IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: CC32/15P

In the matter between:

MONDLI SIPHO JAMES JETRO ZULU

And

THE STATE

JUDGMENT

POYO DLWATI J:

[1] The accused has been arraigned before this court for three charges, namely one count of murder (1st count) and 2 counts of attempted murder (2nd and 3rd counts). The State alleges that on or about 29 April 2014 and at or near Mphise area in the district of Kranskop, the accused unlawfully and intentionally killed Nelson Malan Cele, an adult male and also attempted to kill Ntombifuthi Thusi, an adult female and Phumzile Cele, also an adult female.

[2] The accused pleaded not guilty to all the charges. A statement by the accused in terms of section 115 of the Criminal Procedure Act 51 of 1977 (the Act) was admitted into evidence by consent of the parties as Exhibit "A". In terms of the statement the accused denied being involved in the commission of

all the offences. In particular he denied having been in the Mphise area in the district of Kranskop. He could not say where he was on 29 April 2014 as he was only arrested in this matter on 23 October 2014.

[3] The state, in order to prove the charges against the accused, called various witnesses to testify. I will not repeat their evidence as it is on record save where it is necessary to do so. One of the witnesses called was the complainant in count 2, namely Ntombifuthi Thusi. She was married to the deceased. On the day in question, the deceased had gone to fetch her at Ntunjambili hospital in his silver grey Toyota Tazz motor vehicle. From the hospital they drove to Kranskop to buy some groceries. Thereafter, they left for their home in the company of the deceased's brother's daughter, Phumzile Cele. On their way home, as they passed Qabazini store they saw a white vehicle with [...] registration letters. She was not sure whether the vehicle was a Toyota Yaris or a Toyota Corolla. This vehicle was facing the direction they were coming from and was stationery when they passed it.

[4] As they were proceeding further down the road, they passed the stream that was separating Mabomvini location to Malovana location. They saw that the vehicle they had passed at Qabazini was driving towards them at a high speed. Ms Thusi suggested to the deceased that he must drive towards the side so that this vehicle could pass. The deceased tried to veer the car to the left side of the road. When this car was parallel to them she then heard gunshots. There was one barrel of a firearm in the front window of the passenger's seat that was pointed at them from this car. At the back window passenger's seat of this car two barrels of firearms appeared and were pointed at them. As more shots were being fired, she looked away and tried to get out of the vehicle. She also tried to pull the deceased away but he was powerless at that stage having been struck by some of the bullets. She sustained injuries on various parts of her body.

[5] Thereafter various members of the community, including Mr Mncwango, arrived at the scene. The police also arrived. Mr Mncwango rushed all the injured people to Ntunjambili hospital. She did not see who the occupants of that vehicle were. Phumzile Cele, also a passenger in the deceased's vehicle testified. Her evidence corroborated Ms Thusi's evidence in all material respects. She was also injured as a result of the gun shots. The deceased died on arrival at the hospital.

[6] The state alleges that it is the accused that killed the deceased and injured the complainants in counts 2 and 3. To prove these allegations, the state relied mainly on the evidence of Mduduzi Mhlonishwa Msomi (Msomi) who was the only eye witness to testify. His evidence was that he was seated under a tree at Qhabazini store during the afternoon of 29 April 2014. He noticed a white toyota motor vehicle driving towards the Kranskop direction. The motor vehicle came to a halt next to Qhabazini store and Javas (the accused) alighted. He (Javas) went to the store through the gate which was not far from where he was seated. When Javas was exiting the store the deceased's vehicle drove past the store coming from the direction of Kranskop. Javas walked back faster to the car where he had alighted and boarded it in the front passenger seat. The car made a U-turn and followed the deceased's.

[7] Shortly thereafter he heard gunshots coming from the direction of the river. He went to a hilly area next to the store and from there he observed the white motor vehicle driving parallel to the deceased's vehicle. He could still hear gunshots. He noticed the deceased's vehicle veering off the road and the white vehicle proceeded straight thereafter. He then left the store with Mzo Mhlambo and proceeded to the scene where the deceased's vehicle was found. When they arrived at the scene they found the deceased with his passengers

injured. Community members including Mr Mncwango also arrived at the scene. The deceased and the two passengers were rushed to Ntunjambili hospital in Mr Mncwango's vehicle.

[8] Msomi testified that he knew the accused before the date of the incident but not for more than 12 months. He used to see him at the taxi rank and at times would drive taxis travelling between Kwa Maphumulo and Stanger. He testified that on the date of the incident the accused wore a brown woolen hat and a brownish nike jacket with green patches that matched the hat. He also testified that on that day the accused was clean shaven. It was put to him that the accused practices the Shembe religion and therefore does not shave. Msomi was adamant that he was shaved and it was the accused.

