iAfrica Transcriptions (Pty) Ltd.

Date: 26.03.2012

The Honourable Mr. Justice: Satchwell

Room: _____

High Court

Cnr Vermeulen and Paul Kruger Street

Pretoria

Corrected

Dear Judge,

TYPED JUDGMENT FOR REVISION

It would be appreciated if you could kindly do the correction on the attached judgment whereafter it is requested to return it to our office for further attention.

Case Number: SS 25/10

Parties: State

Versus

T J Mahlangu AO

Delivered On: 02.08.2011

Requested By: Maretha Bothe Appeal

First Revision: 26.03.2012

Second Revision: _____

Third Revision: _____

Final Revision: _____

Remarks: _____

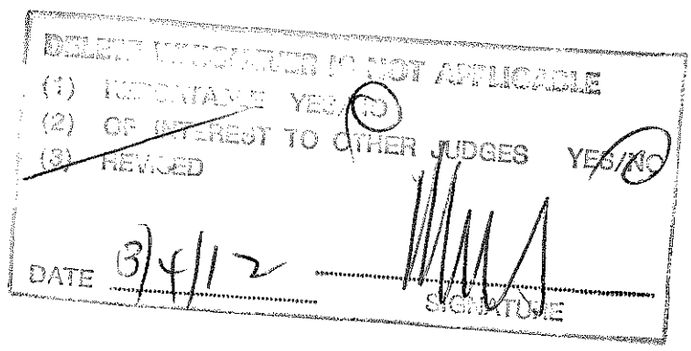
_____

IN THE HIGH COURT OF SOUTH AFRICA

(SOUTH GAUTENG HIGH COURT, JOHANNESBURG)

CASE NO: SS25/2010

02-08-2011



In the matter between

THE STATE

and

THOKOZANI JOHANNES MAHLANGU	Accused 1
MANDLA MESCHACK SILUMA	Accused 2
JEFFREY MASHOPE SELLO	Accused 3

J U D G M E N T

SATCHWELL J:

INTRODUCTION:

On 18 May 2009, Patricia Kaotsane went to work. She was employed as a domestic worker at 14

Magaliesburg Street, van Riebeeck Avenue, Kempton Park. On that day and at that place intruders grained entry. She was bludgeoned to death by a golf club attack to her head and body. The house was ransacked and numerous items were stolen.

Arising there from, these three accused, Messrs Mahlangu, Siluma and Sello are charged with her murder, robbery and unlawful possession of a firearm and ammunition.

This has been a lengthy trial. There has been a number of trials-within-a-trial. Judgments have been handed down, but reasons for such judgments now need to be given.

SUMMARY OF EVIDENCE:

In the course of trial, evidence has been led by the state, some direct evidence, some circumstantial evidence. What one of course must remember is that circumstantial evidence is no less cogent than direct evidence. As was pointed out in Zeffert, Paces and Skeen, the South African Law of Evidence, page 94, *"circumstantial evidence may be the more convincing form of evidence. Circumstantial identification by fingerprint will for instance tend to be more reliable than the direct evidence of a witness who identifies the*

accused as the person he or she saw, but obviously, there are cases in which the inference will be less compelling and direct evidence more trustworthy. It is therefore impossible to lay down any general rule in this regard." This passage from Zeffert was quoted in the judgment of the Supreme Court of Appeal in ***S v Nqnasa & Another***, delivered in September 2003 and also more recently in ***S v Musengadi & Others 2005 (1) SACR 395 (SCA).***

There are seven items of evidence which I find to be relevant in this trial.

Firstly, accused 1, Mr Mahlangu, worked at the premises becoming the scene of the crime. His brother, Mr Piet Mahlangu, had brought him there to join him in certain building work which is taking place and in fact, I understand from a statement made by accused 1 to the police, that he had previously worked for the owner of the property in a factory. On the day of the murder, the building work was not being carried out. It was a Monday. Cement was not available. The owner of the property had informed accused 1's brother, Mr Piet Mahlangu, that they would not be required to work at those premises on that day. Mr Piet Mahlangu gave evidence that he had sent this message through a friend to his brother, accused 1. In short, accused 1 knew

these premises, knew the lady who was in charge of the house as a domestic worker during the daytime and knew that on the day in question his brother, Mr Piet Mahlangu, would not be there.

Secondly, the following day, i.e the day after the murder, accused 1 denies that he was at the premises but the evidence of the owner of the property and his brother was that he was present. I do not know if this piece of evidence takes the matter any further.

Thirdly, accused 1 and accused 2 were arrested on 21 July. Hidden inside the mattress on which they were both sleeping was found a firearm, which firearm was identified as stolen from the scene where the robbery had taken place and where Patricia Kaotsane had been murdered.

Fourthly, accused 2 was arrested on 20 October. Shortly thereafter he made a statement to the South African Police which is been identified in this court as Exhibit "T". It constitutes a confession to at the very least the robbery. There after accused 2 pointed out a safe, Exhibit "G" which had been buried deep in the ground, far away from Kempton Park, which safe has been identified as perhaps being the one which was stolen from the scene of the murder and robbery.

Fifthly, accused 3 was also arrested on 20

October. Shortly thereafter he made a statement, Exhibit "E", placing himself on the scene. In his statement it is clear that it is the scene of the robbery. I need to determine whether or not that statement places him at, and within in the murder.

Sixthly, accused 1 was arrested on 21 October. At the time of his arrest he was found in possession of a watch which was stolen at the time of the robbery.

Seventh; thereafter accused 1 made two different confessions to different police officers. One of which was made in the course of a pointing out.

As can be seen, these are not really seven discreet pieces of evidence, but in fact ten, and will be dealt with as such, but I have identified them at this stage as seven pieces of evidence because they conveniently locate in relation to each of the accused.

In dealing with each item of evidence, and the inferences to be drawn there from, two important principles must be borne in mind. The first is rather trite, which is that the court must examine all the evidence. The court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt, and so to it does not look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might

be true. As was stated in ***R v Hlongwane 1959 (3) SA 330 (A)***, the correct approach is to consider all evidence, *"in the light of the totality of the evidence in the case."*

The second principle which this court must bear in min in assessing all the evidence is the approach to be taken to inferences to be drawn. Inferences are not to be mere speculation but are to be based on fact. Even though one is not always considering circumstantial evidence, nevertheless, I find extremely useful the test laid out in ***R v Blom 1939 (A)*** in following two rules of logic in the approach to inferences. The first rule is that the inference sought to be drawn must be consistent with all proven facts. The second rule is that the proven facts must be such that they exclude every other reasonable inference.

It is important to note that said in the trials-within-a-trial concerning pointing outs and confessions, none of the accused gave evidence in the main trial. The consequence of that failure to give evidence has been fully explained to them, both by their advocates and by myself. Those consequences were set out by the Constitutional Court in ***S v Boesak 2001 (1) SACR 1 24*** where the stated:

"If there is evidence calling for an answer and

an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused."

Other judgments have followed thereafter and expanded on this approach, including ***S v Chabalala 2003 (1) SACR 134 (SCA)*** where were said the following that after facing the accused with direct incredible evidence,

"there can be no acceptable explanation for him not arising to the challenge... to have remain silent in the face of the evidence was damning. He thereby led the prima facie case to speak for itself; one is bound to conclude that the totality of the evidence taken in conjunction with his silence excluded any reasonable doubt about his guilt."

In the present case I have indicated in the summary of the evidence the nature of the evidence which stands against each of the accused.

There are two confessions made by accused 1 which I have found to be admissible in evidence. There is one confession by accused 2 which I have found to be admissible in evidence. There is a confession by accused 3 which I have found to be admissible in

evidence. I need not stress that nothing which is said in any confession by one accused is admissible in evidence against another accused.

THE SCENE - ROBBERY AND MURDER

Mr Keith Coetzee gave evidence that he is the owner of the house where these events took place on 18 May 2009.

Mr Coetzee described how he was called home, to discover that his house have been ransacked as he describes, and as set out in the photographs being Exhibits E 11 to 21. Mr Coetzee confirmed that the body of Ms Patricia Kaotsane was found, lying in the central passage through the house, and as is recorded on Exhibits E 6 to 10.

Also contained in the set of photographs was a photograph of a remote control apparatus left lying and some keys, for which purpose they could be used I do not know. There was no evidence as to whether or not any doors or windows were forced.

I was however informed by each of the accused in their statements, namely Exhibits "P, R, S and T" that access was given to them to the house by Ms Patricia Kaotsane. There was no forced entry because Ms Patricia Kaotsane knew at least one of the persons who were attempting to gain access.

To return to the scene of the murder, the photographs to which I have referred, showing the body of Ms Kaotsane, reveal a great deal of blood on her body and on the floor about her body. Mr Piet Mahlangu gave evidence that the day after the murder he was involved in cleaning up the passage. He stated for instance, *"I remember we removed the skirting inside the house and there were blood stains,"* and he testified that *"we painted the wall because it was dirty."* He spoke in the plural because he said that the person who was assisting him in this work, the day after the murder, was his brother, accused 1, Thokosani Mahlangu. Mr Coetzee confirmed the presence of Thokozani Mahlangu the day after the murder. At least twice in cross-examination it was put to witnesses on behalf of accused 1 that he was not present at this house on the day after the murder, but at the end of the day he did not give evidence. Any merit that that cross-examination might have had falls away and I accept that he was present the day after the murder. However, as I have already indicated, I do not know where this takes one.

