Anathi Swartbooi (“Swartbooi”) into a Toyota Quantum taxi (“the taxi”). The taxi belonged to Mtsholotsholo in the sense that it was the vehicle he used as a taxi driver. Pangwa’s body would be found a few days later in the bushes near Philippi. His hands

were bound, his throat slit, and he had been severely assaulted. Mrwebi, who had also been severely assaulted and left for dead in the same area, managed to escape with his life.

Mtsholotsholo and Siphamandla were not alone on the night. There were other men in the vicinity when the kidnappings, assaults and killing were perpetrated. Who they were, what they did and whether they are culpable are the questions before Court.

5. The six Accused were arrested, and each charged with three counts of kidnapping, one count of attempted murder and another count of murder. Count 1 was for the kidnapping of Swartbooi, Count 2 for the kidnapping of Mrwebi, Count 3 for the kidnapping of Pangwa, Count 4 for the attempted murder of Mrwebi, and Count 5 for the murder of Pangwa, read with section 51 of the Criminal Law Amendment Act, No. 105 of 1997 and section 276(1)(b) of the Criminal Procedure Act, No. 51 of 1977 (“the CPA”), and with the application of the common purpose doctrine.
6. There is no doubt that Mtsholotsholo, Williams’ boyfriend, was the chief protagonist on the night. He, it seems motivated by the desire to avenge the theft of his girlfriend’s cell phone, initiated the events, and took them to their conclusion. The taxi used throughout the night belonged to him and he was at the wheel. However, Mtsholotsholo and his associate Siphamandla did not get to face justice. They were killed prior to the commencement of the trial, leaving the Accused, who all admitted they were in the taxi on the night but clearly played secondary roles, to face the music. The Accused asserted that, while they were

in the taxi, they were there under duress at the hands of Mtsholotsholo, a man who also went by the nickname, “Terror”. They also disavowed participation in the crimes. The crimes, they said, were committed by Mtsholotsholo and Siphamandla.

7. The trial commenced on 14 August 2019 and was delayed on numerous occasions due to the Covid-19 pandemic, as well as other reasons such as the illness of legal representatives and the unavailability of witnesses. There was a trial within a trial regarding the admissibility of the warning statements of all but Mboniswa, who did not make a warning statement. I found that the prerequisites for admissibility had been met and that the warning statements could be disclosed. I indicated that the reasons for my decision would form part of this judgment. After the State closed its case, the five Accused applied for discharge in terms of section 174 of the CPA. After hearing argument, I granted Mbana discharge in respect of the attempted murder of Mrwebi and the murder of Pangwa but not in respect of the kidnapping of Swartbooi, Mrwebi and Pangwa. Manana was discharged on the kidnapping of Swartbooi and the murder of Pangwa but not the kidnapping of Mrwebi and Pangwa nor the attempted murder of Mrwebi. Mkunyanya was discharged on the kidnapping of Swartbooi and Pangwa but not of the kidnapping of Mrwebi and the murder of Pangwa. Mboniswa and Shoba were discharged on all counts. After the close of the State’s case, Manana and Mkunyanya testified along with the former’s girlfriend, Vuyokasi Mawanga (“Mawanga”). Mbana elected not to testify.

B. ADMISSIONS

8. The Accused handed up similar statements containing admissions in terms of section 220 of the CPA. The statements, which were read into the record, and confirmed by the Accused's legal representatives were:

"1. That the deceased was at all material times correctly identified as NZUKISO PANGWA and marked WC11/1579/17, being the person mentioned in the Indictment.

2. That the body of the deceased suffered no further injuries from the time of the alleged offence, removal from the scene up to the time of the post-mortem examination was conducted on the body of the deceased.
3. That DR MANDY DATE CHONG conducted a post-mortem examination on the body of the abovementioned deceased, marked WC11/1579/17 on 19 JUNE 2017.
4. That DR MANDY DATE CHONG correctly noted findings on the post-mortem report in accordance with the examination conducted on the body of NZUKISO PANGWA, WC11/1579/17.
5. That the cause of death of the deceased, NZUKISO PANGWA, is as indicated on the post-mortem report, to wit: MULTIPLE BLUNT AND SHARP FORCE INJURIES, UNNATURAL.
6. The photo album, photos 1 – 16 and with reference number LCRCPR1464/2017 by CONSTABLE AVONTUUR, correctly depicts the crime scene situated at THE BUSH IN VANGUARD DRIVE TOWARDS ROCKLANDS AND MITCHELLS PLAIN.
7. The photo album, photos and with reference number: LCRC, PR899/17 taken by W/O IH JONAS, correctly depicts the body of the deceased during the post-mortem examination by DR MANDY DATE CHONG.
8. That medical officer Dumo examined LUNTU MRWEBI at Mitchells Plain Hospital on 08 June 2017.
9. Medical officer Dumo correctly noted findings on the medical report thereof."
9. That admissions reduced the ambit of the trial and saved valuable time and resources.

C. THE EVIDENCE

10. I discuss the evidence, in the order of presentation, along with the issues that arose as it was presented.
- (i) The mothers of Pangwa, Mrwebi and Swartbooi
11. The first witness was Pangwa's mother ("Ms Pangwa"). She testified that four men came to her home and left with her son. She was not able to identify the men, nor could she say that he was taken against his will, although, given what happened later, it is unlikely that he went voluntarily.