[9] It was also put to him that the last time that the accused drove a taxi was in 2004 and was a driver in Johannesburg. Msomi testified that he used to see him whenever he went to Kwa Maphumulo and would see him at the taxi rank. He was criticized for not having approached the police shortly after the incident as his statement was only made in August 2014. His response was that he did not want to tell the police on the date of the incident as to who he had seen doing what as community members were there and it would then be known as to who said what to the police. It was only later that he met Mhlongo at Qabazini and he told him what he had seen.

[10] It was put to him that he had no reason noticing the accused on the day in question as that road between Kranskop and Maphumulo is a busy road. He responded by saying that what attracted his attention to the accused was the expensive clothing he was wearing. He further testified that the road gets busy in the mornings when vehicles leave for KwaMaphumulo and also in the afternoons when they return but at the time of this incident the road was not

busy. Hence when the accused's vehicle arrived, they looked at the vehicle. It was put to him that he received bits and pieces of information about what had happened on the date of the incident and hence he made his statement so late. He laughed off this and denied that this was the case. It was put to him that he was falsely implicating the accused as the accused was not involved in the commission of the offences and his response was that he saw him and was testifying about what he had seen.

[11] The other evidence led was that of Greshan Pillay, an IT analysis specialist employed by MTN. He testified that after receiving a s205 request from Mr Mhlongo, who is the investigating officer in this matter, he drew all the data information about cellular phone number 0[...]. On the data handed into court as Exhibit "K" and "L" he was able to see that that cellular phone number was in KwaKomo area between 03:55 PM to 04:25 PM on 29 April 2014. He testified that the range of a base station varies from 18 to 22 kilometers in a rural area whereas in the urban areas or CBD it is about 1.5 to 2 kilometers. The cellular phone number was registered in the name of Zamakahle Zulu in Johannesburg.

[12] Ms Theresa Botha, who was, up to March 2016, employed by the South African Police Services as a Chief Administration Clerk testified that she had received training on geographical plotting of towers. Her job entailed managing, coordinating and disseminating data information in the working of cellular phones. She testified that the cellular phone number referred to in paragraph 11 above received calls when it was at Doktorskorp tower in Stanger. From there it moved to Doring Kop. It then moved to Nyamazane Hill tower alongside R74. From there it moved to Ndaba Farm tower. The Nyamazane Hill and Ndaba Farm towers are in close proximity with each other. From these towers the cellular phone moved to Mbongolwane tower.

[13] She testified that at the time that that cellular phone received a call at about 04h25PM it was within the triangle of three towers, namely Nyamazane, Monkey Hill and Kwakomo. The Mphise area lay in between Ntunjambili, Mbongolwane and Kwakomo towers. At the time that the call was received that handset could have been at Mphise area hence it could draw signals from those three towers. Furthermore, because those areas are mountainous, cellular phone signal could be drawn from any visible tower at the time that a call is made or received and that might not necessarily be the closest tower to the person.

[14] The state thereafter called the witness Nathi Agrippa Dlamini. He is a police officer stationed at KwaMaphumulo police station with 8 years' experience. It became apparent when this witness was testifying that what he was saying in court was inconsistent with a statement he had previously made to the police. The gist of his evidence was whether he had called the accused on the number 083 535 4741 on the date of the incident, 29 April 2014. His testimony was that he did not give Mhlongo the accused's number but that number was supplied by Mhlongo to him. All he said to Mhlongo was that he knew the accused and it appeared that he might have called the accused on the date in question. Mr. Van Heerden then applied to declare the witness hostile as the witness had said that he did not make the statement freely and voluntarily as he was threatened by Mr. Mhlongo in the presence of his Supervisor, Colonel Mbhele. He further testified Mhlongo told him that he was warning him that he could be put behind bars if he was in contact with criminals.

[15] Mr Barnard objected to the application on the basis that a witness could be only declared hostile after the state had proved that the witness had made the statement and that his evidence in court was inconsistent with the statement. He argued that at that stage the state had not proved that the witness had made the

statement. The court then explained to the witness the implications of the witness being declared hostile and the fact that if it was found at the end of the inquiry that he had in fact made the statement and had made it freely and voluntarily he could be charged with perjury. The court then advised the witness that he was entitled to be legally represented during the enquiry either by his own private counsel or Legal Aid counsel if he could not afford a private one. The witness chose to instruct his own counsel. At that stage, because the witness had said he did not make the statement freely and voluntarily, I ruled that a trial within a trial be held to determine whether the statement had in fact been made by the witness and if so whether it was made freely and voluntarily.

[16] I pause here to mention that the witness was legally represented and his representative was allowed to cross examine the witnesses and make arguments on his behalf as to the admissibility of the statement. The State called Mr. Mhlongo, Constable Vusi Ziqubu who had accompanied Mhlongo to KwaMaphumulo police station to consult with the witness; and retired Colonel Victor Mbhele who was the head of the detectives at KwaMaphumulo and would act as a station commander if and when Mchunu, the station commander was not present. He was present when the witness was interviewed by Mhlongo.

