IN THE REGIONAL COURT FOR THE REGIONAL DIVISION OF KWAZULU-NATAL

HELD AT DURBAN IN THE SCCC2 SITTING IN T COURT

CASE NO: 41 / 66 / 2019

IN THE MATTER BETWEEN:

THE STATE

And

MADODA MHLONGO	ACCUSED ONE
SIYABONGA MABHIDA	ACCUSED TWO
NTSIKELELO SHEZI	ACCUSED THREE

TRIAL WITHIN A TRIAL REASONS

---

[1] **INTRODUCTION**

At the commencement of the trial Advocate Mzelemu, on behalf of all three accused informed the court that there would be a challenge to the admissibility of the evidence gathered by the State pursuant to a section 252A police operation[1]. The court was advised that the prosecution and the defence would advise the court when in the State's delivery of the evidence it would be appropriate to stop the proceedings and move into a trial within a trial.

[2] The state had led the evidence of Terence Mhlongo, a former police officer who now owns and runs a security company which included the provision of a bodyguard service. During his evidence the court was advised that it would be an appropriate time to conduct the trial within a trial. Unfortunately, much of this earlier evidence has been repeated in the trial within a trial and in hindsight the trial within a trial should probably have commenced earlier.

[1] Section 252 A (6) If at any stage of the proceedings the question is raised whether evidence should be excluded in terms of subsection (3) the burden of proof to show, on a balance of probabilities, that the evidence is admissible, shall rest on the prosecution: Provided that the accused shall furnish the grounds on which the admissibility of the evidence is challenged: Provided further that if the accused is not represented the court shall raise the question of the admissibility of the evidence.

[3] Mindful of the warning of the learned judge Wallis AJA, as he then was, in Kotze where he stressed the importance of the court applying section 252 A (6) and (7) of the CPA to avoid the leading of irrelevant evidence this court brought both the section and the import of the learned judges views to the attention of the legal representatives of the State and the accused.

[4] Paraphrased the direction to other courts by the learned judge of appeal that was passed onto the legal representatives in this matter was;

> From [19] of the judgment, the magistrate must require the accused to furnish the grounds on which they challenge the admissibility of the evidence, as should be done in terms of the proviso to s 252A (6). This might focus attention on the pertinent matters in dispute and limit the lengthy examination and cross-examination over a number of days of witnesses, as well as obviating the need for some other evidence to be led. It might avoid a vast array of issues being traversed at considerable length and in great detail but at the end of the day most of these had little bearing on the central issue of admissibility. It is important for presiding officers faced with challenges to the admissibility of the evidence of a trap to be aware of and apply subsection (6), in terms of which the accused must 'furnish the grounds on which the admissibility of the evidence is challenged'. The matter may then, in terms of sub-sec (7), be adjudicated as a separate issue in dispute, ie, during a trial within a trial[2].

[5] For completeness, the sub-sections read:

> "(6) If at any stage of the proceedings the question is raised whether evidence should be excluded in terms of subsection (3) the burden of proof to show, on a balance of probabilities, that the evidence is admissible, shall rest on the prosecution:
>
> Provided that the accused shall furnish the grounds on which the admissibility of the evidence is challenged: Provided further that if the accused is not represented the court shall raise the question of the admissibility of the evidence. The question whether evidence should be excluded in terms of subsection (3) may, on application by the accused or the prosecution, or by order of the court of its own accord be adjudicated as a separate issue in dispute."

[2] Unfortunately in a number of matters that this court has presided over legal representatives have challenged the evidence gathered during the Section 252A operation ostensibly on the basis that the action went beyond a mere invitation to commit an offence yet during the course of a lengthy trial within a trial the accused will deny actually being entrapped in the commission of the offence but will deny actually committing the offence, with respect the one is an issue of admissibility and the other is a question of fact.

In accordance with the dicta of Steyn J in S v Naidoo[3] in which she approved of the obiter dictum of Wallis JA in Kotze[4] the onus in this division according to stare decisis must be on the State or prosecution to prove that the evidence of the entrapment is admissible and that onus must be discharged beyond reasonable doubt[5].

[6] Advocate Mzelemu informed the court that the challenge to the evidence was that in the conduct of the trap the police and their agents had gone beyond the mere invitation to commit an offence, that they had been improperly induced to commit the offence and that the conduct of the operation including the manner of obtaining authorization and the manner in which it was thereafter carried out warranted the exclusion of the evidence of the trial within a trial.

THE APPLICATION OF THE PROVISIONS OF SECTION 252A

[7] The manner in which the section has been applied has not always been uncontroversial, indeed there have been opinions about its constitutionality from leading authors on criminal law however in recent times the High Courts and Supreme Court of Appeal have given clear indicators how the section should operate and on what basis the evidence gathered in terms of section 252A may be excluded[6].