12. The next witness was Mrwebi's mother ("Ms Mrwebi"). She testified that eight people came to her home at approximately 8pm, but she was not able to identify who they were. She explained that her son woke up, left the house and she closed the door. She was later told by others that he had been taken by a taxi.
13. Swartbooi's mother ("Ms Swartbooi") was also called. She testified that her son was taken by gunpoint from his "hokkie" behind her house in Phase One, Lusaka, by a group of men in a Quantum taxi. However, she could not identify any of the men who took her son. He returned between 9 and 10 pm the same evening.
14. The three mothers' testimony, while it dovetailed with the overall narrative and in that sense had value, as do pieces of a puzzle, did not address the critical question as to whether the Accused were involved in the kidnapping of their sons on the night.

(ii) Williams

15. Williams identified Mbana, Shoba, Mkunyanya and Mboniswa as the men who chased after Pangwa into the Europe squatter camp. These men were known to her as they were fellow employees. After the incident, she went to work where she called Mtsholotsholo, and told him of the theft. Later, after work, Mtsholotsholo and Manana, who was not part of the group who chased Pangwa, came to her at the home of her friend, Ntombi, who had cared for her child that day. After a short discussion the two men left in the taxi, returning approximately ten minutes later with Mbana, Mkunyanya, Shoba and Mboniswa. Williams then went with the men in the taxi to Swartbooi's mother's home, where Mtsholotsholo got out of the taxi and returned with Swartbooi.

Mtsholotsholo did not act alone, but Williams could not recall who assisted him in fetching Swartbooi and getting him into the taxi.

16. At this point Williams got out of the taxi and returned to Ntombi's home. Approximately ten minutes later Mtsholotsholo returned to Ntombi's home, with Mrwebi. Williams identified Mrwebi as someone "also present" when her cell phone was stolen. When the taxi left, Williams stayed behind and had no more contact with the group of men other than a telephone conversation with Mtsholotsholo whilst he was driving. Williams was uncomfortable with what was happening. She told Mtsholotsholo that "If they did not give you the phone, just leave them".
17. Williams' oral evidence, as was the case with the mothers, dovetailed with the overall narrative of what happened from the morning to the night. While she placed all the Accused in the taxi with Swartbooi, Mrwebi, Mtsholotsholo and Siphamandla, she did not implicate any of them in the kidnappings. She did not know who helped Mtsholotsholo when he fetched Swartbooi from his hokkie behind his mother's home and she was not present when Mrwebi and Pangwa were collected. It is, of course, very unlikely that Swartbooi, Mrwebi and Pangwa willingly got into the taxi with a group of men which included Mtsholotsholo who

was demonstrably intent on avenging the cell phone theft, but likeliness is not the benchmark in a criminal case.

18. Cross-examination of Williams was extensive and much of it centred around two statements she made subsequent to the events. She made the first statement on 12 June 2017, four days after the event, at the Nyanga police station (“the first Williams statement”). On 1 November 2017, almost five months later, she made another statement, also at the Nyanga police station (“the second Williams statement”).
19. Both statements are in the form of affidavits. They are prefaced with the words “Akhona Williams states under oath in English”, and end with sentences that one customarily finds at the foot of affidavits, these being “I know and understand the content of this statement. I have no objection to taking the prescribed oath. I consider the

prescribed oath to be binding on my conscience.” Beneath these sentences, under Williams’ signature, appear commissioner of oaths stamps, populated with information in manuscript, namely the place, date and time the statement was taken, the signature, Persal number, rank and name of the policeman who took down the statement, the address of the police station and, once more, the rank of the policeman. On the first Williams statement the policeman’s signature appears twice, while on the second statement, it appears once. On their face, the statements appear to be properly commissioned affidavits.

20. During the cross-examination of Williams, the use of English when writing down statements came to the fore and from that point on, the practice of doing so featured prominently in the proceedings.
21. Mbatha AJ, in the Makhi Kapa, when dealing with the admissibility of a statement of a witness who passed away before the trial, held as follows:

- [51] The applicant also raised an objection as to the admissibility of Ms Dasi’s statement on another ground – what I term ‘the language issue’. He argued that Ms Dasi’s statement did not comply with Regulation 2(1)(a) of the Regulations^[3] promulgated in terms of section 10 of the Justices of the Peace and Commissioners of Oaths Act.^[4] This Regulation states that a deponent must be able to confirm that she ‘knows and understands the content of the declaration’.

The contention here is that, because there was no qualified interpreter when the statement as taken, it is unclear that the English recordal is an accurate statement of what Ms Dasi said in isiXhosa or of what Sergeant Mtsholo translated back to her in isiXhosa.

- [53] ...for the purposes of assessing whether or not the statement should have been admitted, the language issue becomes relevant. It is unsettling that Ms Dasi’s statement was recorded in a language that she did not understand. Her signing of the statement was not, in the circumstances, a satisfactory guarantee of her adoption of the English version recorded by Sergeant Mtsholo.”

22. Williams was emphatic that what had been written down, did not accord with what she had told the policemen. She and the policemen did not speak English, they only spoke isiXhosa. [5] The policemen then, in real time, translated what she said into English and wrote down the statements in that language. The

statements were not read back to her in English or isiXhosa and neither were the statements given to her to read. Giving the statements to her to read would, in any event, have meant little, as she said of her proficiency in English that “according to me I am bad”. The recordal at the foot of her statements that she knew and understood their contents was thus incorrect. She did not know or understand what was contained in her statements as she was not sufficiently proficient in the language in which they were written.