[17] Their evidence established that the witness Dlamini was known to all of them as he is also a police officer at the KwaMaphumulo police station. On checking the accused's cellphone records which he (Mhlongo) had obtained in terms of Section 205 of the Act he found that on the date of the incident the accused's number had been called by the number 082 406 3100. He then phoned that number and established that it belonged to Dlamini. He then made an appointment with Dlamini to see him on the following day being 3 November 2014. On arrival at KwaMaphumulo police station on 3 November 2014 they (Mhlongo and Ziqubu) went into Colonel Mbhele's office and

advised him that they were there to see Dlamini about a case they were investigating. Mhlongo testified that they chose to see Dlamini in the presence of his supervisor so that Dlamini would not, at some stage accuse them of having ill-treated him. He further testified that it was common practice within the police services that if police officers of the same rank are investigating each other, then a senior to them should be present when they are meeting.

[18] Mhlongo testified that upon enquiring from Dlamini about his relationship with the accused, Dlamini told him that the accused was his friend. He asked him if he had phoned the accused on the date of the incident and he said it was possible. After Dlamini said that, Mhlongo then asked him if he would be prepared to make a statement to that effect. Dlamini went to another office and came back with a paper, sat down in the office and wrote his statement as the 3 of them were having a conversation. After he finished he told him that he had finished and Mhlongo enquired if he had read what he had written and Dlamini confirmed and thereafter took the oath and signed. Mhlongo thereafter certified the statement meaning he commissioned it. He denied having threatened Dlamini and explained that he would not have threatened him in the presence of his supervisor. Furthermore no charge was laid against Mhlongo for having threatened Dlamini nor were any reports or complaints made about such threats. Mhlongo denied that he had furnished Dlamini with the accused's number and testified that Dlamini had the accused's number. He denied that the statement was not made freely and voluntarily. He confirmed that the statement was made by Dlamini.

[19] It was put to Mhlongo that the affidavit made by the witness did not satisfy the requirements of the Justices of the Oath and Peace Act in that it did not have time, date and place where the affidavit was made. His response was that in his view, even though the date, time and place are not there the affidavit

was signed by the witness before him and the witness had confirmed its correctness and he certified it accordingly. Mhlongo also denied that what was in the statement was what he had told the witness. Constable Vusi Ziqubu who was with Mr. Mhlongo when he met with the witness also testified. His evidence corroborated that of Mhlongo in all material respects. The only aspect in Ziqubu's evidence was that according to him Mhlongo had asked the witness if he (the witness) had called the accused on the day when Mr. Cele was killed and the witness told Mhlongo that he could not recall.

[20] Retired Colonel Victor Mbhele also testified. His evidence corroborated Mhlongo and Ziqubu's evidence in all material respects. He however did not see whether the witness had taken an oath before Mhlongo or whether Mhlongo had certified the affidavit as he was not paying attention. That was in summary the state's case in the trial within a trial. The witness, Nathi Dlamini testified. He confirmed that he was a member of the South African Police Service stationed at KwaMaphumulo. He also testified that he knew Mr. Mhlongo as a police officer from Kranskop. He also testified that they used to do joint operations between KwaMaphumulo and Kranskop police officers and him and Mhlongo would be involved something which Mhlongo denied. He denied that he had received a call from Mhlongo prior to the date of their meeting.

[21] According to him, Mhlongo arrived at the KwaMaphumulo police station that morning. He summoned to Colonel Mbhele's office where he met Mhlongo and Ziqubu. When he entered the office it appeared that Mhlongo and Mbhele were discussing something. As he entered, Mhlongo said there is the man who is contacting criminals and I'm going to arrest him. Mhlongo thereafter turned to him and said 'Dlamini why are you contacting criminals and I'm going to arrest you.' He testified that he was confused by this. Mhlongo thereafter asked him if he knew the accused and his response was that he knew the accused as he

is from the KwaMaphumulo area. Mhlongo told him that on 29 April 2014 (a date which the witness said he did not remember) an incident had happened and a person was killed. Mhlongo told him that he had records that he (Dlamini) had contacted the accused on that day. Mhlongo asked him where he was on that day and his response was that he was at home after having looked at the time which Mhlongo told him the incident had happened.

[22] He denied that Mhlongo showed him documents or what he had his docket with him. Mhlongo thereafter told him to make a statement explaining what had happened and what he knew. Mhlongo told him that he was warning him to stop talking to criminals and at that time he was not going to arrest him and merely wanted a statement. He testified that he went to a nearby office to fetch paper in order to write the statement. On his return from that office Mhlongo asked him where his cellular phone was and he told him that he had it. Mhlongo asked him if he had the accused's number and he told him he did not have it. Mhlongo told him to write the statement which he did.

