CASE NO. AR 480/2007

IN THE HIGH COURT OF SOUTH AFRICA
THE KWAZULU-NATAL HIGH COURT,
PIETERMARITZBURG

In the matter between

NJABULO MATHEWS PHILANI NZAMA First Appellant

NTOKOZO MCHUNU Second Appellant

and

THE STATE Respondent

Delivered : 2 April 2009

J U D G M E N T

WALLIS J.

[1] The outcome of these appeals against the conviction of the two appellants on charges of housebreaking with intent to rob and robbery with aggravating circumstances and murder depend upon the admissibility of confessions taken from the appellants by Captain Hodgett. There was one further submission addressed to us, albeit somewhat faintly, on behalf of the second appellant in regard to the murder charge but it was, in my view, without substance and I will deal with it briefly at a later stage in this judgment. Apart from that point it is plain that the convictions and sentences of the appellants must stand if the confessions are admissible and equally plain that their convictions and sentences must be set aside if the confessions are not admissible.

[2] It is appropriate at the outset to state three principles governing the present enquiry that, although trite, are nevertheless fundamental. The first is that the onus rests upon the prosecution to prove beyond reasonable doubt that the confessions were made freely and voluntarily by the appellants whilst in their sound and sober senses and

without having been unduly influenced thereto.[1] Secondly in considering whether the prosecution has discharged the onus of proof resting upon it the court has regard to all the evidence led before, that is, not only the evidence of the persons concerned in the taking of the confessions, but also the evidence of the circumstances in which the confessions were taken and such evidence as may be advanced by or on behalf of the accused. It will be aware that the absence of other evidence implicating the accused may tempt those investigating the crime to establish a case by procuring a confession and this can lead to the adoption of improper means. Thirdly the mere fact that an accused's evidence during the course of a trial within a trial concerning the admissibility of a confession is rejected does not mean that the prosecution has necessarily discharged the onus resting upon it, although its task may be substantially enhanced thereby.

[3] Whilst the onus of proving the admissibility of a confession rests upon the prosecution that onus ordinarily falls to be discharged in the context of specific challenges by the accused directed at whether the confession was made freely and voluntarily and without the accused having been unduly influenced thereto. This is not to say that any evidential burden rests upon the accused. It is perfectly proper in the conduct of the accused's defence for the accused to confine him or herself to an investigation and analysis of the circumstances in which the confession was taken and a close scrutiny of the evidence of the relevant police officers on the basis that a submission will be made that the prosecution has failed to discharge the onus of proving that the confession was given freely and voluntarily and without undue influence being exerted. However, that is not an easy course to adopt and the usual experience where the admissibility of a confession is challenged is that the accused person advances specific grounds for their challenge. When that appears the trial within a trial necessarily tends to revolve around the grounds so advanced.

[4] The fact that the trial court may reject the evidence of the accused in a trial within a trial and hold that the allegations made by the accused in challenging the confession are false, does not relieve the court of the burden of determining whether the confession was freely and voluntarily made without undue influence being exerted on the accused. However, where the accused has made specific allegations in challenging

1 See s 217 (1) of the Criminal Procedure Act 51 of 1977

the confession but not advanced others this must have an impact on the judicial decision-making process. If the accused has given evidence and levelled certain charges of misconduct against the police but not claimed that other actions by the police or the circumstances in which they found themselves had any influence or bearing on the making of the confession, it would be an extremely unusual situation for the court nonetheless to determine that the confession was inadmissible because of the matters not relied on by the accused. It is extremely difficult to conceive of a situation where that would be the case and ordinarily for that to happen one would expect there to be some extraneous factors indisputable on their face that left the court with reservations about the voluntariness of the confession or the presence of undue influence, notwithstanding that the accused had placed no reliance thereon. Such cases must necessarily be rare. It is not for the court to speculate as to possible external influences operating on the mind of the accused or even to rely on its own experience, whether within or outside the courtroom, when this has no foundation in the evidence as this removes the court from its proper role of deciding cases on the basis of the evidence actually placed before it.

