

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

CASE NO.: AR40/15

In the matter between:

THEMBELANI NGCOBO

First Appellant

(Accused 1 in the Court *a quo*)

BHEKUYISE SHANGE

Second Appellant

(Accused 3 in the Court *a quo*)

And

THE STATE

Respondent

Coram: Koen J, Seegobin J *et* Henriques J

Heard: 26 February 2016

Delivered: 18 March 2016

ORDER

On appeal from the High Court of South Africa, KwaZulu-Natal Division,
Pietermaritzburg (Potgieter AJ, sitting as a court of first instance):

1. The appeal is upheld.
 2. The conviction and sentences imposed on accused 1 and 3 by the court *a quo* in respect of count 3 are set aside, and substituted with a finding that both accused 1 and 3 are found NOT GUILTY and are discharged on that count.
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JUDGMENT

KOEN J (SEEGOBIN et HENRIQUES JJ concurring)

[1] The Appellants, respectively accused 1 and 3 in the court *a quo*,¹ were convicted of the murder of the deceased, Lindeni Angel Mthlane (count 3) and each sentenced to a period of life imprisonment. They appeal, with the leave of the court *a quo*, against only that conviction.² Accused 1 was also convicted of assaulting Bawinile Khethiwe Mthlane ('Khethiwe') with the intent to cause her grievous bodily harm by stabbing her on the arm with a knife (count 1).³ Count 1 will be referred to in passing in this judgment, but it is not part of this appeal.

[2] The evidence adduced before the court *a quo* is a matter of record and will not be repeated in detail herein. Reference will only be made to salient features thereof as may be required.

[3] The only evidence implicating Accused 1 and 3 on the murder count were:

- (a) a statement made by accused 1 to Lieutenant Colonel Mlangeni ('Mlangeni') on 19 December 2010;⁴ and
- (b) a statement made by accused 3 to Captain Mncwabe ('Mncwabe') on 21 December 2010.⁵

Mlangeni and Mncwabe are both commissioned officers and accordingly Justices of the Peace.

[4] It was common cause, correctly so, that both the statements amount to confessions. Accordingly, in order to be admissible they had to comply with the provisions of s 217 of the Criminal Procedure Act No. 51 of 1977 which, inter alia,

¹ The appellants shall in this judgment be referred to as in the court *a quo*.

² An application for leave to appeal against sentence was refused by the trial court.

³ In respect of that count (count 1) accused 1 was sentenced to 3 months' imprisonment wholly suspended for 5 years on condition that he did not commit an offence which has an element of violence (presumably committed during the period of suspension). The accused were also charged with the rape of the deceased (count 2) but were acquitted by the trial court.

⁴ Exhibit 'M' before the court *a quo*.

⁵ Exhibit 'N' before the court *a quo*.

require that they had to have been made freely and voluntarily, by the accused in their sound and sober senses, and without having been unduly influenced thereto.

[5] The admissibility of these confessions was attacked on a number of grounds. In the case of accused 1 he contended that he had been severely assaulted by the community at the time of his arrest and that was why he admitted to the charges, that he was also assaulted by the police officers at the police station and despite being previously injured was only taken to hospital after he agreed to make the statement, that the statement was never explained to him despite his signature appearing on the document, and that the contents of the statement never came from him. In the case of accused 3 the admissibility of the confession was disputed on the grounds that Mncwabe failed to use an interpreter, that the form used to record the confession was not completed properly, that Mncwabe failed to explain to him the difference between the legal concept of a confession and an admission, that accused 3 was assaulted at Taylor's Halt Police Station by overzealous and angry police officers, that Mncwabe effectively had written the statement and merely requested accused 3 to place his signature at different places, and that accused 3 was threatened that if he did not sign the form at the various places, he would know what was 'in store' for him.

[6] A trial-within-a-trial followed to determine the admissibility of the confessions. Accused 1 and 3 did not testify. At the end of the trial-within-a-trial the confessions were provisionally admitted in evidence. By agreement, the evidence led during the trial-within-a-trial also became evidence in the main trial. Accused 1 and 3 both testified in their defence during the main trial stating that they had been assaulted also by the police prior to the statements being obtained. The learned Judge correctly recorded that his ruling in respect of the admissibility of the confessions against accused 1 and 2 was interlocutory and that it could be revisited at any stage if the evidence so required. The learned Judge, however, concluded as a matter of fact that the police had not assaulted the accused, therefore that the confessions were made voluntarily, that the murder was proved by evidence *aliunde* and that accordingly on the strength of their confessions, accused 1 and 3 should be convicted.