[8] Section 252 A (1) of the CPA reads:

'Any law enforcement officer, official of the State or any other person authorised thereto for such purpose (hereinafter referred to in this section as an official or his or her agent) may make use of a trap or engage in an undercover operation in order to detect, investigate or uncover the commission of an offence, or to prevent the commission of any offence, **and the evidence so obtained shall be admissible** if that conduct does not go beyond providing an opportunity to commit an offence: Provided that where the conduct goes beyond providing an opportunity to commit an offence a court may admit evidence so obtained subject to subsection (3).'[My emphasis]

At [10] In *Kotzè*, the SCA said:

'The section lays down two approaches to the admissibility of evidence obtained as a result of the use of a trap. Evidence is automatically admissible if the conduct of the person concerned goes no further than providing an opportunity to commit the offence. If the conduct goes beyond that the court must enquire into the methods by

---

[3] **S v Naidoo** [2009] ZAKZPHC 57; 2010 (1) SACR 369 (KZP) (27 October 2009)

[4] S v Kotze 2010(1) SACR SCA 100;

[5] "Whilst the section refers to the burden being discharged on a balance of probabilities it is in my prima facie view incompatible with the constitutional presumption of innocence and the constitutional protection of the right to silence. Those rights must be seen in the light of the jurisprudence of the Constitutional Court, in which it has been held that their effect is that the guilt of an accused person must be established beyond reasonable doubt. That a confession was made freely and voluntarily and without having been unduly induced thereto must be proved beyond reasonable doubt and I can see no practical difference between that case and the case where a conviction is based on the evidence of a trap. Each deals with the proof of facts necessary to secure the admission of the evidence necessary to prove the guilt of the accused. In my prima facie view therefore, and in the absence of argument, in order for the evidence of a trap to be admitted, it is necessary that the trial court be satisfied that the basis for its admissibility has been established beyond a reasonable doubt.

[6] S v Kotze 2010(1)SACR SCA 100; S v Viljoen [2019] ZASCA 22 (27 March 2019); Rangaka and Another v S (A10/2016) [2017] ZAFSHC 59 (31 March 2017) ; Bilankulu and Another v S (188/2020) [2020] ZASCA 114 (29 September 2020); *Lachman v S* [2010] 3 All SA 483 (SCA); Myoli and Another v Director of Public Prosecutions, Eastern Cape and Others (593/2014) [2015] ZAECBHC 33 (22 September 2015) on constitutionality of the provision, per Alkema J.

which the evidence was obtained and the impact that its admission would have on the fairness of the trial and the administration of justice in order to determine whether it should be admitted.'

[9] A court is obliged to consider the factors listed in s 252A (2) in considering whether conduct goes beyond providing an opportunity to commit an offence, which is a factual inquiry. These factors must be considered holistically and weighed cumulatively.

Section 252A(2) of the **Criminal Procedure Act 51 of 1977** reads:

'(2) In considering the question whether the conduct goes beyond providing an opportunity to commit an offence, the court shall have regard to the following factors:

(a) Whether, prior to the setting of a trap or the use of an undercover operation, approval, if it was required, was obtained from the attorney-general to engage such investigation methods and the extent to which the instructions guidelines issued by the attorney-general were adhered to;
(b) the nature of the offence under investigation, including–
(i) whether the security of the State, the safety of the public, the maintenance of public order or the national economy is seriously threatened thereby;
(ii) the prevalence of the offence in the area concerned; and
(iii) the seriousness of such offence;
(c) the availability of other techniques for the detection, investigation or uncovering of the commission of the offence or the prevention thereof in the particular circumstances of the case and in the area concerned;
(d) whether an average person who was in the position of the accused, would have been induced into the commission of an offence by the kind of conduct employed by the official or his or her agent concerned;
(e) the degree of persistence and number of attempts made by the official or his or her agent before the accused succumbed and committed the offence;
(f) the type of inducement used, including the degree of deceit, trickery, misrepresentation or reward;
(g) the timing of the conduct, in particular whether the official or his or her agent instigated the commission of the offence or became involved in an existing unlawful activity;
(h) whether the conduct involved an exploitation of human characteristics such as emotions, sympathy or friendship or an exploitation of the accused's personal, professional or economic circumstances in order to increase the probability of the commission of the offence;
(i) whether the official or his or her agent has exploited a particular vulnerability of the accused such as a mental handicap or a substance addiction;
(j) the proportionality between the involvement of the official or his or her agent as compared to that of the accused, including an assessment of the extent of the harm caused or risked by the official or his or her agent as compared to that of the accused, and the commission of any illegal acts by the official or his or her agent;
(k) any threats, implied or expressed, by the official or his or her agent against the accused;
(l) whether, before the trap was set or the undercover operation was used, there existed any suspicion, entertained upon reasonable grounds, that the accused had committed an offence similar to that to which the charge relates;
(m) whether the official or his or her agent acted in good or bad faith; or
(n) any other factor which in the opinion of the court has a bearing on the question.'

[10] If the court finds that the conduct of the person or persons concerned goes no further than providing an opportunity to commit the offence the evidence is automatically admissible, even if the evidence discloses that in the setting of the trap or undercover operation the conduct goes beyond providing an opportunity to commit an offence the court has a discretion whether or not to admit the evidence or not, this discretion must be exercised in accordance with Subsection 3[7].

