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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION,
NORTH-EASTERN CIRCUIT, MTUBATUBA**

Case number: **CCD55/2023**

In the matter between:

THE STATE

and

NTOMBIZODWA GERTRUDE NTINGA

FIRST ACCUSED

SAMKELO NCAMISA MPANZA

SECOND ACCUSED

Coram: Mossop J

Heard: 24, 25, 26, 27, 28 February 2025, 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 17, 18, 19, 20, 24 March 2025

Delivered: 25 and 26 March 2025

JUDGMENT

MOSSOP J:

Introduction

[1] The two accused are charged with two counts of murder, a count of robbery and three counts of kidnapping. All these offences are alleged to have occurred on 1 August 2023 at a rural village known as Phathane in the heart of Zululand.¹ One of the two murder victims is the husband of accused one. He is identified in the indictment as being Mr Nkosinathi Protus Ntinga (WO Ntinga). Both WO Ntinga and accused one were members of the South African Police Services (SAPS) and were stationed at SAPS KwaMbonambi.

[2] The State alleges that accused one instructed accused two and another person not before the court, identified as being a Mr Mira Khoza (Mira), to murder her husband. In acting in accordance with these instructions, a second person was also killed, namely Mr Mpendulo Mdluli. I shall refer to him as the deceased Mr Mdluli to distinguish him from a Captain Mdluli, no relation, who testified later during the trial. The deceased Mr Mdluli was also linked to the SAPS, being employed by it as a clerk.

The pleas and initial admissions

[3] Both accused denied their guilt on all the charges when called upon to plead. Neither of them elected to disclose the basis of their respective defences. Both, however, made the usual admissions in terms of s 220 of the Criminal Procedure Act 51 of 1977 (the Act) regarding the identities of the two deceased men, the fact that neither of them sustained any further injuries following their deaths, the accuracy of the post-mortem examinations performed upon their bodies and their respective causes of death.

[4] Insofar as the death of WO Ntinga was concerned, the post-mortem examination concluded that he had died from multiple gunshot wounds to his entire body, numerous gunshot wounds having passed through his head, chest and abdomen. There was also a gunshot wound to the deceased's right upper leg and a gunshot wound to his right

¹ The village of Phathane is situated in the vicinity of KwaMbonambi, which itself is located north-east of Empangeni and south-west of Mtubatuba.

knee. The post-mortem examination of the deceased Mr Mdluli determined that he had perished from a blunt head trauma comprised of bilateral subarachnoid haemorrhages and subdural bleeding into the fronto-temporal aspect of his brain.

The further admissions

[5] On the second day of the trial, but before the first witness had testified, Mr Mkhwanazi, who appears for accused two, indicated that his client wished to make further admissions in terms of s 220 of the Act. He had apparently not made these admissions initially because he was uncertain of the legal position in which he would find himself in the event of him doing so. Having had whatever difficulties that had gripped him assuaged, accused two then proceeded to make further admissions in terms of s 220 of the Act.

[6] The effect of these additional admissions was that accused two admitted being a participant in the robbery, together with Mira, in respect of which he and accused one are charged but denied that he participated in the two murders. In truncated form, accused two stated that on 1 August 2023, he had been picked up by a Chevrolet bakkie driven by a lady. A passenger in that vehicle was Mira. They had driven to a house that the lady who was driving showed them. The house was in the already mentioned village of Phathane. Later that evening, Mira called him and indicated that he should arrange transport to convey them back to Phathane. Accused two managed to do so and upon arrival at Phathane, Mira removed two firearms from a room in the house that they had been shown by the lady earlier that same day. Mira informed accused two that she was his girlfriend. They thereafter entered the home armed with the two firearms and robbed the occupants of their cellular telephones after tying up the lady present, and WO Ntinga and the deceased Mr Mdluli. The two men were then placed into the deceased Mr Mdluli's motor vehicle and accused two drove them and Mira away from the home in that vehicle, with one of their captives on the back seat of the motor vehicle and the other in the boot. The person on the back seat managed to loosen the cable ties that bound him and attempted to grab Mira. The motor vehicle was stopped and Mira alighted, removed a crowbar from a bag that he carried, pulled the

man out from the back seat of the car and hit him with the crowbar. Accused two drove off, leaving the assaulted man lying on the side of the road. After handing over some bank cards to a person that can only be described as an accomplice and after giving him instructions to take the bank cards to another person in Mtubatuba to draw cash from those cards, Mira formed the view that the motor vehicle that they were using might have a tracking device fitted to it. He commanded accused two to take the motor vehicle and dispose of it. Mira took the person in the boot out and accused two drove off and left the motor vehicle in a sugarcane field. On his way back to rejoin Mira, he heard the sound of gunshots and, not knowing what had happened, he fled. He later joined up with Mira, who informed him that he had killed the man in the boot, who was WO Ntinga.

[7] Notwithstanding these further admissions, the State did not abandon its prosecution of accused two on the murder and kidnapping charges and the trial consequently proceeded in respect of both accused on all the charges.

The evidence

[8] I intend considering the evidence in a manner that allows for easy comprehension and not necessarily in the sequence in which the evidence was presented.

[9] WO Ntinga and his friend, the deceased Mr Mdluli, were at the former's home (the Ntinga home) on the evening of 1 August 2023 and were seated in the television lounge, relaxing. In their company was a friend of the deceased Mr Mdluli, being a Mr Lindani Ndimande (Mr Ndimande). The ubiquitous loadshedding then bedevilling this country commenced at 19h00 that evening. Mr Ndimande testified that shortly after loadshedding commenced, two men burst into the Ntinga home through the kitchen door. Each was armed with a firearm, and each had his face obscured by an item of clothing. Mr Ndimande testified that in the television lounge were himself, accused one, her child (then aged about five), the deceased Mr Mdluli and WO Ntinga.

[10] Upon the masked men entering the home, the occupants of the television lounge were ordered to lie down on the floor, but WO Ntinga was late to respond to this demand and was consequently hit on the head with the butt of a firearm for his troubles, drawing blood. Mr Ndimande testified that when striking WO Ntinga, the intruders had stated that he had caused their brother to be arrested.

[11] The intruders produced cable ties, and WO Ntinga was tied up with them. Mr Ndimande was instructed to bind the deceased Mr Mdluli using cable ties, and he did so. One of the intruders then took WO Ntinga out the house through the kitchen door and Mr Ndimande was instructed to go with him and help load him into the boot of the deceased Mr Mdluli's motor vehicle, a silver-grey Volkswagen Polo (the Polo). This was done. The other intruder remained in the house. Returning to the house, Mr Ndimande testified that he was instructed to go out again with the one intruder and the deceased Mr Mdluli. Once outside, they were both made to lie on the ground while the intruder first searched the interior of the Polo. A firearm was located in the vehicle and was taken by the intruder.

[12] Noticing that the deceased Mr Mdluli was trying to free his hands from the cable ties whilst lying on the ground, the intruder outside with Mr Ndimande stamped on his face, until the deceased Mr Mdluli 'fainted,' according to Mr Ndimande. Mr. Ndimande was instructed to watch the assault that was conducted on the deceased Mr. Mdluli. The other intruder then emerged from the house, and they opened the back door of the Polo and Mr. Ndimande was instructed to help place the late Mr. Mdluli on the back seat of the Polo. He did so.

[13] Mr Ndimande was then instructed to go back into the house and was told to lie down for a period of 10 minutes, presumably to allow the intruders to make their getaway. One of the intruders accompanied him inside whilst the other busied himself with starting the Polo. Inside the Ntinga home, Mr. Ndimande saw cellular telephones belonging to himself, WO Ntinga, the deceased Mr. Mdluli and accused one being placed into a bag by the intruder who had accompanied him inside. Mr Ndimande

thereafter heard the motor vehicle drive off and accused one sprang to her feet and began screaming loudly. He also got to his feet and was immediately intent on seeking help when accused one said to him that he should not leave the house because if he did so, who would stay with her child? Accused one said Mr. Ndimande should rather stay with her child and she would go to raise help.

[14] According to Mr. Ndimande, accused one first went to the Zungu residence, situated approximately 120 metres away, but appeared to get no assistance there. She then returned to the Ntinga home where Mr Ndimande was and then went to the main Ntinga family residence located approximately 130 metres away (the Ntinga main residence). She returned with members of the Ntinga family as well as with a member of the SAPS, who also lives in the general vicinity. This was Sergeant Malusi Mkhize (Sgt Mkhize), and he lived approximately 160 metres away and worked with WO Ntinga and accused one at SAPS KwaMbonambi. I shall return to the evidence of Sgt Mkhize later in this judgment.

[15] Under cross-examination, Mr Qulo, who appears for accused one, disputed several aspects of Mr Ndimande's evidence. He disputed that Mr Ndimande had assisted the intruders in placing the two deceased men in the Polo. Mr Ndimande was adamant that he had done this. Mr. Ndimande was challenged on certain irrelevancies, such as how far the neighbors' homes were from the Ntinga home. It was also disputed that accused one had left her child in the care of Mr. Ndimande, it being the version of accused one that after attempting to raise help at the Zungu homestead, she had returned to her home and had taken the child with her when reporting the matter at the Ntinga main residence. This was strongly resisted by Mr. Ndimande who asserted that the child always remained with him on the veranda of the Ntinga home. Accused one also denied that Mr Ndimande had never been cable tied, as he had stated, and asserted that he had also been tied up. Again, Mr. Ndimande resisted this.

[16] Mr Ndimande was also cross-examined by Mr. Mkhwanazi who appears for accused two. The net effect of this was that it was suggested to him that the two

deceased men had been loaded in a different sequence into the Polo, an assertion that Mr Ndimande rebuffed confidently.

[17] There were no other witnesses to be called during the State case on what occurred inside the Ntinga home: those that were present when the intrusion occurred, apart from Mr Ndimande, were either too young to testify, were dead or were in the dock.

[18] It is important to appreciate that Mr Ndimande was not able in his evidence to identify either of the intruders. It is, however, now known that one of the intruders was unquestionably accused two, because in making the additional admissions that he made in terms of s 220 of the Act, he admitted his presence at the Ntinga home on 1 August 2023. It is extremely unlikely that he would have made this admission if he had not been at the Ntinga home. But there was other evidence led that confirmed this to be true and which suggested at the identity of the other intruder.

[19] Mr Mfundo Mthethwa (Mr Mthethwa) is a friend of accused two and has known him for over ten years, with both of them living in the same area. He was called by the State to testify and said that on 1 August 2023 he had spoken with accused two telephonically at around 13h30. Accused two wanted to hire his services and his motor vehicle, which is apparently the way Mr Mthethwa makes a living. Accused two informed him that he wanted Mr Mthethwa to transport him to the village of Phathane. At the time that he received this telephone call, Mr Mthethwa was in Richards Bay having his motor vehicle, a Ford Ranger bakkie, repaired. That motor vehicle would ultimately be of the utmost importance in determining who was involved in the crimes identified in the indictment.

[20] Having left Richards Bay consequent upon the repairs to his motor vehicle having been completed, and whilst driving home, Mr Mthethwa was called again by accused two at around 18h00. Accused two informed him that he was at that time at a place known as Dangazela and that he still required Mr Mthethwa to transport him to

Phathane. Mr Mthethwa accordingly drove to Dangazela and found accused two. Accused two was, however, not alone but was in the company of another person who was unknown to Mr Mthethwa. Mr Mthethwa was requested to take them both to Phathane. He agreed to do so against payment of an agreed fee and as they drove towards their destination, remarkably, accused two allegedly told Mr Mthethwa, according to the latter, that they intended to go to a certain house in Phathane to rob a person there of his firearm.

[21] Upon arrival at Phathane, a house was pointed out to Mr Mthethwa by accused two but before arriving there, accused two asked that Mr Mthethwa stop his motor vehicle and that they be permitted to alight from it. Mr Mthethwa stopped and was paid the agreed transportation fee of R300, and he then drove off.

[22] During his evidence, Mr Mthethwa was shown a photograph album which included photographs of a house.² He confirmed that the house that accused two pointed out to him was depicted in the album. That house was the Ntinga home. He estimated that he had dropped accused two and his companion at that house at around 19h00 on the evening of 1 August 2023.

[23] Mr Mthethwa's evidence did not end there. Far from it. At around 20h40 that evening he received another telephone call from accused two. He was requested to drive in the direction of the town of Mtubatuba and to look out for a bed and breakfast establishment called 'Meet Mekaar.' Accused two said that he would be there, waiting for Mr Mthethwa. Mr Mthethwa did as he was requested and found accused two at the designated place, who then requested him to go on to the town of Mtubatuba. He gave Mr Mthethwa two bank cards, and he gave him pieces of paper with the pin numbers to those bank cards endorsed thereon. Mr Mthethwa observed that one of the cards was a Capitec bank card. At Mtubatuba, Mr Mthethwa was told he would be required to deliver

² The photograph album was handed in after its compiler, Sgt Phumlani Mangele, a crime scene investigator stationed in Richards Bay, had given evidence, and had confirmed that he had personally taken the photographs that appeared therein.

the bank cards to another man. He was not given the name of the man to whom he was to give the bank cards, but he was given his cellular telephone number. Accused two was not to accompany Mr Mthethwa to Mtubatuba.

[24] At this stage, it occurred to me that the witness was being asked to potentially implicate himself in a criminal activity, which could involve several offences, including being an accessory after the fact to robbery and receiving property reasonably suspected to have been stolen. The State confirmed upon my questioning that it had not presented Mr Mthethwa's evidence in terms of s 204 of the Act. I therefore cautioned Mr Mthethwa against self-incrimination and asked him if he wished to take legal advice before proceeding further. He said that he did, and I permitted the matter to stand down for this to occur. On resumption, Mr Mthethwa indicated that he was prepared to continue with his evidence, having taken legal advice.

[25] The person that Mr Mthethwa was required to hand the bank cards to was driving a Toyota double cab motor vehicle. Having telephoned the number that he was given by accused two, Mr Mthethwa met up with this man at a petrol station in Mtubatuba and handed over the bank cards to him together with their pin numbers. He did not know the man. No money, however, could subsequently be extracted from the bank accounts to which the bank cards related, as was reported to Mr Mthethwa by the man to whom he had given the bank cards. Mr Mthethwa then left for home. However, his involvement in this saga was still far from over.

[26] At around 22h00 that evening, Mr Mthethwa went to visit his girlfriend. At 23h00 he received another call from accused two, who now asked him to pick him up at a place called Magamakhaza. Mr Mthethwa went there and picked accused two up and then proceeded in the direction of their homes.

[27] As already mentioned, Mr Mthethwa's home is near accused two's home. As they drove homeward, accused two indicated that the person that he had been with earlier that evening was called 'Mira' and that the true situation was that Mira had been hired

by accused one to kidnap and kill her husband at a place away from the Ntinga home. Mr Mthethwa allegedly was shocked upon hearing this and asked why he had not been informed of this earlier. The obvious answer that he received was that he, Mr Mthethwa, would not have helped accused two if he had known the truth of the matter.

[28] Accused two also mentioned to Mr Mthethwa that at the bed and breakfast where he met Mr Mthethwa earlier, there had been employees and motor vehicles from Tracker (Tracker), a company that provides electronic monitoring and security services for motorists through the installation of electronic monitoring devices in motor vehicles as against payment of a monthly fee. There had allegedly been a shoot-out between him and the Tracker employees near the bed and breakfast. To emphasise what had happened, accused two showed Mr Mthethwa a firearm. It was about 20 centimetres long and silverish in colour. Continuing talking, accused two explained to Mr Mthethwa that not far from the bed and breakfast, a person had been killed in the forest. He did not explain how this had occurred, but he did say that he now needed to be taken to Esikhaweni, where he wanted to acquire muti from a traditional healer. For some reason this request was ultimately not honoured.

[29] As Mr Mthethwa approached the area of their respective homes, he noticed from afar the presence of motor vehicles with their headlights on at his home. Also seeing this, accused two asked to be allowed to get out of the motor vehicle. Before doing so, accused two asked for Mr Mthethwa's cellular telephone to make a call and when he alighted from the motor vehicle, he took the cellular telephone with him.

[30] When he arrived home, Mr Mthethwa discovered that the car headlights that he had observed came from SAPS motor vehicles. He was asked to explain where he had been that evening and, so Mr Mthethwa alleges, he told the SAPS members the whole story of his eventful evening.

[31] Mr Qulo took Mr Mthethwa under cross-examination. He asked why accused two would have confessed to him that he and Mira were going to commit a robbery.

Understandably, Mr Mthethwa could not give an answer to this question. It was also put to him that he had also given a different explanation for what accused two and Mira were up to when he said that accused two had confided in him that accused one had hired Mira to kidnap and murder her husband. Mr Mthethwa acknowledged that this was, indeed, different to merely carrying out a robbery. He rationalised the difference as being that the first version was what accused two wanted him to believe whilst the second version was what had actually happened. It was pointed out that in accused two's additional s 220 admissions, he had provided a third version of what was intended on the night in question, namely that he and Mira had proceeded to the Ntinga home to rob a person of a bonus that the intended victim had apparently been paid. This is, indeed, what is contained in the additional admissions made by accused two.

[32] Mr Mkhwanazi also cross-examined Mr Mthethwa. The first point of contestation was that accused two denied that Mr Mthethwa had been paid R300 for his services. Mr Mthethwa said he had been paid that amount. Then it was denied that accused two had said they were going to rob someone of a firearm. What had been said, according to Mr Mkhwanazi, was that they were going to rob someone of a bonus that the intended victim had received. This, too, was denied by Mr Mthethwa.

