

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU NATAL LOCAL DIVISION, DURBAN

Case No. AR 740/14

In the matter between:

Priyen Naidu

Appellant

and

The State

Respondent

Judgment

[1] On the 4th July 2014, the appellant, Priyen Naidu ('Naidu'), was convicted in the High Court sitting at Durban, of two counts of murder. The first count related to the murder of Zanoool Fakir ('Zainool'), and the second to Akbar Sudhoona ('Akbar').

[2] On the 6th August 2014, Naidu was sentenced to undergo life imprisonment for the murder of Zainool, and twenty years' imprisonment for the murder of Akbar. Leave to appeal was granted by the court a quo against sentence only. Leave to appeal against the convictions was granted by the Supreme Court of Appeal on the 9th February 2015. For the sake of convenience, I shall refer to the parties by their first names and/or surnames, without intending any disrespect by the omission of their titles.

[3] Before dealing with the evidence led at the trial, it is useful to summarize what the state set out to prove what had happened to the two deceased men.

- (a) Zainool was in a business relationship with Naidu.
- (b) They traded in duty credit certificates, bought from and sold to textile companies, earning them commission.
- (c) Naidu and his co-accused Ruwain Meer ('Meer') who was a self-confessed drug dealer, decided to kill Zainool.
- (d) To this end:
 - (i) They hired the Four Seasons Bed and Breakfast house ('the b&b') in Umhlanga Rocks in order to hold an elaborate party with drugs and women.
 - (ii) They invited Ms Sally Joyce Stainton-Jones (in whose home Meer had been living in Essex Terrace in Westville), and her daughter Samantha to the party, in order to have access to the empty house.
 - (iii) They lured Zainool to a meeting, using a pay-as-you-go cellphone, believing it would not be traced.
 - (iv) Unfortunately, when he was phoned about the meeting, Zainool decided to take his nephew Akbar with him.
 - (v) Naidu and Meer left the b&b party to meet with Zainool. Zainool and Akbar were severely assaulted before being shot to death.
 - (vi) Naidu and Meer then had the house at Westville cleaned, and they returned to the party. The cleaning was done by an employee of Meer's mother, (who lived in the Sherwood area very close to Essex Terrace), together with his friend.
 - (vii) At the b&b Naidu and Meer had the clothing they had worn burnt, and the next morning had the house in Essex Terrace cleaned again. Naidu's car was sent to a car wash for cleaning.

- (viii) They disposed of the two cellphones belonging to Zainool and Akbar, as well as Akbar's driver's licence.

[4] The evidence presented at the trial demonstrated:

- (a) On the 13th May 2009, at about 6.35pm, Zainool had left his wife, Quraisha Fakir at their home, and proceeded to drive his mother-in-law to her house, about five minutes' drive away. He left with a Nokia E51 cell-phone and a Guess wristwatch. At approximately 6:45pm, he phoned his wife, and told her that he was going to Sherwood to meet Naidu. He also said that he intended to fetch his nephew, Akbar.
- (b) Later that night, when he did not return, his wife telephoned Naidu, who said to her that Zainool had not spoken to him, and that he had not seen him that night.
- (c) Ms Fakir then phoned Nizam, the brother of Zainool and father of Akbar, for assistance. Their searches proved fruitless. Eventually, the bodies of Zainool and Akbar were discovered the next morning, in Zainool's red VW Golf motor vehicle in the Sherwood area. The area where the vehicle was found is on the border between Westville and Sherwood. They had both been severely assaulted before being shot at close range.
- (d) Ms Fakir testified that Zainool had concluded a number of deals through a close corporation named Cupra Trading 002 CC, which dealt in the purchase from, and sale to, textile companies of duty credit certificates. In doing so, he had had dealings with Naidu. Ms Fakir only knew this from what she had been told by Zainool, and had never met Naidu. Zainool had also been employed as a logistics manager by a company initially named Aristo Life Sciences, which changed to Volcano Agro Science after a merger. The duty credit certificates were sold to Cupra 002 by Naidu.

- (e) Ms Fakir could not dispute that the sole member of Cupra 002 was one Vishal Ganpath ('Ganpath'), a person she did not know. She conceded that Zainool had registered a close corporation named Zainool Abedeen Fakir Trading on the 3rd February 2009. Ms Fakir also stated that Zainool had told Nizam that Naidu owed him R20 000. She said that Zainool had told her that he was going to fetch that money from Naidu.
- (f) The wife of Akbar, Nitisha Maneckchund, told the court that at 7.20 on the 13th May 2009, Zainool had fetched Akbar from their home in Chatsworth. When Akbar did not return, she phoned him on his Samsung Navigator cell telephone at about 9.00pm, but he did not reply. She then phoned Ms Fakir.
- (g) Thandokuhle Mkulisi ('Thandokuhle') told the court that in the evening of the 13th May 2009, he was in the company of his friend Rodney Mbatha ('Rodney') at the home of his employer, the mother of Meer, when Meer arrived. Thandokuhle had been watching a television programme called 'Generations', which started at 8.00pm, when Rodney, and thereafter, Meer, arrived. They were talking when Naidu arrived in a white Fortuner, accompanied by a black male. Naidu alighted from the Fortuner spoke to Meer, and then left. After speaking to Naidu, Meer informed Thandokuhle and Rodney that they were needed to work as car guards at a party to be held in Umhlanga Rocks that night. Prior to going to the party, Thandokuhle and Rodney were taken to the house in Essex Terrace to do cleaning. Thandokuhle and Rodney were then taken to the b&b where the party was to be held, where they were given liquor, and they took various drugs and smoked dagga. He and Rodney acted as car guards, and the next morning they were given cleaning materials by Naidu, and taken to the Essex Terrace house by Meer where they were instructed to do cleaning again. Meer's mother lived in Sherwood.

