THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 465/2019

In the matter between:

RAJIVEE SONI **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Rajivee Soni v The State* (Case no 465/2019) [2021] ZASCA 57 (5 May 2021)

Coram: NAVSA ADP, SALDULKER and MBHA JJA and WEINER and UNTERHALTER AJJA

Heard: 29 March 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 5 May 2021.

Summary: Criminal appeal – appeal against conviction and sentence – whether pattern of evidence proved guilt of the accused beyond a reasonable doubt – distinction drawn between a mandate and the doctrine of common purpose in respect of a charge of murder – test to be applied when a State witness cannot testify and where cross-examination cannot be completed – sentence – whether period of incarceration awaiting appeal ought to be taken into account.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Henriques J, sitting as the court of first instance):

1. The appeal against convictions and sentences is upheld in part and dismissed in part, as follows:

1.1 The appeal against the conviction and sentence on count 1 is dismissed;

1.2 The appeal against the convictions and sentences on counts 2 and 4 is dismissed;

1.3 The appeal against the convictions and sentences on counts 3 and 5 is upheld;

1.4 The appeal against the conviction on count 6 of conspiracy to murder is upheld, with the conviction substituted with the alternative count, namely, incitement to commit murder;

1.5 The appeal against sentence on count 6 is upheld to the extent reflected in the substituted order that appears hereunder;

1.6 The effective sentence is reduced to the extent reflected in the substituted order.

2. The order of the court below is substituted as follows:

'(a) In respect of count 1: Murder read with s 51(1) and Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997, the accused is found guilty;

(b) In respect of count 2: Defeating or obstructing the course of justice, the accused is found guilty;

(c) In respect of count 3: Defeating or obstructing the course of justice, the accused is acquitted;

(d) In respect of count 4: Defeating or obstructing the course of justice, the accused is found guilty;

(e) In respect of count 5: Assault with intent to do grievous bodily harm, the accused is acquitted;

(f) In respect of count 6: Conspiracy to commit murder, alternatively, incitement to murder, the accused is found guilty of incitement to murder;

(g) In respect of count 1, the accused is sentenced to 25 years' imprisonment;

(h) In respect of count 2, the accused is sentenced to 18 months' imprisonment;

(i) In respect of count 4, the accused is sentenced to 2 years' imprisonment;

(j) In respect of count 6, the accused is sentenced to 5 years' imprisonment;

(k) The sentences imposed on counts 2, 4 and 6 are to run concurrently with the sentence on count 1. The accused is sentenced to an effective 23 years' and 7 months' imprisonment.'

3. The sentence of 23 years and 7 months' imprisonment referred to in (k) above will run from the date of the further imprisonment of the appellant pursuant to this order.

4. The National Commissioner for Correctional Services is directed to ensure that a social worker in the employ of the Department for Correctional Services visits the children of the accused, Mr Soni, regularly during his incarceration, and submits reports to the office of the National Commissioner as to whether the children are in need of care and protection as envisaged in section 150 of the Children's Act 38 of 2005 and, if so, to take the steps required by that provision.

5. The Department of Correctional Services is to give consideration to the recommendation in the report of Floss Mitchell relating to the manner in which contact visits between the accused and the minor children are to take place, and, where possible, to facilitate the assistance of a social worker during such visits.

6. The accused is declared unfit to be licenced for a firearm in terms of the provisions of the Firearms Control Act 60 of 2000.

JUDGMENT

Saldulker JA and Unterhalter AJA (Navsa ADP and Mbha JJA and Weiner AJA concurring)

Introduction

[1] On the night of 13 May 2013, at around 19h00, when Dr Bhavish Sewram (the deceased), a medical doctor, left his surgery in Raisethorpe,

Pietermaritzburg little did he know that he was to meet an untimely death at the hands of assassins hired to execute him. Mr Sabelo Dlamini, who fired the shots that killed him, and those who waited in the getaway vehicle to drive him away, were arrested, convicted and sentenced for his murder. One would think that Dr Sewram's family had closure, in that those responsible for his death were held to account and had paid for their dastardly deed. But this was not to be.

[2] This was only the beginning of a saga which led to revelations of corruption, conspiracies, incitement, defeating the course of justice, and the laying of false charges, all of which eventually culminated in the arrest of a businessman, the appellant, Mr Rajivee Soni, for the murder of Dr Sewram.

[3] The appellant was arrested and charged with six counts, namely, on count 1, the murder of Dr Sewram; on counts 2, 3, and 4, for defeating or obstructing the course of justice; on count 5, for assault with intent to cause grievous bodily harm; and on count 6, for contravening s 18(2)*(a)* of the Riotous Assemblies Act 17 of 1956 (conspiracy to commit murder).

[4] It was a lengthy trial that lasted in excess of three years. The appellant was convicted on all charges by the KwaZulu-Natal Division of the High Court, Pietermaritzburg (Henriques J) (the high court), and sentenced to imprisonment as follows: 25 years on the murder count; 18 months, on counts 2 and 3, for defeating the course of justice; 2 years on count 4, defeating the course of justice; 18 months for the assault on count 5; and, on count 6, to five years for conspiracy to commit murder. The sentences on counts 2 to 5 were ordered to run concurrently with the sentence on count 1. The appellant was sentenced to an effective 30 years' imprisonment. This appeal against the conviction and sentence of the appellant is with the leave of the high court.

Background

[5] Dr Sewram, who was 33 years old at the time of his death, was a doctor who conducted a number of practices, one of which was located at Old Greytown Road, Raisethorpe in Pietermaritzburg, KwaZulu-Natal. The appellant and Dr Sewram enjoyed a friendship for several years and their wives

were also friends. However, during January 2012 their friendship soured, after the appellant formed a suspicion that Dr Sewram was engaged in an extra-marital affair with the appellant's wife.

[6] At the commencement of the proceedings in the high court the appellant tendered a plea of not guilty on all 6 counts and a statement in terms of s 115 of the Criminal Procedure Act 51 of 1977 (the CPA) was handed in on his behalf, in which he denied any involvement in the murder or in any of the offences with which he had been charged. The appellant stated that at a family meeting he and the deceased had reconciled and that over time he had made peace with his wife.

[7] The State's principal witness was Mr Sugen Naidoo, who, at the time of the murder, was a policeman serving at the Mountain Rise police station in Pietermaritzburg. He testified that in 2012 the appellant had visited him and in due course recounted that his wife had been having an affair with his friend, Dr Sewram. The appellant wanted to teach Dr Sewram a lesson and was willing to pay for this to be done. Sugen Naidoo, a self-confessed drug addict and corrupt policeman, was willing to assist the appellant and make some money at the appellant's expense.

[8] Sugen Naidoo's evidence was that he and the appellant planned various actions to be taken against Dr Sewram so as to harm him, and ultimately cause him to leave Pietermaritzburg. Over the course of 2012, Sugen Naidoo lent his efforts, together with the appellant, to this enterprise. First, Sugen Naidoo approached a fellow policeman, Warrant Officer Daryl Gounder, to assist him to plant drugs at Dr Sewram's surgery and then have the doctor arrested for illegal drug possession. Sugen Naidoo purchased the drugs with money given to him by the appellant from his brother-in-law, Mr Hoosen Shaik-Cassim. Sugen Naidoo however informed the appellant that the plan to plant the drugs had been thwarted by senior officers, and he was nevertheless paid by the appellant.

[9] Undeterred, the appellant then conceived of a plan to have Dr Sewram charged with sexual assault and sought Sugen Naidoo's assistance. Sugen Naidoo, in turn, asked Gounder to arrange that a woman would consult with Dr Sewram and then lay a false charge of sexual assault against the doctor. This, Gounder did by persuading Ms Mariamma Kisten to consult with Dr Sewram and then lay a charge of sexual assault against him. Dr Sewram was arrested and charged. But the charge was later withdrawn.

[10] The appellant then sought to escalate the actions against Dr Sewram, and wanted him physically hurt. The appellant asked Sugen Naidoo whether his brother-in-law, Mr Morné Emersleben, would be willing to do so. Sugen Naidoo approached Emersleben and they contrived a plan to plant an unlicensed firearm at Dr Sewram's surgery, and later, to hire men to assault Dr Sewram. In fact, they intended to carry out neither plan and used the appellant's connivance in these plans to extract money from him.

[11] Next, the appellant came to Sugen Naidoo with a plan to lay a false complaint of assault against Dr Sewram that would be corroborated by a friend of the appellant. The appellant did make the complaint. A docket was opened by Sugen Naidoo, and Dr Sewram was arrested and released on a warning. The appellant paid Sugen Naidoo for his efforts.

[12] Sugen Naidoo then made contact with Mr Zaheer Khan, at the instance of the appellant, to have Dr Sewram assaulted against payment of R5 000. The assault did not take place, but a different plan was agreed with Khan. His step-daughter, Ms Sonali Sookraj, would consult with Dr Sewram and then lay a false charge of sexual assault against him. This she did. Dr Sewram was again arrested and charged, but the charge was also withdrawn.

[13] Finally, Sugen Naidoo also testified that he had introduced the appellant to two policemen, Mr Ricky Naidoo and Mr Nishal Maharaj. They conceived of a plan to spray-paint 'sex pest' and 'sex doctor' at Dr Sewram's surgery. This was then done. Emboldened, the appellant then conspired with the two policemen to have them shoot Dr Sewram with a paintball gun, discharging hard

objects. The appellant, Sugen Naidoo, Ricky Naidoo, and Maharaj set off on an expedition to buy a paintball gun. This they eventually procured in Pinetown. Ricky Naidoo and Maharaj carried out the assault upon Dr Sewram, who was injured as a result. And the appellant paid them for their efforts.

[14] We have set out this sequence of events, to which Sugen Naidoo testified, because they are central to the case that the State made against the appellant. The State led the following witnesses to corroborate the account given by Sugen Naidoo. First, Emersleben testified that the appellant had asked him to procure assailants to assault Dr Sewram. He had done so, but the assault did not take place, because the hired assailants had taken the money for the task and fled. The appellant also wanted Emersleben to procure an unlicensed firearm. He agreed to do so, but in fact did not. Second, Shaik-Cassim testified that the appellant had paid him to hire men to break Dr Sewram's arms and legs and had described Dr Sewram's surgery. Shaik-Cassim testified that he had no intention of carrying out the appellant's request and appeared to acquiesce only in order to extract money from the appellant. Third, the State called Mariamma Kisten and Sonali Sookraj, the two women who had laid the false complaints of sexual assault. They testified as to how they had come to do so. Sookraj explained that her step-father had asked her to lay the charge and had thereafter climbed into a white double-cab vehicle, in which she identified the appellant seated in the front of the vehicle. It is necessary to pause to record that the appellant owned a white double-cab vehicle. This part of the evidence is explored further, later in this judgment.

