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REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

In the matter between:

Case No: CC 6/2016

THE STATE

And

NDUMISO BOOI

Accused No. 2

MZOLIMO MAKISI

Accused No. 3

MAWETHU KHAKA

Accused No. 4

Coram: **Chetty J**

Heard: **6, 7, 9, 12, 13, 15, 16 and 19 September 2016**

Delivered: **22 September 2016**

JUDGMENT

Chetty J:

Introduction

[1] The indictment cites four accused persons viz:-

"Thandeka Mange	Accused 1
Ndumiso Boo	Accused 2
Mzolimo Makisi	Accused 3
Mawethu Khaka	Accused 4"

It is common cause that *Thandeka Mange*, enumerated as accused no. 1, died prior to the commencement of the trial. Notwithstanding, the accused were referred to throughout the trial as per the indictment and this judgment follows suit. The first three charges relate to events which occurred on 11 October 2012, and are preferred only against accused no. 2. It is alleged that the accused, armed with a firearm robbed *Oluwatoyin Alin Odufuwa* (Dr *Odufuwa*), and *Zanele Jonga* of a VW Polo bearing the registration letters and numbers FSJ 618 EC, a Blackberry Curve and a Nokia E63 cell phones, an ipad 3 and 2 bags with certain paraphernalia at Ngwekazi Street, Zwide, Port Elizabeth.

[2] Count 4, preferred against all the accused, is a charge of conspiracy to commit murder, in contravention of s 18 (2) (a) of the **Riotous Assemblies Act**¹. It is alleged that during the period 11 October 2012 to 12 June 2013, the accused conspired to, *inter se*, and with *Mange* to murder *Zanele Jonga*.

[3] Counts 5, 6 and 7, to wit, murder and the unlawful possession of a firearm and ammunition concern the shooting of *Zanele Jonga* at [...] Street, NU7, Motherwell, Port Elizabeth on 12 June 2013.

[4] It is common cause that *Zanele Jonga* (the deceased) was employed by Dr *Odufuwa* at his surgery at [...] Street, NU7 Motherwell. It is furthermore not in dispute that Dr *Odufuwa* is abroad and unlikely to return soon. The only evidence concerning the hijacking are written statements by the deceased and Dr *Odufuwa* deposed to at the Kwazakhele Police Station the night of the hijacking. The admission of these depositions as evidential material was sought pursuant to the provisions of s 3 of the **Law of Evidence Amendment Act**². It provides as follows: -

"3 Hearsay evidence

¹ Act No, 17 of 1956

² Act No, 45 of 1988

(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court, having regard to-

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice."

[5] The depositions are admissible in evidence for two reasons. Firstly, in terms of subsection (a) in as much as none of the parties raised any objection thereto, and secondly, the interests of justice impel their admission as evidence. It establishes that when Dr *Odufuwa* stopped at the deceased's residence for her to alight, they were confronted by three armed males who robbed them of their possessions and drove away with the doctor's vehicle.

[6] It is not in issue that during the course of that evening, Warrant Officer *Lucinda Mels* (*Mels*), and a colleague, whilst on routine patrol in New Brighton responded to a tracker signal and discovered the hijacked vehicle outside a home in New Brighton. *Mels* contacted radio control and the Local Criminal Record Centre (LCRC) personnel were dispatched to the scene where the vehicle and its surrounds were photographed. A photo album, (exhibit "C"), comprising the photographs taken was handed in by consent and, those of relevance, depict the vehicle on the verge and a firearm in the front yard of the property.

[7] Detective Sergeant *Ashwell James Prinsloo* (*Prinsloo*) visited the scene of the abandoned vehicle, was present when the photographs were taken and sealed the firearm in a forensic bag. Thereafter, and during the course of his investigation apropos the hijacking, *Prinsloo* enlisted the aid of Detective Constable *Mvuyijeko Xhayimpi* (*Xhayimpi*), attached to the

Kwazakhele detective services, to conduct a photo identification exercise with the deceased to determine whether she could identify any of the three hijackers. *Xhayimpi* was furnished with a collage of twelve photographs wherewith to perform the exercise and testified that the deceased pointed to a photograph of accused no. 2 whereupon he conveyed the information to *Prinsloo*. Approximately six months later, a formal identification parade was held at the St Albans prison where the line-up included accused no. 2. Warrant Officer *Xolile Smith (Smith)*, tasked to conduct the parade, testified that the deceased pointed out accused no. 2.