- (h) Dhanraj Heeralall ('Heeralall') testified that he was the erstwhile attorney for Naidu, having been appointed after Naidu was arrested. Acting on Naidu's instructions, he had informed members of the South African Police Services that Naidu had been informed of the location of the cell-phones which had been in the possession of Zainool and Akbar when they were murdered. This was on the 3rd June 2009. Heeralall had also, on the instructions of Naidu, discussed with the police officers, the possibility of Naidu being used as a s 204 witness. Heeralall also informed the police officers that Meer had told Naidu where the phones were to be found.
- (i) Ms Stainton-Jones told the court that Meer had introduced her to Naidu approximately three weeks' before the 13th May 2009. They had later invited her to the party to be held at the b&b. She was told by Naidu that the party would be at his house. Both Naidu and Meer were there when she arrived at approximately 5.00pm. A few hours' later they left, returning at approximately 11.00pm. When they left they were both wearing red sleeveless shirts. When they returned, Meer jumped into the swimming pool naked, and Naidu was seen by her, walking around upstairs, dressed only in boxer shorts.
- (j) At that stage Ganpath and two other men were making a fire on one side of the house. She wanted to join them, thinking that they were making another braai, but she was told by them she could not do so because they were performing an 'Indian' ritual. The two black males at the fire with Ganpath had returned with Meer and Naidu, and she recognised one of them named Rodney, who had worked for her as a gardener on one day only, having been introduced to her by Meer.
- (k) Ms Stainton-Jones conceded that Meer may have been staying at her home for about a week before the party. There had been cocaine and mandrax available at the party, which she had indulged in. She knew that Meer was a cocaine dealer. She also said that a duvet, which she used for her dogs, had been identified by her to the police. This duvet

had been found in Zainool's red VW Golf by Nizam Hoosen after he had recovered the car from the police. The duvet was covered in dogs' hairs, and had blood on it. She said that when the police officers came to her home enquiring about the duvet and wanting samples of the dogs' hair, she had been phoned by Meer who said that he and Naidu would pay her, Samantha and Neil (who was staying at her home) R20 000 each if they took the dogs and left her house, because the police officers were on their way to her house.

- (l) Ganpath testified that after he had been retrenched from his employment and was looking for work, Naidu had approached him to purchase a shelf close corporation – Cupra 002 - of which he was the only registered member. On the instructions of Naidu, he also opened a bank account in the name of the CC at FNB Umhlanga Rocks. He did so because Naidu said that he wished to trade in duty credit certificates, but could not do so through his own company. Ganpath delivered paper work, made deposits and drew and cashed cheques on the CC, all on the instructions of Naidu. For this he was paid a salary of between R6 000 and R8 000 per month by Naidu. He did not operate the CC and the bank account on any instructions from Zainool.
- (m) On the 12th May 2009 Ganpath was instructed by Naidu to proceed to West Street in Durban and uplift documents for a new CC and deliver them to Zainool. Shortly after doing so, he was phoned by Naidu who instructed him to uplift a cheque from Zainool in the sum of R600 000 and deposit it into the bank account of Cupra 002. The next morning he met Naidu, Meer, one Bob Seedat and Samantha, at the Japanese Gardens and they proceeded to the b&b where the party was to be held. During the course of the day he was given R600 by Naidu and sent to purchase a pay-as-you-go cellular phone and airtime. He purchased the phone and two MTN R60 airtime vouchers at the CNA in Umhlanga Rocks, and gave the items to Naidu.

