REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 17424/2011

In the matter between:

XOLISA BEJA — First Appellant

VUYOLWETU MAHLOMBE — Second Appellant

and

THE STATE — Respondent

Delivered on: 15 December 2016

JUDGMENT

PILLAY, AJ:

Introduction

[1] This appeal concerns an unfortunate chain of events that occurred at around 9 p.m. on 21 February 2011 at an Engen Garage in Eerste Rivier, Western Cape when a security cash van approached the garage in order to collect cash from a drop safe on the premises and to replace the safe with an empty bag. A car approached the garage and certain persons who were in it tried to open the doors of the cash van. They did not succeed in doing so. Sadly, the driver of the cash van and a security guard were ultimately shot dead.

[2] On 14 February 2012, the Appellants were charged at the Blue Downs Regional Court on the following counts:

2.1. Attempted robbery with aggravating circumstances.

2.2. Murder.

2.3. Possession of an unlicensed firearm.

2.4. Possession of ammunition.

[3] Both Appellants pleaded not guilty to all charges. They were convicted on 10 July 2014 in respect of all charges. Both Appellants were subsequently sentenced to: (a) ten years imprisonment in respect of the charge of attempted robbery with aggravating circumstances; (b) life imprisonment in respect the charge of murder; (c) five years' imprisonment for possession of an unlicensed firearm; and (d) one year imprisonment for possession of ammunition.

[4] It is common cause that none of the state witnesses could identify the perpetrators. On 6 April 2011 the Appellants (who were Accused 1 and 3 in the trial) were arrested together with Accused 2. The Magistrate effectively convicted the Appellants based on the contents contained in their warning statements and the pointing out of the First Appellant having also taken into account evidence of the state witnesses about what took place at the scene.

[5] Both warning statements were taken from both Appellants on 10 April 2011, with the First Appellant having also done the pointing out earlier on the same day.

[6] Shortly after the commencement of the trial, it became apparent that the First Appellant had placed in dispute the pointing out that he had made and

contended that he was assaulted prior to the pointing out and that it was not done freely and voluntarily. Both Appellants also alleged that they were assaulted and forced to make the warning statements.

[7] The Second Appellant also contended that he was not afforded the services of an interpreter. The statement was written in English in circumstances where he could only read and write Xhosa. Both Appellants disputed that any constitutional rights were explained to them prior to signing the documents. A trial within a trial was consequently held in respect of each Appellant after which the Magistrate found that the pointing out and the warning statements were admissible. It must be mentioned at this stage that Accused 2 was acquitted on the basis that the statements made by his co-Accused could not be used against him.

[8] In short, the Appellants contend that the extra curial statements and the pointing out were unlawfully and unconstitutionally obtained, and therefore ought to have been found to be inadmissible. They contend that the Magistrate erred by admitting them and by convicting them on that basis. The Magistrate convicted them on the basis of common purpose, based on what was contained in their respective statements.

[9] The First Appellant pointed out the scene of crime to Colonel Nonkula which he alleged had been shown by Captain Mtshali. According to the warning statement of the First Appellant, in February 2011 he received a call from a witchdoctor who informed him that he should pick up some other persons for the purposes of an armed robbery at a garage. He then picked up some persons who directed him to the Engen Garage in Blue Downs where a white Combi was spotted. He parked his vehicle near the garage and observed two of the persons who went straight to the garage. He heard a gunshot about two minutes later. He, as the driver of the

vehicle then drove towards the Engen Garage but the vehicle switched off. One of the men who went with him to the robbery helped him kick start the vehicle. Then the other men returned to the vehicle and he drove back to Khayelitsha to the witchdoctor's house. He (and the others) reported back to the witchdoctor that there were security guards that were shot and that no money was received during the robbery.