[7] Before arriving at the aforesaid conclusion, the learned Judge drew attention to differences between what was put in cross-examination on behalf of the accused during the trial-within-a-trial and their evidence. As regards the suggestion that the police had completed the statements and that the accused were simply asked to sign, attention was drawn to the fact that in the statement of accused 1 there were exculpatory portions, and that it further contained details of his cell phone number, the names of persons he had been drinking with on the evening of the assault appeared, which could not have been within the knowledge of Mlangeni. Further the learned judge also recorded that Lieutenant Colonel Mlangeni would not have been aware of the derogatory term that Khethiwe used, calling accused 1 a 'skhotheni', because on her evidence the affidavit which he took from her did not include this remark. Similarly in respect of accused 3 the learned Judge found that it was significant that the name 'Sigodo', a name used by accused no. 1, appears in the statement of accused 3 as well as details of the school he attended which Mncwabe, would not have been aware of and which could only have come from accused 3. To determine whether the trial court was justified in concluding that the confessions were admissible it is necessary to refer briefly to the relevant factual background.

[8] *Ex facie* the record, the relevant evidence in chronological sequence was as follows:

- (a) Accused 1 was known to Khethiwe for a period of about 2 months. She also knew him by the name of Sigodo. On the evening of 17 December 2010 she and a number of her friends had proceeded to Mortel Store. They were dancing and she accepted that she was intoxicated although she disputed being drunk. Accused 1, erstwhile accused 2 and accused 3 as well as accused 1's brother and others in their company, were also drinking at the Mortel Store that evening. It is not in dispute that some disagreement developed between Nabuthla Sibisi who had accompanied Khethiwe and a male referred to as 'Remember';
- (b) According to accused 1, Khethiwe referred to him and/or his friends as 'skhothenis'. At some stage while he was outside the store he was

attacked by Khethiwe. He warded off this attack and in the process she was stabbed;⁶

- (c) Khethiwe disputed that version, particularly that she used any derogatory term to refer to accused 1 and/or his friends. She testified that she left Mortel Store at about midnight. On her way home, not very far from the Mortel Store, she was accosted by accused 1 who, without any reason, stabbed her on her right arm and in the process also caused an abrasion on her thumb. No words were exchanged during this altercation. Thereafter she continued on her way home. After she was joined by some of her friends, she telephoned her mother and asked her mother to meet her on her way home, which her mother subsequently did;
- (d) When Khethiwe met her mother she noticed that she was accompanied by another person, who she thought was her (Khethiwe's) brother. It was only when they arrived back home, and used a light generated from her cell phone, that she realised the person who had accompanied her mother to meet her was not her brother but accused 1. In the presence of accused 1 she advised her mother that he was the one who had stabbed her earlier that evening. Extremely surprisingly, her mother however did not say or do anything although the injury on her arm was visible and accused 1 was present;
- (e) later, after that exchange, Khethiwe's grandmother returned and asked Khethiwe's mother where the deceased said 'she was going'. Khethiwe testified that her grandmother had at that stage not located the deceased. Accused 1 left their company thereafter;
- (f) Ms Mthlane the mother of the deceased and Khethiwe testified that on the 17th December 2010 after arrival at home at 16h00 she and the deceased were watching a programme on TV called 'Generations', which ended at approximately 20h30. It was shortly after Generations ended that she received a telephone call from Khethiwe requesting her to fetch her from Sis Dombi's residence. At some stage before she left

⁶ The erstwhile accused 2 testified that he did not witness any altercation at Mortel Store where he had been drinking on the evening of the 17th December 2010. He left at about 23h00 with his brother and went home.

a person knocked on the door and identified himself as Sigodo Ngcobo. She had not met accused 1 before. He told her that he was there to help as Khethiwe had been stabbed and she was with friends from Mpophomeni. He then accompanied her to meet Khethiwe. After meeting Khethiwe they all returned home. She noticed that Khethiwe had been stabbed on the left arm.⁷ She further confirmed that when accused 1 was at their home the deceased was not present;

