IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

Case No: 15/2014

In the matter of:

THE STATE

versus

SHRIEN PRAKASH DEWANI Accused

HEADS OF ARGUMENT ON BEHALF OF THE ACCUSED IN HIS APPLICATION IN TERMS OF SECTION 174 OF THE CRIMINAL PROCEDURE ACT, 1977

The charges against the accused

1. The accused is charged with the following offences:

    1.1. conspiracy to commit the offences of kidnapping, robbery with aggravating circumstances and murder (count 1);

    1.2. kidnapping (count 2);

    1.3. robbery with aggravating circumstances (count 3);

    1.4. murder (count 4); and

1.5. obstructing the administration of justice (count 5).

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

> "... by entering into an agreement with Tongo, in terms of which Tongo would procure the services of a person or persons to do one or more or all of the following:
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> 2.1. simulate a hi-jacking of Tongo's motor vehicle;
>
> 2.2 simulate a kidnapping and robbery of Tongo and the accused; and/or
>
> 2.3 effect the kidnapping, robbery and murder of the deceased, Anni Dewani,
>
> and in that, according to the conspiracy agreement, the accused would provide payment to the perpetrators as well as to Tongo for the kidnapping, robbery and murder of the deceased, Anni Dewani".[1]

3. In counts 2, 3 and 4 it is alleged that the accused, Tongo, Qwabe and Mngeni acted in the furtherance of a common purpose to kidnap the deceased (count 2), to rob the deceased (count 3) and to kill the deceased (count 4).

4. Monde Mbolombo ("Mbolombo") is not alleged to have been part of the conspiracy to commit the offences or to have acted with the others in the furtherance of a common purpose to kidnap, rob or kill

[1] Count 1 - 2nd page of the indictment

the deceased. His alleged role is limited to what is described in the summary of substantial facts as follows:

> "Pursuant to the accused's request, on the same day Tongo contacted a friend of his Monde Mbolombo (hereinafter referred to as Mbolombo), who put him in touch with Mzimadoda Qwabe (hereinafter referred to as Qwabe)."[2]

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

The evidence tendered to prove the conspiracy agreement

6. To prove the alleged conspiracy agreement between the accused and Togo, the State relies primarily on the evidence of Tongo. According to Tongo, the agreement was reached in discussions between him and the accused on Friday afternoon, 12 November 2010 at the Cape Grace Hotel, further discussions in a telephone conversation the same Friday evening and in his car the Saturday morning, 13 November 2010, in the absence of any other persons. In this regard Tongo is accordingly a single witness. He is also an accomplice witness.

[2] Summary of substantial facts, page 2, 3rd paragraph.

7. The evidence of Mbolombo and Qwabe as to what Tongo had told them, was adduced to corroborate Tongo's version that the alleged agreement was reached with the accused and to prove Tongo's execution of the alleged agreement.

Submissions to be made

8. It will be submitted hereunder that:

8.1. Tongo's evidence is of such poor quality that it cannot be relied upon.

8.2. The evidence of Mbolombo and Qwabe is of similar poor quality. More specifically, it contradicts the evidence of Tongo on material points, including the material point as to what the alleged agreement with the accused entailed.

8.3. Accordingly, there is no credible evidence on record upon which a Court, acting carefully, may convict the accused.

8.4. Consequently the accused should be discharged on all charges against him in terms of section 174 of the Criminal Procedure Act, 1977.

THE LAW

Section 174 of the Criminal Procedure Act, 1977

9. Section 174 of the Criminal Procedure Act, no 51 of 1977 ("the CPA"), provides as follows:

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

10. The procedure enacted in section 174 of the CPA is nothing new, and both the predecessors of the current CPA contained similar provisions.[3]

11. It is trite law that the words "no evidence" do not mean "no evidence at all" but rather "no evidence on which a reasonable court, acting carefully, might convict".[4]

12. Whether or not to refuse or grant a discharge at this stage of the trial entails the exercise of a discretion by the trial court: it may return a verdict of not guilty and discharge the accused there and then, or it may refuse to discharge the accused, thereby placing him on his defence.[5]

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[3] Section 221(3) of the Criminal Procedure and Evidence Act, no 31 of 1917 and section 157(3) of the Criminal Procedure Act no 56 of 1955

[4] R v Shein 1925 AD 6 (W); R v Herholdt and Others (3) 1956(2) SA 722 (W); S v Mpeta and Others 1983(4) SA 262; S v Shuping and Others 1983(2) SA 119 (B); S v Phuravhatha 1992 (2) SACR 544 (V); S v Lubaxa 2001(2) SACR 703 (SCA)

[5] R v Lakatula and Others 1919 AD 362; S v Shuping, supra, at p.120G-H; S v Lubaxa, supra, at p. 706, par [11]

13. The manner in which this discretion by the trial court must be exercised has always been contentious and the topic of a number of decisions.[6]

14. In the matter of **S v Shuping and Others**, supra, Hiemstra CJ reviewed the case law history of discharge-applications and formulated the test as follows[7]:

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

15. However, the second leg of the latter test did not always find favour. In the matter of **S v Phuravhatha and Others 1992(2) SACR 544 (V)** Du Toit AJ criticized the approach followed in **S v Shuping**, and stated as follows[8]:

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

16. Since the inception of our constitutional order, conflicting views arose as to whether or not the Constitution has changed the test to be applied by a court in an application in terms of section 174.

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[6] R v Kritzinger 1952(2) Sa 401 (W); R v Mall and Others 1960(2) SA 340 (N); R v Heller and Another (2) 1964(1) SA 524 (W); S v Ostilly and Others 1977(2) SA 104 (D); S v Mpetha and Others 1983(4) SA 262(C)
[7] At p. 120 *in fine* – 121A
[8] At p. 550C

17. In the case of **S v Mathebula and Others 1997(1) SACR 10 (WLD)** Claassen J held that "exercising a discretion in favour of the State under the circumstances of this case in terms of s 174 would, in my view, deny the accused his right to a fair trial. To my mind, the spirit, purport and objects of chap 3 of our Constitution can lead to no other conclusion but that the concept of a fair trial in these circumstances means that one can justly and fairly say to the State: `You had your chance to prove the accused's guilt. You failed to prove a prima facie case against the accused. You cannot now seek the accused's or the co-accused's assistance to do what you could not do.'"[9]

18. The latter view was both followed and criticised in a number subsequent cases. It was followed in **S v Jama and Another 1998 (2) SACR 237 (N)** and criticised and not followed in **S v Hudson and Others 1998 (2) SACR 359 (W)**, and in **S v Makofane 1998 (1) SACR 603 (T).**

19. Further support, for the viewpoint that the Constitution did impact on the applicable test in section 174 applications, can be found in the case of **S v Ndlangamandla and Another 1999(1) SACR 391 (WLD)** where Willis J (as he then was) held as follows[10]:

> "It seems to me that the provisions of s 35(3)(h) of our Constitution with regard to the presumption of innocence, the right to silence and the right not to testify, have at least three practical consequences impacting upon s 174 of the Criminal Procedure Act:
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> 1. The court has a duty mero motu to raise the issue of the possibility of a discharge at the close of the case for the prosecution where it appears to the court that there may be no evidence that the accused committed the offence.
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> 2. Credibility, where it is of such poor quality that no reasonable person could possibly accept it, should be taken into account at this stage.
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> 3. The second leg of the test in S v Shuping (supra) should not apply."

[9] At p. 35e-g
[10] At p. 393g - i

20. The point was finally decided by a Full Bench of the Supreme Court of Appeals in the matter of **S v Lubaxa 2001 (2) SASV 703 (SCA)** emphasis added)[11]:

> "[18] I have no doubt that an accused person (whether or not he is represented) is entitled to be discharged at the close of the case for the prosecution if there is no possibility of a conviction other than if he enters the witness box and incriminates himself. The failure to discharge an accused in those circumstances, if necessary mero motu, is in my view a breach of the rights that are guaranteed by the Constitution and will ordinarily vitiate a conviction based exclusively upon his self-incriminatory evidence.
>
> [19] The right to be discharged at that stage of the trial does not necessarily arise, in my view, from considerations relating to the burden of proof (or its concomitant, the presumption of innocence) or the right of silence or the right not to testify, but arguably from a consideration that is of more general application. Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common law principle that there should be 'reasonable and probable' cause to believe that the accused is guilty of an offence before a prosecution is initiated (Beckenstrater v Rottcher and Theunissen 1955 I (1) SA 129 (A) at 135C - E), and the constitutional protection afforded to dignity and personal freedom (s 10 and s 12) seems to reinforce it. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold. That will pre-eminently be so where the prosecution has exhausted the evidence and a conviction is no longer possible except by self-incrimination. A fair trial, in my view, would at that stage be stopped, for it threatens thereafter to infringe other constitutional rights protected by s 10 and s 12."

21. It has been held that, generally speaking, questions of credibility of State witnesses do not play a large role at this stage of the trial.

22. In the matter of **S v Mpetha**, *supra,*[12] Williamson J, held that relevant evidence can only be ignored if "it is of such poor quality that no reasonable person could possibly accept it", and that credibility therefore plays a limited role at this stage of the proceedings.

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[11] At p. 707d-708b
[12] At p. 265D

23. In **S v Ndlangamandla**, supra, the Court also held that credibility should be taken into account at this stage, where it is of such poor quality that no reasonable person could possibly accept it. The following quotation from that matter is apposite[13]:

> "In my view the evidence of the only eyewitness called by the State, Weslyn Kamanga, was of such poor quality that no reasonable person could possibly accept it. This view is shared by my two learned assessors.
>
> In my view a further relevant factor is that the accused, right at the outset, gave an explanation of plea, ie self-defence, which is completely consistent with the satisfactory evidence of the State with regard to the killing of the deceased. Different considerations may have applied if the accused had resorted to a bare denial, or had put up a defence of an alibi."

24. In the more recent matter of **S v Agliotti 2011 (2) SACR 437 (GSJ)**, Kgomo J, quoted the passage of Willis J in the matter of **S v Ndlangamandla**, referred to above in paragraph 23, with approval and stated that it is an exercise in futility to lay down rigid rules in advance for the infinite possible factual situations that may, or may not, arise. Kgomo J held that it is "unwise to attempt to banish issues of credibility in the assessment of issues in terms of section 174 or to confine judicial discretion to musts or musts not."[14]

25. Granting the section 174-application and with reference to the State's main witness in the Agliotti-matter, Kgomo J remarked as follows:

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[13] At p. 393i-394a

[14] At p. 457, par [273]. This statement was repeated by Kgomo J in the matter of S v Masondo: in re S v Mtembu and Others 2011(2) SACR 286 (GSJ), at p. 292 – 293, par [39]

> "It is my considered view that Nassif's evidence is of such a poor quality that it cannot be safely relied upon."
>
> and
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> " Nassif was so thoroughly discredited during cross-examination that, at the end of the day, there is no credible left on record upon which a court, acting carefully, may convict the accused."[15]

26. It is submitted that the present legal position regarding applications in terms of section 174, may be summarised as follows:

26.1. An accused person (whether or not he is represented) is entitled to be discharged at the close of the case for the prosecution if there is no possibility of a conviction other than if he enters the witness box and incriminates himself;

26.2. In deciding whether an accused person is entitled to be discharged at the close of the state's case, the Court may properly take into account the credibility of the State witnesses;

26.3. Where the evidence of the State witnesses implicating the accused is of such poor quality that it can not be safely relied upon and there is accordingly no credible evidence on record upon which a court, acting carefully, may convict, an application for discharge should be granted.

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[15] At **457, para. 275 and 279**

Corroboration of accomplice witnesses:

27. It is trite law that the Court should approach the evidence of an accomplice witness with caution.

28. The duty of the Court in this regard has been described as follows[16]:

> "The cautious Court or jury will often properly acquit in the absence of other evidence connecting the accused with the crime, but no rule of law or practice requires it to do so. What is required is that the trier of fact should warn himself, or, if the trier is a jury, that it should be warned, of the special danger of convicting on the evidence of an accomplice; for an accomplice is not merely a witness with a possible motive to tell lies about an innocent accused, but is such a witness peculiarly equipped, by reason of his inside knowledge of the crime, to convince the unwary that his lies are the truth."

29. For the purpose of the so-called cautionary rule, it is clear from the authorities that the corroboration that what is required has to be corroboration implicating the accused, and not merely corroboration in a material respect or respects.[17]

30. In **S v Mahlabathi and Another 1968(2) SA 48 (A)** Potgieter JA remarked as follows[18]:

> "I would like to emphasise that, as was pointed out by SCHREINER, J.A., in Ncanana's case, supra at p. 405, it is not a rule of law or practice that requires the Court to find corroboration implicating the accused, but what is required is that the Court should warn itself of the peculiar danger of convicting on the evidence of the accomplice and seek some safeguard reducing the risk of the wrong person being convicted, but such safeguard need not necessarily be corroboration. Once, however, the Court decides that in order to be so satisfied it requires corroboration, it would be pointless to look for corroboration other than corroboration implicating the accused."

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[16] R v Ncanana 1948(4) SA 399 (AD), at p. 405

[17] R v Ncanana, supra, at p. 405; R v Mpompotshe and Another 1958(4) SA 471 (A), at p. 476; S v Avon Bottle Store (Pty) Ltd and Others 1963(2) SA 389 (A), at p. 392

[18] At p. 50G – 51A

(emphasis added)

31. Furthermore corroboration in this regard constitutes "other evidence which supports the evidence of the complainant, and which renders the evidence of the accused less probable, on the issues in dispute".[19] (emphasis added)

32. In this regard, the following quotation is relevant[20]:

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

33. Therefore, the images on the CCTV footage, depicting:

33.1. the accused meeting with Tongo at the parking at the Cape Grace Hotel on Friday, 12 November 2010;

33.2. the accused being picked up by Tongo on Saturday morning, 13 November 2010, at the Cape Grace Hotel (en route to exchange money);

33.3. the accused being dropped off again by Tongo later on that Saturday morning at the Cape Grace Hotel (after they had been to exchange money);

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[19] S v Gentle 2005(1) SACR 420 (SCA), at 430j – 431a
[20] S v Scott-Crossley 2008(1) SACR 223 (SCA), at p. 234, par [18]

33.4. the accused and the deceased being picked up by Tongo on Saturday evening at the Cape Grace Hotel;

33.5. the accused talking to Tongo after the incident on Sunday, 14 November 2010; and

33.6. the accused paying Tongo R1 000,00 in the communications room on Tuesday, 16 November 2010;

does not provide any corroboration for the version of Tongo where it differs from that of the accused as set out in his plea explanation, as none of these events are in issue – it is what was said during those events that are, and for that that there is only the version of Tongo.

34. Similarly, the mere fact that there was telephone communication between the accused and Tongo, and between Tongo, Mbolombo and Qwabe, cannot in and of itself corroborate what was said during those calls – it merely confirms that there was communication between the parties concerned.

THE CRUCIAL WITNESS - TONGO

35. It is clear that Tongo, Qwabe and Mngeni, and despite the allegations in the indictment, also Mbolombo, acted in the execution of a common purpose to commit, at least, the offences of kidnapping and

robbery and in all probability also other offences. The real issue in this matter is whether the accused was part of that common purpose (or conspiracy). This will stand or fall with Tongo's evidence, as he is the only witness who testified that the alleged conspiracy agreement was entered into with the accused and what the terms of the alleged conspiracy agreement were.

36. It is common cause that:

36.1. The accused and the deceased arrived in South Africa on 9 November 2010 on honeymoon after a traditional Hindu wedding in India at the end of October 2010.

36.2. They spent a few days at a game lodge in Mpumalanga before flying to Cape Town on 12 November 2010.

36.3. At Cape Town airport, the accused obtained the services of Tongo, who operated a shuttle service, to transport them to the Cape Grace Hotel on the Waterfront.

36.4. After a trip of approximately 20 minutes during which Tongo tried to sell his services to the accused and the deceased as a guide to show them around Cape Town, they arrived at the Cape Grace Hotel.