Accused 1 worked at these premises. The evidence of Mr Coetzee was that accused 1 worked with his brother Piet on a building on project next to the house and that accused 1 was Piet Mahlangu's main

helper. This was the evidence of Mr Piet Mahlangu as well. Mr Piet Mahlangu described how he himself has a remote control to enable him to gain access to the property, but if for instance he was late for any reason, then the maid, who worked in this house would open up for the other builders/workers. There were five builders altogether, one being Mr Piet Mahlangu, one being the accused.

From this evidence it is absolutely clear that it was customary and acceptable for accused 1 to gain access to the house through the services of the domestic worker, Ms Patricia Kaotsane. Accused 1 did not have a remote control but Ms Kaotsane would give him and his co-workers access to the premises if his brother Piet was not there.

The day of the murder was unusual. On that day, Mr Piet Mahlangu and the other workers were not there. Mr Coetzee gave evidence that there was insufficient cement for that day and he had phoned Piet Mahlangu to say that he did not have stock and so they should not come on Monday, the 18th. Mr Mahlangu confirmed that he was given this information. He said Mr Coetzee phoned him on the Sunday and accordingly he informed his brother, Thokozani, not to come to work on the Monday. He did not speak to accused 1, but

found his friend Bugsy and asked him to tell accused 1.

The result is that on the evidence available to me, accused 1 apparently was informed that his brother and the other builders would not be at the premises on the day in question. Mr Coetzee would not be at these premises. This was a day when the person at this house would be Ms Kaotsane.

Accused 1 therefore knew that the premises would have no person other than Ms Kaotsane and this was a house with certain valuables therein.

THE FIREARM

Mr Coetzee gave evidence that a number of items were stolen from his house on 18 May 2009. It included a safe which was kept in the wall of a bedroom. Contained in such safe were spare keys, cash, jewellery, letters, watches, Kruger rand and a 9 millimetre Taurus Parabellum. Mr Coetzee gave evidence that he had, as I understood his evidence, purchased this firearm when he was 21 years old. He had a hunting rifle which was silver and he liked the way which that firearm looked. In an attempt to achieved same appearance on his hand weapon, he had worked on this weapon and he said, *"polished the barrel in such a way that it became unique."* The handgrip was wooden and this he had sanded. The end result was that the barrel was silver in

colour and the wooden handgrip, instead of a normally dull finish, now had a nicer shine.

Mr Coetzee said that his weapon was therefore unique and he was able to identify it. This he did on 28 October 2009, several months after the robbery, when he went to the South African Police to do so.

Warrant Officer Skosana gave evidence that in July 2009, acting on information received, he arrested accused 1 and accused 2. They were in a shack and eventually, after searching underneath and inside the mattress on which they were sleeping, a 9 millimetre pistol was found.

According to Warrant Officer Skosana, as also Warrant Officer de Beer, on examination and etching of this firearm, it was apparent that the serial number to this firearm had been removed. It was therefore at that time not possible to identify the firearm.

However, subsequently Warrant Officer de Beer confirmed that he was present when Mr Coetzee, the complainant, identified this firearm as his own.

There is no doubt that this firearm which was recovered is the property of Mr Coetzee. There is no doubt that this is the firearm which was stolen in the course of the robbery. Accordingly, either accused 1 or accused 2, or accused 1 and accused 2 are linked with

the robbery which took place in May 2009. That link was established, although at that stage unknown to the South African Police, as at 20 July 2009 when they were apprehended with the firearm in the mattress.

Clearly, possession of the firearm by any person at that stage on 20 July was unlawful. Any person in possession of the firearm would have known that such possession was unlawful because such person could not be in possession of a licence for that firearm and they would have seen that the number had been removed. Furthermore, the firearm was hidden.

The only question is the extent to which possession of that firearm is linked with accused 1 or accused 2 or both.

THE SAFE

Accused 2 was arrested on 20 October 2009. I have accepted and allowed to be led into evidence the fact that accused 2 led the South African Police to the finding of the safe. That decision was the result of a lengthy trial-within-a-trial and I now hand down the reasons for my decision.

TRIAL-WITHIN-A-TRIAL/ EXHIBIT G/ THE SAFE

Introduction:

The state has wanted to lead evidence of the circumstances under which a safe, stolen from the

Coetzee home, came to be recovered. The safe was found buried in ground surrounding the home of accused 2, hundreds of kilometres away.

The defence has challenged the admissibility of the finding of this safe. In respect of accused 2, the challenge was that his rights were not read out to him and such pointing out was preceded by a lengthy interrogation. Accused 3 has challenged the admissibility on the grounds that his rights were not explained to him and that he did not point out anything.

In the course of the trial-within-a-trial, certain new objections were raised. Insofar as accused 2 was concerned, it was said under cross-examination, it was put to the policeman that he had been assaulted, but then it was stated that he was not instructed to do anything or that the assault was for any purpose and finally it was said that he pointed out nothing.

The state case:

In brief, the state case to discharge the *onus* which rests upon the state, relied upon the evidence of the investigating officer, Inspector Dikiso, Warrant Officer Mthembu and Warrant Officer Makura.

The accused were arrested on 21 July, interrogation or questioning took place, as a result of which accused 2 made a statement to a police officer

Potgieter. Constitutional rights recorded in Exhibit "N" were read out to accused 2. He was thereafter taken to court on the 23rd.

At court, on the 28th, the accused was represented by a Legal Aid attorney. He was then taken to Kempton Park, to Kwamhlanga and it is there, so goes the evidence, that accused 2 pointed out the place where the safe was to be found. The photographs were taken of the place and of the digging operation which resulted in the excavation and revelation of the safe. These were Exhibits "J and K." The excavation of the safe was carried out by Warrant Officers Dikiso, Makura and both accused 2 and 3.

At this stage it emerged from the police evidence that there was absolutely no evidence concerning accused 3 and there was no averment by the SAP that accused 3 had pointed out the safe. Accordingly, this trial-within-a-trial thereafter continued and only involved accused 2.

The evidence of the South African Police was that accused 2 (and accused 3) had been continuously advised of their rights, *"all the time,"* namely at the time of arrest (per Exhibit "N"), at court, at Kwamhlanga and the house.

The version of accused 2 and 3 was that

accused 2 was instructed to point to the ground, in the sense of raising his arm and extending his finger for purposes of photography only. It was averred that he did not disclose or reveal or identify anything.

It was the version of accused 2 that he was not advised of his rights, that he does not speak Zulu and accused 3 had also said that he was not advised of his rights and he speaks Isipedi.

There was another version at some stage put that accused 2 was not actually in court on a day in question. This became irrelevant and was abandoned.

Legal representation:

Insofar as the advisement of rights is concerned, it seems to me that it was fairly meaningless to continually advise the accused that he was advised of his right to legal representation. What we have in the present situation is that no legal representative was actually provided. The evidence from Exhibit "K" is that a legal representative was available in court. This of course is not someone appointed by the accused. Inspector Dikiso took the view that he had informed the accused that they were going to take this trip immediately after the court appearance and they were going off to Kwamhlanga and that the lawyers should have discovered this jaunt. As one examines Exhibit "L"

the occurrence book, and "M" the cell register, one sees that within seconds or minutes of the court appearance the accused were off to do a pointing out in Kwamhlanga without any lawyers.

Inspector Dikiso advised the court that it was his view that after their appearance in court the lawyers should have come down to the cells and found out about this pointing out expedition to Kwamhlanga and accordingly he concluded that the lawyers had *"failed to do their duty."* This is nonsense. The departure for Kwamhlanga was immediate. It took place without allowing the accused any opportunity to consult with a lawyer. It was a journey outside the jurisdiction of the court to another province. It is difficult to see why the inspector thinks that it was the responsibility of the accused to tell the lawyers that the accused were being removed for a pointing out and it was not the responsibility of Inspector Dikiso.

Of course there is a constitutional right to legal representation. The purpose of this right is to enable any suspect, whether an arrested person, to be given advise and to protect their rights. The protection is against incautious or ignorance self incrimination. I am satisfied that in the present case that advise and protection was denied to them. In particular, it was

denied to accused 2 who is really the subject matter of this trial-within-a-trial.

Inspector Dikiso must have known that there was a lawyer in court when the case was postponed. The case was postponed for further investigation and the accused were apparently represented.

I have no difficulty therefore in concluding that the *"pointing out"* which took place was contrary to the constitutional rights to legal representation of the accused.

However, two questions arise. The first is whether or not such pointing out would be admissible in terms of Section 35 of the Constitution and the second is, whether or not there are any implications for such pointing out by reason of the fact that that which was pointed out was real evidence.

Real evidence:

That which was pointed out was a steel safe. In this particular case it was a very damaged steel safe. It had clearly being damaged in order to enable certain persons to gain access to it who were unable to utilise normal mechanisms so to do.

The safe was buried underground. A hole had been dug, it had been placed in the ground and soil shuffled back thereupon.

I have already indicated that the constitutional purpose for ensuring that there is a right to legal representation to suspects and arrested and accused persons, is to protect them against self incrimination. Where such self incrimination is made unadvisedly, out of ignorance or against one's will.

The difference of course, in relation to the steel safe, is that the object exists whether or not the accused opened his mouth. It does not require the opening of the mouth of the accused or any active self-incrimination for the safe to exist. The only question for this court to decide is whether the pointing out, which led to the real evidence, is an act of self-incrimination.

THE VERSION OF THE ACCUSED

The accused's own version may be roughly summarised as follows: He was assaulted, but he was not instructed to do anything. Secondly, he was not asked to point anything out. Thirdly, he did not point out anything. Fourthly, Inspector Dikiso told him that the community had told the police that the safe was buried under a tree.

