

SOUTH AFRICA / JUDGMENT

S v Diya (CC07/2018) [2018] ZAECHMHC 14; [2018] 2 All SA 488 (ECM) (22 February 2018) [2018] ZAECHMHC 14

COURT

Eastern Cape High Court, Mthatha

BEFORE

Jolwana

CASE / FILE NUMBER

CC07/2018

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IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE LOCAL DIVISION: MTHATHA]

CASE NO. CC07/2018

THE STATE

Vs

SIPHIWE BAPHILE DIYA

JUDGMENT

JOLWANA J

- [1] The accused is charged with one count of murder in contravention of section 84 of Act 9 of 1983 read with section 51(1) of Act 105 of 1997 as amended. It is alleged that upon or about 05 November 2016, at Plangeni Location, Amandisa Administrative Area in the district of Bizana the accused unlawfully and intentionally killed Salukazi Diya, an 86 year old woman.
- [2] The summary of substantial facts in terms of section 144(3) (a) of the Criminal Procedure Act 51 of 1977 as amended (the Act) states the following:
- (i) Tinini George Diya was the husband of the deceased during her life time. They were the biological parents of Thembekile Diya residing at Plangeni Location, Amandisa Administrative Area, Bizana. Tinini George Diya left his house and rented a place at Greenville after the relationship broke down between himself and Thembekile Diya leaving the deceased residing with Owami Diya an eight year old grandchild of the deceased.

(ii) Thembekile Diya is a member of the South African Police Service stationed at the VIP Protection Services, Legislature, Pietermaritzburg. He resides at Pietermaritzburg but occasionally he would go home at Plangeni location. The accused is related to Thembekile and he would occasionally go to Plangeni location and reside with the deceased and Owami.

(iii) Thembekile requested the accused to kill his mother. An agreement was reached between Thembekile and the accused that

Thembekile would pay the accused an amount of R10 000.00 for the murder of the deceased. The accused murdered the deceased on 05 November 2016. Thembekile failed to pay the accused as per agreement and this resulted in them exchanging text messages in a form of whatsapp using their cellular phones.

(iv) Accused was arrested on 06 January 2017 and made a statement regarding his involvement in the murder of the deceased to the

police. Thembekile was arrested on 01 March 2017 after he had been sought by police for a while. At all material times the accused and Thembekile acted in concert with common purposes to kill and murder the deceased.

[3] On the first day of the trial counsel for the state informed the court that the state was withdrawing charges against Thembekile and would only proceed with the case against the accused. The accused pleaded not guilty to the charge of murder and elected not to tender a plea explanation. Furthermore no formal admissions were made by the accused.

[4] The state called Sergeant Thokozani Zide who testified that in November 2016 he had been a member of the South African Police

Service for 13 years. He was working at the community service centre, otherwise known as the charge office at Mzamba Police

Station. He reported for duty on the 06 November 2016 at 05:45am. At 05:50 he received a complaint that a woman

had been murdered at Plangeni Location in the district of Bizana which is an area under the jurisdiction of Mzamba Police Station.

[5] He, together with constable Mbasa proceeded to the scene of crime at Plangeni location. They arrived at the Diya family home where they found local people as well as members of the family including a child called Owami, Ondela and Bawinile. They were showed the rondavel in which the deceased was said to be in. The door of the rondavel was closed. They noticed that the latch of the door was broken. They opened the door and found the deceased lying on the bed with injuries on her face, hand and throat and was already dead.

[6] The injuries appeared to have been inflicted with a sharp instrument which were a cut on her finger in the hand, a cut on her throat and a wound on her face. There were blood stains on the floor and on the wall. They did not see any other injuries. After covering her body

with a blanket with which she had been covered they left the rondavel and sealed the crime scene. They did not find the murder weapon. They then called forensic services, local criminal record centre and the detectives. The ambulance arrived and confirmed that she was dead. Their photographer Constable Mbelu arrived and took photos. The body was removed. They met the detectives on their way back to the police station as they took much longer to arrive at the crime scene.