[5] Against that background I turn to deal with the evidence in the present case. Both confessions were taken before Captain Hodgett of the Serious and Violent Crimes Unit in Cato Manor, a police officer of twenty years' experience during which he had held the rank of captain for thirteen years. Both confessions were taken on 25 November 2005 in the offices of the Serious and Violent Crimes Unit situated behind the Cato Manor Police Station. That of the second appellant was completed at 13h10 on that day. Immediately after Captain Hodgett had taken the second appellant's confession he proceeded to record the confession of the first appellant. That task was completed at 14h04. According to Captain Hodgett, both accused were brought to him by the investigating officer, Detective Inspector Mhlongo, for the purpose of having a statement taken. Detective Inspector Ngcongo, also a member of the Serious and Violent Crimes Unit, acted as interpreter in respect of the second appellant whilst Detective Inspector Shandu, from the same unit, acted as interpreter in respect of the first appellant.

[6] Counsel for the second appellant was the first to cross-examine Captain Hodgett. He explored with him the circumstances in which the confession was taken and physical

surroundings of the room where it was taken. He established that Captain Hodgett was one of the most senior members of the Serious and Violent Crimes Unit and that he oversaw the dockets handled by Inspector Mhlongo, the investigating officer. This was one of between 500 and 1000 dockets for which he had ultimate responsibility at the time. The confession was taken at Captain Hodgett's desk, which is situated in a large hall-like room containing a number of desks where the various members of the unit work. Captain Hodgett accepted that there are daily briefings for the unit and that it would have been reported to him that an arrest had been effected in this case. He had already volunteered in his evidence-in-chief that he could possibly have been present during the arrest. In addition he accepted that he would have known the details of the murder, although the precise extent of his knowledge was not explored with him. It was however established that he might have gone to the scene of the crime after it was committed in August 2005.

[7] A portion of the evidence of Captain Hodgett on which considerable attention was focussed related to the possible presence of other policemen and in particular the investigating officer, Inspector Mhlongo, whilst the statement by the second appellant was being taken. It is appropriate therefore to set out the passage from the evidence in full. It reads as follows:

> "The accused is taken to your desk? --- That is correct, M'Lord.
>
> Where you sit and write? --- That is correct.
>
> And obviously the interpreter is present? --- Yes, M'Lord.
>
> And in this office obviously there are various other policemen that sit around? --- That is correct.
>
> And Mr Mhlongo is there within earshot? --- In and out, M'Lord, yes – or not in earshot, he would have been at least – his desk is by the front door, so it's quite a way.
>
> MAHARAJ AJ There's no partitions? --- Yes, we're in one big hall, M'Lord.
>
> MR VENTER Sorry? --- We're in a big hall.
>
> Yes, yes. It's about half the size of the courtroom, I'd say, maybe bigger? --- A little bit longer, yes, M'Lord.

> In any event, when I speak, as I'm speaking now, this whole [inaudible – interference] --- That is correct, M'Lord.[
>
> But most certainly, when the accused made statements, Mr Mhlongo was present? --- I cannot confirm that, M'Lord, he could have been outside. Sometimes it's – the office is open, people walk in and out the whole time.
>
> Would you agree with me if – I'm not saying it did happen, I'm just putting it as an if at this stage --- Yes, M'Lord?
>
> If the accused were placed under pressure by Mhlongo to make statements … [intervention]
>
> MAHARAJ AJ Were placed under pressure?
>
> MR VENTER Was placed under pressure?
>
> MR VENTER By Mr Mhlongo to make statements … [intervention]
>
> MAHARAJ AJ By the investigating officer?
>
> MR VENTER The investigating officer to make statements.
>
> MAHARAJ AJ Yes.
>
> MR VENTER His presence would have (been) daunting, not so? --- I suppose so, yes, M'Lord."