- (n) Ganpath started the braai in the evening and noticed that Meer and Naidu were leaving the premises, saying that they would be back shortly. When they returned, over two hours' later, neither was wearing a shirt. They both wore jeans, and Meer took off his jeans and jumped into the pool naked. Naidu went upstairs where he was later joined by Meer. They both came downstairs, now dressed in short pants and t-shirts. Naidu told Ganpath to go upstairs and fetch a cardboard box – he did so and Naidu told him to give it to Meer. In the box were two pairs of denim jeans, two t-shirts and a pair of cream takkies. Meer then placed the items into a wheelbarrow, placed firelighters on them and lit the firelighters. In addition Naidu handed to Ganpath a black basketball vest to put in the fire. It had been worn by one Ezeraldo, who was by then also at the party. Naidu and Ezeraldo are cousins.
- (o) The next morning, Ganpath was asked by Naidu to establish whether a nearby carwash was open. He did so, informed Naidu that it was open, and Naidu then brought his white Fortuner to the carwash to be washed. Later, Messrs Ganpath, Naidu and Ezeraldo went to the La Lucia Mall where Ganpath spoke to Naidu. Naidu asked him whether he knew what had happened the previous night, and Ganpath said he did not want to know. Naidu then said it was something to do with Zainool's death, and Ganpath said he wished to stay 'right out of it'.
- (p) Thereafter they proceeded to the Springfield Value Centre where Ganpath purchased a pair of blue denim jeans for Naidu and a pair of black takkies for Ezeraldo. This was done on the instructions of Naidu. Naidu then left with Ezeraldo. Ganpath later met Naidu at his home in Broadway where Naidu told him not to say anything to anyone about what had happened the previous night. Two days' later, on the instructions of Naidu, Ganpath drew R45 000 in cash from the bank account of Cupra 002 and delivered it to Naidu. On the next Monday, on the instructions of Naidu he drew R180 000 from the account and gave it to Naidu in the car-park outside the bank, where Naidu was waiting in his vehicle with Ezeraldo.

- (q) Ganpath later met with Meer and Naidu at the parking lot of the Riverside Hotel, and Meer said that Ezeraldo was going in for questioning by the police, and he could not let Ganpath go home because the police were looking for him. Ganpath then spent two nights with Meer in the Britannia Hotel. The next day they went to the home of Meer's friend in Newlands West. The friend was to uplift Ganpath's car from the Britannia Hotel. Thereafter they went to the Star Lodge in Pinetown where they lay low for six days'. On the second day Naidu arrived at the Star Lodge and told Ganpath that he needed to go to the Durban North Police Station. He did so, having been instructed by Naidu to say that Zainool had instructed him to register a CC and open a bank account in the name of the CC. This explanation was given by Ganpath to an attorney hired by Naidu, and a statement prepared and given to the detectives at Sydenham Police Station.
- (r) Ganpath was then called in by the detectives for a second statement – made by him in manuscript during the early hours of the morning.
- (s) Poobalan Moodley ('Moodley') told the court that he was a self-employed mechanic who lived in Chatsworth. On the 8th June 2009, his flat-bed truck, which had a VW Beetle loaded on the flat-bed was parked outside his home. Moodley had purchased the VW Beetle with the original intention to renovate it, and stored it on the flat-bed because of a shortage of parking space. Police officers arrived at his home, and asked for permission to search the truck. He consented, and underneath the VW Beetle they found a blue plastic bag containing two cellular phones, two batteries and a driver's licence card.
- (t) Indran Naicker testified that he was the manager at the CNA branch in Chartwell Drive, Umhlanga Rocks during May 2009. He confirmed that on the 13th May 2009 he had sold an MTN cell-phone and two airtime vouchers. At that stage no RICA requirements had to be furnished by purchasers of pay-as-you-go phones. It was, however, company policy

to record all sales of cell-phones, by way of the unique identifying number (IMEI number) recorded on each cell-phone. All MTN cell-phones were sold with a starter-pack which was activated at the time of the sale in the store. That cell-phone had been used to phone Zainool at 7.43pm on the 13th May, 2009.

- (u) Warrant-Officer Sujit Rohith, then of the Sydenham Detective Branch testified that he had taken over the murder investigation from the 25th May 2009. He basically confirmed the sequence of statements testified to by Ganpath. The police officers had tracked down the pay-as-you-go cell-phone after investigating calls made to the cell-phone of Zainool around the time of his death. He also confirmed the incident when Heeralall advised him of the whereabouts of the deceaseds' cell-phones found in a blue packet underneath the VW Beetle on Moodley's flat-bed truck. The IMEI numbers on those cell-phones were the same as the numbers on the original boxes shown to Warrant-Officer Rohith by Nizam Hoosen. The driver's licence had belonged to Akbar.

- (v) On the 4th June 2009 Warrant-Officer Rohith was handed a red and grey duvet with dogs' hair and blood on it, by Nizam Hoosen. Forensic investigators could not link the duvet to the dogs belonging to Ms Stainton-Jones because the hair-samples taken lacked follicles. Warrant Officer Rohith also confirmed that the burnt material which he recovered from the wheelbarrow at the b&b where the party was held, was in fact burnt fabric which was forensically tested (he only visited b&b on the 1st June 2009).
 Warrant Officer Rohith also investigated the statements by Ganpath that he had stayed at the Britannia Hotel and the Star Lodge in Pinetown. The records he examined did not contain any references to particular persons.

- (w) Warrant Officer Nyembe, who is part of the ballistics unit in Amanzimtoti testified that he had attended upon the scene where the bodies of Zainool and Akbar were recovered from Zainool's motor

vehicle. He was able to determine that the deceaseds were shot whilst bound and lying in the boot and back of the vehicle respectively.

