SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII Policy

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED

21 May 2026

DATE SIGNATURE

CASE NUMBER: A41/2024

In the matter between:

MOHAPI THABO **First Appellant**

HOLWORTHY GARLOND **Second Appellant**

and

THE STATE **Respondent**

Coram: DOSIO J, MOOSA J and COX AJ

Cell phone records (data generated automatically by a telecommunications system) are admissible as evidence—even without formal authentication by a service provider witness—provided that their reliability, integrity, and method of production are sufficiently established through competent evidence; such records may constitute real (not hearsay) evidence

ORDER

a. The appeal in respect to the convictions and sentences of both the first and second appellants is dismissed.

JUDGMENT

DOSIO J:

Introduction

[1] This is an appeal in respect to the convictions and sentences of both appellants.

[2] Numerous issues have been raised in this appeal, however in essence, the issue raised by the first appellant is that he denies ownership of the cell phone number 0[…]. In respect to the second appellant, the issue raised is that due to the failure of the State in authenticating the cell phone records, the first step to admissibility of the cell phone records is missing, and as a result, the cell phone records remain inadmissible.

Background

[3] On 6 August 2013 the appellant and two others were indicted in the High Court, Gauteng Local Division, on the following charges:
(i) Kidnapping;
(ii) Murder read with the provisions of section 51(1) of Act 105 of 1997;
(iii) Theft.

[4] On 11 November 2015, the appellants were convicted of all charges against them.

[5] On 15 March 2016 the first and second appellants were respectively sentenced to an effective 25 years direct imprisonment. The sentence imposed in respect of the convictions having been ordered to be served concurrently in terms of section 280 of the Criminal Procedure Act 51 of 1977 ('Act 51 of 1977'). The sentences imposed were as follows:

a. kidnapping 5 years imprisonment,

b. murder 25 years imprisonment; and

c. theft 2 years imprisonment.

The court a quo ordered that 10 years of the 25 years imprisonment imposed in respect to the first appellant would be served concurrently with the sentences which were imposed on him on 1 June 2012 and 20 November 2013.

[6] The application for leave to appeal against their convictions and sentences was dismissed by the trial court on 21 November 2016. The Supreme Court of Appeal granted leave against conviction and sentence on 3 March 2021.

[7] This court will firstly deal with the merits pertaining to the convictions.

Ad conviction

[8] The counsel for both appellants are ad idem that there is no direct evidence to link the appellants to the commission of the offences and that the entire State's case is based on circumstantial evidence in the form of video footage and cellular phone records. It is submitted by the appellants that circumstantial evidence in the instant matter is not sufficient to sustain a conviction on the charges preferred against the appellants. It was further argued that the Vodacom data printouts, which were not authenticated, remained inadmissible hearsay evidence.

[9] In the heads of argument filed by the counsel of both appellants, much was made about the court's reliance on the admissibility of exhibit 'E' and 'F', which are the statements made by Thabiso Mpye ('Mpye'), who had entered

into a plea agreement with the State. The said plea agreement pertained to this same incident. Mpye was sentenced to 20 years imprisonment. It was argued further that exhibit 'E' is an inadmissible confession made by a co-offender.

[10] Both counsel for the appellants also contended that the court a quo erred in relying on inadmissible evidence of the identification of the appellants on the cameras at OR Tambo airport.

[11] Furthermore, that the court a quo erred in relying on the evidence of Mpye's pointing out.

[12] The counsel for the first appellant contended that the reliance on the statements marked 'E' and 'F' influenced the court a quo to reach the conclusion that it did. The second appellant`s counsel had the same contention as reflected at paragraph 27 of the second appellant's heads.

[13] During argument before this court, the counsel for the first appellant was referred to his own heads at paragraph 20, where it is stated:

> 'In its judgment on merit, the trial Court, relying on the decision of *S v Litako & others* 2014 (2) SACR 431 (SCA); [2014] ZASCA 54 (16 April 2014), *S v Mhlongo. S v Nkosi* 2015 (2) SACR 323 (CC), found that the extra–curial admission and confession of one is not admissible against another or the other accused. Accordingly, the extra-curial confession statement, that is both exhibit E and F, will not be relied on or used as evidence against the accused.'[1]

[14] This court also referred the second applicant's counsel to the fact that the court a quo made it clear that it did not rely on exhibit 'E' and 'F'. As a result, the counsel for the second appellant abandoned this aspect.

[15] Both counsel for the appellants contended that the video footage was not clear as per the judgment of the court a quo and that the court could not have placed reliance on this.

---

1 Heads of argument of the first appellant page 5, para 20

[16] The two crisp issues for determination by this court are those highlighted at paragraph [2] supra.

