

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: SS26/2013

(1)	<u>REPORTABLE: YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
..... DATE SIGNATURE

In the matter between:

THE STATE

And

KREJCIR RADOVAN	Accused 1
LUPHONDO DESAI	Accused 2
MARUPING SAMUEL	Accused 3
NTHOROANE JEFF	Accused 4
MIYA SIBONISO	Accused 5
MOFOKENG LEFU	Accused 6

J U D G M E N T

LAMONT, J:

[1] The six accused are charged with three counts. Count 1 is a charge of contravening section 5(b) of the Drugs and Drug Trafficking Act 140 of 1992 in that the accused dealt in an undesirable dependence-producing substance. Accused 1 and 2 are in the alternative to count 1 also charged with possession of the substance. The accused are charged in count 2 with kidnapping one Bheki Themba Lukhele ("Lukhele") on 25 June 2013 and holding him over the period 25 June 2013 until 29 June 2013. The accused are further charged with count 3 that they attempted the murder of Lukhele.

[2] The accused all pleaded not guilty to all counts.

[3] The claim made was that accused 2 acting in concert with accused 1 had given one Doctor a bag containing 25 kilograms of ice, tik or crystal meth drugs to enable him to export same. He had in breach of the arrangement taken the bag of drugs for himself. Accused 1 and 2 were urgently trying to recover their drugs from him and decided to capture Lukhele, Doctor's brother and use him to find Doctor or at least blackmail Doctor to deal with them and return the drugs to them. In the course of the activities to seek to find Doctor and recover the drugs accused 1 and 2 had made use of the services of accused 3, 4, 5 and 6. Boiling water had been poured over Lukhele and he

had been kicked, punched and manhandled during the time he was held captive.

[4] The version of the accused who all gave evidence was that they had been involved in neither kidnapping, nor assault nor dealings in relation to a bag of drugs. Accused 2's evidence in addition was that at or about the time of the abduction of Lukhele and for a day or two thereafter he had been urgently seeking Lukhele's brother. The reason why he was seeking the brother was because the brother owed him money which accused 2 wished to be repaid.

[5] A convenient point at which to begin a consideration of the matter is the kidnapping of Lukhele.

THE KIDNAPPING OF LUKHELE.

[6] The evidence of Lukhele was that he was at home at about 20h20 in the evening of 25 June 2013. He heard a knocking at the gate. He looked through the window and saw people outside. He went to the gate and the people who were there asked him where his brother was. His brother is Doctor. Lukhele stated that his brother was not at home. One of the people showed him the identity card of a policeman and said that he was a policeman. The person who showed him the identity card said that he wanted to speak to Lukhele's grandmother. Lukhele opened the gate to allow them into the yard. They asked him when he had last seen his brother. He replied

that it had been some days since he had last seen him. The people knew that this was not true. They interrogated him to try to get him to concede that he had been at a shopping mall with his brother much more recently than he claimed. The people grabbed, manhandled and slapped him. There were about six people who had come in three different motorcars, a white BMW, a Vito Mercedes Benz and a 4x4 of a dark colour. Lukhele was forced into the BMW. His shirt was used to cover his face and he was told to look down. His hands were tied behind his back with a cable tie.

[7] According to an affidavit contained in a docket handed in by the accused, the fact that Lukhele was put into a car by a group of men was witnessed by Lukhele's neighbour one Ngcobo. Ngcobo on 29 June 2013 at 14h00 (prior to the release of Lukhele) laid a charge that Lukhele had been kidnapped. He made an affidavit at 11h45 that day setting out that Lukhele had been kidnapped by a group of men in a vehicle which he believed to be a Toyota the registration number of which he provided. Pursuant to this charge being laid a docket was opened. That docket bore case number CAS No 303/6/2013. Ngcobo was not called as a witness. The docket was produced in evidence by the accused. It contains the hearsay statements set out above. The evidence about the incident is inadmissible to establish its truth. The fact that at the time when the docket concerning the incident at Lukhele's residence is admissible, however, those facts establish that prior to the release of Lukhele, a charge that he had been kidnapped had been laid and these corroborates Lukhele's evidence that he in fact was kidnapped.

[8] Lukhele said that the reason given by his captors for capturing him was that Doctor had taken their money. After he was put in the BMW, Lukhele was taken to a house. In the house there were a number of people present. He was manhandled, kicked, slapped and punched. He was also threatened by a white person. The purpose of the interrogation was to find out where his brother was. During the course of the interrogation Lukhele was forced to sit on the floor facing a corner. One of the persons attacking him spoke in English and said that Lukhele's brother had robbed him of money and that he wanted the brother as well as the money. The blindfold over Lukhele's eyes was removed by a person identified as accused 5 by Peter. The person who had spoken asked Lukhele if he could see him and Lukhele was asked to look at his attacker. He was also asked whether he knew his attacker and whether he was prepared to die like a soldier. Lukhele said that he could see him. This person asked where Lukhele's brother was. Lukhele did not finish the answer. The person who had asked the question poured boiling water over his head. Lukhele was able to identify the person who had poured the water over him as accused 1. Lukhele suffered injuries including blistering of his skin in consequence of the boiling water being poured over his head. He was subsequently kept in a safe house. He was at a point taken to Ermelo to find his brother. Apart from that trip he was kept in the safe house until his release some days later on 29 June 2013. The details of these events are dealt with more fully below.

[9] On 30 June 2013 he went to the doctor. The doctor, Dr Nkosi recorded his observations as follows: "*Burn wound (primary).*" He prescribed treatment

and required his patient to return after two weeks. All this appears from Exhibit “DDD”. A form J88 was completed not by Dr Nkosi but by Dr Ndlandlamandla. That form reveals under general history that the patient had come with a history of being burnt by boiling water being poured on his head, the left side of his face and left chest. The form indicates that there was a primary (first degree) burn wound over the head and left side of the face and cheek. The picture on the form (page 4) was completed and showed markings intended to indicate the place where the injuries were situated on the left side of the head and face and the top on the left side of the head. These markings were not made by the treating doctor. On 20 May 2014 (during the trial) Lukhele was examined and a report prepared and handed in as Exhibit “H”. That report revealed that Lukhele evidenced scars of year old burn wounds including a big scar on his right shoulder and scapula, a small scar on the left shoulder and a scar on the left cheek. Markings were made on page 4 of a different J88 reflecting the situation of the scarring.

[10] That examination was made and the findings written in the absence of the defence counsel. Defence counsel wished to examine Lukhele to ascertain whether or not the findings were accurate. In order for this examination to take place in a dignified manner Lukhele, by consent of, all was taken to Dr Mia who filed a report Exhibit “P”. The findings contained in the report were common cause. They showed hyperpigmented lesions over bilateral shoulders extending anteriorly onto clavicles. They were also bilaterally visible over scapulae and the right shoulder. The lesions were flat and had a “*geographical*” nature. A left clavicular hyperpigmented area was

noted as well. In addition the right forearm evidenced an old scar and skin grafts. These skin grafts and scar antedate the kidnapping. The left hand also had been injured and showed hyperpigmented areas on some of the fingers. The doctor's conclusion was "*Hyperpigmented old scars with 'geographical' pattern over left pre-clavicular area, face, bilateral shoulder and scapula areas and over clavicles. Consistent with but not exclusive to history of eleven month old burn wounds*". Page 4 of the J88 was completed and reflects where the injuries were seen. The injuries seen by the doctor (an expert in the field) were common cause as reflecting the condition Lukhele was in at the time of trial. His opinion was also not challenged by anyone.

[11] Lukhele stated that he had not suffered any other relevant injuries. The only source of the remaining injuries beyond doubt is the pouring of boiling water over him about 11 months before the examination. Eleven months before the examination was at a time when Lukhele was kidnapped.

[12] The doctor who treated Lukhele, Dr Nkosi gave evidence and made light of his injuries stating that from his notes there would only have been a redness of his skin and not a blistering. This evidence is not in line with his treatment of Lukhele. He prescribed Diclofenal, Furox, Savlon and Emerite; drugs to deal with sepsis and pain.

[13] The objectively ascertainable facts show that there is pigmentation of the skin caused by damage to it. Various State witnesses' including Lukhele described blistering. Even on the treating doctor's evidence there was

evidence of burning of the skin. His issue related only to the severity. It appears to me that he was attempting to explain away the inadequate attention that he had given his patient. There would have been no sepsis to treat without open wounds. The only open wounds referred to by the witness are caused by the burn. Hence Lukhele had open wounds when seen by Dr. Nkosi. In my view beyond reasonable doubt there was blistering and such blistering left the hyperpigmented areas seen by Doctor Mia.

[14] The fact that a charge concerning the kidnapping was laid prior to the release of Lukhele is corroborative of the fact that he was kidnapped. There is evidence of his having been burnt and sustaining injuries consistent with the burn emanating from boiling water being poured over him. He did not burn himself, someone burned him. Lukhele went to consult a doctor (the day after his release) at the first reasonable opportunity. The only inference is that he was in sufficient pain to require treatment. The only inference to be drawn is that he was kidnapped and that while he was in the control of the kidnapper he was burned by boiling water being poured over him.

[15] These facts establish in my view beyond reasonable doubt that Lukhele was kidnapped on 25 June 2013 and that he was assaulted by the pouring of boiling water over him.

