

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 65/2009

In the matter between:

THE STATE

and

SHAHID EBRAHIM SAEED AND ANOTHER

JUDGEMENT: RAMPAI J

HEARD ON: 19 SEPTEMBER 2011

DELIVERED ON: 20 SEPTEMBER 2011

REASONS GIVEN: 17 AUGUST 2012

[1] We are now at the halfway station of the journey. Before we proceed further, I am called upon by law to make certain semi final rulings in respect of certain provisional rulings I made along the way in favour of the prosecution's case. At this juncture, I have to make a midway decision either for the exclusion or inclusion of the hearsay evidence which I provisionally allowed. The purpose of the decision is to let each of the accused alerted so that they know the scope of the case he faces now that the proceedings have reached

the end of the prosecution case. **S v RAMAVHALE** 1996 (1) SACR 639 (A).

- [2] During the course of the presentation of the prosecutor's case I heard hearsays by Ms Z Saleem, Ms N Awan, Warrant Officer L Steyn, Captain F J Laux and Warrant Officer E van Zyl. Whereas the two civilian witnesses testified about certain oral hearsays the three police witnesses testified about certain written hearsays. In all these five instances the alleged original declarants did not testify.
- [3] On Monday, 19 September 2011 I heard argument for the inclusion of the aforesaid hearsays in the prosecutions pot of evidence. On the same day, I also heard counter argument for the exclusion of such hearsays. Having heard argument, I adjourned the matter to Thursday 22 September 2011. During the intervening two days I digested the pros and cons of excluding or including the hearsays. I made a determination and handed it down on Thursday 22 September 2011. This mini judgment is about the reasons for my earlier midway ruling.

[4] Ms Bester urged me, in the first place, to allow as admissible evidence the hearsays attributed, to a certain Rehman Khan, as was narrated by Captain F J Laux, Warrant Officer L Steyn and Warrant Officer E van Zyl. The various hearsays by Mr Rehman Khan were collated in a single document and were collectively exhibited. The document was labelled exhibit “dd”). It consisted of 33 pages. I shall make no attempt to fully set out or analyse those hearsays. I shall only outlined a brief overview of each statement.

[5] It was alleged that Rehman Khan made the first statement at Clocolan on Thursday 4 December 2008. The statement was taken down by Capt. F J Laux. The answers he gave to the captain boiled down to this:

He pointed out a particular house and answered that he was last there during November 2007. He was there with Shaid, ‘Shalim’ and Shabir. Shabir showed him a spot where they buried 4 people the night before. Shabir further told him that he was the one who covered the burial site by planting grass on it. He and Shabir were good friends. He did not know the 4 dead people Shabir was talking about – (vide p 7 exhibit ‘dd’.

[6] Rehman Khan allegedly made the second statement at Clocolan on Friday, 5 December 2008 which was also reduced to written form by Capt. F J Laux. He stated that one evening during November 2007 he came home at Clocolan from work at Ficksburg. He saw a blue BMW outside. Inside the house he found 4 Pakistani men. He knew none of them. He gathered that they came from Johannesburg and that they had travelled down by a car, the blue sedan parked outside. With them in the house were Shahid, 'Salim', 'Masar', Farhan, Shabir and Sifat. The eleven men slept in the same house next to Shell Service Station. The next morning the 4 visitors remained behind together with the aforesaid 6 inmates when he went to work – (vide p 15, exhibit "dd").

[7] According to W/O L Steyn, Rehman Khan made the third statement in Bloemfontein on Sunday, 7 December 2008. He stated that the 4 men were passengers in the blue BMW sedan on their arrival at Clocolan from Johannesburg on 10 November 2007. The driver thereof was 'Saliem Gureshi'. The sedan was owned by Majied. The same evening

‘Shaeed’ told them that he enticed the 4 men to come to Clocolan under the false pretext that there was a diamond deal to be clinched. The killing of the 4 men was discussed by the suspects. They had a braai to entertain the unsuspecting foursome – (vide p 19, exhibit “dd”).

[8] The next day he arrived home from work at ± 18:00. He found nobody home. The blue BMW was nowhere to be seen. Tanveer came and found him there. Shaeed called Tanveer to come over to the house in Andries Pretorius Street. He accompanied Tanveer. There he saw the blue BMW parked outside. Shahid, ‘Qureshi’, Farhan, Shabir, Maseer (Mohammed) Ejaz and Clifad were busying cleaning and removing the carpets and the curtains.

[9] He saw 4 persons lying elsewhere in the house. Three of them were obviously dead but the fourth one was gasping for breath. He realised that all of them were shot in the head.

The dead victims and the suspects were members of the same mafia group called ‘hushkar’ whose leader was a

fellow called Ejaz Bazra. Ali Mahzar (Mamo) was not present when the victims were murdered. He arrived afterwards but helped to dig the grave and to bury the victims. Bazra ordered the killing of the victims. After the murder 'Shaeed' gave one of the guns to a fellow called Faizel Gani – (vide p 19, exhibit "dd").

- [10] Rehman Khan signed the fourth statement in Bloemfontein on 8 December 2008. Capt. F J Laux took it down. He allegedly stated that he and his cousin, Tanvir, were invited to the house in Andries Pretorius Street by a fellow called 'Saefed'. The house belonged to Ejaz but Shahid and Salim stayed there.

When he saw the wounded victims, bloodstained carpets and curtains he enquired from Shaid as to what had happened. Shahid answered that they killed the victims. Shahid then said he must help bury the victims in the backyard. There he saw 4 unknown black men digging a hole. According to Shahid he had brought those blacks from Lesotho for that specific purpose. Tanvir helped the diggers. He, Rehman Khan, helped the carriers of the bodies from

the room inside to the grave outside.

[11] He saw that Shahid “Salim’ Farhan and Shabir had guns. Shahid responded that he killed two of the victims and that Farhan and “Saefed’, the other two. The victims were killed because they were considered a threat to all the other members of the group, according to Shahid. Shabir planted grass to patch up the ground where the victims were buried in a secret grave. Shahid ordered all the members to deny any knowledge concerning the disappearance of the 4 victims and their BMW, should the police question them – (vide p 15, exhibit “dd”).

[12] It was further alleged, that Rehman Khan made the fifth statement in Bloemfontein on Monday 19 January 2009. He allegedly stated that during February and March 2008 he was living at Howick with Ali Mahzar, Farhan, Ali Tanveer, Saeed and Sifat. Shabir, Mohammed Ejaz and Quereshi also arrived there. The plot to kidnap Zia from Lesotho was hatched there. Zia was kidnapped, held hostage in the Free State and R2 million demanded as a ransom. Zia was given an excessive dose of chloroform by Shaber to subdue him.

He reacted very badly and died before the ransom was paid. He was buried in the Free State. He, Rehman Khan, gathered all these about Zia's fate from Sifat who was kept informed about the developments by Farhan (vide p 22, exhibit "dd").

- [13] It was further alleged that Rehman Khan made the sixth statement in Bloemfontein on Wednesday, 4 February 2009 which was taken down by Warrant Officer Eben van Zyl.

He allegedly stated that Zia Mohammed of TY in Lesotho was indebted to Zia Khan of Maputsoe in Lesotho in the amount of R70 000,00 which loan he could not repay. For that reason he, Zia Mohammed, Shabir and Shaeed hatched the plot to have Zia Khan kidnapped and robbed of his money (vide p 33, exhibit "dd").

- [14] Rehman Khan allegedly made the seventh statement in Bloemfontein on Friday the 3 April 2009 to Warrant Officer Steyn. He allegedly that after the killings of the 4 men 'Shaeed' called Ejaz Mazra and reported to him that the job was done. He then invited him to come to Clocolan to see

for himself. Bazra came and was very pleased. Ejaz Bazra was the don of the gang called 'Harkatel Mazhedim'. The 4 persons were killed because, as he was told, they had killed Bazra's friend in Johannesburg (vide p 30, exhibit "dd").

- [15] In the eighth statement Rehman Khan allegedly made in Bloemfontein on Monday the 1 June 2009 to Warrant Officer Steyn, he stated that some members of the group stayed in one house near Shell Service Station while others stayed in another house in Andries Pretorius Street. 'Shaeed' told him that the 4 men from Johannesburg were there in connection with a diamond deal and that the same night a certain Makara came from Maseru to meet the 4 men, negotiated a deal and undertook to deliver the diamonds the next day. There were five guns in the house at the time. The 4 from Johannesburg were made to believe that the group was going to catch Makara and rob him of his diamonds. He learned from 'Shaeed' that 2 of the 4 were shot in the afternoon and the remaining 2 in the evening. He refused to help in the burial of the bodies. The four corpses were dumped in one grave. Shabir planted green grass on the burial site. After the murder 'Shaeed' was using the blue

BMW sedan (vide p 22, exhibit “dd”).

[16] W/O L. Steyn alleged that Rehman Khan made another statement again in Bloemfontein on the same day, 1 June 2009. This was the ninth statement in the series of ten. Seemingly the group moved away from Clocolan, and crossed into Lesotho. Some of them, including Rehman Khan and ‘Shaeed’ stayed at Teyateyaneng with a fellow called Zia Mohammed. He, Rehman Khan, overheard Shaeed and Zia Mohammed plotting to have a big businessman of Lesotho, Zia Khan, kidnapped.

[17] In 2008 the group moved from Teyateyaneng in Lesotho to Howick in Kwa-Zulu-Natal. ‘Shaeed’, Ali ‘Mahzar’, Farhan, Tanveer, Sifat and Rehman Khan stayed in the same house. ‘Quereshi’, Ejaz and Shabir arrived later. One day the group leader, Ejaz Bazra called Shaeed and ordered that the wealthy businessman, Zia Khan, be kidnapped and that R2 million ransom be demanded for his release.