[15] The State also called two further witnesses of importance. The first was Mr Mlungisi Sithebe. Sithebe testified that the appellant had asked him to scare Dr Sewram by shooting him in the leg. The appellant wanted this done because Dr Sewram had had an affair with the appellant's wife. The appellant drove Sithebe to show him Dr Sewram's surgeries. Sithebe entertained the proposal, but ultimately decided that it was against his religious convictions. He then reported the matter to Dr Sewram and the police.

[16] The other witness called by the State was Sabelo Dlamini. He, together with Mr Mfaniseni Nxumalo and Mr Brian Treasurer, were convicted of the murder of Dr Sewram. Dlamini testified that Nxumalo had persuaded him to shoot a man who had failed to pay Nxumalo for cutting his grass. Dlamini was driven to Dr Sewram's surgery by Treasurer and given a firearm. Treasurer explained who was to be murdered. When Dr Sewram came out of his surgery, Dlamini shot and killed him. Treasurer then drove him and Nxumalo away. Treasurer placed a call in the course of the journey and said that the job had been done.

[17] These were the principal witnesses called by the State.

[18] The appellant testified in his own defence. He explained how he came to suspect that his wife was having an affair with Dr Sewram. This led to a separation from his wife and the initiation of divorce proceedings. There was also a heated exchange between the families of the appellant and Dr Sewram at a meeting held after the appellant had discovered the suspected affair. But, as to the alleged campaign against Dr Sewram, he denied any involvement. Nor was he in any way involved in the murder of Dr Sewram. In February 2012, he reported that an incident had occurred in which Dr Sewram had slapped the appellant. The appellant laid a complaint of assault with the police. But, in the course of 2012, the appellant's rift with his wife began to heal. In October 2012, there was a meeting of the appellant and Dr Sewram, during which Dr Sewram apologised, the men shook hands and the appellant said that he would withdraw the assault complaint. The appellant's account as to how the attacks upon Dr Sewram had come about was to suggest that Sugen Naidoo had orchestrated the attacks so as to foster suspicion of the appellant's complicity and thereby sought to extort money from the appellant.

[19] The appellant also called his accountant to testify as to how the appellant's businesses were conducted and the insufficiency of cash transactions to fund the payments in cash that the State alleged that the appellant had made to procure the actions taken against Dr Sewram. In addition, the defence called witnesses to corroborate aspects of the appellant's

testimony. These included Mr Ricky Ganhes, who testified that he had met the appellant in March 2013 who, together with a security guard, were looking for windows that had gone missing from one of the appellant's factories. Mr Anesh Premchand gave evidence principally as to being in the company of the appellant at the time of Dr Sewram's murder. Mr Clarence Jones, a colonel in the SAPS, also testified. He investigated police corruption and explained the investigations of corruption against Warrant Officer Gounder and the allegations made against Colonel Bala Naidoo, that Bala Naidoo had intimidated Sergeants Maharaj and Ricky Naidoo into giving witness statements.

[20] Finally, there was expert testimony led by the State and the defence as to the cellular telephone records produced at the trial and what they signified. Mr Dharmesh Kanti, a manager of the law enforcement liaison division of MTN, testified for the State, and Mr Brian Land, the proprietor of Map Centre CC, for the defence.

[21] This extensive body of evidence gives rise to the following overarching issue. There can be no doubt that Dr Sewram was assaulted, arrested and charged on the basis of false accusations of sexual assault, and was ultimately murdered by assassins acting for reward. These actions occurred by design, not chance. The overarching issue is whether the appellant orchestrated these actions against Dr Sewram to seek revenge for Dr Sewram's infidelity, or whether there is an alternative explanation that is reasonably possibly true.

[22] The appellant was convicted on six separate counts. There are distinctive questions of law and fact relevant to each count. We consider these questions in what follows. But, it is also relevant to our analysis that the mosaic of events recounted in the evidence was not random. The pattern of events also has to be considered to determine whether the guiding hand of the appellant set in train the actions against Dr Sewram, culminating in his murder, or whether the pattern of events is susceptible of an alternative explanation which, if reasonably possibly true, would entitle the appellant to an acquittal. It is to this task that we now turn.

Count 1: murder

[23] As stated earlier, on 13 May 2013, Dr Sewram was shot and killed outside his surgery in Raisethorpe, Pietermaritzburg. It was common ground that Messrs Dlamini, Nxumalo and Treasurer were responsible for Dr Sewram's murder. Also, as indicated above, before the appellant's trial commenced, they were convicted of Dr Sewram's murder. In the summary of substantial facts, the State alleged that at all times material to count 1, the appellant acted in concert and in the furtherance of a common purpose with Treasurer, Nxumalo and Dlamini to kill Dr Sewram. Thus, the trial court was called upon to adjudicate whether the appellant had acted in furtherance of a common purpose with Dlamini, Nxumalo and Treasurer, to kill Dr Sewram. The trial court found that the appellant had done so. That finding is appealed to this Court.

[24] At the appellant's trial, the State led the testimony of Dlamini, who shot and killed Dr Sewram, aided and abetted by Nxumalo and Treasurer. Dlamini testified that on 12 May 2013 he had visited Nxumalo, who was repairing a brush cutter for him, at his home. Nxumalo asked Dlamini whether he would be willing to kill a person who had failed to pay Nxumalo for cutting his lawn. Dlamini was told that he would be paid R12 000 if he was willing to do so. A firearm and transport would be provided. Dlamini said he would consider the proposition.

[25] The following day, 13 May 2013, Nxumalo called Dlamini. Dlamini returned to Nxumalo's house, apparently of a mind to carry out Nxumalo's proposal. There he was invited to get into a motor car with Nxumalo. Treasurer, whom Dlamini knew slightly, was in the driver's seat. Nxumalo took out a firearm and handed it to Treasurer. Treasurer drove to Dr Sewram's surgery. Nxumalo indicated that the person to be killed works at that surgery.

[26] Treasurer then explained to Dlamini how the killing was to be executed. The person to be killed would, at the end of the working day, switch off the lights and come out of the surgery. He may be accompanied by a woman. Treasurer would park elsewhere.

[27] Treasurer then handed Dlamini the firearm and explained its operation. Treasurer identified the vehicle of the person to be killed, parked close to the surgery. Treasurer then instructed Dlamini that he should cross the street as the person to be shot approached his vehicle. Dlamini and Nxumalo got out of Treasurer's car, and Treasurer went to park the car.

[28] Dlamini testified that he shot Dr Sewram, and thereafter he and Nxumalo walked briskly to Treasurer's parked car. They got into the car and Treasurer drove off. Nxumalo requested the firearm so that he could return it to Treasurer.

[29] Dlamini explained that, in the course of the journey, Treasurer took out his cellular telephone. The defence objected to the leading of further evidence as to Treasurer's call. The trial judge overruled the objection. Dlamini testified that, whilst in the car, Treasurer made a call, and said the job was completed. Dlamini did not know who Treasurer had called. Treasurer dropped off Dlamini and Nxumalo, and returned, sometime later, with a sum of money. Treasurer handed the money to Nxumalo. Nxumalo then paid Dlamini.

[30] The initial cross-examination of Dlamini was brief. Dlamini confirmed that he had been convicted of the murder of Dr Sewram. He also accepted that he had acted on the instructions of Nxumalo, and that he knew no more of the relationship between Nxumalo and Treasurer than that they had some sort of a connection. Dlamini was later recalled for further cross-examination. He was asked again about the telephone call. Dlamini's evidence-in-chief was as follows:

'And your evidence is that on the way to Mason's a call was made? – Yes.

Right. Who made the call? – It was made by Treasurer.

When you say the call was made, what did Mr Treasurer do? – Treasurer phoned, phoning some person . . . telling that person, whoever it was, that the job was completed.

When Mr Treasurer made the call, what was he using? – He was using a cell phone.

And did Mr Treasurer say anything else during this phone call? – I do not recall anything else.'

[31] Under cross-examination, Dlamini testified that Treasurer made the call as they were passing the Copesville police station. As to the call itself, Dlamini confirmed that apart from Treasurer's voice, he did not hear any other voice. Dlamini was asked whether there was a conversation. The question put and the answer given were as follows:

'And did it sound to you like a conversation, where you could only hear one of the speakers? – Yes, I could not hear the other person who was responding.'

[32] It was submitted on behalf of the appellant that the evidence of Dlamini posed a fundamental difficulty that the trial court had failed to recognise. The evidence of Dlamini before the trial court established a common purpose between Nxumalo, Dlamini and Treasurer to kill Dr Sewram, in furtherance of which his murder took place. Neither Nxumalo nor Treasurer were called as witnesses, though the defence indicated that Treasurer was a possible witness made available to the defence by the State. This was also the common purpose that had formed the basis for the convictions of Nxumalo, Dlamini and Treasurer in separate proceedings. How then was it possible for the trial court to convict the appellant for the murder of Dr Sewram, on the basis of an entirely distinct common purpose that was found by the trial court to exist between Nxumalo, Dlamini, Treasurer and the appellant?

[33] In relation to count 1, the indictment alleged that the appellant was guilty of murder, in that he intentionally and unlawfully killed Dr Sewram. In the summary of substantial facts the State relied on the appellant having acted in concert with and in the furtherance of a common purpose with Treasurer, Nxumalo and Dlamini to kill the deceased. If, however, the evidence established beyond a reasonable doubt that Treasurer was mandated by the appellant to find persons to murder Dr Sewram, and the murder was then carried out in accordance with that mandate, then reliance on the doctrine of common purpose to convict the appellant on the charge of murder would be superfluous. The appellant would be guilty of the murder of Dr Sewram on the basis that his mandate was discharged. This is so irrespective of whether the identity of the appellant was disclosed to the assassin or the other accomplice, or whether they knew of the appellant's existence. As we will demonstrate below the same

result ensues when the doctrine of common purpose is applied. It is to the latter enquiry that we now turn.

[34] It is certainly true that Dlamini had no knowledge of the appellant. Dlamini testified to the agreement between himself, Nxumalo and Treasurer to kill Dr Sewram, pursuant to which they acted to murder Dr Sewram. But does this evidence exclude the possibility that the agreement extended further than Dlamini appreciated? Before addressing that question, it is necessary to reflect that by the time Treasurer was introduced to Dlamini and, if regard is had to Dlamini's evidence about how this had occurred, including the handing-over of the firearm, it must have been compellingly clear that the motive for the intended killing provided earlier by Nxumalo, namely, that it was for failure of the deceased to pay the latter for cutting his lawn, was facile. This is all the more so given the amount he was to be paid to kill the deceased.

[35] In our view, the agreement of which Dlamini had knowledge does not exclude a wider agreement of which he was ignorant. In *Thebus*,[1] the Constitutional Court explained that the doctrine of common purpose permits of the attribution of criminal liability to those persons who jointly undertake the commission of a crime. The conduct of every person who acts pursuant to the common purpose is attributable to all who form part of the common purpose. A common purpose may come about by way of a prior agreement, express or implied, or by way of active association and participation in a common criminal design. In a consequence crime, such as murder, the ordinary requirement that there must be a causal connection between the conduct of the accused and the death of the deceased is dispensed with, provided that the accused actively associated with the conduct of the perpetrators.