[16] The duration of the kidnapping can be determined with reference to Lukhele's conduct as well as his ipse dixit Lukhele stated that he was held until 29 June 2013. The fact that he was so held is corroborated by the fact

that at the first reasonable opportunity when he could go to seek treatment (30 June 2013) he did so. I accordingly find that Lukhele was held from 25 June 2013 until 29 June 2013.

[17] I accept Lukhele's evidence that he was kidnapped held, over the period slapped, manhandled, kicked, punched and burnt as he stated in his evidence.

CRITICISMS MADE OF LUKHELE'S EVIDENCE.

[18] Lukhele in his statement did not distinguish between being held at the place where the assault took place and at a safe house. He was severely criticised for this. This criticism is dependent upon whether the statement was taken accurately by a person who asked the right questions to get the whole story accurately. The police investigation in the matter will be dealt with later. For present purposes it is necessary only to note that three attempts were made to get Lukhele's statement and the result remains a poor effort. In my view all the statements were taken in a slapdash way without proper attention to the facts they needed to cover. Hence there are multiple omissions and apparent inconsistencies in them. In addition a statement is generally a précis of facts and one should expect omissions when the larger picture is pieced together and produced in evidence.

[19] Lukhele in his evidence before me indicated that he had originally been assaulted at an office in a house and had subsequently been kept in a

different house. I accept this evidence of his. It is supported by the evidence of other witnesses with whom I shall deal later. Importantly it is supported by the cell phone records of Peter Masimango ("Peter") which indicated that he spent time in Kensington near where the safe house was situated and where he said he had guarded Lukhele. These records corroborate that Peter was with Lukhele on the day and at the place he said that he was requested to guard Lukhele.

[20] The offices of Money Point are situated within a house. Lukhele correctly identified the place where he was held initially. The probabilities favour, that Lukhele would not have been detained in the office at Money Point during working hours and overnight, but would rather have been kept elsewhere. The explanation for the apparent discrepancy as to where Lukhele was kept is in the poor statement taking of the police.

WHO WOULD WANT TO KIDNAP LUKHELE.

[21] It is apparent from the evidence of Lukhele that there was no person looking to kidnap him and that there wasn't any reason why he should be taken and held captive never mind be assaulted. During the course of being held captive he was taken to Ermelo. There was no reason why on his own he would go there.

[22] Lukhele provided a reason for his being kidnapped, assaulted, detained and transported to Ermelo. That reason was that the person who

had done these acts was seeking his brother Doctor. That person sought to find Doctor by forcing Lukhele to disclose his whereabouts and/or blackmail Doctor into handing himself over to secure the release of Lukhele.

[23] The evidence of accused 2 was that he was looking for Doctor and that at the material time he made use of Peter and Paul to help him look for Doctor. Peter and Paul corroborated those facts. Accused 2 said that he did not kidnap Doctor's brother and further that he was not looking for drugs but for money. This evidence will be dealt with in more detail as the story unfolds.

[24] The inference is irresistible that the only person conducting a search which in any way was linked to Lukhele is accused 2. The State witnesses describe accused 2 as being the person who was involved. It is common cause that accused 2 at the relevant time was seeking Doctor and that, that search for Doctor was urgent. Accused 2 on his evidence owed money to his creditor which he was unable to pay easily as that money had been lent to Doctor and Doctor had not repaid it to him. Accused 2 sought corroboration for the fact that he was looking for Doctor for money which had not been paid in the evidence of Lukhele who said that he was told that his brother Doctor was being hunted in order to obtain money which had been given him. The only person hunting anyone whether for money or drugs at that time was accused 2. The inference that accused 2 was the hunter is irresistible and I so find. The fact that Lukhele said that the kidnappers were looking for money corroborates only that that is what he was told. It was accused 2 who implemented (together with others) the steps taken to kidnap Lukhele. The

kidnapping of Lukhele was designed to flush out Doctor. Accused 2 and others went to Ermelo where Doctor was believed to be. They took Lukhele with them to help find Doctor once they were there. The fact this trip was undertaken further links the kidnapping of Lukhele to a hunt for Doctor. The only person wanting to flush out Doctor was accused 2 on his own evidence. The evidence was that he was present at the time that the boiling water was poured over the head of Lukhele. I accept that evidence. I accordingly find that accused 2 was a participant in respect of that incident too.

WHY HUNT DOCTOR.

[25] The courier, Doctor convincingly describes a plan to export drugs and its implementation. The extent of the search and the facilities (including the employment of Peter, Paul and sundry policemen) used indicate that the hunt was for something of significant value. Accused 2's evidence was that a large sum of money changed hands. The evidence of the State witnesses concerns a lot of money changing hands. Accused 2 has a different causa for the money changing hands; he said it was a loan to Doctor. He needed the money back to pay his creditor. The reason why suddenly on the Monday the matter became urgent is on accused 2's version unexplained. When was he being pressed for payment; when was he to make the actual payment. Why could he not get terms as he appears ultimately to have easily been able to manage. After a few days searching for Lukhele he gave up. There was no reason on his evidence to suddenly stop a very extensive and expensive hunt. The reason for stopping the search is much more likely to be because he

believed at the time the bag of drugs was irrecoverable. It is impossible that being forced to pay any amount to his creditor would at a point make the matter urgent for accused 2 and that it would be less urgent once he had actually paid his creditor out of his own money. It is much more probable that accused 2 if he was forced to pay his own money would redouble his efforts to find Lukhele

[26] The evidence of accused 2 on this issue is unacceptable and I reject it. The evidence of all the State witnesses was that a considerable quantity of drugs which accused 2 had given Doctor was the subject of the search. Accused 2 was hunting Doctor to retrieve a bag of drugs. In the course of that hunt accused 2 kidnapped Lukhele and was party to the assault on him.

WHO ELSE KIDNAPPED LUKHELE ON LUKHELE'S EVIDENCE.

[27] After Lukhele's capture and during the interrogation boiling water was poured over him. Immediately prior to the boiling water being poured onto Lukhele a white person indicated to Lukhele that, he, Lukhele should look at him. He had previously been told to look down and had had his eyes covered. However when he was asked to look at the person he did so. He looked long enough to be able to identify accused 1 as being that person. He was forced to look at the person, saw the kettle in his hand and then the water was poured over him.

[28] It was submitted that this identification of accused 1 constituted a dock identification and was unreliable. Lukhele was certain who he had seen. He had looked in response to being asked to do so. It appears to me that in the circumstances there is no reason why his looking should not be accurate. He was specifically inspecting accused 1 for a period of time in response to accused 1's request. His identification of accused 1 as the perpetrator of the act of pouring boiling water on him is also corroborated by other witnesses.

[29] In addition the events according to the evidence of other witnesses took place at Money Point a place which is frequented by accused 1.

[30] In the light of these facts (witness' evidence and the fact Lukhele was taken to Money Point) the identification by Lukhele of accused 1 as a participant in the kidnapping and the perpetrator of the assault constituted by pouring boiling water over him is established beyond reasonable doubt.

[31] Lukhele identified accused 4 as being one of the persons who had kidnapped him from his home on the evening of 25th June 2013. He identified accused 4 as being the person who had produced his appointment card as a policeman. He also identified him as being the person in a lumber jacket. He described certain physical features of accused 4 and said that he had seen him and was able to identify him properly; he had seen him over a period of time and interacted with him.

[32] Paul identifies accused 4 as being the person who was in the Mercedes Vito at the time that the party of hunters went to Ermelo with Lukhele with a view to finding Doctor. He went to the Vito when accused 3 was unable to open the car door as he was using the incorrect key. At that time the original travellers in the car (which included accused 4) had returned to it. The submission was made that he had not expressly said that accused 4 had returned to the car. It is apparent from the evidence of Paul however that the persons who had been in the car had returned to it there were no others. Accordingly accused 4 was present.

[33] The identification by Lukhele was challenged as being a dock identification made by a witness who had a limited opportunity to see the accused. Lukhele was accurate in his identification. He identified accused 4 as a policeman. He identified him as being a person wearing a lumber jacket. It was never denied that accused 4 had a lumber jacket it was only denied that he was there. The fact that Paul saw accused 4 participating in activities involving the hunting down of Doctor of which the kidnapping of Lukhele was part corroborates the evidence of Lukhele.

[34] There are inconsistencies within the evidence of Lukhele itself and as given in court against the evidence in the three statements which were taken from him.

[35] Those inconsistencies and conflicts are mainly constituted by omissions and pale into insignificance when the major probabilities of the

case which I have set out above are considered. It appears to me that a number of statements were taken from him by police who had no understanding of the issues, how to take statements or what the adequacy of the statements was. I do not accept that the conflicts between the evidence and the matters contained within the statements demonstrate recent fabrication or a change of version on the part of Lukhele. I rather consider that the statements were inadequately taken and do not properly reflect what he intended to say.

[36] I find that the events described by Lukhele took place and that his identification of accused 1,2 and 4 is reliable beyond reasonable doubt.

THE DRUG DEALERS.

[37] It is convenient now to consider the matter from the perspective of Lukhele's brother Doctor and his co-worker Bhekizetha Khumalo ("Sobaba"). This will introduce the early stages and set the stage for the events which took place.