[18] Pursuant to the leader’s order, ‘Shaeed’, ‘Qureshi’, Ejaz Mohammed, Farhan, and Shabir left Howick and crossed

into Lesotho. The order was carried out. According to Farhan the businessman was kidnapped by 'Qureshi' and Shabir. The businessman put up such a strong fight that the kidnappers decided to sedate him with chloroform in order to break his resistance. The businessman was subdued but he never regained his consciousness. Farhan reckoned that he perished as a result of an excessive overdose of the sedative chloroform administered by Shabir. The suspects did not get the ransom. They took R50 000 from the victim. – (vide p 31, exhibit "dd").

- [19] In the tenth statement which Rehman Khan allegedly made in Bloemfontein on Friday the 10 July 2009, he alleged that shortly before he was arrested, Ali Tanveer phoned to warn him that the police were on their way to him and that he should flee. Despite the warning, he did not take to flight. Instead, he stayed put where he was. Later on that same day during December 2008 Inspector Van Zyl arrested him at Lydenburg in Mpumalanga. He stated that he instantly told Inspector Van Zyl that he wanted to tell him what had happened down at Clocolan. Inspector Van Zyl took him to Clocolan where he was handed over to Captain Laux. There

he subsequently pointed out a burial site. On the one hand he was scared of 'Shaeed' for breaking the code of silence. On the other hand he was also scared to languish in prison which was why he, at first falsely told Captain Laux that the burial site was shown to him. He ended up by stating that the truth of the matter was that he was present on the scene when the bodies were buried but not when 4 men were murdered – (vide p 27, exhibit "dd").

[20] To the aforesaid, arsenal of hearsays must be added another piece of hearsay. Unlike the written hearsays embodied in exhibit "dd" and attributed to Rehman Khan the piece of evidence I am here concerned with, was an oral hearsay about the conversation that Rehman Khan had allegedly had with the investigating officer Warrant Officer Linda Steyn in Bloemfontein on Friday the 5 August 2011. On that day Redman Khan, was taken from his protected witness sanctuary to the office of the Director of Deputy Director of Public Prosecution: Free State Province - for consultation. According to Warrant Officer Steyn the witness, in other words Rehman Khan, anxiously told her that his family way-back home in Pakistan was under threat.

He told the inspector officer that certain people were harassing his family. He alleged that they went to his parental home, intimidated his mother and damaged things there. According to Warrant Officer Steyn the witness under protection was deeply concerned about the safety of his family.

[21] Section 3 of the Criminal Law Amendment Act, 45 of 1988 consists of 4 paragraphs. Hearsay evidence is not supposed to be ordinarily admitted as evidence in criminal proceedings - subsection (1). Notwithstanding this exclusionary legislative command, hearsay evidence can be exceptionally admitted as evidence in criminal proceedings: subsection 1(a) if there is mutual agreement between the parties; subsection 1(b) if the original declarant later actually testifies at such proceedings and confirms it; and subsection 1(c) if the trial court holds the view that, in the interest of justice, such hearsay evidence, should be admitted – subsection (1). I shall say no more about subsection 1(a) and subsection 1(b). They are not applicable to the instant case. In the first place, there was no mutual agreement for the admission of the hearsay. In the second place, there

was no subsequent confirmatory testimony by any of the original declarants to whom the hearsays were attributed. The matter revolves around subsection 1(c). I shall revert to the subsection later.

[22] The subsection (1) does not render admissible any variety of evidence which and whose reception is objectionable and whose reception is on any other legal ground other than that such evidence is hearsay evidence - subsection (2). The trial court is empowered to provisionally admit hearsay evidence if an undertaking is given, by the party seeking to adduce such hearsay, that the original declarant himself or herself will testify in due course - subsection (3).

[23] The legislative meaning of the words: hearsay is given in subsection (4).

“**hearsay evidence**’ means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence; ...”

[24] It will, therefore, be readily appreciated that the evidence

given by Ms Zainub Saleem in respect of the cellular conversation she had with her husband, Majid Saleem, had no independent probative value. Her evidence was a secondary narrative. She, as a narrator, repeated inside the court what her husband supposedly told her outside. The probative value of her evidence depended on the credibility of her husband, the original declarant. Since he did not testify to confirm or disavow the declaration attributed to him the credibility of her secondary evidence hangs in the balance. It cannot be readily assessed. The same comments apply to the cellular conversation the witness had with her husband's friend, Amanullah Nusrullam. It follows, therefore, that the evidence given by the witness concerning such conversations falls squarely within the ambit of hearsay evidence as defined.

- [25] Similarly, the evidence given by Ms Naazira Awan in respect of the cellular conversations she had with her husband, Malik Yasser Awan, suffered from the same probative deficiency. The comments I made in connection with Ms Zainub Saleem apply equally well to her evidence.

[26] There is yet another source of evidence in dispute. The evidence attributed by the three police witnesses to a certain Mr Rehman Khan. It was tendered by the state for admission through the secondary narratives. They, Warrant Officer Eben van Zyl, Warrant Officer Linda Steyn and Captain F J Laux, testified about certain encounters each of them individually had with the gentleman, Mr Rehman Khan. Their evidence was backed up by means of certain written statements. The original declarant, Mr Redman Khan did not testify. Therefore, the evidence of each of these police witnesses falls within the ambit of hearsay evidence. The probative value thereof depends on the credibility of Mr Rehman Khan, the original declarant, and not any of the three secondary narrators themselves.

[27] For many decades, the general rule against the admission of hearsay evidence, particularly by an accomplice, was that evidence of an admission made outside a court of law, by one accused, that incriminated another accused was essentially hearsay as regards any other accused person save the one who made such an admission. Rehman Khan was, according to his own say-so somehow, involved.

He could as well have been charged with the accused as their co-accused. The crucial question in the debate before me was to admit or not to admit the hearsays? I have since ruled for the admission. Were there any compelling justifications for my midway decision? The answer is not as simple as the question.

- [28] “[35] In comparison to the common law the Act allows a more nuanced approach to the admission of hearsay evidence. As the Supreme Court of Appeal stated in *Makhathini v Road Accident Fund*, in the application of the Act in the context of a civil case, the Act requires the court to take a contextual approach. The court said that the statutory preconditions for the reception of hearsay evidence are now designed to ensure that the evidence is received only if the interests of justice justify its reception. A court making a determination whether it is in the interests of justice to admit hearsay evidence must - have regard to every factor that should be taken into account, more specifically, to have regard to the factors mentioned in s 3(1)(c). Only if, having regard to all these factors cumulatively, it would be in the interests of justice to admit the hearsay evidence, should it be admitted.”

Nkabinde J.

[29] I recognise, first and foremost, the general rule of evidence that hearsay evidence is ordinarily inadmissible. However, it is relatively and not absolutely so. In **S v RAMAVHALE** 1996 (1) SACR 639 (AD) at 647d Shultz JA observed as follows about the general hearsay rule:

“Before setting out those considerations it is necessary to emphasise what has already been mentioned, that s 3(1) is an exclusionary subsection and that the touchstone of admissibility is the interests of justice, as is made clear by the words: ‘. . . hearsay evidence shall not be admitted as evidence . . . unless - . . . the court, having regard to (the considerations in ss (c)) is of the opinion that such evidence should be admitted in the interests of justice’.”

[30] Obviously, section 3 contains three statutory exceptions. Because we have these exceptions, hearsay evidence is relatively and not absolutely inadmissible. As already shown there are three permissible exceptions or ways in which the otherwise inadmissible hearsay evidence can be received as admissible evidence. The first receptive

avenue is mutual agreement between the proponent and the opponent – section 3(1)a. The second receptive avenue is the confirmatory testimony by the original declarant of the narrator's initial hearsay testimony – section 3(1)(b). The third receptive avenue is by way of the interests of justice – section 3(1)(c). The first two exceptions to the general rule of exclusion entail no procedural unfairness to the party against whom the hearsay evidence is tendered. However the same cannot be said about the third exception. The exceptional admission of hearsay evidence through this avenue – section 3(1)(c) – can have serious adverse impact on the accused person's fair trial rights. Procedural fairness of trial is the hallmark of any civilized system of justice.

- [31] The common law was, for time immemorable, always alert to the hazards of an unqualified wholesale admission of hearsay. Similarly, the statute does not license wholesale admission of hearsay. Hearsay is second-hand evidence of a statement by a person other than a witness narrating or repeating such first-hand evidence which is relied on by its proponent to prove what the original statement asserts.

Whereas a witness' first-hand testimony is open to reliability checks to test and verify its substantive value, it is practically impossible to have such important reliability verification applied to the repeated second-hand testimony of the same witness. This is precisely what, diminishes the substantive value of a repeating witness' second-hand testimony or hearsay. Its diminished substantive value notwithstanding, the real peril of hearsay lies in the fact that its reception by a court undeniably exposes its opponent to the procedural unfairness in the sense of being helplessly unable to meaningfully destroy adverse inferences a court may deduce from it. **S v NDHLOVU & OTHERS** 2002 (2) SACR 325 (SCA) 335C – 336A and the authorities there cited per Cameron JA.

[32] The distinguished judge went on to say:

[14] The 1988 Act does not change that starting point. Subject to the framework it creates, its provisions are exclusionary. Hearsay not admitted in accordance with its provisions is not evidence at all. What the statute does is to create supplementary standards within which courts may consider whether the interests of justice warrant the admission of

hearsay notwithstanding the procedural and substantive disadvantages its reception might entail. The Act thus introduces the very feature this Court held the common law lacked, namely 'a principle that the rule against hearsay may be relaxed or is subject to a general qualification if the Court thinks that the case is one of necessity'." **S v NDHLOVU** *supra*.

[33] In **MAKHATHINI v ROAD ACCIDENT FUND** 2002 (1) SA 511 (SCA) para [21] Navsa JA observed:

"The statutory preconditions for the reception of hearsay evidence are now designed to ensure that it is received only if the interests of justice dictate its reception."