[33] Mr Qulo, in cross-examining Mr Mthethwa, appeared to suggest that it was unlikely that the disclosure of the intended robbery had been made to Mr Mthethwa. This line of questioning by Mr Mkhwanazi, however, removed any doubt that accused two had, indeed, said that they were going to commit a robbery. Mr Mkhwanazi did not challenge the alleged disclosure of the intention to commit a robbery. What was challenged was the expressed goal of the intended robbery, namely the robbery of a firearm versus the robbery of a bonus. Accused two also denied showing Mr Mthethwa a firearm and this, in turn, was denied by Mr Mthethwa.

[34] Mr Mthethwa disclosed in his evidence that the last person who possessed the bank cards that accused two gave him was the man to whom he had handed them in Mtubatuba. They had not been given back to him, although he had seen a slip printed

by the automated teller machine (ATM) where one of the cards had been inserted to the effect that there were no funds available to be drawn out. It was put to Mr Mthethwa by Mr Mkhwanazi that it appeared likely that a witness would be called later in the trial who would say that the bank cards had been given back to Mr Mthethwa. That elicited the response from Mr Mthethwa that if a witness so testified, he would be lying.

[35] On the issue of accused two possessing a firearm, Mr Mkhwanazi stated that accused two would deny possessing a firearm. To this, Mr Mthethwa stated that he had seen accused two being arrested and that the firearm was found on him at that moment. It was, furthermore, put to Mr Mthethwa that accused two had not known of the intention to kill anyone and that he only become involved in the events to commit a robbery in which a bonus possessed by one of the intended victims was the prize. Mr Mthethwa, fairly, said that he could not comment on this as he did not know why accused two had become involved.

[36] Mr Thomas Zungu (Mr Zungu) was the mysterious, unnamed man mentioned in Mr Mthethwa's evidence who met him at the petrol station in Mtubatuba and who attempted to draw money from an ATM with the bank cards given to him by Mr Mthethwa. Mr Zungu was called to give evidence by the State. Before he did so, I was advised that he was a s 204 witness, and I was requested to warn him accordingly. I did so.

[37] Mr Zungu commenced his evidence by indicating that he knew accused one, having previously seen her at Richard's Bay on the morning of 1 August 2023. He had been there when his friend, Mira, who was carrying a bag, arrived. Mr Zungu was waiting for his motor vehicle to be serviced. Mira is a Mozambiquan citizen whom Mr Zungu has known since 1999. They are on such friendly terms that Mira addresses him as his 'brother-in-law' (sbari).

[38] Whilst waiting for his motor vehicle to be worked on by the mechanic in Richards Bay, Mira informed Mr Zungu that his girlfriend would be coming by to pick him up.

Shortly thereafter, a Chevrolet bakkie drew up. The driver was accused one and she parked across the road from where Mr Zungu and Mira were seated. Mira got up, went to the motor vehicle, placed his bag in the bin and then removed it and placed it in the cab into which he got, and the motor vehicle drove off.

[39] At 19h30 that same day, Mira telephoned Mr Zungu and asked him if his motor vehicle was now functional and was informed that it was. Mira mentioned to Mr Zungu that he might call him later that evening to pick him up in Mtubatuba. That prediction came true, for at approximately 21h00 that evening Mira telephoned him and asked him to pick him up in Mtubatuba. Mr Zungu asked Mira if his girlfriend could not give him a lift home but was told that this was not possible because her husband had now come home from work. Mr Zungu agreed to do as he was requested but only after he had finished bathing. Having completed his toiletries and when on his way to meet Mira, Mr Zungu called him to tell him of his progress towards him. He was now told not to go to Mtubatuba but instead to go to a petrol station at KwaBhoboza where he was to meet a 'boy' who would give him money. Arriving at the petrol station, Mr Zungu telephoned Mira who indicated that the 'boy' with the money would contact him telephonically.

[40] That does not appear to have happened, for the next telephone call that Mr Zungu received, so he testified, was from Mr Mthethwa. Mr Mthethwa is a grown man and is hardly to be described as a 'boy'. Mr Mthethwa told Mr Zungu to go to Mtubatuba. When Mr Zungu told him he was already there, he was told to go to the petrol station with the brand name 'Nguni'. He did so and on arrival there, he telephoned Mr Mthethwa. He explained to Mr Mthethwa that he was travelling in a white Toyota double cab motor vehicle. Mr Mthethwa said that he could see the motor vehicle and approached from its rear and produced two bank cards which he handed to Mr Zungu. Mr Zungu was instructed that Mira had said that he should take the cards and attempt to withdraw money from the two bank accounts to which the cards attached. He was also handed the relevant pin codes.

[41] Mr Zungu proceeded to a First National Bank ATM in Mtubatuba and attempted

to withdraw money from both accounts. He testified that both his attempts were unsuccessful: the Capitec bank card generated a slip indicating that there was no money in the account and the FNB bank card generated a slip that explained that the card had expired. Mr Zungu testified that he took the two cards, and the two ATM slips, back to Mr Mthethwa, told him that no funds could be drawn and handed over the bank cards and the ATM slips to Mr Mthethwa. Mr Zungu then left.

[42] On his way home, Mr Zungu telephoned Mira and asked him where he now was. He was told that he was at the bridge at Eteza, near Mtubatuba. Mr Zungu went there but could not find Mira. He waited there for approximately 20 minutes before he realised that Mira was not coming. He consequently drove to a petrol station at KwaMbonambi where he estimated that he waited for an hour before Mira called him. Mira told him to return to Eteza and he did so and parked on the N2 so that his motor vehicle was facing southwards in the direction of Empangeni. Two minutes after arriving there, at around 22h00, Mira and accused two suddenly appeared. Mr Zungu testified that he did not know accused two. He drove off with both in his motor vehicle. After driving for approximately five minutes, he was instructed by Mira to turn onto a gravel road that intersected the N2 on the right side. He did so. This was apparently a heavily bushed area and Mr Zungu eventually said that he was not happy to go on because of the denseness of the bush. Accused two said that was in order and that he could simply be dropped there and would be picked up by someone else. Mira said to accused two that he would be alright in that area because he 'had the tool with you.'

[43] Mr Zungu then retraced his steps to the N2 and drove on in the direction of Mzingazi, which is close to Richards Bay, his purpose being to take Mira to this home. As he drove, Mira pulled out a firearm, cocked it and took out a bullet from the firearm's chamber and then put it back into the magazine of the weapon. Mr Zungu dropped Mira at his place and then returned to his home. He did not see Mira again but did speak with him on the telephone the next day. Mira promised to give him money for his efforts of the day before. He testified that he never received it.

[44] At about 02h00 on the morning of 2 August 2023, the SAPS swooped down on Mr Zungu's residence as he lay sleeping and arrested him. Upon searching his home, some ammunition was found, and the SAPS members demanded from him that he produce the firearm intended to fire that ammunition. Mr Zungu protested that he did not have a firearm and had no idea how the ammunition came to be in his home.

[45] The facts thus far reveal that WO Ntinga and the deceased Mr Mdluli were driven away, tied up, from the Ntinga home in the Polo by accused two and Mira to meet their fate. What that fate was may have been suspected but was not definitively known when the already mentioned Sgt Mkhize arrived at the Ntinga home after being alerted to the events that had occurred there by accused one. It will be recalled that Sgt Mkhize was a neighbour of accused one and WO Ntinga.

[46] Upon his arrival at the Ntinga home, Sgt Mkhize contacted colleagues at SAPS KwaMbonambi to assist in locating the intruders and their two captives who had been forced by them into the Polo. Accused one had informed him then that the intruders had stated that WO Ntinga had killed their brother. Sgt Mkhize then wondered whether the deceased Mr Mdluli's Polo had a tracking device installed in it and he telephoned various members of the deceased Mr Mdluli's family to verify the position and to get the registration number of the Polo. No one seemed to have the information that he required but he eventually obtained the registration number of the Polo, and he gave it to Tracker in the hope that Tracker could assist in locating the Polo.

[47] Tracker, indeed, could assist: Sgt Mkhize was told by Tracker that the Polo was at Teza in the district of Umfolozi and he was given the coordinates of the exact spot where the vehicle could be located. The SAPS members summoned to the Ntinga home by Sgt Mkhize had by now arrived and they all left there to go to the point identified by Tracker.

[48] Sgt Mkhize testified that he had driven but a short distance away from the Ntinga home in his marked police vehicle when he observed the driver of an oncoming motor

vehicle flick its headlights at him. He stopped and ascertained that the oncoming motor vehicle was driven by Mr Phumlani Mlondo (Mr Mlondo). Mr Mlondo, who testified before me, explained to him that he had been driving along the road from Port Durnford and when in the vicinity of a place called Fakude Gardens he had observed the deceased Mr Mdluli, who has the first name of 'Answer', staggering at the side of the road. He happened to know the deceased Mr Mdluli. He stopped and saw that he had been seriously wounded on the back of his head. He put him into his motor vehicle and was intending to drive him home when he came across Sgt Mkhize.

[49] Sgt Mkhize told Mr Mlondo to take the deceased Mr Mdluli to Mr Mdluli's brother's home and explained to him that he was on his way to attempt to apprehend the persons responsible for the deceased Mr Mdluli's condition.³

[50] Sgt Mkhize, using the coordinates that Tracker had supplied him with, proceeded to the identified location. On arrival at that spot, the Polo was not there but another group of SAPS members located it about five kilometres away, according to him. The Polo was locked when found. Sgt Mkhize, however, indicated in his evidence that the key to the vehicle was found. The impression created was that it had been found that night when the motor vehicle was located. The evidence of the investigating officer, dealt with later in this judgment, revealed that not to be the case and the key was found later under very different circumstances than those seemingly described by Sgt Mkhize.

[51] A message was then received by Sgt Mkhize from the SAPS members who were at the spot initially identified by Tracker. The body of WO Ntinga had been found there, lying next to the river, semi-naked. Sgt Mkhize went to that scene. There were already a substantial number of SAPS members in attendance there. Included in those that were

³ Mr Mlondo did take the deceased Mr Mdluli home. From there he took him to a clinic at Nseleni. Mr Mlondo later learned that the deceased Mr Mdluli had been transferred from the clinic to Ngwelezana Hospital and from there he was transferred to the Nkosi Albert Luthuli Hospital in Durban. Both accused admitted the accuracy of the post-mortem report relating to the post-mortem performed on the body of the deceased Mr Mdluli. It stated that death had occurred on 5 August 2023, four days after the events at the Ntinga home.

gathered there were some white farmers who apparently owned the land where the body was found. The white farmers had installed cameras at their farm which took photographs of vehicles that passed their farms on the road. They were asked to look at the footage taken that evening. When the footage was observed, there were photographs of two motor vehicles that had passed that evening: a white double cab Toyota⁴ and a Ford Ranger. By a stroke of good fortune, Sgt Mkhize knew the owner of the Ford Ranger. It was Mr Mthethwa.

[52] The SAPS members, together with Sgt Mkhize, went to Mr Mthethwa's home but did not find him there. He had apparently left to go and visit his girlfriend. As they spoke with people at his home, Mr Mthethwa drove up in his motor vehicle. He was asked a few questions and was then requested to accompany the SAPS members to SAPS KwaMbonambi.

[53] Information was then received that the owner of the Toyota double cab lived at Nseleni and so the SAPS members descended upon that area. The home that they visited was that of Mr Zungu. After arresting him, ten rounds of ammunition were found in his home. While this was occurring, Mr Zungu received a telephone call from Mira, who explained to him that the SAPS were pursuing him. Mr Zungu was taken into custody at SAPS KwaMbonambi.

[54] According to Sgt Mkhize, Mr Mthethwa then provided the SAPS with the identity of accused two. They accordingly went to accused two's home but could not locate him there. Accused two's neighbours were asked to keep an eye on his home and to notify the SAPS when he returned. At 10h00 the next morning the SAPS were alerted to accused two's return to his home. The SAPS divided the assembled task team into two separate teams and proceeded to accused two's home. Accused two saw the first team approaching his house from the front and fled by running to the back of his property, where the second team of SAPS officials had been strategically stationed, and he was

⁴ It will be remembered that Mr Zungu drove a white Toyota double cab but, in so saying, it is appreciated that this is a very common motor vehicle on the roads of this country.

duly apprehended.

[55] Accused two was asked whether he was the person known as 'Ncamisa'. He said that he was not.⁵ The issue of his identity was resolved by Mr Mthethwa: he was present in the company of the SAPS members, and he stepped out of the vehicle that he was in and confirmed accused two's identity.

[56] Sgt Mkhize searched accused two's house together with a Constable Siphelele Ndawonde (Cst Ndawonde). Underneath the mattress of accused two's bed, Cst Ndawonde found five cellular telephones, along with certain cards and a firearm, described by Sgt Mkhize as being a 'toy gun'.

[57] Accused two informed Sgt Mkhize that he had been hired by accused one to rob her husband. This came as a body blow to the SAPS members, according to Sgt Mkhize. Apparently, this was an entirely unexpected development.

[58] Mr Qulo put it to Sgt Mkhize that accused one had her child on her back when she came to his house to report the events to him. After a series of questions, this was ultimately denied by Sgt Mkhize. The witness confirmed that loadshedding was still on when accused one came to his house but asserted that there was sufficient light, primarily from the headlights of the motor vehicle that he drove, for him to see that the child did not accompany accused one.

[59] Mr Qulo, for some unexplained reason, then took up the cudgels on behalf of accused two and asked a series of questions relating to whether he had been apprised of his rights on being arrested. Sgt Mkhize said that while he had not been the arresting officer and he had accordingly not read accused two his rights, accused two had been properly apprised of them, and that he had heard the arresting officer explaining his rights to him.

⁵ It is worth noting that according to the indictment, accused two's full names are 'Samkelo Ncamisa Mpanza.'

[60] Tag teaming on what Mr Qulo had commenced exploring, Mr Mkhwanazi, on behalf of accused two, then denied that accused two's rights had been explained to him. Sgt Mkhize explained tartly that the SAP14A document issued to accused two after his rights had been explained would resolve any dispute about whether he had been warned of those rights. That document was duly handed in as an exhibit. The document has accused two's name on it and had been signed, ostensibly by him, at 20h30 on 2 August 2023. Mr Mkhwanazi then denied that the signature on the document was that of accused two.

[61] Mr Mkhwanazi went on to state that accused two had been forced into admitting his involvement in the crime. How this was done was not explained and what the nature of the force that was applied to accused two was not mentioned. This was denied by Sgt Mkhize. It must be mentioned at this juncture that no direct evidence was led establishing that accused two had admitted any involvement in the murder of the two deceased men. There was, however, evidence that he informed Mr Mthethwa that he was going to commit a robbery. And then when the trial commenced, he admitted his involvement formally in the robbery when he made his further admissions in terms of s 220 of the Act. That being the case, it is not clear what accused two alleged Sgt Mkhize forced him to do.

[62] Mr Mkhwanazi asked Sgt Mkhize if he saw the Polo keys being found. He said that he had seen a Constable Mlaba find them. This evidence is troubling because the investigating officer later testified that this evidence relating to the finding of the car keys was not correct. The car keys had not been found on the same evening that the body of WO Ntinga was discovered. They were found a few days later when accused two pointed out where he had thrown them.

[63] The SAPS member who arrested accused two was the previously mentioned Constable Ndawonde. By the time that the SAPS went to accused two's home, Mr. Mthethwa had already been apprehended. Cst Ndawonde confirmed that upon arrival at accused two's home, accused two had attempted to flee, but he was chased after and

apprehended. The witness indicated that he had asked accused two if he was the person named 'Ncamisa' but he denied that he was.

[64] Cst Ndawonde took accused two back to his home to confirm who he was. Mr Mthethwa was there, and he confirmed the identity of accused two. Accused two was then placed under arrest for the crime of murder committed at Phathane and his rights were explained to him. He was then asked if his home could be searched, and he agreed that this could occur.

[65] Accused two identified which room he occupied and upon searching under the mattress of his bed, Cst Ndawonde discovered five cellular telephones. Each of these cellular telephones was placed in an evidence bag with a numbered seal. The relevant seals and the cellular telephones in each evidence bag were the following:

(a) Seal number PA 500-279-0594 was applied to an evidence bag containing two cellular telephones, namely a Stylo cellular telephone and an Itel cellular telephone. Accused two was asked who owned these two cellular telephones and replied that they belonged to WO Ntinga;

(b) Seal number PA 650-048-8971 was applied to an evidence bag containing a Nokia cellular telephone. Accused two explained that this was accused one's cellular telephone. He told Cst Ndawonde that this cellular telephone had been given to him by accused one so that they could communicate with each other;

(c) Seal number PA 450-016-9289 was applied to an evidence bag which contained a Hisense cellular telephone and another Stylo cellular telephone. Accused two identified these cellular telephones as being his; and

(d) Seal number PA 450-018-1263 was applied to an evidence bag containing what appeared to be a firearm. The firearm was also recovered under accused two's mattress. The State produced this object, and it was inspected by the court. It has the appearance and the weight of a regular firearm. It was dark in colour and was not silver. But apparently it is not a working firearm. No explanation was provided by accused two regarding this firearm.

[66] Cst Ndawonde entered the exhibits that he seized at accused two's home into the SAP 13 register at SAPS KwaMbonambi. A copy of the SAP13 register was handed in as an exhibit. As regards informing accused two of his rights, Cst Ndawonde testified that he had explained those rights to him. Accused two had signed the SAP14A document and was given a copy thereof.

[67] Cst Ndawonde testified further that accused two had stated to him that he had been with Mira. An attempt was later made to arrest Mira, which resulted in Cst Ndawonde being shot by Mira in his leg, causing him to be hospitalized for seven days. Mira evaded arrest and has still not been arrested.

[68] Mr Qulo cross-examined Cst Ndawonde. He wanted to know when accused two had said that the Nokia cellular telephone had been given to him by accused one. The answer that he received was that this had occurred immediately after the recovery of the cellular telephones under accused two's mattress. It was put to Cst Ndawonde that accused one would state that the Nokia cellular telephone had been taken during the robbery. This, ultimately, was a most significant admission.