[38] Doctor's evidence was that during 2012 he met accused 2. He, Doctor worked as a supervisor in the baggage section at the airport. Accused 2 suggested that Doctor could assist with the dispatch of a parcel to Australia. Accused 2 said that he was involved with a white person who would make their lives change. The assistance related to the export, illegally, of drugs. They would test whether it was possible to export the drugs. They did so and

one of the dummy runs at least was successful in that a 5kg quantity of drugs was successfully exported during May 2013. Doctor was paid money for his work. This money was only a part payment of the full amount due to him.

[39] In June 2013 during the first week Doctor and accused 2 met. By then accused 2 had not paid Doctor the balance outstanding in respect of the previous dummy run. Doctor was disgruntled as he was working and being involved but not receiving the payment which he was supposed to have received. Later accused 2 made an arrangement to bring a bag to Doctor on a Saturday. Doctor was working a morning shift. Doctor decided that he would not export the bag to Australia as he had agreed to do but would rather sell it himself. He made arrangements that once he had the bag he would sell it to one Morris. On 22 June 2013 accused 2 brought Doctor the bag of drugs he was to export to Australia. Doctor took the bag from accused 2's car and put it in the car of Sobaba. Accused 2 left. Doctor and Sobaba drove off and Doctor shortly thereafter handed over the bag to Morris. They all went to Benoni. At the house to which they went the bag was opened by Morris. There were small parcels inside, roundish in shape and wrapped in silver tape. In all there were twenty-five parcels shaped like a fist inside the bag. These twenty-five parcels had been described previously by accused 2 as being the drugs which were to be exported to Australia. Morris said that he would find a buyer but he did not know what the things in the bag were. Doctor naively believed the things in the bag to be ice meaning frozen water. He did not want to take the little parcels with him in case they melted. This belief of Doctor can only have arisen because he was told they were ice. The next morning accused 2 came

to Doctor's door. He asked what had happened to the bag. Doctor explained that he had been searched by police who had taken the money which he had in his possession as well as the bag. Accused 2 did not believe him. Accused 2 spoke to someone on his phone and then handed the phone to Doctor saying that a white man wanted to talk to him. Doctor was told that he should sort the matter out as the "*Hawks*" from Pretoria had been to the airport and had said that no one had been arrested. Accused 2 said the thing should be sorted out before it got rough. Accused 2 took Doctor to the airport. Doctor stayed there until it was time to go home. He and Sobaba then left and went to Tembisa. On the Monday Doctor went to work. Accused 2 phoned to have a meeting. Doctor was told that the failure of the drugs to arrive and the loss of the drugs affected many people. They arranged to meet at a garage in Tembisa. Doctor spoke to Morris who said that the best he could raise for the parcels was R100 000,00. Later there was a meeting between accused 2, and two others he brought with him (Peter and Paul); Sobaba, Doctor and three brothers at the garage. Accused 2 and the two others had come in a kombi. Accused 2 told Doctor that a white man wanted to see Doctor and that he should agree to a lie detector test. Doctor refused. They separated. Doctor spoke at the garage to a man (Morris) who was in a Navara. He received payment from Morris. He followed the Navara and unbeknown to him was followed by accused 2, Peter and Paul. On the way the Navara stopped and they also stopped. Accused 2, Peter and Paul fearing detection drove on. This meeting and the following of Doctor is described by accused 2, Peter, Paul, Doctor and Sobaba. The issue is only what happened at the meeting. The

probabilities favour that the discussion concerned the missing drugs as the State witnesses describe.

[40] Later Doctor told his brother Lukhele to meet him at the mall. He told Lukhele that he thought that he should hide for a bit as he had done something which could get his family and the brothers into trouble. Doctor went to Ermelo. That, evening (23 June 2013) Lukhele, phoned Doctor and said there were people at the yard. When he tried to phone him again he could not get through so he phoned the neighbour and asked the neighbour to see what was happening. The neighbour must have been Ngcobo. He gave Doctor the registration number of the car and its colour. Doctor saved that information. Subsequently that night he received a phone call from his brother Lukhele. Lukhele however did not speak to him it was someone else. He was told that he thought he was clever and he heard the voice of his brother Lukhele saying that his Lukhele's life was in his hands. This evidence is corroborated by Lukhele who described such a phone call taking place. According to the evidence of Peter this call was made from Lukhele's phone in the presence of accused 5 who on the evidence spoke to Doctor.

[41] The evidence of Doctor is corroborated by other State witnesses and in part by accused 2.

[42] Bhekizetha Khumalo also known as Sobaba gave evidence. He was with Doctor when the bag of drugs was handed over to Doctor. He did not know the person who handed over the bag and did not interact with him. After

the bag was handed over they drove away and the bag was handed over by Doctor to a man in a Navara. He and Doctor followed the Navara. In due course the bag was opened and it contained little parcels wrapped in plastic which were silver-grey in colour. There were twenty-five of them. He did not know what was inside the parcels. During the night he was phoned by a person who was not known to him. That person asked to meet him. He agreed to meet the person in Tembisa at an Engen garage. He met accused 2 at the garage. Accused 2 asked what had happened to the bag and explained that he was having difficulty making contact with Doctor. Sobaba said he did not wish to become involved and that accused 2 should speak to Doctor. The next day while he was at work he got a phone call from Doctor who told him that the person who had given him the bag (accused 2) had come to his house to try and find the bag. He said that he had told accused 2 that the police had the bag. Sobaba spoke to accused 2 on Doctor's behalf. Accused 2 said he wanted to see the two of them to get an explanation about the bag. Accused 2 informed him that the owner of the bag was looking for it and that it was not his accused 2's bag. They agreed to meet at Tembisa at a Sasol garage at 18h00. At the meeting Doctor reiterated that the bag had been taken by the police. Accused 2 said that it was accused 1's bag and that he was demanding that it be returned. He said further that accused 1 was fighting with accused 2. While they were together accused 2 phoned someone and gave the phone to Doctor to speak to that person. At the time he handed over the phone accused 2 said "*Here is Radovan Krejcir, Doctor speak to him*". Doctor spoke to the person and an argument ensued over the phone. The next day Doctor spoke to Sobaba and told him that he could not sleep as

accused 2 had been phoning him continuously trying to get a meeting organised. They agreed to meet at about 18h00. Sobaba asked his three brothers to come with them. They were to meet at a Sasol garage at Ntalspruit. When they arrived at the meeting place three people came to the vehicle two were unknown and one was accused 2. Accused 2 said that they should go to Bedfordview so that a machine could check whether they were telling the truth. They refused. While they were at that place Doctor went to a white Navara and spoke to the occupant. When he returned, he said they should follow the white Navara which they did. Eventually a black plastic bag containing money was handed over. The money was said to be R100 000,00. Sobaba had already been given R10 000,00 for the transport. That is the last he knew of the matter.

[43] His evidence corroborated the evidence of Doctor. His statement was put to him at length and there were discrepancies of a minor nature between the statement and his evidence.

[44] In my view the witnesses with whose evidence I have dealt namely Lukhele, Doctor and Sobaba were honest witnesses, told the truth and are credible. Their evidence accords with the probabilities and is reliable.

THE PLAN TO EXPORT.

[45] The evidence of Doctor establishes vividly that after a successful dummy run an arrangement was made to export drugs. The arrangement was

made with him by accused 2 who delivered the drugs to him. He did not know if the drugs were actually drugs as he did not check the contents of the parcel but he was told by accused 2 that they were drugs. He beyond reasonable doubt was told the parcels contained ice this is what he believed to be in the parcels. He patently had no idea that ice is a type of drug and does not have the characteristics of frozen water. The only person who could've told him the parcel contained ice is accused 2.

[46] Doctor explained how he had intended to export the drugs and how the drugs comprising the dummy run had in fact been exported. He had found a weakness in the system which he was able to manipulate to get the drugs aboard an aircraft. That system involved generating and attaching a label to the baggage and then pretending that it was baggage which had been left behind by a passenger who had already flown out or who was imminently due to fly out.

[47] It is not clear whether Doctor discovered the weakness in the system before or after he met with accused 2 to arrange for the transport of the drugs. It is probable that having discovered the weakness he would manipulate it to his benefit. This lends credence to the fact that there would be a test run to check whether the weakness he had found would actually prove successful when manipulated and would be followed by a "*real shipment*" if that dummy run proved successful.

[48] In my view it is improbable that Doctor would have dreamed up this detail he provided about how the plan could be implemented and how he came to implement it.

THE HUNTERS.