23. During cross-examination of Williams, counsel for Mbana suggested that the two policemen who took her statements be called in terms of section 186 of the CPA, which provides that a court “may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the court shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such a witness appears to the court essential to the just decision of the case.” The suggestion, in my view had merit so I ruled that Williams’ testimony be interposed with that of the two policemen who took down her statements.
24. Detective Sergeant Thozamile Shaun Mjingana (“Mjingana”), a policeman with seventeen years’ experience, who took down the first Williams statement, agreed with Williams that their interaction had been in isiXhosa and that the preface to the statement was thus incorrect. As to her proficiency in English, when the question was posed by the Court whether he had been under the impression that she understood English, he answered that “I could not judge in that manner as to whether would she follow or not”. He said that he assumed that she could understand English because she was “working at that stage”. If a person was employed, proficiency in English was a given, he seemed to suggest. Mjingana was insistent that he did read the statement back to Williams, which was at odds with her evidence. As to why Mjingana wrote down the statement in English rather than isiXhosa, he said that this was his “everyday experience”. He also confirmed that in addition to taking down the statement, he performed the role of commissioner of oaths.
25. Sergeant Khayelethu Mlonyeni (“Mlonyeni”), a policeman with fifteen years’ experience and the investigating officer, took down the second Williams statement.

He confirmed that he and Williams spoke isiXhosa and that, as had Mjingana, he translated what she had said and wrote it down in

English. Thus, the preface that the statement that it was taken under oath in English was not correct. After insisting that “Akhona knows English”, he then conceded that this was a merely assumption on his part. He did not ask Williams whether she could understand English. Rather, he “...just asked her highest standard of education. She said she failed Matric so a person who did Matric who then knows English will know what is written here because even us, we are employed

by Matric. So she will understand what is written.” As to why he took down the statement in this manner, he answered “We do not have interpreters. We arrange them if we need them but in this case Akhona understood English and we were speaking Xhosa and then she understood English that was written here in this statement.” Mlonyeni had thus decided that an interpreter was “not needed in this case”. As with his colleague, Mjingana, Mlonyeni insisted that he had read the statement back to Williams and confirmed that he performed the role of a commissioner of oaths.

26. So what of the practice described by Njingana and Mlonyeni, both of whom are experienced and dedicated policemen who were simply doing things in the way they had been instructed? How does it impact on the rights of those making the statements and the others involved in this case? In my view, what Mbatha AJ in Makhi Kapa called “the language issue” is not an inconsequential matter, certainly not in the context of this case. Statements fulfil an important role. In the main they are taken shortly after the occurrence of events when things are fresh and recollections more accurate. They serve an important function in a trial where oral testimony can be tested for consistency against prior statements. To a significant degree, the prosecution founds its case on statements. But a statement that does not accurately record what the person such as Williams said at the time of its making and taking, is not reliable enough to serve any of these functions.

27. Language quite rightly features prominently in the Bill of Rights.[6] Section 6(1) designates the official languages, of which isiXhosa is one. Section 6(2) recognises the historically

diminished status and use of indigenous languages and enjoins the State to “take practical and positive measures to evaluate the status and advance the use of these languages”. Section 6(3) provides that “without detracting from the provisions of subsection (2), all official languages must enjoy parity of esteem and must be treated equitably”. Under the heading “Equality”, Section 9(3) provides that “The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including... language”. Section 9(5) provides that “Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.” Section 30, under the heading “Language and culture”, provides that: “Everyone has the right to use the language and to participate in the cultural life of their choice...” Finally, Section 31, under the heading, “Cultural, religious and linguistic communities” provides that: “(1) Persons belonging to a...linguistic community may not be denied the right, with other members of that community...to use their language”. It is not without significance that language rights are accorded constitutional status.

28. David Wright, in his article “Language puts ordinary people at a disadvantage in the criminal justice system”,^[7] which discusses implications of the use of legal language rather than plain language, posits that “Language is pervasive throughout the criminal justice system. A textual chain follows a person from the moment they are arrested until their day in court, and it is all underpinned by meticulously drafted legislation. At every step, there are challenges faced by laypeople who find themselves in the linguistic webs of the justice system.” He goes on to comment that “the issue of comprehensibility is compounded, of

course, when the detainee is not a native speaker of English”. Finally he writes that “language will forever remain integral to our criminal justice system, and it will continue to disadvantage many who find themselves in the process.” Wright makes the language issue real. It is not merely an academic debate. How language is handled has far-reaching ramifications for the people involved in the criminal justice process, including the accused, witnesses, victims, complainants, legal representatives and ultimately the presiding officer if the matter should come to court.