[8] Both Counsel who appeared before us on behalf of the appellants urged on the basis of this passage in the evidence that the investigating officer was present throughout the taking of the two confessions and that, apart from Captain Hodgett and the two interpreters, other policemen from the Serious and Violent Crimes Unit were present working in the room and coming and going about their ordinary activities. In my view this passage does not go far enough to support either of those conclusions. In regard to the presence of Inspector Mhlongo Captain Hodgett's statement goes no further than saying it was possible that Inspector Mhlongo might at some stage have been present in the room but in earshot as his desk was by the door. The fact that Captain Hodgett admitted of that possibility, whilst making it clear that Inspector Mhlongo was nowhere near his desk where he was taking the confessions, is insufficient to form the basis for a positive finding as to the situation particularly in the face of the emphatic denials by both Inspector Mhlongo and the two interpreters that he was at any stage present during the taking of the confessions. As regards the

other point the question was phrased in general terms concerning the layout of the room and was never pursued on the basis that other policemen were in fact present whilst the confessions were taken, although it was accepted that there could have been some coming and going..

[9] Counsel acting for the second appellant suggested to Captain Hodgett that it was improper for him to have taken the statement as he was a captain in the same Unit and from the very same office as the investigating officer and had prior knowledge of the case and had been involved in the arrest of his client. Captain Hodgett's response was to say that it was not advisable but that there was no reason for him not to take a warning statement from the accused. He had not participated in the interrogation of the second appellant. It was then put to him that the first appellant was sitting some four to five metres away in the same room whilst he took the second appellant's statement and he accepted that this was possible but that he would have been somewhat further away than four to five metres. He did not accept that anything said at his table would have been audible in view of the noise levels in the room.

[10] This summary of the cross-examination on behalf of the second appellant reveals that it was directed entirely to the environment in which the second appellant found himself when making the statement to Captain Hodgett. What is significant, however, in my view is that it was never suggested to Captain Hodgett that the second appellant had been intimidated by this environment or induced by his surroundings to make his statement. Notwithstanding the detail in which the environment was explored counsel did not suggest that it had influenced his client to make the statement. Instead he put his client's case in clear and express terms in the following passage from his cross-examination :

> "And accused No.2 informs me that when he was brought to you, he was made to put his thumbprint on a typed page and there was no writing on it when he put his thumbprint on it. ---- M'Lord that is incorrect."

[11] The picture that emerges from this cross-examination is that the basis upon which the second appellant intended to challenge the admissibility of the confession was that he had been brought by the investigating officer into a situation where he was surrounded by policemen from the Serious and Violent Crimes Unit including the

investigating officer's superior, Captain Hodgett, and required to place his thumbprint on a blank document. The necessary inferences from this were that Captain Hodgett was lying when he said that he had taken the statement from the second appellant and that he and Inspector Mhlongo had conspired to place the second appellant in a situation where he could be induced to put his thumbprint on a document even though nothing was written on it. A further necessary implication was that the entire confession must then have been written up afterwards by Captain Hodgett with the benefit of the knowledge that he already had of the circumstances of this particular crime and possibly the assistance of Inspector Mhlongo. This proposition was not put expressly to him by counsel but it necessarily flowed from the suggestion that the document to which the second appellant's fingerprints had been affixed was blank at the time.

[12] The cross-examination of Captain Hodgett by Mr Magigaba proceeded on a different footing. Right from the outset he put to the Captain that the first appellant would tell the court that he was assaulted and threatened prior to making the statement that was made to Captain Hodgett. It was also put that he would say that the investigating officer, Inspector Mhlongo and other policemen were responsible for perpetrating this assault and that Captain Hodgett had seen it occur. Furthermore it was put to Captain Hodgett that whilst he was taking the statement from the first appellant the latter was taken out of the office by Inspector Mhlongo and further assaulted, after which he was returned to the Captain for the purpose of completing his statement.

[13] Inspector Ngcongo gave evidence about his acting as an interpreter between Captain Hodgett and the second appellant. He insisted that no one else was in the room at the time. It was put to him by counsel for the second appellant that he had been present when his client he was arrested but he denied that. He also denied that he had assaulted the second appellant before the latter made his statement. There are two significant aspects of this cross-examination . Firstly it was not put to Inspector Ngcongo that the second appellant had simply affixed his thumbprint to a document that was otherwise blank. Secondly counsel expressly put to Inspector Ngcongo that none of the preliminary questions reflected on the form embodying the statement had been put to the second appellant and all that happened was that when he arrived there and sat with Captain Hodgett "he was just told to tell his story". It was suggested that

the only thing that was correct on the form in regard to any of the formalities was the statement :

"Has this statement been read back to the suspect by an interpreter?"

and the affirmative answer. In other words it was suggested to the inspector that he had in fact read the statement back to the second appellant.