[7] "(a) If a court in any criminal proceedings finds that in setting of a trap or the engaging in an undercover operation the conduct goes beyond providing an opportunity to commit an offence, the court may refuse to allow such evidence to be tendered or may refuse to allow such evidence already tendered, to stand, if the evidence was obtained in an improper or unfair manner and that the admission of such evidence would render the trial unfair or would otherwise be detrimental to the administration of justice.
(b) When considering the admissibility of the evidence the court shall weigh up the public interest against the personal interest of the accused, having regard to the following factors, if applicable:

[11] The first question that falls to be decided is whether or not the conduct of the police, including Mhlongo and his employers went beyond providing the opportunity to commit the offence, if the answer to this question is in the negative then the evidence of the trap is automatically admissible, if the answer is that their conduct went beyond providing an opportunity to commit the offence then Section 252 A (3) must be applied.

In other words, even if the first question to be answered is in favour of the accused, in that the conduct of the operation went beyond an invitation to commit the offence then before deciding the admissibility of the evidence a proper enquiry in terms of Section 252 A (3) must be undertaken.

[12] Once again the Supreme Court of Appeal in Bilankulu reiterated;

> "[14] Notwithstanding the provisions of s 252A having been carefully considered and explained in *Kotzé*, they are still frequently misconstrued. Section 252A (1) provides for the authority to make use of traps and undercover operations and for the admissibility of evidence so obtained. The section states:
>
> 'Any law enforcement officer, official of the State or any other person authorised thereto for such purpose (hereinafter referred to in this section as an official or his or her agent) may make use of a trap or engage in an undercover operation in order to detect, investigate or uncover the commission of an offence, or to prevent the commission of any offence, and the evidence obtained shall be admissible if that conduct does not go beyond providing an opportunity to commit an offence: Provided that where the conduct goes beyond providing an opportunity to commit an offence the court may admit evidence so obtained subject to subsection (3).'

[13] The legislature has explicitly permitted the use of a trap or engaging in undercover operations in order to detect, investigate or uncover the commission of an offence. This is not unlawful. As explained in *Kotzé*:

> 'The section lays down two approaches to the admissibility of evidence obtained as a result of the use of a trap. Evidence is automatically admissible if the conduct of the person concerned goes no further than providing an opportunity to commit the offence. If the conduct goes beyond that the court must enquire into the methods by which the evidence was obtained and the impact that its admission would have on the fairness of the trial and the administration of justice in order to determine whether it should be admitted. It must be stressed that the fact that the undercover operation or trap goes beyond providing the accused person with an opportunity to commit the crime does not render that conduct improper or imply that some

---

(i) The nature and seriousness of the offence, including –
(aa) Whether it is of such a nature and of such an extent that the security of the State, the safety of the public, the maintenance of public order or national economy is seriously threatened thereby;
(bb) Whether, in the absence of the use of a trap or an undercover operation, it would be difficult to detect, investigate, uncover or prevent its commission;
(cc) Whether it is so frequently committed that special measures are required to detect, investigate or uncover it or to prevent its commission; or
(dd) Whether it is so indecent or serious that the setting of a trap or the engaging of an undercover operation was justified;
(ii) The extent of the effect of the trap or undercover operation upon the interests of the accused, if regard is had to
(aa) The deliberate disregard, if at all, of the accused's rights or any applicable legal and statutory requirements;
(bb) The facility, or otherwise, with which such requirements could have been complied with, having regard to the circumstances in which the offence was committed; or
(cc) The prejudice to the accused resulting from any improper or unfair conduct;
(iii) The nature and seriousness of any infringement of any fundamental right contained in the Constitution;
(iv) Whether in the setting of a trap or the engagement of an undercover operation the means used was proportional to the seriousness of the offence; and
(v) Any other factor which in the opinion of the court ought to be taken into account."

taint attaches to the evidence obtained thereby. All that it does is create the necessity for the trial court to proceed to the enquiry mentioned in the previous paragraph.'

Introduction

[14] The uncontested factual matrix underpinning the charges against the three accused are that the three accused, Madoda Mhlongo, Siyabonga Mabhida and Prince Shezi [hereinafter referred to as accused 1-3] are experienced police officers aged between 51 and 44, all holding the rank of Warrant-Officer and were serving in the Taxi Violence Unit of the South African Police Services [SAPS]. During the course and scope of their employment they were advised by the NPA and seemingly given duly authorized warrants for the arrest of Nkosinathi Shange and Jabulani Mazibuko for their involvement in criminal violence in relation to the Taxi industry, this included the offences of Murder of other taxi owners and witnesses[8].

[15] Shange is the chairperson of the Kwandengezi Zwelibomvu Taxi owners Association and Mazibuko who is a taxi owner operating out of the association. He is involved in the running of the Taxi Association and reports directly to Shange.