29. Speaking to the South African experience, Annelise de Vries, Russel H Kashula and Zakera Docrat, in their article “Why using just one language in South Africa’s courts is a problem”, [8] discuss the disadvantage experienced by people who are not able to communicate fluently in English in court and when dealing with legal representatives. As far as I could ascertain, the proceedings were expertly translated from English into isiXhosa and vice versa. In doing so the rights of those involved in this case, who are not proficient in English, were accorded recognition and respect whilst within the four walls of the courtroom. However, legal proceedings do not start in court. The steps that precede cases, such as the taking of statements, and reading of rights, are critical parts of the criminal justice process, with serious ramifications for the people who, in the words of Wright, “find themselves in the linguistic webs of the justice system”.
30. South Africa is a multilingual society, hence the recognition of eleven official languages. However, in the context of the case before me the principle of parity of languages is more notional than real. The practice described by Njingana and Mlonyeni, fosters a language elitism and perpetuates the marginalisation of people who are not sufficiently proficient. It would seem that the observation of Viera Pawlíková-Vilahnová, that “The colonial legacy has rendered African languages invalidated, though they are spoken by the majority of people” [9] has not lost its currency.
31. Returning to the two Williams statements. The isiXhosa language, an official and indigenous language, was not afforded parity, nor was it treated equitably vis à vis English. Would it not be a “practical and positive measure” for statements first to be taken down in the language of the person, and then translated at a later stage, if necessary. On a fundamental level, the practice of only recording statements in English discriminates unfairly against those, such as Williams who are a member of the isiXhosa linguistic community.
32. In my view, it cannot be said in a fundamental sense that the two statements belong to Williams. Yes, she did tell the two policemen her story, and did so voluntarily, and they say they wrote down what she said, but the nexus between the words she spoke in isiXhosa, and the words written down in English after their real-time translation is ruptured. If there were a record in isiXhosa (written or audio) of what Williams said, as is the case with her oral testimony in Court where there is an audio recording, it would be different as the accuracy (or otherwise) of the statements themselves could be established objectively. The reliability

of the statement, as an accurate contemporaneous written record of what was said at the time, cannot be restored by way of questioning of the person who made the statement and the policemen years after the fact. The evidence is then not the statement itself, but rather the often imperfect recollection of a witness as to what was said and written down.

33. Probative value, in terms of section 3 of the Law of Evidence Amendment Act 45 of 1988, means not only what the evidence “will prove, but that it will do so reliably”.^[10] Williams’ statements, whilst made voluntarily, are not themselves reliable proof of what she relayed to the policemen. We

are left with her recollection of what she said, and she was steadfast, emphatic and believable when she disavowed their contents.

I repeat that the unfortunate fate of the statements cannot be laid at the door of the two policemen, Njingana and Mlonyeni, who were diligently following the standard practice. They cannot be faulted for doing so.

34. The highwater mark of Williams oral evidence regarding the participation of the Accused in the events on the night was her placement of them in the taxi, something that was not contested. She did not implicate any of the Accused in any of the crimes.

(iii) Swartbooi’s testimony

35. Swartbooi, in chief, testified that while he was acquainted with Pangwa and Mrwebi, he had no involvement in the cell phone theft. On the night he was approached by Mtsholotsholo and Siphamandla who questioned him about the cell phone theft. After a brief discussion, Mtsholotsholo and Siphamandla left in the taxi, returning ten minutes later with Williams. Mtsholotsholo and Siphamandla then forced Swartbooi into the taxi by gunpoint as Williams had identified him as a friend of Mrwebi, who would know where he lived. Manana and Mkunyanya were by this time also in the taxi. After Williams had been dropped at Ntombi’s home, the taxi, with Mtsholotsholo at the wheel, proceeded to Mrwebi’s mother’s home. Mtsholotsholo and Manana got out and returned with Mrwebi. Mrwebi did not come willingly. He resisted, but the two forced him into the taxi and drove back to Ntombi’s house, where Williams identified him as one of those involved in the cell phone theft. The taxi then left without Williams. Whilst in the taxi, Mrwebi was hit on the head, his blood splattering onto Swartbooi. Swartbooi

could not identify who perpetrated this assault. By now Swartbooi and Mrwebi were desperately “begging Siphamandla and the others who were behind us, but Mtsholotsholo said he was going to show us”. That Mtsholotsholo, aided and abetted by Siphamandla, was the chief protagonist and leader, was a thread that ran through Swartbooi’s evidence.

36. Swartbooi said that shortly after he had seen a Muizenberg sign, the taxi stopped, and while his recollection of what happened was not precise, he did recall that Mtsholotsholo grabbed Mrwebi and pulled him out of the taxi, and with a bit less conviction suggested that Manana assisted Mtsholotsholo. They, in turn, were assisted by two others, who pushed Mrwebi from

inside the taxi, but Swartbooï could not identify them. Outside the taxi, Mrwebi was assaulted as he lay on the ground. In his words, “they were like barbarians”. Mrwebi was left lying in the bushes in Philippi when the taxi departed the scene. With Mrwebi dealt with, Mtsholotsholo turned his attention to Pangwa, who he referred to as “the dark boy”. The group drove to Crossroads, where Swartbooï pointed out Pangwa’s mother’s house. Mtsholotsholo, brandishing a pistol, accompanied by Manana, knocked on Ms Pangwa’s door. She called her son, who was loaded into the taxi by the two men. On the way towards Philippi, Swartbooï was dropped off with R6 and warned not to speak “otherwise they will come”. He used the R6 to take an “Ipela” taxi home. That was Swartbooï’s evidence in chief.

37. The cross-examination of Swartbooï was extensive. Counsel for Mbana emphasised that his client had not been placed in the taxi. For Manana, who featured prominently in Swartbooï’s evidence, it was put that he was not implicated in Swartbooï’s kidnapping whilst it was conceded that he was implicated in Mrwebi’s kidnapping. Mkunyanya, through his counsel, admitted being in the taxi but claimed to have been “an uninvolved, passive bystander / passenger”. Swartbooï did not place Shoba and Mboniswa in the taxi.
38. Swartbooï’s statement, made on 16 October 2017, for reasons that are in all material respects the same as those set out regarding Williams’ statements, has, in my view, no probative value.