- [7] The next state witness was Constable Siyabonga Mbelu. He testified that he is employed by the SAPS as a forensic field worker, photographer, video grapher, drawer and finger print expert and is attached to the Criminal Record Centre in Port Shepstone. He attended the crime scene at the Diya homestead on the 06 November 2016, took photographs and compiled the album in respect of the crime scene. He confirmed the injuries on the head, face, neck and right hand of the deceased in which a finger appeared to have been chopped off. He also noticed injuries on the right shoulder of the deceased. All the injuries were depicted in the album which he compiled and had been exhibited in court.
- [8] The state then called Siphelele Khowa. He testified that he grew up together with the accused in the same area, playing football together and attended the same school. In July 2016 he was in Margate and the accused was in the Eastern Cape. He had asked the accused to assist him in getting a job. He knew the cellphone numbers of the accused by heart as they communicated with each other quite often. He came to Plangeni in Bizana in the Eastern Cape in July 2016 to work with the accused.
- [9] He met the accused at Plangeni after taking a taxi from Margate and the accused took him to his place of residence at Plangeni which was the Diya homestead. He introduced him to his family members at Plangeni and told them that he was going to work with him at the home of Mrs Makiva. At the Diya homestead he found Ondela, Thembekile's wife, two other children and the deceased and it was to these people that the accused introduced him. At the time Thembekile was not at home as he was at work in Pietermaritzburg and was unknown to him.
- [10] He shared a room with the accused at the Diya family home. One day while the accused was in the kitchen having left his phone in the room he decided to use the cellphone of the accused to buy airtime and thereafter deleted the messages that related to the airtime purchase as he did not want the accused to know that he had used his phone to buy airtime. It was in this process that he noticed a message from Thembekile in which Thembekile told the accused to take muti under his bed and put it in the milk of the deceased. He also had Thembekile's cellphone number as at times Thembekile would call him when he could not get hold of the accused and he would pass his own cellphone to the accused for them to speak. He also new Thembekile's cellphone number by heart.

- [11] This message which he understood to mean that the deceased was to be poisoned shocked him. He put the phone back where he had taken it from and acted as if he did not know about the message. In the course of the morning he went to the kitchen to make himself tea. Accused warned him not to use the deceased's milk. He asked the accused why he could not use the milk as they are allowed to use it. The accused told him not to ask too many questions. He left the milk because he had seen the message from Thembekile.
- [12] The deceased came back from Greenville on a Monday afternoon and threw the milk away. Some days later Thembekile called the accused enquiring about the deceased and the accused responded that the deceased threw the milk away. They continued with their conversation and said their goodbyes. This happened in August and at the end of August 2016 the accused got a job in Flagstaff to build a two roomed structure with a verandah. From the end of August he and the accused stayed in Flagstaff building the two roomed structure.
- [13] On Wednesday the 02 November 2016 accused went to see his girlfriend but left the phone behind in his pillow. He took the phone again for purposes of buying airtime because he had received a phone call from his home telling him that his child was not well. He thereafter deleted the airtime related messages and in the process stumbled on a message from Thembekile. In the message Thembekile was hiring the accused to kill the deceased as he was tired of her. He did not read the whole message as he did not intend to read the accused messages but was deleting the airtime related messages as he did not want the accused to know that he had used his phone to buy airtime. The accused phone was black and blue in colour. He switched it off and put it back under the pillow.
- [14] On Thursday morning on the 03 November 2016 the accused came back from his girlfriend and thereafter left for Plangeni to fetch the ceiling tools and he remained behind. He indicated that he would be back the following day. He did not come back on the 04 November 2016 as promised. On the following Sunday he received a call from the accused informing him that the deceased was no more and had been killed with a bush knife. A week later, with the financial assistance of the accused he came back to Plangeni and by that time the deceased had already been buried. They stayed at the home of the deceased and on the 01 December 2016 he left for Gcilima Location in Margate which is his home. He told his elder sister about the messages he had seen in the cellphone of the accused. His sister told him not to come back to Plangeni where the accused was staying at the time. He did not disclose his knowledge about the messages to the Diya family as he feared for his life. He feared that both Thembekile and the accused are from the Diya family and Thembekile is the son of the deceased and they might kill him. He thought because they did not know that he knew about the messages it was safer for him to keep quiet.

- [15] It was for this very same reason that he also did not report the matter to the police. He was later taken in for questioning and it is then that he told the police about the messages. At that stage the accused had already been arrested. This questioning by the police took place in January or February 2017.
- [16] Under cross examination he testified that he and the accused are neighbours in Gcilima location in Margate. He readily admitted that he used accused cellphone to buy airtime without his permission. However nothing turns on this. It was put to this witness that the accused would testify that he never communicated with Thembekile through smses about the killing of the deceased and that he never saw smses from the Thembekile about the killing of the deceased. His response was very direct and in the form of a question as to where he would get the information about the smses if it was not from the accused's phone. He insisted that his evidence in this regard is about what he saw and he did not expect the accused to admit these smses as the case was about the killing of the deceased.
- [17] He admitted that he did not know who killed the deceased but based on the messages it must be the accused having been hired to do so by Thembekile. He further admitted that he did not know Thembekile until he went to Plangeni a few months before the deceased died. However during this period he got to know Thembekile as he would come and go and when he was at Plangeni they spent time together. He would sometimes stay for a whole week during which they spent time together. This related to the ability of the witness to have been able to identify Thembekile's voice when he spoke to the accused about the deceased with the accused's phone being on speaker probably with the accused being unaware that he could hear the conversation.
- [18] He maintained his version that the accused left flagstaff on the 03 November 2016 when he was going to fetch tools at Plangeni because the ceiling was going to be put up on the next Saturday which was the 05 November 2016.
- [19] In a nutshell Mr Khowa's evidence in chief, under cross examination and when compared to what he said to the police when his statement was taken on the 16 February 2017 did not change. His evidence was consistent throughout in most material respects and there were no contradictions even under cross examination. His evidence was credible.
- [20] The state then called Ondela Diya the grand-daughter of the deceased. She testified that she lives in her own homestead