[69] Mr Mkhwanazi, in turn, put it to Cst Ndawonde that accused two would deny that he had explained his rights to him. This was denied by Cst Ndawonde. It was also put to him that the signature on the SAP14A document was not that of accused two. This, too, was denied by Cst Ndawonde. It was then put that the only items discovered at accused two's home were two cellular telephones that belonged to him. This was also denied by the witness, who insisted that all the cellular telephones were found beneath accused two's mattress. This elicited the further version from Mr Mkhwanazi that the two cellular telephones belonging to accused two had not been found under his mattress but had been found on his person. This was also denied by Cst Ndawonde. It was then put that the Stylo cellular telephone belonged to accused two, but the Hisense cellular telephone actually belonged to Mr Mthethwa.

[70] Mr Mkhwanazi also put it to the witness that accused two would deny saying that

accused one had given him the Nokia cellular telephone. This elicited a detailed and passionate answer from the witness who asked from where he would have acquired that information. He explained that he was merely testifying to what he was told at the time that he arrested accused two. Cst Ndawonde made the point that he personally did no investigating in this matter, being merely involved in the apprehension of accused two. It was further put by Mr Mkhwanazi that the cellular telephones were brought to accused two by Captain Mdluli, who asked him whether the cellular telephones were what he had taken during the robbery. This was described as a lie by Cst Ndawonde.

[71] There was a great deal of evidence adduced by the State. The investigating officer who accumulated this evidence was Captain Qaphelani Mdluli.⁶ Capt Mdluli has 21 years' experience in the SAPS, and he commenced with his investigations in this matter at 21h00 on 1 August 2023 when he received a telephone call. The caller informed him that WO Ntinga had been abducted, and that his lifeless body had been discovered a short while later. He proceeded to the place where WO Ntinga's body was found and saw WO Ntinga's semi-naked body. Near the body was a crowbar and next to it were some cards. One of them was a Polmed card. WO Ntinga had both his hands and feet bound with cable ties and appeared to have been shot numerous times. Capt Mdluli also went to the crime scene where the Polo had been found. He estimated the distance between the place where the Polo was found and the place where WO Ntinga's body had been discovered as being about 1,5 kilometres whereas Sgt Mkhize had estimated this distance as being about 5 kilometres. Nothing turns on this.

[72] Capt Mdluli confirmed, further, that there were static cameras at the scene where WO Ntinga's body was found that took snapshots of passing motor vehicles on the nearby road and that when these photographs were observed, Sgt Mkhize had recognised a Ford Ranger motor vehicle that had been captured in an image by the static camera.

⁶ At the time that he performed his investigations, Capt Mdluli was still a warrant officer. I shall continue, however, to refer to him as 'Capt Mdluli.'

[73] From the crime scenes, Capt Mdluli testified that he went to the Ntinga home, arriving there at about 02h00 hours. Despite the lateness of the hour, there were several people still there, including accused one as well as the mother of WO Ntinga. A Colonel Fakazi informed them of the death of WO Ntinga. Capt Mdluli testified that from the reaction that this information elicited, accused one and WO Ntinga's mother did not know at that stage that he was dead.

[74] Capt Mdluli noticed blood on the floor in the television lounge and was told that it was WO Ntinga's blood, he having been hit on the head by one of the intruders. The version that he was told by accused one, narrated by him to the court, was not dissimilar to the evidence of Mr Ndimande. While she was apparently emotional, Capt Mdluli noted that she regained her composure unnaturally quickly in his opinion. He regarded the way that she told her story to be strange – as if she herself was not a victim. He explained further that while she made the noise of crying from her mouth, she had no tears in her eyes.

[75] By this time, the SAPS had located and apprehended Mr Mthethwa. Capt Mdluli accordingly proceeded to SAPS KwaMbonambi where he was being detained. Mr Mthethwa told him who had hired him.

[76] The next day, Capt Mdluli attended the post-mortem of WO Ntinga while the other members of the task force that had been formed were given instructions to locate and arrest accused two. He heard later that day that this had been achieved. Capt Mdluli decided to go back to the place where WO Ntinga's body had been discovered to see if any further evidence could be found. He invited crime scene specialists to go with him with metal detectors, but nothing of any significance could be located. From there, Capt Mdluli again went to the Ntinga home where he took down some statements from witnesses who were there, including the statement of Mr Ndimande.

[77] Capt Mdluli then invited accused one to accompany him to his offices in Richards Bay to make her statement. She was regarded as an important witness. They sat, in

private, in a boardroom. Accused one related the facts of what had happened and then said that she would like to make a statement. At this time, Capt Mdluli received information telephonically that accused two had said that he had been hired by accused one to kill her husband. He confronted her with this information. She appeared to deny it but when the name 'Mira Khoza' was mentioned her response was the following:

'Eish, let me talk the truth now.'

She then confessed.

[78] Being an experienced police officer, Capt Mdluli attempted to acquire the services of a magistrate to formally record the confession of accused one. This turned out not to be possible given the lateness of the hour, it being after working hours. Instead, he obtained the services of Lieutenant Colonel Mkhabela from SAPS Eshowe (Lt Col Mkhabela). Lt Col Mkhabela duly arrived at Richard's Bay and accused one made her confession before him.

[79] Capt Mdluli testified that when accused one had been arrested, she had said that a cellular telephone had been left with her that belonged to her child. He asked to see it. She produced it. It was a Samsung smartphone, and he still had it in his possession when he gave his evidence. It was duly entered as an exhibit in the trial.

[80] Capt Mdluli testified that he had been surprised to learn that accused one had a relationship with Mira but what genuinely surprised him even more was that Mira's cellular telephone number was saved on the telephone that was handed to him by accused one. Mira's name, however, was not recorded on the cellular telephone but his cellular telephone number was and was saved under the name of 'My child.'

[81] Capt Mdluli approached the commercial cellular telephone network operators in South Africa and sought the records of cellular telephones owned by both accused, Mira, Mr Mthethwa, Mr Ndimande, Mr Zungu, and the deceased Mr Mdluli. His request was founded on the provisions of s 205 of the Act and he received the information that he requested. In making his request, he listed the telephone numbers in respect of

which he required information.

[82] The first thing that Capt Mdluli realised upon receiving the requested information was that accused one had been in telephonic contact with Mira from 7 June 2023. The cellular telephone number used by accused one was 2[...] and the number used by Mira was 2[...] (Mira's number). Capt Mdluli produced some of the records that he received from the cellular telephone networks. He did not produce all the records. Some pages were not produced because they contained nothing of interest. Where there was information of interest, the pages where that information was recorded were produced.

[83] Something needs to be said briefly about the production of these records. It is so that Capt Mdluli is not an expert when it comes to cellular telephone data analysis. He is a policeman. In identifying specific cellular telephone communications from the records that he acquired he was not testifying as an expert but merely attempting to assist by sifting out the significant communications from the insignificant. The court, as well as the defence, was of the view that expert evidence from the network providers would later be called by the State. However, that did not occur, because so the court was advised by the State, the defence had informed the State that there was no need to call these witnesses as the records would not be challenged. The State informed the court of this and the witnesses were not called. During argument, Mr Qulo submitted that he had consented to the documents being handed in but had not agreed that their contents were correct. During argument, he tried to dispute the accuracy of certain telephone calls recorded in that documentation. If the contents of the documents were disputed, then the court and the State ought to have been informed of this. Neither were. I accordingly deal with the records on the basis that their contents are correct.

[84] Before discussing the telephone records that he had acquired, Capt Mdluli explained that certain abbreviations were used in the records and that it was important for the court to understand what each abbreviation meant. He explained that the following abbreviations had the following meanings:

MT = Message coming in.

MO = Message going out.

MTC = Incoming call.

MOSMS = Outgoing message.

MTSMS = Incoming message.

[85] Of particular interest to Capt Mdluli were the communications between accused one and Mira. This was primarily because he had information from Mr Zungu that Mira had referred to accused one as being his girlfriend and he also had information that Mira had previously been arrested and had been in detention at SAPS KwaMbonambi, where accused one is employed. He accordingly suspected that accused one and Mira were, indeed, involved in a love relationship, and he carefully went through accused one and Mira's telephone records.

[86] The first recorded contact between accused one and Mira occurred on 7 June 2023, nearly two months before the events of 1 August 2023. Over the period 7 June to 8 June 2023, there were nine attempts at communication between accused one and Mira's cellular telephone numbers. It appears that none of these calls connected to the person to whom it was directed. However, on 9 June 2023, there were 9 calls that were directed from Mira's cellular telephone to accused one's device, all of which were answered by her. The collective duration of these calls came to 2 470 seconds, or approximately 41 minutes. In addition, there were two SMSs sent by Mira to accused one on 9 June 2023.

[87] Mira also used his cellular telephone to communicate extensively with accused two and Mr Zungu. On 1 August 2023, the date of the murders, Mira and accused two exchanged calls on no less than 9 occasions between 21h04 and 21h25, and two further calls occurred on 2 August 2023 between 00h28 and 00h29. Mr Zungu and Mira communicated with each other on 1 August 2023 on a total of 16 occasions between the hours of 20h18 and 23h15.

[88] Capt Mdluli took the handsets and the information that he had received from the

network operators and submitted them all for further analysis to a specialist division of the Hawks, namely the Digital Forensic Investigation laboratory. The official who was required to perform that analysis was a Constable Lindokuhle Thungo (Cst Thungo), who was called by the State to reveal what he had ascertained.

[89] Cst Thungo told the court that he holds a B.Sc. degree in Computer Sciences and is employed by the SAPS at its Provincial Office in Durban. He explained that one of the functions that he performs is the extraction of data from devices such as computers, telephones and cameras. On 14 August 2023, he had received six sealed exhibit bags. Four days later, on 18 August 2023, he completed his analysis of the objects contained in those evidence bags. Within each evidence bag was a note that the exhibit related to an SAPS KwaMbonambi matter with CAS number 12/08/2023. That is the CAS number of the matter being tried.

[90] The exhibit bags bore the following seal numbers and contained the following exhibits:

- (a) Seal number PA550-016-9041: this bag contained two cellular telephones, a Stylo, which contained two sim cards,⁷ both issued by Vodacom, and an Itel cellular telephone that had no sim card;
- (b) Seal number PA 550-016-9042: contained within this bag was a Nokia TA1203 handset which employed a Vodacom sim card. This handset enjoyed considerable attention and I shall refer to it as 'the Nokia TA1203' ;
- (c) Seal number 550-016-9040: this bag contained a Samsung A024 handset which had a Vodacom sim card and an MTN sim card as well as a 16-gigabyte memory card. As with the Nokia TA1203, this handset also was the focus of considerable attention, and I shall refer to it as 'the Samsung A024';
- (d) Seal number PA550-016-9039: this bag contained a Samsung handset, and it had an MTN sim card in it;
- (e) Seal number PA0-016-9046: this bag contained two handsets. There was a Nokia

⁷ <https://www.dictionary.com/browse/sim-card>: A SIM (Subscriber Identity Module) card, is a removable card inside a cellular telephone that stores data unique to the user, such as an identification number, passwords, phone numbers, and messages.

TA1174 handset which housed two Vodacom sim cards. And there was also a Samsung Galaxy Note 10 handset which contained an MTN sim card; and

(f) Seal number PA550-016-9043: this bag also contained two handsets, namely, a Stylo handset containing an MTN sim card and a Hisense handset using a Vodacom sim card.

[91] Thus, in total, Cst Thungo was sent nine devices requiring analysis by him. I only heard evidence of five cellular telephones being found under the mattress of accused two at the moment of his arrest. There was also evidence of a cellular telephone being handed to Capt Mdluli by accused one. I accordingly have no idea where the other three devices came from.

[92] Cst Thungo was able to extract data from all the devices that were sent to him except for the following devices:

(a) In the first exhibit bag mentioned bearing seal number PA550-016-9041, he was only able to partially extract data in the form of photographs and videos from the Itel handset; and

(b) In the fifth exhibit bag mentioned, he was not able to extract data from the Nokia handset itself but was able to extract data from the two sim cards that it held.

[93] Cst Thungo was required by the State Advocate, Ms Ntsele, to concentrate on the Nokia TA1203 handset contained in the second exhibit bag mentioned above with seal number PA 550-016-9042. He explained that this was a small handset that did not store photographs. The device's contacts were saved to the handset's sim card and not on the handset itself.

[94] Having extracted all the data that he could, Cst Thungo prepared a report that was handed in as an exhibit. Cst Thungo was only led on a discrete part of his report, namely what he discovered in relation to the Nokia TA1203 and the Samsung A024. That report revealed that on the evening of 1 August 2023, and between 18:57:44 and 19h21:17, there were three calls to the Nokia TA1203 that registered as missed calls.

There were two further missed calls, one at 19:40:08 on 1 August 2023 and one at 12:33:59 on 2 August 2023. There were two further missed calls on 3 August 2023. All the calls just referred to came from the number 2[...], being Mira's number.

[95] The focus on the Nokia TA1203 was occasioned by the allegation that this was a handset that accused one used to communicate with Mira and accused two in the run up to the murder of accused one's husband.

[96] Cross-examined by Mr Qulo for accused one, Cst Thungo confirmed that he was not able to identify who the owner of a particular cellular telephone was. There was, however, a process that could be employed to determine who the owner was, but he did not have access to it and had not thus employed it. Cst Thungo confirmed that if a number had been saved on a device with a name, when a call was received from that number, the handset would display the name of the caller. He did state, however, that it was not necessary to use a name when saving a number and the number itself could be saved without a name being attached to it. In that event, when the call came in from that number, only the number would display on the receiving handset.

The trial within the trial

[97] After the conclusion of the evidence of Cst Thungo, the State indicated that it had a warning statement taken from accused one and a confession that she had allegedly made. Mr Qulo, for accused one, indicated that the admissibility of these two documents was contested by accused one and accordingly a trial within a trial was declared.

[98] The State commenced leading evidence during this discrete phase of the trial and called the evidence of three witnesses, namely a Capt Buthelezi, a Colonel Khambule and the evidence of Lt Col Mkhabela.

[99] The first of these witnesses to testify was Captain Jafta Buthelezi (Capt Buthelezi), presently retired from his employment by the SAPS, but who was previously stationed at the King Cetshwayo District Detective Branch at Esikhaleni, Richards Bay.

He testified that he had been present when accused one had been arrested, having been instructed by his superior officer to assist Capt Mdluli, the investigating officer. He added that he did not know either WO Ntinga or accused one. He went to accused one's home and confirmed that at that stage she was viewed as a witness and not as a suspect.

[100] Because there were too many people milling around at her home, it was decided to take accused one to the detective's offices in Richards Bay to take a detailed statement from her. There, accused one was given a tablet of foolscap paper and was requested to write out her own statement, it being reasoned that as a policewoman, she would know how to do so.

[101] Capt Buthelezi testified that as accused one was writing out her own statement, Capt Mdluli received a telephone call from the other police team that had gone to apprehend accused two. Consequent upon what Capt Mdluli was informed in this call, he asked accused one if she knew of a man called Mira Khoza. Capt Buthelezi testified that upon being asked this question, accused one's demeanour abruptly changed. She appeared to be noticeably shocked by this question and then said that she now wanted to tell the SAPS everything. She started to tell her story, but Capt Mdluli recognised that she was going to confess and accordingly contacted his commander, Lt Col Khambule, and requested that come to where they were. This he duly did.

[102] Capt Mdluli warned accused one of her constitutional rights before she said anything more. When Col Khambule arrived, he assumed control of the situation and again warned accused one of her rights. Capt Buthelezi stated that accused one was promised nothing, including a lighter sentence or that she would be granted bail if she confessed. In his opinion, accused one made her statement freely and voluntarily. Up until that stage, accused one had been viewed as a witness to a crime and was not considered to be a suspect. That approach changed once she indicated that she wished to make a statement.

[103] Under cross-examination by Mr Qulo, Capt Buthelezi stated that he could not exactly remember who was present when accused one decided to make her statement. He indicated that a WO Ngubane had been present at one stage but was not sure if he was present when accused one made her statement. Accused one apparently made two statements: a warning statement and a confession. Col Khambule recorded the warning statement. Capt Buthelezi confirmed that immediately after Col Khambule warned accused one of her rights, he withdrew and returned to his office at Esikhaleni. He confirmed that Lt Col Mkhabela had been the officer who recorded accused one's confession.

[104] Mr Qulo put it to Capt Buthelezi that all those officers present outranked accused one. He agreed with that proposition. Capt Buthelezi was challenged to state what the requirements were for the taking of a proper confession. He had no difficulty in repeating those requirements. It was then put to him that accused one had been coerced into making her warning statement by her superior officers, a proposition that was denied by Capt Buthelezi. The coercion manifested itself in the form of promises that were made to her that Capt Mdluli would not oppose her being granted bail if she made a statement and she was also promised by him that she would receive a lesser sentence than the mandatory sentence of life imprisonment. Both propositions were rejected by Capt Buthelezi.

[105] The SAPS officer who recorded accused one's warning statement was next called to testify. Colonel Sithembiso Khambule (Col Khambule) confirmed that he had 31 years' service in the SAPS and stated that he was stationed at the Serious Organised Crime unit at Richards Bay. He confirmed that he had taken accused one's warning statement on 2 August 2023. He explained that he is largely office bound and was performing administrative duties on that day when he received a request from Capt Mdluli for assistance. He agreed to assist.

[106] He went to the boardroom where accused one was seated with other SAPS officers. He was introduced to accused one and he requested all of those present to

leave the boardroom, leaving only himself and accused one in the room. He then re-introduced himself to accused one and spoke gently to her to relax her. He explained why he was there and produced his appointment certificate, which he handed to accused one to allow her to inspect it. He then read her rights to her utilising a version of those rights printed in a pocketbook. He asked her if she understood her rights and she confirmed that she did. In recording her warning statement, he intended to use a pre-printed document and he stated that he asked accused one to go through the document with him so that they both understood what was required.