[36] An agreement between A, B and C to commit a crime does not exclude the possibility that A is acting on the instructions of D. In these circumstances, D is a party to the agreement to carry out the crime, even though his identity is not disclosed to B or C. That may come about because A is acting as the agent

[1] *Thebus and Another v S* 2003 (6) SA 505 (CC).

of D. Were it otherwise, the doctrine of common purpose would be constrained in an unacceptable way. D, who initiates the criminal design and instructs his agent A to carry it out, cannot escape responsibility for what he has initiated simply on the basis that those persons his agent has employed to carry out the crime (B and C) are ignorant of the principal's existence.

[37] As we have indicated, the same conclusion as to an accused's responsibility for murder may be arrived at without recourse to any agreement or active association under the doctrine of common purpose, but rather by the application of the concept of mandate. If D instructs A to take the necessary measures to murder a person, and A does so by recruiting B and C to carry out the murder, D is responsible for the murder carried out at his behest. D's liability need not depend upon his agreement with A, B and C. It suffices that A acted within the scope of the mandate given to him by D so as to cause B and C to execute the mandate.

[38] Where an accused's agent agrees to the common purpose, there must be evidence of what the principal had sought of his agent and that the scope of the agency is consistent with the agreement concluded by the agent with the other participants. But on such a showing, the non-disclosure of the principal does not exclude the principal from being party to the agreement, and hence to the common purpose. So too, provided the agent acts within the scope of his mandate to effect the murder, the principal cannot avoid liability simply because those recruited to commit the deed are ignorant of the relationship between the agent and his principal.

[39] For these reasons, it does not follow that because Dlamini understood that he was to murder Dr Sewram in furtherance of a common purpose with Nxumalo and Treasurer, the common purpose did not, in fact, include the appellant. Provided Treasurer was acting upon the instructions of the appellant, the appellant is party to the agreement to murder Dr Sewram.

[40] The alternative way of conceptualising the matter yields the same result. Simply because Dlamini was ignorant of the fact that Treasurer was acting upon

the instructions of the appellant does not avoid the appellant's liability for what was done within the scope of the mandate he gave to Treasurer.

[41] It does not matter that Dlamini thought that the reason for killing Dr Sewram was his failure to pay Nxumalo, nor that that reason lacked plausibility. It is the agreement to murder Dr Sewram that matters in order to establish liability. The reason as to why each party enters into the agreement, or, for that matter, their appreciation of the reasons that motivate each of the others to do so, does not determine what has been agreed. In this case, there can be no doubt that Dlamini, Nxumalo and Treasurer agreed to murder Dr Sewram, and in fact did so. The central question is whether there was proof beyond reasonable doubt that the appellant was party to that agreement or issued the instruction to Treasurer to kill Dr Sewram, and set in train the actions that resulted in his murder.

[42] The submissions of the appellant placed some stress upon the fact that Dlamini, Nxumalo and Treasurer were convicted on the basis of a common purpose that made no reference to the appellant. Yet, it was argued, the case against the appellant is predicated upon a different common purpose that includes the appellant. In our view, there is no conceptual incongruity that arises, nor is there any injustice to the appellant. Proof of the tripartite agreement sufficed for the conviction of Dlamini, Nxumalo and Treasurer. More is required to implicate the appellant. That was a central issue in the appellant's trial. But if Treasurer was acting on behalf of the appellant, then there is no contradiction between the agreement relied upon for the conviction of Dlamini, Nxumalo and Treasurer and the participation of the appellant as a party to that agreement, through the agency of Treasurer.

[43] We turn to consider whether there was proof beyond reasonable doubt that the appellant issued an instruction to Treasurer to have Dr Sewram murdered, or was party to an agreement with Dlamini, Nxumalo and Treasurer to murder him.

[44] Dlamini gave evidence of the call made by Treasurer from his cellular telephone after the murder. Dlamini was not able to identify to whom the call was made. At the trial, the State led the evidence of Kanti, a specialist in the law enforcement division of MTN. Kanti also produced relevant cell phone records.

[45] The following was established from Kanti's evidence. At 7:10:49 pm, on 13 May 2013, Treasurer placed a call to the appellant's cell phone. The call was routed to voicemail. The call's duration was 12 seconds. The call was placed shortly after the murder. This is important evidence, taken together with Dlamini's testimony as to what Treasurer said on the call. Given the immediacy of the call, the reference to the job having been completed, can only have referenced the murder. And if this was said on a call to the appellant, it plainly implicated the appellant in the plan to murder Dr Sewram. Treasurer would only make such a report to the appellant if the job was one given to Treasurer by the appellant. And that would suffice as a significant part of the mosaic of proof that the appellant had commissioned Treasurer to procure the murder of Dr Sewram. It would constitute Treasurer as the appellant's agent to agree with Dlamini and Nxumalo a plan to carry out the murder. Such a plan was agreed and implemented. Under the doctrine of common purpose, the murder would then be as much attributable to the appellant as it was to Dlamini, Nxumalo and Treasurer. The other construct that would also render the appellant guilty of murder arises if the appellant commissioned Treasurer to procure the murder of Dr Sewram, and Treasurer then did so, recruiting Nxumalo and Dlamini for this purpose.

[46] No doubt appreciating the significance of this evidence, the appellant sought to cast doubt on the reliability of the records produced by Kanti. In addition, it was submitted that the records do not establish that it was during the call to the appellant that Treasurer spoke the words reported by Dlamini.

[47] The following submissions were made on behalf of the appellant. First, the record of the call placed by Treasurer to the appellant's cell phone number reflected the suburb in which the call originated and terminated as being

Dunveria, and not Copesville. Dlamini had said that the call was made as they were driving past the Copesville police station. The record thus lacks reliability. Second, the duration of the call was 12 seconds. The voice message on appellant's phone was of longer duration, and hence no message of the kind reported by Dlamini could have been left. Third, the call records reflect that Treasurer made further calls and received one not long after the call placed by him to the appellant. The call received was 59 seconds, and one of the calls placed was 24 seconds, long enough to have spoken the words recalled by Dlamini. Fifth, Dlamini appears to have testified that Treasurer had a conversation, when instead the call record reflected that the call to the appellant went to voicemail. Sixth, the appellant in his testimony denied having received any voicemail from Treasurer. Cumulatively, so it was contended, the State had failed to prove beyond reasonable doubt that the words spoken by Treasurer in the car were addressed to the appellant.

[48] Two facts are incontestable on the evidence. First, Treasurer made a call and said the words 'the job was completed'. This was direct evidence, undisturbed by cross-examination. Second, Treasurer placed a call to the appellant's cell phone number, which went to voicemail. Does the evidence cast a reasonable doubt upon the likelihood that Treasurer spoke the words reported by Dlamini in the course of his call to the appellant?

[49] The evidence of Kanti does not support the proposition that the 12 second duration of the call was insufficient for Treasurer to have left a message containing the words reported by Dlamini. Kanti, under cross-examination, stated that the entry in the records reflecting the duration of the call is a time period after the voice prompt has ended and, to use his word, 'the ping' is heard. In other words, the duration of Treasurer's call to the appellant was 12 seconds after the voice prompt ended. Quite long enough for Treasurer to have left a voice message using the words 'the job was completed'. It does not matter that Treasurer might have miscalculated or was mistaken that the message would be recorded and left on voicemail.

[50] The appellant was extensively cross-examined on his cell phone records. The records showed that the appellant had contact with Treasurer on his cell phone 9 times in the course of 2012, and again on 3 April, 8 May and 13 May of 2013. The appellant's response was to dispute that he received a call or message from Treasurer on 13 May 2013 at 7:10 pm. This selective denial is adverse to the appellant. That Treasurer placed a call to the appellant on 13 May 2013 at 7:10:49 pm appears in the telephone records of both the appellant and Treasurer. It was not disputed before us by the appellant's counsel. The appellant's emphatic denial of the incriminating call from Treasurer on 13 May 2013, without any explanation or proof as to why the records were erroneous, is unconvincing. The denial is consistent with his recognition of the call's inculpatory relevance. The appellant was also unable to explain the extent of his numerous cell phone calls with Treasurer.

[51] Nor does careful attention to the cross-examination of Dlamini establish that he agreed that Treasurer had held a conversation with the person to whom he reported that the job was completed. When it was put to Dlamini in cross-examination whether the call made by Treasurer sounded like a conversation, Dlamini's answer, as we have observed was, 'I could not hear the other person who was responding'. If Dlamini could not hear another person, he could not know whether there was a conversation taking place. There was no guile in Dlamini's testimony.

[52] The records of Treasurer's cell phone do reflect that after he placed the call to the appellant, he received a call at 7:13 pm of a duration of 59 seconds; made a call at 7:28 pm of 5 seconds; and made a further call at 7:40 pm of 24 seconds. However, Dlamini's evidence was clear that it was Treasurer who made the call when he said the job was completed. This was not dealt with in Dlamini's cross-examination. This evidence renders the call received at 7:13 pm outside the bounds of consideration as being the call during which Treasurer reported the murder. Nor, as conceded by counsel for the appellant, was the second call of 5 seconds a likely contender.

[53] That leaves the last call at 7:40 pm. But this call is also not likely to have been the call when Treasurer spoke the words that Dlamini reported. First, Treasurer was driving Dlamini and Nxumalo back to an informal settlement, Masons, after the murder. Dlamini was specifically asked, under cross-examination, whether Treasurer made any other calls in the course of the journey, other than the one call to which Dlamini had testified. Dlamini's answer was 'no'. The phone record reflects that the first call, in the relevant time period, made by Treasurer was the call to the appellant at 7:10 pm.

[54] Second, the call Dlamini heard Treasurer making was at a point on the journey when they were passing the Copesville police station. The defence elicited from Dlamini that this police station was not far from the clinic at Masons, where Dlamini and Nxumalo were dropped off. Defence counsel estimated that to drive from the Copesville police station to the clinic at Masons would take 5 minutes. Dlamini could not confirm this, but did not deny it. This sequence of events, given that Dlamini witnessed Treasurer making but one call, and was dropped off shortly thereafter, renders it entirely improbable that a call Treasurer made at 7:40 pm was the call during which Treasurer reported the murder.

[55] There was a considerable amount of time and energy taken up during the trial seeking to understand why the record of the call placed by Treasurer to the appellant records Dunveria rather than Copesville as the originating base station from which the call was sent on the network. What is plain from the evidence of Kanti, the expert called by the State, is that the cell tower that relays the call depends upon where the signal is strongest at a particular time to connect to the base station. The density of the base stations within the cell network determines the coverage of each station which may vary from 0-3.5 kilometres. As a result, it was not possible to pinpoint the exact location of the caller. The network admits of too much variability to do so. This however does not cast doubt upon the reliability of the cell phone records that were produced in evidence. If anything, it is supportive, as it indicates proximity. Kanti explained how the cell phone records of Treasurer were extracted. These records were extensively utilised by the State and the appellant, leaving no

doubt as to the call made by Treasurer to the appellant, and the other calls made and received by Treasurer during the relevant time period.