Common cause issues

[17] The following issues are considered common cause and therefore not in dispute:

(a) That the deceased, Mr Uwe Gemballa, arrived in South Africa on 8 February 2010.

(b) That the body of the deceased was found buried in Wesfort cemetery in the Atteridgeville area on 28 September 2010.

(c) That the cause of death was undetermined.

(d) That all accused closed their cases and did not testify.

Issues for determination

Admissibility of cell phone records

[18] This court will firstly deal with the issue raised by the second appellant, which if accepted as correct, would be dispositive of the case against both appellants. To an extent, the first appellant during argument, also referred to the aspect pertaining to the admissibility of the cell phone records.

[19] The State relied on the Vodacom data and RICA documents to show that the second appellant (accused 3) and the other accused, were at the airport when the deceased was picked up, and that they were in Edenvale, where the deceased was buried.

[20] When the State during the trial, as per the evidence of Lieutenant Colonel Schnelle ('Lt. Col. Schnelle'), referred to and relied upon the Vodacom data, it was objected to by the defence. The State asked that the Vodacom data be provisionally admitted as the witness Petro Heyneke ('Heyneke') would be called to authenticate the correctness of the Vodacom data.

[21] On this basis the court a quo provisionally admitted the Vodacom data, such as the alleged movement of the accused and their locations in relation to the offences, based on the cell phone records and cell phone towers.

[22] In cross-examination, Lt. Col. Schnelle was asked whether there were affidavits (referred to as s212 and 213 statements in terms of Act 51 of 1977), for purposes of proving the admissibility of the cell phone data. Lt. Col. Schnelle responded that he did not have such statements, but that he was in discussion with Heyneke, of Vodacom, to submit the s212 statements. Such statements remained outstanding and Heyneke was not called as a witness.

[23] Lieutenant Colonel Neethling ('Lt. Col. Neethling'), who did the cell phone tower mapping, to determine the location of the cell phone calls made by the accused, conceded that the maps were provided to him by Vodacom.

[24] The State called Mr Budhia as a witness. He was an engineer at Vodacom and the Central Operations Manager for Southern Gauteng operations. His evidence was relevant to the base stations at the airport, to the extent that he was asked to consider calls inter alia made from cell phone number 0[...]. His evidence is limited to his conclusion that on the account of the base station coverage, two calls were made from that cell phone number from the domestic arrivals South End and that the handset was at a stage inside the international arrival terminals.

[25] Counsel for the second appellant contended that to rely on the Vodacom data, and RICA documents, the authenticity and correctness of the contents thereof had to have been proven by the State.

[26] It was contended that this can be done in one of two ways. The first is to call an appropriate person from Vodacom to confirm the authenticity and correctness of the data. Such a person to the knowledge of the State was Heyneke, who was referred to in the trial and whom the State did not call. The second is to make use of s15 of the Electronic Communications and Transactions Act 15 of 2007 ('ECTA'), which provides for the admissibility and

evidential weight of data messages. Although s15(4) of ECTA was available, the State did not follow this route.

[27] It was contended by the counsel for the second appellant that Lt. Col. Schnelle tried to overcome the absence of Heyneke as a witness by saying that he was a cell phone expert. It was argued this could only mean that he was experienced in reading cell phone records, which does not qualify him as an expert. However, it was argued this does not assist the State because even if he was an expert in reading and applying information contained in cell phone data, the authenticity and correctness of the data must still be proved. Lt. Col. Schnelle conceded that the Crime Management Centre (‘CMS’) of the police analysed the cell phone data. It was argued that even though Lt. Col. Schnelle named the persons responsible for the analysis, they were not called as witnesses. It was contended by the second applicant`s counsel that the evidence of Lt. Col. Schnelle did not deal with the authenticity and correctness of the cell phone data as it did not fall within his expertise or knowledge.

[28] It was argued by the second appellant`s counsel that the State sought to prove that cell number 0[...], registered in the name of Hamunga Hamunga belonged to the second appellant. This was denied by the second appellant, as per the questions posed by the second appellant’s legal representative during the cross-examination of the witnesses. Importantly, it was argued that the number 0[...] was determined on the RICA form which was not authenticated as correct and it remained inadmissible hearsay evidence.

[29] It was contended by the second appellant’s counsel that the requirement to prove the authenticity and correctness of the cell phone records was a constant reminder to the State during the trial and it remains unknown why the required process was not followed. Upon closure of the State’s case, it was once again pointed out on behalf of the second appellant’s legal representative that the State had promised that Heyneke and Carelse, (who allegedly identified the accused as the person on the camera at the airport), should be called as witnesses, yet they were not called.