[107] The recording of the warning statement commenced at around 19h00. Col Khambule testified that accused one was advised that she was not obliged to make a statement and that she was entitled to legal representation. She indicated that she did not need the services of an attorney and confirmed to Col Khambule that she had not been assaulted prior to agreeing to make a statement. Col Khambule confirmed that at no stage had accused one claimed to have been coerced into making her statement nor had she stated that she had been forced or threatened to make a statement.

[108] Mr Qulo cross-examined Col Khambule. He drew him into an admission that he had taken warning statements on numerous occasions and that he was very familiar with the pro forma document used to record such statements. He was asked why no interpreter had signed the form. Col Khambule stated that no interpreter had been used: accused one and he both spoke isiZulu and he interpreted himself what she said in isiZulu into English. As to why he did not go and find an interpreter, Col Khambule said this was the way he had been trained to take a statement.

[109] It was then put to Col Khambule that he had not complied with the wording of the proforma document: when completing certain sections of the form, instructions were provided on the document as to how any alterations should be effected. Thus, the proforma document stated that whatever was not applicable where multiple selections were offered should be deleted. Instead, Col Khambule identified what was applicable by marking it. He acknowledged that the instructions on the document provided

otherwise but said that it was his habit to identify what was applicable and record it. Mr Qulo said that this caused him to be confused by what the document was actually recording. Col Khambule retorted by saying he had no reason to be confused as the document made it quite plain what was applicable.

[110] Mr Qulo then stated to Col Khambule that he had not simply arrived at the boardroom where accused one was to take her statement. He had been actively involved in events and had even gone to accused one's home earlier that day to bring her to the SAPS offices in Richards Bay. This was denied by Col Khambule, who repeated that he was largely office bound in the performance of his duties. It was also denied that he had explained accused one's rights to her. Col Khambule rejected this proposition. It was then admitted that accused one had signed the warning statement, but it was explained that she had done so when she was not in the correct state of mind, and she consequently did not recall what she had signed. Col Khambule indicated that accused one was a voluntary participant in what had occurred and stated that had he known that she alleged that she was not in her correct state of mind, he would not have proceeded further.

[111] The final witness called by the State in this phase of the trial was Lt Col Thokozani Mkhabela. At the time of his involvement in this matter he was stationed at SAPS Eshowe. He was requested by Capt Mdluli to provide assistance and agreed to do so after being told by Capt Mdluli that because of the lateness of the hour, he could not obtain a magistrate to record the anticipated confession that accused one wished to make. He went to SAPS Richards Bay.

[112] At Richards Bay, he met accused one and introduced himself and explained where he had come from. She, in turn, identified herself. He asked her if she knew why she was before him and she replied by saying that she did know: it was so that she could make a statement to him about a crime in which she was implicated. Lt Col Mkhabela informed her that before she said anything, it was necessary for him to explain her rights to her. He used a pre-printed document and as he explained each

right to accused one, he required her to initial next to each right so explained. She clearly understood her rights, in his opinion. In particular, she did not require the services of a legal representative, but she did indicate that she wished to telephone her sister after finishing making her statement.

[113] Lt Col Mkhabela then took down her confession. Both he and accused one spoke isiZulu and he translated her responses into English and recorded them in English. When it was done, he asked her if she wished to read the statement that he had recorded. She indicated that she did wish to do so and she did read it. She pronounced herself satisfied with what Lt Col Mkhabela had written down. She consequently signed each page of the document at the foot of each page and applied her thumbprint to each page as well. He also signed each page of the document.

[114] Accused one did not suggest at any stage to Lt Col Mkhabela that she had been coerced into making her confession. He testified that if this had been mentioned by her, he would have stopped the proceedings immediately.

[115] It was put to Lt Col Mkhabela by Mr Qulo that accused one did say to him that Capt Mdluli and other SAPS officers had promised her that if she confessed, Capt Mdluli would not oppose her being granted bail. This was denied by the witness. This proposition was then subtly altered by Mr Qulo: he now put it that accused one had made her confession in expectation that she would be granted bail to go and take care of her child. Lt Col Mkhabela stated that accused one had mentioned that she wanted bail but did not tell him that the promise of bail was the reason why she had decided to make her confession.

[116] Mr Qulo then drew attention to paragraph 19 of the preamble to the confession, where accused one had stated that she expected to be admitted into bail. Lt Col Mkhabela confirmed that is what she had told him. It was also put to the witness that accused one would deny participating in the creation of the content of the confession and that she was merely made to sign each page and apply her thumb print to each

page. This was denied and Lt Col Mkhabela explained that the process of recording what she told him took approximately six hours. Finally, it was put to Lt Col Mkhabela that accused one had requested that she be permitted to have an attorney present. This was flatly denied and Lt Col Mkhabela stated that if this was what she had desired, he would have arranged for the services of an attorney to be acquired.

[117] Before closing its case in the trial within a trial, the State handed in, by consent, pre and post confession medical reports pertaining to accused one. Both documents indicated that accused one had no discernible injuries either before or after making her confession.

[118] Accused one elected to testify in the trial within a trial. She testified that she had been taken by Capt Mdluli to Richards Bay on 2 August 2023 to make a statement about what had occurred on the evening of 1 August 2023. She confirmed that he had given her a tablet of foolscap paper and told her to write out her own statement. Whilst doing so, she also confirmed that Capt Mdluli had received a telephone call that apparently dealt with her involvement in the events being investigated. She confirmed that she had initially been treated as a witness but all that changed after Capt Mdluli received the telephone call to which reference was made earlier. Through that telephone call, Capt Mdluli came to know of the name of Mira Khoza. Accused one explained that Capt Mdluli said to her that the SAPS now knew that she was communicating with Mira. She was then told that she was now a suspect because accused two had implicated her in the events when he said that she had sourced his and Mira's services to commit the crimes presently being tried.

[119] Accused one indicated that she was shocked when told that the SAPS knew that she had communicated with Mira. She confirmed that, in fact, she did know Mira. She explained how she knew him by referring to a day, the date of which was not disclosed, when she had gone to Richards Bay to get a fault that was manifesting on her cellular telephone repaired. Before getting to the repair shop, she met Mira. She testified that he had a familiar face. Mira told her his name and said that he had been held at one stage

in the cells at SAPS KwaMbonambi, where she works. She asked him how he came to be in Richards Bay because he should be under arrest. Mira explained that his case had been finalised at court. Mira, in turn, asked her why she was in Richards Bay. She explained that she needed to get her cellular telephone fixed. He asked to see the device and allegedly fixed it then and there while standing on the pavement.

[120] I pointed out to Mr Qulo, who was leading accused one through this evidence, that it had nothing at all to do with the admissibility of the two statements that accused one had apparently made, and which were the subject matter of the trial within a trial. He indicated to me that this evidence was relevant and requested that he be allowed to proceed. Rather than presume to understand at this stage where this evidence was taking matters, and accepting what Mr Qulo submitted to me, I allowed him to continue.

[121] So impressed was accused one with Mira's ability to solve her handset's problem that she asked him if he had the general ability to fix cellular telephones. When he confirmed that he did, she immediately suggested that they should go into business together repairing cellular telephones. She testified that she informed Mira that she would check with her husband if he was interested in entering into such a venture with him. She and Mira accordingly exchanged cellular telephone numbers and thereafter kept in touch.

[122] Mr Qulo then brought accused one back to the issue at hand. She was asked why she had made a confession. Her response was that she was shocked and confused and also concerned about her minor child. Capt Mdluli had allegedly told her that if she confessed, he would not oppose bail and he indicated that she would get a 'smaller sentence'. Mr Qulo asked accused one what she was required to confess to. Her answer was that her husband had been killed. That was not an answer to the question that she was asked. The court repeated the question to her. Her next answer was that she was asked to do a confession. Again, that was not an answer to the question. The question was repeated. Her answer was that she was required to do a confession relating to what had happened that led to the death of her husband. When it

was pointed out to her that she was already doing this after being given the tablet of foolscap paper, accused one said that she was in a state of confusion and that she was being told what to do. The court asked her what she was told. Accused one said she was told the facts of the death of her husband.

[123] It was suggested to accused one by Mr Qulo that she was making her statements barely 12 hours after she had learned of the death of her husband and within 24 hours of the events at the Ntinga home having occurred. All of this was confirmed by accused one, who said that these facts caused her to be 'confused' and 'puzzled'. She could not 'think straight.' Based upon the promises made to her by Capt Mdluli, she decided to confess.

[124] She stated that Col Khambule had come to her home prior to her being taken to Richards Bay to make her statement. Col Khambule had also written down her statement and she confirmed that they had conversed in isiZulu. The statement was, however, written in English. Col Khambule did not translate the statement that he wrote out, nor did he read it back to her. She simply just 'signed and signed and signed.' She added that she had asked for legal representation, but Col Khambule insisted that it was not necessary and that everything should be done in a rush.⁸ Accused one agreed that she had signed each page of the statement recorded by Col Khambule.

[125] As regards the confession recorded by Lt Col Mkhabela, accused one testified that she had informed him that Capt Mdluli had influenced her to make the statement that he was about to record, and she told him that she needed a lawyer present and that promises had been made to her by Capt Mdluli. None of this, however, was recorded by Lt Col Mkhabela on the document that he completed in his own handwriting. Mr Qulo directed her attention to paragraph 19 of the preliminary questions put to her by Lt Col Mkhabela before he took down her confession and to her answer to the question posed by that paragraph. The paragraph and her answer read as follows:

⁸ Given the later evidence of Lt Col Mkhabela, who was not challenged when he testified that he had spent six hours recording accused one's confession, this allegation is open to some considerable doubt.

‘Have you received or do you expect any benefit[s] if you make the statement? If so, what benefit[s]?’

I am expecting to get bail since my child is alone at home.’

[126] Asked by the court if her child truly was alone at home, accused one indicated that her child, in fact, was not alone. She explained to Mr Qulo that she expected to get bail because Capt Mdluli had said he would not oppose bail if she confessed. As he was a senior officer in relation to her, she believed him. She added that the other officers present also said this. She, however, immediately changed this statement, moving from the positive act of other officers saying the same thing, to them not actually saying it but not disagreeing with the promises of Capt Mdluli.

[127] On the issue of the promises, Mr Qulo eventually asked accused one the obvious question, namely, who grants or refuses bail in criminal proceedings. Accused one, a sergeant in the SAPS, surprisingly said that it was the investigating officer. Questioned again on this, she changed her evidence and said that it was the magistrate presiding. Accused one was asked three times by the court what benefit she would receive if the investigating officer did not oppose bail. Her only easily intelligible answer was that she would go home and would be able to bury her husband.

[128] Finally, accused one agreed that Capt Mdluli had helped her to acquire legal representation as he had said he had done when he gave his evidence. But this was only after she had made both of her statements.

[129] Ms Ntsele, for the State, took accused one under cross-examination. She was asked when she had first met Mira in Richards Bay. Accused one could not remember but said the year was 2023. She confirmed that she had recognised him. She was asked whether it was her version that she was prepared to engage in a business relationship with someone who had been held in the cells of the police station where she worked. Her first answer was that she did, because he could fix cellular telephones. When the question was repeated, she said he was not under arrest. Then she said, ‘this

business was always on my mind'. Several questions were then asked of accused one as to whether this conduct was acceptable given her position and that Mira had been under arrest and held at her police station. At this juncture, given her performance, I drew to her attention the dangers of being classified as an evasive witness.

[130] I also cautioned the State against this line of questioning. It went more to the merits of the matter and not to the admissibility of the statements. The difficulty was that accused one's counsel had said that the evidence he was leading was relevant to admissibility and accordingly the evidence was now on record. In my view, counsel was wrong, and the evidence had no relevance to this compartmentalised phase of the trial. I was constrained to allow the State a little leeway to deal with the evidence that the defence insisted on leading. On reflection, irrespective of the fact that the defence insisted on leading the evidence that it did, such evidence was not admissible on the issue of whether the statements made by accused one were admissible. I accordingly discounted this evidence entirely when considering the issue of admissibility.

[131] Accused one agreed that she had taken warning statements on numerous occasions in her 13-year career in the SAPS and knew how to take them. She agreed that the person taking the statement generally did the interpretation where both the questioner and the person giving the statement spoke isiZulu. As regards her failure to correct Col Khambule when he did not read back her statement to her, accused one said that she was under pressure and was confused. She said that she had informed Col Khambule that promises had been made to her. She then indicated that Capt Mdluli and Col Khambule himself were the persons who had made the very promises to her. Previously, Col Khambule was not alleged to have made any promises to her. Now, she alleged that he had said that she could get a lesser sentence than a sentence of life imprisonment. Asked by the court if she accepted this proposal, accused one said that she did. Asked why this could possibly be a viable alternative that was attractive to her if she had not committed any criminal offence, the question had to be repeated several times. The final answer was that she was confused and under pressure. She explained further that the officers present were pushing her and in English she stated that:

‘They told me what to say.’

[132] Accused one was asked if she sincerely believed that if she confessed to murder, she would be allowed to go home. She indicated that she did believe this. The State advocate asked why the promises allegedly made to her were not highlighted and exposed at accused one’s bail application. Accused one responded by saying that she told her attorney, who said she would fix the matter. But her attorney did not do so. Ms Ntsele then asked accused one what she regarded a lesser sentence to be. She said she did not know and had not asked what such a sentence might be. The court asked her if she was prepared to sacrifice her own life for something of which she was not sure. The answer to this was that accused one could not think straight and that at the time she was not right in her own head.

[133] At the conclusion of the cross-examination of accused one, Mr Qulo closed her case in the trial within a trial and called no witnesses. In argument, Ms Ntsele called for the two statements made by accused one to be admitted into evidence while Mr Qulo called for their exclusion. I delivered an ex-tempore ruling and held that both statements were admissible. I said that I would provide my reasons at a later stage. I now provide those reasons.

[134] There are two purposes that underpin the concept of a trial within a trial. The first is to provisionally hold back a potentially prejudicial statement from the court to enable its admissibility to be determined separately and the second is to permit an accused person to testify before the State closes its case without fear that her evidence will later be used against her.⁹ For a trial within a trial to be entered into, the issue of admissibility must be clearly and explicitly raised. Where that occurs, the accused person has the right to have that question tried as a separate and distinct issue.

⁹ *S v Nglengethwa* 1996 (1) SACR 737 (A); *S v De Vries* 1989 (1) SA 228 (A) at 233I-J.

[135] In *R v Barlin*,¹⁰ decided nearly one hundred years ago, the Appellate Division discussed when a statement made to a police official by an accused person will be admissible against him. The reasoning mentioned in that matter continues to be of application:

‘Whether the statement of an accused person to a police officer can be used against him at the trial depends upon whether it is shown to have been freely and voluntarily made, and that is a point to be decided by the trial Judge upon the facts of each case. The absence or presence of a prior caution; the fact that the statement was elicited by questions, and the nature of those questions; the stage at which the statement was made, whether before or after arrest, all these are circumstances to be taken into account by the Judge in arriving at a conclusion. The rule rests upon a satisfactory basis for it is founded on principle...’

[136] The State called the evidence of three very senior members of the SAPS in the trial within a trial. I found each of them to be impressive in their own way:

- (a) Capt Japhta Buthelezi was a serious man who was fully conversant with the requirements for taking a statement both from a witness and from a suspect. He was not involved in recording either of the two disputed documents but was present in the run up to accused one’s warning statement being taken;
- (b) Col Khambule was a confident witness and very experienced in what he was requested to do on 2 August 2023. He was cross-examined but other than indicating that he had not acted in accordance with the instructions contained in the pro forma document that he utilised, as previously explained in this judgment, his evidence was uneventful. Everything that he did was meticulously recorded; and
- (c) Lt Col Mkhabela was also a confident witness and he, like Col Khambule, is also greatly experienced. He had a no-nonsense air about him when he took to the witness box. He knew what he was required to do, and he conscientiously recorded all that he did. When he warned accused one of her constitutional rights, which required him to pose 12 separate questions to her, he assiduously required accused one to sign next to

¹⁰ *R v Barlin* 1926 AD 459.

each right that was explained to her. She did so. He fared well under cross-examination and easily repelled suggestions that he had told accused one what to say or that she had requested legal representation. It must be mentioned that there was no suggestion by accused one that this witness had made any promise to her.

[137] The inducement that was allegedly offered to accused one by Capt Mdluli and Col Khambule to get her to confess was that bail would not be opposed, and she would be given a sentence less than the prescribed minimum sentence of life imprisonment. Such an offer made to a layman, unskilled in police and court procedure, may have proved to be attractive and may have persuaded the layperson to confess. But accused one is not such a layperson. She is not an ordinary member of the community who is unskilled in, and unaware of, the procedures required to be followed when the taking of confessions is considered. She holds the rank of sergeant in the SAPS and has 13 years' experience in that body, and she confirmed that she knows how to take such statements.

[138] The proposition by the defence that accused one was coerced to falsely implicate herself on the strength of the promise of being granted bail and the expectation of being sentenced to a sentence less than life imprisonment simply does not have the ring of truth to it. As to the first promise allegedly made to her, accused one knows, despite her answer to the question asking of her who fixes bail, that it is not something within the remit of the SAPS, or the investigating officer, to guarantee. It is a function reserved exclusively for the court. The promise, if made, could not have been made to her as representing a guaranteed outcome. As an active member of the SAPS, accused one had to know that. She ultimately did concede that it was the function of the court to determine the issue of bail. As to the second promise allegedly made to her, I must assume that it is mentioned because accused one believed it to hold some attraction to her. In other words, she was prepared to falsely incriminate herself on the expectation that she would not be sentenced to life imprisonment but to some lesser sentence. She did not, on her own version, know what that lesser sentence would be, for none of the SAPS officers who made the promise to her mentioned what sentence would be

guaranteed nor did she think to ask what sentence she would receive. That simply defies belief. But the sentence to be imposed would, nonetheless, still have to be a formidable sentence because she would be required to confess to at least one, if not two, murders. Given her professed innocence, it is difficult to understand why she would find that to be so attractive that she was prepared to lie under oath.