[56] This analysis of the evidence affords proof, beyond reasonable doubt, that Treasurer phoned the appellant after the murder, en route to his dropping off Dlamini and Nxumalo. Dlamini heard what Treasurer said on the only call that Treasurer made in the course of the journey. On the evidence it was established, beyond reasonable doubt, that Treasurer's words, 'the job was completed', were said on the call Treasurer placed to the appellant's cell number.

[57] Once that is so, as we have explained, Treasurer's report to the appellant concerning the completion of 'the job' implicated the appellant in the murder. There is no way of understanding Treasurer's report other than to conclude that the appellant had mandated Treasurer to procure the murder of Dr Sewram. And Treasurer had done so. The extensive telephonic interactions between Treasurer and the appellant referred to above supports this. That being so, and if the other evidence adduced on behalf of the State supports that conclusion, then the appellant was guilty of the murder. Additionally, Treasurer's report to the appellant afforded evidence that Treasurer was the appellant's agent, and this made the appellant a party to the common purpose, with Dlamini, Nxumalo and Treasurer, to kill Dr Sewram. And under the doctrine of common purpose, the actions of those who carried out the murder are attributable to the appellant.

[58] The evidence of Dlamini does not stand alone. The murder of Dr Sewram was considered by the trial court in the light of the other actions that were taken against Dr Sewram before his murder. Certain of these actions form the basis of other crimes of which the appellant was convicted. We consider the evidence and the appeals relating to these counts below. What, however, cannot be disputed is that Dr Sewram was subjected, in the course of 2012, to a range of hostile actions, involving a variety of persons, that were orchestrated, intensified, and culminated in his murder.

[59] The chronology is as follows. As alluded to earlier, in December 2011, the appellant discovered what he feared was an adulterous affair that Dr Sewram and the appellant's wife had been conducting. On 13 February 2012, a charge of sexual assault was laid by Mariamma Kisten against Dr Sewram. Dr Sewram was charged with sexual assault. At his court appearance on 14 February 2012, the charge was withdrawn. On 21 February 2012, the appellant laid a charge of assault against Dr Sewram. The case was withdrawn against Dr Sewram in July 2012. On 21 August 2012, Sonali Sookraj laid a charge of sexual assault against Dr Sewram. Dr Sewram was arrested and charged. On 30 October 2012, the charge was withdrawn. On 24 October 2012, Dr Sewram, on exiting his surgery, was shot several times with a paintball gun, utilising hard objects, and sustained certain injuries. On 13 May 2013, Dr Sewram was murdered outside his surgery.

[60] Sugen Naidoo was the State's principal witness. Sugen Naidoo, the self-confessed drug addict, liar and extortionist, gave evidence that the appellant had, over the course of 2012, sought his assistance to orchestrate a campaign against Dr Sewram to denigrate him and ultimately cause him to leave Pietermaritzburg. These efforts are constituted by the offences with which the appellant was charged. The appellant had become obsessed with taking revenge upon Dr Sewram for the damage he had caused to the appellant's marriage. We were warned, correctly, by the appellant's counsel that we should treat the evidence of Sugen Naidoo with caution. And we do so.

[61] One further aspect of Sugen Naidoo's evidence warrants mention. He testified that in 2012 the appellant had asked him whether he knew Treasurer. Sugen Naidoo informed the appellant that Treasurer was an ex-policeman and a known criminal. The appellant informed Sugen Naidoo that he had approached Treasurer to kill Dr Sewram for an amount of R80 000. The appellant sought the assistance of Sugen Naidoo to act as Treasurer's driver. Sugen Naidoo declined to assist. Given that Treasurer did indeed procure the murder of Dr Sewram, it begs the question as to how Sugen Naidoo would have known in advance of the plan to use Treasurer for this purpose, save from the appellant. He could also not have known of the extensive telephonic contact

between the two. Furthermore, Sugen Naidoo did not procure the services of Treasurer, Nxumalo or Dlamini to murder Dr Sewram. How then did Treasurer come to arrange the murder? Sugen Naidoo's evidence provides an answer to these questions. The appellant's evidence does not.

[62] But there remains the overarching question. How did it come to pass that Dr Sewram, in the course of 2012, suffered the hostile actions catalogued above? It was certainly not a matter of chance or bad luck. These were deliberate actions taken against him. One answer is the account offered by Sugen Naidoo: Dr Sewram was targeted by the appellant. The other answer, given by the appellant, is that Sugen Naidoo orchestrated the sexual assault charges and the paintball attack so as to extort money from the appellant.

[63] The answer of the appellant is hard to fathom. True enough Sugen Naidoo knew of the appellant's marital troubles. The details of these troubles, provided by Sugen Naidoo, were not in contestation, and indeed, were corroborated by the appellant and other defence witnesses. It indicates that Sugen Naidoo was truthful about these being disclosed to him by the appellant, and a closer relationship that subsisted between Sugen Naidoo and the appellant than the appellant was willing to admit. We are constrained to ask how would the targeting of Dr Sewram, unbidden by the appellant, have permitted Sugen Naidoo to extort money from the appellant? Presumably, on the premise that Sugen Naidoo, a policeman assigned to the Mountain Rise police station, would use his position to cast suspicion upon the appellant for the actions taken against Dr Sewram. This premise is entirely implausible. Had Sugen Naidoo sought to take action against Dr Sewram, unbidden by the appellant, as a stratagem to extort money from the appellant, the appellant would simply have reported the matter to the police at Mountain Rise, with whom he was admittedly closely connected. Indeed, on the appellant's own version, he had a close friendship with Sugen Naidoo's wife, Chantal Norman, who was a senior police officer at Mountain Rise police station. Any attempt by Sugen Naidoo to extort money from the appellant would have simply been rebuffed by the appellant on the basis that there was absolutely no basis to implicate him in any wrongdoing against Dr Sewram. The usual premise for

extortion is either the complicity of the person to be extorted in wrongdoing or the ability of the extortionist to make it appear so. The appellant contended that he was not complicit in the actions taken against Dr Sewram. If that was so, Sugen Naidoo's efforts at extortion would have been short-lived. If Sugen Naidoo had attempted falsely to implicate the appellant in the actions against Dr Sewram, it would have been an easy matter for the appellant to show that he had no connection to Kisten or Sookraj, an aspect to which we will come.

[64] Nor does the appellant's reliance upon extortion by Sugen Naidoo cover the field of actions taken against Dr Sewram. One of those actions was the appellant's own complaint of assault against Dr Sewram. How would that place Sugen Naidoo in a position to extort money from the appellant? Nor does the appellant's incredulous supposition account for the murder of Dr Sewram. It also does not explain the efforts made by the appellant to incite Sithebe to murder Dr Sewram, the basis of count 6. This too, will be dealt with later.

[65] In sum, the appellant's account that the actions taken against Dr Sewram were occasioned by Sugen Naidoo's efforts to extort money from the appellant do not withstand scrutiny.

[66] In our view, once the appellant's account of the actions taken against Dr Sewram cannot be believed, as we ultimately find, then the only other account as to what befell Dr Sewram is the appellant's serial efforts, with a clear motive to harm Dr Sewram, and later to procure his murder.

[67] Furthermore, for all the caution that Sugen Naidoo's evidence warrants, there are material respects in which his essential position, that the appellant sought to procure persons to harm the appellant, was materially corroborated by a number of other witnesses and events with whom and with which he was not always or necessarily connected, as well as by objective evidence.

[68] First, Sugen Naidoo's brother-in-law, Morné Emersleben, gave evidence that he met the appellant when Emersleben was staying with Sugen Naidoo.

This occurred in May 2012. The appellant explained that Dr Sewram and the appellant's wife had been 'messing around', and Sugen Naidoo then asked whether Emersleben knew of someone who could assault Dr Sewram. The appellant explained that Dr Sewram had two surgeries, and that the surgery in Raisethorpe had no cameras. Although, Emersleben was extensively cross-examined, his attorney accepted that when Sugen Naidoo asked Emersleben about a person to assault Dr Sewram, the appellant was present. The appellant's presence, in these circumstances, supports the central premise of Sugen Naidoo's evidence against the appellant.

[69] Second, in the course of the cross-examination of Sugen Naidoo, the defence introduced into evidence the statement that had been taken from Warrant Officer Gounder who, in 2012, had served with Sugen Naidoo at the Mountain Rise police station. Sugen Naidoo testified that he had conceived of a plan, with the concurrence of the appellant, to plant drugs in Dr Sewram's vehicle, and upon refinement of the plan, in Dr Sewram's surgery, and then to arrest Dr Sewram for the illegal possession of drugs. Sugen Naidoo's evidence was that he had sought the assistance of Gounder and Warrant Officer G R Naidoo to carry out the plan. Sugen Naidoo did not go through with the plan. But Gounder's statement confirms that there was such a plan, and that the appellant undertook to pay the sum of R10 000 to have the plan executed as revenge for Dr Sewram having had an affair with the appellant's wife. Gounder was not called to testify, but the defence placed his statement into evidence, and must accept the consequences of that election.

[70] Third, the State called Shaik-Cassim. He too is a brother-in-law of Sugen Naidoo. Shaik-Cassim testified that, in June or July of 2012, the appellant and Sugen Naidoo came to his house. The appellant asked Shaik-Cassim whether he knew of someone who would break the hands and legs of Dr Sewram. Shaik-Cassim testified that he did, but that they were 'bad guys' who would end up killing Dr Sewram. To this, the appellant replied, 'do whatever it takes'. The appellant said that he had money for this purpose. He described the surgery and that it had no cameras. The appellant then left, and returned with R5 000.

He gave R1 200 to Shaik-Cassim to use to transport the proposed assailants from Durban, and the balance was given to Sugen Naidoo.

[71] Shaik-Cassim was strenuously cross-examined. It was pointed out to him that Sugen Naidoo's statement indicated that Sugen Naidoo first approached Shaik-Cassim about the proposed assault, at the instance of the appellant, before Sugen Naidoo, Shaik-Cassim and the appellant met at Shaik-Cassim's home, where the plan was further discussed. That difference is hardly of great moment. The evidence of Sugen Naidoo and Shaik-Cassim are at one that there was a meeting at Shaik-Cassim's home, where the planned assault upon Dr Sewram was agreed with the appellant.

[72] Much was also made of Shaik-Cassim's criminal history and involvement in dealing drugs. But on the central issue, Shaik-Cassim gave clear evidence. The appellant met with him and Sugen Naidoo to procure the assault of Dr Sewram. Although the appellant denied that this meeting took place, there is nothing to fault the trial court's assessment that Shaik-Cassim also confirmed the central account of Sugen Naidoo as to who was behind the attacks upon Dr Sewram. For all the attacks on the State's miscreant witnesses, by counsel on behalf of the appellant, one might rightly ask why they would all unnecessarily implicate themselves in wrongdoing by testifying against him.