[8] The admission of the foregoing oral testimony and photographic evidence was tendered on a circumscribed basis. When *Xhayimpi* was called, and, as a precursor to the introduction of such testimony, Mr *Stander* unequivocally disavowed any reliance on the reliability of the deceased's identification of accused no. 2. Such testimony, he declared was tendered, not as proof that the deceased had correctly identified accused no. 2 as one of the hijackers, but as one of fact. Counsel for accused no. 2 fairly conceded that consequently, an objection to the reception of such a fact would be misplaced. The concession was properly made. In ***S v V***³ Wessels J, articulated the position thus: -

³ 1958 (3) SA 474 (GW) @ p 479 B-F

"In all criminal cases the Crown must prove the facts which are required to be established beyond a reasonable doubt. Facts in issue are proved or established by means of admissible evidence (i.e. testimony, either on oath or after affirmation, or by means of affidavit), formal admissions tendered as such during the hearing of the matter and by presumptions. In my view it is not correct to state that an admission of a fact made during the hearing is evidence thereof unless one disregards the distinction between evidence of a fact and proof thereof and uses the former word as a synonym for the latter. This distinction was sometimes (but not always) present to the mind of the draftsman. See, e.g., sec. 284 (1) where it is provided in the Afrikaans text that an admission shall be 'sufficient proof' ('voldoende bewys'), whereas the English text states that an admission shall be 'sufficient evidence' of the fact admitted. An admission of a fact in issue results in that fact being considered proved or established without receiving evidence in regard thereto. In appropriate circumstances a presumption has the same effect.

In my view the Legislature, in enacting sec. 258 (1) (b) had present to its mind the distinction between proof and evidence of a fact and was, moreover, aware of the various means by which facts in issue may be proved. It therefore, in my view, used the word 'evidence' in the sense suggested above."

Conspiracy to murder and murder

[9] It is not in issue that the deceased was shot and killed whilst seated in a stationary vehicle outside the surgery situate at [...] Street. Constable *Jacques Gilmer (Gilmer)*, then attached to the criminal policing unit of the Motherwell South African Police Services, was on routine patrol and received a report of a suspicious vehicle in [...] Street. Almost simultaneously, occupants of a vehicle stopped him and reported having heard gunshots on the other side of [...] Street. *Gilmer* hastened thence and discovered the deceased in the vehicle and a passenger, one Ms *Zoliswa Halana (Halana)*. It is common cause that the deceased died on the scene as a result of multiple gunshot wounds. *Halana* was, for reasons not germane to this judgment, not called as a witness and the warrant authorised for her arrest, was cancelled at the inception of the trial.

[10] The case against the accused, as I shall in due course analyse, rests to an appreciable degree, upon circumstantial evidence. Thus, the summary of substantial facts provided pursuant to the provisions of s 144 (3) of the ***Criminal Procedure Act***⁴ (the Act), appraised the accused that:

⁴ Act No, 51 of 1977

- "4. At all times during June 2013 accused 2 was being detained at the St Albans Correctional Facility in Port Elizabeth. Accused 2 at all times had a cellular phone at his disposal whilst in custody. Prior to 12 June 2013 accused 2 contacted his girlfriend, accused 1, and in conjunction with accused 3 and 4 agreed to kill Zanele Jonga.
5. On or before 12 June 2013 accused 2 furnished accused 1 with the contact details of Zanele Jonga. On 12 June 2013 accused 2 phoned accused 1 at her office. Accused 1 in turn contacted accused 3 and 4 and placed them on a conference call with accused 2. Later in the day accused 1 contacted Zanele Jonga in order to ascertain whether she was at the surgery of Oluwatoyin Alin Odufuwa. Once she had confirmed the presence of Zanele Jonga accused 1 contacted and informed accused 3 and 4 of the whereabouts of Zanele Jonga. Accused 3 and 4 proceeded to the surgery.
6. At about 18h15 on 12 June 2013 Zanele Jonga left the surgery and climbed into a motor vehicle parked in front of the surgery. Accused 3 and 4 approached her and fired numerous shots at her. She died on the scene. Accused 3 and 4 left the scene.
7. The accused, at all times, acted in the furtherance of a common purpose."