(iv) Mrwebi’s testimony

39. Mrwebi, in chief, implicated Manana in his kidnapping and placed him in the taxi. While he testified to being assaulted in the taxi, he could not identify who had done so. While he recalled that Mtsholotsholo took him out of the taxi and others pushed him from behind, he was not able to identify the other people who assaulted and left him for dead, in the bushes near Philippi.
40. Mrwebi made a statement on 15 October 2017 in Lady Frere. However, as with the other statements already mentioned, he spoke only isiXhosa to Mlonyeni, who wrote out the statement in English. Mlonyeni did not read the statement back to him, in English or isiXhosa. The only reason why he signed it was that he was under the impression that Mlonyeni was writing down in English what he had told him in isiXhosa. In my view his statement also has no probative value.

D. THE WARNING STATEMENTS

41. When the State gave notice that it intended to lead evidence regarding the admissions of Mbana, Manana, Shoba and Mkunyanya made in warning statements, the defence objected, and hence a trial within a trial was held regarding their admissibility.

42. The admissibility of warning statements is governed, in the main, by section 219A of the CPA and section 35(3) and (5) of the Constitution. Section 219A of the CPA provides that: “The evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission

does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in evidence

against him at criminal proceedings relating to that offence.” The relevant part of section 35(3) of the Constitution reads that: “Every accused person has a right to a fair trial, which includes the right – (a) to remain silent; (b) to be informed of the charge with sufficient detail to answer it;... (h) to be presumed innocent, to remain silent, and not to testify during the proceedings;...(j) not to be compelled to give self-incriminating evidence;”. Section 35(5) of the Constitution provides that: “(5) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.”

43. While there is no prescribed form that a warning statement must take, the police use well designed pro forma documents when taking them down. It is not a prerequisite for admissibility that the standard form be used, although conformance

with such formalities does assist a court in determining the admissibility of the statement.[11] I appreciate that policemen in Nyanga, as testified, have an enormous caseload. It can also be accepted that they are, in relative terms, under-resourced and work in a very dangerous and stressful environment. But, does this mean that sloppiness in taking down warning statements, whilst it may be understandable, is excusable? I think not. I do not suggest that strict adherence to form overrides the test for admissibility, but it must be said that non-compliance or disregard of the carefully crafted questions and pointers in the standard warning statement form, does not serve the administration of justice. In this case, the taking down of the warning statements was unnecessarily sloppy in some respects. I mention two examples. There is a standard sentence which reads “I understand / do not understand the allegation against me.” The part of the sentence that does not apply must be deleted. This shows that the suspect has been asked and has answered the question. If the sentence is initialed by the suspect and policemen as well, as was done in the case of Mkunyanana’s warning statement (but not Mbana and Manana) it is compelling evidence that this requirement was met. The form is designed in order to facilitate compliance with the Section 219A of the CPA and the Constitution. In plain language, it makes things easier, and I struggle to think of reason why it should not be followed to the letter. The other example is the inaccurate recordal of the time when the warning statements were taken down. All of them, three of which were taken down by Nonjezi, were recorded as having been taken at 5 pm on 16 September 2017. It was of course not possible for Nonjezi to have taken the three statements at the same time. If he filled in this information after he had taken the statements, it begs the question what other information he filled in after the fact. There is a reason why the form requires this information be recorded. It introduces rigour and forms part of a matrix of evidence, such that contained in the occurrence book, the investigation diary and cell register,

which assist in determining whether the warning statements meet or don't meet the requirements for admissibility.

44. The State bears the onus of showing that the warning statements were made freely, voluntarily and without violation of the Accused's

constitutional rights. The measure of proof required is beyond reasonable doubt. Furthermore, where the Court is confronted with diametrically opposed versions, as it was here, the evidence must be evaluated by considering a conspectus of all the evidence presented so as "to consider the inherent probabilities". A court is enjoined to weigh "evidence that is reliable ... alongside such evidence as may be found to be false" and consider "independently verifiable evidence" in order to determine "if it supports any of the evidence tendered". In finding whether the warning statements are to be admitted it is necessary to "decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the Accused's version" and "an Accused's version cannot be rejected merely because it is improbable. It can only be rejected on the basis of the

inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true." [12]

45. Mbana testified that his constitutional rights were not explained to him, he was assaulted, his warning statement was not read back to him, and that he had no knowledge of the contents of the statement. Manana testified that he was assaulted by Nonjezi, he was threatened by Mlonyeni that if he did not sign the statement he would be beaten, that his constitutional rights were not explained to him, specifically his right to legal representation and to remain silent, and he also took issue with the language used in the statement as he was not proficient in English. Mkunyanya testified that Ngqele, who took his statement, threatened him that he would not be granted bail and he would be imprisoned for 22 years if he did not cooperate, that his handcuffs were too tight, that his constitutional rights were not explained to him, that he was simply told to sign the statement, that its contents were not read back or explained to him, and that certain paragraphs in his statement did not accord with what he told the policeman. For their respective reasons, it was argued, for Mbana, Manana and Mkunyanya that their warning statements were not admissible.
46. The State presented a good deal of real evidence. These were extracts of the investigation diary, photographs of the Accused on the day of their arrest, the blanked-out warning statements, photographs of the police cells at Nyanga, the SAP14A notices, copies of the cell register for 15 September 2017 to 17 September 2017, and extracts of the occurrence book for the same period. The occurrence book showed that the Accused were placed in the Nyanga police cells at approximately 05h33 on Friday,

15 September 2017, and that they were free of injury. The same exhibit showed that, from the Accused's arrest, to their appearance in Court for the first time, the cells were visited on, at least, an hourly basis and on no occasion did the Accused complain of ill-treatment. The certified charge sheet showed that on 18 September 2017, when the Accused made their first appearance

in Athlone Court, the presiding Magistrate, Mr K Lekeur, informed them of their rights and they elected to have an attorney from Legal Aid represent them, whereafter a Miss Douman came on record for the Accused. The Accused's evidence to the contrary was entirely bereft of credibility and not believable.