[10] In terms of the statement of the Second Appellant on 21 February 2011 he was with the First Appellant and others at about 8:30 p.m. The First Appellant was the driver of a white Toyota Corolla, with a dark navy blue left passenger door. They fetched him to commit an armed robbery which he knew about because it was discussed with the witchdoctor in Khayelitsha. He was carrying a gun and he got into the car and gave the gun to an unknown person. The First Appellant drove to the Engen Garage and parked at the back of the garage. The Second Appellant and another person walked in the direction of the garage and as they were following two people at a distance he heard a gunshot coming from the garage. When he entered the driveway to the garage, he noticed one person lying in front of the white Combi cash van. He also noticed their getaway vehicle (the white corolla) approaching the driveway and all of a sudden its engine cut off. They push started the vehicle, jumped in and drove away. They went back to the place of the witchdoctor. He referred to two persons who shot the security guard.

[11] Our law is clear that in order for confessions and admissions to be admissible, they must be made freely and voluntarily. As the Magistrate found, the statements of the Appellants appear to be admissions. For the purposes of this enquiry that issue is not really relevant. Before the content of the statement is even taken into account the State must prove that the statements are admissible.

The Law

[12] In terms of section 217 the Criminal Procedure Act, 1977 (Act 51 of 1977) ("the CPA") evidence of any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, be admissible in evidence against such person at criminal proceedings relating to such offence. The subsection is made subject to two provisos which are not in issue in the present matter.

[13] As regards the admissibility of an admission by an accused, section 219A(1) of the CPA provides that evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in evidence against him at criminal proceedings relating to that offence. The provisos of that subsection also do not arise in the present instance.

[14] In *S v Sheehama* 1991(2) SA 860 (A) it was held that a pointing out is essentially communication by conduct. The court ruled that forced pointings out are not admissible and should be treated as admissions and be subject to the rules of admissibility relating to admissions, i.e. they must be made freely and voluntarily (see Du Toit et at Commentary Criminal Procedure Act at 24-69).

[15] Section 35 of the Constitution provides inter alia as follows:

15.1. Everyone who is arrested for allegedly committing an offence has the right not to be compelled to make any confession or admission that could be used in evidence against that person.

15.2. Everyone who is arrested for allegedly committing an offence has the right not to be compelled to give self-incriminating evidence.

15.3. Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

[16] In *Matlou v S* 2011 (1) BCLR 53 (SCA) at par 28, the Court recognised "the ever-present tension between the State's obligation or duty to see to it that people who commit crimes are arrested, investigated, prosecuted and held accountable for their deeds and its equally important and onerous duty to ensure that the conduct of those saddled with the duty and responsibility to investigate prospective offenders is proper and above board." In the same case the SCA found that the learned Judge (a quo) had erred in accepting evidence of the pointing out by the First Appellant given that when the First Appellant had made the confession to the Magistrate, he still had injuries which appeared to be fresh; which strongly suggested that the assault meted out to him must have been serious. According to the SCA, it made perfect sense and accorded with logic that the First Appellant could only have been assaulted by the police before the pointing out in order to coerce him to do so. The SCA concluded that undoubtedly, such evidence would have been obtained in contravention of the First Appellant's rights in terms of section 35(1)(a), (b) and (c) of the Constitution.[1]

[17] In *S v Mangena and Another* 2012 (2) SACR 170 (GSJ) the Court held: "[48] No statement by an accused may be used in evidence against him

[1] At par 20.

unless it is proved beyond reasonable doubt that it was freely and voluntarily made. See S v Cele 1965 (1) SA 82 (AD). It is irrelevant whether the extrajudicial statement was intended to be incriminatory or not. The statement must be freely and voluntarily made "... in the sense that it has not been induced by any threat or promise proceeding from a person in authority" (see R v Barlin 1929 AD 459 at 462)."