Accordingly, the version of the accused is that there was no pointing out. The version of the accused is that the South African Police and its investigation amongst members of the community, means that the safe

was found irrespective of the pointing out which the South African Police claimed took place, but which accused 2 said did not take place.

On the accused's version alone, the finding of the safe and the manner in which, and the place where it was found, must be admissible. On the accused's version, this safe was found on 28 October buried under a tree in the garden of the home of accused 2.

LEGAL REPRESENTATION CONTINUED

Accused 2 denies that he had knowledge of any pointing out.

I have no doubt that accused 2 did indeed point out the place where the safe had been buried. Firstly, Inspector Dikiso knew where the safe was, he did not need accused 2 to come with him all the way to Kwamhlanga. If Inspector Dikiso knew exactly where on the premises the safe was to be excavated, he could have set off without the accused. Thirdly, there is been no attempt to lead evidence as to what the accused said at the time of the pointing out. It would of course be inadmissible, but the showing of the safe is admissible.

The question is whether or not this is unconstitutionally obtained evidence and what should be done with it.

When one has regard to Section 35(5) of the

Constitution, one sees that the court has a discretion to admit into evidence unconstitutionally obtained evidence, taking into account the fairness of the trial and the administration of justice.

I have already said that the rights of accused 2 were violated because he did not have legal advice with regard to the pointing out. There is prejudice arising there from. There is prejudice that no-one is available to advise him to keep his mouth shut. There is no-one who can advise him not to reveal anything. There is no-one who can advise him not to disclose the knowledge which he has.

Of course all this presupposes that there is prejudice only to the guilty and certainly not to the innocent. The innocent have nothing to hide. A lawyer adds value to ensure the silence of and to protect someone who is guilty and has something to hide.

When one must consider the criterion relevant to Section 35(5) of the Constitution, one must have regard to fairness. On the one hand the question is what is fair to the accused, and the answer to me is that on the other hand it is not unfair or abhorrent that a guilty or knowledgeable person should reveal their knowledge.

Again, with regard to Section 35(5) of the Constitution, when one takes into account the criterion

of the administration of justice, one is mindful that on the evidence before me, the information which is available and which led the South African Police to the finding of the safe, does not emerge from circumstances which court have said are abhorrent in a civilised society. On the evidence of the accused himself, torture did not result in the finding of the safe to the extent that it is alleged, even though it has nothing to do with the pointing out; the South African Police have denied same. Furthermore, and again on the evidence and version of the accused, this pointing out does not emerge as a result of duress and the reason why one has regard to these factors such as duress and torture, is not only because such actions are abhorrent in a civilised society, but because anything which results there from is necessarily unreliable or possibly untrue.

In the present case, what has been revealed, as a result of this expedition to Kwamhlanga, is the real evidence which I have already referred to and real evidence is to be distinguished from, for example, the oral evidence or verbal evidence coming from the amount of a suspect. Real evidence exists, no matter what is said by a suspect.

Having regard to the issues of fairness and administration of justice, I must consider not only the

position of the accused but also the interests of the victim and also the community at large. These are considerations to which the Constitutional Court has committed itself, not least ***in Key v Attorney General Provincial Division 1996 (4) SA 187 (CC)*** and in ***Shaik v Minister of Justice and Constitutional Development 2004 (1) SACR 105 (CC)***. In both those cases the court discussed the question of fairness, pointed out that there is a tension very often between the rights of a suspects and the rights of the community at large and that one must not elevate fairness to a suspect or an accused in such a manner that the community at large loses faith in the criminal justice process.

Conclusion:

Accused 2's version was he pointed out absolutely nothing. He did nothing of assistance to the South African Police; they did not need him, because they already knew that the safe was buried on his property. Notwithstanding this version, I am satisfied that he not only pointed out the place but identified and revealed exactly where and how the safe would be excavated.

Insofar as the accused's version that he was not advised of any rights, and that he does not speak Zulu, I have no doubt that he does speak Zulu. It is made clear

to me in this court that he speaks Zulu. Inspector Dikiso has made it clear that he was able to communicate with the accused. In any event, according to the accused, he did not need to be advised of any rights because he did nothing without such rights.

If of course the accused 2 had not pointed out the safe in the grounds of accused 2's home, the only manner in which the safe could have been found was to perhaps bring in metal detectors, dogs and dig for 40 days and 40 nights in order to search the entire premises. After all, it was there to be found. However, on the state's version, dramatic steps such as utilising a bulldozer and bringing in an entire platoon of South African Infantry was not required. Dikiso and Makura and the accused were sufficient to dig up the safe. One hole only needed to be dug and it was in the right place.

Accordingly, on the state's version, it could only have been the accused who pointed out the placement of the safe.

On the accused's version, since he pointed out nothing, the pointing out could not have been as a result of any duress or anything else.

It was for these reasons that I made an order that it was to be admitted into evidence, that accused 2 directed the South African Police to his home, pointed

out to them a spot in the ground where a safe had been buried which resulted in revelation of the safe. It was to be admitted into evidence that all this had been done to the South African Police. It was to be admitted into evidence that the safe had been hidden and concealed in the ground next to the home of accused 2.

SAFE – EXHIBIT G CONTINUED

The evidence before me was that the steel safe which was found, buried in the ground or adjacent to the home of accused 2, had been destroyed. The evidence of Mr Coetzee was that the keypad to the safe had been removed. Accordingly he could not test the keypad to see if it was his safe. At most, he could say that it was *"the same type,"* and *"similar"* to the safe which had been stolen from his house.

I must note that accused 2 has given no explanation of why a broken safe or a safe of any description was buried in the garden of his home.

I can only but conclude that this safe is indeed connected with the robbery of 18 May and that accused 2 knew of, or was party to the robbery and accused 2 knew of, or was party to the opening of the safe, and that accused 2 knew that the safe needed to be hidden.

THE PINK WATCH

On 20 October 2009, accused 1 was arrested

back at work at the premises where the robbery and murder had taken place.

The evidence which follows is probably the greatest example of incompetence and stupidity that I have heard in the 15 years that I have been a Judge in this court.

On that day the evidence is that accused 1 was found in possession of a watch of very particular identification.

The watch in question was described by Mr Coetzee as a watch used by his wife for cycling. It was a heart rate monitor and it was pink in colour. Mr Coetzee said that this watch was usually kept in the safe.

I know this type of watch, or at least I know heart rate monitors produced by Polar, they are expensive and I can understand that this one was kept in a safe. They are not unusual, but they are unlikely to be worn by persons who have no interest in anything other than the time. They are used as a stop watch, they are used for heart rate calculation, they are used to determine heart rates of a period of time as to average and at the moment.

The evidence that the accused was in possession of this watch is overwhelming. Inspector

Dikiso gave evidence that he arrived at the premises, asked Mr Piet Mahlangu where were the builders. He then found accused 1, Thokozani, and he recognised a wrist watch been worn on the wrist of accused 1. It was pink in colour. Accused 1 made certain admissions which are not admissible in evidence.

Warrant Officer Mthembu was with Inspector Dikiso. He gave evidence that on finding accused 1 he saw the watch in the possession of accused 1. He said the watch was strapped onto his arm and Warrant Officer Mthembu demonstrated his left arm.

Mr Piet Mahlangu, brother to accused 1, was in a very difficult position. He clearly did not want to give evidence. However, his evidence was that when the South African Police arrived, Thokozani was at the back of the house, having gone there to change his clothes. He said he saw that his brother Thokozani was wearing a watch on his left wrist. He did not remember the colour of the watch but thought it might be green. This was the first he, Piet Mahlangu, had seen the watch. He was adamant that it was found on the wrist of his brother.

Mr Coetzee gave evidence that when the South African Police returned with accused 1, he was wearing his wife's watch, it was on accused 1's wrist and Mr Coetzee identified it.

There were certain admissions apparently made by accused 1, either to Inspector Dikiso or to his brother Piet Mahlangu. I indicated that the time, that insofar as the admissions or confessions made to Mr Piet Mahlangu, I did not think that these should be admissible in evidence because they were made after apprehension in the presence of the South African Police and when accused 1 was handcuffed and in custody.

In the course of cross-examination of these witnesses, it was put to these witnesses that the watch was not found on the wrist of accused 1. If that indeed is the suggestion, then of course the suggestion is that the wristwatch was planted in his possession or placed on his arm by one of the policeman. I find this highly improbable. Firstly, the police would have had to found the watch in the possession of the real robbers. They would have had to have made a decision to incriminate accused 1 and let the real robber be released from this incriminating evidence. Secondly, the police would have had to have been in cahoots or in a conspiracy with both Mr Coetzee and Mr Mahlangu because they would have all have had to have agreed to concoct this fake or made-up lying story.

In respect of this denial that accused 1 was in possession of the watch, I must note that this was only

put in cross-examination and accused 1 did not give evidence.

There may be indeed be certain discrepancies as to exactly where everybody was situated, at the back or the front or the side of the house when the watch first came to the light of day, whether the watch was on the left or the right wrist, but they really add up to nothing at all. The issue is possession of the watch. I find that the accused was in possession of the watch on that day.

The inference can only be to link the accused very directly with the robbery on 18 May. That watch was locked in a safe. The safe was subsequently found, having been broken open. Someone removed items from that safe and distributed them either to the robbers or to third parties and for sale or otherwise.

Accused 1, as I have already pointed out, had been working at this property prior to the robbery and murder. He is already been linked geographically and physically. He is now linked by means of the spoils of the robbery.