[14] This question is extremely significant. It involves an acceptance by the second appellant that he had in fact told a story to Captain Hodgett and that this had been recorded at the time. In other words the proposition that he had affixed his thumbprint to a blank form and by implication that the statement was the product of Captain Hodgett's knowledge of the crime, whether or not supplemented by Inspector Mhlongo, necessarily fell away. That is confirmed by the fact that it was expressly put to Inspector Ngcongo that the only truthful statement in the questions and answers dealing with the formalities surrounding the taking of the confession was the statement that after the confession had been recorded it was read back to the second appellant by Inspector Ngcongo. It was not suggested that the statement actually made had not been properly recorded or that it either included material not provided by the second appellant or omitted material that he had volunteered. This may have been consistent with the subsequent evidence of the second appellant that he simply recited what he had been told to say by Inspector Mhlongo but it is destructive of the version put to Captain Hodgett and reflects ill on the second appellant's credibility.

[15] Inspector Shandu was only briefly cross-examined on behalf of the first appellant. Consistent with the latter's contention that he had been assaulted the inspector was asked whether he could comment on that allegation and he simply said that if it happened it did not happen in front of him. It was then put to him that the first appellant would say that during the course of the interview with Captain Hodgett he had been taken outside and assaulted and this was denied. On behalf of the second appellant it was put that he had been present during the latter's arrest but he had denied that. Two other items of information that are relevant emerge from his evidence. The first is that the two appellants and two others arrested on the same night had been detained by him as suspects at 5.40am on Thursday 24 November 2005. The other is that all four suspects were booked out by Inspector Mhlongo at 7.40am on Friday 25 November 2005 and the two detainees other than the appellants

were returned to detention at 11.30am. This timing is consistent with the evidence of Captain Hodgett and the interpreters as to the time taken to record the confessions by the two appellants.

[16] Inspector Mhlongo, the investigating officer, testified that he had received certain information from Captain Lockem of the Tracing Unit which gave an address for a suspect and apparently his name. In consequence of that information he and a team of officers, including Captain Lockem, proceeded to a house in Ntuzuma where he said the second appellant lived. Inspector Mhlongo and Captain Lockem entered the yard of the premises, knocked on the door and woke the second appellant's older brother, who took them to a shack where the second appellant was sleeping with a girl. He was then arrested and taken out to the vehicle. As a result of information furnished by the second appellant the police then proceeded to Clermont to some shacks situated on a steep hill where they arrested three other people, including the first appellant, and seized certain goods. Thereafter all four suspects were taken back to the Cato Manor police cells and detained.

[17] One part of Inspector Mhlongo's evidence must be contrasted with the evidence of the second appellant. He testified that he was arrested in the early hours of the morning and then assaulted at his place of residence by a white police officer and that as he was taken away from the premises towards the motor vehicles he was slapped by Captain Lockem. He says that Captain Hodgett was present and intervened and that he was then put into one of the police vehicles and taken to the Cato Manor police station. There he claims to have been assaulted for some forty-five minutes to an hour by Inspector Mhlongo only after which he took the police to Clermont and pointed out three others, being the other three who were arrested and detained that night. This evidence must be seen in the light of the evidence of the first appellant who testified that he was arrested that night in the early hours of the morning. It was dark at the time but his mother had already left for work.

[18] Bearing in mind that the arrests took place on the morning of the 24 November 2005 only three weeks prior to the longest day of the year, when it gets light at about 5.00am it seems likely that the first appellant was arrested somewhere between 4.00 and 4.30am. That would be consistent with his mother already having left for work and having to travel some distance to reach her place of employment. However, it

posts a question mark against the veracity of the second appellant's version for the simple reason that there hardly seems to be sufficient time for him to have been arrested at Ntuzuma; brought from Ntuzuma, which is situated to the north of Durban, to Cato Manor on the south-western side of the city, a substantial distance not easily traversed; assaulted for forty-five minutes to an hour and then taken to Clermont, which is situated to the north and west of Pinetown, where he pointed the places where the other suspects could be found and they were arrested. These points are not joined by major public roads and for everything that the second appellant gave evidence about to have occurred in the limited time available would have been extremely difficult.