[30] The second appellants counsel is astounded that even though the State never called these witnesses, the court a quo remarked:

"Well, you were told that you are at liberty to call those people as they are now available to you". [2]

[31] It was contended by the second appellant`s counsel that if hearsay evidence is provisionally admitted and the witness is then not called, then there is no basis in law to condone by saying that the defence could call the witnesses.

[32] As a result, it was argued the court a quo misdirected itself in relying on the cell phone records and Rica documentation, as if the authenticity and correctness thereof was proven.

[33] It was further contended that s34 of the Civil Procedure Evidence Act 25 of 1965 does not assist the State either.

[34] The second appellant`s counsel referred this court to the matters of *S v BM* [3] (`BM`), *S v Cwele* [4] (`*Cwele*`), *S v Brown* [5] (`*Brown*`) and *Global and Local Investments Advisors (Pty) Ltd v Fouche* [6] (`*Fouche*`) to show that the authenticity of electronic communication must be authenticated.

Evaluation

[35] It is trite law that the onus rests on the State to prove the guilt of an accused beyond reasonable doubt. If an accused's version is reasonably possible true, he must be acquitted.

[36] In considering the judgment of the court a quo, this court has been mindful that a Court of Appeal is not at liberty to depart from the trial court`s findings

---

2 Court transcript volume 22, page 1954 (lines 7 -9).

3 *S v BM* 2014(2) SACR 23 (SCA).

4 *S v Cwele and Another* 2013 (1) SACR 478 (SCA).

5 *S v Brown* 2016 (1) SACR 206 (WCC).

6 *Global and Local Investments Advisors (Pty) Ltd v Fouche* 2021 (1) SA 371 (SCA).

of fact and credibility, unless they are vitiated by irregularity, or unless an examination of the record reveals that those findings are patently wrong. [7]

[37] The second appellant in the matter in casu has raised the critical issue that while Lt. Col. Schnelle and Lt. Col. Neethling may possibly be qualified as experts in analysing cell phone data records, and that the cell phone data was obtained in terms of s205 of Act 51 of 1977, the State still failed to call Heyneke to authenticate the admissibility of the cell phone data printouts .

[38] The legal question arises as to whether the failure to call Heyneke renders the entirety of the evidence of Lt. Col. Schnelle as inadmissible, or whether the interests of justice permit the admission of such evidence notwithstanding this omission. A further legal question which arises is whether cell phone records should be classified as documentary or real evidence.

[39] In the matter of *Kapa v The State* [8] ('*Kapa*'), the Constitutional Court held that:

'Although the concept of a fair trial is a cornerstone of our criminal law jurisprudence, not every minor irregularity vitiates the right to a fair trial.' [9]

and further

'Section 35(3)(i) of the Constitution guarantees the right to adduce and challenge. In *Ndhlovu*, the Supreme Court of Appeal clarified that section 35(3)(i) does not create an automatic right to cross-examination. The Supreme Court of Appeal said that: the Bill of Rights does not guarantee an entitlement to subject all evidence to cross-examination. What it contains is the right (subject to limitation in terms of section 36) to 'challenge evidence'. Where that evidence is hearsay, the right entails that the accused is entitled to resist its admission and to scrutinise its probative value, including its reliability. The provisions enshrined these entitlements. But where the interests of justice, constitutionally measured, require that hearsay evidence to be admitted, no constitutional right is infringed. Put differently, where the interests of justice require that the hearsay statement be admitted, the right to 'challenge

---

7 See *S v Francis* 1991 (1) SACR 198 (A) at 198 J- 199A and *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645 E-F

8 *Kapa v S* (CCT 292/21) ZACC 1 2023 (4) BCLR 370 (CC); 2023 (1) SACR 583 (CC) (24 January 2023.

9 Ibid para 27

evidence' does not encompass the right to cross- examine the original declarant' [10]. [my emphasis]

[40] In line with the decision of *Kapa* [11], the court a quo ultimately had a discretion to determine the evidentiary weight of the cell phone data presented by the State.

[41] Courts do not automatically require an employee from Vodacom, MTN or Cell C to testify as to the cell phone data, as long as someone competent can explain how the data was obtained and why it is reliable. This in essence would complete the authentication aspect of such data.