POINTING OUT BY ACCUSED 1 – EXHIBITS Q AND R

Accused 1 was taken to perform, what is known in South African Law as a "pointing out" exercise. Such exercises have absolutely no evidential value. All they show to the court is photographs of a person waggling

their forefinger up and down in the direction of something which may, or may not, be interesting. In the present case they have particularly no value, because even if the pointing out operation shows anything, it shows what one would expect the accused to know anyway, namely the place where he worked.

The pointing out exercise is contained in the photographs constituting Exhibit "Q".

Of course, the purpose of the pointing out exercise is not the waggling of the forefinger, but the waggling of the tongue. It is always hoped that in the course of a pointing out exercise a suspect will say certain things which will be recorded by the pointing out officer and that they will add up to admissions or hopefully even a confession. That was indeed the situation in this case.

I have admitted into evidence Exhibit "R" which are the notes which accompany the pointing out exercise and which constitute a confession. I handed down my ruling that the written confession found in Exhibit "S" to Captain Magoai was admissible in evidence and the pointing out photographs contained in Exhibit "Q", accompanying the confession or *vice versa* to Captain Whitford was admissible in evidence.

I must now give my reasons for such ruling.

JUDGMENT ON ADMISSIBILITY OF EXHIBITS Q, R AND S

A trial-within-a-trial was held in order to determine the admissibility of a pointing out exercise and confession made at 10:39 on 21 October to Captain Whitford. A trial-within-a-trial was held to determine the admissibility of a confession made to Captain Magoai at 12:50 on 12 October.

Quite clearly, since these pointing outs and confessions were made on the same day, it is appropriate to make a decision and hand down reasons in respect of all three at the same time.

Three issues need to be decided in respect of the admissibility of these documents. In respect of all of them the *onus* is upon the state to prove the admissibility thereof.

Who is the author:

The question of authorship arose because under cross-examination the accused raised a new version which had not appeared when the various state witnesses gave evidence to the effect that he was not the author of that which was said written.

The version of the accused was that the then Warrant Officer Dikiso wrote out a document in English. The accused says that he read this document and then repeated it to Captain Whitford during the pointing out

exercise and Captain Magoai about two hours later.

In the course of his cross-examination the accused was taken through that document because he had raised the question of the contents thereof and he was questioned at length thereon.

I was satisfied as a result of such questioning that the accused was not regurgitating one document because these two separate statements differed considerably. I was satisfied that the contents of the documents showed the maker thereof to be quite emotional and there was a fair amount of exculpatory statement contained therein. I was also interested to note that the contents did not implicate other persons by name.

Accordingly I was very comfortable in rejecting the version of the accused. The reasons are very simple. How would the accused possibly read a document written by Dikiso in English? If this was his entire knowledge of the events, why would he give two different versions based on the one statement? If Dikiso was attempting to implicate the accused and concoct something against the accused, then why are the statements so exculpatory blaming other people?

Accordingly, I was satisfied that the accused was the author of this document.

Constitutional rights:

Both police officers, Dikiso and Mthembu described the arrest. Both of them described that they had warned the accused of his constitutional right. Captain Magoai and Captain Whitford completed the forms, Exhibits "Q, R and S," setting out a series of questions and answers pertaining to constitutional rights.

On the face of it, every effort was made to warn the accused of their constitutional rights.

I am satisfied that there may in the hysteria or excitement or speed of arrests be moments where police officers failed to do their duty and I can certainly understand that in the speed and excitement of an arrest, an accused person does not hear their rights or does not understand them. Therefore it is entirely possible that when Warrant Officer Dikiso informs the accused of his rights, they were not clearly explained or the accused did not hear or understand.

However, there is the evidence of Warrant Officer Mthembu, the rights were explained to the accused at Norkem Park. There was not the same excitement, the situation was calmer, the situation was stable.

At the time that the accused met with Captain

Whitford and Captain Magoai, the situation was very calm. There was no hurry. Each document from which Captain Whitford and Captain Magoai worked contained the relevant questions to which answers were given. There is, to my mind, no reason why either Captain Whitford or Captain Magoai would go to the trouble of filling out answers to certain questions without actually putting the questions themselves.

If one has regard to Exhibit "R", which is the document filled in by Captain Whitford earlier on the day in question, 21 October, one sees that there is a considerable amount of information included in the document. I need only to, for instance, question 7 which was put to him, accused 1 was asked if he wanted to still point out the scene and his answer was, "I am prepared. I am just afraid of the person by the house where I am going to show." And one sees this followed through later on where Captain Whitford takes steps to ensure that people were removed from the house before the inspection and pointing out took place. There are other examples but I do not need to go into them. Questions were read and answers were indeed given. Based on that form, Exhibit "R" it is clear that accused 1 was informed of his right to remain silent, the right to consultation, the right not to be compelled to make a

confession.

A similar position applies in respect of Exhibit "S" which is the statement made some two hours later to Captain Magoai. Again a series of questions are to be found on the form and a number of answers are given. Interestingly, the accused felt sufficiently confident to respond that he had been assaulted by the police but that he had not been influenced to make a statement.

On the evidence before me, I am satisfied that the accused was warned of his constitutional rights. He says that he was not. If he is correct, then a very time wasting charade was undergone. It is difficult to conceive why one would go through such charade because one does not need to conduct such a charade and fill out such detailed answers in order to complete these documents, Exhibit "R and S."

Assault / duress:

The *onus* is on the state to prove that these statements made by the accused were made freely and voluntarily and without being subject to undue influence. For this purpose the state led the evidence of a number of witnesses, Inspector Dikiso, Warrant Officer Mthembu, Mr Coetzee, Mr Mahlangu, Mr Kgomo and Masenya.

The accused was arrested at the house in Kempton Park. He was placed on the ground and cuffed.

In the course of the trial-within-a-trial it was not put to witnesses that he had been assaulted at the time of the arrest, but when he was giving evidence and under cross-examination, only then did it emerge for the first time that he said he had been kicked.

I find this highly improbable. It was a public place, there were civilian witnesses and more particularly his own brother was present.

At Norkem Park where the accused was taken after his arrest, the evidence of the South African Police was that there were no assaults.

The accused however said that he was assaulted. The difficulty is, there was no clarity as to when and by whom and where he was assaulted. This was not presented in a consistent fashion.

In the course of the state's case, the assaults as subsequently described by the accused, were not put to the various witnesses. For instance, the assaults were not put to the female police officer Monyane. For instance, he did not put that he was kicked on the shins to the police witnesses. The state however endeavoured to discharge its *onus* by presenting evidence of the chain of action in that morning without being provided with proper information or averments as to what the accused said had happened.

To both Captain Whitford and Captain Magoai, the accused said he had been assaulted.

In his information to the two captains the accused was not consistent as to when and where he was assaulted. To Captain Whitford he said he had been assaulted at Norkem Park police station. To Captain Magoai he said he had been assaulted at the time of his arrest.

Both captains wrote down that the accused said he had been assaulted, but both specifically added in comment from the accused. To quote from that which was written by Captain Whitford... (no, I must return to the beginning of this sub section, no, not the whole sub section...)

In the accused's cross-examination of the state witnesses it was not put in detail to those state witnesses the averments upon which the accused based his challenge to the admissibility of these statements. For instance, the assaults were not put to female police officer Monyane and it was not put to the witnesses that he had been kicked on his shins.

To both Captain Whitford and Captain Magoai the accused said that he had been assaulted. This was recorded.

However, the place and time of the assault

differed in what he said to both captains. In the first statement to Captain Whitford he says that he sustained injuries when he was arrested and he referred to his shins. To Captain Magoai, he stated that he was assaulted by the police at Norkem Park.

Captain Whitford took seriously the complaint about the injuries to the shins. He observed abrasions on the shins and photographs were taken. These emerged at photograph Q7.

I was concerned about these injuries and Doctor Moeng was called to give evidence, obviously he was confronted only with the photographs but he was able to present a medical opinion based on those photographs. He found a distinction between the abrasions to be seen on both the left and the right leg. He described that the left leg gives the impression of swelling and reddening, where as the right leg looked dry and scaly. His view was that the injury to the right leg was older, whereas that on the left leg was more recent. The injury to the right leg would be at least three days old while the injury to the left leg was more recent, perhaps less than a day.

What was interesting in response to the averment of the assaults was that to Captain Magoai, the accused stated that the assaults have not influenced him to make a statement.

The difficulty of course is that it would appear that it is possible that the accused sustained an injury as recently as the day of his arrest, because this is confirmed by the photograph taken by Captain Whitford and Doctor Moeng's evidence. Furthermore, the accused has been consistent in his statements to both Captains Whitford and Magoai that there was an assault, although not consistent as to when and where.

The fact that the accused says that the assault did not cause him, or influence him to make a statement, is always problematic. The problem is very simple. He remains in the custody of the South African Police. It is sometimes difficult to distinguish between arresting officers, detaining officers and those who are taking statements.

The evidence of accused 1 was in essence that he had been slapped and kicked. What was put to Dikiso and Mthembu was that he was assaulted at Norkem Park, under a table, and that a plain clothes woman had kicked him. In his evidence in chief, this was not his version. Then under cross-examination he said Dikiso slapped him and put a gun to his eye, but that Mthembu did not assault him and that the female police officer had kicked him later. In short, on the three separate occasions that a version was put, namely

the cross-examination of the witnesses, the evidence in chief and in cross-examination, his evidence was inconsistent and contradictory.

At the end of the day the accused's version is difficult to place any reliance upon. His version changes and it is certainly not reliable. The only thing which in any way supports him, is that of the injuries on his legs, one is more recent than the other.

The fact that he has an injury on both legs and that one is at least three days old, i.e. well before his arrest, allows for the possibility that the other injury has nothing to do with his arrest.