[16] Terence Mhlongo, a former policeman and well known to the three accused and accused one in particular who was described at some point as being a friend, he had worked with or in association with all of the accused. He ran and owned a security company called 'Security on Call.' He supplied security services to Shange whose life was regarded as being in danger. The three accused were aware of the fact that Mhlongo provided security and body guarding services for Shange. Accused one and Mhlongo were in regular contact with each other and had their respective cell-phones saved on their various devices, although it appears that they all use more than one device.

THE EVIDENCE

[17] The only evidence led during the course of the enquiry into the admissibility of the evidence gathered during the Section 252A operations has come from the State. At the time Advocate Siraram for the State closed her case in respect of the evidence to be led in the trial within a trial Advocate Mzelumu told the court that after a full discussion between himself and the three accused they had decided not to testify in the trial within a trial. At counsel for the Accused's request the court asked the three accused to confirm the position which they did. Whereas both the State and the defence have submitted detailed summaries of the evidence before I analyse the evidence it is in my view more logical to set out a summary of the evidence largely in chronological order as it evolved.

[18] This, with respect, to the parties is the best starting point to answer the ultimate issue which was succinctly summarized in S v Kotze where it was decided that the list of factors should therefore be viewed holistically and weighed cumulatively, because the different factors "may point toward different answers". The SCA stated that not all of the listed factors need be considered in every case. The SCA held that, because not all of the factors would necessarily be relevant in every case, the list should not be regarded as a check-list. **Only evidence relevant to determining whether the trap went beyond simply creating the opportunity for the commission of the offence, needs to be analysed to ascertain whether the conduct of the trap goes beyond the limits set by the legislature. [**my emphasis]

[19] Terence Mhlongo stated he met with the 3 accused and had a conversation inside of the VW motor-vehicle on the 13th at the prompting of the first accused. There was some dispute in cross-examination as to who initiated the first contact but it is not in issue that the three policemen wanted to talk to Mhlongo as he provided body guarding

[8] Kwandengezi 05/07/2015, Pinetown 822/08/2015, Umkomaas 257/11/2015, Marianhill 233/01/2016.

services for Shange and the policeman wished to engage with Mhlongo about Shange. It is the nature of this engagement that requires resolution in this trial within a trial. Much has been made about who initiated this first contact and I will deal with this in more detail in conjunction with the evidence led of the cell-phone records between the accused and Mhlongo but what we do know is that at the meeting the following was common cause at least in the minds of those present:

1. That the three policemen had been ordered by the NPA and/or SAPS to arrest Shange and Mazibuko in respect of a number of matters and the charges included murder.
2. Mhlongo's company provided close protection or a bodyguard service.
3. That Mhlongo believed that the accused intended to arrest Shange and Mazibuko.
4. That at the conclusion of the meeting of the three accused and Mhlongo or shortly thereafter the parties had accepted the idea of a corrupt payment of R200 000-00 to be made to ensure Shange and Mazibuko were not arrested.

[20] Mhlongo's evidence is that at this meeting initiated by accused one it was brought to his attention that the three policemen were in receipt of warrants for the arrest of Shange and Mazibuko in connection with matters being investigated by accused number three. The matter was urgent as they were under pressure to effect an arrest in the matter by the DPP as witnesses had been killed. Furthermore, a Warrant Officer Ngcobo who had been transferred to the Hawks was also exerting pressure on them to make an arrest. The fist suggestion that a money payment to the police officers could resolve the issue came when accused two told Terence Mhlongo that "they do not have a problem with Shange, if he pays R200 000 he could arrange with the prosecution that the matter go away."

[21] Mhlongo asked for time to speak to his clients about the offer to which the three accused agreed but indicated that they were under time pressure to effect an arrest. Mhlongo duly met with the association leaders, Shange and Mazibuko and that is the genesis of the resolve to expose the corrupt activities of the three accused and to approach the police to perform an entrapment operation. It was decided as the local police could not be trusted that specialist units outside of the province of KZN were called and the process begun. Because of the large amount of money that was required some-time was required to secure the money from Police sources. In the meantime, authority was sought and obtained from the office of the Director of Public Prosecutions and Advocate Sanker in particular to conduct a section 252A operation. The State then led a number of the role-players, including cell phone evidence indicating calls made between the accused and Terence Mhlongo, steps taken to raise the large amount of money, culminating in the two meetings held in the car parks firstly of the Knowles Centre in Pinetown and then at the Checkers Centre in Pinetown. The accused were arrested at the second meeting in the parking lot of the Checkers Centre. For the purposes of this ruling I do not find it necessary to summarise at this time the minutia of the various role-players evidence.

[22] Once the decision was made to engage with the SAPS, as referred to in [21] above this set in motion an inter-provincial police action in terms of Section 252A, the State evidence outlined briefly is as follows:-

1. Following upon a report made to him Brigadier Basi spoke to Terrance Mhlongo initially by telephone in mid-March 2019. Thereafter they met on 22/03/2019 at Nhlongo's work office in Pinetown. He also met with Shange and Mazibuko and statement were taken from them.