[139] A potential further ground for avoiding the consequences of the statements that she made, outside of the inducements allegedly made to her, was her alleged state of mind at the time that she made the statements. She indicated at different stages of her evidence that she became confused, she could not think straight, and that she was under pressure. I have no doubt that she was under pressure. Confessions frequently are acquired by the application of pressure to an accused person. In this instance, the pressure commenced inexorably building up when Capt Mdluli received the telephone call informing him of the involvement of Mira in the murders. Accused one herself admitted that she was shocked when she realised the SAPS knew of the identity of Mira and her interaction with him. The pressure that she described being under may well have been self-induced: accused one may have felt the net was closing in on her. The evidence of the involvement of Mira was the game changer, for once accused one realised that the SAPS knew that Mira was involved, she agreed to make her statements.

[140] Section 217 of the Act determines the admissibility of a confession made by an accused person. Subsection (1) thereof reads as follows:

‘Evidence of any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, be admissible in evidence against such person at criminal proceedings relating to such offence.’

[141] The recording of the two statements made by accused one appeared to me to have been done procedurally correctly. The officers involved were not from the same

unit, a practice that has met with judicial disapproval.¹¹ Everything was recorded in writing and where required, accused one had signed each page and had applied her thumbprint at the base of each page of both documents.

[142] I do not lose sight of the fact that the burden of proof is borne by the State when the admissibility of a confession is contested. The accused person contesting the admissibility of a statement that she made does not have to prove its inadmissibility. The State accordingly was required in this instance to establish that accused one had not been unduly influenced to confess.

[143] I found the State witnesses to be good witnesses who meticulously played by the rules. I found accused one's version to be fanciful and false. She was not a good witness and did not answer questions that she was asked. She, instead, gave the answer that she wanted to give without paying heed to the question that she was actually asked. As to her evidence of her state of mind, I reject her version that she was not aware of what she was doing. I heard no specialist evidence to indicate that she suffered from any form of mental illness or mental aberration when confessing.

[144] After a consideration of all the evidence led, I was satisfied that there was nothing adduced in the evidence that I had heard that demonstrated that anything unlawful had been done by the SAPS in acquiring accused one's confession and that she had consequently confessed freely and voluntarily. The inducements allegedly made to accused one had all the hallmarks of contrived explanations intended to extricate herself from an arrangement into which she had voluntarily entered but which she now regretted. For these reasons, I accordingly admitted into evidence the two statements that she made.

[145] Having admitted the two statements, the State then called Col Khambule and Lt Col Mkhabela to read the documents that they had taken down from accused one into

¹¹ *S v Latha and Another* 1994 (1) SACR 447 (A); *S v Mafuya and Others* (1) 1992 (2) SACR 370 (W); and *S v Khoza en Andere* 1984 (1) SA 57 (A).

the record. I shall not dwell on the contents of the warning statement but shall instead focus on the confession. Neither document reads well for accused one, as they both indicate that she was involved in the tragic events that happened at Phathane village on 1 August 2023.

[146] In her confession, accused one admitted being involved in a love relationship with Mira. She was so involved because she alleged that she had been ill-treated by her husband. One day, her husband had asked to use her cellular telephone and had discovered that she had made three late night telephone calls to someone. WO Ntinga called the number reflected on accused one's cellular telephone and ended up having an argument with the person who answered the call. He told the person to stay away from his wife and terminated the call. He then accused her of having a relationship with that male. WO Ntinga located his firearm and pointed it at accused one. Accused one managed to flee from the house and ran to her mother-in-law's house, which is close by and which I have previously referred to as being the Ntinga main house. The SAPS were summoned to attend and a formal entry in the Occurrence Book of SAPS KwaMbonambi was apparently made. Both accused one and WO Ntinga's firearms were taken away from them by the attending members of the SAPS.

[147] The confession refers to many other incidents between accused one and WO Ntinga, including physical assault and a lack of economic support from WO Ntinga. One such assault occurred when WO Ntinga thrust accused one against a wall and her lip was split open. She took photographs of her injuries using her cellular telephone and she sent them to her lover, Mira.

[148] Upon receiving the photographs, Mira became angry and suggested to accused one that they should 'kill this dog,' meaning her husband. On 1 August 2023, it was agreed between accused one and her husband that she would fetch him from work. When she called him later in the day telling him she was on her way to fetch him, he informed her that he was not at work but was in Empangeni but was proceeding towards SAPS KwaMbonambi. When she arrived at the police station, she communicated with her

husband who told her now that he was at the Zonza area and, in particular, at the Buthelezi home. Accused one judged him to be intoxicated by the way he spoke. It was ultimately arranged that Warrant Officer Magwaza would fetch WO Ntinga later in the day and take him home.

[149] That having been arranged, accused one drove to Richards Bay and while driving there telephoned Mira, asking him to meet her there. He was elsewhere but agreed to come to Richards Bay. In Richards Bay, accused one went to two stores where she paid some accounts.¹² Mira telephoned her and said that he had arrived in town, and she accordingly drove to the rank where Mira proposed that they meet. Accused one was driving a Chevrolet utility bakkie and Mira got in. He stated to her that that day, 1 August 2023, was going to be the day that he executed the plan to kill accused one's husband.

[150] Mira then called someone on his cellular telephone, who he said would be able to assist him in killing accused one's husband. Accused one and Mira then left Richard's Bay driving towards the area of KwaMthethwa and ultimately met up with the person whom Mira had telephoned. The person was standing on the side of the road. Mira got out of the motor vehicle and spoke to this male away from accused one. The two males then got back into the motor vehicle and were conveyed to accused one's home so that the two males could view it. On the way, they passed a vehicle driven by WO Magwaza, which indicated to accused one that her husband had already been dropped at home.

[151] The time now was approximately 14h30 and accused one accordingly told Mira and the other male that her husband was already at home. They drove to the gate of her property, and it seemed obvious to accused one that her husband was sleeping

¹² The defence made an attempt to secure records from the two shops proving the payments were made by accused one on 1 August 2023. Accused one was taken to the local branches of the two stores by the investigating officer during the trial, but the records requested from the stores were too old to be located. Instead, a bank statement was produced by accused one establishing a payment that had apparently been made on 3 August 2023. By then, accused one was already in custody and it was the submission of accused one's counsel that the payment reflected was actually made on 1 August 2023, as accused one had alleged. The State was content to accept this explanation.

because he was drunk. She showed her house to Mira and showed them a door with a broken handle. She also showed them a window through which they could enter the house. Mira, however, indicated that they would enter via the door that evening.

[152] At this stage, the other male gave accused one a cheap, small Nokia cellular telephone which he said she had to use to communicate with them. She was requested to get a new SIM card at a nearby tuck shop run by a foreign national and it was agreed that when they had finished killing her husband, they would take the cellular telephone off her. Accused one was quick to request the two men that while they were kidnapping and killing her husband, they should leave his wallet at home because she needed to buy food, there being no food at home. The plan was thus struck that Mira and his partner would kidnap WO Ntinga and take him somewhere and kill him. Mira and his partner said that they would kill her husband and then dispose of his body in the Umfolozi River. Upon hearing this, accused one objected, saying that she wanted her children to have closure by seeing the body of their dead father. This was then agreed to by the two men.

[153] There was load shedding scheduled for 19h00 hours that evening, which was the time that it was agreed that Mira and his partner would arrive at accused one's home. Accused one then dropped both men off at Mbiya school and drove home.

[154] At home, accused one, indeed, found her husband sleeping on the couch in his SAPS uniform. At about 18h30 that evening, the deceased Mr Mdluli and a friend arrived at the Ntinga home. WO Ntinga requested accused one to go to a nearby tavern and purchase a six pack of cider and a bottle of vodka. She agreed to do so and drove out of the property in her vehicle. As she did so, she received a telephone call on the small Nokia handset that she had been given earlier. It was Mira calling her and he wanted to know who was leaving the property. She explained what she was about to go and do and Mira said everything was in order and he and his partner then arrived and got into her motor vehicle. She used a slightly longer route to get to the tavern to allow her to speak to Mira.

[155] Accused one informed Mira that the deceased Mr Mdluli was at the house but that he was wearing short pants and was obviously not carrying his firearm. That meant that his firearm must still be in his motor vehicle. She dropped the two men on the road and went and purchased the requested alcohol at the tavern. When she got home, she found that her husband had changed out of his SAPS uniform and was now wearing casual clothing. Noting this, accused one walked out of the house and telephoned Mira to inform him that her husband was no longer wearing his SAPS uniform. She also told him where her husband was seated in the television lounge. She then went and placed both her and her husband's service firearms on the floor in their bedroom underneath the bed just near the headboard. This had previously been agreed upon.

[156] The anticipated load shedding then occurred and accused one's son went and fetched his laptop so that they could watch a film on it. The glow from the screen also helped to illuminate the room. The room was also lit with a rechargeable light bulb that was hanging from a curtain rail. Accused one then took her son outside to the toilet and returned. Her husband gave her a tin of cider to drink.

[157] Before she could finish drinking the cider, Mira and his partner entered the home through the kitchen door, it having been purposefully left unlocked. Mira led his partner into the house. Both men had their faces covered and both were armed with firearms, which they pointed at the occupants of the television lounge. Everyone in the room was commanded to lie on the floor and accused one and her young son hid behind the couch. WO Ntinga resisted this command, and he was consequently hit in the face with something and began bleeding. The deceased Mr Mdluli was asked if he was a police officer, and he said that he was. They demanded his motor vehicle keys, and they were duly handed over. Accused one, the deceased Mr Mdluli and WO Ntinga were all tied up with cable ties. Both WO Ntinga and the deceased Mr Mdluli were dragged out of the house and were taken to the deceased Mr Mdluli's motor vehicle. All the cellular telephones possessed by the people in the television lounge were taken by the intruders.

[158] Mira then re-entered the room and accused one believed that he had done so to take the two service firearms that she had placed under the bed. Mira, in fact, freed her by cutting the cable ties that bound her with a knife. Mira shouted at WO Ntinga during the robbery, saying that he had arrested his brother. It is important to note that accused one did not use a neutral name to identify the person who set her legs free, such as 'one of the men' or words to that effect. She used the name of the person that did this, namely 'Mira.'

[159] The deceased Mr Mdluli's motor vehicle was then driven away with him and WO Ntinga inside it. Realizing that the intruders had left, accused one 'walked' (her words) to the Zungu homestead close by to get help before further proceeding to the Ntinga main house where she reported the matter and she also reported it to another neighbor, Sergeant Mkhize. The latter telephoned SAPS KwaMbonambi and reported the crime and sought assistance. He also attempted to report the details of the motor vehicle owned by the deceased Mr Mdluli to Tracker.

[160] Later during the night, the SAPS reported that the deceased Mr Mdluli had been found but that he had been seriously injured and had been taken to hospital. Then at approximately 02h00 on 2 August 2023, accused one was told that her husband had been found dead with multiple gunshot wounds and that his body had been taken to the Richards Bay mortuary. This information was relayed to her by her station commander who had come to the Ntinga home.

[161] After the SAPS had processed the crime scene at her home, accused one realised that Mira and his partner had failed to leave her husband's wallet behind as arranged. Accused one searched her husband's uniform for his cellular telephone and found it in the trouser pocket. The confession then ended.

[162] Mr Qulo then indicated that he wished to cross-examine Lt Col Mkhabela on the confession that he had just read out. With some reluctance, I allowed this to occur.

However, when it appeared that Mr Qulo was intending to cross-examine with the intent of challenging the admissibility of the confession, I indicated that the issue of admissibility had already been determined with my ruling in the trial within a trial. I indicated that I would permit him to cross examine the witness on the mechanics of recording the confession, for example, if accused one said that she had stated fact A to Lt Col Mkhabela, but he had recorded fact B in its place. I also pointed out that Lt Col Mkhabela had not testified as to the truth of anything that accused one had told him. He had merely been the scribe, recording what he allegedly had been told by accused one. Mr Qulo indicated that he had nothing further to ask in those circumstances.

[163] After the conclusion of the trial within a trial, the State called another witness on the issue of an alleged plot by Mira to escape when he was held in the cells at SAPS KwaMbonambi. The evidence was entirely hearsay in its nature and is not considered further.

[164] The State then closed its case.

The case for accused one

[165] Mr Qulo opened the case for accused one by calling her to the witness box.

[166] Accused one confirmed that she knew Mira. She first got to know him when he was a prisoner at SAPS KwaMbonambi, where she works. She repeated her evidence that she had again met up with Mira in Richards Bay in June 2023 when she had gone to have her cellular telephone repaired. After Mira had repaired her handset on the pavement, she confirmed that she immediately proposed to him that they should start up a business repairing cellular telephones. Mira agreed and they consequently exchanged telephone numbers.

[167] Accused one testified that she knew of no restriction on SAPS members prohibiting them from having dealings with former prisoners and she believed that the communications that she engaged in with Mira were entirely appropriate.

[168] On arriving home from Richards Bay, accused one told her husband of her encounter with Mira. She claimed that she told her husband that Mira was competent to repair cellular telephones. Her husband said he would have to meet Mira but expressed no reservations about doing business with him.

[169] The proposed business ultimately did not proceed. WO Ntinga indicated that he could only assist with the project once he received his annual bonus. Accused one indicated that she had spoken with Mira on the telephone during the month of June 2023 and she ended up blocking his calls because he was:
'... pushing for the business to start.'

[170] By August 2023 she was no longer having communications with Mira. On 1 August 2023, being the date upon which Thomas Zungu testified that he had seen her with Mira in Richards Bay, accused one admitted that she had been in Richards Bay. She claimed not to know accused two and she denied that she met Mira and accused two on 1 August 2023. She therefore denied that she had received a Nokia cellular telephone from accused two on that date.

[171] Accused one narrated the events that occurred inside the Ntinga home on the night of the robbery and stated that she, her husband, and the deceased Mr Mdluli had all been tied up. She could not remember if Mr Ndimande had been tied up. She confirmed that her husband had first been taken out of the house and then the deceased Mr Mdluli was removed. She stated that she did not notice whether Mr Ndimande helped the two intruders.

[172] After the events in her home, and in the early hours of the morning of 2 August 2023, accused two claimed to have found her husband's cellular telephone in the trouser pocket of his uniform which was at that stage hanging up. She claimed to have given it to the SAPS the next day. There was, however, another cellular telephone that allegedly belonged to her child. The status of this handset is not clear, based on the

evidence of accused one. She described it as being 'scrap like', 'old, that it 'had no airtime', 'was not charged' and had 'no SIM card.' But she testified that she took this decrepit device with her when she was taken to Richards Bay to make her statement and when she was arrested she retained it with her and did not disclose it to the SAPS. When she was taken home by the SAPS to fetch her medicine, she claims that she handed it back to her son and did not disclose its existence to the SAPS.

[173] When she had been taken to Richards Bay, the SAPS had asked her for her husband's cellular telephone. She could not explain how the SAPS knew to ask for this device, but she testified that she handed it over to them. But she did not hand over her child's device which, so she explained, was held by her in her hand and which was visible to anyone looking.

[174] Cross-examined by Mr Mkhwanazi, accused one claimed to have no knowledge of accused two's version that he had met her and Mira on 1 August 2023 when she had been driving a Chevrolet bakkie. She denied driving both men to her house to let them see it and she denied suggesting to accused two that her husband had a bonus, and that they should rob him of it.

[175] The State then cross-examined accused one. It almost immediately elicited a previously undisclosed piece of information. Accused one stated in response to a question put to her that Mira does not speak proper isiZulu.¹³ She stated that:

'...his speech is different from other people.'

[176] This was quite a distinctive feature, for she confirmed that had Mira not spoken when they met in Richards Bay when she went there to have her handset repaired, she would never have recognised him. She confirmed that she had spoken with him in the holding cells at SAPS KwaMbonambi and thus knew his voice.

¹³ It will be remembered that Mira Khoza is Mozambiquan.

[177] It was estimated by accused one that she only spoke with Mira between five and eight times over the period from the beginning of June to the middle of July 2023. While she could recall contacting Mira on various occasions, accused one could not remember the content of any of those telephone calls.

[178] As regards the proposed business with Mira, accused one indicated that they had a budget to get the business up and running. The court specifically asked her what the budget was for the acquisition of tools. She mentioned a figure of R10 000. Asked how much was budgeted for business licences, she replied that such amount had not been considered and calculated. As regards rental, she answered that the first month's rental was included in the R10 000 originally mentioned in relation to the acquisition of tools. Asked about a deposit which is ordinarily payable in respect of the rental of commercial premises, this, too, was to come out of the R10 000. She claimed, further, that the premises that they were interested in would cost either R2 500 or R2 800 per month to rent. The premises were in Richards Bay in an area called Town Square. She had gone to view the premises, but only did so from a distance, made no formal appointment to view the interior of the premises and consequently never entered them. This was apparently Mira's area of responsibility. The court asked accused one what allowance had been made for the payment of electricity and other utilities. The answer was that this was still being planned.

[179] Accused one said that she had called either the owner of one of the premises or the agent letting those premises, but the call went to voicemail. She was invited to identify the telephone call in the records before the court pertaining to her cellular telephone. She said that she was unable to do this.

[180] Ms Ntsele asked accused one what Mira was bringing to the business. The response was that he said that he would help contribute here and there but his principal contribution was his competency in repairing cellular telephones. Quite correctly, Ms Ntsele wanted to know whether this was based simply on him clearing the error on

accused one's handset. The answer received was in the affirmative and accused one said that Mira said he could do such repairs and she trusted his word. What basis existed that would justify such trust was not explained.