The foregoing encapsulates the essential and material facts which underpinned the state case and is invariably furnished to enable an accused to prepare his/her defence. In *casu*, the accused were forewarned that electronic data was an integral part of the state's armoury.

[11] Thus, prior to the commencement of the trial, Counsel for the state, sought various admissions from the accused thereanent, those of relevance articulated as follows: -

- "10. That at all times during June 2013 accused 1 was being detained at the St Albans Correctional Facility in Port Elizabeth;
11. That at all times during June 2013 accused 1 had a romantic relationship with Thandeka Mange;
12. That Thandeka Mange was employed by metropolitan, Port Elizabeth;
13. That the number 0875425411 is an open telephone line at Metropolitan only to be activated by a pin number;
14. That Thandeka Mange had a pin number to activate 0875425411;

15. That at all times during June 2013 accused 1 had a cellular phone with number [...] at his disposal whilst in custody;
16. That Zanele Jonga was employed at the surgery of Odufuwa at [...] Street, NU-7, Motherwell, Port Elizabeth;
17. That the landline number of the surgery was [...7];
18. That accused 2 at all times during June 2013 utilised a cellular phone number [...8];
19. That accused 3 at all times during June 2013 utilised a cellular phone number [...2];
20. That on 12 June 2013 telephonic contact was made between Mange, at her Metropolitan office, and accused 1;
21. That on 12 June 2013 Mange contacted accused 2 and 3 and placed them on a conference call with accused 1;
22. That later in the day Mange contacted Jonga at the surgery in order to ascertain whether she was at the surgery of Odufuwa;
23. That later in the day Mange contacted and informed accused 3 and 4 of the whereabouts of Jonga;
24. That accused 2 and 3 proceeded to the surgery;

25. That at about 18h15 on 12 June 2013 Jonga left the surgery and climbed into a motor vehicle parked in front of the surgery;
26. That two assailants approached Jonga, the deceased, and fired numerous shots at her;
27. That Jonga died on the scene;"

[12] In response thereto, accused no. 2 admitted only those facts listed in paragraphs 8, 9, 10, 11, 12, 13, 16, 27, 28 and 29; accused no. 3 declined to make any admissions and gave notice **"to place in issue at the proceedings, those facts mentioned in items 18, 21, 23, 24 of the state's aforementioned notice"**. Accused no. 4, whilst denying the factual averments made in the state's notice, responded to the content of paragraph 19 with the retort, **"The allegations are noted."**

[13] It will be gleaned from the foregoing that the denial that the accused were in possession of cellular phones compelled the state to adduce evidence to prove that: -

- (i) Accused no. 2 had, in June 2013, a cellular phone with number [...1], whilst incarcerated at St Albans,

- (ii) Accused no. 3 had, in June 2013, a cellular phone with number [...8],
- (iii) Accused no. 4 had, in June 2013, utilised a cellular phone with no [...2]

The evidential material upon which the state relies rests almost exclusively upon electronic data extracted from the records of Mobile Telephone Networks (Pty) Ltd, colloquially referred to as MTN.

[14] The admissibility and evidential weight of data messages is regulated by s 15 of the ***Electronic Communications and Transactions Act***⁵. It provides as follows:

“15 Admissibility and evidential weight of data messages

(1) In any legal proceedings, the rules of evidence must not be applied so as to deny the admissibility of a data message, in evidence-

(a) on the mere grounds that it is constituted by a data message; or

(b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.