2. He instructed Mhlongo to phone accused one to inform him that the money was going to be paid but it might take a while to obtain the money. He confirmed that Mhlongo was to keep the accused interested by "playing along" if necessary and saw this as nothing more than his duty to take steps to address criminality. He then assigned the enquiry to Col Zangwa. On being questioned by the State on whether he told Terrance to speak to the suspects, he responded that he would have said he should play along. His outlook was if a crime is being reported, he had a duty that crime is attended to by saying play along.

3. On 22/03/2019 Col Zangwa received the affidavit of Terrance Mhlongo from Brig Basi and immediately registered an enquiry. He applied for the money sought and applied to the office of the DPP

for authorisation in terms of Section 252A of Act 51 of 1971. He contacted Adv Sankar telephonically on 26/03/2019 and simultaneously emailed his application for the police action.

4. Advocate Sanker gave verbal authority for the action to proceed on 28 March 2019 and thereafter as indicated Advocate Sanker later sent the written authority.

5. Colonel Mohapelwa was the handler to Terrance Mhlongo. He and Captain Mosuma were asked by Colonel Zangwa to assist in the conduct of a Section 252A application to be held in Durban on 28 or 29 March 2019. Mosuma and Mohapelwa arranged the various surveillance and recording measure undertaken during the action. They were present at both shopping centers culminating in the arrest of the accused.
6. Colonel Mosuma was in charge of the operation, she took charge of all the logistics involved in the operation, the sourcing of surveillance hardware and the arranging of support personeel during the conduct of the two operations.

[23] During cross-examination a detailed examination of the interactions between the police officers who acted as the handlers of the trap who was named as Terence Mhlongo. Whereas it is common cause that all communication after the first meeting between the three accused and Mhlongo was between accused one and Terence Mhlongo, the head of the KwaNdengezi Taxi Association, Shange played an active role. In the original application made to the office of the DPP sometime before completion of the Action the Trap is listed as Terence Mhlongo, he was listed as the person who was supposed to hand the money over to conclude the trap. This and other instances where the proposed steps to be taken as listed in the application were deviated from has come under sustained and detailed attack during the cross-examination of all the state witnesses. Detailed cross examination was undertaken primarily attacking the trap-handler relationship and that either improper instructions were given to the trap by the handlers or the trap failed to follow those instructions

[24] During cross-examination it was suggested that the average police officer being so poorly paid would have succumbed to the temptation to commit the offence. It being suggested that the amount of R200 000-00 shared equally by the three accused was so high that this would occur. It was also suggested that Mhlongo was so persistent in his approaches to accused one that his conduct went beyond an opportunity to commit the offence. Due to the decision of the three accused not to testify neither of these two suggestions are evidence before the court, exactly what was said to the three accused by Mhlongo, how he placed undue pressure and the manner thereof and the effect that this had on the mental state and the psyche of the three accused remain only as mere suggestions or instructions put in cross examination.

EVIDENCE EVALUATION

[25] There is a golden thread that runs throughout the evidence despite the lengthy and detailed cross-examination that the witnesses were subject to. This thread exists despite considerable and thorough cross examination on the processes and meetings that unfolded between Mhlongo, the taxi-owners and the police. The thread quite simply is that the reliable evidence and uncontradicted evidence is that the three, all experienced police officers approached the taxi bosses via their body-guard service provider to secure a bribe or corrupt payment in exchange for protecting the Taxi-Association leaders from arrest on serious charges, including murder. Once there was a decision taken by Shange and Mazibuko to entrap those seeking to obtain the bribe the acts taken thereafter by the police and their 'Agents' were merely steps taken to ensure that those seeking to break the law were given an opportunity to complete their unlawful design, any deceitful responses to the three accused were made in order to keep open the opportunity for the accused to commit the offence that they had initiated.

[26] Whereas the witnesses were cross examined in detail as to the instructions that they received from their handlers and their behaviour thereafter and numerous suggestions that the police and Mhlongo in particular had

crossed the line very little of this improper inducement has been shown to exist, to an extent that nothing with respect turns on this. This is particularly so on a consideration of some of the evidence that was presented to the court. It was suggested that Shange was intimately involved with the police officer that the Mhlongo and him initially reported the matter. The evidence contained in the cell-phone records presented by the State is dismissive of this proposition. At all material times during the period of the operation Shange, who it was suggested had conspired to entrap the accused on the basis of his intimate relationship with police-woman Ngcobo yet the cell-phone records revealed no calls made to the number of Ngcobo.

[27] Similarly, the evidence gathered by the cameras and recording equipment at the time of the two meetings on the day of the arrest show no improper inducements. In particular the first meeting outside Knowles Supermarket in the car-park is largely destructive of any suggestion of improper influence been brought to bear on the accused one. Documents are willingly produced by accused one, the purpose of which is obvious, to show Shange and Mazibuko that they are not bluffing and that they could be arrested. There is not one jot of evidence on this recording that accused one was reluctant, that he needed to do this because of a financial reason or any other reason. He is a willing participant and the only reason why the contract was not concluded at this juncture was the 'agents' requiring the presence of the remaining accused. There was no suggestion that he was induced or unfairly influenced to call accused one and two from the vehicle to facilitate the handover to all three of the accused, this call was made on viewing of the footage in order to make payment in accordance with a prior arrangement that all three of the accused would receive the money.