[19] The cross-examination of Inspector Mhlongo by Mr Magigaba was brief. He simply put to him that he had assaulted the first appellant from the time he was arrested both at the police station and at the time when he was being interviewed by Captain Hodgett. Inspector Mhlongo denied having been present in the room with Captain Hodgett when the first appellant's statement was being taken. It was put to him that the first appellant appeared frightened and he explained that this was due to the attitude of the other two suspects towards him and to the second appellant. This had been sufficiently marked that they had had to be separated in the cells. Inspector Mhlongo explained that this was because the first appellant wished to make a statement and did not want news of that fact to reach the other two suspects.

[20] I should mention at this stage that the court adjourned whilst Mr Magigaba was still cross-examining Inspector Mhlongo. However the printed record furnished to the court for the purposes of this appeal does not contain any record of any further cross-examination by Mr Magigaba and the reconstruction of the record furnished to us for the purposes of the appeal contains only some fairly terse cross-examination by Mr Venter on behalf of the second appellant and some questions by the trial judge. This is not a satisfactory state of affairs particularly as we are not even informed of how long the missing section of the record is. All that one can say is that the typed record resumes with the evidence of Captain Lockem which covers a mere fifteen pages after which the court took the long adjournment. We can accordingly infer that the missing section of cross-examination endured for at least an hour and fifteen minutes from the sitting of the court that morning until the short adjournment and probably for

some period after the short adjournment. The terse notes with which we have been furnished as constituting the reconstruction of the record are clearly an inadequate reflection of the full cross-examination of Captain Mhlongo.

[21] Notwithstanding these obvious deficiencies the brief reconstruction of the record was accepted in the course of argument before us and a careful perusal of the judgment by the trial judge does not suggest that anything emerged in the course of that cross-examination that might be material to the proper determination of this appeal. It appears, although this does not emerge from the reconstruction, that allegations of assault were put to Inspector Mhlongo. The allegation appears from the judgment on the admissibility of the confessions[2] to have been that after he had been detained he was not further assaulted until the morning of the 25 November, when Inspector Mhlongo booked him out of the police cells. His allegation was that thereafter until he made his statement he was beaten, slapped on the face and kicked on the stomach. All of these allegations were denied by Inspector Mhlongo.

[22] Captain Lockem testified that he was present when the appellants were arrested. He had provided the information leading to the arrest of the second appellant and he accompanied a group of policemen who effected the arrest. Captain Hodgett was the commander of this group and a Captain van Tonder was also present. Inspector Mhlongo, as the investigating officer, was also part of the group. It was put to him that he had assaulted the second appellant by slapping him across the face and he denied that. It was also put to him that Inspector Mhlongo and other policemen assaulted the second appellant in his presence and he intervened to stop them. He denied this.

[23] By the time the appellants came to give evidence in the trial within a trial their respective standpoints in regard to the voluntariness of their confessions was the following. The first appellant maintained that from the time of his arrest he was assaulted by the police and he identified Inspector Mhlongo and Inspector Shandu as the perpetrators of the assaults. He claimed that the contents of his statement to Captain Hodgett had been given to him by Inspector Mhlongo and that he merely repeated that in consequence of the assaults perpetrated upon him. The second

[2] Record Vol 3 p 217 lines 18-21

appellant's case had already become somewhat protean. Initially his counsel had explored the environment in which the statement was made and put it to Captain Hodgett that the second appellant had simply affixed his thumbprint to a blank document. The latter contention had been abandoned by the time Inspector Ngcongo was cross-examined and it was specifically put to him that what he had interpreted was the statement that the second appellant had made to Captain Hodgett and that he had read back this statement to the second appellant. By the end of the prosecution case in the trial within a trial it was being suggested that he had been assaulted after his arrest and taken to the Cato Manor police station where he was again assaulted for nearly an hour. In addition he further claimed that on the Friday morning after Inspector Mhlongo took the suspects from the police cells he was repeatedly assaulted until the time came for him to make his statement.