just above that of the deceased. She testified that the deceased stayed with Owami and the accused. The accused referred to her father as his brother and her as his daughter and she in turn referred to the accused as her father. She is the mother of the then eight year old Owami. Owami stayed with the deceased to assist her with errands and they shared the same bed.

The accused stayed in the flat roofed structure which had two doors leading outside and occupied the room that faced the rondavel in which the deceased and Owami slept.

- [21] At about 4:00am in the morning of the 06 November 2016 she was sleeping in her own homestead when her daughter knocked at the door. She opened for her and she entered uttering some words about the deceased. She was shivering and wet as it was raining on the day. She, Ondela rushed to her aunt who lived next door to her and reported what Owami told her and that she was rushing to the deceased's home. The aunt followed her and she found the deceased lying on her bed with her hand on the chest injured. She went out and screamed for help. She took the phone of the deceased and called her uncle, Thembekile reporting to him that the deceased had been murdered. She also called Thembekile's wife, did not get through and called the accused whose phone rang unanswered and also called her elder uncle.
- [22] Members of the police forum suggested that they should check if there has not been a burglary in the other structures to see if anything was missing. She together with police forum members checked the other structures in the yard and did not observe anything amiss. When they went to check the room occupied by the accused, Bawinile, Thembekile's wife pushed her aside and thus preventing her from accessing it saying there is no key to the room as the key was with the accused. At that time Bawinile stayed at her maiden home and had come after receiving a phone call from her in which she reported the incident.
- [23] Police arrived and did their job and the body of the deceased was taken away. Thembekile arrived and went to the rondavel.

She also saw the accused scrubbing the floor of his room. She did not see the accused when he arrived, she just noticed him when he was scrubbing the floor. She went to the accused, greeted him and asked if he had heard of the killing of the deceased. The accused said yes he had heard. The accused said the reason he was scrubbing the floor was because water had seeped in as it was raining. This struck her as being strange as she used to stay in that structure before she built her own house and no water entered it. She testified that in the afternoon at about 5pm on 05 November 2016 although she was not sure about the exact time, the day before the incident she had gone to the deceased's home to fetch her younger son. She found the deceased, Owami and her younger son there. The accused was also there although she did not talk to him. He took his shoulder bag and left.

- [24] Under cross examination it was put to her that the accused says he arrived at the home of the deceased on the 01 November 2016 from Flagstaff and left on the 03 November 2016 for his actual home in Gcilima, Margate. Ondela testified that she would not dispute that as she already stayed at her own homestead at the time. It was also put to her that the accused did not scrub the floor on that day but the witness insisted that she saw him scrubbing the floor of his room. She also insisted that she saw him the day before the incident on the 05 November 2016 in the afternoon at about 5pm leaving the home of the deceased and she also left for her homestead taking her younger son with her. This was the last time that she saw the accused until she saw him again the following day scrubbing the floor on the day of the death of the deceased.

[25] It is perhaps convenient that I deal with the evidence of Nosipho Mlambo. She testified that she is a neighbour to the home of the deceased. On 05 November 2016 she was at her homestead when at about 6pm in the afternoon or early evening although she is not sure what the time was she saw the accused walking past her homestead. She knew the accused as he was at the time staying at the home of the deceased. There was nothing strange about the accused. He was carrying a back bag on his shoulder. When she saw the accused she was going to a shack in which she keeps her chicken. It was neither bright nor dark at the time so she was able to see and recognise him. Under cross examination she testified that it had been a while since she last saw the accused before the 05 November 2016. However, she knew the accused very well as somebody who built and fixed houses in the area and stayed at the Diya homestead.

[26] Besides the fact that Ms Mlambo's evidence was clear and with no contradictions even under cross examination, it is very

significant that she corroborates Ondela's evidence that the accused was at Plangeni location on the 05 November 2016.