- (g) The brother of accused 1 testified that accused 1 was heavily intoxicated as a result of his drinking at Mortel Store, to the extent that he, Siphelele Wiseman Ngcobo who had witnessed accused 1 fighting with Khethiwe and accused 2 took accused 1 home, put him in bed, locked the door and he put the key in his pocket. He returned to the store to drink but a short while later again returned to the room where accused 1 was still sleeping. This was some time after 22h00.
- (h) The body of the deceased was discovered on the morning of the 18th December 2010 at approximately 5h30. She had been stabbed repeatedly and cut from the area of her vagina up to her chest. Part of what looks like her intestines protrude from this cut. It was a particularly gruesome killing;
- (i) After the police had arrived at the scene, accused 1 was brought to the scene having been apprehended by members of the community. He had been assaulted severely. Members of the community were present and there was a real danger of further harm to him, so much so that he was placed in a police vehicle and subsequently removed from the scene;
- (j) Mlangeni was the senior officer on duty that weekend. A number of police station areas in the greater Pietermaritzburg area fall under his control. These include Plessislaer and Taylor's Halt, the latter being the police station for the area where the crime occurred. He attended the scene of the murder, interviewed witnesses, also interviewed Khethiwe and recorded a statement from her. He testified that after arriving at the scene:

⁷ Khethiwe had testified she was injured on the right arm.

'I observed and I preserved some evidence, marked whatever I could mark and pointed out to the photographer. I interviewed the policemen who were in attendance and also some identified witnesses.'

He said he was concerned about the involvement of the community and that they would take the law into their own hands. Accordingly, he maintained:

'In this case I was there to verify if the suspects were not falsely implicated. I had to interview them. If there were other witnesses I was going to interview them as well, but with the interview with them I established that one of them told me the story what happened and the stories that he gave me, I was happy that he was the right suspect' (referring to accused 1).

Apart from attending this scene of the crime and preserving evidence Mlangeni also pointed out certain things to the photographer, identified witnesses and marked whatever points he could find. He oversaw the proceedings at the scene;

- (k) Khethiwe did not see the body of the deceased, but Mlangeni did;
- (l) Accused 1 was arrested by the police and after being taken to Plessislaer police station,⁸ was later taken to Edendale Hospital for treatment for his various injuries. He was thereafter again detained;
- (m) The next day, 19 December 2010 at approximately 9h20, accused 1 was taken to Dr Soni at St Anne's hospital. Dr Soni recorded that accused 1 was 'allegedly assaulted by many people from community and further that he was assaulted with gun and sticks and kicked';
- (n) According to the occurrence book entry for the Plessislaer Police Station, accused 1 was re-detained there at 16h45 when brought back to the police station. The confession taken from accused 1 by Mlangeni was allegedly completed at 16h20;
- (o) Accused 3 was arrested on 20 December 2010 by a number of policemen including constable Madlala.⁹ The relevant occurrence book

⁸ Accused 1 was detained at the Plessislaer police station because the Taylor's Halt police station, within whose area the crime was committed, only has holding cells but don't have facilities to detain accused persons overnight.

⁹ It seems that the arrest of accused 3 probably followed from accused 1 implicating him in his confession – see paragraph 10 below.

entry on the 20 December 2012 at 18h00 recorded that he was the policeman who detained accused 3 as a suspect;

- (p) Dr Soni saw accused 3 at 15h30 on 20 December 2010;
- (q) Mncwabe is the officer in charge of the detectives at Taylors Halt. The investigating officer, Warrant Officer Mthembu, fell under his command. Mncwabe was not on duty over the weekend of 18 and 19 December 2010. The matter was however a 'high profile' one which would immediately have come to his attention on Monday, 20 December 2010, when he returned to work. He was requested by Warrant Officer Mthembu to take a statement from accused 3 which he completed at 19h33 on 21 December 2010. He said, *inter alia*, the following in evidence in response to various questions:

'Captain, apart from taking down the warning statement from the accused did you have anything to do with the actual investigation of the docket up to that stage? ... Not at all, My Lord.

I understand as the head of the detective branch at Taylors Halt, dockets of your subordinates would pass through your hands at some stage, is that right? ... That is so.