Conclusion:

It is for these reasons, firstly that I am satisfied that constitutional rights were advised to the accused. Secondly, he was not assaulted at the time of his arrest. Thirdly, that there is no credible version as to any assault at Norkem Park. Fourthly, that he was clearly advised of his rights and fifthly, that he is certainly the author of both different statements. I made the ruling which I have already described that I admitted into evidence, both documents are and is.

EXHIBIT R

Exhibit R consists of a series of statements made by accused 1 to Captain Whitford as they were

travelling to the scene of the robbery and murder and whilst they were at the house where the robbery and murder were committed. The notes indicate that certain contemporaneous photographs were taken at the time that these statements were made, alternatively that the statements were made contemporaneously with the photographs. Each page of the handwritten notes is signed by the accused. I am reading only that which was said whilst the accused and Captain Whitford and the photographer were inside the house.

"This is the house, we entered through the other side, we exited at front door, we entered here, the door was open because someone was inside. The woman was standing here. We took the woman and let her sleep here and started beating her here. The safe was here. I once saw it before, so I knew it was here. The baskets were not here but the safe was right here. We took the whole safe. Where I was pointing where the lady was sleeping, and we were beating her, is where we killed her. We only used the golf stick to beat the woman. When we left she was still breathing. We took the safe and we took clothes from this wardrobe. When we were going up and down the lady was

still sleeping. We just jumped her. We took the caps from here, hanging on wall. When we went out, we went out using this door. When we entered here we called the woman to open for us. She knows us so we had no problem. When we left we had the remote which we then threw away.

We were three when we were coming to rob this place. Each one got R4400-00. We did not take many clothes. We left the bag with most clothes. This thing was haunting me for a very long time. I wanted to tell my brother but I could not know how. I wanted just to be done but I could not know how. My heart is very sore because my brother trusts me and he is hurt. He is working there still. I started working there last year. I started at that factory of the owner. I do not remember the month."

As I have indicated, that is not all which was said but it is what appears to be most relevant.

Quite clearly from this document, the accused has made a full and complete statement from which can be extracted the following: He worked at those premises. A woman who worked there was called to open up for him and two others. They entered the house. They beat

her using a golf stick. He had previously seen the safe and the whole safe were removed. Clothes were taken. The lady was *"sleeping"* when they left, where at sometimes he says, *"we killed her."*

From this statement, one can conclude nothing other than that accused 1 was an active participant in the robbery of these premises and that he was involved in the killing and murder of Ms Patricia Kaotsane.

CONFESSION / EXHIBIT S

I have given the reason for the admissibility of Exhibit "S". The relevant portion of this statement reads as follows:

> *"During June or July 2009, not remembering the date and month very well, at about 08:00 or 09:00, I was together with my two friends namely Meshack Mandla Siluma and Jeffrey. We arrived at van Riebeeck Park to a certain house. I do not know the street as well as the number of the house, but can be able to point out the house. When arrival at that house I called the lady in the house, saying 'mama-mama'. The lady, (cleaner) peeped through the burglar door and noticed that it is me who was calling. She then opened the main gate with her remote control because she knows me. After that we both,*

three of us, entered inside the house. By that time the lady was in the kitchen. I then grabbed the lady without any question and pulled her in the passage of the house. Suddenly my two friends came with golf sticks and started assaulting her with golf sticks. I also took golf sticks from the room in the golf stick bag and we both assaulted her with those golf sticks. The lady fell on the floor and we both repeatedly assaulted her with golf sticks. We left her helplessly on the floor and entered inside the rooms. We took the safe from the wall which was not properly mounted on the wall. We also took jewellery as well as clothes. We then left the scene with the above items to Molotto village near Pretoria, using public transport. On arrival at Molotto village we proceeded to another scrap yard. The owner of the scrap yard forcefully opened the safe with an axe. I noticed a firearm inside the safe, cash R13 00-00 as well as jewellery. We shared the money between three of us. We also sold the jewelleries. The owner of the scrap yard did not see what was inside the safe because when the safe started to be open, a little lid, we told him to leave it and we

took the safe to my residence. We gave the owner of the scrap yard R10 or R20-00, I do not remember well. During August 2009 at about 02:15 I was asleep together with Meshack in the house and the firearm was in-between the mattress when we were arrested by the police in possession of the firearm. That is all."

To be extracted from this Exhibit "S" is firstly that the accused has no real comprehension of dates. Secondly, he now names his co-perpetrators. Thirdly, the chronology is a little different to that which was in Exhibit "R".

However, what does emerge is that the accused and his two friends arrived at the house, called the lady who recognised him and then opened up because she knew him. The cleaning lady, Ms Patricia Kaotsane was immediately grabbed and she was assaulted with golf sticks by all three of the robbers. The safe and jewellery and clothing were taken. The safe was opened and the cash and jewellery and a firearm was extracted. At the time of accused 1's arrest in July, he was still in possession of the firearm.

I see it is about 13:20. We will take the adjournment and we will resume at 14:00.

COURT ADJOURNS COURT RESUMES

JUDGMENT (continues)

STATEMENT BY ACCUSED 2 / EXHIBIT T

The state [8:18:18 – 08:19:23] no sound.

The evidence was that then superintendent, now Colonel Potgieter, was brought from Tembisa and he took the statement, Exhibit "T" from accused 2.

Colonel Potgieter's evidence was to the effect that he was called, he arrived, he met with the accused and he ascertains from the accused whether he was prepared to make a statement and was informed in the affirmative. He also ascertains whether or not the accused, or then suspect, needed an interpreter and ascertain that he did. That led to the arrival of female Constable Nhoge.

Exhibit "T" contains a series of questions dealing merely with the personal circumstances of the suspect. One of those personal circumstances is the language choice which is indicated on the document as being "English/Sepedi." Thereafter the document contains a series of questions, the most important one of which reads, *"I want to make a statement."*

Colonel Potgieter gave evidence that with female Constable Nhoge in the room he advised the suspect of his rights as set out in Exhibit "T" and thereafter wrote down everything that was told to him by the suspect

through the medium of Constable Nhoge.

The first and initially, apparently the most major challenge to the admissibility of this document, was the use of language, the language employed. Colonel Potgieter testified that he had been told by the suspect that he wished to talk Sepedi. Constable Nhoge testified that her home language was Tswana, but that she had an understanding of Sepedi and that she spoke Tswana to the suspect and that he responded in Sepedi. However, the accused testified that neither English nor Sepedi was the language of his choice, nor was Tswana, but that he spoke Ndebele throughout.

On the basis of this version there would certainly be doubt as to whether, firstly it would be possible for the suspect to have comprehended the warning of his constitutional rights and secondly, whether one could be comfortable that the statement which was taken reflected that which was said by the suspect.

However, in the course of the accused giving evidence, this concern as to use of language disappeared completely. Initially, in his evidence in chief the accused gave evidence that he understood some of the things which were asked of his such as his name and address. Then under cross-examination he

said that Inspector Nhoge did communicate with him in Ndebele but she was not fluent. Then he went on to say, in response to a question as to whether they had understood each other he said, *"Nhoge understood when I spoke, but when she spoke she struggled and I simplified."* I was concerned as to what was meant by this and asked whether Constable Nhoge understood him and the accused responded in the affirmative. He said that it was simply that when Constable Nhoge spoke Ndebele she struggled somewhat. Finally, the accused went on to say that, and this is in response to a series of questions by myself, that *"we understood each other,"* and *"there was not a problem of language because before she interpreted we conversed and understood each other"* and *"we conversed until we reached a point we understood each other."*

Accordingly, the difficulty of language falls away.

The accused then testified that he had been assaulted. This proved to be a very difficult and most confusion challenge to the admissibility of the statement. Firstly, one version was put to the witnesses namely Colonel Potgieter, another version to Constable Nhoge, a third version in evidence in chief and a fourth version under cross-examination. One of the problems was that

that would subsequently emerged in the course of evidence in chief in cross-examination had not been put to the state witnesses.

In the course of evidence in chief he merely stated that Mthembu, Dikiso and many other members of the S A Police were present and they assaulted him for about five minutes. Potgieter then arrived and Dikiso told him what the accused/suspect had done and Potgieter then started assaulting him.

As to the purpose of the assault, no mention is made of any attempt to obtain any information or a statement from the accused.

In the course of the cross-examination of Potgieter and Nhoge, it was put that Nhoge had also participated in the assault but this was explained as counsel's error and under cross-examination it was now stated that Nhoge was present but standing there merely as a bystander. Similarly, under cross-examination of the witnesses, it appeared to be put to them that there was an assault prior to the taking of the statement and in the room in which the statement was taken. Again this was clarified when accused gave evidence and he said this did not happen. Again it was an error that was put in cross-examination.

The difficulty with these various assaults is that

at the end of the day the accused claims that he was assaulted and he was not advised of his rights and then he goes on to say that Potgieter put things into the statement.

The great difficulty with that version is that if Potgieter, a colonel in the South African Police, is himself concocting out of knowledge given to him by Inspector Dikiso a statement, then assaults are not necessary in order to induce any statement. One does not need to pressurise a suspect into making a statement if the policeman himself is making the statement. In fact, the presence of the suspect is not even necessary.

Clearly this contribution that Potgieter was the author of portion of the statement was somewhat of an after thought. That it was an after thought means that the state did not have the opportunity to cross-examine the witness, i.e the accused on the contents of the document.

Colonel Potgieter testified that there were absolutely no assaults of which he was aware or in which he participated. Constable Nhoge testified that there were absolutely no assaults of which she was aware or in which she participated. Both were adamant that they went through the form, that the accused was

advised of his rights and that he was the author of the statement which was recorded.