37. Tongo's evidence in chief can be summarised as follows:

37.1. <u>The discussions between Tongo and the accused in front of the Cape Grace Hotel on Friday afternoon 12 November 2010</u>

37.1.1. After their arrival at the Cape Grace Hotel, the deceased accompanied a porter with their luggage into the hotel, whilst the accused remained at the car to pay Tongo for the trip. They were standing behind Tongo's car which was parked in front of the main entrance to the hotel. Tongo collected a business card from his car to give to the accused which contained his contact details should the accused wish to make further use of his services. The accused then said to him that he had a job for him and that he must wait for the accused for a few minutes whilst the accused goes to reception to check in. Tongo parked his car in a vacant parking bay opposite the hotel's entrance.[21]

37.1.2. After a while the accused returned from the reception and got into the car with Tongo. He told Tongo that he has a job for him that will make his business grow. As he is from overseas, he can refer people to Tongo. The

[21] Record, p. 902

accused then said that there is somebody he wants to be "removed from the eyes". Asked to explain this by Tongo, the accused explained that he wanted somebody killed. Tongo told him that he is not involved in such activities, but that he knows a person who stays in the "location". He will enquire from this person as it might be that he knows "some people".[22] The accused wanted to make sure that Tongo got in touch with this person. He further informed Tongo that the person to be killed is his business partner, who will be arriving the next day. He further informed Tongo that his business partner is a female.[23] The accused said that he is prepared to pay R15 000,00 to have his business partner killed, which will be payable after "the job is finished". He will also pay Tongo R5 000,00.[24]

37.2. Tongo's interaction with Mbolombo at the Colosseum Hotel on Friday afternoon 12 November 2010

37.2.1. Tongo thereafter drove from the Cape Grace Hotel to the Protea Colloseum Hotel in Century City to see his friend Mbolombo, a receptionist at that hotel. He told

[22] Record, p. 904
[23] Record, p. 904
[24] Record, p. 905

Mbolombo that he transported clients from the airport to the Cape Grace Hotel where "he" (the accused) said that he has a job for him. Mbolombo asked him what kind of a job, to which Tongo replied that this person wants someone, who will be arriving the next day, to be taken out of sight. Mbolombo replied that there is a young man that he knows about, he will phone him and explain to him that there is a job.[25] Mbolombo phoned this person (Qwabe) and explained to him exactly what he, Tongo had explained to Mbolombo. Mbolombo told the person on the phone that a person wanted his business partner, who will be arriving the next day, taken out of sight and that he is prepared to pay R15 000,00 for the job. Mbolombo enquired whether the person will accept Dollars in payment. The person on the phone said that "they" did not want Dollars it must be Rands.[26] Tongo took the person's contact details from Mbolombo.[27] Although Tongo heard the person's name he could not remember it. He saved the person's number under "H" on the contacts list of his cellphone.[28]

[25] Record, p. 907
[26] Record, p. 908
[27] Record, p. 907
[28] Record, p. 910

37.2.2. Tongo testified that Mbolombo had said that he also wanted his share, to which Tongo replied that that does not have anything to do with him.[29]

37.2.3. When Tongo left the Protea Colloseum Hotel there was "some hope" that the person on the telephone would do the job, but the person still had to meet with a friend of his.[30]

37.3. <u>Tongo's telephonic discussion with Qwabe on Friday evening 12 November 2010</u>

37.3.1. Tongo later phoned this person, who became known to him as Spra (Qwabe). He wanted to know, how things are going. Qwabe said everything is going fine, he is still going to meet with another man and "he is promising". That was his only conversation with Qwabe that evening.[31]

[29] Record, p. 977/978
[30] Record, p. 907
[31] Record, p. 909

37.4. Tongo's discussion with the accused on Friday evening 12 November 2010

37.4.1. Tongo later spoke to the accused who wanted to know whether he had found "the people we spoke about". He replied that he had found them. He further informed the accused that he had met a young man, who spoke to another young man, who was willing to do the job. They however do not want to be paid in Dollars but in Rands. The accused then enquired where he can change Dollars into Rands. Tongo told him that he knows of such a place and they arranged to meet the next day at 11:00 a.m. to go and change money.[32]

37.5. Saturday morning - the money changer and further discussion with the accused

37.5.1. The next morning as he drove into the Waterfront to drop a client, the accused called and asked where he was and whether he had forgotten that they must go to the money changer. He replied that he had not forgotten, he is just dropping his client. He dropped his client and rushed to the Cape Grace Hotel. After just arriving there,

[32] Record, p. 911-912

the accused walked out of the hotel door.[33] The accused told him that they must hurry as his wife is having a shower or is washing.[34] He then took the accused to a shop, where the latter changed money.[35]

37.5.2. On their arrival back at the Cape Grace Hotel from the money changer, Tongo parked his car and they discussed how the job should be done. The accused said that he wants the car hi-jacked, they must be robbed, whereafter the hi-jackers must first drop Tongo and thereafter the accused, whereafter they must kill the woman. There was no discussion as to how and where the business partner should be killed.[36] It was agreed that Tongo would pick the accused and the woman up at 7:30 p.m., they would drive around the Waterfront whereafter Tongo will drive with them to the "location". The accused asked which "location" is very busy during the night on which Tongo replied Gugulethu. They then parted company.[37]

[33] Record, p. 913
[34] Record, p. 913
[35] Record, pp. 913-914
[36] Record, p. 915
[37] Record, p. 916

37.6. Saturday afternoon - meeting between Tongo, Qwabe and Mngeni

37.6.1. Tongo also made arrangements to meet with Mbolombo and Qwabe. All three of them could however not meet as he, Tongo was engaged with his business. He later took Mbolombo to work. He asked Mbolombo to tell Qwabe that he, Tongo, will meet him at Khaya Bazaar in Khayelitsha.[38]

37.6.2. He later phone Qwabe who told him to wait at a bus stop in Khayelitsha. He did so. Qwabe arrived, introduced himself as Spra and informed Tongo that they must meet the person who is going to work with him. They drove to where Mngeni was waiting. Mngeni got into the car and introduced himself as Xolile.[39]

37.6.3. Qwabe asked Mngeni whether he remembered that he, Qwabe, had phoned him, telling him about a job. He then told Mngeni that here is the man, with reference to Tongo. Tongo then explained to them what the man (the accused) wanted done. He said the man wants his business partner, who was going to arrive that day,

[38] Record, p. 917
[39] Record, p. 917(24)-919(6)

killed. He wants it to look like a hi-jacking. They must first drop Tongo and thereafter the man, whereafter they must kill the woman. They replied that they would be able to do the job. Tongo then explained that he was going to pick the man and the woman up at 7:30 p.m., drive around Cape Town and then into Gugulethu past Mzolis, past Pitso to a specific T-junction where Qwabe and Mngeni should wait for them. They enquired from Tongo whether the money had been exchanged, to which he replied positively. One of the men said that he was going to look for a "kierie", meaning a firearm.[40] There was no discussion as to how and where the woman would be killed.

37.7. Saturday evening - Cape Town - Gugulethu

37.7.1. On Saturday evening Tongo was running late. He received a phone call from the accused asking him where he was. He told the accused that he was delayed but he was on his way.[41]

37.7.2. Tongo testified that on arriving at the Cape Grace Hotel although he was late, he first cleaned his car and

[40] Record, p. 920
[41] Record, pp. 920/921

engaged the child locks on both rear doors. He then texted the accused and the accused came out with a lady. He did not recognise the lady as she did not look like the woman who was with the accused the previous day. The accused and the lady got into the car and they left the Cape Grace Hotel.[42] They drove around Cape Town and then to Gugulethu.[43]

37.7.3. Tongo drove to the T-junction in Gugulethu as agreed with Qwabe and Mngeni, but they were not there. He then told the accused and the lady that they can go to a restaurant on the beach in Somerset West (Strand). When he was about to join the N2, he received a text from the accused enquiring what is happening. On joining the N2 he also had a call from Qwabe apologising and saying that they had trouble with a car.[44]

37.7.4. Tongo told Qwabe that they were going towards Somerset West. It was his, Tongo's, suggestion that they

[42] Record, p. 922
[43] Record, p. 922
[44] Record, p. 923

must go to the restaurant in Somerset West as he knew that the accused would support him.[45]

37.8. Saturday evening - The Strand

37.8.1. He took the accused and the lady to the Surfside Restaurant in the Strand. He and the accused were walking ahead of the lady on their way to the restaurant. The accused asked him softly, what has happened. He explained to the accused that the men were delayed as a result of a problem with a motor vehicle, but that they are going to wait in Gugulethu. The accused then told him that he must make sure that everything "is going well".[46]

37.8.2. After the accused and the lady had gone into the restaurant, Tongo went to fill his car. He was contacted by the men. He told them where he was but they said they could not come to Somerset West as it was "wet", meaning there are too many police officers in the area.[47]

[45] Record, p. 923
[46] Record, p. 972
[47] Record, p. 972/973

37.8.3. He conveyed the message to the accused that the men could not come to Somerset West, but they are going to wait in Gugulethu.[48]

37.8.4. The accused then phoned him. He wanted to know whether Tongo had spoken to the men. Tongo replied that he did and that everything is still the same.[49]

37.8.5. Tongo explained that Qwabe and Mngeni were going to get the money in the car. They expected to hear where in the car the money would be. In their earlier discussions it was agreed that the money would be in the cubbyhole.[50]

37.8.6. Tongo testified that the accused had told him in the Strand that the money is in the pouch behind the left front passenger seat.[51]

[48] Record, p. 973
[49] Record, p. 973/974
[50] Record, p. 976/977
[51] Record, p. 977

37.9. The "Hi-jack"

37.9.1. They left the Strand and Tongo turned off the highway into Gugulethu. He took the route agreed upon with Qwabe and Mngeni and saw them waiting for him.[52]

37.9.2. They were then "hi-jacked" by Qwabe and Mngeni, who were both armed with handguns. He, Tongo, was forced onto the rear seat next to the accused and the woman. Qwabe got behind the wheel and Mngeni into the front passenger seat. Mngeni robbed the accused and the woman of their valuables and also took Tongo's cellphone.[53]

37.9.3. At a stop sign near the police barracks, Mngeni opened the door where Tongo was seated, from the outside and Tongo was told to get out.[54]

37.9.4. He went to the Gugulethu police station where he reported the matter. A statement was taken from him. He did not tell the truth in that statement.[55]

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[52] Record, p. 975
[53] Record, p. 978/982
[54] Record, p. 983
[55] Record, p. 986

37.10. The Cape Grace Hotel - After the incident

37.10.1. Tongo was then taken by police officers to the Cape Grace Hotel. On their arrival at the Cape Grace Hotel, at approximately midnight, he noticed that there were a number of police officers in attendance.[56]

37.10.2. He went to sit down and the accused came to him enquiring whether he was alright.[57]

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

37.10.4. From the time that he had arrived at the Cape Grace Hotel, the accused came to him every now and then to ask whether he was fine. The accused also wanted to

[56] Record, p. 987/988; 988(11-14)
[57] Record, p. 988(6-8)

know whether he had heard anything and asked "did this really take place".[58]

37.10.5. A CCTV clip was then shown with the accused and Tongo on the terrace of the Cape Grace Hotel.[59] A cleaner can be seen entering the area where the accused and Tongo were. He leaves after the accused had asked him to give them some privacy.[60]

37.10.6. The accused continually kept on asking Tongo whether he was fine and he also wanted to know whether the "job" had been done. Tongo replied that he did not know.[61]

37.10.7. During the time that they were together as depicted on the CCTV clip[62] one of the things the accused wanted to know was whether Tongo had any information about what had happened, whether he had heard anything and whether the men really did what they were supposed to do.[63]

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[58] Record, p. 990(1-8)
[59] Record, p. 990(15)
[60] Record, p. 991(2-13)
[61] Record, p. 992(1-7)
[62] Record, p. 990(15)
[63] Record, p. 993(11-16)

37.10.8. He was then taken back to Gugulethu police station. Mr Blacks accompanied him to the scene where the "hi-jack" took place. Mr Blacks again questioned him and told him that he, Tongo, knew about this incident.[64]

37.11. Tuesday

37.11.1. Members of the media thereafter tried to contact him. On Tuesday morning he phoned the police officer he dealt with at Gugulethu (Captain Lutchman) and explained to him that there were people bothering him.[65] After speaking to Captain Lutchman, the accused came on line and he spoke to him. The first thing the accused asked was whether he was fine. He replied that he was not fine but that he was still alive. The accused said to him there is a number at which he was going to call Tongo as he wanted to pay him the outstanding money.[66]

37.11.2. The accused then phoned him and told him that he must come and collect the outstanding money. They were going to meet at a bridge near the hotel. He cannot remember the time arranged, but from the time

[64] Record, p. 994(13)-995(7)
[65] Record, p. 999(1-22)
[66] Record, p. 1000(6)-1001(2)

that the accused had phoned him it was about 2 hours later that they were to meet.[67] He went to where he was supposed to meet the accused where he waited. The accused did not show up and they contacted each other. The accused informed him that he could not leave the hotel as there were members of the media outside. He asked Tongo to come into the hotel. This Tongo did. He saw the accused standing at the beginning of a passage. The accused signalled him to follow him which he did. They went into the communications centre of the hotel where the accused gave him an envelope in a plastic bag whereafter the accused left the room.[68] He then went to the toilet where he opened the envelope and found only R1000,00 inside. He was angry, folded the envelope, put it into his back pocket and left the toilet carrying the plastic bag in his hand. As he left the toilet he looked down the passage to his right and as he did not see the accused he left the hotel.[69]

[67] Record, p. 1001(13-22)
[68] Record, p. 1002(1-25)
[69] Record, p. 1003(3-10)

37.12. Wednesday

37.12.1. On the Wednesday, he was phoned by the investigating officer, Captain Hendrikse who wanted to see him. He went to see Captain Hendrikse at his office with other police officers present. He was questioned about the incident. Captain Hendrikse did not believe what he was telling him. He gave Captain Hendrikse a statement similar to the statement he made earlier in Gugulethu which was false.[70]

37.13. Thursday to Saturday

37.13.1. On Thursday he appointed an attorney, Mr William De Grass, to represent him. On Saturday, 20 November 2010 his attorney informed him that the police were looking for him and it was arranged that he would go to their offices where he handed himself over to Captain Hendrikse in the company of Mr De Grass.[71] At the time when handed himself over he was aware of the fact that Qwabe and Mngeni had been arrested.[72]

[70] Record, p. 1007(6)-1008(22)
[71] Record, p. 1009(10)-1010(8)
[72] Record, p. 1010(25)-1011(4)

37.13.2. He entered into a plea and sentence agreement with the State which was signed on 5 December 2010. On 7 December 2010 he was convicted in terms of the plea and sentence agreement and was sentenced to 18 years imprisonment. Mr De Grass represented him throughout.[73] He also made a statement to the police.[74]

37.14. Mbolombo's Role

37.14.1. On a specific question as to what Mbolombo's role was in the events described by him, Tongo stated that Mbolombo connected him to Qwabe and Mngeni, "that's what he did My Lady".[75]

37.14.2. He further stated that after the incident Mbolombo contacted him. He wanted money from Tongo. Tongo then explained to him that he could not demand money from him, he must ask Qwabe and Mngeni.[76]

[73] Record, p. 1011(8-20)
[74] Record, p.1010(12)
[75] Record, p. 1022(12-16)
[76] Record, p. 1022(20)-1023(1)

38. **Tongo's affidavit (Exhibit P9)**

38.1. In terms of the plea agreement entered into by Tongo (exhibit P12), he indicated his willingness to testify in any subsequent criminal trials instituted in regard to the alleged conspiracy. To this end a comprehensive affidavit was obtained from him by an experienced detective, Lieutenant Colonel Barkhuizen. Tongo and his attorney, Mr De Grass, who was present throughout, were given an opportunity to consider the final typed document whereafter on 26 November 2010, 18 days after the incident, Tongo signed this affidavit. The affidavit was handed in by the defence as exhibit P9.[77]

38.2. Tongo's plea agreement signed by him and his attorney Mr De Grass on 5 December 2010, was also handed in as exhibit P12.

Tongo as a witness

39. Tongo proved himself to be a completely unreliable witness. His testimony is not only highly improbable but is also riddled with contradictions on virtually every material aspect, to such an extent that no reliance whatsoever can be placed thereon. Furthermore, his evidence on material points and specifically concerning the alleged

[77] Record, p. 1250(8)-1256(10)

conspiracy agreement with the accused, is contradicted by his co-conspirators, Qwabe and Mbolombo.

The major improbabilities

40. As a starting point, it is submitted that Tongo's version of how the alleged conspiracy agreement with the accused arose and how Mbolombo, Qwabe and Mngeni became part thereof, is highly improbable.

40.1. The accused met Tongo at the airport when he was looking for a taxi to take him and his wife to the Cape Grace Hotel. Tongo was a shuttle operator, he was neatly dressed and his car was in good condition.

40.2. On their way to the Cape Grace Hotel, Tongo attempted to sell his services as a guide to the accused and his wife, offering to show them around Cape Town. There could not have been any indication to the accused other than that Tongo is a law abiding shuttle operator and guide.

40.3. Against this background it is highly improbable that the accused, after he had been in Tongo's company for approximately 30 minutes, would, without more, approach Tongo with a request to find someone to kill his business partner.

40.4. It is even more improbable that Tongo, who had never been involved in any criminal activity, would virtually immediately agree to contact his friend to obtain the services of a hit man. Even accepting that he was offered R5 000,00 at that stage (in cross-examination he was uncertain whether the R5 000,00 was offered on Friday night or Saturday morning) - he earned between R30 000,00 and R40 000,00 per month in a good month.

40.5. The improbability goes further. Tongo then approached his friend, Mbolombo, a hotel receptionist, who is also not someone who is involved in any criminal activity, to enquire whether Mbolombo could assist him to obtain the services of a hit man. Mbolombo, without any promise of financial gain, also almost immediately agreed to assist and phoned Qwabe who, according to Mblomobo, might have known such a person.