[49] Peter Msimang indicated that he had received a phone call from a friend of his one Paul. Paul had asked him if he could see him immediately and arrangements were made to meet at Eastgate. When Peter arrived at Eastgate he found Paul in the company of accused 2. Accused 2 was a person unknown to him. Paul in the presence of accused 2 explained that a friend of accused 2 had taken a bag containing 25 kilograms of crystal meth also known as Tik. This person was known as Doctor who was employed at the airport and who lived in Katlehong. Paul asked whether Peter would be able to help recover the bag as he knew his way around Katlehong. The assistance which Peter would provide would be to go with Paul to Doctor's home and act as a backup. In return he would receive 2 kilograms of the Tik if it was found. Accused 2, Paul and Peter got into Peter's car and drove to Doctor's home. They drove past Doctor's house which was pointed out by accused 2 as they drove past. Accused 2 explained that the bag had been given to Doctor and one Sobaba on a Saturday. At the time the bag had been given to Doctor, money had also been given as part-payment for the transportation of the bag to Australia. All in all Doctor would receive in the region of R250 000,00 to R300 000,00. Accused 2 said that prior to handing the bag over to Doctor there had been a meeting between himself, accused 1

and Doctor. After the meeting and unbeknown to Doctor, Doctor had been followed back to his home so accused 2 knew where he lived. A previous consignment had been sent using Doctor's services. This consignment was approximately 5 kilograms and had been successfully exported. By reason of the success of the first conveyance the second conveyance (the current one) was increased to 25 kilograms. While they were in the car in the immediate vicinity of Doctor's home accused 2 asked Peter to go to Doctor's house and see if he was there. Peter went to the Doctor's home and met with his grandmother. She told him that Doctor had just left with his younger brother. Peter told accused 2 and Paul this. When Peter had entered Doctor's home he told the grandmother that he was Jeff using a false name. While they were in the car accused 2 phoned Doctor and spoke to him. He asked Doctor where he was and arrangements were made to meet. Peter, accused 2 and Paul went and waited for Doctor who did not come. Accused 2 phoned Doctor who said they should meet at about 6 o'clock. Peter told accused 2 and Paul that Doctor was playing; he believed it unlikely that they would see Doctor at 6 o'clock. This, notwithstanding they waited for Doctor. Accused 2 telephoned Doctor again and they were directed to a white minibus which he was told to meet at a garage. They found the vehicle. Inside the vehicle were five men unknown to Peter. Doctor came out. When he came out he was speaking on the phone giving a person direction. The person to whom directions had been given came (this person must be Morris) and Doctor spoke to him and then returned to accused 2, Peter and Paul. Accused 2 spoke to Doctor telling him that the boss was looking for him as he understood that the bag was lost. Doctor should come with them to take a lie

detector test. During the discussions a person known as Sobaba stopped accused 2 and asked who Peter, accused 2 and Paul were. He was assured that they were friends. Doctor indicated during the discussion that as he had no guarantee that he would return alive if he went with them he refused to do so. Doctor said that while he would not go and see the boss he would meet Peter, accused 2 and Paul the next day. Accused 2 explained to Peter that the boss is accused 1. They observed Doctor and the people he was with for a while but decided that they had become aware of the fact they were under surveillance and so they left. They returned to Eastgate. Accused 2 telephoned the boss (accused 1). He said that he had found Doctor who refused to undergo a lie detector test. Accused 2 told accused 1 that Doctor had said that the bag had been confiscated by the police and been impounded. He also told him that they would meet again tomorrow. Peter said he had a problem and needed money which was given to him by accused 2. The next day accused 2, Paul and Peter met at Eastgate. They decided to use Paul's Mercedes Benz. They went to Natalspruit. On the way accused 2 phoned Doctor but was unable to speak to him as his phone was off. Eventually he managed to speak to him. Accused 2 told Peter that Doctor was evasive and would not meet or deal with him. The vehicle they were in developed a mechanical problem and they stopped to give attention to it. At that stage accused 2 said that accused 1 had said they should kidnap the youngster who is a member of Doctor's family. Peter asked accused 2 how this could be achieved. Accused 2 said that accused 1 had said that he would send his own "*police*" to do the work. Paul left and accused 2 and Peter continued to wait. They waited at a filling station outside a Debonairs. While

they were waiting there a white BMW 535 came. Accused 2 told Peter that these are the boss' boys. He added that they would wait for the boss himself. After a short while accused 1 arrived in a white Mercedes Benz. Accused 2 called Peter over and introduced him to accused 1 as the boss. Peter recognised accused 1 as he had seen him previously on television. The lighting was good. Accused 2 said "*he is Radovan*". After the introduction Peter had left them alone. After a while accused 1 had driven away. He did not hear the discussion between accused 1 and 2. The discussion was however relayed to him by accused 2 who said they should wait as the police were on their way. Doctor would get a message that accused 1 and 2 were no longer playing games. The police came in a Ford Focus sedan which was maroon in colour. Peter was only able to recognise accused 3 amongst the persons who arrived. Peter did not wish to participate in the kidnapping and for this reason he went to Eastgate leaving the others to attend to the kidnapping. After he returned to Eastgate he was told by accused 2 that they had kidnapped the young man and that he should go to the office. The office was situated at Money Point near Eastgate. When Peter got to the office he found many people there. Accused 1, accused 2, one Johnny, one Mike, one Ronny and the person who had been kidnapped. Of the people in court the persons present were accused 1, 2, 3, 5 and 6. In addition Lukhele was present. This was the first time Peter had met accused 5, accused 6 and Lukhele. Lukhele was facing a corner sitting on the floor. His hands were bound behind his back. His head and face were covered with a hat. The persons present asked him questions. He said that he had last seen Doctor two days ago. It was however known that he had seen Doctor much later

than that and he was confronted with the fact that Peter had been to Doctor's home and knew this. Lukhele was told that he was telling lies. He was kicked by Ronny, accused 6, Khanyiso and others. He was also slapped. Lukhele asked if he could phone Doctor. At a point in time accused 5 took the blindfold off Lukhele. Accused 1 said to Lukhele *"I want you to look at me. Do you know me? Why are you lying? You were with him in the day. Are you prepared to die like a soldier? That is fine."* (As is apparent from what accused 1 said he knew the facts which had been obtained from Lukhele's grandmother). Accused 1 brought a kettle, which contained boiling water and poured it over the top of Lukhele's head. Lukhele experienced excruciating pain and screamed. He had blisters on his skin. Lukhele asked if he could phone Doctor. Accused 1 said they should leave the premises to enable the phone call to be made and that the phone should not be assembled until they were well away from the premises. Peter, accused 2, accused 5, Khanyiso and Lukhele left to enable the phone call to take place. When they were far from Money Point the phone was assembled. Lukhele telephoned Doctor and told him that his life was in his hands. He told Doctor to return whatever he had taken for if he died it would be because of Doctor. Accused 5 took the phone and said that he was Sbu. He said that Doctor should make things easy by returning the goods he had taken so that Lukhele could be set free. The response of Doctor was that he had been provoked and that it was a serious matter for which they could be arrested. Doctor further said that he could come the next day. Accused 5 suggested they should meet immediately and deal with the matter. Doctor told accused 5 that he could only come the next day. It was agreed that they would meet the next day and

the phone was taken apart. They returned to Money Point and what had happened was explained to accused 1. Accused 1 said that Lukhele should be taken to a house. Lukhele was taken to the house which was empty. Accused 2 opened the house. Lukhele was left in the house guarded by accused 2. Lukhele was offered a box to lie on so that he did not have to lie on the cement floor. Accused 5 gave accused 2 a handgun to arm himself so as to properly guard Lukhele. Accused 2 told Peter to come the next morning to relieve him. The next morning accused 2 telephoned Peter. He was told to fetch Paul. Paul did not know where the house was so Peter would have to fetch Paul and take him to the house. Peter went to Eastgate and met Paul who said that Peter should take him to the house as he did not wish to use his vehicle. They went to the house where they found accused 2. Accused 2 left in Paul's vehicle leaving Paul at the house and Peter went home. At noon that day Peter met accused 2 and Paul at Eastgate. They all went to Money Point. The persons at Money Point included Peter, Paul, accused 2 and accused 5. One Mike arrived and said that he had found a member of the police who would be able to trace Doctor using a cell phone. It was established that Doctor was in Daveyton at his wife's house. Paul, accused 2, accused 5 and Khanyiso went to the house looking for Doctor. He was not there. The next morning they heard that Doctor was in Ermelo. Accused 1 who was present said that they should get Lukhele to explain how to get to that place. Lukhele was brought and said that that place was his and Doctor's home. He said that Doctor would be there and that he would be able to show them where the place was. Accused 1 said that they should get the "police" to go with them to Ermelo. They went to Ermelo in a convoy comprising a white Ford Ranger, a

white BMW 535 and a white Vito panel van. The persons who were involved included accused 2,3,4,5 and 6. Accused 5 paid for the petrol for the cars and for snacks with money given to him by accused 1. Eventually they found the place where Doctor was suspected to be. The members of the police went to the place. Those persons were accused 3 and accused 6. They spoke to Doctor's father. They showed their appointment cards and said that Doctor had messed up in Johannesburg. Doctor's father said that he suspected that there was a problem with Doctor. Doctor was not present. When they returned to the Mercedes accused 3 could not open it as he was using the wrong key. Peter went to the Mercedes to look what the problem was. At this point he would've been in close proximity to accused 4 who was to travel in the Mercedes. Hence he could not make an error concerning the identification. They returned to Money Point from Ermelo and sat there for about an hour. They reported what happened to accused 1. Accused 2 later said that they should rest and they would meet later in the afternoon. Later they met again at the Money Point office. It was accused 5, Khanyiso, Paul, accused 2 and Peter. Accused 1 was present and they all discussed the way forward. Accused 1 suggested that Lukhele should be killed. Paul, Peter and accused 2 did not agree to kill Lukhele and the matter was discussed. Accused 5 said they were concerned with drugs during this conversation. Accused 5 was aware that he was involved in a hunt for drugs. There were complaints about the money which Peter wanted to be paid and accused 2 was told that this would be dealt with the next day. It was agreed that Lukhele would not be killed.