Ondela's evidence was that she went to the deceased's home to fetch her younger son and saw the accused leaving carrying a back bag. Ms Mlambo also testified to having seen him in the afternoon or early evening of the 05 November 2016 carrying a back bag in the neighbourhood. Both Ms Mlambo and Ondela's evidence was very clear in this regard and they corroborated each other in all material aspects.

[27] The next state witness was Sergeant X.V. Nqoko who testified that he is the investigating officer of this case. He received a call at about 6am about a person who was found dead at Plangeni location in Bizana. He proceeded to the crime scene but because he was new at Mzamba Police Station he got lost so much that he drove back to the Police Station to ask for assistance. Eventually he got to the scene and it was the Diya homestead.

[28] He asked Mr Petela Diya if they knew of anybody they considered as an enemy of the deceased and he did not know of anyone. He mentioned that perhaps the husband of the deceased could be involved as the deceased and her husband were no longer living together.

The husband rented a place in an area called Greenville. He further said the deceased and her husband were not in good terms.

He proceeded to Greenville to look for the deceased's husband and he was not there but was informed by a neighbour that the

deceased's husband received news that his wife had been killed. He then concluded that they must have missed each other

on the way. He then returned to the Diya family home and he found the deceased's husband there with other family members

and locals.

- [29] He spoke to the husband who said that he should talk to his son as he had left his wife with his son. It then became clear to him that this was a family murder. He told the husband that he should come to the police station once things have calmed down so that he could take a statement from him. He also told Ondela that when she was feeling better she should also come to the Police Station for a statement. Before he left he got the impression from the community that others suspected the husband of the deceased while others suspected her son. On the way back to the Police Station he met a community member who showed him the deceased's son Thembekile Diya. He was carrying a bag which clearly showed that he was coming from somewhere and he asked to speak to him.
- [30] He asked him about who the possible suspects could be and he said he suspected his father because the deceased and his father were not in good terms when he left the family home. He, later that day, received a call from a member of the community who told him that the killer was known in the family and it was not the husband of the deceased. In the morning of the day of the funeral he got a call from the husband of the deceased saying that he was not feeling safe as his son was accusing him of having killed the deceased and he was asking the police to intervene. He was not at work on the day and he asked the station commander to attend to the matter.
- [31] Later on the day of the funeral he received a call from Thembekile who told him that he had found some clothes, bush knife, flops and other items which he suspected were used in the murder. He said he found these items hidden between some rocks near the family home. He asked his colleagues to go and get those items and were entered on SAP 13 form for further investigation.
- [32] After the funeral he called the deceased's husband, Ondela and Thembekile to come to the Police Station for statements. On the same day the deceased's husband came and he took a statement from him in which he denied any knowledge about the death of his wife and said that he must ask his son. He had left the family home more than a year ago and was renting a place in Greenville following a quarrel between himself and his son.
- [33] He got a statement from Ondela in which she said she was staying on her own at her own homestead and the deceased was staying with her eight year old daughter. She further told him that the accused had been asked by Thembekile to stay at the Diya homestead. She told him that the day before the incident she had seen the accused at the home of the deceased and had taken a back bag and left at about 4:00pm. She also left for her own house.
- [34] Thembekile came to the Police station on a Thursday on which he was going back to his place of work and he took a statement from him. Thembekile did not mention that he had asked the accused to stay at his home. He asked him if he knew the whereabouts of the accused on the day of the incident and he said the accused was at his home in Margate.

- [35] Time went by without any breakthrough. Later the deceased's husband came to the Police Station and reported that the community was angry about two young men who were staying at the home of the deceased. Those young men were the accused and his friend. In January 2017 he received information from an informer who told him that he had met the accused who was complaining bitterly about not being paid by Thembekile for the murder of his mother after he had hired him to kill her.
- [36] The deceased's husband came to the Police station again reporting that the community was threatening to kill the two young men who stayed at the Diya homestead. On the 06 January 2017 he and his colleagues proceeded to the Diya family home to establish from the accused what was happening and also to protect him. They found the accused with another young man and they took both of them to the Police Station. They separated them and talked to the accused about what the community was saying about him and his safety. The accused was emotional as if he wanted to cry. He asked him to speak if he had something to say. He decided to take out his pocket book and read out the constitutional rights of the accused in Isizulu.
- [37] The accused indicated that he wanted to explain everything he knew about the death of the deceased. He asked him if he would be prepared to say what he wanted to say to a senior officer and he said yes. He told him that he was placing him under arrest and explained his rights. The accused made it clear that he wanted to co-operate with them as Thembekile had not paid him but was worried of being killed by Thembekile. He told him that he would need to talk to a senior officer.
- [38] He told him that before he killed the deceased he burnt a cd to induce the deceased and the child to sleep. He told him that he was prepared to show him where he had hidden the murder weapon. They proceeded to a forest next to Mzamba river where he pointed out where he had hidden the weapon. They found the place with fresh ashes. He concluded that the weapon must have been taken by the people that made that fire there as they could not find it. From Mzamba river they went to the Diya homestead to retrieve a t-shirt he said he was wearing on the day of the murder but had washed it. He reminded him that he did not have to show him anything but he insisted that he wanted to do so.
- [39] He told him that he had left in the afternoon the day before the murder to create the impression that he had left but came back at night so that he could not be seen. At the Diya homestead he showed him a shack in which he said he burnt the trousers that he was wearing when he killed the deceased which had blood stains. He took the t-shirt he had worn but had washed it from his room at the Diya homestead. He called an officer at Bizana Police Station to assist him in getting a statement from the accused. He made this call at about two in the afternoon on the 07 January 2017. The officer could not assist at the time so he called his branch commander who was also unsuccessful in getting the statement taken immediately as the officer would only be available on Monday the 09 January 2017. The accused was going to appear in court on that day but he arranged for the accused to also go and make the statement to a senior officer at Bizana Police Station. He was not involved in