40.6. Against Mblomobo's expectations, Qwabe is quite prepared (with Mngeni) to commit the murder for R15 000,00.

40.7. This sequence of events as testified to by Tongo is so highly improbable that it simply cannot be true. As the evidence showed, Mbolombo was forced to concede that he was in control of the events of that Saturday night. It was no coincidence that Tongo approached Mbolombo immediately

after he had left the Cape Grace Hotel and that Mbolombo immediately contacted Qwabe, the person who was under Mbolombo's control through regular telephonic contacts and who was given instructions by him during the events of Saturday night 13 November 2010.

MATERIAL CONTRADICTIONS

The discussions in front of the Cape Grace Hotel on Friday afternoon, 12 November 2010

41. As set out in paragraph 37.1.1 above, Tongo testified that after the accused had paid him he gave the accused his business card. The accused then told him that he has job for him and that he must wait for him for a few minutes whilst he goes to reception to check in. In cross-examination Tongo confirmed that it was only after the accused had returned from the reception that he learned that the job entailed the killing of a person.[78]

42. In his affidavit (P9) Tongo stated that before the accused went to the reception, he elaborated on the job and said he wanted somebody to be taken off the scene. On Tongo's question what he meant, the accused explained that he wanted somebody killed. Tongo then told him that he did not associate himself with "such things" but could call

[78] Record, p. 1063(13-24)

somebody in the township who may know someone who associated himself with that type of life.[79]

43. Confronted with this clear and material contradiction between his evidence and the contents of his affidavit with regard to this first discussion, Tongo could do no better than saying that it was a "mistake".[80]

44. Bearing in mind that this is the crucial part of his evidence, and that this had never happened to him before, one can expect that he will remember when he first learnt that the accused wanted a person to be killed. In these circumstances this material contradiction between his affidavit and his testimony raises serious questions of credibility.

45. As set out in paragraph 37.1.2 above, Tongo testified that when the accused returned to the car from the reception, he told him that he has a job for him that will make his business grow, he is from overseas and he can refer people to Tongo. The accused then said that there is somebody he wanted to be "removed from the eyes", meaning killed. Tongo told him that he is not involved in such activities but that he knows a person in the township from whom he will enquire as it might be that this person knows people who will be prepared to kill someone. Tongo testified that the accused further explained that the person to

[79] Exhibit P9, para. 8, record p. 1064
[80] Record, p. 1067(20)-1070(2)

be killed is his business partner who will be arriving the next day. His business partner is a female. The accused said he was prepared to pay R15 000,00 to have her killed, which amount will be payable after the job had been done. He also undertook to pay Tongo R5000,00 after the job had been done.

46. In cross-examination Tongo was confronted with the contents of his affidavit (P9). Therein he stated the following:

> "[8] On our arrival at the Cape Grace Hotel Mrs DEWANI was assisted by a porter - who took their luggage - and she went into the reception area. DEWANI then paid the fee I had quoted - R250=00 and also gave me a R50=00 tip. He said he had a "job" that had to be done, and asked me if I live far away from town. I informed him I was only about 10 minutes drive away from their hotel. He then elaborated about the "job" and said he wanted somebody "to be taken off of the scene". He spoke English with an Indian accent. When I asked him to elaborate he said he wanted somebody to be killed. I said to him I did not associate myself with such things but could call somebody in the township who may know somebody who associated himself with "that type of life". He then said I must give him 10 minutes whilst he goes to book into the hotel and asked me to wait outside. I waited in my car in the parking area. After a while DEWANI came back and got into my car. He <u>again</u> asked if I could organise that somebody be killed. I <u>again</u> informed him that I could contact somebody in the township to hear if that person knew of somebody that could this. I then asked DEWANI how much money he was willing to pay for this "job" to be done and he said he was willing to pay an amount of R15 000=00 [Fifteen thousand Rands]. He said he had USA dollars and could pay them in dollars. He said that the person that had to be killed was a woman and that she was arriving later that evening. He also inquired as to if I knew of a place where he could exchange dollars for Rands as he did not want to produce his passport to do this and wanted a better exchange rate than what the normal Bureau De Change gave clients. I agreed to make inquiries and come back to him and also told him I knew of such a place, as I sometimes changed my dollars that I received from clients at this place. I had handed my business card to him when I dropped him off at the hotel and mentioned that he could call me on the number stated on my card. I reminded him that I only lived 10 minutes away and he was welcome to call me if he needed transport."[81] (our underlining)

[81] Exhibit P9, para. [8], record p. 1075(16)-1076(25)

47. Not only did Tongo state in his affidavit that the accused repeated what he had said earlier before he went to the reception, he stated that the person to be killed is a woman who will be arriving later that evening. No mention is made of a business partner who was going to arrive the following day as he had testified. Confronted with these serious discrepancies, Tongo stated that he told the policeman that the person to be killed was the accused's business partner who would arrive the next day. Again he blamed these serious contradictions on mistakes, apparently on the part of Lt. Col. Barkhuizen who wrote things in his affidavit which he never said and left out important details which he had related to Barkhuizen.[82]

48. In his plea agreement Tongo stated that the person to be killed was a client of the accused. [83] Confronted with this discrepancy he did not at first reply and when pushed for an answer he said that it was a "mistake".[84]

49. He also contradicted himself on when the accused undertook to pay him R5 000,00 once the job was finished. As stated above in paragraph 37.1.2 he originally testified that this promise was made the Friday afternoon in front of the Cape Grace Hotel.[85] In cross-examination he was confronted with his affidavit (exhibit P9) and it was

[82] Record, p. 1075(10)-1076(20)
[83] Exhibit P12, para. 25.3
[84] Record, p. 1077(1)-1078(1)
[85] Record, p. 905(22-25)

pointed out to him that no mention of the payment of such an amount was made therein with reference to the events on the Friday. According to his affidavit this was said on the Saturday morning. When asked why no mention is made of the R5 000,00 in his affidavit with regard to the discussion on Friday afternoon, he replied that he forgot to mention it.[86]

50. Although he did not refer to this in his testimony, he confirmed the contents of his affidavit that the accused had asked him whether he knew of a place where he could exchange Dollars for Rands as the accused did not want to produce his passport to do this and wanted a better exchange rate than what the normal Bureau De Change gave clients.[87] In cross-examination he testified that the accused never indicated that he did not want to produce his passport to change money, that is just something that he, Tongo, thought.[88] When asked in cross-examination why he stated in his affidavit that the accused did not want to produce his passport to change money, he again stated that that was "also a mistake".[89]

51. It is submitted that that these material contradictions on the crucial part of his evidence implicating the accused, being the genesis of the

[86] Record, p. 1084(13)-1086(24)
[87] Exhibit P9, para. 8
[88] Record, p. 1087(6-12)
[89] Record, p. 1089(14-19)

conspiracy involving the accused, can simply not be explained away on the basis that the contradictions were "mistakes".

Tongo's interactions with Mbolombo at the Colosseum Hotel on Friday afternoon 12 November 2010

52. As set out in paragraph 37.2.1 above, Tongo testified that he drove from the Cape Grace Hotel to the Protea Colloseum Hotel at Century City to see his friend Mbolombo. He told Mbolombo that he had transported clients from the airport to the Cape Grace Hotel where "he" (presumably a reference to the accused) said that he had a job for him (Tongo). On Mbolombo's question as to what kind of a job this was, Tongo replied that the person wants someone who will be arriving the next day taken out of sight. Mbolombo then said there is a young man that he knows and he is going to phone him and explain to him that there is a job. Mbolombo then phoned this person and explained to him exactly what he, Tongo, had explained to Mbolombo. According to Tongo Mbolombo said to the man on the telephone that "this person (presumably a reference to the accused) said that he wanted his business partner, who will be arriving the next day, taken out of sight and that he is prepared to pay R15 000,00 for the job. Mbolombo enquired whether the person will accept Dollars in payment. The man on the phone said that "they" did not want Dollars, it must be Rands.

53. During cross-examination Tongo testified that he overheard parts of what Mbolombo told the man over the telephone. Mbolombo told him there is a job that he is hearing about from another man that he knows who wants somebody to be killed. He is prepared to pay R15 000,00 but he wants to pay in Dollars. Questioned whether there is anything else that he overheard he replied "those are the things that I can remember since I am saying I was some distance away".[90] This evidence is entirely different from his evidence in chief where he testified that Mbolombo told the man on the telephone that there is a person that wanted his business partner, who will be arriving the next day, taken out of sight and that he is prepared to pay R15 000,00 for the job.

54. Although he made no mention in his evidence in chief of any payment for Mbolombo, he testified in cross-examination that Mbolombo was also going to be paid by the young men. He then explained that that was one of the things discussed over the telephone between Mbolombo and the man and which he now remembers.[91]

55. Tongo further testified that he cannot remember how much money Mbolombo was going to be paid by the young men but it was their concern.[92] Tongo was then confronted with his affidavit (exhibit P9)

[90] Record, p. 1107(9-25)
[91] Record, p. 1108(10)-1109(5)
[92] Record, p. 1109(15-22)

wherein he stated that Mbolombo wanted R5 000,00 for organising Qwabe and that "we should only pay the guy R10 000,00".[93] Tongo explained that Mbolombo did say that he wanted R5 000,00 on which Tongo said to him as to how much money and how he was going to get paid did not concern him he is not getting involved in that.

56. When this was taken further in cross-examination and Tongo was specifically asked whether he did say that or whether the statement is incorrect, he replied "Monde was going to get his share M'Lady. Whether he was going to get R5 000,00, R2 000,00, R1 000,00, I don't know."[94] Thereafter he explained that it might be a mistake, all that he knows is that Mbolombo was going to get his share of the money.[95]

57. He was then confronted with his plea agreement (exhibit P12) where in paragraph 25.4 he stated "Monde said he wanted R5 000,00 for organising the hit man and that we should pay the hit man R10 000,00".[96] To this Tongo replied as follows "I repeat again, Monde was going to get his share, as to how much money his share was, I don't know. That's why I even said in my explanation and my response, I don't know anything about his money. I can't remember him saying

[93] Record, p. 1110(14)-1111(3)
[94] Record, p. 1127(13-19)
[95] Record, p. 1128(2-8)
[96] Record, p. 1128(14-25)

that he wants R5 000,00." When further pressed in cross-examination he conceded the possibility that there was such a discussion.[97]

58. He thereupon testified:

> "Monde, according to what is written here, maybe I can't recall that very well, he wanted R5 000,00, if that is the case. My response to him was the young men are going to pay you.
>
> So you remember that now that he wanted R5 000,00 and that you told him that the young men would be paying him, do I understand you correctly? - That is correct Sir.
>
> Why didn't you tell the police that in your statement? - Maybe that was just forgotten, but it is written down here, Sir.
>
> That was forgotten, but you did not forget twice to relate the fact that Monde wanted R5 000,00 and that the hit man should only be paid R10 000,00, is that correct? - I said everybody makes mistakes, as you also said that I am ZH but I am ZR."[98]

59. This contradictory evidence raises the question why Mbolombo would have told Qwabe on the telephone that the accused is prepared to pay R15 000,00 for the job if his suggestion was to keep R5 000,00 and only pay Qwabe R10 000,00. It is also insightful to see how quickly Tongo can change his version under the pressure of cross-examination. Initially he was quite prepared to testify that Mbolombo said that he wanted R5 000,00.[99] Moments later he testified "That's why I even said in my explanation and my response, I don't know anything about his money. I can't remember him saying that he wants R5 000,00."[100]

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[97] Record, p. 1130(12-16)
[98] Record, p. 1130(24)-1131(13)
[99] Record, p. 1111(4-9)
[100] Record, p. 1129(11-12)

60. Mbolombo in dealing with the interactions between him and Tongo at the Protea Hotel that Friday evening contradicts Tongo on just about every aspect. He testified that Tongo told him that there is something that he wanted to talk to him about. On his question as to what Tongo wanted to talk about, Tongo said to him "is there no one that I know of who is a hit man?".[101] Mbolombo then phoned Qwabe and told him that there is a person with him, whose name is Zola, who is looking for a hit man. Qwabe asked him whether he knew this person. He responded by saying that he does know Tongo whereupon Qwabe asked if they do the job how much are they going to get paid. As Mbolombo did not know he called Zola and switched off the phone. He re-dialled Qwabe's number and told him that Zola is standing next to him and he then asked Zola that these guys want to know how much they would be paid if they do the job whereupon Tongo said R15 000,00. Qwabe then said they should not discuss the matter over the telephone but that they should make arrangements to meet. Thereafter Tongo said that they should discuss it some other time and he left.[102]

61. Mbolombo further testified that on hearing about the R15 000,00 he mentioned to Tongo that he should also get something, even if its R5 000,00, because of his involvement "in all of that".[103] According to

[101] Record, p. 1491(6-7)
[102] Record, p. 1493(4)-1494(9)
[103] Record, p. 1502(3-19)

Mbolombo Tongo did not respond to this.[104] Further in cross-examination he stated that Tongo never responded to him as to how he was going to get the R5 000,00, from whom he was going to get it and there was never a discussion or an arrangement with regard to the R5 000,00.[105]

62. Mbolombo testified that he had no idea on the Friday night who the person was that had to be killed and that he did not ask Tongo about this. This also flies in the face of Tongo's evidence that he explained to Mbolombo that the accused wants his business partner, who was arriving the next day, killed.[106]

63. According to Qwabe he received a phone call from Mbolombo on the Friday who told him that there was job that needed to be done and there is someone that wanted a job done. He told Mbolombo that he could hand over his telephone number to this person who can call him. Mbolombo did not elaborate on what the job entailed.[107] Importantly he also makes no mention of the amount of R15 000,00 and he makes no mention of what Tongo says he had heard Mbolombo telling Qwabe - that there is a man who wanted his business partner, who will be arriving the next day, killed, that he is prepared to pay R15 000,oo

[104] Record, p. 1502(25)
[105] Record, p. 1538(18-24)
[106] Record, p. 1544(4-6); p. 1557(19-21)
[107] Record, p. 112(2-25); p. 116(1-9); p. 183(6-21)

for the job and that he and Mbolombo discussed that Mbolombo will be paid by them.

64. Qwabe also has no recollection that there was any reference to Dollars in his telephonic discussion with Mbolombo and stated that he would have remembered if there was a reference to Dollars.[108] He also denied any arrangement that he and Mngeni would have paid Mbolombo anything. He has no idea why Tongo was of that view.[109]

65. It is submitted that the evidence of Mbolombo (which is itself not credible[110]) does not support Tongo's evidence as to what had been discussed between them at the Protea Hotel. Similarly the evidence of Mbolombo and Qwabe (which is also not credible) does not support gongo's evidence as to what was discussed between Mbolombo and Qwabe on the telephone.

Tongo's telephonic discussion with Qwabe on Friday evening 12 November 2010

66. Tongo testified that he phoned Qwabe later that Friday evening. He wanted to know how things are going whereupon Qwabe replied,

[108] Record, p. 222(4-13)
[109] Record, p. 246(15-18)
[110] see hereunder

everything is fine, he is still going to meet with another man and "he is promising".[111]

67. Qwabe's version of this telephonic discussion completely contradicts Tongo's testimony. According to Qwabe, Tongo told him that he needed someone to be killed and whether he knew of anyone that can do it. At that stage he was in Mngeni's company, who said that he can do it. Tongo thereupon asked for what fee he would be prepared to do it and Mngeni said for R15 000,00. They thereupon agreed to meet the following day.[112]

68. During cross-examination Qwabe testified that Tongo had told him during this phone call that "there was a husband that wanted a wife to be killed".[113] He was with Mngeni at the time who stated that he was prepared to do it for R15 000,00. Qwabe was at pains to stress that the amount of R15 000,00 came from Mngeni and not from Tongo.[114]

69. These two versions of what transpired during this telephone call is simply irreconcilable.

70. In cross-examination Tongo stated that he had phoned the man Mbolombo had spoken to (Qwabe) later that evening. Qwabe

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[111] see paragraph 37.3.1 above
[112] Record, p. 113(7-14); p. 116(25)-117(18)
[113] Record, p. 187(18-20)
[114] Record, p. 192(6-11); p. 189(1)-192(24)

agreed, meaning that he is prepared to kill the person for R15 000,00, but he must also speak to another person.[115] This is a complete contradiction of his evidence in chief.[116]

Tongo's discussion with the accused on Friday evening 12 November 2010

71. According to Tongo he later spoke to the accused who wanted to know whether he had found "the people we spoke about". He replied that he had found them and informed the accused that he had met a young man, who spoke to another young man, who was willing to do the job. He also mentioned that they do not want to be paid in Dollars but in Rands. The accused then enquired where he can change Dollars into Rands. Tongo told him that he knows of such a place and they then arranged to meet the next day at 11:00 a.m. to go and change money.[117] This evidence given by Tongo contradicts what he told the police in his affidavit (exhibit P9) wherein he stated that this discussion about changing Dollars for Rands happened whilst they were discussing the killing of the accused's business partner in the car in front of the Cape Grace Hotel the Friday afternoon.[118] He made no mention of this discussion in his affidavit when he deals with the discussion between him and the accused on the telephone the Friday

[115] Record, p. 1138(8-25)
[116] Record, p. 909(19-22) and para. 59 above
[117] Record, p. 911(12)-912(19)
[118] Exhibit P9, para. 8

evening.[119] It is submitted that this is the result of Tongo deliberately manipulating his evidence as the discussion about changing Dollars into Rands fits in better after his alleged discussion with the accused that the hit men want to be paid in Rands not Dollars on the telephone the Friday evening, than in the car in front of the Cape Grace Hotel the Friday afternoon.