⁵ Act No, 25 of 2002

(2) Information in the form of a data message must be given due evidential weight.

(3) In assessing the evidential weight of a data message, regard must be had to-

(a) the reliability of the manner in which the data message was generated, stored or communicated;

(b) the reliability of the manner in which the integrity of the data message was maintained;

(c) the manner in which its originator was identified; and

(d) any other relevant factor.

(4) A data message made by a person in the ordinary course of business, or a copy or printout of or an extract from such data message certified to be correct by an officer in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self regulatory organisation or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract."

[15] It is common cause that *Mange* was employed at Metropolitan Life Insurance as a financial advisor and involved in a relationship with accused no. 2. Mr *Leon Pretorius (Pretorius)*, Metropolitan's manager of

forensic services had access to the company's internal polycom system and telephone records. His uncontroverted evidence was that the telephone number to reach the division in which *Mange* was employed was [...1]. Outgoing calls could only be made utilising an individual pin number allocated to each employee. *Mange's* personal pin number was, according to company policy, for her exclusive use. It is not in dispute that her cell phone number was [...3].

[16] The question whether accused no. 2 had access to a cellular phone whilst incarcerated at St Albans is easily resolvable. During the course of the trial it had been put to all and sundry that by virtue of the correctional facilities' prohibition on the use of cellular phones by prisoners, accused no. 2 could not and did not have access to a cellular phone during the period of his incarceration. The assertion made is demonstrably false as evidenced, perhaps inadvertently, by the accused himself. It is common cause that accused no. 2 was arrested in 2012 and has remained in custody. In paragraph 4 of the admissions made pursuant to the provisions of s 220 of the ***Criminal Procedure Act***⁶, accused no. 2 admitted ***"that exhibit "T" are extracts of cell phone messages retrieved from the cell phone of Thandeka Mange. The content of the sms messages are admitted as correct."*** Exhibit "T" records nine sms messages to and from number [...0] between the period 12 October 2013 and 22 November 2013.

⁶ Act No, 51 of 1977

[17] It is common cause that accused no. 2's alias is *Twenty*. Whatever doubt there may have been is dispelled by the sms to Mange on 12 October 2013 "***please call Twenty at [...0]***" and the sms to his attorney, Macgeer "***Mr MacGear, it's me Ndumiso Boo! do we stand a chance of getting bail on this matter***". Although the cellular number utilised by accused no. 2 is different to that which the state alleges he used during June 2013, the foregoing evidence demonstrates, quite unequivocally, that accused no. 2 had access to a cellular phone during the period of his incarceration.

[18] The evidence adduced by the state proves beyond any doubt that accused no. 2 used the cellular number [...1]. As adumbrated hereinbefore *Mange* was taken into custody and questioned by Lieutenant Colonel *Michiel Christiaan Grobblers* (*Grobblers*). He testified that she had two cellular phones in her possession and during the interrogation he telephoned accused no. 2 on that cellular number under her contact details. When accused no. 2 answered and heard his voice he dropped the telephone. He redialled the number and when he informed accused no. 2 that his girlfriend had been arrested he once more ended the call. Although it was put to *Grobblers* that the accused refuted being a party to the telephone call, the denial is clearly false. *Mange's* cell phone contact details establish that the number [...1] was that of accused no. 2.

[19] Warrant Officer *Thembinkosi Mooi* (*Mooi*), attached to the South African Police Services' Cyber Investigation Unit extracted the contact

details stored in *Mange's* cellular phone, downloaded them onto a compact disc and printed those of relevance to these proceedings. The collated data, handed in as exhibit "O", records the following under entry:

-

- "- no 335, the name Mawe2 and phone number [...2]
- No. 768, the name Twenty wam and phone number [...1]
- No 833 the name Yhima and phone number [...8]"

[20] Although accused no. 4, the only one of the accused to testify, was finally constrained to admit that the telephone number [...2], which appeared in *Mange's* contact details under the name *Mawe2* was his number, he nonetheless steadfastly maintained that the contact name bore no correlation to his and that the sim card was in any event, pursuant to the provisions of the ***Regulation of Interception of Communications and Provision of Communication-Related Information Act***⁷, registered in the name of one *Lotz*. It matters not. By his own admission the cell number was his and, given the similitude in the

⁷ Act No, 70 of 2002

pronunciation of the last letter in *Mawethu* and the corresponding digit at the end of *Mawe2*, the inference can properly be drawn that *Mawe2* is merely an internet language derivative of *Mawethu*.