- (x) Ms Neyiwa told the court that she was employed at the b&b. On the morning of the 14th May 2009 she had arrived at work and found that the cleaning materials were not where she had left them the day before, and were missing. They were eventually returned to her, but half of the chemicals had been used. She had also seen the wheelbarrow with the remnants of burnt cloth in it.

[5] Both Meer and Naidu testified. The relevant portions of Meer's evidence may be summarised as follows.

- (a) He lived in Westville, and decided to hold a party at the b&b. To that end, and on the morning of the 13th May 2009, he met with Naidu who handed over to him R50 000 for the purchase of drugs for use at the party. He then proceeded to the Japanese Gardens where he met with Naidu, Ganpath, Samantha and one other. He also arranged with Rodney to do car-guard duties at the party, and said that he would fetch him that evening. He went to his mother's home at about 8.00pm to fetch cocaine, Rodney and Thandokuhle. Whilst there, Naidu arrived in his Fortuner, accompanied by his bodyguard. Meer left the R50 000 he had been paid by Naidu at his mother's house. They then proceeded to the b&b.
- (b) When they arrived at the party, Meer thought it was boring, and jumped into the pool naked in order to cheer things up. They had arrived back at the party from Sherwood at about 9.00pm. He and Naidu went upstairs to one of the bedrooms in order to weigh the cocaine he had brought with him. They mixed the cocaine with Ashton & Parsons teething powder to make it go further. He then saw Ganpath burning something in the wheelbarrow on the lawn.
- (c) The next morning Meer told Naidu that he had to return to the home of Ms Stainton-Jones, where he had been staying, in order to clean up the

place because he was no longer going to stay there. He borrowed Samantha's car and went to Essex Terrace to do so. Rodney and Thandokuhle accompanied him to do the cleaning. He removed some latex gloves and paper towels belonging to Ms Stainton-Jones, in order to clean up a ginger ale he had spilt. After they had finished cleaning, he returned to his mother's home, dropped off Rodney and Thandokuhle, and returned to the b&b to hand Samantha's car back to her.

- (d) In cross-examination Meer said that he had sent Ganpath to purchase some Mandrax at about 11.00pm on the night of the party. He also confirmed that he had spent time in various hotels with Ganpath after the 13th May 2009. He admitted that he had been in cell-phone communication (six times) with Naidu after they had left the party early on the evening of the 13th May 2009.

[6] Naidu's evidence may be summarised as follows.

- (a) He was the sole member of Gateway Fabrics CC, which traded in duty credit certificates. He had been doing so since 2005. He was also the sole member of Divine Logistics CC. He knew nothing of Cupra 002 Trading CC. He had helped out his old school friend, Ganpath, when, in January 2009 he became unemployed, by giving to him Zainool's cell-phone number.
- (b) Naidu first met Zainool when Zainool was employed as an administrator by the clearing and forwarding agents, Spectrum Shipping. Zainool was in charge of the processing of duty credit certificates. He then took up an administrative position in Spunchem, a chemicals company, and he and Naidu remained in telephonic communication. Zainool had requested Naidu to lend to him the sum of R20 000, but Naidu refused to do so.

- (c) Naidu said that he regularly gave instructions to Ganpath to go and fetch his girlfriend, Lee, from her home in Overport.
- (d) Naidu had booked the b&b for the party on the 13th May 2009. He requested Meer to cater for the party. He paid about R3 500 for the hire of the b&b, and R50 000 to Meer. Naidu denied any knowledge of the pay-as-you-go cell-phone purchased by Ganpath.
- (e) Earlier in the day Naidu had communicated on six occasions with Zainool, with regard to duty credit certificates.
- (f) Both Naidu and Meer left the party at about 7.00pm – Meer to obtain more drugs, and Naidu to fetch Lee, whom he was supposed to meet downstairs outside her residence. He communicated with Meer telephonically during this trip, in order to ensure that Meer did not short-change him with the provision of cocaine. Lee did not arrive at the appointed place, and Naidu could not phone her because her family were at home. A person named 'Rasta' looked after cars outside Lee's flat, and he told Naidu that Lee had not come downstairs. Rasta then accompanied him to Meer's mother's home. Naidu went there to ensure again that Meer would bring the correct quantity of drugs to the party. He spoke to Meer briefly. He saw Thandokuhle there, but not Rodney. He then dropped Rasta off in Alpine Road, Springfield, and proceeded back to the party.
- (g) When Naidu arrived back at the party, he saw Meer jump naked into the swimming pool, and he went upstairs to shower and change into more comfortable clothes. He then worked with Meer on mixing the cocaine. When he went downstairs he noticed that a bonfire had been lit. Later he received a phone call from Zainool's wife, who told him that Zainool had gone off to meet him. He told her that he had not seen Zainool. He also later spoke to Zainool's brother.