[24] It is unnecessary to explore in any detail the evidence of the first appellant at the trial within a trial. It was riddled with contradictions and rejected by the trial judge. There was no attempt before us to suggest that he had been a credible witness. His version of his assaults after his arrest was inconsistent with the evidence of his father. His claim that during the course of his giving his statement to Captain Hodgett he had been taken out of the room and assaulted was clearly fanciful as on his own version such an assault was entirely unnecessary because he was in the process of making a confession. The suggestion that all that he told Captain Hodgett was a story in which he had been schooled by Inspector Mhlongo foundered on the fact that the statement contained information that could not on any conceivable basis have emanated from Inspector Mhlongo. (This related to a prior abortive attempt to break into the deceased's house, which no-one suggested that Inspector Mhlongo could have been aware of.) His evidence was rightly rejected.

[25] The second appellant fared no better. I have already mentioned the difficulty in fitting the story of being assaulted by Inspector Mhlongo at the Cato Manor police station prior to his taking of the police to Clermont into the time available between his arrest and his detention in the police cells. He embroidered his story about the assaults effected on him by saying that Inspector Mhlongo proffered as an inducement to his confessing the proposition that the first appellant had already implicated him in the commission of the offence. He abandoned his story that on the

morning of 25 November he had been taken from the cells and assaulted until the time when he was taken to Captain Hodgett to make his statement. Instead he claimed that he had only been threatened. Although he described the earlier alleged assault by Inspector Mhlongo in graphic detail, including the statement that the inspector pressed his knee into his chest, none of this had emerged in prior cross-examination. He alleged that Inspector Mhlongo had pulled out his firearm, cocked it and pointed it at him but this also was a novel proposition. He claimed that he made this statement in an endeavour to prove his innocence and that Inspector Mhlongo had promised to assist him if he said what he (Mhlongo) told him to say even though he had nothing to do with the crimes of which he was being charged. Again the difficulty with this is that his statement contained information regarding the prior attempt to break into the deceased's house of which Inspector Mhlongo would have been unaware.

[26] As with the first appellant it is unnecessary to give further examples. The second appellant was a totally unsatisfactory witness and his evidence was rejected by the trial court. There was no endeavour before us to resuscitate it.

[27] The argument before us proceeded on the basis that notwithstanding the effective rebuttal of the claims by the appellants to have been assaulted and schooled by Inspector Mhlongo in what to say their confessions should still not be admitted because of the environment in which they had been taken. Reliance was placed on the fact that Inspector Mhlongo, the investigating officer, was Captain Hodgett's subordinate and ultimately Captain Hodgett oversaw his work. Reliance was also placed on the fact that the two interpreters were part of the same unit. Particular play was made of the concessions made by Captain Hodgett that it was possible that there were other policemen in the room at the time, including Inspector Mhlongo, and that the two appellants might have been in the room at the same time. On the basis of this "environmental" evidence it was submitted that the court could not safely conclude beyond a reasonable doubt that the confessions had been freely and voluntarily made and without any inducement being given to the appellants to confess. The contention was that taking all of these factors cumulatively the environment surrounding the taking of the confessions was such that it must inevitably have operated upon the

minds of the accused as a threat or inducement to confess. Accordingly it was submitted that the confessions should not have been admitted.

[28] Our courts have over many years repeatedly drawn attention to the undesirability of having a confession taken by a police officer in the same unit as the investigating officer. They have equally deprecated the use as interpreters of officers in the same unit as the investigating officer and the person taking the confession. The undesirability of taking a statement in the presence of the investigating officer, however, remote, and other policemen is manifest. The reason is, as Jansen JA. pointed out,[3] that these factors provide fertile soil in which the accused can plant a seed of suspicion against the conduct of the police and the propriety of their behaviour in obtaining the confession. Such an environment can also, as the learned judge pointed out, plant suspicion in the mind of the accused that he or she is not free to speak their mind and tell the person recording the confession of misconduct or inducements brought to bear upon them in order to compel the confession.

[29] There is, however, an important qualification that Jansen JA added, namely that it is necessary for the accused to plant that seed of suspicion in the mind of the court. That can readily be done where the accused testifies of assaults and threats and that evidence could reasonably possibly be true. In such a case, where there is potentially credible evidence that prior to making the confession the accused was subjected to an improper inducement, the seed of suspicion is planted in the fertile soil afforded by the environment in which the confession is taken and "readily sprouts and burgeons to the stature of a reasonable doubt". An example of such a case is provided by *S v Mahlabane*[4].