[50] Peter was extensively cross-examined about his statement and in relation to shortcomings in it. Peter's evidence in court was more detailed than the facts set out in the statement. He was asked as to omissions in the statement. His evidence was that he himself had edited the facts which he provided the policeman and that the policeman had edited the facts by not writing down all the matters which he told him. He was being asked for many more details in court than he had furnished at the time he made his statement.

[51] Where there are discrepancies between the evidence of a witness and his statement it is necessary to consider whether or not these discrepancies are innocent or whether they reflect either:

faulty recollection by the witness;

deliberately given differing sets of facts.

[52] There were discrepancies between the statement which he had made and his evidence. Peter stated that the statement if it was inaccurate could be because he himself had not given as much detail in the statement and also had not been asked about such detail as also not everything which he had said had been written out. There were numerous differences in the detail within the evidence he gave as opposed to the statement he had made and with regard to other witnesses. In my view these discrepancies do not so detract from his evidence that it is not credible. The evidence which he gave consisted of events which took place over a long period of time and in respect of which he gave extensive detail. He was cross-examined extensively on cell

phone records and his whereabouts. There were discrepancies as to what he had said and where he had been as opposed to what the records disclosed. In my view these discrepancies are not material for the simple reason that it is common cause that he was a participant in at least certain of the events which I have found to have taken place as I have set out earlier and for the reasons which I have set out. There is material corroboration for each of the material aspects of the evidence he gave. As with the evidence of Paul it matters not who went to whose house or at what precise time. What matters is that there were in fact meetings as described; that events took place as described and that persons were involved as described.

[53] He was extensively cross-examined over a period of weeks as to what had happened subsequent to the events in question. The relevance of the cross-examination was it appeared to me to attempt to establish that there was a conspiracy by the police to justify the arrest of at least accused 1 and 2. No such conspiracy was ever established neither was there any evidence of such a conspiracy.

[54] There was lengthy cross-examination as to the involvement of one Colonel Ximba in the matter. Peter agreed that he well knew a person known as Colonel "Killer" Ximba. The colonel is a policeman who owns a carwash business. It was suggested to him that Ximba was involved in the dealings which he had had with the kidnappers. He denied that this was so. He explained that he often spoke to Ximba, but Ximba had nothing to do with the events. It was suggested that Ximba was a participant in the events. It was

also suggested that he was the person who had influenced accused 2 to make a statement at a point in time. Whether or not he was involved in the affair is of no concern. The only reason it might be of some concern is if he was a participant in a plot to inculcate accused 1 and 2. No such plot has been established. His participation in the events is irrelevant. Even if he was a participant the fact that he was not charged in the present matter has no impact on the facts or whether or not the offences were committed.

[55] Peter conceded that he was a criminal; that he had been arrested for a number of crimes. He had laid a charge against Colonel Ximba as he believed Ximba had dealt with him improperly. This colonel was the colonel who, at a point, accused 1 indicated may have participated in a discussion with him. Ximba and accused 1 met at a point in time according to accused 1. This meeting antedated the kidnapping. The evidence concerning Ximba paints him as a shadowy figure who is mentioned as entering and exiting various scenes but who plays no visible role. The accused suggested Peter manufactured facts. There is no evidence that he did so. The facts I accept are ascertainable on well corroborated detailed evidence and the probabilities.

[56] Peter stood to gain 2 kilograms of ice, crystal meth or tik which was worth a significant amount of money and he intended to pursue his activities in seeking to recover the drugs with a view to that end. For this reason he did not inform the police or desist from further conduct and participation in the events. The accused made much of this criticism. In my view it is of no consequence.

[57] The events which Peter had described in evidence were canvassed in great detail and it was put to him that there were differences between the detail he had described in court and what he had said in the statement which he had made. For example he said at one point that there was a squabble and he in court had said there was no squabble. He said that Ximba was met at a point in time but that fact was omitted from the statements. He had not dealt with the fact that part of the assault immediately prior to the boiling water being poured over Lukhele was constituted by kicking and slapping. In his evidence-in-chief he had said that the boiling water was poured over the victim before he had gone out with Lukhele to phone Doctor, whereas in the statement he had said that it was after. In the statement he did not mention that a Nissan Navara had come whereas in chief he had said these things. In the statement he had not said that he had been to the house of Lukhele the previous day which he had said in his evidence-in-chief. In his evidence-in-chief he had mentioned a number of persons including policemen whereas in the statement he did not. He had mentioned persons as working for accused 1 whereas they were present as participants in the event and he had meant “working” in that sense. In my view none of these alleged conflicts is material or affects the honesty of the detailed evidence he gave.

[58] A criticism of Peter's evidence the accused advanced is that Captain Ramuhala said that Peter had told him that he participated in kidnapping Lukhele at his house. I found Ramuhala to be dishonest, devious and totally untrustworthy in a different judgment in this case. I stand by what I said there.

He in addition to his dishonesty was reckless and uncaring about the accuracy of his evidence. His dishonest, incompetence is the foundation of this criticism of Peter. The accused assumed wrongly that Ramuhala's evidence is acceptable and point to the conflict (Peter said in evidence he was not there) and seek to bolster the argument by producing the cell phone records to prove Peter was there. The cell record shows activity in Katlehong but some time before the kidnapping and activity during or about the time of the kidnapping at Eastgate. It takes some time to travel from the one place to the other. It seems to me that if anything the records support Peter. They certainly do not establish his presence in Katlehong. This criticism of Peter is unfounded.

[59] A further criticism of his evidence is that the cell phone records show a different date for the trip to Ermelo than the one he gave in evidence (one day's difference). It seems to me that the record supports Peter. There was a trip corroborated by the cell phone records. He got the date wrong.

[60] I accept Peter's evidence. It is cogently coherent and accounts with the probabilities.

[61] Paul Mthabela (Paul) gave evidence that on 24 June 2013 he and accused 2 had met. Accused 2 was well known to him; they were friends. He also knows accused 1. There is a conflict between the evidence of accused 2 and Paul as to precisely how they came to meet. This conflict is irrelevant in the light of the fact that it is common cause accused 2 and Paul did in fact

meet, did in fact contact and meet Peter and did go to look for Doctor. During the conversation that Paul had with accused 2, accused 2 said that he had a problem, concerning one Doctor who was supposed to facilitate the export of a bag to Australia. Doctor, who worked with Sobaba, had vanished together with the bag of drugs which he was supposed to export. Doctor, was supposed to produce the slip or waybill to show that the bag had been exported and had not done so. Doctor when confronted had explained that the police had taken the drugs. During the conversation accused 2 explained that a parcel had previously been sent that the bag could and should have been sent. He further explained that Doctor had been give R70 000,00 as an upfront payment. On the previous day accused 2 had suggested to Doctor that he should go to the owner and explain what had happened. Doctor refused to go. The owner who was in Cape Town would return on the Monday and accused 2 needed Doctor to explain and/or produce the bag. During the conversation accused 2 asked Paul to help him. Paul knew someone namely Peter. Peter, Paul and accused 2 met. Accused 2 explained the problem to Peter. Paul could not have known the detail unless he was told it by accused 2. Paul also knows detail unknown to Peter and could not have manufactured.

[62] I have set out the portion of Paul's evidence which was not known to or spoken about by Peter. Paul's evidence in all respects materially corroborates Peter's evidence.

THE ACCUSED.

[63] The evidence of each of the accused was a denial.

ACCUSED 1.

[64] Accused 1 admitted that he frequented Money Point but claimed that he had been present about his own affairs and that he was not a participant in the events at all. He knew of Colonel Ximba as he had spoken to him about his apparent blackmailing of a friend of his. It is probable that accused 1 was not just lounging about Money Point as his evidence would have it. It is probable that Money Point was as described by the witnesses:- the hub of the business accused 1 was controlling. Every activity undertaken involved as a material part of it some incident at Money Point. Lukhele was taken there, discussions were held there, the search was co-ordinated from there and attempts were made to get Doctor to go there. Accused 1 on the State's evidence was alerted to and in control of the plan to export the drug, the plan to kidnap Lukhele and the implementing of the plan.

ACCUSED 2.

[65] Accused 2 denied participation in any drug deal, kidnapping or assault.

[66] Accused 2 admitted that he was urgently seeking Doctor at the time. He gave as a reason that he had advanced Doctor money which had to be repaid. The money had been advanced to enable Doctor to purchase clothing which he would sell in a business. He stated that he stopped looking for

Doctor as at a point in time he had been forced to pay at least some of the debt due to the person from whom he had borrowed the money and that for that reason he had ceased looking for Doctor. This explanation is highly improbable. The moment a creditor pays over his own money because his debtor failed to pay him is the moment when it becomes more important than ever before to obtain payment from the debtor. A much more probable reason to stop the hunt would be the realisation that the subject-matter of the search (Doctor and the bag) could not be found.

[67] Accused 2's evidence as to what he was to be repaid is also improbable. At a point in time accused 2 claimed that he was to be repaid a certain amount, subsequently he claimed he was to be paid that amount and a share in the business. He also claimed that the full amount, was fully due, owing and payable at that point in time. This could not be unless all the clothes which had been bought with the money had been sold. It is improbable that the clothing would have been sold as a unit and a lump sum received as a unit. It is much more likely that a business over a period of time would generate the funding and that as and when it did so the debtor would be obliged to pay the creditor.