- (h) On the morning after the party Naidu had his car booked into a car wash in Umhlanga Rocks. He travelled there with Ganpath. He denied that he had gone to Springfield Park with Ganpath to purchase clothing.
- (i) On the 15th May 2009 Naidu was requested by Sydenham Police to make a statement. He stated that he been at a party on the 13th May, but gave no indication of having left the party, because he did not wish to expose his extra-marital affair with Lee. When he was detained at the Sydenham Police Station on the 3rd June 2009, Lee visited him, and then again at Westville Prison. He had no idea of her present whereabouts.
- (j) Naidu admitted that he knew that his attorney was having discussions with the police officers regarding the possibility of his becoming a section 204 witness. He also admitted having given Heeralall particulars to give to the investigating officer regarding the whereabouts of the cell-phones taken from both the deceased. He would not have given the information to Heeralall unless he thought it would advance his chances of getting bail.

[7] In cross-examination, the following emerged.

- (a) Naidu had instructed his attorney not to reveal to the police officers the identity of the person who gave him the information concerning the whereabouts of the cell-phones. It transpired that that person was Meer.
- (b) Naidu admitted that he had gone to the home of Meer's mother together with Rasta, but denied that Rasta was his bodyguard. He could not explain why Meer referred to Rasta as Naidu's bodyguard.
- (c) Although he had telephonically discussed with Meer the possibility of his being short-changed and the issue of the car guards, he still went to Meer's mother's home to discuss those issues with him.

- (d) Naidu denied having given Ganpath instructions to fetch a cardboard box from upstairs at the b&b. In the early hours of the morning of the 13th May he had phoned Ganpath because he wanted Ganpath to drop Lee off at her home. The times were 2.25am, 2.26am, 4.27am and 7.41am. His explanation for having contacted Ganpath in the early hours of other mornings was that he required Ganpath to pick up drugs from Meer as well as fetching Lee. On the 11th May he had called Ganpath 13 times between 6.38am and 9.20am - this in relation to work Ganpath was doing on his nephew's car.
- (e) Although Naidu denied in his evidence that he had at any time traded through a corporate entity called Shelltrans, he later admitted that he had done so.

[8] Mr *Hellens SC*, appeared for Naidu at the appeal together with Mr *Howse*. The submissions made, together with those contained in Naidu's heads of argument, are:

- (a) The evidence of Ganpath was of such a poor standard that it ought not to have been relied upon in convicting Naidu. The trial court erred in failing correctly to apply the cautionary rule applicable.
- (b) The evidence of Thandokuhle should have been ruled inadmissible because the obtaining of it contravened s 35(3) of The Constitution. This was in accordance with the decision in *S v Mthembu* 2008 (2) SACR 407 (SCA).
- (c) The trial court committed a material misdirection by failing to recognise that the evidence of Thandokuhle which was accepted is inconsistent with the inferences drawn that Messrs Meer and Naidu murdered both deceased.

- (d) The trial court erred in drawing adverse inferences from the cell-phone records, where other inferences existed.
- (e) The trial court erred in relying upon the inadmissible evidence of Ms Fakir to support the conclusion that Zainool had a business relationship with Naidu, and had gone to meet Naidu on the night he was murdered.
- (f) The trial court erred in drawing adverse inferences from perceived falsehoods in the evidence of Naidu which had no material bearing upon the main issue for decision.

[9] It was submitted that the trial judge incorrectly accepted that Naidu's business association with Cupra 002 was the only link between Naidu and Zainool, and was seen as the motive for the murders. Naidu's own evidence was that he had had a prior business relationship with Zainool, which had continued despite the fact Zainool had changed the nature of his employment. Their relationship is also evidenced by the numerous phone calls Naidu admitted having had with Zainool. In addition, the proximity of Naidu to the scene where the bodies of the deceased were found is significant when viewed against his improbable explanations for being there.

The evidence of Ganpath:

[10] The acceptance of the evidence of Ganpath that he merely acted on the instructions of Naidu in carrying out business transactions relating to Cupra 002 is supported by the following;

- (a) It was common cause that the transactions effected on the bank account of Cupra 002 related to duty credit certificates. Ganpath had no history or qualifications or prior employment qualifying him to operate in this field, whilst Naidu did.
- (b) Naidu clearly treated Ganpath as a messenger who did his every bidding, from going to fetch and carry his girlfriend, to going to fetch drugs and food for them at all times of the day and night.

- (c) Naidu paid Ganpath a salary of between R6 000 and R8 000 per month. This would be a menial salary for someone who could deal in duty credit certificates involving a turnover in excess of R10million over six months. Only two possibilities existed – either Ganpath worked for Zainool or he worked for Naidu. No explanation was proffered why Ganpath would lie about working for one and not the other. If Ganpath worked for Zainool, Naidu would not have been able to direct and order Ganpath around as he did. Ganpath's evidence is further supported by the fact that Naidu appeared to have large amounts of cash available to him, unlike Zainool.
- (d) Although Ms Fakir had never met Naidu, she had spoken to him on various occasions over the phone. She knew from her husband that he did business with Naidu. She did not know, and had never met or heard of Ganpath. Ms Fakir knew from Zainool that he wished to open a new close corporation for the same business. All this fits in with the evidence of Ganpath that he was merely a pawn in the hands of Naidu.