The challenge by the accused was haphazard, contradictory and somewhat half hearted.

I am satisfied that the accused was advised of his rights and that he was not assaulted for the purposes of extracting a statement from him. I am satisfied that he understood the proceedings and that he is the author of the document Exhibit "T".

Exhibit "T" reads as follows:

"During May 2009, it was a Sunday. I find Thokozani and Jeffrey talking very serious about money in Mpumalanga where I was residing. The address was at Molotto, Block 13. Thokozani told me they had a plan of robbing a guy who stays in Norkem Park. Thokozani was doing renovations at the house in Norkem Park. He told me that the white man who stays at this house always used to carry R200 notes. I was unemployed and I then also decide to join the plan of the robbery because I needed money at that stage. The following day, it was a Monday, I came with Thokozani and Jeffrey to the house in Norkem Park. We had no firearms or knives with us. The cleaning lady opens the gate for us

with her remote. I and Jeffrey went to the garage. Thokozani went inside the house. He then whistled and we went in the house. We found Thokozani busy strangling the cleaning lady. I and Jeffrey started searching the house for DVD's and CD's. Thokozani then came with the cleaning lady to the bedroom. He asked me to hold the lady. I then held the cleaning lady. Thokozani and Jeffrey went through the house. Thokozani came back and took a golf stick and started to bash the cleaning lady on her head. The lady fell to the ground and there was a lot of blood. Me, Thokozani and Jeffrey then put items like DVD's, CD player, clothes and shoes in bags. We also broke out the safe. I then saw Thokozani dragging the cleaning lady and bashing her again with the golf stock. He then covered her with a blanket. We then left the premises through the gate with the remote. We walked to Kempton Park station where we took a taxi to Pretoria and Mpumalanga. We open the safe and found R13140-00 inside the safe as well as a 9 millimetre pistol. We shared the money. During June we were arrested. This is all I can state about the incident."

From this statement we extract the plan to commit the robbery, that access to the premises was gained by the assistance of the cleaning lady who knew accused 1; an attempt to strangle her which was obviously not continued; a searching of the house, that this accused held the lady for a while, she was assaulted with a golf stick and thereafter her body was left in the passage.

There is clearly an attempt to distance accused 2 from leadership or responsibility for the murder. For instance, he makes it clear that he is the last person to join in the plan to rob. For instance, he makes it clear that it was accused 1 who was trying to strangle the lady. For instance, he makes it clear that he did no more than hold her. For instance, he makes it clear that he did not kill her.

STATEMENT BY ACCUSED 3 – EXHIBIT P

Accused 3, also arrested on 20 October, made a statement at 09:10 on the morning of 23 October. I made a ruling to the effect that the statement was admissible in evidence after a trial-within-a-trial and must now give reasons there for.

The document, Exhibit "P" can certainly be criticised because it is not complete. On the first page thereof there is a question put to the suspect, *"what do*

you wish to do - make a statement, answer questions or remain silent?" No answer is written in. The second page of a series of questions has a line to be signed by the suspect and he has not there signed. He has however signed at the bottom of both of the two pages comprising the statement.

Clearly it is highly undesirable that the memorial of any statement is incomplete. However, incompletion is not fatal to the admissibility of the document. One must have regard to the circumstances of the taking and the nature of the incompletion.

There were two challenges to this document. Firstly, the accused said he did not make the statement and secondly, he said he was not advised of his rights. I shall deal with both of these in turn.

Having indicated the nature of the challenge, the state then attempted to discharge the *onus* resting upon the state for the document to be found admissible.

The statement was taken by the investigating officer Dikiso. It is not a confession to murder; on the face of it, it is not a confession to robbery. This is because it is not a *"clear and unequivocal acknowledgement of guilt."* Accordingly it is acceptable that the statement taken as *"a warning statement"* is taken by mere inspector.

The version given by the accused is that on the day of his arrest certain information was requested from him. He said that when Dikiso came to take this warning statement, he was presented with a blank page on which nothing was written and he was ordered to sign. That was his evidence in chief.

In cross-examination it was put to him that his signature appeared on two pages. He then gave evidence that, *"I copied from what he wrote"* and then signed. He went on to say, *"when he presented the documents the writing was not on the paper and he asked me to transcribe."*

What I understood from this is the first version of the accused was that he was presented with a blank sheet of paper which he signed, which means that he was advised of no rights and that he made no statement. The second version is, that he was given something, already written down and he had to copy it down himself.

Insofar as the first version is concerned, the first page is not a blank page. It is a fully typed written page in prescribed format. It could never have been a blank sheet signed by the suspect. The second sheet is also a page containing a number of typed written lines, although there is one portion where there is space for something to be written, conceivably that could have

been left blank.

Insofar as the accused says that he is not the order of the document, one is entitled to have regard to the document itself. Looking at the document one sees that very little at all is said. This is not a statement that an overly diligent policeman is going to himself concoct. This is an attempt to provide an entirely exculpatory statement. Indeed, it is a statement putting off the evil day because what is stated twice is, or three times, *"I want to tell the magistrate about the murder,"* *"I will tell the statement"* and then apparently in the suspect's own writing, *"I am (and the word is unreadable) to tell, or I am prepared to tell the magistrate the story"* with the suspect's name immediately thereafter.

It is difficult to see what possibly could have been concocted by Dikiso; that the accused wished to make a statement to the magistrate.

As far as the advisement of rights is concerned, Dikiso is the only witness for the state. As I have already indicated, the state bears the *onus* to discharge and prove the admissibility of this document. Dikiso's evidence was that he and the accused could communicate that he, his own home language is Northern Sotho and he translated everything that is in this document into Zulu for the benefit of the accused. It

was put in cross-examination to Inspector Dikiso that the accused speaks Sepedi, but Dikiso was adamant that the conversation was in Zulu and understood by both.

Now if Dikiso had concocted this entire exercise, then it is difficult to understand why Dikiso had not properly completed this form. It would have been very easy not to leave the answer to the question whether or not the suspect wish to make a statement, answer questions or remain silent, blank. It would have been easy to have filled that answer in. Instead he left it blank. He gave a reason there for.

He said to the accused, according to Inspector Dikiso, that the suspect had a choice as to whether or not he wishes to make a statement and he said that the accused was silent; that the accused, the suspect did not give an answer. He says that is the reason why he did not fill in the answer to that question.

Dikiso assumed, from the accused's silence, that he did not want to answer the question. He took the view he says that, *"he did not want to answer some questions and he did answer other questions."* He did not understand from the refusal or the failure to answer the question that the accused was choosing to remain silent. Dikiso says that if the accused had indicated he want to remain silent then, *"I would have stopped."*

I made a note to myself at the time that Inspector Dikiso was being cross-examined, that if the accused was exercising his right to silence, then I found it difficult to understand why Dikiso just stopped asking any questions. However, immediately after that note it seems that the accused/suspect, then went on to answer questions. In other words, he chose to not make an election between remaining silent, making a statement or answering questions, but he did choose to answer the other questions as to whether he wanted to make a statement, did he make it out of his own free will and had he been assaulted.

It is here that the suspect has not signed the document. Clearly what has not been signed is the line indicating advisement of rights.

It should be noted that I learned in the course of cross-examination that the accused, this accused did not make a statement to a magistrate. Clearly that was his choice apparently on the 26th when he was taken to a magistrate.

The accused has certainly elected to play a very careful game. He said nothing on the face of it which is incriminating and on three occasions he has indicated that he prefers to go and talk to the magistrate. On one occasion himself writing that down in his own

handwriting. Clearly he is behaving carefully, some would say sensibly, and some would say strategically.

However, such calculation does not necessarily mean that a statement has been induced or that the statement is inadmissible. It suggests exactly the opposite.

At the end of the day I have to choose between the evidence of Inspector Dikiso and the suspect. I have chosen to accept the evidence of Inspector Dikiso.

I have found against the accused on both of his versions that he was presented with a blank page, alternatively that he was given a version by Inspector Dikiso and that he copied that down.

It was for this reason that I made a ruling that the statement, Exhibit "P" was admissible in evidence.

The statement Exhibit "P" reads as follows:

"On 2009/05/18 at about 08:00 I went to Norkem Park with Meschack and Thokozani. On arrival Thokozani called the maid to open for us. I went to the garage with Meschack while Thokozani went to the house. (I want to tell the magistrate about the murder.)"

The statement is not a confession to either robbery or murder.

All that can be extracted from this statement is

that firstly, it places accused 3 on the scene on the day at the place with the other two accused. Secondly, he distances himself from any activity at all. Thirdly, he knows about the *"murder."*

It has been argued that reference to, *"the murder"* does not necessarily mean the murder of Ms Patricia Kaotsane. I must reject this argument. Firstly, the warning statement taken by Dikiso states that on the page first, that what has been investigated is a charge of murder and housebreaking on 18 May 2009. Secondly, if the suspect had information to give a magistrate about a murder, that is a murder other than the one with which we are concerned today, then he would be an unusual young man.

Thirdly, and most importantly, the accused has not given evidence and there is no explanation at all as to the murder to which he makes reference. I can draw one conclusion only. He wanted to tell the magistrate *"the whole story"* about the murder of Ms Patricia Kaotsane.

There is no explanation in the form of evidence from the accused as to why he was at this house in Norkem Park, why he was with accused 1 and accused 2 on 18 May, for what purpose he was there and what happened.

The inference that I must draw is that he went there with accused 1 and accused 2 for the same purposes, i.e to rob that home, that he did so and that he knew that Ms Patricia Kaotsane was murdered.