[42] Lt. Col. Schnelle at the time of the trial, possessed twenty-five years` experience in the South African Police Service ('SAPS'), as well as twenty years as a detective specialising in telecommunications investigations. Mr Budhia, who is employed by Vodacom as a radio engineer, held a BSc Engineering degree and had accrued seventeen years` experience in mobile network infrastructure and data analysis. Lt. Col. Neethling, on the other hand, had thirty-one years of experience in the SAPS and had attended a specialised two- week training course on understanding GSM networks. Lt. Col. Neethling has since applied this expertise in approximately 800 cases involving cell phone data tracking. He has been exposed to the utilisation of cell phone technology in crime investigations since 2005 and obtained all the information in terms of s8 of the Regulation of Interception of Communication and Provisions of Communication Related Information Act 20 of 2002. Lt. Col. Neethling obtained a judge`s authorisation to intercept cell phone communications. No expert evidence was led by any of the appellants to rebut the evidence presented by Lt. Col. Schnelle, Lt. Col. Neethling or Mr Budhia.

[43] In the matter in casu, the value of the evidence depended on the credibility of Lt. Col. Schnelle, Lt. Col. Neethling and Mr. Budhia. That evidence met the

---

10 Ibid para 28 (reference made the matter of *S v Ndhlovu* [2002] ZASCA 70, 2002 (6) SA 305 (SCA) at para 16

11 Ibid

requirements of the law of evidence. Regarding the authenticity and integrity of the cell phone data, it was never put to any of the witnesses that the cell phone records had been tampered with.

[44] It is not an absolute universal requirement to have a dedicated cell phone expert to prove the admissibility of cell phone records. The admissibility is governed by the general principals of evidence. As a result, this court finds there was no misdirection on the part of the court a quo to admit and rely on the cell phone data records.

[45] Even if this court is wrong in this respect, a further legal question requires some analyses, and this is whether cell phone records amount to real evidence as opposed to documentary evidence.

[46] In the matter of *Ex* parte *Rosch* [12] ('*Rosch*'), the court found that a computer print-out from a telecommunication company, which reflects information which was mechanically recorded by a computer pertaining to the time, the length of a call and the number to which the call was made, constituted real evidence.

[47] The full court in the matter of *Rosch* [13] stated

'Here the documents were generated by a computer without the assistance of any human agency. It is therefore plain that the provisions of section 34(1) of the Civil Evidence Act, or any other provisions thereof do not apply as no person could give evidence in regard to the contents of these documents. <u>A statement made by a computer is not a statement by a person as envisaged in section 34 of the Civil Evidence Act</u> (see *Narlis v South African Banks of Athens* 1976 (2) SA 573 (A) at 577H and section 34(4) of the Civil Evidence Act). Neither of the respondents placed any reliance on the Computer Evidence Act, 1983 (Act 57 of 1983) as a basis for the admissibility of the evidence. The question arises whether the computer printout evidence in the present case is excluded by the Act. In our view a reading of the statute makes it plain that the statute does not require that whatever is retrieved from a computer can only be used if the statute`s requirements have been met. It is a facilitating act not a restricting one. <u>The common-law position prevails ie evidence</u>

---

12 *Ex Parte Rosch* [1998] 1 All 8A 319 (W)

13 Ibid

tending to prove or disprove an allegation which is in issue is admissible unless a specific ground for exclusion operates (see *R v Trupedo* 1920 AD 58 at 62; *R v Katz and another* 1946 AD 71 at 78). As no specific ground does operate the provisions of the Act are inapplicable in the present case. The submission on behalf of second respondent that the 'document' should be admitted in terms of section 3(1)(c) of the Law of Evidence Amendment Act, 1988 is without substance. Section 3(1)(c) permits the admission of "hearsay evidence" in certain circumstances. Section 3(4) of this Act defined hearsay evidence as "evidence the probative value of which depends upon the credibility of any person other than the person giving such evidence". The computer is not a "person" a subsection of the Act is therefore inapplicable in this case. The computer is not a witness who stated what he did not himself know. The printout is real evidence in the sense that it came about automatically and not as result of any input of information by a human being. There is therefore no room for dishonesty or human error. The printout in the present case is similar to the radar diagram produced in the English case of *The Statue of Liberty: Owners of the Motorship Sapporo Maro v Owner of Steam Tanker, Statue of Liberty* [1968] 2 All ER 195 (PDA) where such a document was admitted as evidence'. [14] [my emphasis]

[48] In the matter of *S v Ndiki and Others* ('*Ndiki*') [15], the State sought to introduce certain documentary evidence consisting of computer-generated printouts. The accused objected to the admissibility of these exhibits. As a result, the court conducted a trial- within-a-trial to determine the true nature of the printouts. The defence argued that the admission of such evidence would offend the presumption of retrospectivity and that the documents failed to comply with the 'requirement of personality', in that the information contained therein had not emanated from a person and could not be regarded as evidence given or confirmed by a person. The court held that due to the fact that the admissibility of the evidence depended on the reliability and accuracy of the computer and its operating systems and process, as opposed to the credibility of a person, and the duty to prove such accuracy and reliability lay with the state. [16] The court held further that computer printouts produced by a computer that had sorted and collated information would be admissible under s22 of this Act if the foundational requirements thereof had been satisfied.