And is it so that you would have had course [cause] to peruse this docket during the course of the investigation? ... That is so M'Lord;

Mncwabe confirmed that he knew of the murder and its details. He had heard that the community had arrested a person on the Saturday. He had heard that the body of the deceased was mutilated, at least by the Monday when he returned to work. He had also heard that there were other suspects that were arrested as well. As this was a particularly gruesome murder everybody in the detective branch was talking about the incident

- (r) Mncwabe further said in his evidence that if accused 3 had wished to exercise his right to a legal representative that he 'would not have carried on in taking the statement, however I would have still asked him some questions regarding this matter'. When asked 'what questions do you mean', he confirmed that it would be 'questions regarding the crime itself or what' and that he would have 'done it right there on that time'.

This is a startling misunderstanding of an accused person's right, *inter alia*, to silence and not to incriminate himself. It must inevitably influence other statements that the accused's rights were duly observed.

[9] It is against that evidence that the versions of the two accused as contained in their respective confessions must be contrasted and compared. Obviously in assessing a confession, experience has taught that it is not uncommon for the deponent to down play his involvement in a particular crime. I am very mindful of that pitfall as well as the others that one encounters from time to time in presiding over criminal trials, when considering confessions.

[10] The material portion of the confession by accused 1 reads as follows:

'I admit having killed the deceased in this case but I did not rape her. She was raped by Bhekumuzi.Ntshеле and Siphokuhle Mkhize. On 2010/12/17 at about 19h00. I was at Mortel Store. I was together with Siphokuhle Mkhize, Muzi (Bhekumuzi) Ntshеле, Sihle Ntshеле, Thanda Ntshеле, Mondli (surname unknown) and one Mr Khumalo who stays at the place with Taxis at Mafakatini and who is slender built. We were busy drinking liquor which was two bottles of Smirnoff and some beers.

While busy drinking now and again we stood up to dance to some females. I do not know their names. One of these females kept on telling others not to dance with us saying that "SINGOSKHOTHENI". I warned her not to call me 'USKHOTHENI'.

One Male person who was drinking with these female told me to move away from them of which I did. At a later stage I saw the same females walking out of the shop while I was also outside. When she walked pass me she said here is this "SKHOTHENI". I got upset and I drew the okapi knife that was in my possession (but which belonged to Muzi) and I stabbed her on her hand. I went back to the shop and I told Muzi and Siphokuhle that I had stabbed the female who called me "USKHOTHENI".

Muzi took his knife from me and he said: "Let us follow them." I wasn't to stab her my hole as well. Siphokuhle also said he wanted to stab her. We followed them but we did not see as to what direction they took. Muzi said he knew where one of them stayed as he used to walk pass her house when going to the soccer gymnasium. We followed.

When we came to that house we saw a female who came out of the toilet. She walked into a one roomed out building and she closed the door. We thought it was the same female who insulted us calling us “oskhotheni”.

Muizi knocked at the door and he said: “I am Muzi, please open”. The said female opened the door without asking any questions. Muzi grabbed her and closed her mouth. I told her to point out to us her sister who is fair in complexion. Muzi started to stab her. He gave me the knife to stab her and also gave the same knife to Siphokuhle to stab her. She appealed to us not to kill her. She promised to point out where the sister was. She led us down the road but she turned around and said she did not know where the sister was.

We then decided to rape her as we thought she was fooling us around. It was Muzi who said she had to be raped. Muzi started to rape her. Siphokuhle was next to rape her. I also tried to rape her but my penis failed me. We all agreed that we had to cut her and kill her in order to silence her.

We did stab her several times. She was also cut but I do not recall as to who cut her on the stomach from her vagina. That is all I wish to state

QUESTION 1: Some blood stains were found on the photo in the house and on the door? Can you tell me how this blood got there?

ANSWER 1: After the said female was cut I realised that my skipper was missing from me. Muzi also said his shoes were missing. We therefore went back to the deceased's house to look for my skipper and Muzi's shoes. Muzi did find his shoes but I did not find my skipper. It is possible that we touched few things in the house while having blood on our hands

QUESTION 2: There was a pair of push in sandals that was found near the gate at the deceased's house. Whose sandals were these?

ANSWER 2: May be if I can see them, I will tell you because I know what my friends used to wear.

QUESTION 3: I see that you are injured. How did you sustain these injuries?

ANSWER 4: The community who caught me assaulted me. I did admit to them as well that I killed the female.

QUESTION 5: Is there anything else you would like to say.