THE ASSESSMENT OF THE EVIDENCE

Accused 1:

As has been indicated in my analyses of the evidence thus far, it is clear that accused 1 worked at these premises, had knowledge of valuables within the house and went to the house on the Monday to perpetrate the robbery. He knew that on that day the cleaning lady/domestic worker, Ms Patricia Kaotsane would be the only person at home.

The issue of the murder is of course very important. There is no evidence that accused 1 went to the premises armed with a weapon and there is no evidence that the murder was planned in advance.

I have regard to the fact that the only way in which accused 1 and his co-perpetrators could gain access to the premises was by presenting himself to Ms Patricia Kaotsane and relying on her knowledge of him to gain access. She knew who he was, she knew his face, she knew his name, she knew that Piet Mahlangu was his brother.

Accused 1 had every motive to conceal that he

was a robber because otherwise Ms Patricia Kaotsane could lead the police to him. He would be arrested for robbery and imprisoned for a lengthy period of time. Ms Patricia Kaotsane guaranteed that he would spend a long period of time in jail.

It was therefore never going to be enough for accused 1 and his fellow robbers to tie Ms Kaotsane up, to lock her up or to restrain her in any way so as to prevent her from escaping or raising the alarm. She had to be killed.

The robbery could only take place because accused 1 knew that Ms Patricia Kaotsane would be in the house. If she was not there, they could not gain access to the house. The only person who would open up would be Ms Patricia Kaotsane who knew him.

The result is, that the minute accused 1 planned this robbery, he planned the murder. The robbery could not take place without the murder taking place. There would be no point in committing a robbery and being picked up by the South African Police the very next day.

The only inference from all the evidence before me is that in the mind of accused 1 there was the intention to kill Ms Patricia Kaotsane the minute he planned the murder. The question of course is whether this was the plan with accused 2 and accused 3 as well.

I have had to asked myself, when the robbery was planned and accused 2 and accused 3 said how are we going to get into the house, and he said to them oh, Patricia, the domestic worker will let us in, if one or both of them did not say but she is going to tell on us, she is going to tell Mr Coetzee that it was you who came into the robbery, your brother Piet Mahlangu will say where you can be found, you will lead the police to us and we will all go to jail, and I have to ask myself, if that conversation took place and if accused 1 did not say, do not worry, we will kill her.

Insofar as the counts in respect of the unlawful possession of the firearm and the unlawful possession of the ammunition are concerned, the accused's own version, as set out in his statements, confirms what we would all know as common sense. Once the safe was opened, one would look inside and see what one had achieved as a result of this robbery. We know this was done not only from the accused's own statement but from the recovery of the safe and possession of the firearm thereafter.

The result is that accused 1 must be found guilty of all four counts against him.

Accused 2:

There is no doubt that accused 2 participated in

the robbery. He went to that house on that particular day for one reason only, to rob. His statement makes it clear that that is the reason for going.

Insofar as the question of access is concerned, accused 2 must have been assured by accused 1, before they event went to house, that there was a means whereby they could gain access. He obviously was not told that they would have to climb over fences and breaks down burglar bars; quite obviously accused 1 informed accused 2 that he was going to gain access through being known by the domestic worker working on the property. Accused 2 therefore knew the means by which they were going to gain access to perform this robbery.

Accused 2 obviously realised from what he must have been told by accused 1, that the domestic worker who was the means of their access, knew accused 1 and he was therefore in a position to lead the South African Police to all of the accused once the robbery was complete. Accused 2 therefore had a number of possibilities available to him. He either thought that the domestic worker would be able to identify accused 1 only, but he had the utmost face that accused 1 would never identified him or reveal his identity to the South African Police. The second possibility is that accused 2

would take every step to ensure that the domestic worker in the house could not identify him, so she could never be a witness against him. The only person who could then implicate him would be accused 1, and he would obviously be a very untrustworthy witness in a court of law. All accused 2 had to do to make certain that the domestic worker could not identify him was to wear a hat or a balaclava or to cover his face and to wear some gloves, but there is no evidence that this was done.

The third possibility is that accused 2 knew that he would never have anything to fear from the one person inside the house. After all, the one person inside the house could be silenced. So the possibility, which is virtually a probability, is that in going to carry out this robbery, accused 2 knew that the intention all along was to kill Ms Patricia Kaotsane.

In his statement to the South African Police, Exhibit "T", all that accused 2 says that he did was to restrain Ms Patricia Kaotsane. He says that it was accused 1 who did the actual deed. Now this is not evidence accused 1. It is indicative of how accused 2 distances himself from that what actually happened.

To try and achieve some distance from what actually happened does not serve accused 2 well.

Accused 2 knows that Ms Patricia Kaotsane has not been tied up or locked into a bathroom. He knows on his own version that she is not being restrained. He seems, on his own version, unworried that she is available to raise the alarm, make an escape or identify him (noise-inaudible)

There is absolutely now indication that accused 2 did anything to stop this murder taking place. In fact, there is every indication that he was relying upon this murder in order to complete the robbery.

Insofar as the safe is concerned, it is quite clear that accused 1 could not carry off the safe by himself and he needed assistance. Once the safe was opened, of course each accused or each robber would be interested in what was taken. In the case of accused 2, it would appear that items were removed from the safe, such as the firearm, and the safe was then buried in the garden of his home. As he says in his statement, he benefited in the spoils of the robbery. The safe was buried in his garden.

What was taken from the safe included the firearm. The firearm was recovered at the same time that he was first arrested. There appears throughout to have been little distance between him and the firearm. At least at the time that the safe was opened, he was in

joint possession with his co-accused of the firearm and ammunition.

Accused 2 must therefore be found guilty in respect of the robbery and the unlawful possession of the firearm and the ammunition.

I shall return to the question of the murder.

Accused 3:

The admissions made by accused 3 and the warning statement is very limited and certainly distances him from all events.

I have certainly wondered why the accused said that he and accused 2 went to the garage while Thokozani went into the house, but have decided that there is probably the simple version that he and accused 2 were hiding in the garage while accused 1 was gaining access to the house. In his statement accused 3 wrote in his own handwriting that he was prepared to tell the magistrate the story and Inspector Dikiso has written that the suspect said, *"I want to tell the magistrate about the murder."*

Notwithstanding this statement, the accused did not give evidence. As I have already commented, there is no attempt in explanation.

From this document it is clear that the accused firstly was on the scene at the date and time when the

robbery and murder took place. He was present with two persons, accused 1 and accused 2, who without hesitation I find guilty of conspiracy to rob. He would not have gone to that house for any other purpose than to participate in the robbery. After all, if two people go to commit a robbery, a third hardly accompanies them in order to hold their hands but not participate in the robbery.

Accused 3 must therefore be found guilty of robbery. Again the question arises, which I have discussed at some length in respect of accused 2, as to how accused 3 thought that he would gain access to the premises. He too must have been told of the existence of the domestic worker who knowing accused 1 would give him access to the house. He too must have been assured that there would never be any chance that the domestic worker could identity accused 1 to the South African Police. Accused 3 makes no mention of any attempt to disguise or hide his identity. He obviously felt no need to conceal himself from Ms Patricia Kaotsane.

One is left with accused 3 in exactly the same position as accused 1. Reliant upon the existence of Ms Patricia Kaotsane and her knowledge of accused 1 to gain access, equally dependent upon the continuing

silence of Ms Patricia Kaotsane by reason of her death.

Insofar as accused 3 is concerned, once he is on the scene, once he is a co-perpetrator of the robbery, he too has an interest in the contents of the safe and at the very least, he was guilty of joint possession of that firearm at the moment that the safe was opened and its presence was discovered. It does not matter that when he was arrested, the firearm had already been discovered at the time of the arrest of accused 1 and accused 2. There was possession at the exact moment that the safe was opened.

Accordingly, accused 3 must be convicted of robbery as also unlawful possession of the firearm and the ammunition.

THE MURDER OF MS PATRICIA KAOTSANE

I have already commented at length that the role of Ms Patricia Kaotsane was unknowingly and certainly not unlawfully to give access to accused 1 to this house and thereby let all three robbers into the house.

Once the robbers were inside the house, Ms Kaotsane was beaten most severely. This certainly appears from the photographs in Exhibit "E" which shows her body lying on the passage faced down, blood oozing from her head, her skull at the back being a massive blood and when her body is turned over, her face also

being a massive blood.

The *post mortem* report was admitted into evidence. The *post mortem* indicates the most severe injuries sustained by this lady. The injuries are about her neck, her head, neck and chest. I refer to paragraph 4 of the *post mortem* report which simply describes the external appearance of the body. From this it is clear that it was not one blow by one person only on one occasion only that was inflicted upon Ms Patricia Kaotsane. She was the victim of a sustained and overwhelming assault.

I quote as follows from paragraph 4:

"*(1) Kop, gesig en boonste ledemate is ootrek met bloed.*

(2) Ingedrewe skedel fraktuur oor die agterkop regs as gevolg van veelvuldige laserasie kneuswonde.

(3) Vier verdere laserasie kneuswonde linieer agter die linkeroor.

(4) Vier laserasie wonde wat van die eerste op linker wenkbrou lateraal is, tweede vanaf linker wenkbrou tot op voorkom, die derde op voorkop links tot by vorige laserasie en die vierde op die middel van die voorkop.

(5) Laserasie kneuswond op regter wang.

(6) Bloed uit neus en mond.

(7) Twee laserasies in die middel van rug net bokant boude.

(8) Veelvuldige laserasie kneuswonde op agterkop, regs en links."

The injuries or the lacerations to which I have referred, they ranged in depth from 2 to 8 centimetres. In other words, some of them were very deep.