[73] For these reasons, we find that there is no basis to disturb the conviction of the appellant for the murder of Dr Sewram, and the appeal accordingly fails in respect of count 1.

Count 6: conspiracy to commit murder, alternatively incitement to commit murder

[74] The State alleged that, in early February 2013, the appellant hired Mlungisi Sithebe to kill Dr Sewram. Sithebe pretended to agree, but then informed Dr Sewram of the plan to kill him. In the alternative, the appellant unlawfully and intentionally incited Sithebe to murder Dr Sewram. The trial court found that the appellant and Sithebe did conspire to kill Dr Sewram. Sithebe's change of heart occurred after the agreement to murder Dr Sewram had taken

place. On this basis, the trial court convicted the appellant on the main count of conspiracy. The appellant appeals his conviction to this Court.

[75] At the trial, Sithebe's evidence was led and cross-examined. That took place in the period 28-30 September 2015. The cross-examination of Sithebe was detailed and lengthy. On 19 October 2015, the prosecution raised with the court a video that Sithebe had taken and that the prosecution wished to have admitted into evidence. Sithebe had referenced the video in his evidence-in-chief, but the State had not sought to admit the video into evidence. In chief, Sithebe stated that the video had been made on the second occasion that the appellant had pointed out Dr Sewram's surgeries to him. The defence placed in issue the admissibility of the video, in particular its originality and authenticity, and also the requirement that the prosecution prove the identity of the speakers on the video.

[76] The trial court decided, perhaps unwisely, that these matters were to be determined in what was styled a trial-within-a-trial. Sithebe was recalled. He testified that he had recorded a video on his cell phone on 20 February 2013, during a journey he had taken with the appellant. The video, he testified, recorded a conversation between Sithebe and the appellant near Dr Sewram's surgery. The conversation ended with the following statement made by the appellant: 'take this number'. Sithebe explained that the appellant was referencing the number of Dr Sewram's surgery, which the appellant had indicated Sithebe should telephone.

[77] A lengthy cross-examination followed, in which the defence raised the following issues with Sithebe: when the video was taken; how it was taken; the phone calls made by Sithebe to Dr Sewram and the appellant on 20 February 2013; that Sithebe placed the cell phone, on which the video was recorded, with the pawnbrokers, Cash Crusaders; Sithebe's prior statements to the police; and what was said on the video.

[78] At the conclusion of the trial-within-a-trial, the trial judge explained her understanding of the procedure she had adopted. The trial judge indicated that

she would give a ruling as to the admissibility of the video evidence, and depending on the ruling, the veracity of the contents of the video could then be traversed. The trial judge, in due course, made the following rulings. First, the video was admitted into evidence. Second, the evidence produced in the course of the trial-within-a-trial was incorporated as evidence in the main trial. Third, leave was given to the defence to recall Sithebe, Sugen Naidoo and Kisten for further cross-examination.

[79] The trial court carefully delineated the issues in respect of which further cross-examination would be permitted. In respect of Sithebe, these were issues not previously canvassed in cross-examination. The entitlement of the defence to cross-examine Sithebe further was circumscribed and confined to the following: the veracity and reliability of the video recording; the context in which the video recording was made; the contents of the video recording as it was relevant to such context; the contents of the video recording in relation to the evidence given by Sithebe at trial and in his two statements, to the extent not already canvassed; the contents of certain further particulars given by the State in respect of the video; and aspects pertaining to the date and time of the recording.

[80] Before Sithebe could be further cross-examined, he died. The defence submitted to the trial court that the incomplete cross-examination of Sithebe required that all of Sithebe's evidence must be excluded from consideration. This, it was argued, was the necessary consequence of the recognition by the trial court of the appellant's constitutional right to challenge the evidence produced by the State at trial, which right could no longer be fully exercised in respect of the testimony of Sithebe. The trial court, referencing a number of cases that have considered this issue, found that, given the extent of the cross-examination of Sithebe that had already taken place, the inability further to cross-examine Sithebe occasioned no prejudice to the appellant and did not violate his right to a fair trial. Consequently, the evidence of Sithebe and the video evidence were not excluded from consideration by the trial court. Indeed, it provided the basis for the appellant's conviction in respect of count 6.

[81] On behalf of the appellant, it was submitted to this Court that the trial court's failure to accord the appellant his constitutional rights was an error, and that all the evidence of Sithebe should have been excluded. And with it, the appellant's conviction in respect of count 6.

[82] The appellant enjoyed the right to challenge evidence. This right formed part of the appellant's overarching right to a fair trial, entrenched in the Bill of Rights in terms of s 35(3)*(i)* of the Constitution. Under our adversarial system of criminal justice, the right to challenge evidence includes the right of the accused in a criminal trial to cross-examine the witnesses whose evidence is led by the State. This is uncontroversial.

[83] Difficulties arise when a witness who has given evidence is no longer available for cross-examination, or, as here, cannot complete their cross-examination. In a number of decisions, the high courts have had occasion to consider these matters.[2] Two approaches have found support. First, the exclusion of evidence should depend upon the exercise of a discretion by the trial court. The discretion is responsive to various case-specific considerations. How truncated was the right to cross-examine? What is the nature of the evidence? Is the evidence to be admitted reliable and otherwise confirmed? These considerations are by no means exhaustive. The second approach is that the right to challenge evidence is a fundamental right. It is not a right of degree. If the right is infringed, the better view is that the evidence should be excluded. The adoption of a discretion fails to accord proper recognition to the right as fundamental to the fairness of the trial. A discretion of this kind also gives rise to considerable indeterminacy as to how it is exercised. Better then, simply to exclude the evidence.

[84] The correct starting point for the analysis is the recognition that an accused has the right to cross-examine those witnesses whose evidence is relied upon by the prosecution. Where that right cannot be exercised, or cannot be exercised in full, the court has a duty to ensure that the trial remains fair. To

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[2] *S v Motlabane and Others* 1995 (8) BCLR 951 (B); *S v Khumalo* [2012] ZAGPJHC 141 (GP); *S v Msimango and Another* 2010 (1) SACR 544 (GSJ).

do so, the trial court should not engage in conjecture as to what the cross-examination would have been likely to yield. That is speculative. Once a body of evidence cannot be cross-examined or cross-examined fully, the safest course, to ensure the fairness of the trial, is to disregard that evidence, because the right to challenge evidence is so intrinsic to what makes a trial fair. It matters not that the impossibility of cross-examination is not attributable to the fault of any person. It is the fact of impossibility that renders the right nugatory.

[85] The clearest case is one in which the witness called by the prosecution gives evidence-in-chief, but then cannot be cross-examined. The accused is deprived of the right to cross-examine. That is the deprivation of a fundamental right. The only question is this: what remedy should the court provide to the accused? In this situation, the remedy will ordinarily be self-evident: the evidence must be excluded from consideration by the trial court.

[86] In the present case, a more nuanced issue arises. To what evidence does the right of the appellant have application? As we have observed, Sithebe died after the trial court had made an order that he was to be recalled. However, his recall was to permit of further cross-examination within a specified remit. The defence was permitted to cross-examine Sithebe exclusively with regard to the video evidence that had been admitted into evidence. It will be recalled that Sithebe had already been extensively cross-examined in respect of all his other evidence. And even in respect of the video evidence, the trial court ruled that the evidence yielded from the trial-within-a-trial was admitted as evidence in the main case. Much of that testimony was taken up with the cross-examination of Sithebe, and it was not confined to issues of authenticity and reliability of the video.

[87] The appellant does not challenge the order made by the trial court as to the remit within which the cross-examination of Sithebe was to take place, upon his recall. Once that is so, the appellant's right to cross-examine was circumscribed. The right was only capable of being exercised in respect of the contents of the video: what it depicted, when it was made, what was said, the true import of that speech, and its bearing upon other testimony and statements

given by Sithebe. What the order of the trial court did not sanction was a re-visitation of other aspects of Sithebe's evidence. Put simply, whatever latitude might have been allowed to the appellant or his counsel, the cross-examination had to have relevance to the contents of the video.

[88] Once that is so, the right of the appellant went no further than to cross-examine Sithebe, upon his recall, as to the contents of the video. It was the potentially damaging contents of the video, upon its admission into evidence, that led the trial judge to permit of the further cross-examination of Sithebe. The right afforded to the appellant was an opportunity, by way of cross-examination, to negate the contents of the video. That is what the trial court ordered, in fairness, to the appellant. But if the video is excluded from the evidence, then the appellant suffers no infringement of his right, because the right was never of application outside the contents of the video. And since the exclusion of the video evidence eliminates any damaging evidence recorded on the video, nothing more is required to be fair to the appellant. The fullest exercise of his right could never have achieved more than what is secured by the exclusion of the video evidence.

[89] The exclusion of all of Sithebe's evidence as a consequence of the appellant's inability to cross-examine Sithebe on the contents of the video would constitute a remedy entirely disproportionate to the right that the appellant had foregone. There was a substantial body of evidence given by Sithebe that had been thoroughly cross-examined. There is no reason why this evidence should not be allowed to stand simply because the right to cross-examine Sithebe on the contents of the video could not be exercised. Wholesale exclusion would be a remedy lacking rational justification. It would want for proportionality. And such a remedy would not make the trial any fairer to the appellant in comparison to the remedy we consider appropriate to the right foregone – the exclusion of the video evidence.

[90] In sum, our approach recognises that the right to cross-examine is a fundamental right, and, if it cannot be exercised, the court must fashion a remedy that secures the fairness of the trial. What this requires is an

appropriate remedy that cures the absence of the right to cross-examine. A remedy is not appropriate if it lacks proportionality or rational justification. The remedy flows from the right, and the recognition of the right as fundamental to our constitutional commitment to a fair trial.

[91] So understood, we do not favour the position that would repose a discretion in the trial court to weigh the probative value of the evidence that has not been subjected to cross-examination against the prejudice to the accused that arises from the absence of the right to cross-examine. Such a test, redolent of many common law regimes for deciding whether to exclude evidence, fails, in our view, to recognise the constitutional significance of a right that is intrinsic to a fair trial. The absence of the right to cross-examine is not measured by a cost-benefit analysis as to who gains or loses, and by how much. Rather, if an accused cannot enjoy a right that is fundamental to the fairness of the trial, the court must restore the fairness of the trial. That is not done by attaching weight to the probative value of the evidence and engaging in conjecture as to what difference the cross-examination might have made.

[92] The trial court did not follow this approach. Rather, it admitted the video evidence and relied upon it, because the trial court considered the video evidence to have probative value. In particular, the trial court found that the video evidence corroborated Sithebe's other evidence. And it was not thought to be prejudicial. For the reasons given, this is not the correct way to determine the remedial consequences of the appellant's inability further to cross-examine Sithebe.