ANSWER 5: No; That is all'.

Thereafter followed the signature of accused 1 and the signature of Mlangeni.

The statement continued:

'I forgot to mention something.

QUESTION: What is it that you forgot to say?

ANSWER: I wish to state that Sihle Ntshele did not participate in the killing and raping of the deceased, but it was his brother Muzi (Bhekumuzi) who participated. Muzi is not yet arrested as he ran away. That is all.'

[11] The material portions of the confession made by accused 3 to Mncwabe read as follows:

'I understand the allegations against me and I admit the charges.

The incident started when myself and my friends namely (Sgodo) Themabela Ngcobo and (Spho) Sphokuhle Mkhize were on our way to look for a certain female person who had had an argument with Sgodo earlier that evening. I do not know the name of that female person but she resided at Mafakatini location.

It was at about 23:00 when we reached at the homestead of that female person. I stood at the verandah of the house and the other two went in to the room of that female person because they knew where she slept. They spend approximately five minutes inside that room and shortly thereafter there was a female person who came out of the room holding the shoulder and bleeding. I realized that she had been stabbed by one of the two friends of mine. I do not know as to where the female person went to.

While I was stil waiting, my friends came out with another female person. We all went out of the premises and when we we out they started to rape the woman one by one and they also told me to rape her. I raped the woman after having instructed by my friends and also due to the fact that I was drunk.

When we had finished, Sgodo instructed me to stab the woman with an okapi knife which he gave me. I stabbed the woman once on the chest and I stood aside. I returned the knife to Sgodo and they both also stabbed the woman until she died. We then left and took separate routes to our homes. I was at home and I did not report to anybody of what had happened.

I should say that what caused us to commit the crime was that we were heavily drunk. We had been drinking at Motel store. We were drinking a case (dozen) of beers and three bottles of Smirnorrff Vodka.

I did not intend to raped, murder the woman but due to being under influence of liquor I found myself under the situation of committing the crime.

That is all I can say'.

[12] The trial court correctly found that Khethiwe's evidence that she had been stabbed out of the blue (as she described) whilst on her way home, could not be the truth. The probabilities and the inferences to be drawn from the surrounding circumstances clearly point to there being some altercation, most probably of the nature described by accused 1, during which Khethiwe was probably the antagonist and which resulted in her being stabbed. Whether the court's finding of guilt on count 1 was nevertheless correct does not arise in this appeal and I shall not comment on it any further.

[13] It also seems highly improbable, where accused 1 had stabbed Khethiwe for whatever reason, that he would proceed to her home and then accompany her mother to go and meet up with Khethiwe. As much as the trial court accepted Khethiwe's mother's evidence, the concern is that the community, and probably she and Khetihwe, had concluded that accused 1 must have been involved in the killing of the deceased because he had stabbed the deceased's sister, Khethiwe, earlier that evening. They would therefore have a reason to want to place him at or near their home. Mlangeni had also concluded similarly,¹⁰ for probably similar reasons.

[14] However, at the time accused 1 was still with Khethiwe and her mother on their version, which must have been after midnight as Khetihwe's evidence was that she had only left the Mortel Store at around 24h00, the deceased (according to the question posed by Khethiwe's grandmother) had already left their homestead. This was said to have been at approximately 23h00. However, on Khethiwe's version she had not at that stage yet been stabbed and was not at her home. Accused 3's confession is totally irreconcilable with this version.

[15] The explanation by accused 1 in his confession also suffers from a similar time line problem. Accused 1, accused 3 and the erstwhile accused 2 would on accused 1's version have proceeded to the home of the deceased and Khethiwe at approximately 23h00, whereas Khethiwe says she only left the store at approximately 24h00. If accused 1 was part of the killing, at around 23h00, then

¹⁰ See paragraph 8(j) above.

Khethiwe was not yet at home, but he, on Khethiwe's mother's evidence,¹¹ was already at Khetiwe's home. If the estimations of time are wrong and the murder had by then already been committed, then accused 1 would have accompanied Khethiwe's mother to fetch Khetiwe, having murdered her other daughter possibly minutes before, and in the process would be placing himself near the scene. The version of accused 3 according to his confession is in direct conflict and cannot be reconciled with the version of Khethiwe or accused 1. On his version Khethiwe was back home and in the company of the deceased in a room when Khethiwe was stabbed. As much as one is alive to the mendacity of potential co-perpetrators or accomplices when recording confessions and the natural tendency to down play their involvement, the significant contradictions between these versions is a matter of considerable concern.