the process of the confession being taken from the accused.

[40] Under cross examination he conceded that no warning statement was taken or any other written down statement by him when he interviewed the accused and that this was contrary to police standing orders which required that each time a suspect is being interviewed

irrespective of whether he was under arrest or not a statement must be taken. His explanation was that the accused was co-operating

and had even agreed to make a statement before a senior officer. The accused was confessing to the crime and as such for the statement to be admissible in court it needed to be taken before a senior officer.

[41] When he was asked who was with him when he went to the Diya homestead to arrest the accused he said he did not go there to arrest the accused and he was with Sergeant Mzondi and Warrant Officer Mshiywa. When it was put to him that the accused would testify that when he went to the Diya homestead he was with Constable Bebula and another unknown police officer he denied this and insisted that he was with Sergeant Mzondi and Warrant Officer Mshiywa. There were two reasons for going to fetch the accused namely to question him as he was alleged to be involved and secondly to protect him as it was reported that the community might harm him.

[42] It was put to him that the accused says he was arrested after 09:00pm on 5 January 2017. He denied this and insisted that it was after midnight on the 06 January 2017. After introducing themselves as police the accused opened the door for them. It was further put to him that accused was not told why he was at the Police Station and his rights were also not read to him. He denied this and said the initial purpose of taking him in was not to arrest him but to question him. He only decided to arrest the accused when he noticed that he was implicating himself in the crime and it was at this stage that he read him his rights.

[43] He denied tying the accused's arms and legs to a chair or putting a 10kg rice empty bag and a tyre tube over his face and thus suffocating. He denied that Constable Bebula was involved in interviewing the accused insisting that Constable Bebula was not even in the team that investigated the Diya murder. He denied that he and his colleagues tortured the accused at all as he in any event was co-operating with them. This was why there were no injuries reported by the accused at all. It was put to Sergeant Nqoko that eventually, after repeated suffocation the accused succumbed and admitted to the killing. The torture included the accused being pressed on his stomach with booted feet and knees. Sergeant Nqoko disputed all this and insisted that accused told them about his involvement in the crime voluntarily and denied promising a lenient sentence if he implicated Thembekile.

[44] The version of the accused as put to Sergeant Nqoko is full of improbabilities. For instance while he insists that he was arrested after 9:00pm on 05 January 2017 it appears on SAP14 A form which is a notice of rights that accused signed for his rights on 06 January 2017 at 2:15am, this in circumstances in which the accused denied that he was advised of his rights

at all. The occurrence book of Mzamba Police Station reflects the accused and Zukile Diya being detained at 02:15 on the 06 January 2017. That occurrence book also contains an entry in which it is indicated that both the accused and Zukile Diya were notified of their rights.