Saturday morning - the money changer and further discussions with the accused

72. There can be no doubt that Tongo wanted to create the impression that the accused had to change Dollars into Rands to be able to pay the hit men and that he was anxious to do so.

73. That is why Tongo testified that he received a call from the accused the next morning just as he was getting into the Waterfront to drop a client, during which the accused asked him where he was and whether he had forgotten about their appointment to go to the money changer. Tongo testified that he replied that he was on his way, he was just dropping a client. He then rushed to the Cape Grace Hotel and just after getting there, the accused walked out of the door. The

[119] Exhibit P9, para. 10

accused told him that they must hurry as his wife is still having a shower or washing.[120]

74. During cross-examination it was demonstrated that this anxiousness that Tongo wanted to create on the part of the accused to go and change money, was simply a lie. CCTV footage shows that the accused and the deceased appeared from their bedroom shortly before 11:15 that Saturday morning. The accused was dressed in shorts, sandals and a grey polo shirt and has his sunglasses on his head. His wife was dressed in white trousers and pink top, also with sunglasses on her head. The Court was informed that there is CCTV footage available (exhibit 4) to show that they went for breakfast and thereafter that they went to the pool.[121] At 11:52:19 Tongo texted the accused and at 11:53 the accused replied to that text saying "Okay. Give me 10 mins."[122] Further CCTV footage shows the accused having changed from pool clothes into trousers and a golf shirt coming out of his room and walking down the corridor. There is also no record of any telephone call made by the accused to Tongo on Saturday morning.[123]

75. It is clear from the CCTV footage and the text message, that the accused had forgotten about the appointment to go to the money changer until Tongo had texted him that he was outside, whereupon

[120] Record, p. 912(20)-913(9)
[121] Exhibit 4; Record, p. 1152(6)-1153(7)
[122] Exhibit F1, p. 13; Record, p. 1153(8)-1154(6)
[123] Record, p. 1157(1-16)

the accused texted Tongo to give him ten minutes to get ready to go to the money changer. The question arises why Tongo wanted to create the impression that the accused was anxious to go to the money changer when that was clearly not the position. One also needs to ask whether the accused would have forgotten about his appointment to go to the money changer if the real reason for this was to obtain funds in Rands to pay the hit men.

76. Tongo's whole version of these events was clearly demonstrated to have been untrue.

77. According to Tongo they discussed how the job should be done on their arrival back at the Cape Grace Hotel from the money changer. The accused said that he wanted the car hi-jacked, they must be robbed, whereafter the hi-jackers must first drop Tongo and then himself whereafter they must kill the woman. It was agreed that Tongo would pick the accused and the woman up at 7:30 p.m. Tongo would drive around the Waterfront with them whereafter he will drive with them to the "location". On the accused's question which "location" is very busy during the night Tongo replied Gugulethu. They then parted company.[124]

[124] See para. 37.5 above

78. During cross-examination Tongo confirmed that this discussion took place after their arrival from the money changer at the Cape Grace Hotel and whilst they were sitting in the parked car.[125] He was then shown the CCTV footage of them arriving from the money changer. The car had hardly stopped when the accused alighted and walked towards the hotel. The car then leaves. There clearly was no time during which any type of discussion could have ensued after their arrival at the Cape Grace Hotel from the money changer.[126]

79. Having been caught out on this lie, Tongo changed tack and stated that the conversation actually took place in the motor vehicle whilst he was driving. Confronted with this discrepancy he again resorted to calling it a mistake.[127]

Saturday afternoon - meeting between Tongo, Qwabe and Mngeni

80. Tongo testified that he made arrangements to meet with Mbolombo and Qwabe that afternoon. All three of them could however not meet as he was busy with his business. He later took Mbolombo to work and asked Mbolombo to tell Qwabe that he, Tongo, will meet him at Khaya Bazaar in Khayelitsha. He later phoned Qwabe and told him to wait at a bus stop in Khayelitsha which he did. Qwabe arrived and introduced himself as Spra and told Tongo that they must meet the person who is

[125] Record, p. 1160(3-11)
[126] Record, p. 1160(12)-1161(10)
[127] Record, p. 1161(11)-1163(17)

going to work with him. They drove to where Mngeni was waiting. Mngeni also got into the car and introduced himself as Xolile.

81. He further testified that he explained to Qwabe and Mngeni what the accused wanted done. He said the man wants his business partner, who was going to arrive that day, killed. He wants it to look like a hi-jacking. They must first drop Tongo and thereafter the accused, whereafter they must kill the woman. Tongo then explained that he was going to pick the man and the woman up at 7:30 p.m., drive around Cape Town and then into Gugulethu past Mzoli's and Pitso to a T-junction where Qwabe and Mngeni should wait for him. According to Tongo they enquired from him whether the money had been exchanged to which he replied positively. One of the men said that he was going to look for a kierie, meaning a firearm.[128]

82. In cross-examination Tongo further testified that he had told Qwabe and Mngeni that the money would be left in the cubbyhole because that was what was agreed with the accused that morning.[129] Tongo was then confronted with what he told Col. Barkhuizen in paragraph 17 of exhibit P9 where he stated that "the first man (Qwabe) said that we had to leave the R15000,00 in the cubbyhole of my vehicle, as they wanted their payment available to them as soon as the job had been done". He then confirms the contents of his statement (exhibit P9) and

[128] See para. 37.6 above.
[129] Record, p. 1197(15-19); p. 1184(1-24)

told the Court explicitly that it was the decision of Qwabe and Mngeni that the R15 000,00 had to be left in the cubbyhole.[130] Although he stated at the beginning of this line of cross-examination that the accused agreed with him that morning that the money would be left in the cubbyhole[131] he can suddenly no longer remember that the accused had said this.[132]

83. Tongo in his evidence in chief testified that he explained to Qwabe and Mngeni how he would be driving into Gugulethu and where they had to wait for him at the T-junction.[133] In cross-examination he became extremely vague as to who suggested the place where the hi-jack was to take place. At first he said that was decided between him and the young men, then he indicated that Qwabe and Mngeni explained where they would be waiting for him and ended off by saying "I just cannot remember who said what to what and who mentioned what, that's just one of the things that I can still remember M'Lady."[134] This vagueness was most probably the result of the fact that whereas in his evidence in chief he testified without any qualification that he explained to Qwabe and Mngeni where the hi-jacking should take place, in his statement to Barkhuizen (exhibit P9) he stated that

[130] Record, p. 1197(19)-1198(25)
[131] Record, p. 1197(15-18)
[132] Record, p. 1199(1-3)
[133] Record, p. 919(22)-920(4)
[134] Record, p. 1188(15)-1191(10)

Qwabe gave him instructions as to how he should drive and where they would be waiting for him.[135]

84. The following statement contained in paragraph 17 of exhibit P19 was taken up with Tongo in cross-examination:

> "I then parked on the street corner and we held a discussion. The first man explained what I had told him to the second man and they both said that they had spoken to Monde the previous day and they knew what was expected of them."

He confirmed in his testimony that that is what had happened.[136] When the question was taken up with him as to how Mbolombo could have known, the previous day, what he had explained to Qwabe at this meeting Saturday afternoon, he again sought refuge by calling it a mistake.[137]

85. Questioned about what would happen to his motor vehicle after the woman had been killed he testified that Qwabe and Mngeni had to abandon his car on the spot where they were going to kill the woman.[138] When it was pointed out to him that he makes about R30 000,00 to R40 000,00 with his car in a busy month, that according to him he would be paid R5 000,00 by the accused after the job and that his car would just be left unattended, most probably with the keys in the ignition and open, he replied that he did not know where they

[135] Exhibit P9, par. 17
[136] Record, p. 1195(10-19)
[137] Record, p. 1196(5)-1197(6)
[138] Record, p. 1192(1-8)

were going to leave the car and that he would have dealt with what would happen with his car if and when it arose.[139] When he was later confronted with the telephonic discussion between him and Mbolombo at 18:38 the Saturday evening, he testified that once "this thing has been done" Qwabe and Mngeni was to leave the car near the car wash that was allegedly near to Mbolombo's home in Khayelitsha."[140]

86. When he was confronted with this glaring discrepancy in his evidence he tried to avoid answering the question and in the end could not give a proper explanation.[141]

87. Although Tongo testified that both Qwabe and Mngeni introduced themselves to him when they met the Saturday afternoon, he previously denied that he knew their names.[142] He conceded in cross-examination that from then on he knew he was dealing with Spra (Qwabe) and Xolile (Mngeni).[143] He was then confronted with the contents of his affidavit (P9) wherein he stated that neither Qwabe nor Mngeni was introduced to him.[144] He stated that that was also "a mistake", as they were introduced to him.[145] It was then pointed out to him that throughout the whole of his affidavit he referred to Qwabe as

[139] Record, p. 1193(5-21)
[140] Record, p. 1272(12)-1273(8); p. 1273(19)-1274(22)
[141] Record, p. 1275(3)-1276(14)
[142] Record, p. 918(11)-919(6)
[143] Record, p. 1092(5-19)
[144] Exhibit P9, para. 17; p. 1093(4-25)
[145] Record, p. 1094(1-2)

the first man and Mngeni as the second man and that in the penultimate paragraph of his affidavit, he stated that he saw the first man and the second man when he was being transported to court on Monday, 22 November 2010 but that he had since heard that the first man is Qwabe (aka Spra). He first tried to explain that the police wrote incorrectly. Then he explained that he couldn't remember their names but as the time went on he "just remembered their names again". It was pointed out to him that he should have told the police that they were introduced to him but that he has forgotten their names instead of stating at two different places in his affidavit that they were not introduced to him. To this he replied "let's say then that's a mistake that happened that I never mentioned but they did introduce themselves to me and I just forgot their names but as time went on I then remembered their names again".[146] It was then pointed out to him that the affidavit was made in the presence of his legal representative. Tongo confirmed that his legal representative knew his full story and that one would expect Mr De Grass to have pointed out the mistake to him. To this Tongo replied that De Grass could also have made a mistake.[147]

88. Tongo was confronted with the contact list on his cellphone where Qwabe's number was saved under the name Spra, to which he replied

[146] Record, p. 1095(2)-1096(2)
[147] Record, p. 1096(3-16)

that he forgot his name and after some time he remembered it again.[148]

89. When it was taken up with him again why he referred to Qwabe and Mngeni as the first man and the second man that weren't introduced to him in his affidavit, he replied "I'm repeating that they did introduce themselves. The fact that I forgot it's a mistake that can be done by anybody and I then remembered their names again."[149]

90. It is submitted that Tongo deliberately brought the investigating officers under the impression that he did not know the names of Qwabe and Mngeni, whereas he full well knew who they were and what their names were. This clearly demonstrates the deviousness of this witness.

91. Qwabe testified that at their meeting Tongo told them that "there was a husband that wanted the wife to be killed and it has to look like a hi-jacking. So he told us which route he will be taking, you know, that we'll be going to Gugulethu."[150] They also told Tongo to leave the money in the cubbyhole.[151] Far from supporting Tongo's version of his discussion with Qwabe and Tongo, this contradicts Tongo's evidence materially. Tongo maintained throughout that his agreement with the accused entailed the killing of the accused's business partner, not his

[148] Record, p. 1096(17)-1097(10)
[149] Record, p. 1097(11-18)
[150] Record, p. 120(9-16)
[151] Record, p. 121(10-11); p. 198(5-12)

wife. He only learnt from the police in the early hours of Sunday morning that it was the accused's wife who was with him in the car.

Saturday evening - Cape Town - Gugulethu

92. On Saturday evening Tongo was supposed to pick the accused and the deceased up at 7:30 p.m.. He was however running late and when the accused enquired telephonically where he was, he told him that he was delayed but he was on his way.[152]

93. He testified that on arriving at the Cape Grace Hotel, he first cleaned his car and then engaged the child locks on both rear doors. He thereafter texted the accused. The accused came out with a lady who he did not recognise. They got into the car and they drove around Cape Town and thereafter to Gugulethu.[153]

94. Tongo drove to the T-junction in Gugulethu as agreed with Qwabe and Mngeni but they were not there. He then informed the accused and the lady that they can go to a restaurant on the beach in Somerset (Strand). When he was about to join the N2, he received a text from the accused enquiring what is happening. On joining the N2 he also

[152]see para. 37.8.1 above
[153] see para. 37.8.2 above

had a call from Qwabe apologising and saying that they had trouble with the car.[154]

95. Tongo told Qwabe that they were going towards Somerset. It was his suggestion that they must go to the restaurant in Somerset as he knew that the accused would support him.[155]

96. Tongo stated that he was late because he was scared ("my knees were trembling"). On a question why he did not just call it off and did not go to the hotel to pick them up, he replied "it's because the accused person once said to me I must remember that I'm the only person knowing this, that he has spoken to. And? ... That's one of the things that made my knees to be trembling. And, secondly, the accused person also mentioned the fact that he is going to enlarge or increase my business by referring people to me."[156]

97. Insofar as Tongo tried to say that the accused threatened him, it is clearly nonsense. No mention of such a threat was referred to in his comprehensive affidavit, exhibit P9. Furthermore, that he would take part in a murder based on a promise by a foreigner that he was going to increase his business by referring people to him, is simply unbelievable. This alleged promise which would have been extremely

[154] see para. 37.8.3 above
[155] see para. 37.8.4 above
[156] Record, p. 1211(10)-1212(2)

important in the context was also not referred to in his comprehensive affidavit, exhibit P9.

98. When regard is had to the CCTV video clip (exhibit 4H) showing Tongo arriving at the Cape Grace Hotel and engaging the child locks on both rear doors, the callousness of his actions becomes clear. This is not the actions of a man who is scared, but calculated actions to ensure that his victims would not be able to leave the car when the hi-jack is staged by Qwabe and Mngeni.[157] The fact that he first parked in front of the hotel, and then moved his vehicle to another parking out of view of the front door, before he engaged the child locks, demonstrates cold planning and can never be the actions of a scared man. His excuse was that he moved his car so that the porters could not see that he was throwing rubbish under the car does not hold water. At no stage did he bend into the car to remove rubbish from the floor of the vehicle as he wanted the court to believe.[158]

99. It must also be pointed out that no mention was made in his comprehensive affidavit (P9) that he had engaged the child locks prior to picking up the accused and the deceased. He was clearly

[157] Record, p. 1212(3-16)
[158] Record, p. 1217(12)-1222(11)

confronted with the CCTV footage and thereafter testified about this in chief.[159]

100. His evidence that he did not recognise the woman with the accused as the same lady that he picked up from the airport the previous day is contradicted by his statement exhibit P9. In his affidavit he describes what happened when he arrived at the hotel as follows:

> "When I arrived at the hotel I sent Dewani a text to inform him I was waiting outside. Dewani and the same lady got into the car." [160]

101. When this was taken up with him in cross-examination he replied as follows:

> "I can see this is written and I signed it, but I never said the same lady.
>
> COURT: Was it the police that made that mistake? - That is correct, M'Lady.
>
> MR VAN ZYL: The person who took this statement, judging from the deposition at the end thereof, which is the normal way the police work, is Lt. Col. Barkhuizen, an extremely experienced investigating officer who, at the time most definitely would have known how important a case this is. Can you think of any reason why he would put something in an affidavit that you didn't say? - - That can be a mistake on his part, but I cannot answer on his behalf."[161]

102. According to Tongo's evidence he had arranged with Qwabe and Mngeni that he would be at the agreed hi-jack spot at 8:00 p.m.. As agreed with them he phoned Qwabe at 20:09:21, shortly after he had left the Cape Grace Hotel with the accused and the deceased.[162]

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[159] Record, p. 922(1-4)
[160] Exhibit P9, par. 22
[161] Record, p. 1082(4-15)
[162] Time line 5, exhibit P11

103. According to Tongo he had agreed with Qwabe and Mngeni that the R15 000,00 they would be paid for killing the deceased, would be left in the cubbyhole of his vehicle. He however drove to the agreed hi-jack place with the deceased and the accused in the car without the money being in the cubbyhole and without even establishing from the accused whether he had the money with him.[163] It is simply unbelievable that Tongo, knowing that Qwabe and Mngeni are dangerous people, would not ensure that the money was in the car if not in the cubbyhole, before he drove to the agreed hi-jack spot, if that was indeed the agreement with the accused and Qwabe and Mngeni.