[21] Despite initial protestation that accused no. 3's alias was *Yhima*, counsel for accused no. 3 was constrained, after *Grobber* produced his pocket book of contemporaneous entries on 18 February 2014, to concede, not only that accused no. 3 was indeed known as *Yhima* but that his cell number was [...8]. This concession was undoubtedly triggered by the evidence of Captain *Hendrik Stephanus Erasmus (Erasmus)* who arrested accused no. 3 on 25 June 2013 and confiscated his cell phone bearing the same cell number.

[22] The evidence adduced by the state establishes beyond any reasonable doubt that during June 2013 and in particular, 12 June 2013 accused no. 2 was the possessor of the cell phone with the number [...1], accused no. 3 was the possessor of the cell phone with number [...8] and accused no. 4 was the possessor of the number [...2].

Contact between Accused No. 2 and Accused No. 4 and Accused No. 2 and Accused No. 3, extrapolated from exhibit "K⁸"

⁸ The Call data on accused no. 2's cell phone msisd#083 861 7031

[23] The first contact between accused no. 2 and 4 occurred on 3 June 2013. It is common cause that accused no. 2 appeared in the New Brighton Magistrates' Court on that date. Exhibit "K10" establishes contact between accused no 2 and 4 at 01:40:14 p.m. on 3 June 2013. On 4 June 2013 accused no. 2 and accused no. 4 were once again in telephonic contact for close onto four minutes. On 5 June 2013 telephonic contact was made on no fewer than twelve (12) occasions. On 6 June 2013 two (2) calls were made; on 7 June 2013, one (1) call; on 9 June 2013, four (4) calls; on 10 June 2013, one (1) call; and on 11 June 2013, nine (9) calls.

[24] Exhibit "K" establishes cellular phone contact between accused no's 2 and 3 for the first time on 10 June 2013. The first, from accused no. 2 to accused no. 3 and, thereafter, three (3) calls from accused no. 3 to accused no. 2. On 1 June 2013 at 12h39 p.m. accused no. 2 contacted accused no. 3 in a call lasting 74 seconds.

12 June 2013

[25] As a precursor to tabulating the telephonic contact between the cellular numbers of *Mange*, accused no's 2, 3 and 4 it is apposite to dispel any notion that the calls may not have been made or received by them. The historical record refutes any such suggestion and I accept that the

contact was between *Mange*, accused no's 2, 3 and 4 and in the chronological order as extrapolated from the data on exhibit "G", "K", "M" and "N". The pattern which emerges is as follows: -

14h50	Accused no. 2 contacted accused no. 4
16h24	Accused no. 3 contacted accused no. 2
16h26:02	<i>Mange</i> contacted accused no. 2 from her landline at Metropolitan in a call lasting 10 minutes and 39 seconds. Whilst the call was in progress, <i>Mange</i> initiates a conference call with accused no. 4 and accused no. 3.
17h05:32	<i>Mange</i> contacted the deceased at the surgery. I interpolate to state that the purpose was undoubtedly to confirm her presence at her place of employment. Dr <i>Odufuwa</i> , as adumbrated hereinbefore deposed to an affidavit after the incident. Its admission was sought pursuant to the provisions of s 3 of the <i>Law of Evidence Amendment Act</i> . I ruled that the statement was admissible in evidence in the interests of justice

[26] In paragraph 2 of the statement Dr *Odufuwa* narrates the content of a telephonic conversation between himself and the deceased at 18h26 on 12 June 2013 wherein she recounted a telephonic call to the surgery for the sole purpose of establishing her identity and, when she answered in

the affirmative, the call ended. It was submitted on behalf of accused no. 2 that contextually read, the caller was a male person and automatically excluded *Mange* as the caller. The submission is, to say the least, fatuous. I accept that the caller was indeed *Mange*.