[11] Although, save for the evidence of Ganpath, there was no evidence directly linking Naidu to the pay-as-you-go cell-phone, the evidence of Ganpath is corroborated by the police investigations which independently led the police officers to the CNA. The probabilities accord with the evidence of Ganpath that he was asked by Naidu to purchase the cell-phone.

[12] The evidence of Ganpath that Meer and Naidu had left the party together is corroborated by Ms Stainton-Jones, and by Messrs Meer and Naidu themselves. On their version they left, one after the other. It was never suggested that they left in the same car, but rather only that they left at the same time. The burning of the clothing was not based solely on the evidence of Ganpath. Ms Stainton-Jones was clearly misled when she was told that the fire was a form of Indian ritual. The evidence of Warrant Officer Rohith was that remnants of fabric were found by him in the wheelbarrow which forensics confirmed were fabric. The burnt fabric was also seen by Ms Neyiwa.

[13] The fact that Ganpath made contradictory statements to the investigating officer is mitigated by his explanation for doing so. He was clearly unable to persist with the falsehoods, mainly because of his own fears. He was forthright in giving evidence that he had misled the police. Given the relationship which existed between Naidu and Ganpath, it is entirely probable that he would initially have followed his boss's instructions to protect him from incrimination. Ganpath stated that he feared Naidu, which is a further reason for him to follow his instructions.

[14] A further factor in favour of the acceptance of Ganpath's evidence is that he voluntarily proffered the information about the purchase of the cell-phone, the existence of which is corroborated by the link between that phone and the cell-phone of Zainool on the night of his murder. The only other explanation which may be suggested to fit all the facts is that Ganpath himself was responsible for the murders. Not only is this grossly improbable because of the relationships between the various parties, but Ganpath was clearly at the party when the murders were committed. Warrant Officer Rohith denied that Ganpath knew of the fact that the police had discovered the pay-as-you-go cell-phone before he told them of it, and it is speculation to suggest that he did.

[15] There can be no suggestion that Ganpath's evidence should be treated in the same light as an accomplice witness. He was not an accomplice, and whatever suspicions he may have had as to what went on that night, he clearly did not want to be involved. There is no evidence that he knew, or even suspected what was actually happening on the night of the murders. The various cases dealing with the treatment of the evidence of accomplices are therefore distinguishable from the present circumstances.

The admissibility of the evidence of Thandokuhle:

[16] This aspect is dealt with at two levels:

- (a) The contravention of the provision of s 35 (5) of The Constitution, to wit the torture of Thandokuhle by the police officers of the Cato Manor unit, leading to the total exclusion of the evidence; and
- (b) The analysis of that evidence, in the event that it is not excluded.

[17] On the first leg, reliance is placed on the judgment in *S v Mthembu* 2008 (2) SACR 407 (SCA). In my view that case is distinguishable on the facts. In this appeal, there is little doubt on the evidence that the members of the police force unlawfully threatened Thandokuhle by pointing a firearm at him and slapping him. They also tortured Rodney in the presence of Thandokuhle. This conduct was, no doubt, directed at obtaining a confession to the murders, but that was not forthcoming, and both Thandokuhle and Rodney were released on the basis that they were no longer suspects.

[18] It is correct that Thandokuhle made a statement on the 2nd July 2009 to the Sydenham police officers (D/Inspector Rohith) after his return from Cato Manor. The typed version of this statement is confusing filed back-to front in the record. A further statement was made by him to D/Inspector Rohith on the 10th December 2009.

[19] The statements made by Thandokuhle reflect on Naidu in two aspects:

- (a) That he arrived at the home of the mother of Meer and spoke to him in the driveway, at a time when there was a black male in Naidu's vehicle. He did not alight from the vehicle, and Thandokuhle did not recognise him; and
- (b) On the morning after the party, and at the b&b, Naidu called him and Rodney into the kitchen, and instructed a light-skinned, unknown Indian male to give them cleaning materials. He then told Rodney and Thandokuhle that they should go and clean the house in Westville again, and they would then get their money.

[20] With regard to those statements:

- (a) Mr *Howse*, appearing for Naidu at the trial, put to Thandokuhle in cross-examination that at the b&b Meer asked for the cleaning materials to be given to Thandokuhe and Rodney, and Naidu said that they had to go and clean the house in Westville, and that he would take responsibility for the cleaning materials to the owner of the b&b.
- (b) When giving his evidence-in-chief, Naidu stated that he went to the home of Meer's mother on the evening of the 13th May 2009, accompanied by one Rasta, in order to speak to Meer, which he did. He admitted that he would have seen Thandokuhle there. He had knowledge of the detergents at the b&b, and, despite having heard the maid going frantic about them being missing, he did not speak to her because she never asked him about them.
- (c) In cross-examination Naidu confirmed his visit to Meer's mother's home. The issue of the cleaning materials was not further dealt with.