104. It is insightful to note that according to Mbolombo, Tongo had told him that he was supposed to have met with Qwabe "in order to give them their money, but they could not meet".[164] This would mean that not only did Tongo tell him that he needed to pay the hit men up front (and not after the job had been done), it also contradicts Tongo's evidence as to the arrangement he allegedly made with the accused that morning for the money to be put in the cubbyhole or his later evidence that Qwabe told him that the money must be placed in the cubbyhole.

105. According to Tongo he expected the hi-jacking to take place when he first drove into Gugulethu and there was no question of him taking the

[163] Record, p. 1204(9)-1208(8)
[164] Record, p. 1504(4)-1599(19)

accused and the deceased to a restaurant in Somerset West area for dinner. When the hi-jack did not happen he, off his own bat, proceeded to drive in the direction of Somerset West and told his fares that they can go and have something to eat in a restaurant on the beach in Somerset (Strand). This is also a lie. The objective facts show that the accused had booked a table at 96 Winery Road Restaurant in the Somerset West area for 2 people at 21h30 and that he had requested a romantic table. Furthermore, Tongo in his affidavit (P9) stated in paragraph 22 thereof that after he had picked the accused and the deceased up from the Cape Grace Hotel, the accused "instructed me to first drive around in town as he wanted to see what the city looked like at night and then through to Somerset West where they planned to have dinner". When this was taken up with him, he again said that was a mistake.[165] Mbolombo also testified (for what it is worth) that Tongo had told him that he would be taking the couple to a restaurant in Somerset West where they would have something to eat for the evening.[166]

106. When Tongo was asked whether there was a lot of laughter between the accused and the deceased in the car, he replied that they were "smiling". He stated that he saw them smiling in the rear view mirror. Tongo clearly did not want to concede that they were laughing, forgetting that he testified in chief that there was a lot of laughter in the

[165] Record, p. 1224(22)-1225(24)
[166] Record, p. 1509(2-8)

car. When this was taken up with him he stated "they are smiling and they were laughing".[167] This bit of evidence again underlines the deviousness of this witness.

107. Tongo also testified that when the hi-jack did not take place and before he rejoined the N2, he received a text from the accused enquiring what is happening.[168] When it was pointed out to him that there was no such SMS on the records (which was common cause between the parties) he stated that the records are wrong.[169] Again the objective facts show that Tongo was lying in this attempt to further incriminate the accused. Similarly Tongo claimed that there was telephonic communication between him and the accused whilst they were underway from Gugulethu to the Strand. Confronted with the documentary evidence that there was no such communication indicated on the documentation, he again stated that there might be a problem with the records.[170]

108. According to Tongo it was decided between him, Monde and Qwabe, while he was still on his way to the Strand, that they will meet at the hi-jack place later.[171] The objective facts show that there was no telephonic communication between Monde and Tongo from the time that they had left the Cape Grace Hotel until after they arrived at the

[167] Record, p. 1222(21)-1223(14)
[168] Record p. 923(8-10); p. 1228(19-24)
[169] Record, p. 1228(25)-1230(20)
[170] Record, p. 1232(25)-1233(18)
[171] Record, p. 1231(7)-1232(10)

Surf Side Restaurant.[172] Although there were a number of phone calls between Mbolombo and Qwabe during this period.

109. Qwabe testified that when the first hi-jack attempt failed, he agreed with Tongo "to let the matter stand over for another time". Tongo denied this evidence of Qwabe and testified that it was decided that they were going to wait for him at the place that they decided on.[173]

110. Tongo testified that he wanted Qwabe and Mngeni to come to Somerset West to do the hi-jacking there.[174] Qwabe however told him that Somerset West was "wet", meaning that there were too many police officers there.[175] They then decided that Qwabe and Mngeni were going to wait for them on the agreed place, although they never set a time.[176]

111. He was confronted with his affidavit (exhibit P9) and referred to paragraph 24 thereof wherein he stated that Mbolombo contacted him and told him that Somerset West was "wet". He did not understand what Mbolombo was trying to say and Mbolombo explained that this means that there were a lot of police officers around in Somerset West. He thereafter received another call from Qwabe who informed him

[172] Exhibit P11; time lines 5 and 6
[173] Record, p. 1235(11-14)
[174] Record, p. 1259(15-24)
[175] Record, p. 1259(25)-1260(9)
[176] Record, p. 1260(13-19)

that they would wait for him at the spot.[177] He then claimed that this was a mistake made in his affidavit, as Qwabe was the one that told him that Somerset West was "wet" and not Monde. He had difficulty in explaining why he said in his affidavit that he did not understand what the term "wet" meant and stated that he wanted him to explain "in the manner which I was also aware of".[178]

Saturday evening - The Strand

112. On their arrival at the Strand, Tongo testified that he and the accused were walking ahead of the lady on their way to the restaurant. The accused then asked him softly what has happened. He explained to the accused that the men were delayed as a result of a problem with a motor vehicle, but that they are going to wait in Gugulethu. The accused then told him that he must make sure that everything is going well.[179] He was confronted with his affidavit (exhibit P9) wherein he stated the following:

> "Dewani and the lady first took a stroll on the beach and then I walked with them to the restaurant. At the entrance the lady went in and Dewani turned around and spoke to me, he asked what is happening, he appeared to be stressed and then threatened me. He said if the job was not done that evening, he was going to kill me. I told him that I would call the man I had arranged for the job and ask him what was happening. I then went to my car while Dewani went into the restaurant to have supper."[180]

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[177] Record, p. 1261(5-24)
[178] Record, p. 1262(21)-1263(6)
[179] see para. 37.1.1 above; record p. 1237(2-7)
[180] Exhibit P9, para. 24

113. He then testified that what is contained in his affidavit it not the truth, as the accused never said that he was going to kill him. He stated that a mistake was made "maybe the one who typed this, typed wrong or maybe a mistake." He was then asked:

> "Did you tell Col. Barkhuizen in the presence of your attorney when this statement was taken down, that the accused at the Surf Side Restaurant asked you what's happened and then threatened you by saying if the job was not done that evening, he was going to kill you? Did you tell Col. Barkhuizen that? - - I never that M'Lady. I said he said I must remember I am the one who is having knowledge.
>
> So Col. Barkhuizen simply wrote this down although you never said it? - - It's the same as the mistake that he made by saying: "Oh ja that was read (sic), same lady".

114. This evidence clearly demonstrates that Tongo is a completely unreliable witness.

115. Also the second passage in his affidavit that he told the accused "that I would call the man I had arranged for the job and ask him what was happening"[181] was contradicted by what Tongo testified namely, that after the accused had asked him why this thing they decided on did not happen, he responded by saying "I don't know, but the young men said that they encountered some problems with the motor vehicle ...".[182] Why would he tell the accused that he would call the man he had arranged for the job to enquire what was happening, when

[181] Exhibit P9, par. 24
[182] Record, p. 1237(4-6)

according to his testimony he already knew what the problem was. He simply avoided giving a straight answer to these questions.[183]

116. Tongo further contradicted his evidence in this honourable Court in paragraph 24 of his affidavit, where he told this Court that he and the accused were walking ahead of the lady, who was following them, when the accused enquired why the thing that they decided on did not happen[184] he stated something completely different in his affidavit:

> "Dewani and the lady first took a stroll on the beach and then I walked with them to the restaurant. At the entrance the lady went in and Dewani turned around and spoke to me. He asked "what is happening?"

Tongo could not, not surprisingly, explain this contradiction.[185]

117. The extent to which Tongo was prepared to lie to incriminate the accused was amply demonstrated by the following:

117.1. According to Tongo, while they were walking towards the Surf Side Restaurant the accused asked him what had happened, meaning why the hi-jack had not taken place.[186] Tongo explained that the man had a problem with a motor vehicle, but that they were going to wait in Gugulethu. To this the accused

[183] Record, p. 1241(9)-1243(5)
[184] Record, p. 971(16-20)
[185] Record, p. 1244(14-23)
[186] Record, p. 971(16-20)

said he must make sure that everything is going well, meaning that the attack will be carried out.[187]

117.2. As was pointed out above in his affidavit (exhibit P9, par. 24) he stated that the accused asked what is happening and then threatened him by saying if the job was not done that evening he was going to kill him.[188]

117.3. The objective evidence however tells a completely different story. At 21:31:55 Mbolombo called Qwabe. In the course of this telephone discussion he told Qwabe "It's that thing we were talking about, it must happen today".[189] Mbolombo who had not spoken to Tongo since 18:38[190] is clearly instructing Qwabe that the hi-jacking must take place that night. Tongo simply refused to deal with the questions pertaining to this discussion between Mbolombo and Qwabe by stating that he was not involved in the discussion and that he did not know what they were talking about.[191]

118. Tongo further testified that during the discussion between him and the accused, whilst they were in Somerset (Strand) the accused told him

[187] Record, p. 972(12-17)
[188] Exhibit P9, para. 24
[189] Record, p. 1279(10-22); exhibit 2/21A(1)
[190] Exhibit P11, time line 6
[191] Record, p. 1280(1)-1282(14)

that he had put the money in the pouch of the front seat.[192] He further testified that he conveyed this knowledge to the young men after he had been informed thereof. He could not remember whether he had sent a text message or whether he made a telephone call, but he informed them that the money was behind the left front passenger seat before they left the Strand.[193] He was then confronted with what he had stated in his affidavit (exhibit P9) where he stated the following:

> "Whilst I was driving - it was either on the way to Somerset West or after we had departed from Somerset West - I realised that Dewani had not discussed the money that was destined to be paid over to the men. I then sent him a text message "don't forget the money!". He then answered - also by text - informing me that the money was in an envelope in a pouch behind the front passenger seat."[194]

119. He confirmed that this is what he had told Col. Barkhuizen but stated that it was not the truth.[195] In trying to explain this discrepancy between his evidence and his affidavit he said "it's going back to what I said M'Lady. As I said, that as time goes by or goes on, some of the things just resurface, and now I can remember some of the things much better, or well."[196] He then goes on to give a long explanation at the end of which he stated that there might be "some mistake in

[192] Record, p. 1297(17)-1298(10)
[193] Record, p. 1298(18)-1299(22)
[194] Exhibit P9, para. 27
[195] Record, p. 1303(2-3)
[196] Record, p. 1309(5-18)

there".[197] This evidence again underlines the fact that Tongo is not to be believed.

120. Tongo, in cross-examination, testified that by the time he arrived at the hi-jack spot that night, Qwabe knew that the money was in the pouch behind the front passenger seat. There would accordingly have been no need for him to still ask where the money is or for Tongo to tell him where the money is.[198] Yet Qwabe testified that as they were ordering Tongo out of their car after the hi-jack, he told them that the money is in the pouch behind the front passenger seat.[199]

The Hi-jack

121. In his evidence in chief Tongo testified that when they arrived at the hi-jack spot, Qwabe and Mngeni, who were both armed with handguns, "hi-jacked" them. He, Tongo, was forced onto the rear seat next to the accused and the lady, Qwabe got behind the wheel and Mngeni into the front passenger seat. At a stop sign near the police barracks Mngeni opened the door where Tongo was seated from the outside and he was told to get out.[200]

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[197] Record, p. 1301(9)-1302(3)
[198] Record, p. 1303(6-15)
[199] Record, p. 132
[200] See paras. 37.10.2 and 37.10.3 above

122. Tongo's evidence that he was forced to the back seat, contradicts the accused's plea explanation wherein the accused stated that after the attackers had taken over the car, there was a person with a gun in his hand next to him on the seat.[201] When Tongo was confronted with the accused's version in cross-examination, he replied "those are lies".[202] However, in his affidavit (exhibit P9), he stated the following:

> "The first man got into the driver's seat and pushed me over to the passenger seat. The second man got into the back of the vehicle with Dewani and the lady."[203]

He could not explain this discrepancy between his evidence and his affidavit.[204]

123. Having placed himself on the back seat, with the child lock engaged he had to explain how he left the vehicle. This he did by stating that Mngeni (who was in the front seat) opened the door by stretching out his arm and telling him that he had to get off the car.[205] In his affidavit (exhibit P9) wherein he had explained that he was pushed over to the passenger seat, a different picture emerged. There he stated "... the driver (Qwabe) put his firearm against my head and ordered me to get out of the vehicle." He also made no mention of the fact that Mngeni opened the door for him, something which would not have been

[201] Plea explanation, Exhibit R, para. 76
[202] Record, p. 1305(10-21)
[203] Exhibit P9, para. 28
[204] Record, p. 1305(22)-1307(16)
[205] Record, p. 1308(6-19)

necessary as there are no child locks on the front doors. When this was taken up with him in cross-examination, he first said that what is contained in his affidavit is correct, to immediately qualify that answer by testifying "Qwabe never pointed his gun at me. They were - both of them were talking, instructing me to get out, and that's what I did, since I was aware of this."[206] When asked to explain why he told Col. Barkhuizen that the driver put his firearm against his head he stated "That's a mistake, M'Lady."[207] Again Tongo demonstrated his unreliability.

The Cape Grace Hotel - After the incident: CCTV footage of the terrace

124. A CCTV clip was shown with the accused and Tongo on the terrace of the Cape Grace Hotel. A cleaner can be seen entering the area where the accused and Tongo were. He leaves after the accused had asked him to give them some privacy. According to Tongo the accused continually kept asking him whether he was fine and he also wanted to know whether the "job" had been done. Tongo replied that he did not know. During the time that they were together as depicted on the CCTV clip, one of the things the accused wanted to know from him, was whether he had any information about what had happened,

[206] Record, p. 1399(1-11)
[207] Record, p. 1311(20-25)

whether he had heard anything and whether the men really did what they were supposed to do.[208]

125. One would have thought that this information would have been conveyed to Col. Barkhuizen when Tongo made his affidavit on 26 November 2010. He was taken to his affidavit under cross-examination where he said the following:

> "The police then took me through to the Cape Grace Hotel. When we arrived there a marked police vehicle from the Harare police station was also parked there. When we got to the reception I saw another two policemen standing with Dewani in the reception area. I then pointed out Dewani to them. Dewani spoke to me briefly and enquired if I was okay. The policemen then had a discussion while I sat on a couch. I then heard the policemen referring to the lady as Dewani's wife. This was the first time that I realised that the lady that Dewani wanted us to murder was his wife. Dewani then went with the police to another office."[209]

126. When it was taken up with him in cross-examination that he made no mention of this important discussion with the accused on the terrace of the Cape Grace Hotel and whether he did not regard this as important, he gave a nonsensical answer.[210] The fact remains that if this discussion really took place, it is incomprehensible why he did not tell Col. Barhuizen about it. This bit of evidence has all the hallmarks of a story concocted by Tongo after he had viewed the CCTV footage.

127. According to Tongo he was offered R5 000,00 by the accused to arrange the murder of his wife. They were clearly together and alone

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[208] See sub-para. 37.11.5, 37.11,6 and 37.11.7 above
[209] Exhibit P9, para. 33
[210] Record, p. 1318(5-20)

for a considerable period that Sunday morning after the incident, yet Tongo never raised the issue of the money owing, how and when he can expect payment, with the accused.[211]

Tuesday

128. Tongo testified that members of the media tried to contact him as a result of which he phoned the police officer he dealt with at Gugulethu (Capt. Lutchman) and explained to him that there were people bothering him. After speaking to Capt. Lutchman the accused came on line and spoke to him. The first thing the accused asked was whether he was fine. He replied that he was not fine but he was still alive. The accused then said to him there is a number at which he was going to call him as he wanted to pay him the outstanding money. The accused then phoned him and told him that he must come and collect the outstanding money. They were going to meet at a bridge near the hotel. He cannot remember the time arranged but from the time that the accused had phoned him it was about two hours later that they were to meet. Tongo went to where he was supposed to meet the accused where he waited but the accused did not show up. The accused informed him that he could not leave the hotel as there were members of the media outside and he asked Tongo to come into the hotel. This he did. He saw the accused standing at the beginning

[211] Record, p. 1319(20)-1320(5)

of a passage. The accused signalled him to follow him. They went into the communications centre of the hotel where the accused gave him an envelope in a plastic bag whereafter the accused left the room. He then went to the toilet where he opened the envelope and found only R1 000,00 inside. He was angry, folded the envelope and put it into his back pocket and left the hotel carrying the plastic bag in his hand. As he left the toilet he looked down the passage to his right and as he did not see the accused he left the hotel.[212]

129. In cross-examination it was taken up with him that he had made no mention of having received any money from the accused in his affidavit (P9). He first made mention of these facts in a statement dated 2 December 2010, most probably after he was confronted with the CCTV footage. Therein he stated that he was scared to admit that he had received money because he believed that it would have increased his participation in the offence.[213] In evidence he gave a different reason for not disclosing this:

> "The reason for that, the reason for me to admit that with them, and I did not admit that from the beginning or on the beginning, it's because I was scared M'Lady, for such a big job that I've done, then now I only get an amount of R1 000,00.
>
> MR VAN ZYL: So you made a statement in which you told the police everything, according to you, what happened, how the conspiracy went,

[212] See sub-para. 37.12.1 and 37.12.2 above
[213] Exhibit P14, para. 3

> who did what, but you were scared to tell them that you received R1 000,00. Is that what you say? - - That is correct M'Lady."[214]

130. The truth is most probably that he did not want to tell the police that he had received a thank you card with R1 000,00 from the accused, as that would have flown in the face of his whole story.