[28] The events at the culmination of the trap in the Checkers Supermarket parking lot in Pinetown following upon Terence Mhlongo's last minute regret at being party to the police trap and the apparent warning that the accused must not take the money. Notwithstanding this the evidence is clear and unequivocal, there was nothing to suggest anything else other than the three policemen at the time they arrived at the Checkers shopping centre were willing participants. Their conduct throughout the matter is the opposite of what policemen who have a statutory and constitutional duty to arrest dangerous and violent suspects especially when they hold in the possession signed warrants for their arrest. One must remind oneself of the enquiry here; per Kotze[9] and Wallis JA;

> 'The section lays down two approaches to the admissibility of evidence obtained as a result of the use of a trap. Evidence is automatically admissible if the conduct of the person concerned goes no further than providing an opportunity to commit the offence'

[29] At the time that they arrived at the place of their eventual arrest the real evidence of the recordings and on a full conspectus of all the evidence lead in the trial within a trial there is no evidence other than an invitation was open to the accused to commit the offence and Mhlongo's warning at this time, although irregular and in conflict with his instructions from his handlers it is not an inducement to commit the offence, its not conduct designed to unfairly influence the accused to commit the offence its actually the opposite, it's a warning not to commit the offence. Notwithstanding this warning the accused despite being under a statutory obligation to arrest the taxi-bosses on charges of Murder did not do so but entered into the vehicle. As it falls outside the ambit of this trial within a trial I pertinently do not deal with any issue of withdrawal of the accused's participation and/or whether the money may have been forced upon them. In so far as the manner in which the money was handed over in respect of the duties of the agent via a vis the instructions of his handlers, the SAPS, this failure does not affect the indisputable conclusion from all the evidence that despite this the evidence shows beyond doubt that the accused were willing participants who initiated the payment of the bribe and the conduct of the trap as a whole was merely designed to keep the invitation open.

[30] Inevitably with detailed and expert cross-examination some discrepancies even contradictions emerge, considering the length of time involved here and the fairly long period over which evidence spans there are some discrepancies. In my view they are largely to be expected. The court is mindful that mere discrepancies and or contradictions do not necessarily mean that the evidence is unreliable and that the proper approach to evaluation

[9] Kotze (Supra)

contradiction is stated in S v Mafaladiso en Andere,[10]

> "The juridical approach to contradictions between two witnesses and contradictions between the versions of the same witness (such as, *inter alia*, between her or his *viva voce* evidence and a previous statement) is, in principle (even if not in degree), identical. Indeed, in neither case is the aim to prove which of the versions is correct, but to satisfy oneself that the witness could err, either because of a defective recollection or because of dishonesty. The mere fact that it is evident that there are self-contradictions must be approached with caution by a court. Firstly, it must be carefully determined what the witnesses actually meant to say on each occasion, in order to determine whether there is an actual contradiction and is the precise nature thereof. In this regard the adjudicator of fact must keep in mind that a previous statement is not taken down by means of cross-examination, that there may be language and cultural differences between the witness and the person taking down the statement which can stand in the way of what precisely was meant, and that the person giving the statement is seldom, if ever, asked by the police officer to explain their statement in detail. Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Non-material deviations are not necessarily relevant. Thirdly, the contradictory versions must be considered and evaluated on a holistic basis. The circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect of the contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions – and the quality of the explanations – and the connection between the contradictions and the rest of the witness' evidence, amongst other factors, to be taken into consideration and weighed up. **Lastly, there is the final task of the trial Judge, namely to weigh up the previous statement against the *viva voce* evidence, to consider all the evidence and to decide whether it is reliable or not and to decide whether the truth has been told, despite any shortcomings**."

[31] Advocate Mzelemu has argued eruditely and in considerable detail that the handler- agent relationship was not performed in accordance with the best practice, that Mhlongo's conduct and also Shange, the head of the taxi association was poorly executed to the extent that not only was it unfair to the three accused but that the conduct of the trap in its entirety resulted in the accused being unfairly induced to get involved, that their poor salaries as Warrant officers' in the SAPS was a factor, that the average person in their position would have succumbed to the huge temptation of an equal share of R200 000-00.

[32] It was suggested during cross examination and in argument that Terence Mhlongo was the driver of the process, it was suggested that he and his business could not afford to lose Shange as a client, that he initiated the process and this can be evidenced by "the number of telephone calls made by Mhlongo to accused one vis a vis the calls made by accused one to Mhlongo shows the level of persistence by the agent in luring or enticing the accused to commit the offence.[11]" Exhibit MM reveals from 14 March to 29 March 2019 accused one and Terence Mhlongo spoke to each on the cell-phones compared, noting there is a suggestion that the parties may have had more than one device, 17 times, the total time spent talking is 16 minutes and 29 seconds, eleven of the calls were made by Terence Mhlongo and six by accused one. The longest call is the contact initiated by Terence Mhlongo on the 15th of March 2019 and 4 minutes one second in duration. Over the 15 days of the conduct of the operation I do not believe that these 17 calls of limited duration are an indicator in itself that anything untoward was going on by the state witnesses.