[18] In *S v Zuma* 1995 (2) SA 642 (CC), albeit in the context of the Interim Constitution, the Constitutional Court held: "[33] The conclusion which I reach, as a result of this survey, is that the common-law rule in regard to the burden of proving that a confession was voluntary has been not a fortuitous but an integral and essential part of the right to remain silent after arrest, the right not to be compelled to make a confession, and the right not to be a compellable witness against oneself. These rights, in turn, are the necessary reinforcement of Viscount Sankey's 'golden thread' - that it is for the prosecution to prove the guilt of the accused beyond reasonable doubt (Woolmington's case supra). Reverse the burden of proof and all these rights are seriously compromised and undermined. I therefore consider that the common-law rule on the burden of proof is inherent in the rights specifically mentioned in s 25(2) and (3)(c) and (d), and forms part of the right to a fair trial. In so interpreting these provisions of the Constitution I have taken account of the historical background, and comparable foreign case law. I believe too that this interpretation promotes the values which underlie an open and democratic society and is entirely consistent with the language of s 25. It follows that s 217(1)(b)(ii) violates these provisions of the Constitution."

[19] In this case the Appellants alleged that they were assaulted prior to the statements taken and also a pointing out in respect of the First Appellant.

The Evidence

[20] Turning now to the evidence in the present matter, during the trial within a trial conducted in respect of the Appellants. In respect of the First Appellant, Sergeant Sombo, who is in the employ of SAPS and was involved in the arrest of the First Appellant testified that the First Appellant was arrested in Philippi. While he did not physically do the arrest, he was involved in the operation. The First Appellant was arrested at the door of his house. The First Appellant was never assaulted in his presence and nor did he assault the First Appellant. He was requested by Captain Mtshali to assist to take the First Appellant to the officer who was going to do the pointing out. He took the First Appellant out of the police station cells to the pointing out. He did not notice any visible injuries when he received the First Appellant from the cells. He did not influence the First Appellant or threaten him to make a statement.

[21] Captain Mtshali testified that he is the investigating officer in the matter. There was a joint investigation between Strand CID and Organised Crime; they were both looking for a white Toyota Corolla sedan, with a navy blue door on the left hand side but that the registration number was not known except that it ended with "EC". The investigation led to the vehicle being identified on Browns Farm Informal Settlement, where the vehicle was parked between two shacks. They knocked on the door of the shack closest to the vehicle; they enquired about the vehicle from the owner of the shack. The occupier took the members to the address where the First Appellant stayed; that is how he came to be arrested. The First Appellant confirmed that the vehicle belonged to him. When the First Appellant was arrested,

Captain Mtshali was not close by. The First Appellant then took them to the Second Appellant. The First Appellant identified Second Appellant as "Killer", subsequent to which he was arrested. A third accused to be arrested, Accused No 2 started to flee but was arrested. During the interview he noticed injuries on the First Appellant, though he could not recall clearly whether it was on his arms. When he asked the First Appellant how he had sustained these, his response was that it was during the time of his arrest. He denied assaulting the First Appellant.

[22] Captain Jam Jam, who is in the employ of the South African Police Services ("SAPS") took down the warning statement of the First Appellant but was not involved in the investigation, and nor was he involved in the arrest of the First Appellant. He testified that he took down the warning statement in his office. There was no one else in the office except for the First Appellant and himself. He communicated in Xhosa and he and the First Appellant understood each other. The First Appellant had no injuries at that point, he could see no injuries and the First Appellant was fully clothed while giving the statement. He never asked the First Appellant to undress. Before taking the warning statement, he had a conversation with the First Appellant during which he explained him about his rights. He explained that the First Appellant had a right to tell him what had happened and a right to say everything to his lawyer or to remain silent. He explained to him about the State lawyer and the legal aid and that there is legal aid who could represent him at his case. He never assaulted the First Appellant and nor did he make any promises before taking the statement. He first explained before starting to fill in the form and then completed the form as he was speaking. The form appears as Exhibit B. He was not involved in any pointing out, but made arrangements in that regard.