131. Tongo explained that he had put the R1 000,00 (in R100,00 notes) in his pocket and folded the envelope and also put that in his pocket. He then walked with the empty plastic bag to the front door and left the hotel. He was asked why he did not throw the empty plastic bag into the refuse bin in the toilet and he replied that he did not have any reason.[215] During the viewing of the CCTV footage (exhibit 4J) it was pointed out to the court that there is a shadow of something inside the plastic bag and that the manner in which Tongo carried the bag also indicated that there was something inside.[216] When it was taken up with Tongo in cross-examination that if one looks at how he carried the plastic bag and the silhouette of something square like an envelope or a card in the bag, he replied "that's not true M'Lady. That plastic is a little bit hard. If you are holding it correctly on the top side, that's now where the handles are, it might appear as if there is something inside the plastic bag, whereas it's empty and with nothing inside. It might appear to you as if there is something inside, whereas there is actually

[214] Record, p. 1332(13-22)
[215] Record, p. 1342(3-7)
[216] Record, p. 1340(21)-1341(4)

nothing inside it."[217] It is clear from this answer that Tongo knew that that plastic bag was not empty.

132. Tongo's evidence that he was angry when he left the toilet area and that he looked down the passage to his right but as he did not see the accused he left the hotel, was taken up with him in cross-examination. The evidence that follows on that question speaks volumes for the credibility of this witness:

> "And when you left the toilet area you were angry. Did you look around to see if you could see the accused somewhere? - - I did not look around by means of turning my head around. But what I did, was using the corner of my eye to see whether I won't be able to see the accused person. But I did not use or move any body part to look around on trying to get to see where the accused person is. Did you try to look if you don't see him there? - - Yes M'Lady.
>
> COURT: Why did you not move your head? - - Because I was feeling angry inside M'Lady and I was just - I just wanted to get out of that place, because now I was appearing like a fool.
>
> MR VAN ZYL: So you just looked like at the corner of your eye if you didn't see him - - That's correct M'Lady that's what I did. You didn't think when you left the toilet area, to perhaps look down the passage to see if he is not around there somewhere? - - As I have said M'Lady, I never turned my neck or my head to look, but I just used the corner of my eye, did not see anybody, and then I left."[218]

133. Tongo clearly gave this unbelievable piece of evidence to tie in with the fact that the CCTV footage shows that he did not look around but walked straight out of the hotel.

134. In passing it is pointed out that his evidence that he had to meet the accused two hours after the call at the bridge flies in the face of his

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[217] Record, p. 1342(8-18)
[218] Record, p. 1342(19)-1343(15)

evidence that he had told the accused that he may have a problem finding transport.[219]

135. According to Tongo they were just inside the communication centre, the accused handed him the parcel and said thank you and then they left.[220] Yet they were inside that room for one minute and four seconds according to the CCTV footage. Clearly more happened than the handing over of the parcel, a thank you and then leaving the room.[221]

136. In cross-examination Tongo testified that Mbolombo contacted him and demanded his money from him. He explained to him that he could not ask money from him, he must ask the young men for his money. Bearing in mind Tongo's earlier evidence that the young men were going to pay Mbolombo and that, that is one of the things that he heard when Mbolombo was speaking to the young men[222] and his evidence that he made it clear to Mbolombo that he should not look at him for payment, it is between him and the young men, it is strange that Mbolombo would now demand his money from Tongo.[223] It also contradicts what he had stated in his affidavit (exhibit P9) where he said the following:

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[219] Record, p. 1335(25)-1336(7)
[220] Record, p. 1344(7-14)
[221] Record, p. 1345(15-22)
[222] Record, p. 1108(10)-1109(3)
[223] Record, p. 1349(18-24)

> "On Wednesday the 17th of November 2010 I called Monde to enquire if the first man had paid him his R5 000,00. He said that he had not been paid but was on his way to find the first man to enquire where his money was."[224]

When the contradiction between his evidence and his statement was taken up with him he avoided the question.[225]

Mbolombo's role

137. In his evidence in chief Tongo was asked what Mbolombo's role in this incident was. He replied:

> "Monde is the one who connected me to those young men that I didn't know.
>
> Yes and was that his primary role, was that his role? - - That's what he did M'Lady."[226]

138. In cross-examination he indicated that Monde's only contribution was that he had phoned the young man after Tongo had spoken to him at the Protea Colloseum Hotel.[227] He was then specifically asked the following:

> "Mr Tongo, did Mr Monde play any further role in what happened here, that ended in the death of the deceased, apart from putting you in contact with Qwabe? - - What I remember that he put me in touch with Qwabe and again phoned me after the incident had already taken place, asking for his money. Those are the things that I can remember."[228]

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[224] Exhibit P9, para. 38
[225] Record, p. 1352(2-24)
[226] Record, p. 1022(12-16)
[227] Record, p. 1132(12-16)
[228] Record, p. 1135(1-6)

139. When this was taken further with him, he testified that he and Mbolombo contacted each other the said Saturday night as "I wanted to know from him why did the young man not do the job, and Monde then said he is going to contact them while we were on our way to Somerset. If I again remember correctly, me and Monde contacted each other in the Strand and we again discussed as to what's up with this young man. Those are the things that I can remember."[229]

140. Later in cross-examination he extended Mbolombo's role by testifying that his role was to assist him (Tongo) "to make sure that everything just happens ...".[230] He then explained that Mbolombo assisted him by phoning the young men and thereafter explaining to him what they are saying and "... also when I was phoning the young men he would see that what was said or conveyed by Monde to me is just like, it's the same information that Monde gave to me or what the young men say was the same as what Monde said."[231] On a question why he could not phone Qwabe himself, he stated that Mbolombo knew Qwabe. He was forced to concede that he also knew Qwabe and Mngeni as he had met them the Saturday afternoon when he made the

[229] Record, p. 1135(11-21)
[230] Record, p. 1263(7-14)
[231] Record, p. 1263(15-22)

arrangements, according to his evidence, Mbolombo was not present but at work.[232]

141. Tongo was then confronted with the various recorded telephone calls from which it was clear that Mbolombo played a much bigger role than simply being a link or an assistant to Tongo. Tongo however kept on protecting Mbolombo by sticking to his version that Mbolombo was merely his assistant.[233]

142. Tongo could not explain why, if Mbolombo was assisting him, why would he have to look to Qwabe and Mngeni for payment. He avoided the obvious by saying that he told Mbolombo that there is nothing with him.[234]

143. Mbolombo was however forced during cross-examination to concede that he was actually in control of the events that Saturday night.[235]

144. That something much more sinister was afoot than what Tongo testified to became clear when exhibit 2(10)(a) was played to the court and the transcript thereof (exhibit 2(10)(a)(1)) was handed in. Mbolombo is speaking to Tongo at 18:38 and reminded him "... there's five of us remember so you will leave him/her with ...". In the context of what

[232] Record, p. 1263(23)-1264(22)
[233] Record, p. 1265(22)-1283(19)
[234] Record, p. 1283(20)-1285(3)
[235] Record, p. 1654(4-5); p. 1659(3-6)

was due to happen later that evening the inference is inescapable that there are five persons involved in this conspiracy.[236] When questioned about this Tongo quite disingenuously explained that Mbolombo was also counting the accused as he was also part of the conspiracy. His explanation for this reply quickly fell apart at the seams.[237]

145. Despite Tongo's explanation that Mbolombo was counting the accused as the fifth person, this was not Mbolombo's explanation. He could not explain who the five people are that he referred to.[238]

Monwabisi Beach

146. Mbolombo testified that he met Qwabe approximately two weeks before this incident on Monwabisi Beach in the company of criminal types. Qwabe also brought him a bullet when he needed a bullet to hand to a traditional healer. This led him to think that Qwabe may be able to find somebody to act as a hit man.[239] Tongo also gave a version concerning Monwabisi Beach which differs entirely from what

[236] Record, p. 1269(3)-1270(4)
[237] Record, p. 1270(18)-1272(3)
[238] Record, p. 1626(1)-1627(17)
[239] Record, p. 1492(18-25)

Mbolombo told the court. It is clear that this is a made up version to try and tie in with what he knew Mbolombo would tell the court.[240]

Conclusion on Tongo's evidence

147. As stated above, Tongo proved himself to be a completely unreliable witness. On virtually every material aspect he contradicted his affidavit made to Col. Barkhuizen on 26 October 2010. As further demonstrated his evidence is also inherently contradictory. In some instances it makes no sense and in others his explanations are simply laughable.

148. His evidence furthermore is contradicted on material points by his accomplices Qwabe and Mbolombo.

149. Tongo is an accomplice witness and should the Court look for corroboration for his evidence, such corroboration should come from credible evidence and must be evidence implicating the accused in the commission of the offence. Such corroboration is not given by Qwabe or Mbolombo and in any event both these witnesses are in themselves not credible.

150. It is submitted that Tongo's evidence, implicating the accused, is of such appalling poor quality that no reliance whatsoever can be placed thereon.

[240] Record, p. 1121(7)-1122(4)

QWABE

151. Qwabe's evidence in chief can be summarised as follows:

151.1. He testified that he received a call from Mbolombo on the Friday, who told him that there was a job that needed to be done. He said okay Mbolombo can give his telephone number to the person who wants the job done.[241]

151.2. Tongo called him later. He told him that he obtained his number from Mbolombo and that he had a job that needed to be done, someone needed to be killed, how much would that cost. He was with Mngeni at the time and he either conveyed the message to Mngeni or gave him the phone. Mngeni said he would do it for R15 000,00. It was then agreed with Tongo that they would meet him and talk face to face the following day.[242]

151.3. On the Saturday he received a call from Tongo and they arranged to meet at Khaya Bazaar in Khayelitsha.[243] Tongo described the car that he would be driving. He recognised the car, went to Tongo and introduced himself as Spra. Tongo said there was a husband that wanted the wife to be killed. He told

[241] Record, p. 111(22)-112(7); p. 116(1-19)
[242] Record, p. 116(25)-117(23)
[243] Record, p. 117(23)-118(3)

Tongo to wait, he is not alone, they must go to his friend's house. Here Mngeni joined them and introduced himself to Tongo.[244]

151.4. Tongo then told Qwabe and Mngeni that there was a husband that wanted "the wife" to be killed and that it has to look like a hi-jacking. He told them which route he will be taking and that he will be going into Gugulethu. He will drive to Gugulethu near Mzoli's and they agreed on where the hi-jacking would take place, which was at the corner of NY112 and NY108. They also agreed on the fee and told Tongo to leave the money in the cubbyhole.[245] It was agreed that the lady would be killed and that nothing would happen to Tongo and her husband.[246] Tongo told them that he would give them a call when he is leaving the hotel which would be around "past seven".[247]

151.5. On Saturday evening Tongo called him after 8:00 p.m. saying that they were now leaving the hotel. He phoned Mngeni but they struggled to get transport. On their way Tongo phoned him and informed him that they had already left Gugulethu and that

[244] Record, p. 118(20)-120(8)
[245] Record, p. 120(12)-121(11)
[246] Record, p. 121(22)-122(3)
[247] Record, p. 122(18-21)

they were on their way to Somerset West. They agreed "to let the matter stand for another time".[248]

151.6. Tongo phoned again later on, he is not sure of the time, and informed him that he is at a restaurant in Somerset and told him "the job had to be done that same evening, the husband wanted the wife to be killed that same evening".[249] Tongo also informed him that he would be taking the same route to Gugulethu and that he and Mngeni should meet him there.[250]

151.7. They got a lift to Gugulethu. Mngeni had his (Qwabe's) Norinco pistol. He was unarmed but took yellow kitchen gloves along to prevent fingerprints.[251]

151.8. He received a text message from Tongo to say that he was close by. As he was urinating he saw Tongo's car approaching. Mngeni stopped the car, by pointing his firearm at the occupants. He, Qwabe, got in behind the driver's side and Mngeni into the front passenger seat, whilst Tongo got onto the back seat.[252]

[248] Record, p. 123(19)-124(25)
[249] Record, p. 125(15-19)
[250] Record, p. 125(20-22)
[251] Record, p. 127(19)-128(10)
[252] Record, p. 128(22)-130(5)

151.9. He stopped at an intersection near the police barracks where Tongo was ordered out of the car. As Tongo was getting out he told them in Xhosa that the money is in the pouch behind the front passenger seat.[253]

151.10. He then drove with the accused and the deceased onto the N2 in the direction of Khayelitsha. They had no plan as to what they would do. He took the Baden Powell turnoff and stopped between Harare and Kuyasa, where the accused was ordered out of the vehicle.[254] He then drove further with the deceased and Mngeni in the car into Mew Way between Harare and Ndlovini, an informal settlement.[255] While driving down Mew Way between Ilitha Park and Ndlovini, he heard a gunshot. He took the first turnoff into Ilitha Park and stopped at the side of the road. He was shocked at the gunshot and asked Mngeni what he had done. Mngeni replied that he had shot the lady.[256] While getting out he saw Mngeni looking for something in the back of the car. Mngeni told him that he was looking for the cartridge case. He assisted to look for it, found it and they left the car. Some distance in front of the car he threw the

[253] Record, p. 131(22)-132(12)
[254] Record, p. 133(14)-135(7)
[255] Record, p. 135(8-11)
[256] Record, p. 136(20)-137(22)

cartridge case into a storm water drain and further from the scene he threw away the gloves.[257]

151.11. Mngeni then took out the money which he had taken from the pouch. Qwabe is not certain when Mngeni had removed the money from the pouch, although he thinks it was shortly after Tongo had told them where the money was. They counted the money and found that it was R10 000,00 which they shared between the two of them.[258] He then went home.

151.12. On Sunday, he is not sure at what time, he called Mbolombo and also went to see Mbolombo because they were short-paid R10 000,00 instead of R15 000,00. Mbolombo undertook to sort it out with Tongo.[259] Mngeni also returned his firearm.[260]

151.13. He further testified that he might have had contact with Mbolombo after that Sunday, he does not recall properly, but that would have been to find out how far Mbolombo got with the money that was short.[261] He was then arrested the Thursday in the early hours of the morning.[262]

[257] Record, p. 138(2)-139(17)
[258] Record, p. 139(8)-140(16)
[259] Record, p. 142(4-17)
[260] Record, p. 143(1-3)
[261] Record, p. 143(6-10)
[262] Record, p. 143(13-20)

151.14. He assisted the police to retrieve the cartridge case and one of the gloves he had thrown away.[263] He eventually pleaded guilty and admitted his involvement in the matter.[264]

151.15. He is not certain which door he opened to assist Mngeni to look for the cartridge case.[265] He also did not check to see whether the deceased was alive or dead.[266]'

151.16. He explained that Tongo's number does not appear on his list of contacts on his cellphone as he had deleted it after the incident.[267]

151.17. On a question whether he can recall being in contact with Mbolombo on the Saturday he replied that this was possible.[268] He was then shown telephone calls between him, Mbolombo and Tongo. He stated that the only contact he had with Mbolombo was concerning this incident.[269]

[263] Record, p. 146(8-17)
[264] Record, p. 146(18-20)
[265] Record, p. 156(8-12)
[266] Record, p. 155(10-11)
[267] Record, p. 165(7-10)
[268] Record, p. 166(10-13)
[269] Record, p. 167(4)-171(23)

Cross-examination

152. Under cross-examination Qwabe proved himself to be a totally unreliable witness.

153. Right at the outset he had to concede that after his arrest he applied for bail and testified under oath in that bail application wherein he maintained that he had an alibi defence to the charges against him. He had to concede that this was a lie.[270] He also maintained for almost two years that he had an alibi defence before he pleaded guilty to the charges against him.

154. Apart from a number of untruths and contradictions in his evidence and between his evidence and the affidavit he had made on 13 August 2012[271] two important aspects stand out and underline how unreliable this witness really is.