---

[14] Ibid page 328 to 329

[15] *S v Ndiki and Others* 2008 (2) SACR 252 CK

[16] Ibid [para 31-37] at 264 e- 266 e

The court held that since the information contained in these statements had been sorted and collated by a computer to produce the exhibits in question, such exhibits were admitted into evidence.

[49] The significant paragraph from the judgment in the matter of *Ndiki* [17] states that:

'To the extent that the computer through its operating system processed existing information (exhibits D5 and D8) did calculations and 'created' additional information without human intervention, such as sequential numbers, the 'creation' of cheques (exhibit D9) and the recording of the identity of the person who operated the computer at any given time, such evidence in my view constitutes real evidence. As stated, the admissibility of this evidence is dependent upon the accuracy and the reliability of the computer, its operating systems and its processes as opposed to the credibility of a natural person.' [18] [my emphasis]

[50] The documents were acquired via a s205 warrant, in terms of Act 51 of 1977, from the service providers and sent directly to Lt. Col. Schnelle who identified them and testified about it. These documents were generated by a computer and were not dependant on any human intervention. The court a quo correctly found them to be authenticated.

[51] The matter of *Ndiki* confirmed the decision of *Ndlovu v The Minister of Correctional Services and Another* [19] ('*Ndlovu*')

[52] The information on the cell phone printouts, which were presented in court, are in a chronological order. The sequential information follows logically and naturally. There was no reason why the court a quo had to doubt the veracity and integrity of the Vodacom data printouts.

[53] The process of how the information is captured by the computer was explained by Lt. Col. Schnelle and Lt. Col. Neethling and this court is satisfied with the explanation given to the court a quo by both witnesses, albeit the

---

[17] Ibid
[18] Ibid para 37
[19] *Ndlovu v The Minister of Correctional Services and Another* [2006] 4 All SA 165

failure of the state advocate to call petro Heyneke. This court finds no misdirection for the court a quo giving evidential weight to the Vodacom data printouts, as corroborated by the evidence of Lt. Col. Schnelle and Lt. Col. Neethling. In any event, the actual content of the documents was not in dispute as the second appellant's counsel conceded this in his address.

[54] As stated by the Supreme Court of Appeal in the matter of *Firstrand Bank v Venter* [20] :

'…the statements in question [which] were data messages was not placed in issue in cross-examination. The certificate complied with the terms of ss (4) and once produced was admissible against Mr Venter and served as 'rebuttable proof' of the facts contained in the printouts of the bank statements. Such proof did not of course extend to the underlying agreement, but it was sufficient to establish, prima facie, the state and details of the account and the basis for each credit or debit. <u>No rebuttal was attempted by the defendant</u>' [21] [my emphasis]

[55] The second appellant's counsel drew this court's attention to the matter of *S v Brown* [22] where the court dealt with images on a cell phone. The court held that:

'Given the potential mutability and transient nature of images in this matter which are generated, stored and transmitted by an electronic device, I consider that they are more appropriately dealt with as documentary evidence rather than 'real evidence.'

[56] In the matter of *Brown*, a cell phone having photographs of the accused was found which the state sought to introduce as evidence. The state led the evidence of Lieutenant Colonel Linnen ('Lt. Col. Linnen'), the commander of the Co-ordination Centre, who testified that the images in question had been transmitted to the cell phone two days before the shooting. The investigating officer had requested Lt. Col Linnen to download the material, which he did. The investigating officer then selected five images which he wished to utilise in criminal proceedings against the accused. Due to the small size of the images, in the downloaded file, he enlarged them for viewing purposes.

---

[20] *Firstrand Bank v Venter* (829/11) [2012] ZASCA (14 September 2012):

[21] Ibid para 16

[22] *S v Brown* (note 5 above)

Accordingly, the images in question were downloaded from the phone, reproduced in hard copy (paper) form and enlarged.

[57] The facts of the matter of *Brown* are distinguishable from the matter in casu, in that in the matter of *Brown*, the images were captured by a human, thereby showing human intervention, hence the classification of documentary evidence as opposed to real evidence. In the matter in casu, the Vodacom data printouts were acquired via a s205 warrant from the service provider, namely, Vodacom and sent directly to Lt. Col. Schnelle, who identified them and testified about it. The documents were generated by a computer and were not dependent on any human intervention. The court a quo correctly found them to be authenticated and real evidence.