The fundamental test of the hearsay statute as to when unconfirmed hearsay evidence may be ultimately rejected as inadmissible evidence or ultimately received as admissible evidence is based on flexible supple standards informed by the broad normative interests of justice. So much about the generalities relative to the exclusion or inclusion of hearsay evidence.

[34] The hearsay provisions of section 3(1)(c) of Act 45 of 1988 have been previously considered in numerous leading decisions, for instance:

S v NGWANI 1990 (1) SACR 449 (N); **S v DYIMBANE & OTHERS** 1990 (2) SACR 502 (SE); **S v CEKISO & ANOTHER** 1990 (4) SA 20 (E); **S v NDLOVU & ANOTHER** 1993 (2) SACR 69 (A); **S v RAMAVHALE** 1996 (1) SACR 639 (A); **S v NDHLOVU & OTHERS** 2002 (2) SACR 325 (SCA); **S v MOLIMI** 2008 (2) SACR 76 (CC); **S v LIBAZI AND ANOTHER** 2010 (2) SACR 233 (SCA) and many more.

In almost everyone of these criminal cases, judges of the high, supreme and constitutional court were at pains to sound words of caution about the erroneous admission of hearsay evidence that could be occasioned by any skewed application of the fundamental test. As I set out, with some trepidation, to consider the seven cornerstones of the test in order to determine whether the interests of justice demand the hearsay evidence in this case to be excluded or included, I shall constantly bear such warnings in mind.

[35] **The hearsay statute requires, in the first place, that specific account be taken of the nature of the**

proceedings – subsection 1(c)(i). This alludes to the distinction, not only between action proceedings and motion proceedings but also between civil proceedings and criminal proceedings. The overriding and distinctive feature of criminal law is that in criminal proceedings the state bears the onus of establishing the guilt of the accused person beyond reasonable doubt. Such a high standard of proof does not apply to civil proceedings. Our civil law requires proof on a balance of probabilities. It follows, therefore, that where the admission of hearsay is sought but challenged, an appropriate standard of proof must be applied, the admissibility has to be argued, its contents has to be probed, its reliable and unreliable feature have to be debated and its admission must be properly proved in accordance with the applicable standard of proof.

[36] In this matter, the legal proceedings are of a criminal nature. I am mindful, not only of the nature of these proceedings, but also of the onus of proof, which the proponent of the hearsay, viz the state, bears in order to establish the guilt of the seven accused persons. Moreover, I am sufficiently aware of the perils of the hearsay evidence.

[37] Those proceedings concern several criminal charges. Originally, there were 17 charges spelt out in the written indictment. Ten of them remain. The state withdraw 3 because the victim died before the hearing. At the end of the prosecutor's case counsel for the state decided not to pursue 4 charges in respect of testimonies of several witnesses who had already been heard. As regards the remaining 10 the prosecution alleges that the accused are guilty of: contravention of section 9(1), Act 191 of 1998 – organised criminal gang alternatively – contravention of section 9(2) – a pattern of criminal gang activity; 2 counts of robbery with aggravating circumstances; 1 count of kidnapping; 1 count of attempted extortion; 5 counts of murder and 1 count of contravention of section 51, Act 105 of 1997.

[38] These are the crimes the accused are facing. This completes my consideration as regards the first factor, which has to be taken into account in determining whether or not it is in the interests of justice to allow the hearsay as admissible evidence.

[39] **The hearsay statute requires, in the second place, that specific account be taken of the nature of the evidence – subsection 1(c)(ii).** I deal with the hearsay evidence of Ms Z Saleem first. The gist of her hearsay utterances was that she dialled her husband cellular phone but his phone was off. She then called his friend Ama, in other words Amanullah Nusrullam who told her that he, Ama, Majid, Shabodin and Malik were at Clocolan; that they travelled from Johannesburg to Clocolan with Querashi; that Majid was in a meeting with Shahid and Farhan; and that he would ask Majid to return her call once he was free. This cellular conversation which took place on Saturday 10 November 2007, then ended. She never spoke to him again. Amanullah Nusrullam never testified.

[40] Ms Z Saleem also testified about the cellular conversation she had with her husband, Mr Majid Saleem on Sunday, 11 November 2007. The contents of the conversation was: that he told her that he was at Clocolan; that he had a meeting with Shahid and Farhan; that the meeting was about a business deal; and that he travelled from Johannesburg to

Clocolan with Saleem Querashi. The conversation ended on happy note with Majid Saleem's promise to call her later in the evening to give her precise details of his flight arrival in Cape Town. He never called. She never spoke to him again. He did not testify.

- [41] Both sets of Ms Z Saleem's hearsay utterances were made during the course of normal social chatting. The original declarants Messrs Amanullah Nusrullam and Majid Saleem were Pakistanis. They were friends. Ms Z Saleem, the hearsay narrator, called the former to find out where the latter was. He allegedly gave her an answer. She gathered that the 2 friends were together at Clocolan on Business. The next day Ms Z Saleem made cellular contact with her husband. He allegedly confirmed his whereabouts. Between the information gathered from the 2 men there was no discrepancy. Obviously, confirmation of one hearsay utterance by another does not serve a very useful practical purpose in a court of law. Although both hearsay conversations were mutually symbiotic, their corroborative value was minimal. They remained truly unsworn statements, which were totally untested in a court

of law according to the criminal procedure rules to ascertain how reliable they were.

[42] Notwithstanding the foregoing defects of the hearsays, the testimony of its subsequent narrator remains unaffected. Nothing affects the reliability of her direct evidence that she made cellular contact with each of the two original declarants. There is no question of impaired recollective faculties, dishonesty, lack of dependability, lack of independent recollection or contradictory blemishes. Her uncontradicted evidence that she had distant conversations with these men has to be accepted as reliable. So too must her evidence that the two men made certain statements or disclosures to her during those conversations. Those aspects of her evidence are reliable. There are also other important pieces of objective evidence, which render her evidence even more reliable. For instance, the cellular data tends to show that the cellular phones of the two men were used in the vicinity of Clocolan.

[43] Mr Saleem's unchallenged evidence was that, before the

conversation she did not know Clocolan and that she had never heard of the place before. She was in Cape Town when, for the first time, she heard about the place. She flew to Johannesburg when she could no longer reach her husband or hear anything constructive about his whereabouts. There she reported her husband as a missing person to the Booyens Police. The police referred her to a certain cellular services outlet. Her evidence was that the information she received from that outlet was consistent with the hearsay utterances. She was fastidious in the manner in which she conducted her investigation of her husband's whereabouts. From Johannesburg she drove to Clocolan not only on the strength of the hearsays as previously outlined, but further information obtained from a cellular outlet in Johannesburg. I am mindful that the alleged cellular information itself was hearsay. However, its significance lies in the fact it came from an independent source. She established the true reason that the cellular phone of her husband was last used in the vicinity of Clocolan.

[44] Both sets of hearsay statements related to the information

voluntarily and spontaneously conveyed, Mr Amanullah Nusrullam had no reason to fabricate a false story about his whereabouts and those of his other three companions, the purpose of their visit, the identity of their escort from Johannesburg and the names of those who hosted them where they actually were. He had no opportunity to deceive the witness. The spontaneous information he gave her concerned a current state of affairs then. He said that they were at Clocolan at the time of the cellular conversation; that they were exploring business opportunity and that her husband was in a meeting with specific individuals, whose first names Shahid and Farhan coincided with those of accused number 1 and accused number 5 respectively.

- [45] The hearsay statement was not about a contemplated future event or an accomplished past event attributed to a deceased person. The hearsay statement was about a live event of that moment of the conversation. The same can be said about the hearsay statement the witness attributed to her husband. Although Mr Saleem's hearsay statement was not as detailed as that of his friend, Mr Nusrullam, it

was nonetheless sufficient information as to the place or where the venue of the meeting, the purpose thereof and the names of the convenor(s).

[46] I turn to the hearsay evidence of Ms N Awan. By and large the thrust of her hearsay evidence which allegedly emanated from the cellular conversations she had with her husband, Mr Malik Yasser Awan, on Saturday the 11 March 2007 and the next day was in a pretty much a similar vein as that between Ms Saleem and her husband. Here, the hearsay concerns no future event but rather a current event, which was existant at the same time of the conversation. The hearsay has it that Mr Awan told Ms Awan that he was at Clocolan and that they were visiting Saleem and others. By the prom on 'they' she meant the four gentleman namely, Messrs M Y Awan, A Nusrullam, S Hussein and M Saleem.

[47] It has to be remembered that three days before the cellular conversation, on Thursday 8 November 2007 to be precise, Ms Awan gathered from her husband that he and these three other men would travel down to Clocolan on a

business mission. That particular conversation was face to face. It took place at Lenesia in Johannesburg. Obviously it was a future event. There it carried less evidential weight than the subsequent conversations. When the future, the past and the present dimensions of her hearsay evidence are collectively taken into account the reliability of her hearsay evidence is greatly bolstered.

- [48] From a cellular outlet at Lenasia, she obtained a list of the last five cellular numbers, which had contact with her husband's cellular number. She called one of them. Someone who identified himself as Farhan picked up her call but declined to give her any information about her husband. Instead, he abruptly ended the call. The first name of accused number 5 is Farhan. When Ms Awan last had a cellular conversation with her husband, he told her he was at Clocolan. The alleged suspicious reaction attributed to a respondent who identified himself as Farhan and from his somewhat incriminating possession of a cellphone, which had cellular contact with Mr Awan's cellphone, culpable association could be inferred. He, accused number 5, is therefore implicated by the hearsay

evidence of Ms Awan. Her hearsay ties him to the scene of the crime itself at Clocolan, a town which is implicated in the disappearance of the 4 men.