[23] He testified that he wrote the first paragraph of the statement on his own. When he was writing the second paragraph Mhlongo assisted him with the time and date of the incident. He wrote the statement and left a space for the accused's number as he did not have it. Mhlongo went out and said he was going to get the accused's number in prison where he had signed. Mhlongo came back with a piece of paper that had a number and he took that paper and wrote the number. He completed the statement and Mhlongo took it. He testified that he was shocked at this incident and thought that he would be arrested. He however never reported the incident to anyone as he knew that one cannot lay a charge against someone by them merely saying they were going to arrest you. He only saw the cellphone records in Pietermaritzburg when he was consulting with the prosecutor, Mr. Van Heerden and Mhlongo in preparation

for the trial. And that is where they all realized that his statement was incorrect in that it said the accused had called the witness whereas it was the witness who had called the accused.

[24] He testified that he had asked Mhlongo about the cellphone records when they met at KwaMaphumulo and Mhlongo told him that he did not have them with him. He therefore wrote what was said by Mhlongo as he trusted him. He testified that he never took an oath and none was administered to him. Under cross examination it was put to him that he was not being truthful to the court when he said the statement was not commissioned whereas in the earlier proceedings he had testified that the statement had been commissioned. His response was that he had merely confirmed that the statement had been commissioned because when it was shown to him it had been commissioned but he did not mean that it had been done in his presence. He confirmed that he had told Mhlongo that he knew the accused. He conceded that whilst earlier he had testified that he went and wrote the statement in another office, he had been mistaken about this aspect as he had in fact written the statement where Mhlongo, Ziqubu and Colonel Mbhele were.

[25] Under cross examination he testified that he felt threatened by Mhlongo's threats. He was asked why he never said so in his evidence in chief and his response was that being shocked and being threatened is one and the same thing in isiZulu. He was asked why he never reported the threats by Mhlongo to his superiors and his answer was that it happened in Colonel Mbhele's presence so he could not report elsewhere. He could not agree or dispute that the statement was made on 3 November 2014. He confirmed that it was made at KwaMaphumulo police station. He also confirmed that he recorded so help me God on the document as that was the oath.

[26] Under re- examination by his counsel, he testified that he wrote his 082 number on the statement because Mhlongo had told him that that was the number he used when communicating with the accused. This aspect of the evidence was never put to Mhlongo when he testified nor did he testify about it in his evidence in chief. On being asked by the court whether as a police officer he would write the words 'so help me God' even if he did not take the oath his response was that he usually writes statements for members of the public and that was the mistake he made when writing his own statement. That was the witness's case. After argument I ruled that the statement was admissible and that it was made freely and voluntarily by the witness.

[27] There were two contradicting versions by the state and by the witness. I weighed the probabilities and the improbabilities of both versions. I also took into account the credibility of the witnesses. In my view it is highly improbable for Mhlongo to have threatened the witness even before interviewing him and in the open next to the charge office at the station. If he did that he risked being heard by everyone making those threats. There would have therefore been more witnesses who could have heard Mhlongo making those threats. Furthermore it had earlier been put to the witnesses that the threats were made to the witness closer to the charge office whereas when the witness testified he said the threats were made in Colonel Mbhele's office. I also find it highly improbable that Mhlongo would threaten the witness in front of Colonel Mbhele who was acting as a station commander at that time. There was no evidence that Mhlongo and Mbhele were friends and therefore Mhlongo would have done as he pleased before Mbhele.

[28] Furthermore if Mhlongo had indeed threatened the witness in front of Colonel Mbhele and Colonel Mbhele did nothing about it and the witness felt aggrieved he (the witness) could have still reported the matter to the station

commander, Mr. Mchunu. He could also have reported the matter to the area cluster head or the Provincial Commissioner of Police. I am therefore satisfied that the witness was not threatened in any way before making the statement. He never mentioned during his evidence in chief that he was threatened by Mhlongo. All he said was that he was shocked by what was happening. His counsel tried very hard to get out of him to say that he was threatened but he did not succeed. Only under cross examination did he say that he was threatened. When asked why he did not say this earlier he said the isiZulu word for threatened is the same as being shocked. This was indeed blue lies. In isiZulu being shocked is ukuthuka and being threatened is ukusaba. There is a huge difference. This was another lie by the witness.