[58] This is in line with the reasoning as per the learned authors CWH Schmidt and H Rademeyer which stated that:

'How should the admissibility of data messages then be dealt with in practice? A logical approach appears to us to be the adoption of a two-step procedure when a court is confronted with evidence which may potentially be a data message. First, the court must decide whether the evidence to be adduced is in fact a data message, bearing in mind the definition thereof. Second, if the evidence to be adduced can be classified as a data message, the court must be placed in a position to decide whether it was created or generated by human conduct and can be printed or otherwise viewed. If so, the rules relating to documentary evidence should be utilised. If it was created or generated by an electronic device, with no human intervention, the rules relating to real evidence must be utilised. [See *Ndlovu v Minister of Correctional Services supra* 173] During the second step, the blurring of the dividing lines between documentary and real evidence in the electronic age must be borne in mind and the focus should primarily fall on detail regarding the way in which the data message was created.' [23]

[59] During the evidence of Lt. Col. Neethling he was asked;

[23] CWH Scmidt, *Law of Evidence*, Chapter 12 '*Means of Proof: product of a device or apparatus* – Chapter 12.5 '*Computer evidence: electronically recorded and transmitted information'* (12-11 to 12-12, Issue 13, LexisNexis

`*You cannot tamper with this data that you get from the cell phone providers is that correct sir?*
No Mlord, this data is computer generated and I would not have any access to that data, to be able to manipulate it.' [24]

[60] Ultimately, the question this court must decide is whether the Vodacom data in the matter in casu was obtained in a manner that violated any right in the Bill of Rights and whether the admission thereof by the court a quo rendered the trial of the appellants unfair. This court does not find that the reception of such evidence in any way violated the rights of the appellants or that it rendered their trial unfair. Computer generated evidence to prove either the identity of the owner or the location of where such cell phone was, when a call was made, can hardly be objectionable.

[61] Accordingly, this court finds that the Vodacom data printouts and the documents depicting same were correctly admissible as real evidence.

Failure to testify

[62] The charges against both appellants are of a serious nature.

[63] The witness Mr Budhia testified that both the first and second appellant were inside the terminal when the deceased arrived and not merely in the vicinity of the airport. The evidence of Mr Budhia was not contested by the second appellant. There is no reason why Mr Budhia cannot be regarded as an expert. He was asked to look at the base station coverage at the OR Tambo International airport in respect to cell phone number 0[...]. He stated that:
'*Based on the call records the mobile was in the terminal building for most of the time. There was one transaction where the mobile went outside to Johannesburg International Airport sector 2. Then 30 seconds later the mobile was back inside the terminal building'*. [25]

---

[24] see Court transcript volume 19, page1696, lines 17-20
[25] Court transcript volume 21, page 1908, lines 14 to 17

[64] The second appellant gave instructions to his legal representative not to ask any questions to Mr Budhia. (see court transcript volume 21, page 1917, lines 4 to 5). Such evidence as a result remained uncontested. The second appellant during the cross-examination of Lt. Col. Schnelle admitted that the number 0[...], as reflected on exhibit 'U3" belonged to him and that he made those calls as reflected. The second appellant also never disputed he was at OR Tambo International airport.

[65] It is a well-established principle in law that facts admitted by a party or their counsel during a trial, including during cross examination, need not be proven by the opposing party. This is because an admission is considered the best evidence against the person making it. In the matter of *S v Xoswa and others* [26], the court held that if evidence is not challenged it may be accepted without further ado. In the matter of *President of the RSA v SARFU* [27], the Constitutional Court held that if a point in dispute is not challenged, or admitted, in cross examination, that evidence is accepted as correct. The principle ensures procedural fairness, preventing a party from being ambushed later with a challenge to a point that was seemingly accepted during the trial.

[66] It is trite law that statements put to the witnesses during cross examination is not evidence. In *S v Katoo* [28], the court remarked as follows:

> 'The other issue relates to the weight attached by the trial Judge to the defence version which was put to State witnesses under cross-examination. …… As the respondent failed to place any version before the Court by means of evidence, the Court's verdict should have been based on the evidence of the prosecution only.' [29]

[67] The court may only consider the statements that were put to the witnesses, as evidence with any value, if those statements were repeated by the appellants under oath.

---

26 *S v Xoswa and others*, 1965(1) SA 267 (C)
27 *President of the RSA v SARFU*, (CCT16/98) (1999) ZACC 11; 2000 (1) SA 1; 1999 (10) BLCR 1059
28 *S v Katoo* 2005 (1) SACR 522 (SCA) at 529e
29 Ibid page 529e

[68] In the matter in casu, the value of the evidence, particularly in respect to the value of the Vodacom printouts, depended on the credibility of Lt. Col Schnelle, Lt. Col Neethling and Mr Budhia. This court finds that the evidence met the requirements of the Law of evidence. The appellants elected not to give evidence in their defence, despite the overwhelming evidence against them.