[49] Now I turn to the absent witness. The specified aspects of the statement attributed to Mr Rehman Khan certainly entailed hearsay evidence, which may play a significant albeit not a decisive role in determining whether a *prima facie* case has been made out for all the accused to answer. Since admitting and relying on such hearsay has the deadly potential of eventually playing a decisive part in convicting some of the accused – (vide **S v RAMAVHALE** *supra* at 469d – e) a court should only tread this path only if there is compelling justification for doing so – (vide **S v NDHLOVU** *supra* at 345c – d). This particular absent witness seemingly had personal knowledge of facts crucial to the location of the four men over the specific weekend when the two hearsay ladies had the last cellular contact with three of the four.

[50] The significance of his hearsay evidence rested in the fact that he apparently had physical contact with the 4 men; that

he lived at Clocolan; that he knew the accused; that some of them were his relatives; that most of them were apparently together at Clocolan over the weekend during which the other three deceased original declarants had cellular conversations with the two narrative witness, Ms Awan and Ms Saleem. According to the hearsay evidence attributed to Mr Rehman Khan by the three police narrators as embodied in the written statements the majority of the accused had physical contact with the 4 men at Clocolan.

[51] The first of his several hearsays was recorded on 5 December 2008 after the lapse of almost 13 months since the incident reached its pinnacle on Sunday, 11 November 2007. He took Captain Laux to the scene at Clocolan. The spot he pointed out was excavated and four human bodies, all in advanced stages of decomposition, were discovered, exhumed and identified. Among them were those of the three original declarants of the hearsays I am here grappling with. The shocking revelation of the secret grave pointed strongly that the hearsays of Mr Rehman Khan as regards the whereabouts of the four men at the critical moment when three of them declared their exact

whereabouts to the two ladies, were reliable and correct. His accurate pointing out showed that notwithstanding the passage of time between the incident and the pointing out, he still remembered the fine details of what happened there.

- [52] The discovery of the men in the clandestine hole in the backyard significantly and objectively validated the hearsays of Mr Rehman Khan. It showed that, notwithstanding the fact that his controversial statements did not relate to a very recent event he still had an accurate, clear and reliable memory of the event. Moreover, the discovery showed that he had adequate opportunity of observing things. Although grass was planted on the grave on purpose to conceal it so that it could not readily attract suspicious attention, he identified the grave with relative ease after 13 long months. Rehman Khan did not struggle to identify the unmarked, secret grave on a huge property. All his statements had one common golden thread running through them and it was this: They were all statements of accomplished facts, a past, but unforgettable chain of events. None of them was a statement of any future intention. There were no future uncertainties about them.

[53] Here, every hearsay concerned a second-hand stated account of a past event. The account of such an accomplished mission was stated, recorded and relayed by an individual who did not actually hear any of the deceased original declarants saying where they were, but actually saw where they were. He was not only present there. He actually participated in certain dubious circumstances which suspiciously led to the inability of the original declarants to attend these court proceedings in order to testify. In statements of a past event or accomplished fact the sort of vagaries attending statements of a future event or contemplated missions by a deceased are entirely absent here – **S v NDHLOVU & OTHERS**, *supra*, para [42].

[54] Mr Rehman Khan's hands were not clean. He was suspected by the police of being an active member of the same criminal gang as the accused. Where the original declarant is himself suspected of participation in a criminal enterprise, a motive to implicate an innocent person may well be present if the hearsay emanates from a statement which is substantially exculpatory in nature – **S v**

NDHLOVU & OTHERS, *supra*, para [43]. The hearsays in this instance are not. On the contrary, they are substantially self-incriminatory in nature. This particular declarant was under a cloud of suspicion not as a solitary criminal but a small fry in the underworld sea of big sharks. At the tender age of 19 years of age, he was the youngest of those suspected, arrested and charged. In the sixth of the seventh statements he stated that Mr Ali Mamo Mazhir (accused number 4) was his uncle and that Mr Ali Tanveer (accused number 7), his cousin, and they together with Mr Farhan Ullah (accused number 5) stayed in the same house at Clocolan.

[55] Judging by his age which is 14,4 years below 33,4 years, the average of the seven accused, the magnitude of the crimes and their number, it can be reasonably deduced that he could not have done it alone. He vanished from Clocolan *en masse* with all his house inmates under a mighty cloud of suspicion. He was on the run for months. When he was eventually tracked down at Lydenburg in Mpumulanga far from Clocolan in the Free State, he confirmed the police suspicion by eventually implicating

himself without much ado. The hearsays are fundamentally self-incriminatory statements in nature notwithstanding some of their exculpatory features.

[56] So far it cannot be said that Mr Rehman Khan was unjustly actuated by ulterior motive to falsely implicate the accused. No sinister motive other than that he was an accomplice was suggested as to why he would have needlessly implicated seven innocent men of which two were his close relatives. No reason was suggested and I could find none, why he would have gone out of his way to shield his actual co-perpetrators at the expense of seven innocent men including his close relatives, and all this in a foreign country overseas far away from their motherland, Pakistan. No specific or vaguely general history of past or current animosity or potential conflict was hinted. I am not persuaded that the pieces of the hearsays can be justly excluded as unreliable and false stories fabricated by an accomplice who did not have the courage to come to court and to openly repeat them in the presence of the accused.

[57] In the circumstances I am of the *prima facie* view that the

nature of the hearsay evidence attributed by the various narrators to the aforesaid original declarants does not justify that they be excluded on the grounds that they constitute inadmissible evidence. Having taken account of the nature of the evidence, I am of the view that the interests of justice on this front favours the inclusion of the hearsay evidence under attack. This completes the second leg of the inquiry.

[58] **The hearsay statute requires in the third place, that account be taken of the purpose for which the evidence is tendered – subsection 1(c)(iii).** By tendering the hearsay evidence the aim of the proponent for its admission was to prove in the first place a great variety of *facta probanda* pertaining to the whereabouts and togetherness of the four victims. The multiple purpose for which the six shades of the hearsay evidence were tendered was to establish:

- that the victims Mr M Y Awan, Mr A Nusrullam, Mr S Hussein and M Saleem had travelled together from Johannesburg ;
- that they were invited to Clocolan under a false pretext;
- that they headed for Clocolan;

- that they were escorted by Mr Querashi (accused number 2) down to Clocolan;
- that they reached their destination well and alive;
- and that they were initially received, hosted and entertained at No 10 President Brand Street, adjacent to Shell Service Station.

[59] In the second instance the purpose which the state tendered the evidence was plainly to put the accused under the spotlight on the scene of the crimes. The hearsay evidence was tendered to show:

- that some of the accused were physically linked to the aforesaid reception venue at 16 President Brand Street;
- that physical contact between the victims and the accused gang was established;
- that the victims were, after the Saturday night party, shifted to 42 Andries Pretorius Street where they were similarly disarmed, detained and executed;
- that the victims were buried together in one grave on the same residential premises;
- and that some of the accused were physically linked to

the murder house;

- that the killing of the victims was a joined criminal venture.

[60] The purpose for which the hearsay evidence was tendered was certainly to prove important aspects in the chain of evidence, namely the identities of the perpetrators and their deadly association with the victims. The finding is essential in order to establish each charge of murder. It is one of the basic tenets of the common law caution about hearsay evidence that the greater the importance of the aspect(s) so sought to be established by the tendering of hearsay – the greater the intuitive reluctance of the court to have it allowed as admissible evidence - **S v DYIMBANE AND OTHERS** 1990 (2) SACR 502 (SE) per Erasmus J.

[61] Where there is virtually no evidence other than the hearsay about crucial aspects in the case, the importance of such an aspect is a factor which understandably militates against the admission of hearsay evidence. However, where, as in this case, there are reliable pieces of evidence substantially consistent with the hearsay evidence, on the same important

aspects underlying the purpose for which hearsay evidence was tendered, the importance of the particular aspect the hearsay is purposefully led to prove, alone should not be treated as a decisive factor for disallowing the hearsay. The statute requires, and this accords well with the fundamental test of the interests of justice, that a court should adopt a contextually integrated and not a compartmentally fragmented approach to the specified conspectus of the supply factors of the statute in determining whether to disallow or allow hearsay evidence. (**S v MOLIMI** *supra*). Such global integration is vital notwithstanding the recognized procedural and substantive disadvantages hearsay reception might entail – **S v NDHLOVU** *supra*.

[62] The purpose of the various pieces of the hearsay was, in a nutshell, to show:

- that the victims were at Clocolan;
- that the accused were with the victims there at all times material to this case;
- that the accused had a sinister shared motive to kill the victims;
- that the accused had ample opportunity to do so;

- and that, *prima facie*, they appear to have done so.

[63] It would seem that Rehman Khan was involved; that he had decided and volunteered to make clean breast of the events and that his hearsay accorded, in certain respects, with the evidence, both direct and indirect presented, by the state. Where his hearsays are so corroborated and retrieved, they will indeed complete the picture by brightening some dark spots without building bridges to cross the deep, impassable ravines, if there are any.

[64] These hearsays are not the only evidence led by the state indicating that the four victims were at Clocolan. Therefore such hearsays were not of central, let alone decisive, importance in the process of determining whether a *prima facie* case has been made out against the accused. I had no difficulty with the prosecution case shortly before the hearsay statements attributed to Rehman Khan were tendered as evidence. The argument for the inclusion of such hearsay statements found favour with me, not because such statements were consistent with hearsays by other absent declarants and not because without them the

prosecution's case would have been on shivering sand, but because certain objective facts and reliable direct evidence independently called for an answer. This completes the third leg of the inquiry, viz the purpose for which the hearsay evidence was tendered.