- [45] The state indicated their intention to have the confession admitted as part of the record and that there should therefore be a trial within a trial to determine its admissibility. Mr Sakwe for the accused confirmed in court that the statement concerned was in fact made by the accused and therefore its contents are from the accused. However the accused denied that he made the statement voluntarily and said that what is contained in the statement was told to the accused by Sergeant Nqoko.
- [46] Sergeant Nqoko gave evidence in the trial within a trial. He testified that at 8pm on 05 January 2017 all of them as a team of seven detectives had an operation. It was at this time that he told his colleagues that there was information about the Plangeni community not being happy with the presence at the deceased's home of two young man who were suspected of being involved in the killing of the deceased. Their commander decided that they were to divide themselves into two groups. He, sergeant Mzondi and Warrant Officer Mshiywa went to the Diya homestead after 24:00 midnight.
- [47] On their arrival there they introduced themselves as police and the door was opened for them. They found the accused and another young man there and told them that there was information that they were implicated in the murder of the deceased and the community was not happy about them being there. They also wanted to question them about the incident. At the Police Station they separated them and questioned the accused about his involvement in the killing. He became emotional and started crying and said he wanted to tell them everything as he knew about the death of the deceased.
- [48] He realised that the accused was about to implicate himself and he stopped him and read him his rights. After the rights were read to him he said he wanted to talk as he knew about the death of the deceased. He then stopped him and explained his rights to him in Isizulu reading them from his pocket book. Their cells at Mzamba Police Station were under renovations so he took the accused for detention at Port Edward Police Station. He also read an entry from an occurrence book of Mzamba Police Station in which there is an entry that the accused and Zukile Diya were detained at 2:15am and that their rights were read to them and were without any visible injuries. He also read from a copy of the Port Edward Police Station occurrence book in which it is entered that on the 06 January 2017 at 02:20am the accused and Zukile Diya were received and their constitutional rights read and were free from injuries.
- [49] At 09:00am on the 06 January 2017 he booked out the accused for further investigation and returned him back to Port Edward Police Station at about 1pm. The reason he did this was because during the interview the accused had mentioned the weapon he used in committing the crime and he wanted to retrieve it. This evidence is supported by an occurrence book entry showing that at 09:15 the accused was book out of Port Edward Police Station for

further investigations. There is also another entry which shows that he was returned or booked back at 12:55 with no visible injuries. On the 07 January 2017 he went to Port Edward Police Station to take the finger prints of the accused and did not take him out of that police station.

- [50] On the 09 January 2017 he was booked out of Port Edward Police Station. Sergeant Nqoko referred to an entry in the Port Edward occurrence book which showed that accused and three other prisoners were booked out for court appearance. However he was not involved in this process. He was however aware of the arrangement for the accused to make a statement to a senior officer. After lengthy cross examination he maintained his version. He confirmed that Constable Bebula took the accused to the commissioned officer to make a confession as he was not involved in the investigation. He denied that the accused succumbed to torture to make the statement he made to the commissioned officer as he was never tortured.
- [51] He also referred to SAP14A form which is a notice of rights which were read to the accused and for which he signed at 02:15am on the 06 January 2017.
- [52] The state called Warrant Officer Mshiywa who corroborated the version of Sergeant Nqoko that Nqoko, he, Warrant Officer Mshiywa and Sergeant Mzondi are the three officers who went to the Diya homestead to take the accused to the police station and that Constable Bebula was not involved. He corroborated Sergeant Nqoko's version about all the events of the 05 January 2017 and 06 January 2017 including accused implicating himself in the crime. He testified that he asked constable Bebula who was taking dockets to court to also take the accused from the court cells to Bizana Police Station for confession before Captain Ntlangula. He denied that the accused was ever tortured at all or made to recite a statement which he was to make to Captain Ntlangula.
- [53] The state then called Constable Ntando Bebula. He testified that he is a detective and was part of the operation meeting on 05 January 2017 and that he was with the other group and did not go to the Diya homestead. He knocked off duty at 3am and did not come to work at all on the 06 January 2017 after knocking off at 3am. His involvement with the accused was taking the accused from the court cells to Bizana Police Station to Captain Ntlangula for a confession. He corroborated the version of other state witnesses about his non-involvement in the Diya investigation. He denied participating in the interview of the accused at all and therefore could not possibly have been involved in his torture. In any event the torture is said to have occurred as soon as the accused arrived at the Police Station and continued non-stop for five hours.