[33] With the utmost respect to counsel, I do not believe this reveals an untoward harassment or persistence by the trap. Whereas there are contradictions as to who made the calls the reliable evidence, in fact the only evidence is that the approach came from the accused, that accused one was the communicating with Terence Mhlongo and that the goal was that once the corrupt offer was made Mhlongo was to keep the invitation open and this necessitated, fairly obviously some deceit but that deceit was obviously necessary to keep the invitation open. There is no

[10] 2003 (1) SACR 583 at 593E–594H
[11] Page 38 of the defence's heads of argument paragraph 215 (f)

evidence led on behalf of the accused in respect of what was discussed in these calls, how much pressure if any was exerted by Mhlongo against accused one and on a conspectus of all the evidence on this aspect there is no reliable evidence on any pressure being brought to bear on the three accused and accused one in particular. The only reliable evidence is that the accused initiated the idea of paying a bribe in order to protect Shange and Mazibuko from arrest, the only evidence before the court on this aspect is from the State, the accused utilization of their right to remain silent means that the only evidence on this aspect comes from the State and on a conspectus of the evidence should be accepted as correct. Indeed, during the many days of cross-examination, it was suggested to the witnesses firstly that Mhlongo sought the payment of the bribe in order to protect his business interests and that Shange because of an intimate relationship with a police officer at the Hawks channeled his active involvement in the process through her. Neither of these two aspects raised by the accused was proceeded with, there is not one iota of evidence suggesting this was true, cell-phone records show otherwise in respect of the alleged relationship and no evidence has been led of Mhlongo fearing the loss of income to his business as being a factor in him actually seeking the payment of the bribe.

[34] Starkly, the accused are all experienced police officers holding not insignificant rank, they are part of a specialized unit dealing with one of the more serious violent crimes, taxi-violence and the associated murders, they knew that there was evidence and warrants for the arrest of Shange and Mazibuko yet agreed to take a substantial amount of money not to arrest the accused. Self-evidently police officers should not be involved in the accepting of corrupt payments, when police officers accept money to let "alleged murderers" remain in the public domain where they may endanger innocent people and you are specifically charged with combating crime in the taxi-space then this aspect comes to the fore. A policeman is expected to combat crime, an amount of one third of R200 000-00 is not a "huge amount that would cause the average policeman to succumb to the temptation.[12]"

[35] The evidence in its totality is compelling. To the extent that the guidelines might not have been adhered to one must firstly be aware that the situation and events are fluid, hindsight is a perfect science, and human frailty and error will always be present. Where this has occurred in cannot find that this has been present to the extent that it has been shown during this trial within a trial that the conduct of the role-players has gone past merely presenting the accused with an opportunity to commit the offence. Once the accused had agreed or offered to accept a bribe what followed is to my mind inevitable, the office of the DPP authorized the use of an entrapment operation in terms of Section 252 A and with the amount of money involved some delay in the execution of the Action was inevitable. The handing over of the money and role played by Shange as the payer of the bribe is understandable at the time the application was made to the DPP it is not a detailed synopsis of how the trap is to be conducted, deviations especially with the delay in the actual planning of the action are inevitable and even to be expected- the true enquiry is what this means in respect of the issue and in this case the answer falls without doubt on the side of the State, as the person paying the bribe there was nothing untoward in him handing over the money and engaging verbally with the accused both at Knowles and the Checkers centers. I find no hint of collusion between the Mhlongo and the police officers including Brigadier Bassi and Colonels Mohapelo and Bosuma, in the manner they handled the operation. Other than on the day of the police action the police seemed to have no dealings with anyone other than Mhlongo and most definitely no contact with the taxi owners[13] other than the first meeting where their statements were taken by Brigadier Basi.

[36] I am satisfied from a conspectus of all the evidence led in the section 252A enquiry that the conduct of the police and all those who played a role in the operation does not go beyond a mere invitation to the accused to commit the offence and the offence was initiated by the three accused when they approached Mhlongo initially. I find that the State has proved this beyond reasonable doubt. After a careful consideration of all the factors listed in Section 252A, as set out in Section 252A (2) of Act 51 of 1977 and listed in [4] of this judgment I find that the State was justified in applying to use an entrapment operation and the conduct of the operation was in the circumstances necessary and did not go any further than giving the accused the mere invitation to commit the offence.

---

[12] As stated in the Heads of Argument

[13] I will deal with their evidence in more detail if necessary during the main judgment.

Accordingly, in terms of section 252 A (1) the evidence obtained in the operation shall be admissible against all three accused as the conduct did not go beyond providing an opportunity to commit the offence and the evidence discloses this beyond reasonable doubt. I do not believe that the reception of this evidence in any way infringes upon the accused's fair trial rights in this matter.