[65] **The hearsay statute requires, in the fourth place, that specific account be taken of the probative value of the evidence – subsection 1(c)(iv).** The inquiry has two legs according to **S v RAMAVHALE** 1996 (1) SACR 639 (A) at 649 e. The first aspect concerns reliability and completeness of the narrator's recitation of the declarants' words.

In **S v NDHLOVU AND OTHERS** 2002 (2) SACR 325 (SCA) para [31] Cameron JA said:

“[31] The probative value of the hearsay evidence depends primarily on the credibility of the declarant at the time of the declaration, and the central question is whether the interests of justice require that the prior statement should be admitted notwithstanding its later disavowal or non-affirmation. And though the witness's disavowal of or

inability to affirm the prior statement may bear on the question of the statement's reliability at the time it was made, it does not change the nature of the essential inquiry, which is I whether the interests of justice require its admission.”

[66] As regards Ms Awan’s transmission of the declarant’s original words, I kept in mind that the narrators and declarants were a couple, husband and wife. She gave a detailed account of the conversations she had with her husband before and after his departure. Before his departure she established that advanced plans were afoot for him and others to travel to Clocolan. Her husband divulged to her his future intentions to travel to the particular town. Subsequent to his departure she established from him that he had reached the intended destination. During the last conversation her husband declared that he was going to a far away place but declined to specify such place.

[67] Ms Awan’s husband never returned home. She was anxious to find him. She investigated his mysterious disappearance. She met Ms Saleem. She discovered that her predicament and her’s were identical. She ascertained that her

husband's companions also went missing. Central to their disappearance was a place called Clocolan. She travelled to Clocolan to look for him. She believed that in that town she would probably obtain some constructive information about his whereabouts. Her husband had no reason to say that he was at Clocolan if he was in fact elsewhere. It seemed unlikely that she would have taken the trouble to start her investigation at Clocolan unless there was a compelling reasons(s) for her to start there. The only reason why she kicked off her agonising tracing campaign in that town is to be found in the hearsay utterances she attributed to her husband. This narrator's transmission of the declarant's original words appeared to me to have been a *prima facie* reliable and complete account. The probative value of her hearsay evidence was fairly high. The probative value of her hearsay evidence was fairly high.

- [68] As regards Ms Saleem's transmission of the original words of the declarants, the contextual setting, emotional dynamics and almost everything else were more or less similar as in the case of Ms Awan. Ms Awan, however, knew after her last conversation with her husband, that he would never

come home back to her again. Ms Saleem did not such a chilling permistic remark. After her last conversation Ms Saleem was still hopeful that her husband would be coming home. By the time they met, however, they were in the same predicament. They could no longer reach their husbands by phone. My findings concerning the two witnesses were therefore likewise identical, it must be borne in mind that Ms Saleem's hearsays were attributed to two declarants, her husband and his friend. Their two declarations were identical to the declaration Ms Awan had attributed to her husband. The significance of this was that the hearsays tendered to show that the missing men were together and that they were agreed as to the place where they said they were. The probative value of this witness was substantially great, in my view.

[69] As regards Ms Rehman Khan, the narrators were all police officers who testified about certain hearsay statements they attributed to the gentlemen. All but one of those hearsays were written. In this context the probative value of those written statements as well as those oral utterances by the subsequent narrators, in other words the police witnesses,

depended on the credibility of the original declarant, in other words Mr Rahman Khan. These hearsay narratives purported to be comparatively more reliable and complete accounts of the declarations, because, save for one, they were preserved in written form. Each hearsay was written down at the time it was made.

[70] Here the hearsay narratives were recounted by police witnesses. They relied on declarations by a declarant who did not affirm any of the prior statements the narrators attributed to him as their original source. None of the narrators harboured any sinister motive to fabricate such narratives and to falsely label them as the declarations of someone. They were neutral investigators with allegiance to neither the accused nor the victims. There was no suggestion that they exaggerated or suppressed anything in order to secure the conviction of the accused at all costs. I have no reason to believe or to suspect that the declarations were inaccurately recorded or incompletely relayed or narrated. Therefore, I tentatively accept that the transmission of the declaration was reliable, complete and accurate.

[71] The second aspect of the same inquiry revolves around the reliability and completeness of the declarant's words. Here evidence is usually needed to prove that the original words of the declarant were accurately stored and preserved. The aspect needs not detain me longer than it is necessary. The comprehensiveness of whatever the declarant did say appears *ex facie* the prior statements he made. The first declaration he made was about a year after the alleged incident and the last about one and a half year. The recollective powers of human mind gradually fade away with time. Factual distortions may blur the picture as time passes by. However, the mind is slow to forget events so huge especially those that have an impact on such an individual. The witness to murder, let alone a participant or an accomplice thereto, is unlikely ever to forget such an incident within a relatively short period of 18 months. This is so much true for a fugitive. In this instance there is evidence about four murders. It was an enormously huge event. I think that no normal participant in the event of such magnitude can ever forget it. These factors coupled with the fact that the original declarations were preserved in a written

form and not oral form, enhanced the probative value of the hearsay evidence and its finer details as reasonably reliable, accurate and comprehensive.

[72] I do not have much more to say save to assure the accused that I am mindful and alert to the perils of hearsays by the author of those prior statements. The original declarant did not testify under the sanction of an oath in an open court. He did not show up. He did not face the accused. He did not, in their presence, repeat the averments he previously made in those prior statements against them. And they could not debate the incriminating elements of such prior statements with him in order to expose their unreliable and untrustworthy features, if any.

[73] Because Rehman Khan did not testify what his powers of perception were; what opportunities of observation he had; what his levels of attentiveness were; what his concentration endurance was; what his strength of his recollections were; what his motives were for making the prior statement; what prevented him from making a clean breast of the events earlier than he did; what benefit, if any, he was expecting by

making those statements and what his dispositions were, as an individual, to speak the truth - cannot now be accurately assessed – **Taylor's Treatise on the Law of Evidence**, 12th ed (1931) at para 567.

[74] The narrators of the crucial narratives that the victims, on the one hand, were together with the accused, on the other hand, at Clocolan would not step into the shoes of the absent original declarant. They could not be subjected to the ordeal of cross-examination in order to show that his declarations were not reliable and credible. That was so seeing that they were not on the scene, they could add no substantial probative value to the second aspect of the inquiry.

[75] The nub of the hearsay statute entails that hearsay utterance does not automatically become absolutely inadmissible and valueless simply because the extra-curial declarant, for whatever reason, happens to be absent. Such absence, clearly frustrated the accused procedural right to openly confront such a declarant. But the accused procedural right to confront such a declarant by way of cross-examination

may also be frustrated, albeit differently, by a declarant who, though physically present in court, for one or other reason, testifies but denies the correctness of the hearsay statement; or testifies but denies ever making it; or testifies but neither confirm nor deny it; or simply refuse to testify.

[76] In **S v NDHLOVU & OTHERS**, *supra*, para [30] Cameron JA pointed out that if the original declarant is physically present, but when called to testify, disavows the hearsay statement previously attributed to him, or fails to recall making it, or is unable to affirm some of its material aspect(s) – the situation is not, in substance, materially different from the case where, as in this case, the original declarant does not testify at all.

“When the hearsay declarant is called as a witness, but does not confirm the statement, or repudiates it, the test of cross-examination is similarly absent, and similar safeguards are required.”

[77] The probative value of the narrator’s hearsay evidence depends primarily, but not entirely, in my view, on the credibility of the declarant at the time that the declaration was made and not at the time the testimony is given by the

declarant - **S v NDHLOVU**, *supra*. In *casu* the central question is whether the interests of justice require that the prior hearsay statements attributed to the declarant should be received as admissible evidence against the accused notwithstanding lack of its final confirmation occasioned by the non-attendance of the declarants. It is not and it will never be known what impact their untold stories would have had on the probative value of the hearsay narratives. However the hearsay evidence cannot be as probatively valueless for that reason alone.

- [78] Hearsay evidence has an inherent probative value derived from the spirit purport and object of the statute itself where the declarant subsequently testifies and affirms his earlier declaration, (s)he made outside court and passes the test of cross-examination. The court declares him or her a credible witness. The credibility of the declarant increases the probative value of what was earlier previously received as hearsay evidence. Where the declarant testifies but repudiates his earlier declaration, he fails the test of cross-examination. The court disbelieves him and declares him an untrustworthy witness. However, the negative finding of the

court on the credibility of the declarant does not automatically have a decremental effect on the probative value of the unconfirmed hearsay evidence. That used to be the case before the statute but not anymore though.

[79] The second scenario has all the material hallmarks of a case where a declarant does not testify at all on account of his physical absence from court. That is precisely the situation here. The difficulty in a case of an absent declarant lies in the fact that it becomes virtually impossible for the trial judge to make credibility findings which are crucial to the inquiry relative to the probative value of the hearsay narrators or witnesses. What happens at the trial and brings about the declarant's inability to affirm the prior statement, does not practically terminate the inquiry. To a greater or lesser extent the general impressions the court forms about the narrator as a witness, will play a role. As far as the non-hearsay aspect of the evidence was concerned, all the narrative witnesses acquitted themselves reasonably well in this case, in my view. They were reliable and credible. They asserted that they had certain declarations made by individuals who did not ultimately confirm such declarations.

Their evidence as a whole contained a number of corroborative safeguards which bolstered the trustworthiness of their hearsay assertions.

[80] The probative value of the declarants' statements to the various narrators did not entirely depend on the credibility of what they could or would have said at the trial, had they testified, but rather on their credibility at the time they allegedly made such prior statements to the hearsay witnesses, whom I evaluated as reliably and credibly impressive witnesses. The fundamental test is informed by the interests of justice, which demand that a global impact of the evidence be taken into account before hearsay evidence can be excluded on the basis of its non-affirmation by the original declarant. In this case the interests of justice require that the inherent probative value of the hearsay statements should not be devalued and garbished as valueless on account of its non-affirmation but rather enhanced. The most significant aspect is the enormously powerful way in which the various pieces of all the evidence interlinked to form a spiderweb around the accused. I shall deal with those facts in the main judgment. It is also significant to

keep in mind that Mr Rehman Khan made several statements to three police witnesses. Broadly speaking those statements were mutually constructive.