47. Captain Phakamani ("Phakamani"), Ngqele, Mlonyeni and Njingana testified to the taking of the warning statements.
48. Phakamani has 19 years' experience and is currently the Head of the Serious Violent Crimes unit in Nyanga. He led the tracing team when the Accused were arrested and said that he did not see them being assaulted. He also explained that the cell guards do not accept detainees if they are injured unless they have been taken to hospital first.
49. Ngqele, who has 20 years' experience, was part of the tracing team that arrested the Accused. His role was to safeguard the cars. He testified that he did not assault anyone that morning and did not witness an assault on any of the Accused. When he left the police station after the tracing operation, Mlonyeni and Nonjezi were busy "giving the Accused their warning rights and doing their paperwork". He also testified that when he took down Mkunyanya's warning statement, he explained his constitutional rights in isiXhosa as that was the language he understood. After attending to all the formalities and taking down the statement, he read it back to Mkunyanya in English, interpreted it into isiXhosa and asked him to read it. He said that whilst Ngqele was doing so, Nonjezi was busy informing the other Accused of their constitutional rights.
50. Mlonyeni testified that Mbana was arrested before Mkunyanya. However, when it was pointed out to him that this was contrary to his A17 statement, he agreed that the order of arrest was as indicated in the statement and that he had made a mistake in his oral evidence. Regarding this discrepancy, counsel for the State drew my attention to the judgment *S v Bruinders en 'n Ander*:^[13] where the Horn AJ held that: "Dit is vergesog om van 'n getuie te ver wag om in sy getuieverklaring reeds presies dieselfde weergawe te verskaf as wat hy in die ope hof gaan getuig. . . . Getuieverklarings bly nuttige ammunisie vir kruisondervraging, maar dan moet dit in konteks oorweeg

word en sal die aard en omvang van die afwykings in geheel in ag geneem moet word alvorens dit gesê kan word dat 'n getuie se getuienis as gevolg van sulke afwykings verwerp moet word." I was also referred to *S v Mafaladiso en Andere*:^[14] where the Court remarked that: "In hierdie verband moet die feite-beoordeelaar in ag neem dat 'n vorige verklaring nie by wyse van kruisverhoor afgeneem is nie, dat daar taal- en kultuurverskille tussen die getuie en die opskrifsteller mag wees wat die korrektheid van wat presies bedoel is in die weg staan, en dat die verklaarder selde of ooit deur 'n polisiebeampte gevra word om in detail sy of haar verklaring te verduidelik. Tweedens moet dit steeds voor oë gehou word dat nie elke fout deur 'n getuie en nie elke weerspreking

of afwyking die getuie se geloofwaardigheid aantas nie. Derdens moet die weersprekende weergawes steeds oorweeg en ge-evalueer word op 'n holistiese basis. Die omstandighede waaronder die weergawes gemaak is, die bewese redes vir die weersprekings, die werklike effek van die weersprekings ten aansien van die getuie se betroubaarheid of geloofwaardigheid, en die vraag of die getuie voldoende geleentheid gehad het om die weersprekings te verduidelik – en die kwaliteit van dié verduidelikings – en die samehang van die weersprekings met die res van die getuie se getuienis moet onder andere in ag geneem en opgeweeg word. Ten slotte word die eindtaak van die Verhoorregter, nl om die gewig van die vorige verklaring teen dié van die viva voce getuienis op te weeg, ook in hierdie soort gevalle tereg soos volg in *S v Sauls and Others* 1981 (3) SA 172 (A) op 180F saamgevat: “The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told.”

51. In my view, Mlonyeni's mistake was inconsequential and understandable. It did not diminish the value of his evidence in any way. Mlonyeni denied that he assaulted any of the Accused or that they were assaulted by anyone else and he dismissed the suggestion that he promised to use Mkunyanya as a State witness. Mlonyeni was a good witness. He remained unshaken during cross-examination on all the critical aspects of his testimony.
52. Nonjezi was also part of the tracing team. His task was to secure the perimeter and he did not enter any of the homes on the night of the tracing. He refuted Manana's allegation that he slapped him inside his hut for the very reason that he did not enter any dwellings. He testified that he was the person who gave the Accused their SAP14A notices and that he explained their constitutional rights to them. He did so in isiXhosa as this was their language although he said that when he asked the Accused if they could read English, all indicated that they could do so. He admitted that he had neglected to get Mbana to sign

his SAP14A notice. Nonjezi testified that he had no knowledge of the case as he had been on leave at the time of the incident and thus that he did have enough knowledge to fabricate anything in the statements. He said that the Accused were interviewed one by one, and this process involved him introducing himself to them again, explaining the allegations they faced, as well as informing them of their constitutional rights. He admitted that he had been remiss in not deleting all the relevant parts of the warning

statement form. He said he did read the warning statement back to Mbana. He denied that Manana only signed the warning statement

because he was threatened. Nonjezi was an impressive witness. Where he had made mistakes, he admitted to doing so and the mistakes were of such a nature that they did not of themselves render the warning statements inadmissible.