[181] Mr Zungu had said in his evidence that accused one drove a silver Chevrolet bakkie. He had seen it, according to his evidence, on 1 August 2023 when he had been in Richards Bay with Mira. Accused one confirmed this to be the case. Ms Ntsele wanted to know how he could have known this if he had never seen her that day. Accused one said she did not know. She agreed that she was in Richards Bay at around the time that Mr Zungu claimed to have made his observation.

[182] Accused one confirmed, further, that both intruders had firearms. She also confirmed that before they left the Ntinga home, one of the intruders had cut the cable ties binding her feet. She could provide no explanation for this. She claimed, further, to have no knowledge of the Nokia TA1203 handset. It was put to her that if it was accepted that Mira was with accused two on the evening of 1 August 2023, then, according to the records handed in, he had made seven phone calls to the Nokia TA1203 handset that she possessed. She denied any knowledge of the handset. It was then put to her that she had mentioned the Nokia TA1203 handset in her confession, but only she, Mira and accused two knew of the existence of this device. She had no knowledge of this, so she said. She, almost flippantly, said that she could not remember purchasing a SIM card for this handset.

[183] On the issue of her possession of her child's cellular telephone after being placed under arrest, accused one confirmed that she had been placed in the cells with it. She had allegedly never been asked to hand in her valuables, nor had she been searched. She had also never thought to hand it over to the SAPS and explained that she generally was not thinking straight at that time. Yet, as was pointed out by the State advocate, she thought sufficiently soundly enough to ask the magistrate, before whom she appeared, to allow her to go home to retrieve her medication. She admitted handing over a handset to Capt Mdluli, which she stated was her husband's device, but,

strangely, did not think to hand over her child's handset. She rationalised this by saying that she did not think to hand it over because it did not have a battery. When it was put to her that she chose not to hand it over, she did not reply.

[184] Staying with the topic of the handset that she did hand over, accused one said she had found it in the trouser pocket of her husband's SAPS uniform in the early hours of the morning of 2 August 2023. She agreed that no one had had access to the handset between the time that her husband changed out of his uniform and the time that she found the device. But the call records before the court revealed that various calls had been made to that handset from just before 19h00 on the evening of the crimes and that it had also been used at 22h00 to make an outgoing call. It was put to accused one that the phone was always with her and was therefore not her husband's. She denied this. The court asked her, given the number of calls made to the device, would she not have heard it ringing long before she claimed to have found it. She said she did not hear it ringing and the bedroom was a long way from where she was in the house.

[185] Concerning her relationship with her husband, accused one said that it was like everyone else's relationship with their spouse. There were moments when they did not see eye to eye. Ms Ntsele asked accused one whether her husband had hit her. She said that he had. She said that she had not reported this to SAPS KwaMbonambi, but that she had summoned officers from that police station to attend her home. A Captain Nhlehyane and a Sgt Ndlovu had come to their home. The attending officers felt that the situation was not safe and confiscated both her and her husband's firearms.

[186] Accused one was asked what form the assault by her husband took. Accused one then did a volte-face and said that there had been no assault, simply raised voices. She had been locked out of the home by her husband. She denied that she had been hit by her husband and specifically denied that she had suffered a split lower lip that bled.

[187] According to accused one, the split lower lip had occurred on another occasion, and it had not come about because her husband had assaulted her. The State indicated that it possessed a photograph that accused one herself had taken of her injury and it was shown to the witness and the court. Accused one admitted that she took the photograph but said that the injury had been caused by her falling onto a hoe while working outdoors in the garden. Asked why she had taken the photograph if that was the cause of the injury, accused one said, rather vacuously, that she likes to look at pictures of herself. In this instance when she would look at the photograph in the future she would be able to say to herself:

‘This hoe hurt me.’

[188] Ms Ntsele placed accused one under some pressure at this juncture and wanted to know why she had changed her evidence. Her responses to these questions were not on point, and she can only be considered to have been evasive in the extreme in responding as she did.

[189] Accused one’s answer that her injury had been sustained by falling onto the hoe placed her in a difficult position. Her injury, revealed in the photograph that she took of herself, was also mentioned in her confession. Had the injury been occasioned by falling onto a hoe, there would have been no need for it to have been mentioned in the confession. It would have been entirely out of place and irrelevant. She was asked how Lt Col Mkhabela would have known about the injury to her lower lip if she herself had caused it. Accused one said that she did not know. She was asked how he would have known that she took a selfie of the injury. Accused one said she did not know. She was asked if he had simply guessed that the injury had occurred and had guessed correctly. She said that she did not know. Accused one was asked to concede that Lt Col Mkhabela could only have known of this incident because she had told him of it. She said that she did not know.

[190] Moving her focus to the layout of accused one’s bedroom, Ms Ntsele focussed on the windows in that room. She drew accused one’s attention to the further admissions of

accused two where he admitted that the principal window was low enough to permit someone outside the house to reach into the bedroom and remove something that had been placed on the bed. Accused one denied that the window was low enough to permit this. A photograph was then produced of the interior of accused one's bedroom. The window was clearly depicted and the portion of the window that is not fixed ran down the side of the fixed windowpane and ended very low in relation to the floor of the bedroom. The court estimated that the bottom of the window was less than a metre above the floor of the bedroom. Again, accused one was evasive when discussing the window height.

[191] Finally, it was put to accused one that she had ordered the death of her husband. This was denied. Continuing with this thrust, Ms Ntsele asked accused one why she had not called off the murder of her husband when she realised that the deceased Mr Mdluli had unexpectedly arrived and was likely to be there at the time of the planned hit. Accused two said that she knew nothing of a hit.

[192] The court sought clarification from accused one on an aspect of her evidence. She had conceded to having spoken to Mira often on the telephone. She had also mentioned that he spoke an imperfect form of isiZulu. When the two men had burst into the Ntinga home and had begun shouting instructions to the occupants, she was asked whether she had recognised Mira's voice. Her initial response was that she did not. When the question was repeated, she began to vary her answer, indicating that she would have recognised him. She then said that she had heard Mira. When asked if she was certain, her final answer was that she was not saying that Mira was there, but that his voice matched a voice that she heard that evening.

[193] Mr Qulo called no other witnesses in support of accused one's case and closed her case once she had finished giving evidence.

The case for accused two

[194] Mr Mkhwanazi called accused two to the witness box.

[195] His opening statement was to confirm that he was involved in the robbery and kidnapping of the two deceased men but that he was not involved in their murder. He testified that he had received a call from Mira at 07h00 on 1 August 2023 asking him if he was doing anything. He responded that he was at home and not doing anything. Mira said he would be coming to see him shortly. At around 10h00, Mira called him again. He explained that he was looking for a size 15 car wheel. Coincidentally, accused two had such a wheel at his house and he informed Mira of that. Later, Mira called him again and said that he should go to the shop near his house.

[196] Accused two did as he was instructed. While standing next to the main road, he saw a powder blue Chevrolet bakkie approach. Inside it were accused one and Mira. When the vehicle stopped, accused two walked around to the passenger side because he did not know accused one.

[197] Mira asked accused two if he knew the Phathane area. Accused two said that he knew the entire area. He was asked if he knew accused one's home and he said that he did not. Looking at her, accused two formed the view that he had seen her before somewhere. He described her as wearing a blue and white striped dress. He was told to get in the vehicle and jumped into the bin area of the vehicle but accused one told him to get into the cab of the vehicle. The vehicle took off, headed for the Phathane area.

[198] As the vehicle neared Mbiya school, the topic of conversation changed. Accused one pointed to a house a distance away. Mira made her drive closer. As they did so, accused one noticed that it was painted grey.¹⁴ At the gate to the house, accused one made a U-turn and the vehicle began moving slowly back in the direction from whence it had come. Accused one identified the house as being her house. As she was driving, accused one received a telephone call. It was her husband. He was already at home and had seen her vehicle pull up at the gate to the house and then drive off again. Her

¹⁴ The photograph of the Ntinga house in the photo album handed in by consent, indeed, shows that it has grey exterior walls.

husband demanded that she go home, so accused one dropped her two passengers off at Mbiya school. It was now between 14h30 and 15h00.

[199] The two men walked in the direction of accused two's home. Whilst walking, Mira said that accused one was his girlfriend, but that she was married. Her husband had been paid his annual bonus and Mira wanted to rob him of it. Accused two asked how it was to be taken and Mira said that he had all the means of taking it. Accused two then attempted to get a vehicle to pick them up but could not do so. Reaching a shop at Mthatheni, they drank a cold drink and then accused returned to his home, leaving Mira at the shop.

[200] At 17h00, Mira called him again. He said that he was still at the shop at Mthatheni and that he was cold. He required accused two to bring him a jersey. Accused two obliged but the jersey that he took to Mira did not fit him. Mira then said that he wanted to return to his girlfriend. He mentioned that he was waiting for someone to bring him a firearm. Mira then called accused one and stated that the person with the firearm was not coming but that he, Mira, was still coming to her. He then asked accused two to arrange a lift for them. Accused two called a person that he knew in order to request a lift. The person that he called was Mr Mthethwa. They commenced walking but around 18h00 to 18h30, Mr Mthethwa arrived in his vehicle and the two of them clambered into the cabin of the single cab vehicle. Accused two introduced Mira to Mr Mthethwa and then said that they needed to be driven to Phathane.

[201] When they arrived at accused one's house at Phathane, the electricity supply was still on, and they observed a Polo motor vehicle parked in her yard. Both accused two and Mira alighted from the vehicle and accused two told Mr Mthethwa that he would call him later in the evening. Mr Mthethwa said that it would be no problem and then left.

[202] Mira called accused one to find out about the ownership of the Polo. He informed accused two that accused one could not speak at that moment but that she would come to them. They sat on the grass and waited. A car soon enough drove out of the yard and

headed towards them. Mira went to the driver and spoke for a while. It was a powder blue Chevrolet. The arrival of another car disturbed the driver and Mira and the Chevrolet drove off. Mira informed accused two that 'Mama', being a reference to accused one, was going to purchase liquor for her husband and his friends. This would mean that he and accused two would have to wait until she returned because she was going to leave the kitchen door unlocked for them. She returned a short while later.

[203] Throughout, Mira had carried bag with him. Mr Zungu also mentioned it in his evidence. He withdrew an Okapi knife from this bag and said to accused two that they needed to make face masks. This was done by cutting the jersey that accused two had brought for Mira. Mira also informed accused two that accused one would give them firearms. Mira then took out a side cutter from his bag and they proceeded to the corner of the fence around the Ntinga home and cut it to gain access to the yard.

[204] They proceeded to accused one's bedroom and Mira then put his hand through the open window. Accused one initially said that he did not know how Mira did it, but he returned to him carrying two firearms. Mira then called accused one to ask her to unlock the door. A short while later, the door opened, and a person left the house and disappeared but returned shortly and re-entered the house.

[205] Accused two and Mira entered the Ntinga home through the kitchen door. They shouted 'Voetsek all of you, lie down!' Mira had given accused two one of the firearms that he had acquired through the bedroom window. One of the men refused to lie down and was made by Mira to do so by the application of some force to him. Accused two took a wallet lying on a table and put it in his pocket. Handing his firearm to Mira, he searched the persons in the room. He found car keys on the one man, and he took cellular telephones and put them in Mira's bag. Mira instructed him to bring the Polo parked outside closer to the house. Accused two did so. In the Polo he found a bag with a firearm inside it. He placed it under the front passenger seat.

[206] Getting out of the motor vehicle, he saw Mr Ndimande and Mira come out of the

house with someone. Accused two opened both back doors of the vehicle and the captive was placed on the back seat. Mira and Mr Ndimande returned indoors but came out again with another man who was bundled into the boot of the Polo.

[207] The court asked accused two why he thought the men were being placed in the motor vehicle. He stated that he thought that they were being taken to withdraw money from their bank accounts before the accounts were closed.

[208] Mira and Mr Ndimande went back inside and when Mira came out alone and got into the motor vehicle, accused two drove off. He was told by Mira to drive to a place where the ATMs were closest. Accused two headed for KwaMbonambi. As they drove, the man on the back seat attempted to loosen his bound hands and tried to grab Mira. The motor vehicle was stopped by accused two and Mira alighted, having first opened the bag that he was carrying, and having taken out a crowbar. Mira pulled the man on the backseat out of the car and assaulted him by hitting with the crowbar. Accused two claimed not to have seen the beating and said that he had merely heard it. Mira got back in and told him to drive off, leaving the beaten man on the ground where he lay.

[209] Mira thought that there would be a problem if they headed for KwaMbonambi and instructed accused two instead to drive to Mtubatuba, driving on old roads and avoiding the N2. Then Mira directed accused two to stop again. Accused two then telephoned Mr Mthethwa and told him to go to Mtubatuba using the old road. Mira telephoned someone and told him also to go to Mtubatuba. Accused two took out the wallet that he had taken and took out the cards, of which Mira selected two. Mr Mthethwa arrived where they were, and Mira handed over two pieces of paper with the pin numbers for the two cards written on them. Also written down was the telephone number of the person that Mira had telephoned. Mr Mthethwa then left for Mtubatuba.

[210] It was then speculated by Mira that the Polo may have a tracking device fitted to it. They opened the boot and took out the man that was in the boot and put him on the ground. Mira then said that accused two should drive the Polo to the N2 and leave it

somewhere. Accused two drove off and after covering what he estimated to be approximately 500 metres he realised that the further he drove away, the further he would have to walk back to Mira. He decided to dump the motor vehicle in a sugarcane plantation. After locking it, he threw the keys into the sugarcane plantation and commenced walking back towards Mira. Halfway back, he heard multiple gun shots. He ran away and landed in what he described as a park because there were animals there. He ran for a while. He took out his cellular telephone at some stage and saw that Mira had been trying to contact him. Mira telephoned again and asked where he was. Accused one told him and Mira then arrived, running. Despite professing to be in shock after hearing gunfire, accused two testified that he did not ask Mira what had happened. But Mira did say, of his own volition, that he had killed 'the dog'.¹⁵

[211] Mira also explained that there was no money in the accounts attached to the bank cards given to Mr Mthethwa. Mira continued to make calls as they moved, indicating that he wanted to speak to 'Mama', accused one. He got hold of her and she had told him that she had taken the bank card with the money in it when she went to purchase the liquor that her husband had asked her to get when the deceased Mr Mdluli arrived. She had neglected to put it back into WO Ntinga's wallet on her return to the house. That explained why no money could be withdrawn. Mira then arranged for someone to come and pick them up.

[212] Accused two stated that Mira had said that they would get money the next day. The court asked why they would be given money. The answer was that it was agreed upon that they would get money. The obvious question was how much money: the answer was that accused two would receive not less than R5 000. The court then enquired from accused two how accused one would benefit by this arrangement. In other words, why would she want her husband to be robbed? Accused two said that he did not know. I asked him if he had not thought of this. He responded by saying that he had not. He had, however, asked Mira why they were to rob accused one's husband

¹⁵ The reference to WO Ntinga as being 'a dog' also was mentioned in accused one's confession.

and he was told certain things by Mira, including that accused one had taken a loan to build the house and her husband now had received his bonus but was not contributing and was simply drinking his bonus away. This explanation was particularly flimsy given the fact that accused one had testified that her husband's birthday was in July and that members of the SAPS get paid on the last day of the month. The bonus he was entitled to receive would be paid in his birthday month. WO Ntinga had thus received his bonus the day before he was murdered.

[213] The person that Mira had called to come and fetch them was Mr Zungu. He picked them up and was taking accused two to his home when he suddenly refused to go any further because of the denseness of the bush through which he was required to drive. Accused two was then dropped at that spot and Mr Zungu made a U-turn and left. Because he had no airtime left, accused two was required to send Please Call Me messages to Mr Mthethwa, who then came to fetch him.

[214] Accused two agreed that he had later got out of Mr Mthethwa's motor vehicle to avoid the SAPS who were gathered at Mr Mthethwa's home but he denied telling him that the purpose behind of the robbery was to take a firearm. He also denied that he had gone to Phathane to kill accused one's husband.

[215] Under cross-examination from Mr Qulo, accused one was challenged on the colour of the Chevrolet motor vehicle belonging to accused one. He had described it as being powder blue. It was put to him that the colour was, in fact, metallic grey. Accused two had estimated the colour of the car by referring to the interior colour of the walls of the court which were, indeed, pale blue. He, however, was prepared to concede that it may have been powder grey. He apologised if he had got the colour incorrect.

[216] Mr Qulo probed accused two on the reward that he would get for his participation in the robbery. Accused two confirmed that he would get no less than R5 000, but he could not say how big the bonus was that they were going to steal, nor could he say how much Mira would receive of their anticipated plunder. One would have expected

that these were fundamental issues upon which there should have been clarity before there was action.

[217] As to how the firearms were removed from accused one's bedroom, Mr Qulo's cross-examination extracted a contradiction from accused two. Accused two first explained that Mira had inserted his arm into the bedroom window and had then produced two firearms, one by one. The first firearm was passed from Mira to accused two. This contradicted what he had said earlier, namely that Mira had come to him holding a firearm in each hand.

[218] Accused two then remembered an important piece of information about what had happened inside the Ntinga home that he had neglected to mention previously. It was that accused one had been instructed to tie up her own husband. He was asked who he had tied up and he said that he had tied up no one. It was then put to him that his own counsel had said to a witness that accused two had handed his firearm over to Mira to tie up people. This was disputed by accused two, who said that he had handed his firearm to Mira to enable him to search people. Accused two said that he did not hear his counsel say this, but if he did, then his counsel was incorrect in doing so.

[219] In rather colourful language, Mr Qulo put it to accused two that because Mira was not before court, the closest person for accused two 'to spit venom onto' was accused one. This was denied by accused one, who, rather tellingly, explained that he implicated accused one on the very day that he was apprehended. Mr Qulo finished his cross-examination of accused two by getting him to state that he had never given the Nokia TA1203 cellular telephone to accused one. This answer would later cause him serious difficulties.