[69] In the matter of *S v Mthetwa* [30] , the Appellant Division, as it then was, stated that:

‘Where… there is direct prima facie evidence implicating the accused in the commission of the offence, his failure to give evidence, whatever his reason may be for such failure, in general ipso facto tends to strengthen the State case, because there is nothing to gainsay it, and therefore less reason for doubting its credibility or reliability.’ [31]

[70] In the matter of *Osman and Another v Attorney- General Transvaal* [32], the Constitutional Court held that our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt, however, an accused always runs the risk that, absent any rebuttal, the prosecution`s case may be sufficient to prove the elements of the offence.

[71] An accused person has the right to remain silent and is under no obligation to testify. In the matter of *Boesak v The State* [33], the Constitutional Court held that:

‘The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. <u>If there is evidence calling for an answer, and an accused person chooses to remain</u>

---

30 *S v Mthetwa* 1972 (3) SA 766 (A)
31 Ibid page 635
32 *Osman and Another v Attorney- General Transvaal* (CCT 37/97) [1998] ZACC
33 *Boesak v The State* [2000] ZACC 25, 2001 (1) BCLR 36 (CC)

silent in the fact of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused.' [34] [my emphasis]

[72] The heads of argument of the first appellant states:

'In issue is not the accuracy or reliability of the cellular phone data but whether the first appellant was the user or can be linked to the implicated number – 0[…].' [35] It was also disputed that the first appellant signed exhibit 'Y1' and that the signatures on exhibit 'Y1' and the warning statement are not the same. The first appellant's identity number, namely, 7[…], as well as the cell phone number 0[…] appears on exhibit 'Ý1', as well as a signature. [36] The first appellant's identity number 7[…], as well as a signature of the suspect appears on exhibit 'ÁJ' [37] and page 2930. [38] The address of the first appellant, namely, 1[…] M[…] street, Soweto, appears on exhibit 'Ý1', page 2930 and on exhibit 'ÁJ'.

[73] If the first appellant disputed that the cell phone number 0[…], reflected on 'Ý1' was not his and that it was incorrectly depicted on that form, he could have come to testify and explain that. The first appellant could also have come to give a version why the same identity number appears on 'Y1', 'AJ' and page 2930.

[74] It was pointed out in argument by the first appellant's counsel that the signatures of the first appellant as reflected on exhibits 'Yi', 'AJ', pages 2912 to 2931 and exhibit 'G' (the admissions in terms of s220 of Act 51 of 1977) are different. The first appellant never testified in this respect and neither did he call his own expert to dispute that the signature on exhibit 'Y1' is not his. The first appellant also never came to explain how the address of his mother, namely. 1[…] M[…] Street, Soweto, came to be filled in exhibit, 'Y1', or the warning statement.

---

[34] Ibid para 24
[35] First appellant's heads of argument [page 12 paragraph 36]
[36] Court record, volume 31, page 2749
[37] Court record, volume 33, page 2919
[38] Court record, volume 33

[75] The evidence of warrant officer Ramowedzi, states that the signatures on exhibits 'AJ', which commenced on pages 2912 to 2930 of the court record, were all signed by the first appellant in his presence [39], as well as exhibit 'AJ8'.[40] Warrant officer Ramowedzi stated that the signatures on exhibits 'Y1' and 'AJ8' [41]were very similar. The signatures on the warning statement of the first appellant, which appear from pages 2912 to 2931 are clearly different to those on exhibits 'Y1' and 'AJ8'. If warrant officer Ramowedzi stated he was present when the first appellant signed both the warning statement reflected at pages 2912 to 2931, as well as exhibit 'AJ8', then logic dictates that the first appellant changed his signatures. The first appellant had a lot of explaining to do, yet he remained silent.