[21] There is little doubt that when he made the second statement, Thandokuhle was not intimidated in any way. The statements are very similar in context, and Thandokuhle stated that he was not afraid when he made the second statement, nor yet when he testified at the trial. Given the findings of credibility made by the court-a-quo regarding Thandokuhle, the fact that the evidence he testified to with regard to Naidu became common cause, and the nature of the evidence itself, I do not believe that the authority in *Mthembu* is relevant. In saying this I do not wish to be misunderstood as in any way condoning the appalling behaviour of the Cato Manor officers. This is an aspect which should have been followed up by the prosecution to ensure that the officers concerned were prosecuted. There was no excuse for their conduct.

[22] With regard to the merits of the evidence of Thandokuhle, and given the evidence of Naidu and what was put to the witnesses by his counsel, there is no reasonable doubt that the learned judge correctly accepted the evidence. The suggestion that Naidu arrived at Meer's mother's home before 8.00pm is not supported by the evidence because Thandokuhle stated that at about 8:15pm, he had been watching the 'Generations' programme which started at 8.00pm when Meer, and then later, Naidu, arrived. The inferences drawn by the learned judge a quo were consistent with the facts testified to, and in the absence of a reasonable and innocent explanation by Naidu concerning his phone calls, etc, the conclusions drawn are the only reasonable inferences, and exclude all others.

The cell-phone records:

[23] The suggestion that Ganpath left his cell-phone in Umhlanga Rocks, whilst using the pay-as-you-go phone to lay a false trail, is mere speculation, unsupported by any facts, and was never put to Ganpath or any other witness. The suggestion that the cell-phone towers may have coincidentally picked up the CNA cell-phone and that of Naidu at about the same time, and in the same area, is also speculation and inconsistent with the evidence of Ganpath that he delivered the CNA cell-phone to Naidu. The coincidence of such an occurrence should not be viewed in isolation, but in the context of all the evidence.

The hearsay evidence of Ms Fakir:

[24] Such of the evidence of Ms Fakir as is relied upon by the court a quo was elicited in cross-examination, and accordingly is admissible. Examples of this are:

- (a) That at 6.45pm on the 13th May 2009. Zainool told Ms Fakir that he was going to Sherwood, that he had just received a call, and that it was important for him to go.

- (b) That Naidu owed Zainool R20 000, and that Zainool was going to fetch it from him that night.
- (c) Naidu had previously spoken to Ms Fakir when he phoned to speak to Zainool.
- (d) Naidu and Zainool had previously communicated on the phone which was being used by Ms Fakir when Zainool disappeared.
- (e) Zainool had previously dealt in duty credit certificates.
- (f) Zainool sourced the duty credit certificates from Naidu.
- (g) A deposit of R868 667.95 was made into the account of Cupra 002 on the 13th May 2009.
- (h) Ganpath fetched a cheque from Zainool on the 12th May 2009 and deposited it into the bank account of Cupra 002.
- (i) When he left home on the 13th May 2009, Zainool gave Ms Fakir the impression that he would return shortly.
- (j) Within ten minutes of leaving their home Zainool phoned Ms Fakir, saying that he had received a call that he should go to Sherwood.
- (k) That Zainool told Ms Fakir that he was going to speak to his friend, Naidu.
- (l) That Naidu said to Ms Fakir that he had not seen Zainool on the night of the 13th May 2009, but that he would see both of them on the 23rd May 2009 because he was holding a thanksgiving dinner for his son, and they were both invited

[25] As per Kgomo JP in *S v Waldeck* 2006 (2) SACR 120 (NCD) at para 13:

‘It is a settled principle or rule of our law of evidence that an accused person may adduce hearsay evidence of his/her own purposes, by giving such evidence him-/herself or calling a witness to give such evidence, as appellant attempted to do with the discarded evidence of Ms Damoense (referred to above), or an accused person may elicit hearsay evidence by way of cross-examination, as the defence has done in this instance (as will be demonstrated hereinafter). Evidence adduced in this manner is admissible, and an adducer thereof cannot try to wriggle out of it when the shoe pinches. See *R v Bosch* 1949 (1) SA 548 (A) at 553-4; *S v Mthembu* 1988 (1) SA 145 (A) at 150; *S v Mokoena* 1978 (1) SA 229 (O); *S v Olifant* 1982 (4) SA 52 (NC); *S v Minnie* 1986 (4) SA 30 (E); and, generally, *Law of Evidence* by C W H Schmidt and R Rademeyer (loose-leaf) at ch 13-20-13-21.’

[26] In those circumstances it was acceptable for the court a quo to include the above in her reasoning and the conclusions at which she arrived based on the evidence of Ms Fakir.

Improper reliance on perceived discrepancies in Naidu’s evidence.

[27] It was submitted that it was common cause that the person who arrived at Meer’s mother’s home with Naidu was a black male. Thadokuhle said that the person was a black male. Naidu’s counsel suggested to him that the person was a dark-skinned Coloured male. The presence or otherwise of this person is significant because his presence is used to back-up the version of Naidu, and to corroborate the evidence of Naidu that he had been in the area because he wanted to fetch his girlfriend, Lee. As that person was never called to give evidence, only the evidence of Naidu explains his role.