[81] Where a broad overview is collectively taken of the entire spectrum of the evidence at this halfway juncture, numerous and forceful pointers to the probative value of the hearsay evidence emerge. Beyond the narrow confines of the hearsay evidence *in casu* the guarantees of reliability are high. Such corroborative features or scatterlings in this unfolding drama, *prima facie*, turned to give substantive measure of credence to the hearsays. To brush aside the probative value of such valuable evidentiary material, would not accord well with the interests of justice.

[82] In **S v NDHLOVU**, *supra*, paragraph [45] Cameron JA said:

“[45] 'Probative value' means value for purposes of proof. This means not only, 'what will the hearsay evidence prove if I admitted?', but 'will it do so reliably?' In the present case, the guarantees of reliability are high. The most compelling justification for admitting the hearsay in the present case is the numerous pointers to its truthfulness.

The only detail in which anything that either accused 3 or 4 told the police was proved wrong was accused 4's statement that the deceased's vehicle was 'white'. It was, in fact, light yellow. That detail can hardly dent the pile of accurate, reliable information that accused 3 and 4 supplied to the police.”

[83] For the purposes of interim proof, I am satisfied that the weight or probative value of such hearsay material compensates, perhaps not adequately but nonetheless enough, the deficit occasioned by lack of affirmation of the prior statement by the declarant. The minimum requirements of the threshold for the transition appeared satisfied. I am inclined to think that the probative value of the hearsay evidence and the objective guarantees of the entire evidence prove to be the compelling justification that the hearsays deserve to be considered and not to be disregarded. Whatever discrepancies there might be in the hearsay statements can hardly eclipse the mountain of accurate and reliable information Mr Rehman Khan supplied to the police. This ends the fourth leg of the inquiry.

[84] **The hearsay statute requires, in the fifth place, that**

specific account be taken of the reason why the evidence was not given by the person upon whose credibility the probative value of such evidence depends – subsection 1(c)(v). The subsection demands that the proponent of the hearsay evidence give a sound explanation why the declarant cannot testify. The law of evidence, for obvious reasons, places a high premium on the hearing of the original story from the horse's mouth. Unlike the second-hand narrative, a first-hand account of an event by its original declarant, has many advantages. The inquiry pertaining to its reliability and credibility features is straightforward. It does not presents procedural difficulties.

[85] The following declarants did not testify because it was practically impossible for them to be called to testify: Awan, Nusrullam, and Saleem. They were dead. The situation presented no problem. There was a sound reason why they did not testify. On account of their absence the state had to rely on the hearsay narratives, which were not and could not be affirmed by the original declarant.

[86] Yet another declarant who did not testify was Rehman Khan.

His situation is very different. Precisely why he did not testify, is at the heart of this inquiry. He escaped from his secret sanctuary where he was placed under witness protection program. Since then his precise whereabouts are unknown to the state. Ms Bester argued that the accused were responsible for the inability of the particular declarant to testify. Mr Potgieter disagreed. He argued that the accused were not all to blame for the escape of the state witness and his subsequent failure to testify.

[87] The situation here is not akin to a classical case of an absent witness. He is an Asian of Pakistani origin. He lived at Clocolan but worked at Ficksburg. He was one of the suspects in the case. He was on the wanted list of the police investigation team. Apparently he was on the run for over a year since the incident. During that period it is unlikely that he would have forgotten why he was on the run. It is not in dispute that accused number 7 was arrested at Barberton. The next day the witness was arrested at Lydenburg. According to W/O E van Zyl although the witness was acutely aware of his imminent arrest and despite the warning by accused number 7 he did not flee any more. He told the

police officer that he was tired of being a fugitive from justice; that he felt very insecure; that all he needed was police protection and that he would divulge all he knew about the incident of the 4 missing men.

[88] From Lydenburg he was taken straight to Clocolan where he pointed out a specific site the next day. According to captain Laux the witness was very anxious about his personal safety. He once again repeated his request for police protection. He feared the wrath of those who were involved with him.

[89] The police acceded to the request of the witness. The spot which the witness had anxiously pointed out was excavated. The police discovered decomposed corpses of four men of Pakistani origin. They were identified. Of the four, three were the declarants Awan, Nusrullam and Saleem.

[90] I pause to remark that the escape I am here dealing with was not the witness' first. Following his earlier escape, he resurfaced in Durban. On his own free accord, the escapee surprisingly, as one may be inclined to think, voluntarily

surrendered himself to the Durban Police from where he called the investigating officer, warrant officer Steyn, and desperately begged her to urgently fetch him in order to place him under the witness protection programme again. This demonstrated strongly, perhaps conclusively, just how dangerous he perceived the situation concerning his personal safety out there to be. The endangered witness was immediately rescued by the police. On that particular occasion he was placed under a 24 hour witness protection programme. I understood this to mean that the police protective safety measure around him and his secret sanctuary were intensified. Precisely what those measures were and where the secret sanctuary was, are matters which, for obvious reasons, should not be publicly divulged as doing so, might compromise the safety of the witness so protected.

- [91] Three days or so before the date on which he was expected to testify, he was lawfully removed from his secret sanctuary for a final refresher consultation with a colleague of counsel for the state. According to the investigating officer, the witness was extremely concerned. He anxiously informed

her that certain faceless forces were subjecting his family way back in Pakistan to acts of harassment and intimidation. During the early hours of that very same night at approximately 3h36 the fearful witness mysteriously escaped from his high security secret sanctuary. He was never seen again to this day.

[92] Subsequent investigation revealed that the witness apparently had a clandestine cellular phone in his secret sanctuary; that there were numerous cellular contact between such clandestine mobile phone and another mysterious mobile phone; that calls to and from the latter phone were captured by the Grootvlei cell station; that such cell station was located on the premises of Grootvlei correctional facility; that the last recorded transaction of the protected witness' phone was captured by a Kranskop cell station near Glen. There, the witness disappeared completely from the radar.

[93] It was common cause that the accused have, since their arrest, been incarcerated at Grootvlei, that accused number 1 has, from that prison, telephoned the state

witnesses, Mr Iftikhar Khan of Bethlehem; that accused number 1 has, from that prison, telephoned the state witness, Mr Rashid Khan while the witness was in Pakistan. This witness's relative, Zia Khan was kidnapped from Maputsoe in Lesotho. The kidnappers demanded R2 million from the witness for the release of his brother. Moreover, they threatened to kill the hostage unless the witness paid the ransom.

[94] The ransom was never paid. Though the witness was willing and able to pay. Rashid Khan never saw his relative, Zia Khan alive again. His body was found buried on a residential plot in Bloemfontein.

[95] At the time of their arrest accused number 1, 2 and 5 were conspiring to kidnap Rashid Khan according to Mr Iftikhar Khan. In fear of the safety of his life the witness fled Lesotho and returned to his motherland. According to the witness accused number 1 threatened to put an end to his life. It was also common cause that accused number 2 has, from Grootvlei, telephoned the state witness, Mr Iftikhar Khan about the case. This witness had a friend at

Ficksburg. According to the witness the kidnapping and death of Zia Khan so frightened his friend that the latter decided to leave the RSA. He is now living somewhere in Europe. The witness himself expressed his own fears about the accused and their group.

- [96] It can, therefore, be seen that Rehman Khan was not the only person living in fear of the criminal gang. He, more than any other witness, seriously and directly incriminated the accused with exception of accused number 3. He also incriminated himself. Some of the accused, are his relatives. A person does not readily incriminate those close and dear to him unless he speaks the truth. **REX v NCANANA** 1948 (4) SA 399 (AD). In a similar vein it is unlikely for a person to incriminate himself unless what he says is indeed true.

Obviously, it was in the interest of the accused if Rehman Khan, of all the state witnesses, did not testify.

- [97] Rehman Khan was the youngest of all those suspected, arrested and accused. The first 6 of the 7 accused were

arrested on the 10th of March 2008. Accused number 7 on the 3 December 2008 and Rehman Khan 9 months later on the 4 December 2008. He was the last to be arrested. Until his arrest, the fate of the 4 missing men was still a mystery. The participant in the criminal enterprise were apparently sworn to secrecy. He broke the code of silence. He was tired of being on the run. As a result, there was a dramatic breakthrough in the investigation. He sought police protection because he had been sternly warned beforehand, as was every other perpetrator, about what the consequences of betraying fellow participants would be.

- [98] At once stage he escaped, probably he was subjected to tremendous undue pressure and intimidation to do so. He quickly realised how dangerous it was for him out there. He was rescued by the police. Seemingly powerful forces intensified pressure afterwards. He was probably given a serious warning again that his family in Pakistan would be violently harmed if he went on and testified against the group. He eventually succumbed to the relentless pressure.

[99] It is now an accomplished fact that the witness did not testify. I am not all persuaded by Mr Potgieter's submission that this was a classical case of an absent witness. The numerous cellular contacts between the witness secret sanctuary and the correctional centre where the accused were held were extremely suspects. The probabilities strongly suggest that the witness did not chicken out on his own accord. They strongly seemingly to suggested that he was, by improper means, induced to run away to prevent harm to his next of kin and to himself. He might have been lured away under false pretext that if he did not testify he and his dear folks would not be harmed. Whether he is still alive is a doubtful proposition. His second escape was no guarantee that he would not again surrender and eventually give damning evidence against the gang. Putting an end to his life was certainly the only absolute guarantee. I hope I am wrong.