[76] The cell phone records of the first appellant, for the cell phone number 0[…], shows the following:

(a) that on 8 February 2010 from 17h17 to 19h16 he was in Pretoria CBD and then travelled all the way to Midrand. [42]
(b) That on 8 February 2010 from 20h42 to 21h23 he was at OR Tambo International Airport, while talking to accused 2 and the second appellant. [43]
(c) That on 8 February 2010 from 22h11 to 23h19 he was in Edenvale in the vicinity of the house where the deceased was held and thereafter returned to Midrand, while talking to accused 2 and the second appellant. [44]

[77] The cell phone records of the second appellant, for the cell phone number 0[...], shows the following:

(a) that on 8 February 2010 from 19h56 to 20h28 he was in Midrand and then travelled all the way to OR Tambo International airport while inter alia talking to accused 2. [45]

---

[39] Court transcript, volume 21, lines 20 to 24
[40] Court record, volume 33, page 2932
[41] Court record, volume 33, page 2933
[42] Court record, volume 31, page 2757, exhibit 'Y3', page 4 of 483
[43] Court record, volume 31, page 2757, exhibit 'Y3', page 4 of 483
[44] Court record, volume 31, pages 2757 to 2758, exhibit 'Y3' page 4 and 5 of 483

(b) That on 8 February 2010 from 20h34 to 21h54 he was at OR Tambo International Airport while talking to the first appellant and accused 2 as well as Marilyn Carelse. [46]

(c) That on 8 February 2010 from 22h10 to 23h58 he was in Edenvale in the vicinity of the house where the deceased was held and thereafter returned to Midrand, while talking to the first appellant, accused 2 and Marilyn Carelse. [47]

[78] This appeal turns on the quality and sufficiency of circumstantial evidence upon which the court a quo convicted both appellants. The locus classicus in this regard is the much-cited decision in *R v Blom* [48] , in which the court described the 'two cardinal rules of logic' as follows:

'(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.

(2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.'

[79] In the matter in casu, both appellants closed their case. The court a quo correctly took cognisance of the case law regarding this issue and correctly made a negative inference from the failure of the first and second appellant to remain silent.

[80] The court a quo correctly found when dealing with circumstantial evidence that both appellants, including accused 2, who is not before this court, all went to OR Tambo International airport. This evidence is corroborated by comparing all the cell phone records. The communication between both appellants and accused 2 on 8 February 2010 cannot be a mere coincidence. The appellants did not come and explain these coincidences when they had the opportunity to do so.

---

45 Court record, volume 29, page 2510, exhibit 'U3', page 134 of 189).
46 Court record, volume 29, page 2510, exhibit 'U3', page 134 of 189
47 Court record, volume 29, pages 2510 to 2511, exhibit 'U3' page 134 to 135 of 189
48 *R v Blom* 1939 AD 188

[81] The only evidence before the court a quo, given under oath, was that which was adduced by the State.

[82] The court a quo correctly found that the State proved:

(a) that the cell phone number 0[…] did indeed belong to the first appellant and that he used it.
(b) That the first appellant on 8 February 2010 from 20h42 to 21h23 was at OR Tambo International Airport while talking to accused 2 and the third appellant.
(c) That the first appellant on 8 February 2015 from 22h11 to 23h19, was in Edenvale in the vicinity of the house where Gemballa was held and thereafter returned to Midrand, while talking to accused 2 and the second appellant.
(d) That the cell phone records of the second appellant, with cell phone number 0[...], which was captured in exhibit 'U3' place the second appellant within the terminal building of OR Tambo International airport on 8 February 2010.
(e) That the second appellant on 8 February 2010 from 20h34 to 21h54 was at OR Tambo International airport while talking to the first appellant and accused 2.
(f) That the second appellant on 8 February 2010 from 22h10 to 23h58, was in Edenvale in the vicinity of the house where Gemballa was held and thereafter returned to Midrand, while talking to the first appellant and accused 2.

[83] The court a quo correctly found that no other inference could be drawn but that the appellants kidnapped Gemballa, took him to Edenvale, killed him and buried him in a shallow grave.

[84] In light of the strong prima facie case against the appellants and in the absence of any version to gainsay the State's case, the court a quo correctly found that the case of the appellants was not reasonably possibly true and correctly found them guilty as charged.

[85] This court finds no misdirection on the part of the court a quo. No grounds exist on which the appeal of the appellants should succeed, In the result, the appeal against the conviction is dismissed. This court sees no need to deal with the sentences imposed.

Order

[86] The appeal in respect to the convictions and sentences of both the first and second appellants is dismissed.

D DOSIO
JUDGE OF THE HIGH COURT
JOHANNESBURG

I agree

C MOOSA
JUDGE OF THE HIGH COURT
JOHANNESBURG

I agree

I COX
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand- down is deemed to be 10h00 on 21 MAY 2026.

APPEARANCES

On behalf of the First Appellant:	Adv M Milubi Instructed by Legal-Aid SA
On behalf of the Second Appellant:	Adv B Roux with Adv G Motuba Instructed by Luando Vorster Attorneys
On behalf of the Respondent:	Adv R Du Toit with Adv G Market Instructed by the Office of the
National	
	Director of Public Prosecutions