



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**  
**MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF**  
**APPEAL**

**From:** The Registrar, Supreme Court of Appeal

**Date:** 22 AUGUST 2022

**Status:** Immediate

*The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal*

*Qurashi and Others v The State* (Case no 1166/2018) [2022] ZASCA 188 (22 August 2022)

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Today the Supreme Court of Appeal (SCA) handed down a judgment dismissing the appeal against the decision of the Free State Division of the High Court of South Africa, Bloemfontein (the high court).

The first, second and third appellants, Saleem Qurashi, Farhan Ullah and Shabber Ghulam (hereinafter referred to as 'the accused'), stood trial as accused 2, 5 and 6 respectively, together with four others, all Pakistani nationals before the high court. The accused had to answer to 11 counts, namely: the contravention of s 9(1)(a) of the Prevention of Organised Crime Act 121 of 1998 (POCA) (count 1); two counts of robbery with aggravating circumstances (counts 9 and 16); five counts of murder (counts 10, 11, 12, 13 and 17); kidnapping (count 14); attempted extortion (count 15); and, a contravention of s 18(2)(a) of the Riotous Assemblies Act 17 of 1956, being a conspiracy to commit kidnapping (count 18) - a charge that was not preferred against the third appellant.

Count 1 relates to the alleged participation of the accused in organised criminal gang activity in contravention of s 9 of POCA. As part of a pattern of such activity, the State contended in the high court that the accused either individually or collectively committed the various offences set out in the indictment. The prosecution alleged that in November 2007, the four deceased in counts 10 to 13, Malik Yasser Awan, Amanullah Nusrullam, Shabodien Hussein and Majid Saleem, who were also Pakistani nationals, were lured to Clocolan, Free State, by the accused, where they were robbed of a BMW sedan motor vehicle, four Nokia cell phones and two firearms (count 9). They were then murdered and buried in a shallow grave (counts 10, 11, 12 and 13) at a property known as 42 Andries Pretorius Street, Clocolan.

On 4 March 2008, the accused allegedly kidnapped Mr Zia Khan and deprived him of his liberty at 6 Van der Spuy Avenue, in Bloemfontein (count 14). They then threatened to kill Mr Zia Khan unless his relative, Mr Rashid Khan, paid them R2 million (count 15). Mr Zia Khan was also robbed of his Opel Corsa bakkie and a cell phone (count 16). Following the killing of Zia Khan (count 17), he was buried in a shallow grave at 6 Van der Spuy Avenue, Estoire, Bloemfontein. The State further alleged that accused 1, 2 and 5 conspired with Mr Ifthkar Ahmed to kidnap Mr Rashid Khan (count 18). Save for count 17, on which the accused were convicted of culpable homicide instead of murder, the accused were convicted as charged and each sentenced to imprisonment for life.

The issues before the SCA concerned: first, the admission of evidence, which, the accused contended, was obtained unconstitutionally and infringed their right to privacy and to a fair trial; second, the admission of hearsay evidence and the prominent role it played in their conviction; and, third, the credibility findings made by the high court in favour of the prosecution witnesses against the accused.

At to the first, it was contended for the accused that the search of the premises and seizure of exhibits at 6 Van der Spuy Avenue in Bloemfontein violated the accused right to privacy. So too, the search of their persons, vehicles and houses upon their arrest.

The SCA held that the starting point must be an appreciation that a notable feature of the Constitution's specific exclusionary provision (s 35(5)) is that it does not provide for the automatic exclusion of unconstitutionally obtained evidence. Evidence must be excluded only if it (a) renders the trial unfair; or (b) is otherwise detrimental to the administration of justice. As no evidence was adduced on that score on behalf of the accused, the high court was simply unable to make that assessment.

The SCA found that although the search at 6 Van der Spuy Avenue was without a search warrant, the property was for all intents and purposes abandoned. The search had been conducted with the permission of the letting agent. Furthermore, it held that the searches in Kestell and Pietermaritzburg followed upon the arrest of suspects and were conducted in terms of s 23 of the Criminal Procedure Act 51 of 1977 (the CPA). Lastly, the SCA held that as none of the accused testified during the trial within a trial, the high court was simply none the wiser as to whose privacy rights had been infringed, the extent and scope of such infringement and whether or not, as a consequence, it ought to exercise its discretion in favour of admitting such evidence. So approached, the SCA held, no justification existed for the exclusion of the evidence.

As to the second, during the course of the trial, some of the evidence relied upon by the prosecution was sought to be excluded by the defence on account of its hearsay nature. The high court ruled them admissible in terms of s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 (the Law of Evidence Act).

The SCA considered the principles applicable. In respect of the evidence of Ms Saleem and Ms Awan, with regard to the telephonic conversations they had with their husbands immediately prior to being reported missing, the SCA held that there were sufficient safeguards in the evidence, if viewed holistically, which ought to have satisfied a trier of fact as to the reliability of the hearsay evidence tendered by each of the witnesses.

Furthermore, the SCA held that the various statements attributed to Mr Rehman Khan, who did not testify, ought not to have been admitted into evidence against the accused. This was so, because a witness who testifies in open court does so under oath or affirmation and so the potential liability for perjury operates as a natural deterrent against false testimony. Also, the presence in court of the person against whom the evidence is tendered encourages circumspection on the part of the witness. Because of the adversarial nature of court proceedings, a person has the right to confront his or her accuser and to test, by cross-examination, the veracity of the witness's assertions.

The SCA further held that, unlike Mr Rehman Khan's extra-curial statements, the pointing out made by him stood on a different footing. It led to the discovery of the bodies of the four deceased in counts 10 to 13, which could not have been left out of the reckoning.

As to the third, it was contended that the high court erred in finding that Latela, Ahmed, Rossouw and Van Zyl were credible and reliable witnesses. In respect of the credibility findings made by the high court in favour Mr Rossouw and W/O Van Zyl, the evidence of each related to real evidence. Aside from the challenge to the admissibility of such evidence, which the SCA found to be untenable, the fact of the existence or reliability of that evidence was not sought to be impugned in any way. Their credibility could hardly have featured and receded into the background.

As to those made in favour of Mr Latela, the SCA found that the relevance of his evidence was restricted to count 1, the alleged participation of the accused in the organised criminal gang activity. The court held that Mr Latela had been warned in terms of s 204 of the CPA and thus his evidence had to be treated with caution where it stood alone. His evidence found corroboration in that it ultimately came to be undisputed that each of the accused had more than just a passing acquaintance with each other as well as 42 Andries Pretorius Street during 2006 and 2007.

As regards Mr Ifthkar Ahmed's version, the SCA found material corroboration in the other evidence adduced by the prosecution as detailed in the judgment. More importantly, the evidence adduced through cross-examination of accused 6 provided weighty support to Mr Ahmed's version that he was

told by accused 2 that the killing of the four deceased was gang related. Furthermore, he was told by accused 1 of their involvement in the criminal activities. The SCA found, that Mr Ahmed could hardly have conjured up that information as it would take tremendous guile and ingenuity for him to have pieced together such a coherent account.

Regarding the evidence of each of accused's version, the SCA held that little value would be served in traversing the evidence of each of them in any greater detail. Not only did the evidence show a clear association between the accused to each other, but also links each of them by means of several different pieces of evidence to all five deceased and the two properties where their bodies were buried.

The SCA held that the points raised on appeal, when viewed either individually or collectively, could hardly tip the scales in favour of the accused.

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