[68] At a point in time accused 2 seemed to indicate that the urgency was related to the salary which Doctor would receive at or about that time. This suggestion is wholly improbable having regard to the small salary and the large amount which accused 2 was seeking to recover from Doctor.

[69] The claim of accused 2 is in direct conflict with the evidence of the State witnesses, is improbable having regard to the scope of the search, the number of people employed in it, the amount of money changing hands and the urgency. Accused 2's evidence is false. The search concerned attempting to recover drugs and the missing courier. The search included the kidnapping and assault of Lukhele. There is no explanation on the evidence of accused 2 for the kidnapping and assault on Lukhele. The probable reason for the kidnapping and assault is set out previously to flush out Doctor and recover the drugs.

ACCUSED 3.

[70] Accused 3 is a member of the South African Police. On the 25th June 2013 he had three phones which he kept with him continuously day and night. He was investigating and was on duty. He used a Mazda 6 which is a police vehicle which was allocated to him. He was investigating corruption of traffic officers on the East Rand. On that day he was nowhere close to Katlehong which is the place where Lukele was kidnapped. He was also nowhere near Sasol garage at or about the time that the meeting took place prior to the kidnapping. He denied being at any of the other places including at Money Point, at Ermelo. He was involved in none of the offences. He knew about a bag of drugs as he had heard of it. He had no personal knowledge of these things. Accused 4 and 6 are his colleagues. He neither knew accused 1, 2 nor 5. In 2013 Colonel Ximba asked him to set up a meeting with accused 1 and asked him if he knew accused 1. He did not set up the meeting as he did

not know accused 1. He later said in conflict with his earlier evidence that Ximba had phoned him and asked only if he knew accused 1. He had not asked him to set up a meeting. He knew Peter. They had from time to time lent each other money. On the afternoon of the 25th June 2013 he was at Bradford Road and at or near Money Point. The records show the vehicle parked near Bradford Road and stationary there for some period of time moving a short distance and being stationary again. Accused 3 said that he was not inside Money Point he was at the taxi rank which is about 100 metres from Money Point. He worked together with accused 4 in the same group and their vehicle records show them together at OR Tambo, the airport. At that time they were working on a complaint involving rifles, RDP houses and drugs. This is in conflict with his earlier evidence that the work with which he was involved was corrupt traffic officers. During the course of the trial it was put by counsel for accused 3 that the vehicle he drove was allocated to him for his exclusive use. When he gave evidence accused 3 cleverly modified the version to cope with the conflict in his evidence that he did not have exclusive use of the vehicle by saying that the person with whom he shared came after the vehicle had been originally allocated to him exclusively. This point might appear insignificant but it is material as his sole use of the vehicle founded his alibi defence. Accused 3 referred to vehicle records as establishing he was not at Lukhele's house at the time of the kidnapping. The records show the vehicle inter alia circling about in the immediate vicinity of the airport and at a time as stopping near accused 4's vehicle.

[71] The evidence of accused 3 is flawed in material respects concerning his exclusive use of the motorcar, why he was with accused 4 on the day in question and whether or not he was at Money Point.

[72] The probabilities are that the vehicle used by accused 3 would not drive aimlessly around the airport as it seems to have done. The investigation whether it involved traffic officers, rifles, RDP houses and other corruption including drugs remains unlinked to the movement of the vehicles and the movement of accused 3 on the day. It appears to me that accused 3 and accused 4 have orchestrated an alibi through the use of their vehicle records. I do not accept that either accused 3 or accused 4 were present in their vehicles. As is clear from the evidence of accused 3 he used many cell phones. The fact that any particular cell phone records demonstrate him being at a particular place on a particular day does not independently of his evidence (which I do not believe) establish his whereabouts.

[73] Peter identified accused 3 as being at the Sasol garage at Money Point when Lukhele was assaulted; at Bethal at the filling station and at Ermelo when they were looking for Doctor.

[74] Paul identified accused 3 as being at Money Point when Lukhele was assaulted and at Ermelo when they were looking for Doctor.

[75] Accused 3 put himself near Money Point in the afternoon prior to the kidnapping. The co-ordinates show that he was on the premises. They are

accurate to 5 meters. He was also seen at Money Point and admittedly went there. He claims he went on business. It is not coincidence that accused 3 is linked to events at Money Point by witnesses and his admission that he was there on occasion about a different occasion.

ACCUSED 4.

[76] The evidence of accused 4 was that over the period of the kidnapping he was working with the Organised Crime Unit and in particular that on 25th June 2013 he was working together with accused 3 on the same project. He was involved in the observation concerning a crime involving drugs. He said he was working together with accused 3 but was not continuously with him. He specialised only in drugs; that was his main concern whereas accused 3 was a co-ordinator of the other matters which were being investigated. He in particular was only doing investigation of drugs.

[77] This is in conflict with accused 3's evidence which was that they were working together on a number of matters. Accused 3 did not isolate any particular matter as being the domain of accused 4. He explained that he was at OR Tambo that evening (25th June 2013) for observation. He also had his own purpose which was to fetch a plane ticket for his child who was leaving the next day for Durban. Subsequently it became clear from his evidence that he was fetching not only a ticket for his son but for other people including himself and the dates when the travel was to take place did not coincide with his original suggestions as to when the dates were.

[78] It transpired that on the day when he went to fetch the tickets he was there to fetch three tickets and that whereas in his evidence he had originally mentioned one ticket as had been put in evidence that he was there to fetch two tickets.

[79] He was unable to explain why details which had been given by the state witness such as that he was a policeman, and that he worked with accused 4, that he had been in Money Point at or about the time and on the day when his records show him to have been in the immediate vicinity of Money Point. In addition accused 4 put it to Captain Ramuhala that the reason accused 4 went to the airport was to purchase a ticket as if that was the only reason he had gone there. It was not put that he was there about police business together with accused 3.

[80] I do not accept the evidence of accused 4 and do not accept that he was in possession of the vehicle at the time that he was identified as being one of the kidnappers at Lukele's house. I further do not accept that he was not present in Ermelo.

[81] It was submitted that there could have been an error made by Lukhele in identifying accused 4 whose name is Jeff in that Jeff was the person who had been to the property earlier in the day and was not the current accused 4: Jeff. There is no evidence that the witness was in any way confronted with the names of the person he identified or that he identified on the basis of the

names. He identified on the basis of what he saw. He dealt with the six attackers at his home for some time. He was in their presence for some time prior to being manhandled and bundled in the car. In the later statement he made he said that he would be able to identify them. He did not give a description. In an affidavit dated November 2013 Lukhele said that his eyes were closed so he might not be able to identify his attackers. This is the only very hesitant indication that he could not identify them. I do not believe it impacts upon his certainty.

[82] Accused 4 produced documentation reflecting that had he been in possession of the motor vehicle that was issued to him; by the SAPS had been in possession of his cell phone, was not present at the place when Lukhele said he was there. This evidence presented as an alibi is dependent on a finding that accused 4 was in fact in possession of the car and cell phone at the time.

[84] Accused 4 produced similar documents to those produced by accused 3. For quite some time over the relevant period the two accused were driving seemingly, aimlessly around the airport. Both accused are aware of the tracking capabilities of cell phones and the cars they rove. It is inconceivable that they would take those cars with them when they want to perform activities where they did not wish to leave an electronic trail. It is much more likely they would use them to create a fictitious alibi.

[85] I do not accept the evidence of accused 4.

ACCUSED 5.

[86] Accused 5's evidence was a blunt denial of what had been said of him by the state witnesses. He said that his name was Miya and that he had never been known as Zulu or Zuluboy or as Sbu. He **raised** as an issue that he may have been implicated because he had fallen out at a point in time with Ximba. It is apparent from the facts which I have set out previously that he was identified positively as being a participant in numerous of the events and by numerous witnesses. His explanation is not only incredible it is untrue and not reasonably possibly true. There is simply no indication of any accused being substituted for any participant. The detail concerning his identification is too detailed in time, place and event. He is a person involved in the taxi industry in which people are killed for little money. He claimed to have never experienced this. It is a well-known feature of this country that the taxi industry is regularly involved in violence. I do not accept his evidence. In addition the motive of Peter and Paul to implicate him was never put during evidence.

[87] Peter identified accused 5 at Money Point where Lukhele was assaulted, at the safe house on 25 June 2013, as being with him hunting in Daverton on 26 June 2013 as being at Money Point prior to the Ermelo trip and at Money Point when they returned. Peter also identified him as being the person who took Lukhele to phone Doctor and as the person who spoke to Doctor. He was one of the people who were opposed to killing Lukhele. Paul

identified accused 5 at Money Point before the Ermelo trip. Accused 5 fetched Lukhele from the safe house. During the Ermelo trip he was identified as the person who paid for petrol and snacks with money he got from accused 1. Paul well knew accused 5.

ACCUSED 6.

[88] Accused 6 is a member of the South African Police. Similarly his evidence was a blunt denial. He conceded that he works together with accused 3 and 4 at the same office. At the time of the events he was on leave. Accused 6 was similarly identified as previously set out by numerous witnesses whose evidence was reliable. The witnesses corroborated each other and gave detailed evidence which proved to be accurate.