[220] It was then Ms Ntsele's turn to cross-examine accused two. He stated that he made a living by driving a van transporting school children to and from school. But he conceded that he did not have a driver's licence. He explained that he knew Mira from meeting him at a scrapyard where he had gone to sell scrap metal. It 'just happened'

that they exchanged telephone numbers.

[221] Accused two admitted calling Mira on 31 July 2023 at 22h40. He could not, however, remember why he had done so. He did say that they often spoke, primarily about motor vehicles. Significantly, given the additional s 220 admissions that he made, accused two stated that he did not know that they were going to commit a robbery. This was when they were being driven by accused one to her home during the daylight hours of 1 August 2023. He thought that she was merely intent on showing them her house. When they were walking back from accused one's home, Mira had for the first time disclosed to him that they were going to go and rob accused one's home because her husband had received his bonus. He estimated that he came to know of the robbery between 17h00 and 18h00 on the day of the robbery. He was content to participate in the robbery because he heard money being mentioned. He immediately said he had no idea how much money was involved nor had any agreement been reached between him and Mira on how whatever money they got should be shared. Ms Ntsele, incredulous, asked him whether he would involve himself in a robbery when he did not know how much money was involved. Accused two did not answer and remained silent.

[222] Ms Ntsele then said that accused two was not being entirely honest with the court. He had claimed to have only become aware of the robbery between 17h00 and 18h00 on 1 August 2023 but Mr Mthethwa's uncontested evidence was that accused two had called him at 13h30 that day and specifically requested transport to Phathane. The cellular telephone records showed that this call happened at 13h32 on that day. Accused two said that he could not remember. When accused two was challenged with the records of his telephone calls to and from Mr Mthethwa, he stood silently in the witness box and did not answer.

[223] It was put to accused two by Ms Ntsele that firearms can hurt people. He agreed with that proposition. It was also put to him that events can happen which can lead to shots being fired during an armed robbery. He also agreed with this. He was then asked, knowing this, whether he was still happy to proceed with the planned robbery

and he said that he was. Asked whether he did not care if anyone was killed, accused two said that he had not thought of this but that he never thought anyone might die.

[224] Accused two was asked why it had been necessary to kidnap the two men. Accused two's answer was that they had to be kidnapped so that they did not block the bank cards and prevent him and Mira from accessing the money in their accounts. Given that accused one was left behind at the Ntinga home, he was asked whether she might not block the cards. He also had not thought of that, but he did not think that she would do so because she was involved and knew that they were going to draw money from her husband's account. Ms Ntsele put it to accused two that there was no need to kidnap anyone if their true motive was to commit robbery. Accused two said that he could now see that there was no need to do what they had done.

[225] Accused two resisted any suggestion that he knew that two murders were to be committed. He repeated that it had not been his intention to murder anyone. He was then asked a very important question by the State advocate. Having heard the man placed on the backseat of the Polo being beaten by Mira with a crowbar, what did he think was going to happen to WO Ntinga who was tied up in the boot of the motor vehicle? His answer was that he did not think that anything would happen. Asked how he could have held this view, he said that he did not know what to say. He later repeated that he did not think that anything would happen to WO Ntinga.

[226] It then transpired that accused two had also at one stage been arrested and detained in cells at SAPS KwaMbonambi. Ms Ntsele put it to accused two that this was where he had first met Mira. This was denied by accused two.

[227] The final point made by Ms Ntsele in her cross-examination was an important one. There had been evidence, contained in accused one's confession, that when accused one had taken Mira and accused two to her home in the afternoon of 1 August 2023, accused two had produced the Nokia TA1203 cellular telephone and said that this was how they would communicate with each other. Accused two denied categorically

that he had given accused one such a cellular telephone.

[228] Ms Ntsele, however, insisted to accused two that the Nokia TA1203 cellular telephone was his. It was then produced and handed to accused two in the witness box. After looking at it, he said that he did not recognise it. He was then referred to the data extracted by Cst Thungo from that very telephone. At page 35 of the data report, his attention was drawn to the second entry on that page. The data extracted was a message from Vodacom and it is necessary to narrate it in full:

‘You have less than 28 minutes remaining in your VC-VC Anytime balance for 0[...]. For more voice bundles, dial *123 # and select “Voice.”’

[229] Accused two admitted that the number 0[...] was his cellular telephone number. The message just narrated was delivered to that telephone number on 7 July 2023 at 18:34:59, just over three weeks before the murders occurred. There was another entry that the State had not noticed. On page 29 of the same data report, an identical message, save for the amount of time remaining referred to in the message, also appears. This message was delivered to accused two’s telephone number at 23:17:11 on 31 July 2023. In other words, just under 45 minutes before the start of the day upon which the murders were to be committed.

[230] It was impossible for accused two to explain how his cellular telephone number and information pertaining to his account appeared on someone else’s handset, for he was adamant that the handset was not his. But then he faltered for a second. The court revisited his earlier statement that he did not recognise the handset. The question was put again. His answer now was that he did recognise it and had seen it before. He had last seen it, however, two to three months before the day of the crimes. It had ended up with Mr Mthethwa. He then agreed that he knew the telephone. He was asked to explain the entry at page 29 of the data report. He could not do so.

[231] Accused two thereafter closed his case.

Argument

[232] In argument, the State called for the conviction of both accused on all counts and the defence called for their acquittal.

Analysis

[233] At the commencement of argument, following questions put by the court to the State advocate, it was conceded that neither of the accused could be convicted of the kidnapping of Mr Ndimande. This was a concession, in my view, that had to be made. They are accordingly entitled to their acquittal on this count.

[234] The principal issues to be determined in this matter are whether accused one orchestrated the murder of her husband and the unfortunate deceased Mr Mdluli and whether accused two knew that the aim of the intrusion into the Ntinga home that he has admitted to participating in on 1 August 2023 was to commit murder.

[235] It is not in issue that accused two is guilty of the robbery and kidnappings with which he and accused one are charged. Accused one is alleged by the State to have been the mastermind behind the crimes now being considered by this court. Accused two, together with the as yet unapprehended Mira Khoza, are alleged to have been accused one's servile followers who agreed to perform the crimes that she required carried out.

[236] While it is alleged that each of accused one and accused two performed different acts in bringing the plan to fruition, there being no suggestion that accused one was involved in the physical infliction of any violence on any of the victims, there is a common feature in each of their respective cases: both of them have made statements in which their guilt is admitted in one form or the other. In accused one's case, she made a confession in which she admitted arranging for Mira and accused two to murder her husband, whereas accused two made a detailed series of admissions in terms of s 220 of the Act at the commencement of this trial in which he admitted that he was guilty of the crimes of robbery with aggravating circumstances and kidnapping. Thus, they

have, through their own words and actions, admitted their involvement in the crimes for which they have been indicted.

[237] Accused one disputed the admissibility of her confession but despite such resistance it was found to be admissible. She then professed to have no knowledge of its contents, adopting the position that she had been told what to say by the SAPS when making her confession. Accused two does not admit his guilt as regards the two counts of murder. He claims that he was not aware that anyone was going to be murdered when he proceeded to the Ntinga home on the evening of 1 August 2023.

[238] I shall revert to the contents of accused one's confession shortly. But first it is necessary to note that in terms of our law the admissions contained in her confession are not admissible against accused two.¹⁶ The Supreme Court of Appeal in *Litako* revisited the judgment in *S v Ndhlovu & others*¹⁷ and concluded that it had not been correctly decided. The Supreme Court of Appeal preferred to adopt the previous common law position that applied before the judgment in *Ndhlovu*, namely that where several persons are accused of an offence, and one of them makes a confession or an admission, that confession or admission is evidence only against the party making it. The reason for this was set out in the Privy Council case of *Surujpaul (called Dick) v R*,¹⁸ where the court explained that:

'A voluntary statement made by an accused person is admissible as a "confession". He can confess as to his own acts, knowledge or intentions, but he cannot "confess" as to the acts of other persons which he has not seen and of which he can only have knowledge by hearsay. A failure by the prosecution to prove an essential element in the offence cannot be cured by an "admission" of this nature.'

[239] I turn to consider the content of accused one's confession. It provides an explanation for the conduct of accused one in that it yields a reason why she may have

¹⁶ *S v Litako* [2014] ZASCA 54 (*Litako*).

¹⁷ *S v Ndhlovu & others* 2002 (2) SACR 325 (SCA).

¹⁸ *Surujpaul (called Dick) v R* [1958] 3 All ER 300 at 304A-B.

wished to have her husband killed. That reason took the form of allegations about her husband assaulting her to the extent that she suffered a visible injury to her lower lip that bled. Understandably, this distressed her and she took a photograph of her face which she claims that she sent both to her sister and to her alleged lover, Mira. I can accept that this is entirely consistent with the conduct of someone who is outraged by the way that she has been treated by her spouse.

[240] Yet, accused one, ultimately, rejected the fact of an assault and said that her husband had not caused her any injury: the injury that she had sustained, and which is depicted in the photograph that she took, had actually been caused by her falling onto a hoe whilst working in the garden. This was a significant moment, because it followed shortly after an admission made by accused one to the State advocate that WO Ntinga had, indeed, assaulted her.

[241] The sudden contradiction at first seemed strange and even incomprehensible. Accused one had taken a photograph of her face showing her injury. Why would she have done this if she had not been assaulted by her husband but had, in truth, clumsily fallen onto a hoe? When asked why she had taken a photograph if this was truly the cause of her injury, her response was scarcely believable: she explained that she likes looking at photographs of herself and when she might look at this particular photograph at some date in the future, she would be able to say to herself that a hoe had caused her injury. The explanation is banal and unconvincing and patently contrived.

[242] But, in a sense, accused one was compelled to deny the occurrence of an assault by her husband. She is no one's fool. She appreciated that admitting the assault would jeopardise her position on the truthfulness of her confession, in respect of which she continued to allege that she had been told what to say by the SAPS. Had she adhered to the fact that her husband had assaulted her, she would not be able to explain how the officer recording her confession, Lt Col Mkhabela, would have known of this and could have randomly dictated to her a fact that, in reality, was true. In other words, if the allegation of the assault was true, how could Lt Col Mkhabela possibly

have known this? Better for her to contradict herself than to accept that she had told Lt Col Mkhabela the truth.

[243] I do not accept that the injury to accused one's lower lip was occasioned by a mishap involving a hoe. Having initially admitted that she had been assaulted by her husband, she admitted that the SAPS had been called to attend her home because she and her husband had engaged in an argument in which they had employed raised voices and she had been locked out of the matrimonial home by her husband. That appears to me to be a trivial incident that could not warrant the calling out of two SAPS members. The occurrence of an assault, however, places an entirely different complexion on the SAPS coming to their home.

[244] Thus, it became apparent that accused one was prepared to contradict herself and to advance a version that was false if it improved her position. In truth, it did not for it exposed her as being a manipulative person who is unwilling to tell the truth if it does not provide any benefit to her.

[245] Under oath, accused one denied that she was involved in any way in the death of her husband and the deceased Mr Mdluli. This evidence was in stark contradistinction to the contents of her confession to which reference has just been made. Accused one treated the two statements that she made as being irrelevant to her position and continued to regard those two statements as being the work of other people and not the recordal of her own words and experiences.

[246] The confession recorded by Lt Col Mkhabela was a lengthy document comprised of twelve pages, each of which was signed by accused one and her right thumb print applied to it, as well as being signed by Lt Col Mkhabela. It contains an abundance of detail that could not have been known to the officer who took down the confession. For example, the names of the members of SAPS KwaMbonambi who attended the Ntinga home were noted down - according to the later evidence of accused one, these names were correctly recorded; the fact, which was correctly recorded according to accused

one, that both her and her husband's firearms had been confiscated by the attending officers; the name of WO Ntinga's son from another relationship was correctly mentioned in the confession. There are more details which only accused one herself could have known and which would have been unknown to Lt Col Mkhabela, who did not know accused one or her husband. Any suggestion that the confession is a document created by the scribe who recorded it must thus be firmly rejected.

[247] There were, moreover, portions of the confession that accorded entirely with what accused two later said in his admissions made in terms of s 220 of the Act. One such convergence in the two versions was the recordal in accused one's confession that she and Mira had driven to a place where they had met up with a male and that after the male got into the motor vehicle that she was driving, they drove to her home. That is precisely what accused two says happened. He was the male standing on the side of the road and he got into her motor vehicle, which he correctly described as being a Chevrolet bakkie, although he appears to have got the colour of the vehicle wrong. People often err when it comes to describing colours. Accused two also stated in her confession that she had shown her home to the two men in her motor vehicle. Accused two said the same thing. Much of what was recorded in the confession was mentioned by accused two, either in his formal admissions or in his evidence before this court.

[248] An interesting aspect attaching to accused one's confession is the mention therein of a Nokia cellular telephone that she claimed had been given to her by accused two. Based upon what emerged during accused's two's cross-examination, it appears that accused one was telling the truth in this regard and that she had, indeed, acquired that handset from accused two. This, again, is not something that Lt Col Mkhabela could have known at the time that he recorded her confession. If he had made up the confession as accused two would have this court believe, then he again guessed correctly when including this detail. I shall deal with this aspect more fully when considering the evidence of accused two. But, significantly, accused one through her counsel, advanced a version that this handset had been taken during the robbery. She, therefore, had to have possessed it.

[249] As regards accused one as a person and her performance overall, I commence by making a general observation that accused one, an experienced member of the SAPS, did not present herself as being a person of integrity. This comment is based upon her version of her relationship with Mira. There are, in truth, two versions of this relationship. In her evidence in chief, Mira was no more than a potential business partner. In her confession, he was her lover. As an aside, there is no mention of any business relationship in the confession, adding weight to the conclusion that it is a recently invented explanation for accused one's admitted relationship with Mira. Whichever version one accepts, she openly associated with Mira when she knew full well that he had spent time in the holding cells at SAPS KwaMbonambi, where she worked. She claimed that her husband, himself a warrant officer in the SAPS stationed at the same police station as she was, approved of this association, and had no qualms about doing business with a known villain. I have my doubts about the acceptance of this relationship by WO Ntinga, but accepting for a moment that it may be true, it demonstrates poor judgment and a lack of integrity on the part of accused one. Members of the SAPS should not be seen to fraternise with criminals and accused one must have known this. But she refused to admit that this was the case, instead advancing gimmicky arguments that there is no law forbidding contact between a member of the SAPS and an accused person. Of course there is no such law. People are expected to have common sense and to conduct themselves accordingly. Especially SAPS members.

[250] I just accepted, for the purposes of argument, that there was a proposed business relationship between accused one and Mira. I do not, however, accept that, in fact, to be the case. Simply put, how the proposed business relationship came about is entirely fanciful and absurd. Accused one attempted to convince the court that she encountered Mira in Richards Bay, by chance, when she went to have a fault with her cellular telephone repaired. She recognised him on the pavement and he confirmed that he had been held in the cells of the police station where she worked. This did not deter her, because Mira said that his case had been finalised at court. She sought no proof of

this later but simply accepted his say-so that this is what had occurred. Then, while still on the pavement, he asked her for her handset and, in a flash, cured it of the defect of which she complained. Amazed, she asked if he could repair cellular telephones. He said he could. She sought no proof of this ability and, again, simply accepted his word.

[251] The unbelievable part of this scenario then followed. Impressed with what Mira had done standing on the pavement, accused one allegedly immediately proposed that they should go into business together repairing cellular telephones. Mira accepted the proposal on the spot. Life experience teaches us that such things simply do not happen. These type of contrived explanations come into being only in the imagination of human beings when those human beings find themselves faced with a predicament. That this is the case here becomes more evident when it is considered that accused one herself lacked any means to go into business with Mira. She had no money of her own. She was entirely dependent on her husband financing the proposed business relationship. She was not going into business with Mira: her husband was. That this is so is revealed when it is acknowledged that the proposed business relationship was put on hold until her husband acquired his bonus, this being further proof of who the true business partners were.

[252] The predicament that accused one found herself in was that she knew that the State had forensic evidence of the fact that she had been in telephonic contact with Mira. Despite stating in her confession that Mira had been her lover, when she testified she denied that to be the case. If she was not his lover, then her telephonic contact with Mira required explaining. The business proposition was the contrived explanation.

[253] A few probing questions to accused one about the substance of the business plan underpinning the proposed business relationship revealed it to have all the substance of hail damaged gossamer. I have already detailed her answers to questions put to her on this topic. It was palpably obvious that accused one was making the story up as she went along.

[254] Accused one cut a poor figure when in the witness box. Despite Mr Qulo's submission during argument that accused one was a good, honest witness who was consistent in her evidence, I do not find that to be the case. She was frequently evasive as a witness and questions often had to be repeated before she would offer a responsive answer. Her version also morphed. For example, it was initially put to Mr Ndimande that accused one would say that he had been tied up and that he had not assisted in placing the two men who were subsequently murdered into the Polo. Mr Ndimande, it will be remembered, said he had not been tied up and that he had assisted in putting the two men into the Polo. But accused one's version in this regards changed: she indicated that she could not remember whether he had been tied up and she had not noticed if he had assisted the intruders to put the two doomed men into the Polo. A fact became a vague belief.

[255] Accused one also contradicted herself on the issue of the assault by her husband, as already mentioned. Mr Qulo submitted in argument that she had claimed that this had happened on another occasion and not on the occasion when members of her own police station had been called to her home. That is not correct for accused one stated contrary to her earlier answer, that her husband had never assaulted her - her bleeding lower lip was caused by the hoe.

[256] In short, accused one did not impress me as a witness nor as a human being. Her confession is confirmed in material parts by the admissions made by accused two and by other evidence. There is evidence aliunde in abundance to support the central tenets of her confession and prove its correctness. In fact, the only version that makes sense, and explains the conduct of everyone involved in these sordid events, is to be found in accused one's confession. The confession is sufficient to establish that she desired the death of her husband and that she employed the services of Mira to bring about that end. In doing so, she bears responsibility for all that followed. Her confession establishes her guilt as the master mind behind the crimes.