[100] If the witness was not kidnapped he was assisted to escape. Only the accused stood to benefit if such important witnesses did not show up to testify. The living Rehman Khan was bad news for them. He was the one

and only eye witness to the incident. From the same prison, they, accused 1 and accused 2, have called two other state witnesses. He, accused 1, allegedly threatened to kill one of those witnesses. The testimony of Rashid Khan, implicated some of the accused, including accused number 1 with the kidnapping and murder of Zia Khan, the Bloemfontein victim of murder. The secret cellphone which the witness apparently used, shortly before his dramatic escape was falsely registered in the name of a fictitious person with a similarly false address somewhere in Cape Town. The secret cellphone used at Grootvlei to communicate with the witness was never found despite the police raid of the prison. It was probably unlawfully smuggled into the prison cells as was the secret cellphoned used in the secret sanctuary by the protected witness.

[101] All these pieces of evidence strengthen my view that there was something illegal about the cellular contacts between the witness's sanctuary and the correctional centre where the accused were held. The underlying purpose of such illegal communication was to derail the normal course of these proceedings. The sabotage of a due process of law

cannot and should not be tolerated. In the circumstances I am of the *prima facie* view that one of two or more or all of the accused persons were responsible for the absence of the witness and his resultant inability to testify. It would seem that they made their bed and now they must lie in it. Those who deliberately engineered this undesirable state of affairs cannot, on any legal or moral grounds, turn around and complain about the adverse impact of their own unlawful actions to their fair trial rights. To exclude the prior statements of the witnesses in these circumstances would be contrary to public policy considerations. The reasons why the evidence was not given by the witness on whose credibility the probative value depends favours the state. It can never be said the interest of justice require this factor to be adjudicated in favour of the defence.

[102] Right from the onset the witness has serious concerns about his personal safety. Warrant Officer Van Zyl arrested the witness at Lydenburg. He testified that the witness was concerned about his personal safety. Captain Laux interviewed the witness at Clocolan. He testified that during the prepointing out interview the witness was very

concerned about his personal safety. Warrant Officer Steyn interrogated the witness in Bloemfontein prior to the taking of the statements from him. She testified that the witness was deeply concerned about his personal safety. She caused the witness to be taken to the offices of the Deputy Director of Public Prosecution for final consultation. She testified that the witness was extremely concerned on that day about the safety of his mother in particular and the family members of her household in Pakistan. The conduct of the witness particularly during his first escape tells a story of a terrified young man who has seen things a youth so young is not supposed to see. He was trapped between the devil and the deep blue sea.

[103] The witness was in Bloemfontein hours before his mysterious disappearance. So were the accused at the critical moment. The numerous cellular contacts which preceeded his disappearance originated from the Radiospoor tower in the vicinity of the sanctuary where the witness was held to the Grootvlei tower in the vicinity of the correctional centre where the accused were incarcerated. The conduct of the witness as evidenced by those secret

communication strongly suggest that he probably switched allegiance from the police to the accused under tremendous pressure. I had a feeling, and it was a very strong feeling: that he was probably apologising to them for breaching the code of silence; that he was compassionately besieged them to do his family no harm or to spare his family which was under severe threat and that he was probably given no such guarantees unless he, in return, severed ties of his perceived unholy alliance with the police in order to subvert these criminal proceedings against the group.

[104] As I see it, his dramatic second escape was prompted by these considerations. I do not, for one moment, think that he freely ran away. I think he was forced to run away by the sheer magnitude of the predicament. He feared, and in my view, on reasonable grounds, that his testimony would seriously endanger his life and that of his family. By escaping he was trying to demonstrate the *bona fides* of his undertaking to the powerful forces that turned his life into a nightmare. He did so in a bid to appease the enormously powerful forces which were threatening his personal safety

as well as that of his family. I fear that the witness might have journeyed from his secret sanctuary near Radiospoor tower to his secret grave near Kranskop tower somewhere around Glen.

[105] When the provisions of the statutory exception in terms of subsection 1(c)(v) are applied: firstly, to the hearsay narratives of the two civilian witnesses, namely Ms Awan and Ms Saleem, it will be readily realised that the reasons why the evidence was not given by original declarants was that they were all dead. Mr Awan, Ms Nusrallam and Mr Saleem died of unnatural causes. All of them, including Mr Hussein, were shot dead. There was evidence which linked the accused to the house where their corpses were discovered. The death of each of those original declarants, in those peculiar circumstances, was a sound reason why the disputed evidence was not given by its original declarants but rather by subsequent narrators.

[106] Applying the provisions of the statutory exceptions in terms of subsection 1(c)(v) secondly to the hearsay narratives of the three police witnesses, namely Warrant Officer Van Zyl,

Captain Laux and Warrant Officer Steyn, in connection with the written statements of Rehman Khan, it will be appreciated that the reason why the evidence was not given by the original declarant was that he escaped from his secret sanctuary less than two days before the date on which he was supposed to testify against the accused. There was cellular evidence which tended to implicate the accused concerning his escape. The suspicious disappearance of that original declarant, in those mysterious circumstances, was a sound reason why the disputed evidence was not given by its original declarant but by the subsequent narrators. There seemed to have been undue influence and drastic pressure which induced him to chicken out.

[107] In **S v NDHLOVU & OTHERS** 2002 (2) SACR 325 (SCA) at 347e accused number 3 and accused number 4 were the original declarants who in their original warning statement implicated their co-accused. The police witnesses were the subsequent narrators of the prior statements. The declarants testified at the trial but denied ever making the hearsay statements which implicated their

co-accused, accused 1 and accused 2. Here unlike there the original declarant was not a co-accused but an accomplice nonetheless. Therefore his hands were not clean. Here unlike there the original declarant did not recant his post arrest statement. He did not deny ever making those statements. He did not testify at all. It would seem that the accused deprived the original declarants of the opportunity of testifying.

[108] Those cosmetic differences notwithstanding, the situation here was, in substance, not materially different from the situation there. The bottomline in this matter as in that case was that the court had to grapple with the unconfirmed hearsay narratives and the underlying reason for such non-affirmation. Sounder reasons than the reasons I found in this will be hard to find. The interest of justice impelled me take into account the compelling force of those reasons, as the justification for ruling in favour of the state. This disposes of the fifth leg of the inquiry.

[109] **The hearsay statute requires in the sixth place that account be taken of any prejudice to a party against**

which the admission of such evidence might entail. A great deal has been said in many decisions about the inherent prejudice of hearsay evidence. In **S v RAMAVHALE** *supra* there were three features of prejudice which I found missing in the instant matter. Firstly, the only evidence tendered by the prosecution purported to indicate why the deceased victim went to the appellant's house was hearsay evidence which found its favour into the record through an unorthodox method or through the backdoor, if you will. Secondly, such unwanted hearsay evidence was never, at an appropriate stage, ruled to be an admissible integral part of the state case. Thirdly, such hearsay evidence was belatedly relied upon by the state and used by the court as evidence of central, if not decisive, importance in the case. On account of such hearsay the trial court was persuaded to find that the state had discharged the onus of disproving the appellant's plea of self-defence. There was no such procedural prejudice here. The procedure was not tainted by any irregularity.

[110] Mr Potgieter argued that the hearsay evidence sought to be included in the prosecutor's pot of evidence was highly

prejudicial to the accused. On the strength of such procedural prejudice, he submitted that a cautious court would exclude it. Of course, any evidence, be it hearsay or primary is always prejudicial to the interests of a party against whom it is adduced. See **S v DYIMBANE** 1990 (2) SACR 502 (SE) at 505b-c; **METEDAD v NATIONAL EMPLOYERS' GENERAL INSURANCE CO LTD** 1992 (1) SA 494 (W) 499B; **S v RAMAVHALE** *supra* 1996 (1) SACR 639 (A) at 650h-i. But that is not the fundamental test.

[111] In **S v NDHLOVU & OTHERS** 2002 (2) SACR 325 SCA the court acknowledged the inherent and inevitable prejudice of the hearsay evidence but pointed out that such prejudice has to be gauged against the interest of justice. At paragraph [50] Cameron JA eloquently and lucidly put it as follows:

“[50] The suggestion that the prejudice in question might include the disadvantage ensuing from the hearsay being accorded its just evidential weight once admitted must be discountenanced, however. A just verdict, based on evidence admitted H because the interests of justice require it, cannot constitute 'prejudice'. In the present case, Goldstein J found it unnecessary to take a final view, but accepted that 'the strengthening of the

State case does constitute prejudice'. That concession to the proposition in question, in my view, was misplaced. Where the interests of justice require the admission of hearsay, resultant strengthening of the opposing case cannot count as prejudice for statutory purposes, since in weighing the interests of justice the court must already have concluded that the reliability of the evidence is such that its admission is necessary and justified. If these requisites are fulfilled, the very fact that the hearsay justifiably strengthens the proponent's case warrants its admission, since its omission would run counter to the interests of justice."

[112] I have already alluded to considerations of public policy under the previous topic: the reason why the evidence was not given by the original declarant(s) to whom such hearsay utterances or narratives were attributed. I found that there were adequate and acceptable reasons advanced by the prosecution as to why the declarants did not testify. Those who were the effective cause of the inability of the declarants to give firsthand account of the incident could not justly complain about the inevitable prejudice which naturally followed as a direct consequence of the situation they created. What more can I say which Cameron JA has not said about prejudice? He question

whether the admission of hearsay evidence might entail any prejudice to the accused had to be considered against the backdrop of the findings I have already made under the previous topic, the reason why the evidence was not given by the original declarant upon whose credibility the probative value of such evidence primarily depended.

[113] The witness, Rehman Khan, had a story to tell. The interests of justice required that he be heard and that the party against whom he was supposed to testify be afforded ample opportunity to challenge his testimony as well as his prior statements by way of cross-examination in order to diminish the probative value of his evidence. The sole purpose of a testimonial court drama is to ascertain the truth. In the circumstances of this sort an adverse inference can be legitimately drawn that a party who prevented another party's witness from testifying was not interested in the truth of the matter. When the chickens come home to roost, the guilty party should not cry foul play. Such cynical abuses of the system should never be rewarded.