[23] Constable Mthembu testified that the First Appellant was not assaulted in his presence and that he did not assault the First Appellant. In cross examination, he testified that there was a joint operation on 6 April 2011. There was a vehicle that was identified as belonging to one of the suspects; the vehicle was spotted in Philippi. They were knocking on houses and then someone came out of one of the houses and pointed to another shack and informed them that the owner of the car stays in that shack. When the arrest took place, some of the police officers were left in the Main Road but Constable Mthembu proceeded with other members and when they approached the First Appellant's specific shack, the First Appellant was at the door of the shack. The members of SAPS introduced themselves to him and Constable Ntoto did the talking. The First Appellant was asked if he knows the vehicle, which he agreed that he was the owner of. Constable Ntoto explained that he was looking for the owner of the car which had been involved in an armed robbery. They then arrested the First Appellant, entered his house, searched it and proceeded back to the vehicle. The First Appellant was placed in one of the vehicles and then questioned about the case; during that questioning he made reference to Accused No 2. They then made an arrangement for the First Appellant to phone Accused No 2; he did so. They arranged to meet Accused No. 2. When Accused No. 2 realised that the First Appellant was approaching him with the police, he opened the door and ran away, the police ran after him and arrested him; that was the last time that Mthembu saw the First Appellant. He denied assaulting the First Appellant.

[24] Colonel Nonkula testified that he received a call from Captain Jam Jam on 9 April 2011 at about 8 p.m., requesting that he assist with a pointing out. He responded that he would be ready to do it the following day and requested that he organise a photographer. On 10 April 2011 he went to the Bellville Organised Crime Office and saw Captain Jam Jam. He was

taken to an office where the First Appellant was brought in. He asked the First Appellant for his name, which he provided; and asked him where he worked to which he responded Swissport at the airport. He then introduced himself, asked the First Appellant whether he was satisfied that he was a policeman and then told him his rights. He informed him of the right to remain silent, that he was not obliged to say anything or to answer any questions and further that he has a right to legal representation before they could say anything. He explained that he had powers in respect of the pointing out. The First Appellant said that he will engage legal representation when he is in Court. The First Appellant confirmed that he understood his rights. When asked about visible injuries, Nonkula stated that he saw two wounds, which did not seem to be fresh and seemed a bit old. He asked the First Appellant about the wounds; the First Appellant said that he had fallen off a bicycle. Nonkula further stated: "After I have called in the photographer and also requested him, the accused, to undress so that I can check thoroughly inside if there are any wounds there I noticed there were some – not wounds as such, but some like sort of … (indistinct) and then I asked him about those injuries." The First Appellant responded that he sustained them when he was at the scene where he was arrested, i.e. during the arrest. Nonkula did not ask the First Appellant how the injuries were sustained. In cross examination, Nonkula stated that he was informed by the First Appellant that four of the injuries were sustained during the arrest.

[25] Warrant Officer Van der Westhuizen testified that he performs inter alia duties as a photographer. He was the official photographer on duty on 10 April 2011; he was called by Captain Mtshali to attend to a pointing out. He started with taking photographs of the suspect, he then took photographs of the vehicle, a Nissan Tida and of the odometer reading. They then went to Khayelitsha, Site B, then to Kleinvlei where they

stopped about 100 m from the Engen Garage. They then went back to the office where he took photos of the suspect. The standard procedure is to ask the suspect to undress so that they can see if there are any injuries visible; he followed that procedure in the present instance. He noticed that the First Appellant was in pain and injured; the First Appellant showed him the injuries and stated that he had been abused. The First Appellant did not say when he was abused. He did not ask the First Appellant how he got the injuries. Colonel Nonkula was present and keeping a diary; he should have written everything down. The bruises on the First Appellant were described by Warrant Officer Van Der Westhuizen as "scuff marks" and the colouration and discolouration of the skin could be caused by bruising.

[26] Constable Ralushi testified that she was requested by Captain Jam Jam to drive the First Appellant to where he was going to point out certain places; those places were unknown to her. There were three of them in the car: Colonel Nonkula, herself and the First Appellant. The First Appellant directed her as to where to go. When she picked up the First Appellant that morning for the pointing out, she did not notice any injuries; there was nothing wrong.