53. Mjingana, who has 19 years' experience as a policeman, was also part of the tracing team and cross-examination centred on his conduct at the time of the tracing operation. There is no doubt that the tracing operation was conducted in a dangerous place in the dark and that

the policemen involved would have been in a heightened state of awareness and under a significant amount of stress. The cross-examination on behalf of the Accused evidenced a lack of appreciation for this reality. By the same token, there was no credible evidence led, or elicited, that the conduct of the police at the tracing operation was such that it

rendered inadmissible the warning statements that were taken subsequently.

54. Kriegler J, in *Key v Attorney-General, Cape Province Division and Another*[15] held that “In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale. To be sure, a prominent feature of that tension is the universal and unceasing endeavour by international human rights bodies, enlightened legislatures and courts to prevent or curtail excessive zeal by state agencies in the prevention, investigation or prosecution of crime. But none of that means sympathy for crime and its perpetrators. Nor does it mean a predilection for technical niceties and ingenious legal stratagems. What the constitution demands is that the accused be given a fair trial. Ultimately, as was held in *Ferreira v Levin*, fairness is an issue which has to be decided upon the facts of each case, and the trial Judge is the person best placed to take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted.” Similarly, in *S v De Vries & Others*[16] Bozalek J held that “I am of the view that should the evidence seized be held inadmissible by virtue of this technical defect, the accused will gain an unjustified advantage in the trial and the administration of justice will be brought into disrepute in the eyes of reasonable members of the public in our society.”
55. In the final analysis, the State proved beyond reasonable doubt that the warning statements were taken freely and voluntarily without the violation of the Accused’s constitutional rights. The versions of the Accused that they were assaulted, intimidated, slapped, that their handcuffs were too tight, that Mbana was strangled with the laces of his hoodie, that they were threatened with long terms of imprisonment if they did not sign the warning statements and that they were not informed of their constitutional rights, on the basis of the inherent probabilities, were so improbable that they could not be considered reasonably possibly true.
56. With the warning statements admitted, what remains is to be determined is their probative value and here, in my view, they suffer the same fate as the witness statements already discussed. Mbana, Manana and Mkunyanya all made their warning statements in isiXhosa. The policemen taking down these statements then translated what they heard, in real time, and wrote down the statements in English. The nexus between what was said by the Accused when they made their warning statements and what was written down was

thus ruptured. The Accused do not understand English sufficiently, and hence they would not have been able to determine whether the translation of the person taking down the statement was correct or not, irrespective of whether they were given the statement to read, or it was read back to them. So, while I found that the warning statements were taken down voluntarily and the constitutional rights of the Accused were honoured, in my view they are too unreliable to have probative value. As mentioned above, I hold the view that this is not something that is capable of being remedied at a later stage, for example, during a trial without having the benefit of an audio or written record of what was said, in the language used by the Accused. The value of the warning statement is that it records what was actually said and written down at a particular time, not the interpretation or recollection of the Accused or the policeman who took down the statement. It is unfortunate that the Court does not have the benefit of these warning statements made shortly after the event when things were fresh in the minds of the Accused, perhaps before opportunities to distort the truth had presented themselves.

E. The testimony of the accused

57. With the applications for discharge disposed of, the Accused had the opportunity to testify. Given the finding that none of the statements or warning statements had probative value, the Court was left with the oral evidence of Williams, Swartbooi and Mrwebi. What follows is essentially a repeat of my assessment of their testimony which appears above. Williams did not implicate any of the accused. She placed the Accused in the taxi, which in any event they admitted, and her evidence formed part of the overall narrative as did the testimony of the mothers of Swartbooi, Mrwebi and Pangwa. Swartbooi testified that Mtsholotsholo and Siphamandla forced him into the taxi by gunpoint but did not implicate any of the Accused in his own kidnapping. He implicated Manana in the kidnapping of Mrwebi and testified to his assault in the taxi, but he could not identify who perpetrated the assault. He implicated Manana in the assault of Mrwebi in Philippi but only in the sense that he helped Msholotsholo pull him out of the taxi. There were also others involved in the assault, but he could not identify them. He implicated Manana in the kidnapping of Pangwa but could not testify to the murder of Pangwa as he was dropped off before that occurred. Mrwebi implicated Manana in his kidnapping and placed him in the taxi. While he testified to being assaulted

in the taxi, he could not identify who had done so. While he recalled that Mtsholotsholo took him out of the taxi and others

pushed him from behind, he was not able to identify the other people who assaulted, and left him for dead, in the bushes near Philippi. In my view, it was significant that he was not able to corroborate Swartbooi's testimony in this respect.