[29] With regards to whether the statement was made by the witness, I am also of the view that it was made by him. His initial evidence was that he had left the office where Mhlongo,Ziqubu and Colonel Mbhele were and wrote out the statement in another office. Later as the three witnesses testified and he saw that it was evident that what he had said was contrary to what the witnesses had said, he confirmed their version and said he wrote out the statement in that office. It was initially put to the witnesses that the witness only wrote the first paragraph and thereafter Mhlongo told him what to write. However it emerged during cross examination that a lot of what is contained in the entire statement emanated from him. On his own version, in any event he testified that he wrote out the whole statement and left a space for the accused's cellular phone number to be inserted when Mhlongo had returned with it. I find these contradictions in his statement to be an indication of how untruthful he was when he testified.

[30] Furthermore only by chance and under cross examination did he reveal that Mhlongo had told him to put his 082 number in the statement as this was

the number used in contacting the accused. This was never put to any of the witnesses and I find this to be a fabrication of his evidence on his part. It was an after- thought right at the end of testimony. I have no reason not be believe Col. Mbhele when he said at no stage did Mhlongo leave his office when the statement was being written by the witness. He also testified that Mhlongo had his docket and documents when he came to his station. Col Mbhele's evidence was quite impressive. He was honest and told this court when he did not know certain things or did not remember them. His demeanor was good and I had no reason to disbelieve his evidence. He testified that he had a good relationship with Dlamini before his retirement and he could count on Dlamini as he was a real man. He therefore had nothing to gain by coming to court to lie. Furthermore his evidence corroborated Mhlongo and Ziqubu's evidence. On the other hand, the witness was quite unimpressive. He tried to change all the evidence that he had given before the trial within a trial. I have already alluded to various things that he testified about which were not put to the witnesses and contradictions in his evidence. I am therefor satisfied that the statement was made by him.

[31] As to whether the statement was duly commissioned in front of him, this is another after thought and a technicality to get out of the hurdle of owning up to the statement. He had earlier confirmed that the statement had been commissioned and I accept that. The further evidence led cured any deficiencies that could exist in the statement. For instance there is no dispute that the statement was made at KwaMaphumulo on 3 November 2014. The only thing missing is the time and that is not fatal to the statement so as to make it invalid. The statement therefore is admissible as it was made by the witness, freely and voluntarily. It was handed in as Exhibit N. The evidence in the trial within a trial was incorporated to the main trial by consent of all the parties.

[32] The state thereafter made an application to declare the witness hostile as his testimony was inconsistent with the statement. Even though I granted the application, I am of the view, and in hindsight that this part was no longer necessary as it was superfluous. The court had already made a ruling that the statement was made freely and voluntarily by the witness after extensive cross examination of the witness. Most of what he testified about in any event was already covered in the trial within a trial. The only new aspect that came out of this evidence was that the witness knew the accused and they used to phone each other from time to time. He denied that they were friends but confirmed that he used to see him at the KwaMaphumulo taxi rank but he did not know whether he owned a taxi or not.

[33] The state also intended to rely on a statement purportedly made by the accused shortly after his arrest. In this regard both counsel presented argument as to whether the statement was a confession or an admission. Both the State and the defence agreed that the court should first deal with the issue of whether the statement was an admission or a confession and thereafter the admissibility of same could be determined. Mr Van Heerden, on behalf of the state argued that the statement was an admission in that it was made before the investigating officer, and not in front of a magistrate as would be the case with a confession and that the provisions of s217(1)(a) are applicable.

[34] He further submitted that the statement was an admission as the accused had not mentioned anything about murdering the deceased in that statement. He argued that once there is a slight opportunity of a defence then the statement cannot be a confession. He argued that it was not clear in the statement as to who had shot the deceased. He argued that for a statement to be a confession it must amount to a plea of guilty and in this case, even though it was highly

incriminating it was not or did not amount to a confession or a plea of guilty. He also made reference to various authorities in this regard.

[35] On the other hand, Mr Barnard, on behalf of the accused argued that the statement amounts to a confession. He argued that the statement must be assessed objectively and the surrounding circumstances must be considered. In this regard he relied on *State v Yende* 1987(3) SA 367 (A) and argued that this case brought to an end the impractical and artificial approach that had been adopted in *S v Bekker* 1929 AD 167. He argued that in this case, at the time that the accused made the statement, he knew that he was suspected of killing the deceased and therefore if the statement is considered as a whole with the surrounding circumstances then the statement amounts to a confession. After hearing argument from both counsel and having examined the statement closely, I ruled that the statement was an admission.

[36] In examining the statement I was satisfied that the statement was not an admission of all the elements of the offence, nor was it a full acknowledgment of guilt, see *State v Zuma & Others* 1995(4) SACR 568 CC at page 585 para 27. The court confirmed this principle as was laid down in *R v Becker* 1929 AD 167. Mr Barnard urged this court not to consider *R v Becker supra* as it was no longer the law on the issue. However *R v Becker supra* was quoted with approval by the Constitutional Court in *S v Zuma supra*. If one for instance considers paragraph 5 of the statement which reads; "After shooting or killing of Malani Cele we proceeded with a gravel road to Emangongo to Dorinkop where we hide ourselves". In this regard I cannot say with certainty as to who shot Malani Cele and for what reason. I also cannot say why they went and hid themselves. I have had regard to that which is necessarily implied from the statement and I have doubt if it amounts to a clear admission of guilt, hence I ruled that the statement is an admission.