[27] At 17h06:12 *Mange* contacted accused no. 2 and initiated a conference call between them and accused no's 3 and 4. Colonel *Phillip De Jager Cronje (Cronje)*, stationed at the Priority Crime Management Centre of the Directorate for Priority Crime Investigations (The Hawks), was provided with MTN phone call data records of *Mange*, the surgery and the accused (exhibits G, H, K, L, M and N) and prepared a graphic illustration of the pattern of the calls, their chronological sequence and the cell phone towers which registered the telephone activity (exhibit "Q"). It is apparent herefrom that accused no. 3 and accused no. 4 were in the vicinity of the cell phone tower of the Motherwell Library between 17h33 and 18h37. The probabilities are that the deceased must have been killed between 18h26 and 18h43. The submission made by counsel for accused no. 3 that the latter was, as evidenced by the cell phone data, engaged on his cell phone during that period, is untenable and at variance with the objective facts.

[28] Exhibit 'Q' establishes the movement of accused 3 from the time he entered the signal tower area of the Motherwell Library. It demonstrates

that at 06:33:19 p.m. he was, on the uncontroverted testimony of *Erasmus* within a radius of 600m from the surgery. And so too, was accused no. 4. Exhibit "K" next establishes contact between accused no's 2, 3 and 4 between 19h17:13 and 22h41 that evening after the shooting of the deceased. By 16 June 2013, all communications between them ceased.

[29] It was submitted on behalf of the accused that the foregoing cell phone data merely established that there was communication between the accused *inter se* and with *Mange* without any evidence concerning the import of their conversation. Consequently, there was, so the argument unfolded, a *lacuna* in the state case which warranted their acquittal on the charges preferred against them. It is indeed so that there is no direct testimony implicating the accused in the commission of the offences. The state's case, as I remarked earlier, rests on circumstantial evidence. In assessing such evidence, Zulman AJA stated as follows⁹: -

"... one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oft-quoted

⁹ S v Reddy and Others 1996 (2) SACR 1 (AD) at page 8c to page 9e.

dictum in R v Blom 1939 AD 188 at 202-3, where reference is made to two cardinal rules of logic which cannot be ignored. These are, firstly, that the inference sought to be drawn must be consistent with all the proved facts and, secondly, the proved facts should be such 'that they exclude every reasonable inference from them save the one sought to be drawn'. The matter is well put in the following remarks of Davis AJA in R v De Villiers 1944 AD 493 at 508-9:

'The Court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way; the Crown must satisfy the Court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence.'

Best on Evidence 10th ed 297 at 261 puts the matter thus:

'The elements, or links, which compose a chain of presumptive proof, are certain moral and physical coincidences, which individually indicate the principal fact; and the probative force of the whole depends on the

number, weight, independence, and consistency of those elementary circumstances.

A number of circumstances, each individually very slight, may so tally with and confirm each other as to leave no room for doubt of the fact which they tend to establish. . . . Not to speak of greater numbers, even two articles of circumstantial evidence, though each taken by itself weigh but as a feather, join them together, you will find them pressing on a delinquent with the weight of a mill-stone. . . . Thus, on an indictment for uttering a bank-note, knowing it to be counterfeit, proof that the accused uttered a counterfeit note amounts to nothing or next to nothing; any person might innocently have a counterfeit note in his possession, and offer it in payment. But suppose further proof to be adduced that, shortly before the transaction in question, he had in another place, and to another person, offered in payment another counterfeit note of the same manufacture, the presumption of guilty knowledge becomes strong. . . .'