- [54] This line of evidence by the accused continued even in the face of the entries in the occurrence book of the Mzamba and Port Edward Police Station. The accused continued to link constable Bebula even after he testified that he did not even come to work on the 06 January 2017 after knocking off duty at about 3am. Constable Bebula confirmed being asked to take the accused at the court cells in Bizana Magistrate's court to the office of Captain Ntlangula which he did.
- [55] The state called Captain Ntlangula who testified that he has been in the police service for 33 years and has been a captain since 2011. In his evidence he went through all the questions and answers in the confession form as given by the accused. In any event the defence attorney Mr Sakwe made it clear that there was no contest about the fact that the confession was in fact made by the accused. Their only issue was that it was not made freely and voluntarily as it was induced through torture that continued for several hours.
- [56] Captain Ntlangula testified that his assessment of the accused was that there were no visible signs of assault over and above the accused having told him that he was not threatened and he was not assaulted. It became clear from the evidence of Captain Ntlangula that he, as indeed is required by the confession form, read all the accused rights to him and assured him that he had nothing to fear. It was never suggested that any torture or assault or threatening occurred in the presence of Captain Ntlangula.
- [57] The accused corroborated Captain Ntlangula's evidence of not being alerted to threats, torture or assault having been perpetrated to him. He in fact testified that he lied to Captain Ntlangula about these things. In his evidence in chief the accused gave evidence of first being taken to a female officer who was not satisfied that he was confessing. When asked what happened after the statement he made to the female officer he testified that he was then fetched from that officer to the community service centre by another female officer. In the meantime the female officer to whom he made a statement left going about her business but when he saw the other officer who was with Bebula and Nqoko he showed her that officer whose name he did not know. The female officer to whom he allegedly made a statement did not talk to Bebula but when he met Bebula at the reception Bebula took him back to the office of the female officer where he was subjected to further assaults and threats and torture.
- [58] It became clear that the accused was putting together a clumsy combination of lies, half-truths and fabrications. His story even considered alone did not make sense and was contradictory in most material respects. It is very strange that after all these assaults he would sit in front of Captain Ntlangula and say he had not been assaulted but also show no signs of having been ill-treated at all.
- [59] The state applied to cross examine the accused on the contents of the statement. That application was not opposed by his defence attorney. On being cross examined on the contents of the statement he testified that all its contents were prescribed to him by Sergeant Nqoko. These included details about Thembekile's wife not conceiving, details

about his movements between Flagstaff, Plangeni and Gcilima. He started saying that some of the things came from him and not Nqoko. What made it clear even more that he was lying is that he admitted that Sergeant Nqoko and his colleagues did not give him a written statement to memorise and recite before Captain Ntlangula but told him what to say in that statement which is detailed and lengthy.

- [60] He also later claimed to have been promised a lenient sentence if he implicated Thembekile. However just like the allegations of assault, threats and torture he did not give any evidence beyond his mere ipse dixit. The admissibility of confession is provided for in section 217 of the Criminal Procedure Act as follows:

“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.”

- [61] It is important to always remember the over-arching provisions of the Constitution in relation to a fair trial. The relevant

provision in this case is Section 35 (5) of the Constitution which reads thus:

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

- [62] The balancing act necessary to ensure that the right to fair trial is not compromised was explained in the following terms in *S v Khan* 1997 (2) SACR 611 (SCA):

*“In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale. To be sure, a prominent feature of that tension is the universal and unceasing endeavour by international human rights bodies, enlightened legislatures and courts to prevent or curtail excessive zeal by state agencies in the prevention, investigation or prosecution of crime. But none of that means sympathy for crime and its perpetrators, nor does it mean a predilection for technical niceties and ingenious legal stratagems. What the Constitution demands is that the accused be given a fair trial. Ultimately, as was held in *Ferreira v Levin* fairness is an issue which has to be decided upon the facts of each case, and the trial judge is the person best placed to take that decision. At times fairness might require that evidence, unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence albeit obtained unconstitutionally, nevertheless be admitted.”*

- [63] On the facts of this case there was not even the slightest objective evidence of anything having been done by the police that would have resulted in the accused making the statement he made to Captain Ntlangula in any way other than as provided for in section 217 of the CPA.

[64] To clarify this issue further I am reminded of a comment made by Erasmus J in *S v Nombewu* 1996 (2) SACR 396 (E) where he said the following:

“The court should in fact endeavour to educate the public to accept that a fair trial means a constitutional trial and vice versa.

Pronouncements on human rights by the Courts and academics obviously add body to the jurisprudence which surrounds the Constitution.

But abstract statements of law very often mean different things to different people and very little to the bereaved and the aggrieved

who see factually guilty accused go free in consequence of some infringement of his constitutional rights by officials. It is therefore the duty of the courts in their everyday activity to carry the message to the public that the Constitution is not a set of high minded values designed to protect criminals from their just deserts: but is in fact a shield which protects all citizens from official abuse. They must understand that for the courts to tolerate invasion of the rights of even the most heinous criminal would diminish their constitutional rights. In other words, the Courts should not merely have regard to public opinion, but should mould people’s thinking to accept constitutional norms using plain language understandable to the common man.”

[65] I was, inter alia, also guided by these sentiments as I listened to all the evidence given for and against the admission of the confession and I came to the conclusion that on the facts of this case the confession was made freely and voluntarily by the accused in his sound and sober senses and without being unduly influenced thereto.

[66] It seemed to me that the choice on constable Bebula by the accused who despite evidence to the contrary, placed him at his home at the time they were taken in by police for questioning on the 06 January 2017 had more to do with an attempt to extricate himself from the confession which he had made to Captain Ntlangula by trying to have it declared inadmissible on the basis of constable Bebula having played a role far exceeding even that played by Sergeant Nqoko, the actual investigating officer. This was one of the many disingenuous attempts by the accused to mislead the court by creating doubt around the admissibility of the confession.