[93] Rather, given that the appellant's right to cross-examine concerned the contents of the video, the loss of this right required that only the video be excluded from the evidence at trial. Such a remedy restores the fairness of the trial, because the appellant does not suffer the detriment of the video evidence that the further cross-examination was intended to test. The remedy is proportionate, because it is bounded by the remit of the order that gave rise to the right. The remedy is also just, because it leaves in place the evidence that was subject to the very fullest cross-examination. We accordingly find that the

trial court fell into error in failing to rule that the video evidence must be excluded.

[94] Once that is so, our analysis turns to the evidence of Sithebe, shorn only of the video evidence. The trial court found that the appellant and Sithebe conspired to kill Dr Sewram. It was submitted, on behalf of the appellant, that the evidence of Sithebe did not support the appellant's conviction. The crime of conspiracy required that the appellant and Sithebe reached an agreement to kill Dr Sewram.[3] No such agreement, so it was contended, took place.

[95] There is merit in this submission. Sithebe's evidence was that on the first occasion he met with the appellant, the appellant had sought to persuade Sithebe to scare Dr Sewram, for which he would be paid R100 000. On the second occasion, what the appellant wanted of Sithebe went further. He wanted Sithebe to kill Dr Sewram. Sithebe certainly gave consideration to the matter, and was much tempted by the offer of R100 000. But Sithebe's evidence does not indicate that he, at any point, agreed to the appellant's proposal. Indeed, on his account, his religious scruples prevailed, and he went to inform Dr Sewram that the appellant had sought to recruit him to kill Dr Sewram. The trial court found that Sithebe had agreed to assist the appellant before his change of heart. But in our view, Sithebe was equivocal as to the appellant's proposal and never reached a definite agreement with the appellant. That being so, the appellant's conviction on the charge of conspiracy cannot stand.

[96] The appellant was charged, in the alternative, with incitement to commit murder. The question is whether the evidence at trial supports a conviction on this charge?

[97] Section 18(2) of the Riotous Assemblies Act 17 of 1956 renders a person who incites, instigates, commands or procures any other person to commit any offence guilty of an offence, liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable. The key

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[3] *S v Sibuyi* 1993 1 SACR 235 (A) at 249E.

feature of the offence of incitement, for present purposes, is that the person charged with incitement, 'seeks to influence the mind of another to the commission of a crime'.[4] It matters not whether the person sought to be influenced is susceptible to such influence.

[98] Sithebe testified that the appellant had in February 2013 collected Sithebe and driven him to point out Dr Sewram's surgeries. During this journey, the appellant asked of Sithebe whether he would be able to procure a firearm to kill Dr Sewram, who, the appellant had previously explained, had been in a relationship with the appellant's wife. The appellant pointed out which of the surgeries had no cameras. The appellant promised to pay R100 000, if Sithebe would kill Dr Sewram. According to Sithebe, the appellant withdrew money from an ATM, and gave him R3 000 to procure an unlicensed firearm. Sithebe was not ultimately persuaded to agree with the appellant to kill Dr Sewram. Indeed, troubled by his conscience, he went to Dr Sewram's surgery and informed him of the appellant's plan to have him killed. Sithebe telephoned the appellant and claimed to have shot Dr Sewram. The appellant sought to obtain confirmation of this, and ultimately realised that Dr Sewram had not been shot. The appellant nevertheless sought to have Sithebe kill Dr Sewram whilst the appellant was overseas. Sithebe reported the matter to the police.

[99] The appellant denied that he had incited Sithebe to murder Dr Sewram. He acknowledged meeting with Sithebe in February 2013. The meeting was, he testified, to arrange for certain guarding services for premises owned by the appellant. He explained that he had encountered problems with the services rendered by the incumbent service provider, Tiger Force, and discussed with Sithebe that Enviro Watch would take over the guarding service. Sithebe worked for Enviro Watch. This was the basis of the appellant's meeting with Sithebe in February 2013, and also of the calls that passed between the two on 20 February 2013. The call records also showed that the appellant and Sithebe were in contact on 6 occasions on 10 March 2013, and yet further calls were made in the period of 22-23 March 2013. The appellant testified that these calls

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[4] *S v Nkosiyana* 1966 (4) SA 655 (A) at 658-9.

and the subsequent meetings with Sithebe concerned a break-in and theft that had taken place at the appellant's premises in Mkondeni. These were the premises that Sithebe had secured a contract to protect. The appellant suspected Sithebe of some complicity in the theft.

[100] There can be no doubt that if Sithebe's evidence is accepted, the appellant is guilty of the incitement of Sithebe to murder Dr Sewram. The appellant, on Sithebe's evidence, plainly sought to influence Sithebe to murder Dr Sewram. The appellant expressed his wishes plainly. He made provision for Sithebe to purchase a firearm. He pointed out to Sithebe the whereabouts of the two surgeries. And he offered Sithebe a large reward once the murder had taken place. That is incitement beyond reasonable doubt.

[101] The trial court found that, quite apart from video evidence, the appellant's version fell to be rejected. The conflicting versions of Sithebe and the appellant must be considered by recourse to the following evidence. On 20 February 2013, apart from the calls that took place between the appellant and Sithebe, Sithebe's phone records reflect the fact that Sithebe phoned the two surgeries of Dr Sewram. That is entirely consistent with Sithebe's evidence that he sought out Dr Sewram, after his journey with the appellant, to warn him of the appellant's murderous plans.

[102] Why, it may be asked, would Sithebe have telephoned the surgeries of Dr Sewram on the very day in February that the appellant admits that he met with Sithebe? Sithebe had no prior connection to Dr Sewram. If the February meeting was simply concerned with a security guarding contract, what would explain Sithebe's conduct in phoning Dr Sewram. Nor was it ever suggested that Sugen Naidoo knew of or was in any way connected to Sithebe.

[103] In the cross-examination of Sithebe it was suggested that Sithebe was in contact with Dr Sewram, because Dr Sewram and Sithebe were conspiring together to kill the appellant. There was simply no basis for this claim. Sithebe did not know of Dr Sewram. Sithebe's telephone records show no calls to Dr Sewram prior to 20 February 2013. If Dr Sewram wished to conspire to kill

the appellant, there is simply no showing as to how he knew Sithebe. Dr Sewram's conspiracy theory is entirely fanciful and unsubstantiated.

[104] Once that is so, as the trial court found, Sithebe's account is confirmed in a material respect by Sugen Niadoo and the other witnesses referred to above, more particularly in that the appellant wished the deceased harm, on the basis of his wife's infidelity with Dr Sewram. The appellant's version cannot explain Sithebe's call to the surgeries and falls to be rejected. The timing of the appellant's approach to Sithebe is also significant. It occurred many months after the appellant supposedly made peace with the deceased and their agreement to put their past discord behind them. This was the evidence of the appellant in his statement in terms of s 115(1) of the Criminal Procedure Act and also at the trial. The approach made to Sithebe and the ongoing criminal acts planned and taken against Dr Sewram are indicative of an ongoing vendetta undertaken by the appellant. This lends a lie to the lasting accord that was supposedly concluded.

[105] In the result, while the appellant's conviction on the charge of conspiracy to murder must be set aside, the appellant is guilty of the alternative charge of incitement to murder Dr Sewram.

Count 2: defeating or obstructing the course of justice

[106] The trial court convicted the appellant of obstructing the course of justice in that, on 13 February 2012, he enlisted the assistance of Mariamma Kisten to lay a false complaint of sexual assault against Dr Sewram, knowing the complaint to be false.

[107] It is common ground that Kisten did make a complaint of sexual assault against Dr Sewram; a docket was opened; the complaint was false; and Kisten did so for the payment of money. The trial court, applying the required caution to the evidence of both Kisten and Sugen Naidoo, found their evidence to be truthful, thereby implicating the appellant as the person who knowingly procured the false charge against Dr Sewram.

[108] The appellant contended before this Court that the trial court should not have found Kisten and Sugen Naidoo to be truthful witnesses. In addition, the link between Kisten and Sugen Naidoo, and hence the appellant, was Daryl Gounder. Gounder was not called by the State, and hence the State had failed to prove that Gounder had received instructions, ultimately from the appellant, to procure Kisten to lay the false charge.

[109] Kisten's evidence was that Gounder sought her assistance to lay the false charge of sexual assault against Dr Sewram. Gounder indicated that he did so to assist a friend whom he did not identify. Sugen Naidoo's evidence was that the appellant had come up with the plan to lay a false charge of sexual assault against Dr Sewram. Sugen Naidoo had asked Gounder to find the person to do so. Gounder did so. But Sugen Naidoo confirmed that the appellant and Gounder did not communicate in carrying out the appellant's plan. It must accordingly be accepted that it is Sugen Naidoo alone who was in a position to identify the appellant as the person at whose instance the false charge came to be laid.

[110] The question is whether Sugen Naidoo's evidence sufficed for this purpose. That Kisten laid a false complaint of sexual assault against Dr Sewram is beyond doubt. That she did so at the instance of another and for reward is also clear. Sugen Naidoo's testimony was that the appellant initiated the plan to have a false complaint of sexual abuse laid against Dr Sewram, mandated him to execute the plan, and provided the money to do so. This was but one action taken by the appellant in an orchestrated campaign against Dr Sewram.

[111] Who then had reason to target Dr Sewram by causing Kisten to act as she did? We have, in considering the murder charge against the appellant, already assessed the two accounts offered at trial as to how it came about that Dr Sewram suffered serial adverse actions, culminating in his murder. Either, as Sugen Naidoo testified, this resulted from the efforts of the appellant to take revenge against Dr Sewram for the infidelity with the appellant's wife. Or, Sugen Naidoo targeted Dr Sewram to extort money from the appellant. But, for reasons we have already set out above, this latter account is so lacking in

evidential support or coherence that it can safely be rejected. Once that is so, it leaves intact the explanation provided by Sugen Naidoo.

[112] We were reminded by counsel for the appellant of the caution with which Sugen Naidoo's evidence should be approached. And we do so. In addition, a number of inconsistencies in the evidence of Kisten were pointed out to us. Kisten gave different accounts of the money she was paid and who persuaded her to accept Gounder's proposal. Kisten was also asked as to how her complaint could ever have sufficed for the purpose of charging Dr Sewram, given its evident ambiguity. Indeed, the charge was dropped.

[113] But, as with the trial court, we do not consider the criticisms of the evidence to be of such moment so as to discredit the central feature of Kisten's testimony: that she was paid to lay a false complaint of sexual abuse. And in answering the crucial question as to who stood behind what Kisten did, here too there is insufficient reason to deflect from the conclusion that this person was the appellant. The appellant had reason to do so. There is a considerable body of evidence that the false charge laid by Kisten formed part of an orchestrated pattern of action taken by the appellant. And finally, the alternative account of the appellant as to how the false complaint may have come about falls to be rejected.