[37] The Constitutional Court said in *Shaik*[14]:

> "The right to a fair trial requires a substantive, rather than a formal or textual approach. It is clear also that fairness is not a one-way street conferring an unlimited right on an accused to demand the most favourable possible treatment. A fair trial also requires fairness to the public as represented by the State. It has to instil confidence in the criminal justice system".

Whereas there may be circumstances where there is a duty to exclude evidence, when to do so would render the trial unfair or be otherwise detrimental to the interests of justice, however in this matter I can find no violation of the accused's constitutional rights in the conduct of the entrapment. I can find no violation of the accused's fair trial rights as envisaged in section 35 of the constitution. Indeed the trap may have deviated from protocol on occasion, recommendations as to the conduct of the trap were not strictly followed, hindsight is perfect and fluid situations involving human beings will almost always present with challenges and unexpected turns such as accused one arriving alone at Knowles centre, predicting the future is difficult and deviations from predictions or proposed plans are almost inevitable.

[38] Similarly the original application to Sanker indicating that the money be handed over by Terence Mhlongo is made sometime after the application, with respect logically Shange as the head of the Taxi association and the man "most wanted" by the police who was to be the beneficiary of the proposed corrupt payment is the person most likely to benefit. The evidence overwhelmingly discloses that the conduct of the police and the manner in which the trap was planned was no more than an invite or the keeping open of the opportunity to commit the offence.

[39] The accused in this matter are statutory and constitutional duty bearers, one of their primary duties is to combat and eradicate crime. Considering their experience and the nature and seriousness of the crimes they are charged with combating even if there had been considerable inducement to the extent that the finding I made was incorrect, it is my view that the evidence would be admissible in any event on a proper application of Section 252A (3) and the proper exercise of the courts discretion to either admit the evidence or to disallow the evidence. Bearing in mind the accused's position and the manner in which the operation was conducted and the importance of the combating of these types of offences when committed by police officers. A mere statement some of the factors set out in the requisite legislation, with respect, strongly suggests this: -

> "(b) When considering the admissibility of the evidence the court shall weigh up the public interest against the personal interest of the accused, having regard to the following factors, if applicable:
> (i) The nature and seriousness of the offence, including –
> (aa) **Whether it is of such a nature and of such an extent that the security of the State, the safety of the public, the maintenance of public order** or national economy is seriously threatened thereby;
> (bb) **Whether, in the absence of the use of a trap or an undercover operation, it would be difficult to detect, investigate, uncover or prevent its commission**;
> (cc) Whether it is so frequently committed that special measures are required to detect, investigate or uncover it or to prevent its commission; or
> (dd) **Whether it is so indecent or serious that the setting of a trap or the engaging of an undercover operation was justified;**

[14] *S v Shaik* [2007] ZACC 19; 2008 (2) SA 208 (CC); 2007 (12) BCLR 1360 (CC).

(ii) The extent of the effect of the trap or undercover operation upon the interests of the accused, if regard is had to
(aa) The deliberate disregard, if at all, of the accused's rights or any applicable legal and statutory requirements;
(bb) **The facility, or otherwise, with which such requirements could have been complied with, having regard to the circumstances in which the offence was committed;** or
(cc) The prejudice to the accused resulting from any improper or unfair conduct;
(iii) The nature and seriousness of any infringement of any fundamental right contained in the Constitution;
(iv) **Whether in the setting of a trap or the engagement of an undercover operation the means used was proportional to the seriousness of the offence."**

[40] Indeed, the failure of the accused to testify about how this supposed improper pressure and inducement affected their better judgment as police officers' investigation taxi violence and related murders is fatal to their suggestion that the conduct of those conducting the trap went beyond an invitation to commit an offence. On a conspectus of all the evidence I believe that the evidence as given in court and subject to the versions of the accused as given in cross examination would have justified this finding. However, I reiterate my finding that the State has proved beyond a reasonable doubt that the conduct of the State witnesses went no further than an opportunity to commit an offence and is therefore automatically admissible.

Findings and Order:

1. In terms of section 252 A (1) the evidence obtained in the Section 252 A operation authorised by Advocate Sanker is admissible against all three accused as the conduct did not go beyond providing an opportunity for the accused to commit the offence.

2. That the onus as set out in Section 252A (6) as confirmed by Steyn J in S v Naidoo[15] has been satisfied.
    a. I find that the onus has been discharged beyond reasonable doubt.

3. That even had the evidence warranted a finding that those involved in the police action had gone beyond merely providing an opportunity to commit the offence**, on the facts of this matter and on a conspectus of all the evidence** led after considering the factors set out in Section 252A (3) as set out above this court would have exercised its discretion in admitting the evidence.

4. I find no protected right in terms of section 35 of the constitution has been infringed by the police operation.

Dated and signed this_____ day of January 2022

_____

G P W Davis-Regional Magistrate

[15] supra