[37] After having ruled that the statement was an admission, Mr van Heerden sought to hand in the statement as part of the evidence. However Mr Barnard objected to the statement being handed in and submitted that the statement was not made freely and voluntarily by the accused and was therefore inadmissible. He submitted that the accused alleged that prior to making the statement he had been assaulted by the investigating officer, Mr Mhlongo, in the presence of other police officers. He further contended that no rights were explained to him prior to the making of the statement. The state therefore applied for a trial-within-a-trial to be held in order to prove the admissibility of the statement and that it had been made freely and voluntarily by the accused.

[38] I will not go into detail with this evidence as it is on record, suffice to say that Mr Mhlongo testified and denied having assaulted the accused. It was put to him that the accused had reported this assault to a police officer who was on duty in the early hours of 24 October 2014 but this, Mhlongo disputed. It was further put to him that this assault was also reported to a magistrate at KwaMaphumulo Magistrate's court on the accused's first appearance there and as a result the magistrate ordered that the accused be taken to a doctor. Subsequently the accused was taken to Ntunjambili hospital where he was seen by Dr Maharaj. However, Dr Maharaj, for some flimsy reason, was not able to attend court and Dr Nomkhosi Phakati (Dr Phakati) testified in order to interpret the medical data on the accused's J88.

[39] She testified that the doctor made an assessment of an assault according to the hospital records admitted into evidence as Exhibit "R". She testified that an assessment is a combination of history as told by the patient and the doctor's own assessment. In other words it is the doctor's finding after having received history from the patient. Under 'A' which is assessment, the doctor wrote

assault and further wrote rib pain and bruise; C-spine and tenderness. She testified that the doctor would have elicited tenderness if she applied pressure on the C-spine. However the doctor did not indicate which part of the rib was painful and did not indicate where the bruise was. The bruise, however, would be what the doctor would have seen.

[40] The next step after assessment is that the doctor ordered x-rays and after she obtained the results he recorded that there were no abnormalities detected. He further planned to give treatment, namely *Amoxyl* which is an antibiotic, then *Panado* for pain and the patient was injected with *Penicillin,* which is also an antibiotic and *Voltaren* an anti-inflammatory for pain. On the next page which was an x-ray request form, under history and clinical finding the doctor wrote assault but it was evident from the records that a "NO" had been inserted before assault. This clearly was a forgery perpetrated so as to create an impression that a finding of no assault had been made by the doctor and yet according to Dr Phakatini, Dr Maharaj had not made a diagnosis. I do not know who would have inserted the words "NO" before assault but that must be frowned against as it is not in the interest of justice to mislead the court.

[41] It had been put to Mhlongo that upon the accused's arrest no rights were explained to him. Further, he was made to sit on a chair and a tube was pulled through his face from behind. Later that evening he was taken to a place in Stanger that was near a river. He was slapped and pushed into this river. He was taken out of the river and pushed to the ground whereafter Mhlongo stood over him and pulled a tube over his face. From there he was taken to a soccer field in Stanger and was forced to lie on the ground. Pepper spray was sprayed on the tube and the tube was put on him. Although Mhlongo denied that all this had been done on the accused, Dr Phakati on the other hand confirmed that the bruise on the accused could be consistent with the fact that the accused had

been pushed into a river. Furthermore, the tenderness on the C-spine would be consistent with the fact that a tube was pulled over the accused's face when Mhlongo was standing behind him. The tenderness would be caused by the hyper extension of the neck and its sudden movement.

[42] Constable Sinothi Nxele denied that the accused had reported any assaults to him nor had he complained of pains. That in a nutshell was the State case in the trial within a trial. The accused elected not to testify. I ruled that the state had not proved its case beyond reasonable doubt that the statement was made freely and voluntarily by the accused. The statement was therefore ruled as inadmissible. I was satisfied that *prima facie*, there was an allegation of assault. At the first available neutral moment, in the KwaMaphumulo Magistrate's Court, the accused reported the assault to the magistrate on 27 October 2014. Thereafter the accused was taken to a doctor at Ntunjambili hospital who prescribed substantive medication for him. The doctor's own assessment was assault even though there was no clear diagnosis. However, the medication given is in line with the pains that the accused says he suffered. Furthermore, some of the injuries he sustained are consistent with the type of assault that the accused says was perpetrated on him. I was satisfied that the accused could not have made all this up unless it had indeed happened. Even though the accused did not testify, on the state's version there was an assault on the accused as assessed by Dr Maharaj, hence I ruled the statement inadmissible. In any event the onus was on the state to prove beyond reasonable doubt that the accused had not been assaulted and the state failed to discharge the onus.