[27] The First Appellant testified that on 6 April 2011, while asleep with his wife and child he received a call from the police enquiring about his vehicle's registration number. The police asked to see him and he gave them directions. He then closed the door and left his house; he was far from his house when three people approached him (two males and one female). Only one person was in uniform and a police bus was there. He was then taken and put inside the bus, where some police officials wearing casual clothes also entered the bus. He confirmed that the vehicle belonged to him and that it was driven by a driver. He continued: "I was then beaten and they said there's no such, they then said to me I must tell the

truth where were was my car." He further explained that he was fastened with handcuffs at the back and on his feet with long chains and stated: "I was beaten with sticks and some planks and then they put some spray inside the plastic and then they suffocated me. That was the manner in which I being assaulted inside this car. I was also being kicked." He named the persons who assaulted him as being Captain Mtshali; Sergeant Sombo; Mthembu and Mtotwa and others whose names he had forgotten. He told them to wait for the driver of his vehicle who would come to fetch the car at 4:30 a.m. but they were not interested and swore at him and assaulted him. The police then took his phone and scrolled through it; they enquired about the names on his phone. They then dialled the numbers on his phone and managed to get a hold of Accused 2 and 3 (the Second Appellant). When they got to the Second Appellant, they (Captain Mtshali and Mtotwa) assaulted the Second Appellant. He testified further that at Bellville they assaulted him with objects, viz, a rubber of a car wheel which was cut, planks and a golf stick. Captain Mtshali; Sergeant Sombo; Mumtembo and Mtotwa were responsible for the assault. In response to a question as to how long the assault lasted, he testified that it was from past 10 a.m. to past 6 to 7 p.m. They locked them up at Belville Police Station. Captain Mtshali then said inter alia the following to him: "So the case that I'm busy investigating doesn't have any evidence so the only thing that I link you with is the colour of the car. So I want you to become the Court's witness. I then ask him what must I said in Court. He said he is going to make a plan himself. I then said its fine, its okay. He then said to me I just ask you to assist me with one thing. I am going to show you where it was robbed .... He then said that he will make a plan so that I must be out of this case because I was never involved in any trouble. I then said its okay. We then went away to Blue Downs. And then we arrived at Engen garage." When they arrived at the Engen, they parked the car a bit far and Captain Mtshali showed the First Appellant where the car which was

robbed was parked. He also showed him where the robber's car went off. He then asked him if there was a Sangoma that he knew and that he must take them there as if the robbery was planned there; he agreed. Mtshali also said that he will send Sergeant Sombo to establish whether the First Appellant really takes the people to the scene. He answered the questions posed by Mr Nonkula. Thereafter, the camera man told him that people were being assaulted in order to admit to cases. The camera man saw a mark on the head of the First Appellant and asked him what had happened; the First Appellant responded that he was assaulted. The camera man asked that he undress, which he duly did. The camera man then saw the mark on his forehead, on his left shoulder and left arm and on his back and that there was a bruise which was swollen on his knee. He signed the documentation that was placed in front of him because he wanted to protect himself and he was told that if he did not want to co-operate according to instructions, they would assault him. They then left in a maroon vehicle to the scene where he pointed out the places as they had been shown out to him. They then charged him without explaining constitutional rights. He explained that he received tablets for his injuries. The Court a quo ultimately ruled that the warning statement is admissible and the pointing out by the First Appellant were admissible.

[28] Thereafter the matter proceeded on its merits.

Findings in respect of the First Appellant

[29] It is evident that the pointing out took place before the First Appellant's warning statement was taken. It is apparent from the evidence of Warrant Officer Van der Westhuizen that it is standard procedure to ask the suspect to undress before a pointing out, is done so as to establish if there are any injuries visible on the body of the accused. Warrant Officer Van Der

Westhuizen testified that he followed that procedure in the present instance prior to the pointing out by the First Appellant. He took photographs of the body of the First Appellant and he noticed that the First Appellant was in pain and injured. The First Appellant showed him the injuries and stated that he had been abused. He described the bruises on the First Appellant's body as "scuff marks" and concluded that the colouration and discolouration of the skin could be caused by bruising.