[257] As regards accused two, it is not in issue that he is, at the very least, guilty of the

offence of robbery and kidnapping. He has made formal admissions that disclose his guilt in that regard, and he has also given oral evidence before this court during which he unashamedly admitted that he accompanied Mira to the Ntinga home with the express intent of committing a robbery there. He has, furthermore, not denied that in carrying out the robbery, he was armed with a firearm which he admitted that he pointed at the persons that he found within the Ntinga home. He has admitted that he took several cellular telephones from the persons at the Ntinga home against their will. He is, therefore, on his own version, guilty of robbery with aggravating circumstances.

[258] Accused two has also admitted that WO Ntinga and the deceased Mr Mdluli were both bound hand and foot and placed against their will into the motor vehicle owned by the late Mr Mdluli and driven away from the Ntinga home. The offence of kidnapping is defined to be:

‘... the unlawful, intentional deprivation of a person’s freedom of movement.’¹⁹

[259] There can therefore be little doubt that accused two is also guilty of the offence of kidnapping WO Ntinga and the deceased Mr Mdluli. The further question to be determined is whether he is guilty of the murder of the two people that he robbed and kidnapped.

[260] Accused two walks a very fine line in presenting the defence that he relies upon. His admissions place him unavoidably in the company earlier on 1 August 2023 of the person that he alleges murdered the two men mentioned in the indictment. His admissions also place him at the scene of both the robbery and the kidnapping and at the places where the two kidnapped persons were put to death. He admits knowledge of the robbery and kidnapping but denies any knowledge of the murders nor of the intent to commit those murders. He claims that he, rather fortuitously, did not see either of the acts that led to the death of the two men. The beating of the deceased Mr Mdluli was not observed by him, when he was right there, but he heard it happening. Likewise,

¹⁹ *Ntuli and Another v S* [2021] ZAGPPHC 149 para 30; *S v Hlongwa and Others* [2023] ZAKZPHC 110 para 106.

the shooting of WO Ntinga was also heard, but not seen by him.

[261] There are several difficulties that I have with accused two's version. The first relates to when accused two came to realise that he and Mira were going to commit a robbery at Phathane. His final version was that he acquired that information between the hours of 17h00 and 18h00 on the evening of the robbery. However, that cannot be true because Mr Mthethwa was not challenged when he testified that accused two had called him at about 13h30 on 1 August 2023 to arrange transportation for himself to Phathane. There can only have been one reason to go to Phathane and that was to commit a crime at the Ntinga home. No other reason for a trip to that rural village was mooted in accused two's evidence. Thus, he knew earlier in the day that he was going to Phathane and not an hour before he actually went there.

[262] My second difficulty with accused two's version is why he and Mira had gone to accused one's home in the first place. Accused two adheres to the fact that he was hired by accused one, through the person of Mira, to commit a robbery of her husband in terms of which her husband's bonus, paid to him the day before his murder, was to be taken. Had that been the real reason why accused two became involved in these shocking events, the question must be asked why accused one would desire the impoverishment of her husband, and ultimately, herself and her family. I can conceive of no reason why a wife would desire her spouse's bank account to be plundered. It might be different if the wife was to receive the proceeds of the robbery but that is not what was alleged was arranged in this instance.

[263] According to accused two, Mira and he were to share the proceeds of what they could extract from the bank cards that they took from WO Ntinga and, according to accused two, this for him would amount to a sum of not less than R5 000. That version, in itself, poses a potential problem. It is well known that banks have daily withdrawal limits from ATMs. It appears that neither accused two nor Mira had considered this. Accused two did not disclose that they had ascertained what the limits were on the two bank cards that Mr Zungu used at the ATM in Mtubatuba. While this may have posed a

problem for accused two and Mira, the problem that I am unable to comprehend is why accused one would have ordered only the robbery to occur.

[264] The third difficulty that I have is if robbery was the main goal, why was it necessary to kidnap WO Ntinga and the deceased Mr Mdluli? The act of binding them and taking them away would appear to be senseless and unnecessary. It created potential difficulties for accused two and Mira, and an example of those potential difficulties manifested when the late Mr Mdluli managed to loosen the cable ties that bound his hands and allegedly attempted to tackle Mira from the back seat of the Polo. The only answer that accused two could give when faced with this question was that the two men had been taken to stop them putting a hold on the bank accounts to which the bank cards related before accused two and Mira had managed to make withdrawals therefrom.

[265] That, unfortunately, is a false answer and cannot explain, or justify, the kidnapping. The reason for this conclusion is twofold. The first reason is that the two deceased men, whilst at the Ntinga home, had no way of alerting their banks as to what was going on. They were tied and accused two and Mira had taken their cellular telephones and the cellular telephones of all those in the television room of the Ntinga home. There was simply no way that the bank could be notified and thus no need for any person to be removed from the Ntinga home. Putting them in the Polo did not achieve anything in relation to the act of robbery: they still remained powerless to contact their banks. That this must be so is evidenced by the fact that Mr Ndimande testified that he had never been tied up at any stage and had been left behind in this state when the Polo was driven off. The second reason is that there was no evidence led at the trial that any of the bank cards belonged to the deceased Mr Mdluli. His presence in the Polo was therefore unnecessary, for he had nothing to stop, and just as with WO Ntinga, he had no way of notifying his bankers even if he was at risk of having his funds withdrawn from his account by accused two and Mira. It must therefore be that these two men were removed for another purpose and not the reason advanced by accused two.

[266] The fourth difficulty that I have with accused two's version relates both to that version and to his integrity. His version is that when he first met with accused one, she gave him the Nokia TA1203 cellular telephone which was to be their mode of communication with each other. She, on the other hand, in her confession said that accused two had given the handset to her, albeit for the same purpose. I mentioned earlier in this judgment that it appears that accused one's version (which she now disavows in denying the contents of her confession) is in all likelihood the correct version.

[267] This is apparent from the fact that the cellular telephone records extracted from the Nokia TA1203 handset by Cst Thungo recorded various messages on that handset that were sent by the network operator to cellular telephone number 0[...]. That, so accused two admitted, is his cellular telephone number. Accused two was shown the handset and claimed that he did not recognise it nor had he ever possessed such a handset. This was before the cellular telephone records extracted from that handset were disclosed to him. When they were disclosed to him, he immediately found himself between Scylla and Charybdis.²⁰ How could he explain how a message that was personal to his cellular telephone number was found on a complete stranger's handset? He was obliged to recant his version: he now did recognise the handset and, indeed, he had actually possessed the very same handset that he was shown in the witness box and of which he had earlier denied any knowledge. He explained that he had given it to Mr Mthethwa about three months before the events in question.

[268] It hardly needs to be mentioned that this retraction of his version by accused two did nothing to help him. It showed him to be a person quite willing to advance a falsehood as a fact if it meant that he avoided responsibility for his actions.

²⁰ The phrase originates from the Greek myth of Scylla, a six-headed monster, and Charybdis, a monstrous whirlpool, both of which Odysseus had to navigate in his journey home. Sailors had to choose between sailing past Scylla, risking their lives to the monster, or sailing past Charybdis, risking their lives to the whirlpool.

[269] A final difficulty that I have is the varying explanations given by accused two for his involvement. While he consistently claimed that robbery was his motive, he was unable to consistently explain what was to be robbed: he told Mr Mthethwa that taking a firearm was the objective but told this court that taking WO Ntinga's bonus was the objective. There was no explanation for this clear variation offered by accused two.

[270] I consequently reject his version of only being involved for the purposes of committing robbery. The robbery obviously did occur, but it was incidental to, and was the cover for, the true purpose of those involved, namely the kidnapping and murder of WO Ntinga.

[271] Ironically, I found accused two at least initially to be relatively impressive as a witness. He appeared to have an incredible recall of detail and the leading of his evidence by Mr Mkhwanazi literally took hours, so populated was it with facts and observations. Perhaps, on reflection, it had too much detail. But as soon as accused one was placed under pressure under cross-examination, he began to crumble and at times he did not answer difficult questions put to him but instead stood silently in the witness box, looking at the floor. Once his ordeal in the witness box was over, the overriding impression left was of a witness that had learnt his lines well with regard to the story that he had constructed for himself but who could not deal adequately with issues that he had not thought of or rehearsed.

[272] The fundamental issue that accused two's version cannot answer is why accused one would have hired him only to rob her own husband. The version, embraced with enthusiasm and advanced with total conviction by accused two, simply does not make sense. The interaction between accused one, Mira and accused two only acquires a degree of meaning if the true purpose of the intrusion into the Ntinga residence was the kidnapping of accused one's husband with the purpose of removing him from the premises and killing him at some other place. Accused two mentioned this to Mr Mthethwa but framed the proposition to only include the services of Mira being hired for this purpose and excluded himself from the proposition. As someone intimately involved

in events, it was not difficult for accused two to simply airbrush himself out of this picture.

[273] The inescapable inference is that the reason why both men proceeded to the Ntinga home on the evening of 1 August 2023 was in furtherance of accused one's wishes that her husband be kidnapped and killed somewhere away from the Ntinga home. While it is so that the State does not have to establish a motive for the events that it prosecutes as allegedly constituting criminal conduct, a motive often permits sense to be made of something that on the surface appears to be senseless.

[274] Accused two acknowledged under cross-examination from Ms Ntsele that he appreciated the fact that firearms are dangerous and that, when used in events such as a robbery, they can often be used unwittingly and unintentionally to disastrous effect. Why each of him and Mira required firearms before storming into the Ntinga home was not revealed by accused two. He was, thus, content to be armed and must, at the very least, have contemplated using the firearm if circumstances demanded that he do so. He must also have contemplated that Mira would do likewise. Otherwise, there was no purpose in being armed. He certainly did not appear to blanch at the thought of violence: he raised no objection to, or complaint about, the brutal beating of the deceased Mr Mdluli. He did not ask Mira why the deceased Mr Mdluli had had to be beaten so savagely nor did he ask why he was to be left on the side of the road as if what happened to him did not matter. He did not ask if he was dead or alive. In short, he showed a complete indifference to the deceased Mr Mdluli's condition and well-being. He entirely reconciled himself with Mira's conduct and proceeded onwards with him in furtherance of their common purpose.

[275] The State, in framing the murder charges contained in the indictment, asserted that the murders had been premeditated and had been committed by two or more persons acting in common purpose. Common purpose is:

'... a purpose shared by two or more persons who act in concert towards the

accomplishment of a common aim.’²¹

[276] A common purpose may come about either by prior agreement between those involved in it or it may come about on an impulse without prior consultation or agreement.²² If there is such a prior agreement, there is seldom evidence that may be led of such agreement. None of the participants are likely to admit to the common purpose. Courts are usually asked to infer the existence of such common purpose from the proven facts. When common purpose is to be found to exist, each person will be responsible for specific criminal conduct committed by one of their number which falls within their common design. The conduct of each of them in the execution of their common goal is thus imputed to all.

[277] Accused two claimed that he did not wonder what would happen to WO Ntinga when he was removed from the boot of the Polo by Mira. He had, however, just been present when a savage beating was inflicted on the deceased Mr Mdluli and must surely have wondered if the same fate awaited WO Ntinga. His conduct makes it plain that at all times he was content to go along with Mira. He made no attempt to withdraw from their criminal enterprise. Even after disposing of the Polo and hearing gunshots as he sought to rejoin Mira, accused one continued to maintain contact with Mira by cellular telephone and ultimately rejoined him in order for both of them to make a safe getaway together. He had an excellent opportunity then to take a backward step, to protest about the unnecessary violence and disassociate himself from what had occurred, but he did not take that opportunity. He identified fully with what had occurred and was a willing participant in those events.

[278] In my view, the State established the existence of a common purpose between accused one, Mira and accused two to kidnap and kill WO Ntinga. Rather than shelve their preconceived plans when the deceased Mr Mdluli arrived at the Ntinga home, he was also done away with for no real reason. If ever there was a man who happened to

²¹ *S v Motaung and Others* 1990 (4) SA 485 (A) 509A.

²² *Magmoed v Janse van Rensburg and others* 1993 (1) SACR 67 (A) 96e-f.

be at the wrong place at the wrong time, it was the deceased Mr Mdluli.

[279] Accused two was thus an active member in the common purpose to kidnap and murder WA Ntinga and did not participate in the enterprise in the belief that all that was going to be carried out was a robbery.

[280] I remain alive to the fact that at least two of the State witnesses were accomplices after the fact. I refer here, of course, to Mr Mthethwa and Mr Zungu. Both Mr Mthethwa and Mr Zungu were deeply involved in the terrible events with which this court is dealing. While Mr Mthethwa was not warned initially as a s 204 witness for reasons that I am still unable to comprehend given the fact that Mr Zungu was presented as such a witness, once it became apparent that he was being required to answer potentially incriminating questions put to him by the State advocate, he was warned that he was not required to do so and he was given the opportunity to seek legal counsel. I am thus constrained to view both of them as accomplices.

[281] The cautionary rule applicable to the evidence of an accomplice was explained as follows in *S v Hlapezula and Others*²³ as follows:

‘It is well settled that the testimony of an accomplice requires particular scrutiny because of the cumulative effect of the following factors. First, he is a self-confessed criminal. Second, various considerations may lead him falsely to implicate the accused, for example, a desire to shield a culprit or, particularly where he has not been sentenced, the hope of clemency. Third, by reason of his inside knowledge, he has a deceptive facility for convincing description – his only fiction being the substitution of the accused for the culprit. Accordingly. . . there has grown up a cautionary rule of practice requiring (a) recognition by the trial court of the foregoing dangers, and (b) the safeguard of some factor reducing the risk of a wrong conviction, such as a corroboration implicating the accused in the commission of the offence, or the absence of gainsaying evidence from him, or his mendacity as a witness, or the implication by

²³ *S v Hlapezula and others* 1965 (4) SA 439 (A) at 440 D-H.

the accomplice of someone near or dear to him; see in particular *R v Ncanane*; *R v Gumede*; *R v Nqamtweni and another*. Satisfaction of the cautionary rule does not necessarily warrant a conviction, for the ultimate requirement is proof beyond reasonable doubt, and this depends upon an appraisal of all the evidence and the degree of the safeguards aforementioned.’ (Citations omitted)

[282] I acknowledge the caution that must be applied to the evidence of these two witnesses. However, much of what these witnesses testified to was not in conflict with the evidence of accused two. Their evidence only touched tangentially on the version of accused one. Accused two admitted that he had made contact regularly with Mr Mthethwa over the course of 1 August 2023 regarding the transportation that he required from Mr Mthethwa. The only point of conflict was when accused two first telephoned Mr Mthethwa in order to arrange the lift to Phathane for him and Mira, alleging that it was between 17h00 and 18h00 on 1 August 2023 whilst Mr Mthethwa said it was around 13h30. The cellular telephone records establish such a call being made by accused two to Mr Mthethwa at 13h32 and thus reaffirm Mr Mthethwa’s evidence. In argument, Mr Mkhwanazi indicated that there was no dispute by accused two as to the correctness of the cellular telephone records handed in by the State.

[283] Mr Zungu gave his evidence under caution as a s 204 witness. His evidence was largely uncontroversial and he implicated himself without hesitation in the events that unfolded on the evening of 1 August 2023. On a complete conspectus of Mr Zungu’s evidence, I am satisfied that he testified frankly and honestly in respect of all questions put to him. In coming to this conclusion, I do not lose sight of the contradiction between his evidence and the evidence of Mr Mthethwa as to what ultimately happened to the bank cards handed to Mr Mthethwa by accused two. I am not able to conclude as to who is correct, for both directly contradict each other’s version, each asserting that the other was the last person in possession of the bank cards. That notwithstanding, I am satisfied that Mr Zungu is accordingly entitled to be discharged from the risk of further prosecution consequent upon his giving evidence in this matter and such an order shall issue at the end of this judgment.

Conclusion

[284] I am satisfied that the State has established beyond reasonable doubt that accused one, in accordance with the disclosure in her confession, desired her husband to be killed. She either persuaded Mira, or permitted him, to propose that WO Ntinga be murdered by himself and another. The another was accused two and he knew fully why he had been brought in to assist Mira. The kidnapping of WO Ntinga and the deceased Mr Mdluli was part of the plot to ensure that at least WO Ntinga was killed somewhere away from his home. The murder of the deceased Mr Mdluli was an unnecessary consequence of the plan to kill WO Ntinga.

[285] In the circumstances:

1. Both accused are acquitted of the offence of the kidnapping of Mr Lindani Ndimande.
2. Accused one and accused two are convicted of:
 - (a) The murder of Mr Nkosinathi Petros Ntinga;
 - (b) The murder of Mr Mpendulo Mdluli;
 - (c) The robbery with aggravating circumstances of Mr Nkosinathi Petros Ntinga, Mr Mpendulo Mdluli and Mr Lindani Ndimande; and
 - (d) The kidnapping of Mr Nkosinathi Petros Ntinga and Mr Mpendulo Mdluli.
3. The State witness, Mr Thomas Zungu, is discharged from prosecution in terms of s 204(2)(a) and (b) of the Criminal Procedure Act 51 of 1977 for the offence of being an accessory after the fact to the crime of robbery and for any offence in respect of which a verdict of guilty would be competent upon such a charge.
4. The following exhibits received by the court during the course of the trial are to be disposed of as follows:
 - (a) The cellular telephones taken from Mr Mthethwa, Mr Zungu and Mr Ndimande are to be returned to them;
 - (b) The remaining cellular telephones received by the court as exhibits are declared forfeited to the State; and
 - (c) The fake firearm seized from accused two is also declared forfeited to the State.

MOSSOP J

APPEARANCES

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