[43] Mr. Van Heerden sought to address the court and applied for the statement of Dlamini to be handed in in terms of Section 3(1) of the Law of Evidence Amendment Act 45 of 1988. For this he relied on *S v Mathonsi* 2012(1) SACR 335 KZP and *S v Rathambu* 2012(2) SACR 219 SACR. The

facts briefly in *Mathonsi supra* were that a witness had made a statement to the police. He was called to testify on behalf of the state. During his testimony it became apparent that he was deviating from the statement he had made to the police. The prosecution asked for the statement to be proved and the witness to be declared hostile. The court then declared the witness hostile and he was then subjected to a full and effective cross examination on the statement by both the prosecution and the defense.

[44] When evaluating and considering the totality of the evidence before him, the learned magistrate took the statement made by the witness who had been declared hostile into account. The issue that arose on appeal was whether the previous inconsistent statement by a hostile witness has any probative value worth consideration during the evaluation and assessment of all the evidence adduced before the court *a quo,* and, if the answer is in the affirmative, what weight is to be attached thereupon. I pause here to mention that in my view the facts in Mathonsi were distinguishable from this case.

[45] I say so for the following reasons: When the witness Dlamini testified it became apparent that he was deviating from the statement he had made to the police. At that stage Mr. Van Heerden applied for the witness to be declared hostile but Mr. Barnard, objected on the basis that the witness had testified that the statement was not made freely and voluntarily. At that stage after having considered the implication of a finding after the determination of whether the statement was made freely and voluntarily, I found it prudent that I advise the witness that if at the end of the enquiry I found it that he had made the statement and had done it freely and voluntarily, he might be charged for perjury. I was and still am of the view that it was best to advise him at the early stages of his testimony.

[46] I then advised him of his rights to legal representation before we dealt with the inquiry. He chose to appoint a legal representative of his choice. When the matter proceeded it was agreed between the parties that the issue proceed by a way of a trial within a trial. The accused's counsel was also participating throughout. Furthermore the witness was also alleging that some of the information in the statement was not from him but was given by Mhlongo.

[47] At the commencement of the trial within a trial Mr. Van Heerden argued that there was no basis in law for the witness's counsel to cross examine the witnesses. Mr. Jorgensen who appeared for the witness then argued that for a trial within a trial to be effective, he must be allowed to cross examine the witnesses. I found that it was in the interest of justice that the legal representative of the witness be allowed to participate fully in the proceedings. His duty was to safeguard the interests of the witness and could only do so if he cross examined the witnesses. This would enable the parties to fully ventilate the issues.

[48] The issue of whether the statement was made by the witness freely and voluntarily was ventilated fully and the witness gave evidence and was cross examined extensively. The issue of hearsay therefore does not and did not arise. The statement was admitted into evidence and all the evidence in the trial within a trial was incorporated into the main trial hence I alluded to the fact that a further application to declare the witness hostile was superfluous in the circumstances. In any event much of what was testified about after the witness was declared hostile was a repetition of what was dealt with in the trial within a trial. Hence in my view this case is distinguishable from *Mathonsi* as well as *Rathumba* for that matter. In *Mathonsi* the court *aquo* never dealt with the evidence as extensively as it happened in this case. The truth and untruthfulness of the statement was established. I therefore do not believe that it ought to be

admitted in terms of the hearsay evidence rule. The requirements set forth in Mathonsi for the admission of the statement in terms of the hearsay evidence rule do not find application in this case. They in a way have been compiled with during the trial within a trial. It therefore could not be said it was hearsay evidence as the witness had testified fully about the statement. That then was the state's case.

[49] Mr. Barnard argued that because the court had ruled inadmissible the statement made by the accused to Mhlongo, I should reconsider the ruling made in the Dlamini statement as Mhlongo was the main protagonist in the Dlamini statement. I however rejected his argument as the circumstances where I had admitted Dlamini's statement and rejected the accused's statement were different. My reasons for admitting the one and rejecting the other have been fully explained above. I therefore remained unconvinced that I should reconsider my ruling. Mr. Barnard then closed the defence case. The accused did not testify and confirmed that after discussing with his counsel, he elected not to testify.