[114] For these reasons, we find no basis to interfere with the conviction of the appellant in respect of count 2.

Count 3: defeating or obstructing the course of justice

[115] The trial court convicted the appellant of unlawfully and intentionally obstructing the course of justice by laying a false complaint of assault with the police against Dr Sewram, knowing that the complaint was false.

[116] Here too, it was common ground that the appellant laid the charge with the police. The central issue was whether the assault had taken place. The appellant gave evidence that he was assaulted by Dr Sewram. Sugen Naidoo

contended that it was a fabrication. The trial court found that the probabilities favoured the assault being a fabrication.

[117] Two aspects of the evidence warrant careful consideration. First, unlike other aspects of Sugen Naidoo's testimony, where he remained steadfast as to the appellant's complicity in pursuing a campaign against Dr Sewram, here he conceded under cross-examination that 'the possibility exists that the assault could have taken place – it could have'.

[118] Second, the witness statement of Mr Roshan Jayinath, a friend of the appellant, admitted into evidence at trial by consent, stated that he was travelling with the appellant in his car on 18 February 2012. The car was stationary in the traffic, when, according to Jayinath, Dr Sewram jumped out of his vehicle, which had drawn up alongside them, and slapped the appellant's face.

[119] In relation to this count, the appellant is entitled to the benefit of the doubt. As a result, the appellant's conviction cannot stand on count 3.

Count 4: defeating or obstructing the course of justice

[120] The appellant was charged with obstructing the course of justice, in that he procured Sonali Sookraj to lay a false complaint of sexual assault against Dr Sewram, knowing that the complaint was false. The trial court convicted the appellant on this count. The trial court found that Sookraj's evidence confirmed Sugen Naidoo's account that the appellant was behind the plan to target Dr Sewram with a further complaint of sexual assault. The trial court was satisfied that Sookraj had identified the appellant as being present on the day when she agreed to lay the false complaint against Dr Sewram.

[121] Before this Court, counsel for the appellant submitted that the conviction was predicated upon several misdirections. First, no evidence was led at trial of Zaheer Khan, Sookraj's step-father, who was said to have played a central role in persuading Sookraj to lay the complaint. Reliance on the hearsay evidence of Sookraj as to what Khan had said was inadmissible. Such

evidence, so it was argued, was not admissible under the exception to the hearsay rule in respect of the executive statements of co-conspirators. Second, the cross-examination of Sookraj established definitively that she was not in a position to identify that the appellant was present, after Khan had persuaded Sookraj to lay the false complaint. Third, the trial court placed too much reliance on the respects in which Sookraj corroborated Sugen Naidoo's evidence, but discounted the contradictions in their respective testimonies.

[122] As with count 2, Sookraj did lay a false complaint against Dr Sewram. The question is whether she did so at the instance of the appellant. Sookraj gave evidence that on 21 August 2012 she was working at her step-father's tuck shop. Her step-father, Khan, came to her and asked her to lay a false complaint of sexual assault against Dr Sewram. She agreed to do so. During her evidence-in-chief, Sookraj said that her step-father then jumped into a vehicle, a white double-cab, in which two other men were seated, one of whom she identified as being the appellant. Khan returned, explained to Sookraj what she was to do, and drove her to Dr Sewram's surgery.

[123] The cross-examination of Sookraj, understandably, devoted much attention to her identification of the appellant. The defence produced a dossier of photographs, taken by the defence team, of the tuck shop and the area in front of the tuck shop where the double-cab would have been parked. Sookraj was asked to mark on one of the photographs where the double-cab had parked. Defence counsel explored with Sookraj her line of sight from within the tuck shop to the parked vehicle. Although the questioning sought to elicit from Sookraj that her line of sight to the vehicle was compromised, Sookraj was adamant that she had a clear view of the double-cab and its occupants.

[124] The appellant submitted before this Court that the photographs shown to Sookraj prove that Sookraj could not have seen the face of the driver of the double-cab. That is not so. Sookraj was asked to consider photographs 1, 4 and 5. Sookraj explained that the large windows at the front of the tuck shop were open and she had an unimpeded view. It was put to Sookraj that there was something of a downward inclination from the tuck shop to the road in

which the vehicle was parked, and that distance was 12 meters, as marked on photograph 5. However, Mr Sangham, the appellant's attorney who conducted the cross-examination, had earlier stated that the distance was 4 meters. Sookraj accepted that the double-cab was parked in the road outside of the tuckshop, with the left side of the vehicle in her line of sight. She stated that the window of the double-cab was rolled down, and that she had a clear view.

[125] A careful consideration of the evidence does not establish that Sookraj could not have identified the appellant in the double-cab. There was no inspection *in loco* to determine in fact what was visible from the tuck shop. The distances depicted on the photographs were not verified. Indeed, the defence's own estimates of the distance from the tuck shop to the vehicle were at odds. Sookraj was unshaken as to what she saw. She had an unimpeded view from her standing position in the tuck shop to the double-cab, with its window open. We can find no error on the part of the trial court in accepting Sookraj's identification of the appellant as being seated in the double-cab when Khan got into the vehicle. It was common ground that the appellant owned a white double-cab.

[126] This finding has important consequences. First, it entirely undermines the appellant's evidence that he had nothing to do with the false charge laid against Dr Sewram. Second, it corroborates Sugen Naidoo's evidence that Khan was hired at the instance of the appellant, in the first place to assault Dr Sewram, but, as the plan evolved, to persuade Sookraj to lay the false complaint of sexual assault. Third, the identification of the appellant at the very place and time when Khan persuaded Sookraj to go along with the false complaint renders the appellant's account unworthy of belief, both as to his lack of involvement and his explanation that the complaint was initiated by Sugen Naidoo so as to extort money from him.

[127] Nor is the appellant's complaint that no reliance may be placed on what Khan is reported to have said to Sookraj of any moment. There is no dispute that Sookraj agreed to make the complaint upon the request of her step-father. In any event, that Khan made the request is not hearsay evidence. That a

statement was made is admissible, it is the truth of the statement that is subject to hearsay objection. And finally, the defence cross-examined Sookraj on what Khan had said to her. The defence can hardly object to evidence as hearsay that it has elicited.

[128] The appellant also raised points of contradiction between the evidence of Sugen Naidoo and Sookraj. These contradictions reference when the false complaint was laid and whether a meeting had taken place between the appellant, Sugen Naidoo, Khan, Sookraj and her mother to discuss the making of a false charge. Allowing for these contradictions does not negate the force of what Sookraj's evidence does corroborate. In particular, that Khan persuaded Sookraj to lay the complaint, and that the appellant was involved in having Khan do so. Why else was the appellant in the double-cab with Sugen Naidoo and Khan on that very day?

[129] Nor are the internal inconsistencies in the evidence of Sugen Naidoo of sufficient import to undermine the central account given by him, that is, that the plan to target Dr Sewram with the false complaint of sexual assault was undertaken with the full involvement of the appellant, so as to satisfy his desire for revenge. The issues raised in cross-examination, as to when Sugen Naidoo first met Khan, and how much Khan was paid, do not cast serious doubt on the convergence of evidence that explains how Khan came to recruit his step-daughter in a plan to target Dr Sewram, and with what end in mind.

[130] For these reasons, we do not consider that the conviction of the appellant on this count was incorrect, and the appeal must fail.

Count 5: assault with intent to do grievous bodily harm

[131] The State charged the appellant with assault with intent to do grievous bodily harm. The basis of this charge was that the appellant hired assailants to shoot Dr Sewram with a high-powered paintball gun purchased by the appellant. On 24 October 2012, Dr Sewram was shot several times with this gun, using solid projectiles, and suffered certain injuries.

[132] The trial court gave detailed consideration to the evidence of Sugen Naidoo. Sugen Naidoo testified that the plan to shoot Dr Sewram with a paintball gun was conceived with the appellant. Sergeant Ricky Naidoo and Sergeant Maharaj were recruited to carry out the assault. Sugen Naidoo explained how he, the appellant, Ricky Naidoo and Maharaj undertook an expedition to buy the paintball gun and the paintballs. Ricky Naidoo and Maharaj then shot Dr Sewram. Sugen Naidoo was present at the police station, shortly after the assault, when Dr Sewram entered, 'totally disorientated and dazed and had red marks on his face and neck'. Dr Sewram laid a charge against the appellant. The trial court found that, although Sugen Naidoo was a single witness, upon a conspectus of the evidence, and in the light of the probabilities, the appellant was guilty of having orchestrated the assault.

[133] There is no doubt that Dr Sewram was assaulted on 24 October 2012. Sugen Naidoo implicated Ricky Naidoo, Maharaj and the appellant in the assault. There are two pieces of evidence, which the appellant submitted introduced a reasonable doubt, that should have been heeded by the trial court.

[134] First, the appellant's cell phone records reflected that on the day that Sugen Naidoo said that the appellant joined the expedition to buy the paintball gun in Pinetown, the appellant never left Pietermaritzburg. This evidence casts doubt on the testimony of Sugen Naidoo as a single accomplice witness.

[135] Second, Ricky Naidoo and Maharaj were not called to give evidence at the trial. Their witness statements were handed in by consent at the trial. These statements not only denied any involvement in the assault upon Dr Sewram, but recanted their earlier statements, which they claimed were obtained under duress.

[136] The witness statements of Ricky Naidoo and Maharaj were admitted into evidence at trial. There are many questions that arise from these statements. But their denial of complicity leaves the assault of Dr Sewram without an assailant. The appellant has an alibi for the expedition to purchase the paintball

gun. This evidence accordingly introduces a reasonable doubt as to the appellant's guilt. He is entitled to the benefit of that doubt.

[137] In the result, we find that the appellant's conviction cannot stand in respect of count 5, the appeal succeeds, and we hold that he is acquitted in respect of count 5.

Conclusion on the merits

[138] Our analysis yields the following result. The appeal succeeds in respect of the appellant's convictions on counts 3 and 5. The appellant is entitled to an acquittal on these counts. The appeal fails on the remaining counts, that is, counts 1, 2, and 4. On count 6, the appellant's conviction on the charge of conspiracy is set aside and the appellant is guilty of the alternative charge of incitement to murder.

[139] In coming to this conclusion, we return to the overarching question we posed at the outset: was the pattern of events directed against Dr Sewram the result of the appellant's orchestration, or does some other agency account for these sequential and interconnected outcomes?

[140] In our view, the evidence provides overwhelming proof that it was the appellant who sought and, in many instances brought about, the actions against Dr Sewram that culminated in his murder. First, numbers of witnesses independently confirmed the appellant's obsessive desire to take revenge upon Dr Sewram. Second, apart from the testimony of Sugen Naidoo, which required the application of the cautionary rules, the evidence of Gounder, Emersleben, Shaik-Cassim, and Sithebe and Sookraj directly implicated the appellant in securing that hostile actions be taken against Dr Sewram. Third, the call placed by Treasurer to the appellant and the chilling words 'the job was completed' incriminated the appellant in the murder of Dr Sewram. This was the final result of the co-ordinated actions taken by the appellant against Dr Sewram. That Sugen Naidoo testified to the appellant's discussions with him as to Treasurer's suitability to murder Dr Sewram, well in advance of the murder, provides further proof of the appellant's complicity in the murder. Fourth, as we have found, the

appellant's account as to what brought about the serial hostilities against Dr Sewram entirely lacks plausibility.