Mbolombo's role

155. He was questioned about Mbolombo's role and testified as follows:

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

[270] Record, p. 173(11-20)
[271] Exhibit P8

> But he was not actively involved in arranging things, giving messages, talking to you, that sort of thing - no Sir. Not at all? No."[272]

156. Despite both Tongo and Mbolombo referring to the fact that Mbolombo was supposed to attend the meeting with Qwabe on Saturday afternoon, Qwabe could not recall anything about such an arrangement.[273]

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

> "What was his role in this affair? - He is the one that put me in contact with Zola. Yes, no I understand that according to you he put you in contact with Zola - Yes. Did he have any other role to play? - Not that I know of he was the link between me and Zola. Ja - yes Sir. And then that's all he did and then he was out of it. Is that right? - He was the link Sir. I said that's all he did, he linked you with Zola and for the rest he was out of it? Yes Sir."[274]

158. When questioned on whether he spoke to Mbolombo at all on the Saturday he replied that he could have spoken to him. He then testified:

> "For what purpose Sir? - Maybe if Zola didn't come just to confirm, you know things like that. And why would you phone him if Zola didn't come to confirm that, what does that mean, why would you do that? - (No answer). I am waiting for a reply - I don't know Sir. Then was Monde Mbolombo not deeply involved in what happened on that Saturday when the accused and his wife were hi-jacked? Deeply involved would be a strong word Sir because he was only the contact between me and Zola, he wasn't even at the meeting Sir. There would be no reason for him to discuss this matter with you at all that Saturday afternoon and evening is that what you are saying? - The only time I recall discussing the job was a Friday with Monde."[275]

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[272] Record, p. 196(13-24)
[273] Record, p. 197(8-17)
[274] Record, p. 229(18)-230(4)
[275] Record, p. 232(2-18)

159. He again reiterated later in his cross-examination that Mbolombo had nothing to do with these events apart from making the contact between Qwabe and Tongo.[276] Even when confronted with the calls between him and Mbolombo that Saturday and Saturday night, he maintained that Mbolombo was just the link and that he conveyed messages from Tongo, although he knew what was happening.[277]

160. Even when confronted with the phone call from Mbolombo to him in which he was told "It's that thing we were talking about, it must happen today" he replied that he does not recall such a call and that Mbolombo was "only the link".[278]

161. In the end he could not explain why, if Mbolombo was merely a link, all these calls were made between him and Mbolombo and between Mbolombo and Tongo during the course of the Saturday.[279]

162. Despite Qwabe's protestations that Mbolombo was merely a link and nothing more, the audio recordings of the telephone conversations Mbolombo had that Saturday, tell a different story. Similarly the number of calls and attempted calls by Mbolombo that Saturday night to Qwabe and Tongo also speak volumes. Mbolombo in his evidence conceded that he was in control of the events that Saturday night.

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[276] Record, p. 236(23-24)
[277] Record, p. 237(8)-242(14)
[278] Record, p. 321(10)-322(9); p. 238(14)-239(9)
[279] Record, p. 326(13-24)

163. There can be no question that Qwabe was fully aware of the role that Mbolombo played in the events. He deliberately tried to hide this from this honourable Court by maintaining that Mbolombo was merely a link.

164. This proves, undeniably, that Qwabe is an unreliable witness.

The shooting of the deceased

165. Qwabe testified that Mngeni shot the deceased whilst he was sitting in the left front passenger seat, with the firearm in his left hand pointing at the deceased who was sitting in the back seat. He had his right shoulder to the back and his left shoulder was turned with the firearm pointing at the deceased.[280]

166. Dr Verster testified that the single shot that killed the deceased was an angled contact shot.[281] She further testified that the shot would have immediately rendered the deceased paralysed.[282] It is clear from the photographs of the deceased's position in the vehicle that she was against the backrest of the rear seat.[283] According to Dr Verster her left hand would have been against or very close to her chest when the shot was fired.

[280] Record, p. 209(1)-210(2); p. 276(20)-277(1); p. 292(24)-293(12); p. 295(14-15)
[281] Record, p. 87(8-18)
[282] Record, p. 74(9)-75(4)
[283] Exhibit B, photos 17 and 28

167. It is clear from the objective facts that the deceased could not have been shot by Mngeni whilst he was sitting in the front passenger seat, as Qwabe would have it. The State's ballistic expert, Warrant Officer Engelbrecht, conceded that it would have been impossible for Mngeni to have shot the deceased from that position.[284]

168. Qwabe's explanation of how the deceased was shot also does not explain the marks of a right hand found on her left lower leg by Dr Verster.

169. Qwabe's testimony as to how Mngeni allegedly shot the deceased can simply not be true.

170. When regard is had to the following established facts the finger points strongly in Qwabe's direction as the person who shot the deceased.

170.1. He lied about the fact that Mngeni had shot the deceased whilst seated in the left front passenger seat.

170.2. His explanation does not cater for the marks on the deceased's left lower leg.

170.3. Primer residue was found to be present on the web of the glove he wore between the thumb and the forefinger. Although,

[284] Record, p. 878(16)-879(6)

according to Lt. Col. Mlabeteki this could have been the result of Qwabe being in close proximity of where the shot was fired, that is exactly where she would expect primer residue to be found if a firearm was fired by a person with that hand.

170.4. Glove marks corresponding with Qwabe's type of glove were found on the outside of the left rear door by a fingerprint expert of the SAPS.[285] In this regard, Qwabe's explanation that he could have opened that door to look for the cartridge case does not hold water. In his affidavit, exhibit P8, he stated twice that he had opened the right rear door of the vehicle to search for the cartridge case.[286] Confronted with the findings of the fingerprint expert, he was quick to say that "I think I opened that door when searching for the cartridge case".[287]

170.5. Although it would have been impossible for Mngeni sitting in the left front seat to have shot the deceased as explained by Qwabe, the probabilities are overwhelming that a person standing at the left rear door and leaning into the car with the pistol in his left hand could press the pistol against the deceased's chest (and hand) and could have grabbed her left lower leg with his right hand.

[285] Exhibit P4 - common cause facts - par. 9.3
[286] Record, p. 274(19)-275(10)
[287] Record, p. 277(13)-278(14)

170.6. If this was Qwabe and the shot was fired in that position, on the strength of Lt. Col. Mlabeteki's evidence, his right glove could also have been contaminated with primer residue. Primer residue can be transferred from, for instance, a glove contaminated with primer residue to surfaces coming into contact with the glove. In this regard it becomes important that primer residue was found to be present on the handle of the inside handle area of the driver's door of the Sharan. No primer residue was found to be present in the area around the left front passenger seat.[288]

170.7. The person who retrieved the cartridge case from the car and disposed of it was Qwabe.

171. It is submitted that Qwabe's evidence with regard to the shooting of the deceased is completely false.

Other indications of untruthfulness

172. Apart from the fact that he previously lied under oath, that he was not truthful in this court with regard to Mbolombo's role in the events and the shooting of the deceased, which is already enough to put huge question marks over the reliability of his evidence, there are other indications that he was not truthful in his evidence.

[288] Common cause facts - Exh AA, par. 2

172.1. In dealing with the question who allegedly removed the money from the pouch behind the front passenger seat, he gave three versions. In his affidavit he stated that the money was taken from the pouch by Mngeni, after they had stopped.[289] In this court he testified that the money was taken out whilst he was still driving.[290] In the Mngeni trial he testified that he cannot recall exactly who took the money out of the pouch, whether it was him or Mngeni.[291]

172.2. Immediately after the passage from the Mngeni trial wherein he stated that he could not recall who recovered the money, was read to him, he testified "Ma'am, now I remember I didn't take the money out Ma'am. The money was taken out by him, but still I am not sure at which point Ma'am."[292]

172.3. When he was confronted with these three versions and asked which one is the correct one he replied "I cannot recall exactly, Ma'am".[293]

172.4. According to the State's case, Qwabe and Mngeni were to shoot and kill the deceased, after they had dropped the accused. Yet, after they had dropped the accused they did not

[289] Exhibit P8, para. 26; p.256(14-25)
[290] Record, p. 250(2-12)
[291] Record, p. 257(15)-258(22)
[292] Record, p. 258(23-25)
[293] Record, p. 259(7-14)

go to the nearby bushy areas but instead drove back into the residential area down Mew Way, which is one of the major roads in that area, in the direction of the N2. When Qwabe was questioned about this and where they were going, he was after all the driver, he replied that they were going to no specific place. He also could not give a reason why he decided to drive back into a residential area.[294] To this should be added the fact that the shot that killed the deceased was not a normal execution type shot, which is usually to the head.[295] This should also be seen against the reference to the fifth person in Mbolombo's telephonic discussion with Tongo the Saturday evening. It is submitted that these facts also point to only one conclusion, that Qwabe was not being truthful with this honourable Court.

172.5. He even lied to Tongo as to where he and Mngeni was at the time when Tongo first went to the hi-jack spot.[296]

172.6. When he was initially confronted with the phone call made by Monde to Tongo at 16:02:59 concerning the white gloves, he denied any knowledge of white gloves stating that nothing was

[294] Record, p. 306(21)-307(15); p. 310(4-7)
[295] Record, p. 1771(10)-1773(15)
[296] Record, p. 266(5-18)

discussed with him about white gloves.[297] When this was taken up with him again later on in cross-examination he stated that it is possible that he could have spoken to Mbolombo about white surgical gloves "I do not deny that".[298]

Contradicting the evidence of Tongo and Mbolombo

173. As was pointed out above, Qwabe contradicted the evidence of both Mbolombo and Tongo as to their discussions the Friday evening.

174. Qwabe also contradicted Tongo's evidence that he was not aware that the person that had to be killed, was the accused's wife, but the accused's business partner who would be arriving the Saturday. Qwabe testified that at the time Tongo phoned the Friday night he told him "... that there was a husband that wanted the wife to be killed."[299]

175. He also contradicted Tongo's evidence that the R15 000,00 was an offer made by the accused. Qwabe testified that Tongo asked them (him and Mngeni) how much it will cost to have the person killed, to which Mngeni replied R15 000,00.[300]

[297] Record, p. 233(12)-234(6)
[298] Record, p. 270(22-25)
[299] Record, p. 187(18-20)
[300] Record, p. 189(3-15); p. 192(8-11)

176. According to Tongo he communicated with Qwabe when they were still in the Strand to inform them that the money was in the pouch behind the passenger seat.[301] Qwabe however testified that they only became aware of where the money was when Tongo was ordered out of the car and he told them in Xhosa that the money was in the pouch behind the rear seat.[302]

177. Tongo testified with reference to the phone call by Mbolombo dealing with the washing of the car, that Qwabe and Mngeni were to leave his car near a car wash in Khayelitsha close to Mbolombo's house.[303] Qwabe however testified that they were to leave the car "as it is".[304]

Conclusion on Qwabe

178. It is submitted that Qwabe was an untruthful witness whose evidence is wholly unreliable.

MONDE MBOLOMBO:

Evidence in Chief:

179. Mbolombo previously also testified in the Mngeni trial. His evidence in chief can be summarized as follows:

[301] Record, p. 1298(18)-1299(10)
[302] Record, p. 132(2)-(10)
[303] Record, p. 1272(19)-1273(8)
[304] Record, p. 320(11-13)

179.1 Tongo telephoned Mbolombo at his workplace at the Protea Colosseum Hotel on the afternoon of 12 November 2010 and informed him that he was on his way to his workplace. After Tongo's arrival he enquired from Mbolombo whether he knew anyone who is a "hit man".

179.2 They then moved to the outside of the lobby of the Protea Hotel. Once outside, Tongo repeated his question and Mbolombo told him that he did not, as he did not socialize with criminals. However, he then told Tongo that he could make enquiries about this to a person whom he called "Abongile". It is common cause that "Abongile" is a reference to Qwabe[305].

179.3 Mbolombo had previously explained during his evidence in chief that he knew "Abongile", (hereinafter referred to as "Qwabe") as they had previously work together at a project called "The Pride of Table Mountain". They last had any contact in 2006 but met up again, purely by chance, on 1 November 2010 at Monwabisi beach. At the time Qwabe was in the company of people whom he described as criminals. Shortly thereafter Mbolombo's son fell ill and he approached Qwabe to obtain a bullet from

[305] Record, p. 1491 to 1942

him in order to use the gunpowder, on the advice of a traditional healer, in an attempt to "cast away bad spells from his house"[306].

179.4 Mbolombo explained that the aforesaid was the reason why he decided to approach Qwabe about Tongo's request about a hit man. Mbolombo testified that he then used the cordless telephone of the Protea Hotel to dial Qwabe's number. He then left his own mobile phone on the desk in the back office and walked out of the foyer and spoke to Qwabe. He informed Qwabe that there is a person here called Zola "who said that he is looking for someone who can do a job". Qwabe enquired about the nature of the job and he told him that Tongo was looking for a hit man. At the time Tongo was inside at reception.[307]

179.5 Mbolombo testified that Qwabe wanted to know whether he knew Tongo and how much they would be paid if they were to do this. Mbolombo then moved back to the inside of the lobby and beckoned to Tongo. He then switched the phone off whilst Zola was walking towards him. When Tongo reached him, he phoned Qwabe again and informed him that Tongo was standing next to him.

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[306] Record, p. 1488
[307] Record, p. 1491 to 1492

179.6 He then told Tongo that "these guys want to know, if they were to do the job, how much would they be paid?". Tongo then informed him that they would be paid R15 000.00. He conveyed this to Qwabe, who then told him that they should not discuss the matter over the phone and they should rather meet in person. According to Mbolombo, Qwabe indicated that he would do the job and that he had no problem to do this. Both Mbolombo and Tongo went back into the hotel and Tongo left[308]. After Zola had left, Mbolombo telephoned Qwabe again in order to reassure Qwabe that he knew Tonga and that he could be trusted.

179.7 Mbolombo then testified that he received a call from Tongo on the morning of 13 November 2010, who requested him to accompany him to a meeting with Qwabe in order to discuss "how to go about in doing this"[309]. Mbolombe then contacted Qwabe and informed him that Tongo would be coming through to Khayelitsha.

179.8 Mbolombo said that he waited for Tongo to meet with him at his home in Khayelitsha. According to him, Tongo was aware of the fact that his shift at Protea Hotel started at 15h00. However, Tongo did not arrive and Mbolombo then went to the taxi rank

[308] Record, p. 1493 to 1494
[309] Record, p. 1495

at Site C. Shortly after his arrival and whilst he was already in a taxi, Tongo contacted him. He then got out of the taxi and into Tongo's vehicle[310].

179.9 Whilst they were in the car, Mbolombo enquired from Tongo why he was looking for a hit man. Tongo informed him that there was a married couple and that the husband wants the lady to be killed. Mbolombo then wanted to know which lady and how he had met these people. Tongo informed him that he met the people at the airport and that it is "the man who wants his wife to be killed"[311].

179.10 Whilst they were talking, Tongo's phone rang. Tongo informed him "here is this gentleman you are talking about", here is the man who wants his wife to be killed". Tongo then spoke on the phone. At one stage Tongo said "I'm coming, I'm coming, I'm coming". Tongo then ended the call and informed him that "this gentleman does not trust me"[312]. Mbolombo testified that Tongo then informed him that he had to leave as he had to "take this gentleman to go and change dollar into rands so in order for him to be able to pay the killers"[313].

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[310] Record, p. 1495 to 1496
[311] Record, p. 1496
[312] Record, p. 1496 to 1497
[313] Record, p. 1497

179.11 Tongo also informed Mbolombo that the gentleman did not want to go to a legitimate money exchange as he wanted to avoid paying tax. As a result, Tongo was going to take him to a place "on the side" where he could go and exchange his money[314].

179.12 Tongo also told him that this gentleman was not from South Africa but that he was from overseas, that this was not the first time that he had done this and that he "wanted to do it again, but that it should appear as if it is a fake high jacking"[315].

179.13 Mbolombo and Tongo arrived at the Protea Hotel at approximately 10 to 5 minutes before 15h00 that afternoon. Upon their arrival, Tongo informed him that he had to rush back because he still had "to meet these guys", which, according to Mbolombo, was a reference to Qwabe[316]. Mbolombe testified that he did not know at that stage how many people would be involved.

179.14 On a question from the prosecutor, Mbolombo indicated that his role in the endeavor was "to make sure that Zola and Abongile meet, and to see to it that this thing happens". He further elaborated on the aforegoing role that he had to play,

[314] Record, p. 1498
[315] Record, p. 1498
[316] Record, p. 1499

stating that the reason why he had further telephonic contact with Qwabe was "to get things into order, and to make sure that things go according to how they were planned"[317].

179.15 Mbolombo further testified that, based on his communications that evening, he knew that the persons involved were a couple and that Zola was going to drive them through to a restaurant in Somerset West where they would have dinner[318].

179.16 Qwabe phoned him that evening just before 19h00, looking for Tongo. Qwabe informed him that they were supposed to meet Tongo at 19h30, but they could not meet as Tongo's phone was switched off and he was unable to reach Tongo. Mbolombo also tried to contact Tongo but was also unable to do so, as Tongo's phone was still switched off.

179.17 He eventually got hold of Tongo and informed him that "these guys are looking for gloves"[319]. Mbolombo explained that this related to an earlier request from Qwabe who phoned him that Saturday morning at approximately 10h35 and informed him

[317] Record, p. 1499 to 1500
[318] Record, p. 1501
[319] Record, p. 1501

that they wanted gloves so as not to leave any evidence or fingerprints behind[320].

179.18 On a question from the prosecutor Mbolombo said that, when Tongo told Qwabe that they would be paid R15 000.00 he told Tongo that he, Mbolombo, would also have to be paid for all his effort in the matter "even if it is R5 000.00"[321]. He explained this was something that he mentioned to Tongo when he telephoned Qwabe the previous evening and Qwabe enquired about the price[322]. According to Mbolombo, Tongo did not respond to his request to be paid R5 000.00.