[30] Colonel Nonkula corroborated Warrant Officer Van der Westhuizen in regard to the existence of the injuries on the First Appellant's body. He testified that he saw two wounds on the First Appellant, which did not seem to be fresh and seemed a bit old. He asked the First Appellant about the wounds and the First Appellant informed him that he had fallen off a bicycle. When the First Appellant undressed he noticed that there were some abrasions which he asked him about. The First Appellant advised that he sustained them when he was arrested. Colonel Nonkula did not ask any further questions about exactly how the injuries were sustained. This evidence is key as shall become apparent shortly.

[31] Injuries were also noticed by Captain Mtshali during the interview with First Appellant, though he could not recall clearly whether it was on his arms. When Captain Mtshali asked the First Appellant how he had sustained these injuries, the First Appellant's response was that it was during the time of his arrest.

[32] All these witnesses, i.e. Warrant Officer Van der Westhuizen, Colonel Nonkula and Captain Mtshali noticed that the First Appellant had injuries prior to the pointing out and the taking of the statements. Both Colonel Nonkula and Captain Mtshali were told that some of those injuries were sustained during the arrest. Despite this, neither of them made any further

enquiries about precisely how they were sustained, the circumstances under which these were sustained and in particular, what bearing they could have on the First Appellant's pointing out and later on his warning statement. These factors, in my view, are material to the question of whether the pointing out and the warning statement were done freely and voluntarily. The First Appellant testified that he was assaulted by the police prior to the pointing out. It was imperative therefore for the officers conducting the pointing out to explore with the First Appellant what he meant when he said that the injuries were sustained when he was arrested and why was he assaulted and what they did to him and whether it had any influence in him pointing out and making a statement. The key question would be whether those facts had any bearing on the pointing out and his later warning statement. As observed in the judgment of *S v Mashengoane* 2014 (2) SACR 623 at par 18, if the Magistrate or person taking the statement from the suspect notices injuries, the statement should not be taken. Context should obviously be established.

[33] In my view, these injuries which were apparent to at least three members of SAPS ought to have necessitated further investigation prior to any warning statement or pointing out having occurred, which did not happen.

[34] If the evidence of the three Officers is taken into account with that of the First Appellant it is possible that the version of the First Appellant is reasonably possibly true. The Court a quo accordingly erred in admitting the statement and the pointing out without interrogating these issues further.

[35] As regards the latter point, the Court is mindful of the judgment of the SCA in *Chauke and Another v S* [2012] JOL 29536 (SCA); [2012] ZASCA 143 (28 September 2012) at paragraph 21 where the Court said: "the admissibility of a statement has to be carefully and consciously considered

and ruled upon, particularly where the statements in question are the only evidence upon which a conviction is sought to be premised."

[36] While Captain Jam Jam testified that he did not notice any injuries or that the First Appellant did not complain about any injuries when the warning statement was taken, it is clear from the record that the pointing out occurred before the warning statement was done. Captain Jam Jam was part of the unit that did the investigating although he was not the Investigating Officer. While it is accepted that he might not have seen or been informed about the injuries prior to the taking of the statement, it is not unreasonable to conclude that if indeed the assault had taken place as the First Appellant had alleged before the pointing out, it should necessarily taint any further process that follows, regarding the taking of the statement which could amount to a confession or an admission. It must be remembered that the Court does not necessarily have to believe the First Appellant, his version needs only be reasonably, possibly true.

[37] Mr Dube for the Respondent accepted that the First Appellant ought to have been taken to hospital once the injuries were noticed so as to confirm the extent of the injuries as well as the probable cause thereof, which was not done. He was ultimately constrained to concede that there was too much doubt surrounding the voluntariness of the pointing out and the warning statement such that they should have been held to be inadmissible.

[38] I am of the view that the Magistrate erred by simply focusing on the version of the State witnesses who testified to the proper conduct of the process without giving due and proper consideration to the allegation of assault by the First Appellants and the three police officers who noticed the injuries. The Magistrate should have interrogated this issue more fully.

[39] Given the absence of any other evidence implicating the First Appellant available to sustain a conviction, the appeal of the First Appellant must succeed.