[28] The analysis by the court a quo as to the R50 000 is significant because the whole idea of paying R50 000 for holding a very small party is grossly improbable, even considering the drugs involved. However, in the context of a payment for a murder it takes on far more realistic and probable consequences. The evidence of Ms Stainton-Jones was that Meer had told her that he had been offered R50 000 for 'a hit'. That evidence standing alone may be inadmissible as against Naidu because the source of the money was not revealed to Ms Stainton-Jones. However, the money assumes more significance when Naidu admits having paid R50 000 to Meer, but suggests it was for drugs. The somewhat desperate suggestion in cross-examination that 'a hit' referred to the party is clearly an attempt to distance Meer from the suggestion that he was to be paid R50 000 for organising the murders. It is also contrasted with the suggestion by Meer in chief that what was referred to was a 'hip' party!

[29] In all the circumstances, and whatever legitimate criticisms may be levied against the reasoning of the learned judge a quo in her lengthy and detailed judgment, there is no reasonably possibly true explanation for the conduct of Naidu which was demonstrated at the trial, and which could have led to his acquittal.

The sentence:

[30] The factors advanced by Naidu which are argued to constitute substantial and compelling circumstances not to impose a sentence of life imprisonment, are the following.

- (a) Naidu was, at the time that sentence was imposed upon him, a first offender.
- (b) He is married and has two young children.
- (c) He is the primary breadwinner for his family.
- (d) He suffers from a medical condition called Hemangioma.

[31] In addition, it is submitted that Naidu had no motive for the murders, and did not stand to gain from the death of Zainool and Akbar. The submission is also made that both Meer and Naidu were under the influence of drugs and alcohol in the commission of their crimes.

[32] Motive is, however, not a requisite which the State is required to prove in order to establish the commission of a crime by an accused person. The reasons why Meer and Naidu planned and/or caused the murders to take place is not entirely clear from the record. It seems highly probable that Naidu feared that Zainool would take away his business. As pointed out by the court a quo, Naidu is a cold, calculating person, who used others for his own ends without any regard for the consequences to them. This is clearly evident from his treatment of Ganpath. Accordingly, the lack of establishing the precise motives for the murders, impinges neither upon the conviction, nor the imposition of a proper sentence.

[33] If it was in fact true that the murders were committed as the result of a drug and drink induced event which spiralled out of control, the court was not made privy to that information. Both Meer and Naidu demonstrated throughout the trial a singular lack of remorse, and failed to take the court a quo into their confidence as to how exactly the events of the murders unfolded. In those circumstances they can hardly complain that the learned judge did not consider these factors.

[34] With regard to the medical condition of Naidu, this was thoroughly examined by the court a quo, and there can be no criticism of the finding that the medical condition was insufficient to ground a substantial and compelling circumstance to warrant the imposition of a lesser sentence than life imprisonment for the murder of Zainool. The other factors outlined above do not constitute substantial and compelling circumstances to deviate from the prescribed minimum sentence either.

A possible increase in sentence on count three:

[35] The appellant was requested to make submissions as to why the sentence for murdering Akbar should not also have been life imprisonment. In that regard the following are relevant:

- (a) Akbar appears to have been murdered solely because he was in the company of Zainool.
- (b) On the basis that he was not the original target of Meer and Naidu, his murder served only one purpose – to silence Akbar as a witness to the murder of Zainool.
- (c) In terms of s 51(1) of the Criminal Law Amendment Act, 1997, read with (b)(ii) of Part 1 of Schedule 2, life imprisonment is to be imposed where the offence is murder when planned or premeditated, or the victim was a person who was likely to give material evidence of the commission of an offence referred to in Schedule 1 to the Criminal Procedure Act, 1977 in court. Schedule 1 includes both murder and assault where a dangerous wound is inflicted.

[36] It is apparent from the record that Zainool and Akbar were assaulted and shot dead when they were together. If only Zainool had been assaulted and murdered, Akbar would doubtless have given evidence against the perpetrators at any subsequent trial. He was clearly murdered to silence him. In the circumstances, there is no reason why the sentence for murdering Akbar should not have been life imprisonment as well. This is irrespective of who carried out the actual shooting of Akbar, because his attackers acted with a common purpose. That common purpose was premeditated from the time the attackers found out that Akbar was accompanying Zainool.

[37] In all the circumstances there appears to be no merit in the suggestion that the sentence imposed on count 2 – the murder of Akbar – should not also have been life imprisonment.

[38] I accordingly make the following order:

- (a) The appeal against the convictions of the appellant is dismissed.
- (b) The appeal against sentence on count 1 is dismissed.
- (c) The sentence on count 2 is set aside and replaced with the following:
 'The accused is sentenced to undergo life imprisonment on count 2'

Lopes J

I agree.

Kruger J

I agree.

Nkosi AJ

Counsel for the Appellant: Mr *M Hellens* SC, and with him

Mr *J E Howse*

Instructed by: Yugan Naidu Attorneys

Counsel for the Respondent: Ms *N Moosa*

Instructed by: Director of Public Prosecutions

Date of hearing: 29 January 2018

Date of Judgment: 16 February 2018