179.19 Mbolombo further testified that he telephone Tongo on Saturday afternoon from the Protea Hotel. During this conversation Tongo informed him that he was going to take the money and place it in the cubbyhole of his vehicle[323].

179.20 On a further question by the prosecutor, relating to any further discussions on Saturday regarding payment, Mbolombe said that Tongo was supposed to have met with Qwabe in order to give them the money, but they could not meet[324]. It was during

[320] Record, p.1501 to 1502
[321] Record, p. 1502
[322] Record, p. 1502
[323] Record, p. 1503
[324] Record, p. 1504

the same conversation that Tongo informed him that he was going to leave the money in the cubbyhole of the vehicle.

179.21 Mbolombo also enquired from Tongo during the same discussion whether he managed to get the gloves they earlier spoke about. However, Tongo did not understand what he was referring to, he had to explain to him that it is "the kind of gloves that are used at a hair salon or gloves that the doctors are using"[325].

179.22 Mbolombo testified that it was after this conversation with Tongo that Qwabe telephoned him looking for Tongo and informed him that they were supposed to have met "at 18h30". Mbolombo then corrected himself and said that they had to meet "at 19h30". When Mbolombo eventually got hold of Tongo, he informed him, Mbolombo, that his phoned was switched off as he was "with the people at a table" and that this was the reason why he could not answer his phone[326]. Mbolombo then called Qwabe and informed him what Tongo had told him. Qwabe then informed him that they are in Gugulethu.

[325] Record, p. 1504
[326] Record, p. 1504 to 1505

179.23 Shortly thereafter he received a phone call from Tongo who informed him that they were leaving the restaurant and that they were on their way to Gugulethu[327].

179.24 According to Mbolombo he did not know exactly where in Gugulethu "this thing would happen", only that it would happen in Gugulethu. Mbolombo said that Qwabe informed him that "as these people were coming to Gugulethu they will take the vehicle and then go to Khayelitsha. They will then drop off Tongo as well as the husband and will then drive on with the wife"[328]. Qwabe also told them that they "were going to stop the people, take the vehicle and take it to Khayelitsha". Mbolombo testified that he did not know exactly where in Khayelitsha they were going to do this, only that it was going to take place in Khayelitsha and that they "were going to leave the vehicle there and thereafter wash the vehicle"[329].

179.25 Mbolombo testified that that was the last telephone call he received that evening as he informed Qwabe that he was about "to do the banking", that they were "disturbing" him and that they will "chat some other time"[330]. According to

[327] Record, p. 1505
[328] Record, p. 1505 to 1506
[329] Record, p. 1506
[330] Record, p. 1506 to 1507

Mbolombo this last call took place after 22h00 that evening. He thereafter went home when his shift ended at 23h00.

179.26 On Sunday 14 November 2010 he was at home and tried to call Tongo but could not get hold of him as his mobile went to voicemail[331]. Mbolombo said that Qwabe arrived at his home that Sunday morning just after 10h00. Qwabe informed him that the money that Tongo gave them was "short with R5 000.00". Mbolombo testified that he wanted to enquire from Qwabe about his payment but Qwabe was so angry that he decided not to do this. Qwabe wanted to know where Tongo was and Mbolombo informed him that he did not know as his phone is off and goes to voicemail[332].

179.27 Mbolombo then asked Qwabe what had happened and Qwabe told him that he should not ask a lot of things and whether he did not see on TV what had happened. Qwabe also informed that "there were police officers and helicopters all over the place"[333]. Qwabe also requested him to inform Tongo that he, Qwabe, wanted his R5 000.00.

179.28 On his arrival at work on Monday 15 November 2010, Mbolombo read about the incident in the newspapers. He then

[331] Record, p. 1508
[332] Record, p. 1508
[333] Record, p. 1508 to 1509

realised that they had really killed the lady "that had to be killed".[334]

179.29 On Wednesday 17 November 2010 he was contacted by Tongo who informed him that he was phoning him from his girlfriend's telephone. Tongo informed him that the police contacted him about the shooting incident, but that he did not tell them the truth, and that he just told the police that he "does not know anything"[335]. During the conversation with Tongo, Mbolombo informed him that Qwabe was looking for him. Tongo then warned him to "get away from those guys" as they are "very dangerous"[336].

179.30 Mbolombo was arrested on 18 November. According to him he did not see Tongo again and last saw him on 12 November when he was at the Protea Hotel. Mbolombo also testified that he only "had a glimpse" of Qwabe when they were at Bellville, as they were travelling in different vehicles.[337] (It is clear that this happened after their arrest.) According to Mbolombo this was the only time that he saw him after the incident[338].

[334] Record, p. 1509 to 1510
[335] Record, p. 1510 to 1511
[336] Record, p. 1511
[337] Record, p. 1512.
[338] Record, p. 1512

179.31 On a question by the prosecutor Mbolombo again said that the last time he saw Tongo was on Friday the 12th of November when he came to the Protea Hotel, looking for a hit man[339].

Mbolombo's background and previous testimony:

180. In his evidence in chief, Mbolombo admitted that he had lied in his initial warning statement (Exhibit P5), in his statement to the police in terms of section 204 of the Criminal Procedure Act, no 51 of 1977 (Exhibit P6) and during his evidence at the Mngeni-trial,[340] but testified that his lies were limited to downplaying the extent of his involvement in the matter.[341]

181. However, as will be demonstrated hereunder, Mbolombo's showing in the witness stand during cross-examination clearly re-affirmed his self-confessed status as a blatant liar.

182. It is submitted that it is important to bear the following in mind when Mbolombo's evidence is evaluated:

182.1 Mbolombo impressed as being intelligent. This is also corroborated by the fact that he matriculated at the age of 19, and also obtained a two year post-matric qualification from the

[339] Record, p. 1512
[340] Record, p. 1480 to p. 1482
[341] Record, p. 1480 (11) to (13); p. 1481 (2) to (4); p. 1482 (10) to (11)

Department of Environmental Affairs, when he qualified as an assistant educational officer.[342]

182.2 He is clearly proficient in the English language, to the extent that he was able to testify, and be cross-examined, in English during the Mngeni-trial.[343]

182.3 Mbolombo testified that the provisions of section 204 were not only explained to him on two occasions[344], but that he understood what it meant.[345]

182.4 Despite the aforesaid, Mbolombo stated in paragraph 21 of his September 2014-affidavit (Exhibit P10) that he never believed what he was told by the police and later the Presiding Judge in the Mngeni-trial, and that it was only when he was given an opportunity to view the CCTV footage and listen to the audio recordings thereof that he realized he could no longer "hide" and that he "had to be open and honest". This, according to Mbolombo, was the catalyst for his decision to be completely frank and truthful with this Court.[346]

[342] Record, p. 1477(13) to p. 1478(1)
[343] Record, p. 1523 (14) – (15)
[344] Record, p. 1475 (1) - (2); p. 1479(6) – (8); p. 1480 (18) – (22);
[345] Record, p. 1480 (23)
[346] Record, p. 1482 - 1484

182.5 Mbolombo then proceeded to deliver a pre-prepared, written, speech to the Court, in which he explained the circumstances under which, and reasons for, his decision to now, finally, tell the complete and honest truth about the incident.[347]

182.6 However, as will be demonstrated in more detail below, the sincerity of this "soul-cleansing" became highly questionable fairly soon into his cross-examination.

182.7 More importantly, exactly how calculated and untrustworthy Mbolombo's pre-prepared speech was, became clear when it was disclosed that he gave a similarly emotive speech to the Court in the Mngeni-trail, before blatantly lying about a material aspect that had nothing whatsoever to do with hiding his involvement in the matter.

182.8 In that matter he also testified that he had decided to "came clean" about his earlier version in his section 204-statement(Exhibit P6), that he did not overhear what Tongo had said when he spoke to Qwabe on the phone on Friday, 12 November 2010 at the Protea Hotel, and confessed that this was a lie, as he actually did overhear Tongo speaking.

[347] Record, p. 1485 - 1486

182.9 However, during his evidence in this trial, he testified that Tongo never spoke to Qwabe over the phone on 12 November 2010.[348]

182.10 As pointed out above, Mbolombo is intelligent and well-versed in the English language; his deceitful confession, which he deliberately chose to repeat in this Court, was clearly by design, and not merely an error on his part.

The cross-examination of Mbolombo:

183. As pointed out above, Mbolombo's evidence quickly became unraveled during cross-examination, as he started to contradict himself on virtually each and every material aspect of his earlier evidence.

184. The following are not a complete record of all the problems he encountered under cross-examination, but merely examples of the more important aspects on which he contradicted himself:

184.1 He testified that he never gave Qwabe's telephone number to Tongo, and that Tongo in fact never even requested it, on the Friday evening.[349] Clearly realizing that this would make nonsense of his version that Tongo and Qwabe would have arranged to meet the next day, he then changed his evidence and said that

[348] Record, p. 1584 – 1588.
[349] Record, p. 1517 (12) – (14)

Tongo must have looked for Qwabe's phone number on his, Mbolombo's, mobile which he left on the table in the back office whilst he went out to phone Qwabe.

184.2 This would clearly not have been possible for Tongo to do: firstly, Mbolombo said that Qwabe's number was saved on his mobile under the name "Abongile", a name that Mbolombo merely made up, and therefore not a name which would have been known to Tongo.[350] Secondly, it is common cause that Mbolombo's mobile phone did not contain Qwabe's contact details when it was confiscated by the police on the day of his arrest.[351] Mbolombo also did not delete it.[352]

184.3 Later on in his evidence, Mbolombo changed his original version, and then said that he could not remember whether he gave Qwabe's number to Tongo.[353] However, when he was confronted with his earlier contradictory evidence, he changed tack again and said that he did not give the number to Tongo, only to change that almost immediately to "I am not certain".[354]

[350] Record, p. 1607 -1608
[351] Record, p. 1526 - 1527
[352] Record, p. 1527 (12) – (18)
[353] Record, p. 1522 (5) – (11)
[354] Record, p. 1523 - 1524

184.4 He told the Court that he was definitely going to get R5 000.00 for his involvement in the matter,[355] but did not know how or by whom he would be paid.[356] He then changed this version, stating that he merely mentioned it to Tongo, and that his payment was not event discussed.[357]

184.5 His initial version clearly was that he still expected to be paid after the event, and that he wanted to ask Qwabe about this on Sunday morning.[358] Later on he changed this version and said that he did not even think about asking for his money.[359]

184.6 Mbolombo was questioned about his earlier evidence that he was going to ensure that "things go according to how they were planned". He also admitted to taking the leading role and that he was in control of events the Saturday night.[360]

184.7 Yet, he also wanted the Court to believe that he was not involved in any planning, nor was he a party to any discussion with either Tongo or Qwabe about any details regarding the murder. Clearly realizing his predicament, he then testified that Tongo told him about the details when they were both in Tongo's

[355] Record, p. 1520 (23) – (25)
[356] Record, p. 1521 (1) – (10)
[357] Record, p. 1531 (22) – page 1532 (2)
[358] Record, p. 1508
[359] Record, p. 1532 – 1533
[360] Record, p. 1659(1) – (6); p. 1581 (18) – (19)

vehicle on Saturday afternoon, on their way to the Protea Hotel.[361]

184.8 He then almost immediately changed this version, stating that he made a mistake, as it was actually Qwabe who told him on Saturday morning at about 10h00 when it was supposed to happen.[362] However this version completely contradicted his earlier evidence that the meeting with Qwabe, which would have been the very first opportunity for Qwabe to receive any information regarding the murder, would only have taken place after 15h00[363] It would therefore have been impossible for Qwabe to have any knowledge of this at 10h00 that morning.

184.9 That Mbolombo realized the predicament he found himself in at that stage during his cross-examination was patently clear, as he started to contradict himself on virtually every answer that he gave, then started to say that he "cannot remember" and eventually asked for the matter to stand down, stating that he was "tired" and that he cannot think any more.[364]

184.10 Needless to say, when the Court reconvened, he changed his version again, stating that he had made a mistake, as the

[361] Record, p. 1567 (19) – (23)
[362] Record, p. 1567 - 1568
[363] Record, p. 1498 - 1499
[364] Record, p. 1568 - 1571

conversation with Qwabe on Saturday morning was merely about arranging the intended meeting.[365]

184.11 During further cross-examination about the planned meeting later on that Saturday, Mbolombo again changed his version, stating that the reason why he wanted to attend the meeting was merely out of curiosity.[366] This version is not only highly improbable, but still left the original question unanswered as to how he would have been able to oversee the proper implementation of the planned killing, if he did not know how, where or when this would happen.

184.12 At some stage he testified that his role would be to assist Qwabe and Tongo in communicating with one another if they experienced difficulties in contacting one another. However, this version was obviously nonsensical: he firstly did not know if they were going to experience problems contacting one another, and was also unable to provide any cogent explanation why either of them would be able to contact him when they could not get hold of one another.[367]

184.13 Mbolombo's evidence that the accused telephoned Tongo in his presence shortly before 15h00 on Saturday afternoon on

[365] Record, p. 1572 - 1573
[366] Record, p. 1574 - 1578
[367] Record, p. 1580

their way to the Protea Hotel, and that Tongo then told him that he had to take the accused to exchange "dollars into rands in order to be able to pay the killers"[368] was clearly a blatant lie: it is common cause that no such telephone call ever took place. Secondly, it is also common cause that by that time, Tongo had already taken the accused to exchange money.

184.14 The latter is not the only example where Mbolombo's evidence was contradicted by the objective, common cause facts: he also testified that he received a call from Tongo at around 19h30 and that Tongo explained to him that the reason why he, Tongo, could not answer his telephone earlier, was because he was "sitting at the table with the couple". It is also common cause that no such call between Tongo and Mbolombo ever took place, and that Tongo was never inside a restaurant with the accused and the deceased. [369]

184.15 At times Mbolombo also clearly tailored his evidence in an attempt to fit in with that of Tongo. During his initial evidence he repeatedly testified that Tongo had told him that "a man wanted his wife to be killed".[370] However, he then changed his

[368] Record, p. 1497 - 1498
[369] Record, p. 1659 - 1661
[370] Record, p. 1496 (23) – (24); p. 1497 (5); p. 1506 (7) –(9); p. 1544 (12) – (13);

version, stating that Tongo did not say "wife", but "lady".[371] When he was confronted with this discrepancy, he changed back to his original version, and attempted to explain himself by saying that he was "confused".[372]

184.16 However, it was pointed out that in his September 2014-statement (exhibit P10), he expressly corrected his earlier version (in Exhibit P6), that Tongo used the word "wife", whereafter he first tried to explain this by saying that he does not differentiate between the words "wife" and "lady",[373] then said that he could no longer recall whether Tongo said "wife" or "lady"[374], and eventually conceding that Tongo did say "wife".[375]

184.17 Mbolombo's showing in the witness stand in this regard is but one example how he did not hesitate to lie during his evidence in an attempt to explain away problems that he encountered during cross-examination: if Tongo did use the word "wife" (as opposed to the word "lady"), Mbolombo clearly did distinguish between the two words.

[371] Record, p. 1546 (7)
[372] Record, p. 1548 (5) – 1549 (15)
[373] Record, p. 1551 - 1552
[374] Record, p. 1554 (8) – (10)
[375] Record, p. 1555 (1) – (6)

184.18 Mbolombo testified that Qwabe contacted him at 10h30 on Saturday morning and asked for gloves "for their fingerprints not to be found on the motor vehicle.[376]

184.19 However, on his version it would simply not have been possible for Qwabe to have known that a vehicle was going to be involved, as Qwabe and Tongo would only have met later on that day to discuss how the "hit" had to take place.

184.20 At times Mbolombo also blatantly attempted to shape his evidence to fit in with the audio transcripts of the CCTV footage, which created even bigger problems for him under cross-examination. Examples of this was his evidence regarding the CCTV audio clips where he spoke about:

184.20.1 the "washing of the car"[377];

184.20.2 the gloves that Qwabe asked for;[378]

184.20.3 his statement that "it must happen tonight".[379]

[376] Record, p. 1614
[377] Record, p. 1632 - 1636
[378] Record p.1614; p. 1622 - 1624
[379] Record p. 1652 - 1655

185. As in the case of Tongo and Qwabe, Mbolombo was a poor and completely unreliable witness, and his evidence is of such poor quality that it simply cannot be relied upon.

186. More importantly, as demonstrated above, there are stark contradictions between his evidence and that of Tongo and Qwabe on virtually each and every material aspect of their evidence.

CONCLUSION

187. It is submitted that there is no credible evidence left on record, implicating the accused in the commission of the alleged offences, upon which a court, acting carefully, may convict him.

188. It follows that this honourable Court may return a verdict of not guilty on all counts in terms of section 174 of the Criminal Procedure Act, No. 51 of 1977.

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FRANCOIS VAN ZYL SC

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P A BOTHA

Chambers
Cape Town
19 NOVEMBER 2014.

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