[89] Peter identified accused 6 at Money Point when Lukhele was assaulted, at the Bethal filling station on the way to Ermelo.

[90] Paul identified accused 6 as being at Money Point before they left on the Ermelo trip and at Ermelo when they went to look for Doctor.

IDENTITY ACCUSED 1,2,3,5 AND 6.

[91] All the accused were identified at various point in the events by various witnesses. All save for accused 4 were present at Lukhele's assault at Money Point.

[92] One or more or all were present at various other points. The witnesses who gave evidence of the trip to Ermelo identified the accused who were present at different times. There is evidence which inherently contains the assertion that those who left for Ermelo returned. The fact that different witnesses saw different accused at different times does not mean they were not participants throughout the Ermelo incident.

[93] The witnesses who gave evidence of occurrences where only a few of the accused were present corroborated each other as to what had happened. All the events spanned more than a few minutes each. There was ample opportunity to observe in each case. The sightings occurred over several days and the witnesses had time and opportunity to recollect and reinforce their identification of each accused.

[94] Certain of the accused were known to certain witnesses.

[95] In my view the identification of each accused are reliable and supported by the probabilities.

ICE/TIK/CRYSTAL METH/ AS METHAMPHETAMINE IDENTIFICATION.

[96] Count 1 charges the six accused with dealing in an undesirable dependence-producing substance in breach of section 5(b) of Act 140 of 1992 in that the accused dealt in methamphetamine commonly referred to as

crystal meth/ice/tik. It is an element of the charge and the State is required to establish that the accused dealt in 25 plastic bags containing that substance. The first issue to be resolved is whether the State established that the substance allegedly dealt in was the substance defined in the Act namely methamphphetamine.

[97] No expert evidence was called. The evidence was that accused 2 referred to the contents of the bag as being drugs.

[98] Paul told Peter in the presence of accused 2 that accused 2 had also told him that what had been lost was 25 kg crystal meth. Accused 2 agreed to pay Peter 2 kg of tik if the bag containing all the drugs was recovered. Paul said that accused 2 had said that he had a problem about a bag containing ice which was supposed to be sent to Australia. Accused 2 is the source of the information of what the bag contained. He knew what was inside it. Doctor referred to the substance as ice. Doctor did not know what was in the bag which was sent on the dummy run but was told by accused 2 that it was a drug. Accused 2 gave Doctor the bag containing 25 parcels. Doctor thought that the contents were ice as in frozen water as, when he was told to take the bag with him his response was "*What if it melts while in my possession?*" Doctor's description of the contents of the parcels as having properties similar to the properties of ice is indicative of the fact that that he was told that the parcels in fact contained ice. He, Doctor clearly did not have any idea of what ice was and assumed that the reference to ice was a reference to frozen water. The fact that this suggestion to him led him to believe that the

properties of packets were frozen water is indicative of the power of the suggestion which had been made to him. In my view the State has proved that it was stated by accused 2 that the parcels contained crystal meth, tik and ice on several different occasions. Additional evidence that the bag contained drugs is found in the elaborate furtive process to export the bag, the value of the contents and in the nature and cost of the search to recover the bag when it was lost. This was a hunt on a large scale. A hunt at all costs to recover something extremely valuable. The statement of accused 2 is not admissible against the other accused but is one of the facts setting the matrix.

[99] The bag was proven beyond reasonable doubt to contain a drug known as crystal meth, tik and ice. The question is whether that evidence establishes that its contents were methamphetamine.

[100] The Oxford Dictionaries Online defines crystal meth as being methamphetamine. The Memidex online dictionary defines crystal meth as being a methamphetamine derivative used in the form of a crystalline hydrochloride. Its source is given as a crystal methamphetamine, methamphetamine hydrochloride. Synonyms include crystal, glass, ice and meth. The Collin's Dictionary online which can be sourced at the same site as the Memidex Dictionary defines crystal meth as being crystal methamphetamine which is a concentrated and highly potent form of methamphetamine with dangerous side effects. A number of other dictionaries referred to in the same website indicate that methamphetamine, ice, tik, crystal, crystal meth are all synonyms meaning methamphetamine. The

English language defines the names as all meaning the same thing methamphetamine. The Concise Oxford Dictionary tenth edition published 2001 defines meth (also crystal meth) as methamphetamine.

[101] In the present matter the drug forming the subject-matter of the charge was sold by Doctor and is irrecoverable. It is accordingly impossible to check and analyse the substance which was contained within the plastic bags inside the sports bag. The substance was repeatedly referred to by accused 2 as being crystal meth, ice or tik according to the evidence which is set out above. Each of those references by accused 2 constitutes a reference to the prohibited drug methamphetamine. In my view the use of the language by accused 2 of the abbreviation and slang which have the same meaning as the word contained within the statute is a reference to the word contained within the statute and the substance defined by that word which is a prohibited substance in terms of the Act. Accordingly accused 2 on the evidence provided sufficient information as to the contents of the bag to enable the identification of the drug within it to be identified as methamphetamine.

Each of the 25 bags was worth R300 000,00 so the total consignment was worth of the order of R7,5 million. The extent of the steps taken to recover the drug demonstrates the employment of a significant number of people and a great degree of urgency. These steps must have been expensive. Peter would have been paid of the order of R600 000,00 had the drug been recovered. The lengths to which the persons seeking to recover the drug were prepared to go also indicate the value of the substance and that it is a

drug. It is highly improbable that for a relatively insignificant amount Lukhele would have been captured tortured and kept hostage for several days. In addition to the resources which were employed in the attempts to recover the bag there was also expense in travelling to Ermelo, to the airport, to Katlehong and various other places on an almost continuous basis over a period of some days by a significant number of people.

[102] In my view it is established beyond reasonable doubt that the bag contained the drug methamphetamine.

ATTEMPT.

[103] Section 256 of the Criminal Procedure Act 51 of 1977 makes it competent if the evidence proves an attempt to convict. Section 256 provides:

“If the evidence in criminal proceedings does not prove the commission of the offence charged but proves an attempt to commit the offence or an attempt to commit any other offence of which an accused may be convicted on the offence charge, the accused may be found guilty of an attempt to commit that offence or as the case may be such other offence.”

[104] This section makes it competent for an accused who participates in a crime to be convicted of an attempt if the facts are appropriately proven. The offence charged is dealing in a prohibited substance. The element of the

offence involves not just the existence of a state of affairs but proof that the affairs concern a prohibited substance.

DRUGS AND DRUG TRAFFICKING ACT 140 OF 1992.

[105] The definition section of the Act provides that dealing is constituted by:-

“performing any act in connection with the transshipment, importation, cultivation, collection, manufacture, supply, prescription, administration, sale transmission or exportation of the drug” The offence is contained in section 5 (b) which provides:

“Section 5 No person shall deal in –

(a) Any dependence-producing substance”

[106] In this case accused 2 and accused 1 were involved with the arrangements for and exportation of drugs contained in the bag. Accused 2 was the person who made arrangements with the courier and who implemented the plan. Accused 1 is beyond reasonable doubt the mastermind who only appears as and when he is needed. Accused 1 was intimately involved and in control of all the events described by the State witnesses.

[107] Accused 1 and 2 were also each instrumental in attempting to recover the bag by way of recovery of the person in whose possession they had left the bag. The knowledge of accused 2 was the knowledge of accused 1. Accused 2 and accused 1 both knew that drugs were inside the bag. Accused 2 knew the drugs were methamphetamine. Accused 1 according to what

accused 2 said would also have known this. The extra curial statements of accused 2 concerning the identification of the drug as crystal meth, tik or ice are inadmissible against accused 1. Accused 1's knowledge is limited to the bags containing a prohibited drug as that is all that the admissible evidence against him establishes.

[108] Applying the principle of *dolus eventualis* to the problem the knowledge of accused 1 extended to any one of the prohibited drugs listed in the act being within the bag. Hence accused 1 attempted to deal in methamphetamine as the State proved what drug was in the bag, but only proved that accused 1 was dealing in an illegal unidentified drug.

[109] The provisions of section 256 allow a conviction of an attempt. In *S v Ndlovu* 1982 (2) SA 202 (T) Nestadt J with whom Van Dijkhorst J concurred held at page 205 that a conviction of attempt was competent on a similar provision. In the present case accused 1 was attempting to commit what on the evidence before me is impossible namely the export and recovery of a prohibited substance which has not been proven as against him to be the particular one alleged. Hence accused 2 is guilty of count 1 and accused 1 is guilty of an attempt to commit the offence in count 1.

ACCUSED 3, 4, 5, AND 6 AND COUNT 1.

[110] It remains to deal with the involvement of accused 3, 4, 5 and 6. It was submitted that the evidence did not establish beyond reasonable doubt that

they knew that the person they were hunting was being hunted because of his possession of the bag of drugs. The bag and Doctor were freely discussed among all of the accused. There is, save in respect of accused 5, no evidence actually identifying the contents to the accused. In respect of accused 3, 4, and 6 there is no reliable evidence that they knew the bag contained drugs. The position of accused 5 is different. At the meeting where the killing of Lukhele was discussed and accused 5 and others opposed his murder, accused 5 said they should not kill him and that they were seeking drugs worth millions. Hence he knew the bag contained drugs. There is no evidence that he knew what specific drug was in the bag. On the same reasoning applicable to accused 1 he is guilty of an attempt.