The Second Appellant

[40] The Second Appellant alleged that he was assaulted and did not make the warning statement freely and voluntarily.

[41] During the trial within a trial Captain Mtshali testified that he informed the Second Appellant of his rights in terms of section 35 of the Constitution prior to taking down the statement and did so in isiXhosa which the Second Appellant confirmed that he understood. The content of the statement was conveyed to the Second Appellant in Xhosa and translated into English. He made no promises and did not in any way threaten, assault or unduly influence the Second Appellant and the Second Appellant acted voluntarily. He could not recall noticing any visible injuries on the Second Appellant.

[42] According to the evidence of Mr Mtembu, he did not assault the Second Appellant at any stage. He testified that he did not deal with the Second Appellant at any stage.

[43] According to Sergeant Sombo, his only involvement with the Second Appellant was on 6 April 2011 when the Second Appellant was arrested. He denied that the Second Appellant was assaulted during the arrest and specifically denied that he assaulted him. The next time that he saw the Second Appellant was when they appeared in Court.

[44] The Second Appellant, testified that, he was arrested on 6 April 2011 at about 4 a.m. when the First Appellant arrived and knocked on his door. When he stepped out of the house there were people pointing firearms at

him. He was instructed to lay on the ground and was assaulted. He was assaulted during his arrest and specifically named Mr Mthembu, Sombo and Mtshali as having been responsible for that assault. They assaulted him using their fists and a baseball bat that was made of plank. They were hitting on his body and kicking him while he was lying on ground. On 9 April 2011 they were taken to Bellville South where he and his co-Accused were made to lie down on a mat and he was hit and assaulted. Mr Mthembu covered his face with a tube; Sombo put the tube on his face. He described his injuries as his body having been sore as well as a bruise on his head. He made a request to Mr Mtshali to go to the hospital because his head was very sore. He was taken to hospital. He explained that he was unable to read the English in the documents; and that the writing was in cursive. He also stated that his rights were never explained to him. He never understood what was written in the documents. He explained that on 9 April he was assaulted from about 8 a.m. to about 8 p.m. and that on 10 April he was assaulted by Captain Mtshali. He was then forced to sign the document; he was grabbed on his throat and choked; he signed because he was scared to be assaulted. He did not know what he had signed.

[45] What distinguishes the case of the Second Appellant from that of the First Appellant is that in respect of the Second Appellant the witnesses of the State did not attest to noticing any visible injuries on the Second Appellant. The Appellants were arrested on the same day, on account of the same criminal incident, by some of the same persons and kept in the police vehicle. The First Appellant said that he saw the Second Appellant being assaulted. In addition, there are similarities in the nature of the assault as complained of by both the Appellants; for instance, a tube and planks were allegedly used in both instances. As Mr Dube seemed to accept that, even if it is accepted that the Second Appellant was not assaulted, the First Appellant's assault would have occurred in his presence and it is reasonable

to infer that such assault could have induced fear in him to also make an admission or confession. Furthermore, the Second Appellant's clothes were not removed as in the case of the First Appellant. Therefore, it could not be said that, just because injuries were not noticed on him, he was not assaulted. All these create reasonable doubt regarding the voluntariness of the admission made by the Second Appellant also.

[46] It is therefore my view that the Court a quo erred in admitting the statement of the Second Appellant.

[47] As in the case of the First Appellant, given the absence of any other evidence implicating the Second Appellant, the appeal of the Second Appellant should succeed.

Conclusion

[48] The outcome of this judgment does not however detract from the heinous nature of the criminal conduct meted against the deceased persons and which ultimately brought about their untimely deaths. The Court is not unsympathetic to the agony felt by the loved ones of the deceased persons. The Court however has a duty to ensure that accused person obtain a fair trial and that evidence used to convict is properly obtained.

In the result, the following Order is made:

1. The appeal in respect of the First and Second Appellants is upheld.

2. The convictions and sentences imposed by the Court a quo are set aside and replaced with an order that the Appellants are acquitted and discharged.

PILLAY, AJ

I agree and it is so ordered.

BOQWANA J