58. Regarding the test to be applied at this juncture, the setting out of *Plasket J in S v Mdiniso*[17] is instructive:

“[12] The basic principles of criminal law and the law of evidence that apply in this case are trite. The first principle is that the guilt of the accused must be proved by the State and that the onus rests on the State to prove the guilt of the accused beyond reasonable doubt. In the matter of S v T 2005 (2) SACR 318 (E), at paragraph 37, I had occasion to say the following of the importance of this principle:

‘The State is required, when it tries a person for allegedly committing an offence, to prove the guilt of the accused beyond a reasonable doubt. This high standard of proof – universally required in civilized systems of criminal justice – is a core component of the fundamental right that every person enjoys under the Constitution, and under the common law prior to 1994, to a fair trial. It is not part of a charter for criminals and neither is it a mere technicality. When a court finds that the guilt of an accused has not been proved beyond reasonable doubt, that accused is entitled to an acquittal, even if there may be suspicions that he or she was, indeed, the perpetrator of the crime in question. That is an inevitable consequence of living in a society in which the freedom and the dignity of the individual are properly protected and are respected. The inverse – convictions based on suspicion or speculation – is the hallmark of tyrannical systems of law. South Africans have bitter experience of such a system and where it leads to.’

[13] It follows from the requirement that the State must prove an accused person’s guilt beyond a reasonable doubt that the onus rests on it to prove every element of the crime alleged, including that the accused is the perpetrator of the crime, that he or she had the required intention, that the crime in question was committed, and that the act in question was unlawful. See Schwikkard and Van Der Merwe Principles of Evidence (3 ed), at paragraph 31.3.1.

[14] It also follows from the fact that the onus rests on the State to prove the guilt of an accused beyond reasonable doubt that no onus rests on the accused to prove his or her innocence. See S v Mhlongo 1991 (2) SACR 207 (A), at 210d-f; R v Hlongwane 1959 (3) SA 337 (A), at 340H. In order to be acquitted, the version of an accused need only be reasonably possibly true. The position was set out thus by Nugent J in S v Van der Meyden 1999 (1) SACR 447 (W), at 448f-g: ‘The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see, for example, R v Difford 1937 AD 370 at 373 and 383). These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives.’

In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other.’

[15] Much the same point was made by Zulman JA in S v V 2000 (1) SACR 453 (SCA), at paragraph 3(i) when he stated: ‘It is trite that there is no obligation upon an accused person, where the State bears the onus, “to convince the court”. If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to

convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. It is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true but whether one subjectively believes him is not the test. As pointed out in many judgments of this Court and other courts the test is whether there is a reasonable possibility that the accused's evidence may be true.'

- [16] These statements of the law beg the question of what is meant by proof beyond reasonable doubt. In *S v Mlambo* 1957 (4) SA 727 (A), at 738A, Malan JA stated that, while it was not incumbent on the State to 'close every avenue of escape which may be said to be open to an accused', it would be sufficient, in order to secure a conviction, to 'produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused'. See too *S v Phallo and others* 1999 (2) SACR 558 (SCA), at paragraph 10; *S v Mavinini* 2009 (1) SACR 523 (SCA), at paragraph 26.
59. Given my setting out of the testimony of Williams, Swartbooi and Mrwebi, none of whom implicated Mbana in any of the charges, I find Mbana, who elected not to testify, not guilty on all charges.
60. Turning to Manana and Mkunyana, whilst they were implicated by Swartbooi and Mrwebi to the extent I have already explained, I am unconvinced that the State, bereft of the statements and warning statements, managed to produce, in the words of Plasket J, "evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged" which would leave me "morally certain of the guilt of the accused".
61. Whilst on that basis alone, I am compelled to find Manana and Mkunyana not guilty, I am also of the view that their versions are

reasonably possibly true. Manana testified that he was first offered a lift by Mtsholotsholo as he needed to buy meat but once in the taxi Mtsholotsholo refused to let him leave. Mtsholotsholo threatened to shoot him. He said he was an unwilling part of the group in the taxi without any intent to commit any crime. Mkunyana's testimony was that he too was an unwilling part of the group on the night in question at the behest of Mtsholotsholo, who exhibited violent and extreme behaviour on the night.

62. For these reasons I find Manana and Mkunyana not guilty on all counts.

F. ORDER

63. In the circumstances I find Accused two, three and five not guilty on all the remaining counts.

P A MYBURGH

Acting Judge of the High Court

[1] [2023] ZACC 1 at [6].

[2] Chief Lesapo v North West Agricultural Bank [1999] ZACC 16 at paras [11] and [17].

[3] Regulations in terms of section 10, GN1258 GG3619, 21 July 1972 (as amended).

[4] 16 of 1963.

[5] As is the case in the authoritative, The Grammar of isiXhosa, JC Oosthuizen, Sun Press, 2016, “I follow the fashion of using the appellation isiXhosa”.

[6] Chapter 2 of the Constitution of the Republic of South Africa, 1996.

[7] The Conversation, Published: August 17, 2017.

[8] The Conversation, Published April 16, 2020.

[9] viera.vilhanova@savba.sk, Multilingualism in Africa: Challenges and Solutions,

[10] Claasen, Dictionary of Legal Words and Phrases, Issue 6, Vol. 3 at

p. 106 and S v Ndlovu 2002 (6) SA 305 (SCA).

[11] S v Brits 2018

(1) NR 97 (HC) at paragraphs 28 – 30, S v Abbot 1999 (1) SACR 489 (SCA).

[12] S v Trainor 2003

(1) SACR 35 (SCA); S v Shackell 2001 (2) SACR 185 (SCA) at para [30]; S v BM 2014 (2) SACR 23 (SCA) at para [2].

[13] 1998

(2) SACR 432 (SE) at 437F.

[14] 2003 (1) SACR 583 (SCA) at 594A.

[15]

[1996] ZACC 25; 1996

(2) SACR 113 (CC) at para [13].

[16] [2008] JOL 22152 (C) at para [71].

[17]

[2010] ZAECGHC 18

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