Lord Coleridge, in *R v Dickman* (Newcastle Summer Assizes, 1910 - referred to in *Wills on Circumstantial Evidence* 7th ed at 46 and 452-60), made the following observations concerning the proper approach to circumstantial evidence:

'It is perfectly true that this is a case of circumstantial evidence and circumstantial evidence alone. Now circumstantial evidence varies infinitely in its strength in

proportion to the character, the variety, the cogency, the independence, one of another, of the circumstances. I think one might describe it as a network of facts cast around the accused man. That network may be a mere gossamer thread, as light and as unsubstantial as the air itself. It may vanish at a touch. It may be that, strong as it is in part, it leaves great gaps and rents through which the accused is entitled to pass in safety. It may be so close, so stringent, so coherent in its texture, that no efforts on the part of the accused can break through. It may come to nothing - on the other hand it may be absolutely convincing. . . . The law does not demand that you should act upon certainties alone. . . . In our lives, in our acts, in our thoughts we do not deal with certainties; we ought to act upon just and reasonable convictions founded upon just and reasonable grounds. . . . The law asks for no more and the law demands no less.'"

The Electronic Data

[30] No criticism whatsoever can be directed at the electronically retrieved data, as indeed, none was. The evidence adduced conforms to the statutorily enjoined safeguards and their reliability and integrity is beyond question. The proved facts establish that after accused no. 2 came into possession of copies of the case docket relating to the hijacking of Dr *Odufuwa's* vehicle on 3 June 2013, a flurry of telephone calls passed

between *Mange*, accused no's 2, 3 and 4. Shortly after the deceased's presence at the surgery was confirmed on 12 June 2013, accused no's 3 and 4 moved into close proximity. After the deceased had been killed they both departed the area and, after that evening, all communication between them ceased. The network of facts which I outlined in the preceding paragraphs compel the inference, as the only reasonable one, that accused no's 3 and 4 were on the scene when shots were fired at the deceased. It matters not which of them fired the fatal shot(s) which caused her death. They clearly acted with a common purpose with accused no. 2, their guiding hand.

[31] The accused are however charged with both the statutory offence of conspiracy and the completed offence, i.e. murder. Having found that the latter offence has been proven beyond a reasonable doubt, it stands to reason that since the two offences are conjoined, a conviction on both counts is impermissible and cannot be sustained - the conspiratorial agreement was terminated by the deceased's murder.

The Robbery Count

[32] Mr *Stander* submitted that on the proven facts the inference may legitimately be drawn that accused no. 2 was one of the persons who robbed the deceased and Dr *Odufuwa* of their possessions on 11 October 2012. Although the hearsay evidence of the deceased was tendered on a circumscribed basis viz the fact of the pointing out, there is no evidence to suggest that accused no. 2 was aware of the identity of the person who pointed him out at the formal parade. It was only in June 2013, when the accused had access to the content of the case docket and in particular the statements by the deceased and Dr *Odufuwa*, that he could have obtained such knowledge. It appears from the charge sheet pertaining to the robbery count, exhibit "R", that on 4 June 2013, the matter was postponed to afford accused no. 2's attorney the opportunity to examine and consider the case docket as a prequel for a formal bail hearing.

[33] The inference may thus properly be drawn that the conspiratorial agreement which ensued was inextricably linked to the discovery of the identity of the deceased. In the face of such damning testimony accused no. 2 had a case to answer but instead chose to close his case. His failure to testify must consequently redound to his detriment. The frenetic telephonic interaction between the accused thereafter, which ultimately led to the death of the deceased, ineluctably compels the inference that he had robbed the deceased and Dr *Odufuwa* and her death provided the avenue for his escape from prosecution.

[34] In the course of this judgment I examined the evidence tendered by accused no. 4. He was a thoroughly unsatisfactory witness and it soon became obvious that he is incapable of speaking the truth. He is an incorrigible liar and I reject his evidence in its entirety.

[35] In the result therefore: -

1. Accused no. 2 is found guilty on counts 1, 2, 3 and 5 and not guilty on count 4.
2. Accused no. 3 is found guilty on counts 5, 6 and 7 and not guilty on count 4.
3. Accused no. 4 is found guilty on counts 5, 6 and 7 and not guilty on count 4.

D. CHETTY

JUDGE OF THE HIGH COURT

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