[16] On the version of accused 3, Khethiwe was stabbed in the room at her homestead where she had been with the deceased, she thereafter emerged from the room and the deceased was then brought out of the room and attacked. During all this, accused 3 was waiting on the "veranda" of the structure in which Khethiwe and the deceased had been, which structure *ex facie* the photographs which were produced in court does not have a veranda at all.

[17] Even attaching very little, if any, probative value to the factual circumstances set out in the confessions of accused 1 and 3, on the State's own version, more particularly the time frame emerging from Khethiwe's evidence, the crimes could not have been committed as alleged.

[18] A further disconcerting aspect of the case is that the confession of accused 1 was recorded by Mlangeni, who was intimately involved with the initial investigations at the scene, who interviewed witnesses and who, in fact, obtained a statement from Khethiwe. Mncwabe likewise was the officer in charge of the detective branch at Taylor's Halt under which the investigation was conducted. The investigating officer, Warrant Officer Mthembu reported directly to him.

¹¹ Save that Khethiwe's mother's evidence was that the call from Khethiwe for her to meet her came earlier, after she and the deceased had finished watching 'Generations'.

[19] The law is clear regarding confessions recorded by a police officer in the same unit as the investigating officer or by officers in the same unit. It is undesirable that such confessions be taken by any such police officers.¹² It is also trite that the fact that it is undesirable, does not mean that such confessions are inadmissible *per se*.¹³ The issue of undesirability however goes hand in hand with the danger that exists or which is perceived that there is a potential for improper inducement, personal knowledge of the officer to find its way into the narrative, or that the confessions otherwise might result from undue influence.

[20] Ultimately each case must be decided on its own facts. In the minority judgment of Kruger J in *S v Nzama and Another*¹⁴ he referred to *S v Dhlamini* (supra)¹⁵ where Holmes JA in regard to the analogous provisions to s 217 in the Criminal Procedure Act of 1955 referred to the following statement of De Villiers J P in *R v Ndozana and Another*¹⁶ namely that:

‘Where the only evidence for the Crown implicating an accused person is an alleged confession it is immediately suspect.’

Reference was also made to the comment by Innes CJ in *Rex v Barlin* 1926 AD 459 at 465 where it was said:

‘A police officer who has charged or arrested a person, or has him in his custody, occupies in regard to that person a very special position of authority – one which may in itself strongly affect a weak or ignorant man.’¹⁷

Following *S v Magwaza*¹⁸ if a rights infringement results in the creation of evidence which would otherwise have not existed, then the use of evidence that could not have been obtained but for the participation of an accused in the construction of the evidence for the purposes of a trial would tend to render the trial process unfair.

[21] Mlangeni had clearly concluded at a very early stage that accused 1 was correctly considered as a suspect. For this he could only have been influenced by

¹² *S v Dhlamini and another* 1971 (1) SA 807 (A) at 815A–C.

¹³ *S v Nzama* 2009 (2) SACR 326 (KZP).

¹⁴ 2009 (2) SACR 326 (KZP) para 6.

¹⁵ See footnote 12 of this judgment.

¹⁶ 1958(2) SA 562 E.

¹⁷ See para 6 of *S v Nzama* fn 14.

¹⁸ 2016 (1) SACR 53 (SCA) at 66 para 18.

what was reported him by the community, who themselves seemingly concluded that accused 1 must have been involved in the murder probably on the basis that earlier during the evening he had stabbed the sister of the deceased (no other basis for the community suspecting him to be complicit was advanced), thus suggesting some motive (which remains uncertain) to murder her sister. These circumstances would have tainted and influenced his entire approach to the interview with and the recording of accused 1's confession.

[22] The trial court sought to find some support and safeguard for its ruling that the confessions were admissible in the fact that they contain statements which accord with objectively established facts which the two police officers would not have known personally, therefore that the communication of the existence of these facts could only have emanated from the accused. Clearly, for example in the case of accused 1, details of his cellphone number and the names of the friends he was drinking with, could probably have emanated from him, although also known to others at the Mortel Store and who would know him, but it is also not surprising that these details would have been given to Mlangeni as they were also relevant to the stabbing of Khethiwe, which was not disputed by accused 1.