[30] However, where the accused fails to sow the seed of suspicion because his or her complaint is about something else or where their evidence of an improper prior inducement is properly rejected as being wholly untruthful and incapable of credence, I am unaware of any case where these undesirable environmental features have been held on their own to constitute a sufficient basis to give rise to a reasonable doubt as to whether the confession was made freely and voluntarily and without improper

---

3 In S v Dhlamini and Another. 1971 (1) SA 807 (A) at 815 A-C.

4 1990 (2) SACR 558 (A). See also S v Mofokeng and Another 1968 (4) SA 852 (W).

inducement. The general nature of the problem was identified in *S v Mofokeng & Another*[5] and endorsed by the then Appellate Division in *Dhlamini's* case *supra* and *S v Mdluli & Others*[6]. However, a suggestion that because a confession is taken by a police officer who was a member of the same unit as the investigating officer this constitutes a *per se* irregularity [7] has been rejected in a number of cases.[8] In all of these cases it has been stressed that there is statutory authority for certain police officers to take confessions and it is not open to the courts, under the guise of assessing whether the confessions have been freely and voluntarily made without undue influence being exerted on the accused, to remove that right. It can only be removed by way of a challenge to the constitutionality of this provision on the basis that it amounts to a denial of the accused's right to a fair criminal trial or by way of statutory amendment.[9] I conceive that the legal position remains as set out in S *v Mazibuko*[10] namely that:

> In *S v Mdluli and Others* 1972 (2) SA 839 (A) HOLMES JA observed at 841 A - C:
>
> "... that it is not a question of impugning in any way the integrity of responsible police officers in carrying out their duties as justices of the peace. But the practice may plant suspicion in the mind of an accused, with much time spent judicially in determining the issue of admissibility, as in the present case, with several members of the police in attendance as witnesses for long periods. In our opinion it would be preferable to enlist the services of an experienced magistrate; but, if this is not practicable in a given case, the justice of the peace should not be a member of the police unit or station which is investigating the crime, particularly if his office is in the same premises".
>
> The presence of this feature of undesirability in a given case is of course not without legal significance. It is a circumstance to be considered in conjunction with other relevant circumstances, if any, by a court of law in making the ultimate decision whether or not the State has proved beyond a reasonable doubt that the confession in question was made in conformity with s 244 (1), ie freely and voluntarily and without undue influence.

---

5 1968 (4) SA 852 (W) at 858 B.

6 1972 (2) SA 839 (A) at 840 H-841B.

7 S v Mbele 1981 (2) SA 738 (A) at 743 C-G.

8 S v Khoza en Andere 1984 (1) 57 (A) at 59 E-60A; S v Mbatha en Andere 1987 (2) SA 272 (A); S v Mavela 1990 (1) SACR 582 (A) at 589 f-590b.

9 There is indeed such an amendment to section 217 of the Criminal Procedure Act enacted by Section 11 of the Criminal Procedure Amendment Act 86 0f 1996, but it has not as yet been brought into force, which suggests that there are logistical problems in implementing its provisions.

10 1978 (4) SA 563 (A) at 568E-H

[31] All the cases to which I have referred stress that the ultimate question is not whether the environment in which the confession was taken was undesirable but whether the statement was freely and voluntarily made without the accused having been unduly influenced thereto. In all the cases I have mentioned the circumstances in which the confession was taken or a pointing out occurred displayed one or more of the undesirable features that exists in this case. Nonetheless in all of them save those of *Mahlabane* and *Mofokeng,* the confessions were admitted as having been freely and voluntarily made. The same is true of the confession in the most recent decision, that of *S v Letha & Another.*[11] In a number of those cases, as in this one, the court was faced with an accused who contended that he had been assaulted and that the assault was what had caused him to confess. In each case once the allegation of assault was rejected as being untruthful the confession was admitted.