IDENTITY GENERALLY.

[111] The witnesses who identified the accused were able to in addition to making the identifications refer to numerous facts about each witness. The witnesses were able to identify the policemen as such, Money Point as the hub of activity, the different roles each accused played features of each individual accused accurately. The fact that the corroboration in detail exists strengthens the probabilities that the identification is accurate. If from the analysis that on count 1 accused 2 is guilty on the main count and accused 1 and 5 are guilty on an attempt; on count 2 all the accused are guilty. On count 3 accused 1, 2, 3, 5 and 6 are guilty. Accused 4 was not at Money Point but was complicit in the common assault which took place at Lukhele's house.

SAPS.

[112] The accused submitted that Lukhele had made a conscious decision not to pursue any charge and hence the earlier charge had not been prosecuted. These submissions arose out of the fact that a docket had been opened pursuant to a charge being laid by Ngcobo at a time prior to the release of Lukhele. The police according to the investigation diary had taken some steps to investigate the matter concluding the registration number for Ngcobo and the type of vehicle. On 3rd July 2013 the police discovered that Lukhele was at home having been released. Lukhele told them that he had been released because the persons who had kidnapped him were looking for his brother not for him. There is an entry dated 8th July 2013 stating that the docket was closed as being false.

[112] Notwithstanding clear evidence before SAPS as to facts concerning the kidnapping of Lukhele no further steps were taken.

[114] The next step in the investigation was the assignment of the case to the investigating officer Captain Ramuhala by a General Moono. The instruction Captain Ramuhala received was to trace and arrest the suspects. At a point in time he received the old docket from General Moono. This docket appears to have been made available at some time after the investigating officer had commenced the investigation.

[115] It is apparent that the investigation was commenced not in consequence of any initiation of the investigation by Lukhele but from some other source. It became common cause that the fresh investigation had commenced or the instruction emanated from the National Task Team in Pretoria. It appears as if the police discovered the existence of what had happened to Lukhele and pursuant to an instruction to investigate further did so. It was submitted that the instruction given was to "get accused 1" and that in the course of doing so the police behaved improperly in the investigation by creating and/or tampering with and/or failing to obtain evidence.

[116] There is no evidence that the police in any way were instructed to falsely implicate any of the accused or that the police in fact did so. There is further no evidence of any conspiracy on the part of the police to implicate any of the accused or modify the evidence. The evidence of the kidnapping, assault and drug deal are established independently by the witnesses to the events. Accused 1 and accused 2 have been found by me to have been party to those events independently. The other accused 3,4,5, and 6 are identified by evidence which is detailed and corroborated in material respects. In my view not only is there no evidence of tampering it is improbable there was tampering with the evidence.

[117] The investigation of the police was poor. There were sources of information which could have been collected and used, there were leads which were not followed, and there was objective evidence which was not obtained.

[118] The fact that the investigation was poor and some evidence not obtained in no way leads to the inference being capable of being drawn that the evidence was in any way tampered with or that in any way any of the witnesses were directed as to who should be implicated.

[119] The submission is made that as the police knew who the suspects were that the identity of the suspects have been created by the police with a view to them being implicated. There is simply no evidence of this conduct.

[120] The submission was made that there were throughout the occurrence of the events during June 2013 numerous phone calls made to and from several of the witnesses and one Colonel Ximba. The cell phone records of the various witnesses do evidence frequent phone calls being made from time to time over the period. The explanation of the witnesses was that the phone calls were innocently made and had nothing to do with the case. Even assuming the phone calls were related to the case the fact that they were being made in no way means that the facts were being invented or that the accused were being substituted for perpetrators. One does not know if Ximba was evidence gathering for SAPS or whether he was a rogue. Whichever one of the two it was, it does not amount to changing or tampering with the evidence.

[121] The rhetorical question was put as to how the police could know that persons not identified in affidavits were the physical persons who

subsequently became the accused. The answer of the investigating officer is that there were informers and that the witnesses are reliable.

[122] The submission was made that the trial was unfair in that the evidence had not been collected and for example an identity parade had not been held. The submission was made that had an identity parade been held the accused would have been vindicated as witnesses would not have been able to identify them; had the video-recordings been collected the accused would have been vindicated as their presence would not be visible on the video. In my view these are all highly speculative submissions. All of the witnesses who gave evidence as to the identity of the accused in my view attempted of their own accord to describe and relate how the particular accused was involved and why they said he was involved.

[123] It was submitted that certain of the evidence was taken unconstitutionally in that for example a witness had been lied to as to the reason why he was being taken to the police station. The answer to this is that he may well have been lied to as to going to the police station. He however voluntarily made the statement at the police station when requested to do so and he voluntarily testified. In my view the concept of fairness in a constitutional sense is not eroded in this case.

[124] It was submitted that several of the records establishing the whereabouts of the cell phone of the investigating officer and others demonstrated that what had been said in evidence was inaccurate. The

criticism is factually correct. It must be remembered that the kidnapping endured over a period of time. The events took place over an extended period of time. In addition the persons hunting the accused and the bag of drugs were under pressure to perform the hunt. They appeared to me to have done a large number of things in a short space of time. In these circumstances it is not unreasonable for a witness to remember events in an inaccurate order or in a slightly inaccurate way. The question is not whether there is an inaccuracy; the question is whether or not the reliability of the evidence remains intact notwithstanding the inaccuracy. In my view the witnesses who gave evidence attempted as best they could not to give detailed evidence over an extended period of time of a large number of events which took place. I would expect such witnesses to deviate from the precise sequence of events in minor detail or to jumble the order on occasion.

[125] In my view the true result of the police's improper and inadequate investigation in this case is that it put the State case at risk. The State case was dependent upon an unlawfully obtained confession which was excluded in evidence and such witnesses as the State was able to marshal. By the nature of the events many of those witnesses fall into the category of accomplice. I am conscious of the fact that accomplice evidence can be and often is easily manipulated. An accomplice can easily substitute one person for another while maintaining the true set of facts. The accomplices in this case are accomplices in respect of different facets of the case which overlap to an extent. Some were hunters some were drug dealers. There is sufficient objectively accurate evidence and factually corroborated evidence for their

evidence to be accepted. The overlapping portions of the case are insightful as the different witnesses to different events would not in detail give the same evidence unless it was true.

SUBMISSIONS GENERALLY.

[126] I have not dealt with each of the submissions made and each factual discrepancy allegedly existing as those submissions run into hundreds of pages. I have dealt with the pertinent issues and the probabilities namely what happened and who probably caused what happened to happen. Those enquiries which are the proper ones to be made encompassed a small portion of voluminous evidence and extensive cross-examination into minutiae. I allowed this extensive cross-examination although I at the time believed the cross-examiner at times merely was milling each grain of sand on the beach. After the milling of the grains of sand the picture remained the same – it was still sand on the beach. The accused fully exercised all their rights of obtaining documents and investigating each aspect as deeply as laws of evidence permitted. The fact that after this intensive attack upon the witnesses' evidence remained intact is testimony to the fact that their evidence materially was true.

REASONS FOR DISCHARGE APPLICATION BEING REFUSED.

[127] The reasons given for convicting the accused explain why I refused the application for discharge.

SECTION 204 WITNESSES.

[128] The witnesses who were warned in terms of section 204 gave their evidence acceptably and are entitled to the indemnity the section permits me to give them. It is a matter of sorrow that persons who were involved in reprehensible conduct walk free. The law recognizes however that society must sometimes sacrifice its right to convict wrongdoers in the interest of convicting others. There was no easy way for the State to obtain a conviction otherwise than by using the witnesses it did.

[129] It is apparent from what I have said that it is my view that the following is an appropriate order.

1. Count 1

Accused 2 is guilty in the main count.

Accused 1 and accused 5 are guilty of an attempted
contravention of the main count.

Accused 3,4, and 6 acquitted.

2. Count 2.

Accused 1, 2, 3, 4, 5 and 6 guilty.

3. Count 3.

Accused 1,2,3,5 and 6 guilty

Accused 4 guilty of common assault.

4. Section 204 witnesses

4.1 The witnesses mentioned below are indemnified from any possible prosecution arising out of the events specified:-

4.1.1 Peter Vusi Msimang is indemnified from any possible prosecution in relation to counts 1 and 2 of the indictment.

4.1.2 Paul Mathabela is indemnified from any possible prosecution in relation to counts 1 and 2 of the indictment.

4.1.3 Bhekizwe Doctor Nkosi is indemnified from any possible prosecution in relation to count 1 of the indictment.

4.1.4 Bhekizitha Sobaba Khumalo is indemnified from any possible prosecution in relation to count 1 of the indictment.

Counsel for The State	:	Adv. Mashiane
Counsel for Accused 1 and 2	:	Adv. A Van Den Heever
Attorneys for Accused 1 and 2	:	BDK Attorneys
Counsel for Accused 3, 4, 5 and 6	:	Adv. Spangenberg
Attorneys for Accused 3, 4, 5 and 6	:	Spangenberg Attorneys
Date of hearing	:	8 May 2014
Date of judgment	:	24 August 2015