[114] The admission of hearsays in this case, gave rise to a *prima facie* case of criminal complicity against the accused. If regard is had to the sighting of Saleem's car at Clocolan and the sighting of accused number 1 driving the same sedan at Clocolan shortly after its owner went missing then it appeared that accused number 1 and indeed accused number 2 who escorted the 4 from Johannesburg at least were in contact with the foursome. That also gave rise to a further inference that they probably knew their whereabouts or their fate. I am of the opinion that the accused have some explaining to do in order to refute these inferences. The statements attributed to the 4 declarants were not cryptic and terse. They were rather elaborate. They gave rise to the inference that the 4 victims were together; that they were at Clocolan and that they were not alone all alone by themselves but with 2 or more of the accused. In my opinion there was no prejudice. But even if there was, the accused had only themselves to blame. This dispose of the sixth leg of the inquiry.

[115] **The hearsay statute requires, in the seventh place, that account be taken of any other factor which should, in**

the opinion of the court, be taken into account. This is the final topic or element of the test.

There were 3 charges which were withdrawn. The first withdrawals were precipitated by the subsequent death of the victim (vide charges 2 – 4) namely, kidnapping, armed robbery and theft. There were 4 charges which the state decided to drop (vide charges 5 – 8). By that time about 8 witnesses had already testified. There was direct evidence adduced that the accused as a group used 2 houses at Clocolan, namely: 10 President Brand Street and 42 Andries Pretorius Street. The corpses of the 4 victims were discovered at the latter house. The hearsay statements of Rehman Khan were consistent with that evidence.

[116] Moreover, during the cross-examination of a certain witness, Latela, the defence conceded that, Mr Awan did stay in the latter house. It was not in dispute that the house was occupied by some of the accused at the time and that accused number 1 was responsible for the payment of the monthly rental. The only dispute was that the status of Mr Awan, according to the prosecution witnesses, he was

kidnapped from Barberton and held hostage at Clocolan for approximately 2 weeks. According to the suggestion by counsel for the defence Mr Awan was not there as a hostage but a potential buyer of a motor vehicle.

[117] Consider the following factual allegations levelled against the accused:

Shahid Jamee Awan testified that accused number 1 visited him at Elukwatini outside Badplaas in Mpumalanga. He regarded accused number 1 as a compatriot and a kind of a friend. The next day accused number 1 asked the witness to drive him to Nelspruit. He acceded to the request. However, they never reached Nelspruit. On the way accused number 1 lured him to Barberton. There his tea was spiked. His limbs were tied up and his face covered up. The piece of cloth that was used to cover his face was dosed with one or other sedative substance. He lost consciousness. He was still in a state of unconsciousness when he was kidnapped. He was eventually taken to the Free State where he was held hostage at 42 Andries Pretorius Street, Clocolan. According to his testimony the accused were occupants of that particular house. This is

the first factual scenario.

[118] Mrs Saleem recalled that accused number 1 once visited her husband in Cape Town. Mrs Awan recalled that accused number 2 once visited her husband in Johannesburg. They regarded the two as friends to their husbands.

[119] The four heard from the accused about an attractive diamond deal. Rehman Khan stated that accused number 2 escorted the foursome from Johannesburg in Gauteng to Clocolan. They were entertained at the braai before they were introduced to a certain Lephoi Makara who posed as a diamond dealer. It would appear that they were entertained at 10 President Brand Street Clocolan. The four must have believed that they were with friends. During or after the braai on that particular night, the four were accused of having murdered a friend of Bazra. The next day they were executed for that reason and buried in a secret grave at 42 Andries Pretorius Street. The last contact which Mrs Saleem and Mrs Awan had with their husbands was on Saturday, 10 November 2007. This is the second factual

scenario.

[120] Rashid Khan testified that accused number 1 and others visited his brother Zia Khan at Maputsoe on 3 March 2008. He regarded them as friends of Zia Khan. The companions of accused number 1, namely accused number 2 and 6 slept over at Zia Khan's but accused number 1 did not. The next morning Zia Khan left with them. He was never seen alive. A ransom was demanded from Rashid Khan for the release of Zia Khan. Zia Khan died before the ransom was paid. His body was discovered in a secret grave on a plot commonly known as 8 Van der Spuy Avenue, Estoire in Bloemfontein. The residential property in question had been leased by accused number 3 on 23 February 2008 a week before Zia Khan was kidnapped. This is the third factual scenario.

[121] Iftikar Ahmed testified that he and his friend drove to Kestell to have a meeting with accused number 1 and others. The meeting was initiated by accused number 1 who travelled to Kestell on 10 April 2008. He and his friend meet accused number 1, 2 and 5. They wanted him to find a safe place

for them, because they were conspiring to kidnap Rashid Khan. Their plot did not materialise because they were arrested there and then. This is the fourth factual scenario.

[122] The investigating officer, warrant officer Steyn and warrant officer Van Zyl testified that Rehman Khan made certain hearsay statements and did certain pointings out.

[123] His statements were remarkably consistent with the testimonies of credible and reliable witnesses. His pointings were consistent with objective proven facts. Both the pointings (of the town, the houses, the grave and the corpses) and the statements highly incriminated the accused. The evidence showed how one or some or all of the accused managed to establish secret, illicit and cellular communication with the most important of the prosecution witnesses, Rehman Khan and all that while they were detained at Grootvlei Correctional Centre and he at the protected witness sanctuary. Before his arrest, the accused regarded Rehman Khan as their friend. Since his dramatic escape, Rehman Khan was never seen alive again. This is the fifth and last scenario.

[124] There is a golden thread that runs through the aforesaid five scenarios. It is this: the betrayal of friendship. Indeed execution of friends *prima facie* appears to have been the hallmark of the criminal activities the court is here dealing with. These then are supplementary factors which, in my opinion, should be taken into account in determining whether to exclude or include the hearsay statements of Rehman Khan, a person who was, though identified, earmarked and protected as an endangered potential witness, did not eventually testify. This then disposes of the seventh and final leg of section 3, to wit subsection 1(c)(vii).

[125] The statements attributed to the absent witness, Rehman Khan can be fairly criticised in certain respects. For instance, he did not have personal or firsthand knowledge of all the averments contained in some of them. There were a few inconsistencies in some of them. There were a number of gross misspellings of the names and surnames of those implicated by Rehman Khan. Notwithstanding all those blemishes and, perhaps, many more other critiques – the statement were collectively reliable, accurate and

dependable. In many respects they seem to be reconcilable with numerous aspects of the direct evidence given and certain proven objective facts.

[126] Section 34 of Civil Proceedings Evidence Act 25 of 1965, under the heading: admissibility of documentary evidence as to the facts in issue – provides:

“(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document tending to establish that fact shall on production of the original document be admissible as evidence of that fact, provided –

- (a) the person who made the statement either –
 - (i) had personal knowledge of the matters dealt with in the statement; or
 - (ii) ...; and
- (b) the person who made the statement is called as a witness in the proceedings unless he is dead or unfit by reason of his bodily or mental condition to attend as a witness or is outside the Republic, and it is not reasonably practicable to secure his attendance or all reasonable efforts to find him have been made without success.

(2) The person presiding at the proceedings may, if having

regard to all the circumstances of the case he is satisfied that undue delay or expense would otherwise be caused, admit such a statement as is referred to in subsection (1) as evidence in those proceedings –

(a) notwithstanding that the person who made the statement is available but is not called as a witness;

(b) ...

(3) Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.

(4) A statement in a document shall not for the purposes of this section be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialled by him or otherwise recognised by him in writing as one for the accuracy of which he is responsible.

(5) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of the provisions of this section, any reasonable inference may be drawn from the form or contents of the document in which the statement is contained or from any other circumstances, and a certificate of a registered medical practitioner may be acted upon in deciding whether or not a person is fit to attend as

a witness.”

[127] Now, section 222 of the Criminal Procedure Act, 51 of 1977 expressly imports the foregoing civil provision. It provides that the provisions of section 34 of the Civil Proceedings, Act 25 of 1965 shall apply *mutatis mutandis* with reference to criminal proceedings.

[128] Quite obviously, there are limits to the reception of hearsay evidence as admissible evidence in any proceedings. One of such receptive limits is the salient rule that “hearsay-within-hearsay” by a proponent. Put differently – matters stated in Rehman Khan’s series of hearsays about which he had no direct primary knowledge cannot be used as admissible evidence against the accused. Any given matter in any given statement that incriminates any given accused in this case has to be carefully contextualised to determine whether it falls under the first grade hearsay which is admissible or the second grade hearsay which is inadmissible. This is so because documentary hearsay evidence is admissible as evidence provided the maker had personal knowledge of the matter – section 34(1)(a)(i).

[129] Applying the provisions of the statutory hearsay exception in terms of section 3(1)(c) to the disputed oral hearsay declarations as well as the written prior statement – I came to the conclusion that the interest of justice required or favoured the admission and not the exclusion of the hearsay evidence in dispute.

[130] Accordingly, I made the following order:

130.1 The various aspects of hearsay given on behalf of the state by the two civilian witnesses, namely: Ms N Awan and Ms Z Saleem are received as admissible evidence and allowed as part of the state case.

130.2 The various aspects of hearsay given on behalf of the state by the 3 police witnesses, namely: W/O E Van Zyl, Capt F J Laux and W/O L Steyn concerning several statements made by Rehman Khan are received as admissible evidence and allowed as part of the state case.

130.3 The reception of the foregoing hearsays is subject

to the exclusive limitations as fully set out in par 122
hereof.

M. H. RAMPAL, J

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