In regard to the murder, no such peculiar objective facts which could only have been known to the murderer of the deceased appear in the confession. The confession of accused 1 refers to the deceased having been cut open along the front of her body, a fact which would be known to her murderer, but it is also a fact known to Mlangeni who witnessed the deceased for himself, investigated the scene and conducted various interviews, and could have made its way into the confession even inadvertently from his personal knowledge. It is also somewhat improbable that where the evening was apparently so dark that Khethiwe could not see that the person who accompanied her mother to fetch her was not her brother but in fact accused 1 who had stabbed her earlier, that accused 1 if he was one of the co-perpetrators would not have been able to observe the extent of the cut on the deceased having regard to the darkness in the area where her body was found.

It is also improper that after recording what was allegedly volunteered by accused 1, specific questions not aimed at clarifying any ambiguous statement, but amounting

to an interrogatory, were posed by Mlangeni to accused 1. Significantly, answer 4 records that it was 'the community who caught me, assaulted me. I did admit to them as well that I killed the female'. On that version the confession to the community followed upon a assault (confirmed by the objective evidence of extensive injuries suffered by accused 1 and which required medical treatment at hospital), which could hardly make that confession free and voluntary and not without undue influence.

[23] Similar considerations apply in respect of the confession made by accused 3 to Mncwabe. At the stage he made his alleged confession the threat of violence by the community would have been paramount in the mind of accused 3, hardly making any thing he might say incriminating to the offences freely and voluntary and without undue influence. In addition, his description of the relevant circumstances fly directly in the face of the events described by Khethiwe as to how she came to be stabbed. Effectively the state's version, the version of accused 1 and that of accused 3 are in conflict to such an extent that they are irreconcilable and contradictory. All that remains in the confessions are the simple statements admitting that accused 1 and 3 were responsible for the murder, but the aforesaid contradictions as to the events and circumstances regarding the murder are such that these conclusions of alleged complicity have insufficient evidential value as to persuade me of the guilt of the accused beyond a reasonable doubt.

[24] Certainly following so shortly after a vicious assault by the community and/or the real danger of further possible assaults, I have concerns and misgivings as to the voluntariness of the two confessions, whether they were free of undue influence and whether they in fact record information which could only have come from the accused. Having regard also to the zeal in securing suspects to avoid the community resorting to self-help as expressed by the two officers, in the case of Mlangeni that he was satisfied he had 'the right suspect' (it seems based mainly on what the community had concluded) and in the case of Mncwabe, that he would have continued questioning the accused even if accused 3 wished to avail himself of the right to legal representation, coupled with their intimate and detailed knowledge of the facts and circumstances surrounding the murder, thus being able to contribute descriptions of the nature of the injuries and the like, the trial court in my view erred

in concluding that these confessions passed the test for admissibility. I am certainly left with a distinct feeling of unease for the convictions to depend solely on the confessions obtained in these circumstances.

[25] There are also other aspects of concern such as the alleged failure by accused 1 when initially making his confession to specifically implicate accused 3. This was seemingly added as an afterthought. It is not without significance in the sequence of events, that accused 3 is then arrested on the very next day, probably in the main based on the confession of accused 1, which would in the ordinary course be inadmissible as against accused 3, thus introducing the need for a separate confession by accused 3 to the crime.

[26] The case in favour of the admissibility of the two confessions is in my view weaker than that which confronted the court in *S v Nzama*. The reasoning and concerns expressed in that minority judgment are even more prominent in the context of the facts of this matter and leave me to conclude that the State had not proved the guilt of the accused beyond a reasonable doubt.

[27] Accordingly, the following order will issue:

- (a) The appeal is upheld;
- (b) The conviction of accused 1 and 3 on count 3, and consequently the sentences of life imprisonment imposed on each of the accused by the court *a quo* are set aside and substituted with a finding that both accused 1 and 3 are found NOT GUILTY and are discharged on that count.

KOEN J

SEEGOBIN J

HENRIQUES J

Date of hearing: 26 February 2016

Date of Judgment: 18 March 2016

Appellant's counsel: Mr X Sindane

Instructed by: Justice Centre: Pietermaritzburg

Respondent's counsel: Ms P Ngcobo

Instructed by: DPP: Pietermaritzburg