[50] I now look at the evidence. The evidence implicating the accused is that of Msomi, Dlamini's statement and the cellphone evidence. Mr Van Heerden argued that the state had proved its case beyond a reasonable doubt and the accused must be convicted. He argued that there was direct evidence linking the accused but there was no explanation from the accused nor was there rebuttal of the state's evidence by the accused. He argued that there was one version before the court and urged the court to accept it. Mr Barnard argued for the accused to be acquitted as the state, in his view had failed to prove the accused's guilt beyond a reasonable doubt. He criticised the evidence of Msomi as being unreliable as he had contradicted himself in certain aspects. He argued that the fact that Msomi took so long to make a statement must be one of the reasons,

why his evidence is not reliable. He argued that there was no onus on the accused to prove his innocence. Even if he did not testify the state still had to prove its case beyond a reasonable doubt.

[51] In terms of S 208 of the Act 51 of 1977 an accused may be convicted of any offence on the single evidence of any competent witness. It is however trite now that such evidence must be clear and satisfactory in all material respects. The evidence therefore must be treated with caution. As held by Macdonald AJP in *R v J* 1966(1) SA 88(SRA) the cautionary rules are no more than guides, albeit very valuable guides, which assist the court in deciding whether the Crown has discharged the onus resting upon it. He added, the exercise of caution should not be allowed to displace the exercise of common sense. This view has been quoted with approval in various cases in our courts including the Supreme Court of appeal.

[52] The evidence of Msomi must be treated with caution as it is one of a single witness and identification was at issue. One of the safeguards of caution is corroboration. I however will come back to this later on in the judgment. The criticisms leveled at Msoni's evidence were the following:

(a) He made his statement 3 or 4 months after the incident;
(b) He could not clearly tell this court how he knew the accused;
(c) He contradicted himself about the colour of the tracksuit alleged to have been worn by the accused on the day of the incident;
(d) He had no reason in minding all the cars passing by at Qabazini store and people walking in and out of the store.

[53] Msomi explained in his evidence that he could not tell the police at the scene what he had seen with regard to the accused as he feared that the news might spread and he feared for his life. He also explained that he was scared to

contact the police but when he found the police on a certain day at the store enquiring about the matter he then volunteered the information and told them that the accused was involved. On how he knew the accused, he explained that he used to see him in the KwaMaphumulo taxi rank whenever he went to town. He knew him as Javas as people with him called him that. He did not remember the date when he first saw him. He however knew him at least 4 months prior to the incident. At times he saw him driving taxis travelling between him Maphumulo and Stanger.

[54] Although it was disputed that the accused drove taxis it was never disputed that he used to be present at the taxi rank. This was also confirmed by Dlamini when he testified. Furthermore there was no evidence rebutting what the witness had said. It is natural that people would know a person without that person knowing them. I therefore find no reason to disbelieve Msomi in this regard.

[55] On the colour of the tracksuit worn by the accused on the day in question, he explained that the difference in what was in the statement and what he testified about was because Mhlongo recorded what he did not tell him and he stood by his testimony. On the issue of identification Msomi testified that the incident happened during broad daylight. It was hot and he had just come back from swimming. He was seated under a tree chatting to Mzo. He testified that the road was not busy at that time. He testified that the road does get busy in the mornings and afternoons, I suppose during the peak hours. He observed the accused alighting from the white vehicle to the tuckshop and back from the tuckshop. He provided an explanation as to why he had an interest on the accused and that is he wore expensive clothing. This must be taken in the context of someone, a young man, staying in the rural areas and amused by the

type of clothing that the accused wore. In my view he satisfied all of the requirements of identification as laid down in S v Mthethwa.

[56] His evidence is corroborated by Dlamini's statement that he phoned the accused that afternoon on his number 083 5354 741 from 082 4061 300. It was confirmed by Mrs Botha that that number would have been around the Mphise area when the call was received. In any event, in my view, Msomi was an honest witness. The court was impressed by his evidence. His demeanour was good in the witness box and never hesitated to answer all the questions put to him. He had opportunities to tailor his evidence to close any criticisms leveled against him by Mr Barnard but he did not do so. He gave a clear, coherent version of events as they unfolded on the date of the incident. I am satisfied that he told the truth about what happened on that day. His evidence therefore was clear and satisfactory in all material respects.

[57] The accused did not testify and that is his constitutional right not to do so. However as held in *S v Boesak* 2001 (1) SACR 1 CC at para 25, the fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to his decision to remain silent at the trial. 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. I am satisfied that having taken the evidence in totality, the accused was one of the persons that were in the white Toyota motor vehicle as testified to by Msomi. He was seated on the front passenger seat of that vehicle and that is where a barrel of a firearm appeared and fired shots at the deceased and the complainants in counts 2 and 3. I am satisfied that the state has proved beyond a reasonable doubt the guilt of the accused and I find him guilty as charged.

APPEARENCES

Date of Judgment	: 22 July 2016
Counsel for State	: Adv Van Heereden
Instructed by	: The Director of Public Prosecutions PMB
Counsel for Accused	: Adv L Barnard
Instructed by	: Rakesh Maharaj & Co Stanger