[141] Taken together, the evidence shows beyond reasonable doubt that the overarching question we posed must be answered thus: it was indeed the appellant who was responsible for the pattern of actions taken against Dr Sewram. This answer provides further support for the convictions that have been sustained on appeal.

Sentence

[142] What remains for consideration are the sentences imposed on the appellant by the trial court. The well-established triad,[5] namely the criminal, the crime and the interests of the community, are relevant in determining an appropriate sentence.

[143] Section 51(1) of the Criminal Law Amendment Act 105 of 1997 (CLAA) prescribes a minimum sentence on count 1 of life imprisonment. However, s 51(3) of the CLAA provides that a lesser sentence may be imposed if the court is satisfied that substantial and compelling circumstances exist. The trial court referred to *S v Vilakazi* [2008] ZASCA 87; 2009 (1) SACR 552 (SCA), at para 15, where this Court dealt with the proper approach to determining whether there are substantial and compelling circumstances that warrant a deviation from the minimum sentence prescribed by the CLAA. This Court said that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is proportionate to the particular offence. In addition, in ultimately deciding whether substantial and compelling factors exist, one must look at the mitigating and aggravating factors, and consider the cumulative effect thereof.

[144] The trial court found that there were substantial and compelling circumstances and imposed a sentence of 25 years' imprisonment on count 1.

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[5] *S v Zinn* 1969 (2) SA 537 (A) at 537-540G.

On counts 2, 3 and 5, the appellant was sentenced to 18 months' imprisonment; on count 4, the appellant was sentenced to 2 years' imprisonment; and on count 6, he was sentenced to 5 years' imprisonment. Counts 2, 3, 4 and 5 were ordered to run concurrently with count 1. The appellant was thus sentenced to an effective 30 years' imprisonment.

[145] As mentioned earlier in the judgment on the merits, this Court has acquitted the appellant on counts 3 (defeating or obstructing the course of justice; and on count 5 (assault with intent to cause grievous bodily harm). On count 6, this Court has set aside the conviction of conspiracy to commit murder and the appellant has been found guilty of the alternative charge of incitement to murder Dr Sewram. It is necessary to consider the sentences imposed by the court a quo on the remainder of the counts, namely counts 1, 2, 4 and 6.

[146] In considering sentencing, this Court's powers are limited. This Court cannot usurp the sentencing discretion of the trial court. In *S v Bogaards* [2012] ZACC 23; 2012 BCLR 1261 (CC), the Constitutional Court held:

'Ordinarily, sentencing is within the discretion of the trial court. An appellate court's power to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it. A court of appeal can also impose a different sentence when it sets aside a conviction in relation to one charge and convicts the accused of another.'

[147] The main submissions put forward on behalf of the appellant are that the sentence of 25 years' imprisonment is shockingly inappropriate, and that the period the appellant has served, namely 18 months of that sentence while awaiting this appeal, should be taken into account.

[148] The appellant did not testify in mitigation of sentence in the trial court, but through his legal representatives made submissions which the court considered. The trial court considered the personal circumstances of the appellant in great detail, his upbringing, and his family history. To have a complete and balanced picture, the trial court also took into account the reports

of expert witnesses, and importantly the impact and effect of the crimes on the deceased's family, the nature of the crime, the seriousness of the offences, their cumulative effect and the interests of society, including the possibility of rehabilitation. Accordingly, the trial court took the following into account. The appellant was 42 years of age at the time of sentencing and he was a first offender. He was a useful member of society and an accomplished businessman. He had grown up in a staunchly conservative Hindu family. The appellant suffered from poor health, and was diagnosed with hypertension and a non-occlusive coronary disease. He also suffered from depression. He had been married for eleven years until the marriage between him and his wife ended in divorce. Even though, in terms of the divorce agreement of settlement, Mr and Mrs Soni were declared co-holders of parental rights and responsibilities in regard to the two children born of the marriage, the divorce was settled giving recognition to the appellant being the primary caregiver of his daughter. Both minor children were financially depended on him. He was also a community orientated person contributing to charities and feeding schemes.

[149] In deciding on an appropriate sentence on count 1, it is important to bear in mind that the appellant persisted on exacting revenge on the deceased and ultimately conspired with and embarked on a campaign to kill the deceased, and which resulted in the cold-blooded murder of the deceased. Never once did he shrink back from a campaign involving a number of schemes, and ultimately procured the murder of the deceased through the hands of hired assassins. He embarked on this conduct over a period of time until he avenged the deceased's alleged affair with his wife, using corrupt policemen to do his bidding, and using money as a means to an end.

[150] After due consideration of all the facts and circumstances relevant to sentencing, in our view the sentence of 25 years' imprisonment imposed on count 1 by the trial court for the murder of Dr Sewram does not appear to be shockingly inappropriate. It is not disproportionate to the seriousness of the crime committed by the appellant. It is an appropriate and salutary sentence which is balanced and fair, and which also takes into account the moral

indignation of the community. Consequently we find no reason to interfere with the sentence on count 1.

[151] The sentences imposed on the appellant with respect to counts 2 and 4 (defeating the course of justice) of 18 months' and 2 years' imprisonment respectively, in the circumstances of this case, do not appear to be excessive. On both counts a false complaint was laid against Dr Sewram at the instance of the appellant, in order to satisfy the appellant's desire to exact revenge on Dr Sewram. Thus, the sentence imposed by the court a quo on counts 2 and 4 appear to be appropriate and justified.

[152] In regard to count 6, this Court has found that the appellant is not guilty of the crime of conspiracy to kill Dr Sewram, but is guilty of the alternative charge of the incitement to murder Dr Sewram. The trial court imposed a sentence of 5 years' imprisonment on count 6. In the circumstances of this case, the appellant clearly sought to influence Sithebe to kill Dr Sewram. He offered Sithebe a large reward and pointed out the two surgeries of Dr Sewram. The conviction of the appellant on the alternate charge of incitement to murder Dr Sewram is no less grave than the trial court's conviction of the appellant on the conspiracy to murder Dr Sewram. Consequently, we consider a sentence of 5 years' imprisonment to be appropriate in respect of the conviction for the incitement to commit murder.

[153] Furthermore, in our view, given the circumstances under which the offences on counts 2, 4 and 6 occurred, they are all closely linked to count 1. All these offences form part of the scheme which the appellant embarked upon, carefully planned, and which ultimately culminated in the commission of the offence on count 1. In the light of the cumulative effect of the sentences imposed, the sentences on counts 2, 4 and 6 are to run concurrently with the sentence on count 1.

[154] It has been submitted on behalf of the appellant that this Court should take into account the period of imprisonment served by the appellant after his conviction and sentence by the trial court. The appellant was sentenced by the

trial court in October 2018. The relevant records in the Registrar's office indicate that the appellant was released on bail pending appeal by this court on 19 March 2020. The appellant has thus served approximately 17 months of the sentence imposed on him before his release on bail pending the outcome of the appeal. We are of the view that in such circumstances, it would be just and equitable for the appellant to receive credit for the period already served, and that this be taken into account in determining the effective sentence. In doing so, we are mindful of the loss that the deceased's family have suffered.

[155] The result is that the appellant is sentenced to an effective 23 years and 7 month's imprisonment, which period will run from the date of the further imprisonment of the appellant pursuant to this order.

[156] In the result, the following order is made: The appeal against convictions and sentences is upheld in part and dismissed in part, as follows:

1. The appeal against convictions and sentences is upheld in part and dismissed in part, as follows:

1.1 The appeal against the conviction and sentence on count 1 is dismissed;

1.2 The appeal against the convictions and sentences on counts 2 and 4 is dismissed;

1.3 The appeal against the convictions and sentences on counts 3 and 5 is upheld;

1.4 The appeal against the conviction on count 6 of conspiracy to murder is upheld, with the conviction substituted with the alternative count, namely, incitement to commit murder;

1.5 The appeal against sentence on count 6 is upheld to the extent reflected in the substituted order that appears hereunder;

1.6 The effective sentence is reduced to the extent reflected in the substituted order.

2. The order of the court below is substituted as follows:

'(a) In respect of count 1: Murder read with s 51(1) and Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997, the accused is found guilty;

(b) In respect of count 2: Defeating or obstructing the course of justice, the accused is found guilty;

(c) In respect of count 3: Defeating or obstructing the course of justice, the accused is acquitted;

(d) In respect of count 4: Defeating or obstructing the course of justice, the accused is found guilty;

(e) In respect of count 5: Assault with intent to do grievous bodily harm, the accused is acquitted;

(f) In respect of count 6: Conspiracy to commit murder, alternatively, incitement to murder, the accused is found guilty of incitement to murder;

(g) In respect of count 1, the accused is sentenced to 25 years' imprisonment;

(h) In respect of count 2, the accused is sentenced to 18 months' imprisonment;

(i) In respect of count 4, the accused is sentenced to 2 years' imprisonment;

(j) In respect of count 6, the accused is sentenced to 5 years' imprisonment;

(k) The sentences imposed on counts 2, 4 and 6 are to run concurrently with the sentence on count 1. The accused is sentenced to an effective 23 years' and 7 months' imprisonment.'

3. The sentence of 23 years and 7 months' imprisonment referred to in (k) above will run from the date of the further imprisonment of the appellant pursuant to this order.'

4. The National Commissioner for Correctional Services is directed to ensure that a social worker in the employ of the Department for Correctional Services visits the children of the accused, Mr Soni, regularly during his incarceration, and submits reports to the office of the National Commissioner as to whether the children are in need of care and protection as envisaged in section 150 of the Children's Act 38 of 2005 and, if so, to take the steps required by that provision.

5. The Department of Correctional Services is to give consideration to the recommendation in the report of Floss Mitchell relating to the manner in which contact visits between the accused and the minor children are to take place, and, where possible, to facilitate the assistance of a social worker during such visits.

6. The accused is declared unfit to be licenced for a firearm in terms of the provisions of the Firearms Control Act 60 of 2000.

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H SALDULKER

JUDGE OF APPEAL

_____

D UNTERHALTER

ACTING JUDGE OF APPEAL

Appearances:

For appellant:	M Hellens SC (with him J E Howse SC)
Instructed by:	Subash Maikoo & Associates Inc, Pietermaritzburg
	Honey Attorneys, Bloemfontein
For respondent:	J du Toit
Instructed by:	Director of Public Prosecutions, Pietermaritzburg
	Director of Public Prosecutions, Bloemfontein