The photographs show a golf stick which was apparently lying in the passage and from the statements, two of the accused, one knows that this golf stick was used for the purposes of the assault. The photographs also show blood on both walls of the passage, higher than the prostrate body of Ms Kaotsane, indicating that either her body or some spits of blood must have made their way to the wall before she fell down. Perhaps she struggled for her life, unable to believe what was happening to her.

I have already found that accused 1 must have intended to kill Ms Patricia Kaotsane in order to prevent her reporting him as the robber. It is also quite clear from the medical evidence that the only purpose of the assault was to kill her. You do not perpetrate these injuries on somebody and then it is a mistake or an error

that they are dead. She was bashed about with this golf stick until she was dead.

I have already commented that it was not only necessary, and for the benefit of accused that Ms Patricia Kaotsane was killed. It was in the interest of all three robbers that she was killed because they needed to avoid detection.

I have to ask myself whether the intent to kill Ms Patricia Kaotsane was part of the original common purpose to rob or whether this was something which developed later.

Of course there is no evidence that the accused arrived at this home armed with weapons enabling them to kill her, but the absence of weapons does not negate an intention to kill, a conspiracy to kill, a common purpose to kill. One can kill without a firearm or a knife, as one seen in this particular case.

Accused 2 and accused 3 have made absolutely no attempt to do anything other with the lady inside the house than to see that she was killed. They are not disguised and so they are not concealed from her. They do not need to protect their identity from her. She is not tied up while they go round the house rampaging and ransacking and stealing. She is not locked up so that she cannot make a phone call or shout out a window for

help.

All this points away from the idea that accused 1 took it upon himself to kill Ms Patricia Kaotsane and accused 2 and accused 3 had no idea that he planned to do this. All this points away from a finding that there was an expansion of a common purpose to rob, to a common purpose to murder; all this strongly suggests that there was the intention to kill, the conspiracy to kill, the common purpose to kill Ms Patricia Kaotsane from the very beginning.

Even if this was a new development in the course of the robbery, one sees absolutely no dissociation or disengagement by accused 2 and accused 3 from the murder of Ms Kaotsane.

In a judgment of the Supreme Court of Appeal, ***S v Moshengadi & Others 2005 (1) SACR 395*** the court had to consider a very similar case. Three persons entered a house, intending to rob cash from a safe. One of the persons inside the house was the domestic worker. The three intruders and the domestic worker were all found guilty of robbery and murder. They were sentenced to death.

The basis of the decision of the court was that the accused had all agreed to participate in the robbery. Those who left the house had left the lady of the house,

to what was called her probable fate, which was that she would be killed so that the domestic worker could not be identified. The court said that thereby they had shown their agreement in the expansion of a common purpose to rob to include now a common purpose to murder.

The lady who was killed, was killed after three of the robbers had left the house. They were not even there, but the court found that they knew that she had to be killed because otherwise she would have identified one of the robbers and the court said that they had not disassociated themselves or disengaged themselves from that murder. They accepted that murder. I quote from certain portions of the judgment:

> *"(1) The judgment points out that there was a good opportunity to steal money from the safe to which the deceased held the key. To obtain that key she had to be overpowered.*
>
> *(2) Had the deceased survived the robbery, she would have been able to identify accused 2 as the household traitor. The deceased therefore had to be killed in order to avoid accused 2's detection."*

The deceased's death by whatever means was in the air.

(1) The Trial Court accepted the reasonable possibility that the deceased was still alive when the men left the house taking the money with them. In convicting the other accused of the murder on the basis of dolus eventualis, the court pointed to the fact that the accused were responsible for the deceased's captive state; that they left her helpless, that they must have known that the other accused was intent upon killing the deceased and they must have known that she was powerless to resist.

(1.1) The court said that the accused "cannot in law just to be allowed to wash their hands of what they knew to be the consequence of leaving the deceased abound helpless captive at the mercy of a vicious would-be murderer."

(2) It was assumed by the court that the intent to kill was not part of a common purpose in the first place. Therefore the court went on to consider whether the common purpose to rob was expanded

to include a common purpose to murder.

(3) The accused did not dissociate themselves from the robbery because they went off with the money and shared it. What had become clear to them however, was that the robbery was developing into a murder which would be facilitated by their own prior conduct. By departing the scene and leaving the helpless accused to her probable and actual fate, the appellants must be taken to have aqueous in the expansion of the common purpose unless they took steps to effectively to dissociate themselves from that development.

(4) The court commented on a number of judgments of South African and other jurisdictions with regard to dissociation. Then went on to say, not every active disengagement will constitute a dissociation. Much will depend on the circumstances, on the manner and degree of an accused's participation, on how far the commission of the crime has proceeded, on the manner and

timing of disengagement, on what steps the accused took, or could have taken to prevent the commission or completion of the crime."

What emerges from this judgment in the matter of ***S v Moshengadi*** is that in this case the robbers were found not to have formed an intent to kill at the time that they planned the robbery. I find differently. In drawing inferences from all the facts before me, from the knowledge of accused 1 by Ms Patricia Kaotsane through to the failure to take any steps at disguise, through to the failure to restrain by her locking her up or tying her, I can draw no other inference than that all three of the accused intended to have her killed from the very beginning that they planned the robbery, otherwise they were guaranteed arrest.

If however I am wrong, then one must examine, as was done in ***S v Moshengadi & Others***, the question of disassociation. Did accused 2 and accused 3 dissociate themselves from the murder of Patricia Kaotsane when it became likely that it was about to happen? The house is not that large. She was murdered in a passage, they could not fail but to be aware of what was about to, and did in fact, happen. Rooms lead off from the central passage. It is there that

her body lies. It is there that there is blood on the wall. They must have been aware, even if they themselves did not wield the golf stick.

Furthermore, this was not a quick death. From the wounds I have indicated there were many, many-many blows. After the first one they could have stopped accused 1. Accused 2 and accused 3 could have either physically or verbally stopped accused 1. They could have said, no, let us lock her up, let us tie her up. Instead, they obviously accepted the need for her to be killed.

Even furthermore, what did they do? They carried on searching, they carried on rampaging, they left her lying in the passage, dead or dying. They carried out their robbery. They did not abandon their robbery because their robbery depended upon her death. It would not be a successful robbery if she were not dead.

I return to ***S v Moshengadi*** at paragraph 39, page 409 against the letter g to h.

> *"The greater the accused's participation and the further the commission of the crime has progressed, then much more will be required of an accused to constitute an effective disassociation. He may even be required to*

take steps to prevent the commission of the crime or its completion. It is in this sense a matter of degree and a border line case cause for a sensible and just valued judgment."

Assessing the evidence in this case, ***S v Moshengadi***, the court found that the accused did not do enough. They could not simply walk away, leaving the deceased tied up and at the liberty of the accused who actually did the killing. They were convicted of murder. They were sentenced to death.

In the present case, accused 2 and accused 3 have, as I pointed out, relied upon the death, the murder of Ms Kaotsane in order to achieve their robbery. They are therefore guilty of murder. If I am wrong in that, and this was something that developed as the robbery went along, they are still guilty of murder because they did not disassociate or disengage there from.

COMMENT ON THE WORK OF THE SOUTH AFRICAN POLICE

As has become customary now in the Criminal Courts, one wishes to comment on the hopeless nature of the investigation of the South African Police. In this case I comment firstly on the fact that no fingerprints were taken at the scene. We do not even know whose fingerprints were on the golf club. I comment secondly

on the fact that the items which were handed in to the South African Police register were declared quite forfeit to the state and sent off for auction. Notwithstanding that the trial had not even commenced.

This incompetence is not surprising. After all, we learned from Captain Mayolo, who is the policeman who declared the various, what would have been exhibits forfeit, that he moved from constable to captain without an examination or even an interview. We wonder if his promotion had something to do with family relationship to somebody in power because it certainly had nothing to do with greater knowledge, charm or competence.

Finally one must comment upon the great reluctance of the South African Police to ever take suspects to magistrates for statements to be made. The claim is always that magistrates are not available. They may be difficult to find, but in this case there is no suggestion that any attempt was ever made to find a magistrate.

FINDING

Accused 1, Thokozani Mahlangu, you are **FOUND GUILTY** as follows: Count 1, in the murder of Patricia Kaotsane on 18 May 2009; Count 2, the robbery of a number of items from 14 Magaliesburg Street on 18 May 2009; Count 3, the unlawful

possession of a firearm on or about 18 May 2009 and 21 July 2009; Count 4, unlawful possession of firearm, on or about 18 May and 21 July 2009.

Accused 2, Mandla Siluma, you are found **GUILTY** of the murder of Ms Patricia Kaotsane on 18 May 2009. You are found **GUILTY on count 2**, a charge of robbery and the taking of certain items from 14 Magaliesburg Street on 18 May 2009. You are found **GUILTY on count 3** of unlawful possession of a firearm on or about 18 May and 21 July 2009. You are found **GUILTY on count 4** unlawful possession of ammunition on 18 May and 21 July 2009.

Accused 3, Jeffrey Sello, you are found **GUILTY on count 1**, the murder of Patricia Kaotsane on 18 May 2009. You are found **GUILTY on count 2**, robbery of certain items from 14 Magaliesburg Street on 18 May 2009. You are found **GUILTY on count 3**, unlawful possession of a firearm on or about 18 May 2009. You are found **GUILTY on count 4**, unlawful possession of ammunition on or about 18 May 2009.

In respect of count 2, the conviction of robbery, it must be noted that this is a robbery where aggravating circumstances, as defined in Act 105 of 1977 are present.