[32] In my view the present case falls squarely within the principles set out in the authorities that I have quoted. It was in principle undesirable for the appellants to be taken to Captain Hodgett for the purpose of having their confessions recorded and it was undesirable for Inspectors Ngcongo and Shandu to act as interpreters. It is possible (although a positive finding cannot be made on the evidence), that the circumstances in the room where the confessions were taken were not ideal in that other policemen were able to come in and out and Inspector Mhlongo may on occasions have come in and out and gone to his desk near the door. However, neither appellant said that any of these factors operated on their minds as an inducement to make a confession or as an implied threat detracting from the voluntariness of their confessions. Instead both advanced claims of prior assault or threats that were clearly untenable. Both contended that they had been schooled to say what they did and these contentions were rightly rejected. In those circumstances and consistent with the decisions in those authorities I am unable to fault the decision by the trial court to admit the confessions on the basis that they were freely and voluntarily made and that the appellants had not been induced to make these confessions.

[33] I would add only two points to that conclusion. The first is that the evidence supports the notion that the second appellant, once arrested, was minded to give as much assistance to the police as possible. That is consistent with his conduct in taking them

---

11 1994 (1) SACR 447 (A).

to Clermont and identifying the places where the other three suspects could be found. It is also consistent with the terms of his confession in which he says that he did not himself perpetrate an assault on the deceased. He is a young man with no prior criminal record and I find nothing improbable in the proposition that he might have sought to save his own skin by making a full breast of matters to the police. Secondly some play was made in argument of the period of time on the morning of the 25 November between 7.40 am, when Inspector Mhlongo requisitioned the suspects from the police cells, until the confessions were taken. However, the other two suspects were returned to the police cells by 11.30 am and there was no evidence that they had been assaulted. The period from 11.30 am until 14.04 pm when the first appellant finished making his confession is consistent with the evidence as to the time taken to record the confessions and is consistent with the length of those documents. Accordingly the unexplained period is only four hours. The reconstructed record shows that Inspector Mhlongo was asked about this period and said, without challenge, that he had endeavoured to find a police officer other than Captain Hodgett to take the confessions but had been unable to do so and had also endeavoured, with an equal lack of success, to make arrangements to take the appellants to a magistrate for that purpose. That evidence was not challenged nor is there anything in the record to suggest that it was even explored in any detail to show that there were substantial periods of time for which there was no explanation during which the suspects were in the custody of Inspector Mhlongo. In my view there is nothing in the lapse of this period that supports the notion that the confessions should be excluded.

[34] As mentioned at the outset there was an endeavour by counsel appearing for the second appellant to suggest that on his own version as embodied in his confession he was not guilty of murder because he had not participated in the fatal assault on the deceased and there was no common purpose between him and the other members of the gang. In my view there is no merit in that submission. His evidence is that the gang went to the deceased's home firmly intent on the criminal enterprise of housebreaking or robbery. They were aware because the television was playing of the likelihood that someone was in the house. Two of them went upstairs to the loft where they found the deceased sleeping. They informed the other two (including the second appellant) of this fact and according to the second appellant he and his partner in crime, who were downstairs busy making preparations to steal things, armed

themselves with pool cues to defend themselves if the occupant of the house woke. They went upstairs where the other two members of the gang viciously assaulted the deceased with a baseball bat and a pool cue. There is no suggestion on the part of the second appellant that he did anything to prevent this assault or in any way disassociated himself from it. On his own version he intervened only after a number of blows had been struck. I have no doubt that his conviction on the charge of murder was proper.

[35] Although leave to appeal was sought and granted in respect of sentence no submissions were advanced before us that the sentences were inappropriate. In the circumstances I propose that the appeals of both appellants be dismissed and that their convictions and sentences be affirmed.

DATE OF HEARING **23 FEBRUARY 2009**

DATE OF JUDGMENT	**2 APRIL 2009**
FIRST APPELLANT'S COUNSEL	**MS Z ANASTASIOU**
INSTRUCTED BY THE JUSTICE CENTRE	
SECOND APPELLANT'S COUNSEL	**MR A KHAN**
INSTRUCTED BY THE JUSTICE CENTRE	
COUNSEL FOR RESPONDENT	**MR M.E. MTHEMBU**
INSTRUCTED BY THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	