[67] Following the ruling on the confession the state called Captain Ntlangula to give evidence in the main trial. He read into the record the original statement made to him by the accused which was admitted as Exhibit “I”.

[68] The statement reads as follows:

“During November 2016 I was at my home. There arrived Thembekile Diya to me asking me to remove his biological mother. Thembekile believed that his mother had knowledge as to why Thembekile’s wife does not give birth. Thembekile was asking me to kill his mother. I refused to kill his mother. He kept on begging me. I later agreed if he pays me a sum of R10 000.00. We had a deal as to how he was going to pay me and he promised to give me this R10 000.00 at the month end of December 2016.

On the 01 November 2016 I went to Flagstaff and came back. On the 03 November 2016 I wake up going to Gcilima and I was to fulfil the deal. On a Friday at night I arrived to my home. The purpose was to make sure that nobody would see me. On Sunday night between 24:00 and 01:00 I woke up and wore a black short trouser, a striped t-shirt. I took my tom hawk. I went to the deceased's room within the yard. I burned a CD so that the mother of Thembekile should sleep. The tom hawk had a part built to remove nails. I went to the deceased room and force the door to open. I observed Thembekile's mother was asleep. He was with a minor child. I then chopped the woman on the head above the right ear as she was sleeping on her left side. I chopped her three times. I observed if she would be able to wake up and I found that she is unable. I then put on her blanket and took my cd with a spade and throw it on the toilet. I took my tom hawk.

I recalled that the clothing I was wearing would give me a problem because a black short trouser and a t-shirt had blood stains. I then changed the attire and took the t-shirt and short trouser and burned them at home during the night of the incident. I took the tom hawk and hide it on the forest. I went back to sleep. At about 03:00 – 04:00 I left going to Port Edward. When I was at Port Edward, I was phoned by Sinethemba and Ondela telling me about the death of my mother. I called Thembekile and informed him that I have killed his mother, Thembekile informed me that he would give me money on the month end and he will confirm that his mother is dead. Thembekile phoned me to go home as if I knew nothing.

Thembekile has not paid me until I was arrested on Thursday 05 January 2017”

- [69] Captain Ntlangula's evidence was not challenged in that no cross examination was done by the defence nor was the accused version put to him for comment. The state then sought leave to hand up the post mortem report as an Exhibit “J” as being in compliance with the provisions of section 212 (4) (a) of the Criminal Procedure Act. The defence had no objection and the post mortem report was admitted accordingly after which the state closed its case.
- [70] Accused gave evidence in his defence in which he testified that he is related to the deceased in that the deceased was the wife of his elder partenal uncle. He stayed at the home of the deceased since April 2016 when he had gone to Plangeni to extend a structure at the home of Mrs Makhiva. He grew up with Mr Siphelele Khowa at Gcilima location in Margate. He confirmed most of Mr Khowa's evidence in so far as it did not implicate him in the offence.
- [71] He denied any knowledge of the sms messages about which Mr Khowa testified. He denied that he left Flagstaff on the 03 November 2016 insisting that he left Flagstaff on the 01 November 2016 remained at Plangeni until 03 November 2016 when he left for Gcilima. He did not challenge Mr Khowa's evidence about him having gone to see his girlfriend on the 02 November 2016 and coming back to their place of evidence on the 03 November 2016 before he left for Plangeni.
- [72] He down played Mr Khowa's knowledge of Thembekile on the basis that at most they would not have been together for a month or even two weeks. I do not understand what the accused meant in this piece of evidence. It is difficult to accept that if Thembekile had spent a week with Mr Khowa at Thembekile's home where the accused and Mr Khowa resided that

would not have been enough for Mr Khowa to know him. In any event the issue was about cellphone messages having been seen and read by Mr Khowa in the accused's cellphone. All that this required was for Mr Khowa to know the cellphone number of Thembekile. It should be remembered that Mr Khowa testified that when Tembeka could not get through to the accused he would phone him and ask him to give the phone to the accused.

- [73] Despite his insistence that he was at Gcilinga location at his home on the 05 November 2016 the day before the murder two witnesses Ondela and Nosipho Mlambo testified that they saw him at Plangeni on 05 November 2016. Ondela's evidence was that she went to the deceased's homestead to fetch a child and saw the accused at the deceased's homestead in the afternoon at about 4 or 5. The accused was also seen by Ms Mlambo when he walked past her home in Plangeni. These two witnesses knew the accused very well. It is his version that he arrived at Plangeni in April 2016, that would be more than 6 months before the incident. For the accused to now suggest that Ms Mlambo could be mistaking him for somebody else ignores the fact that Ms Mlambo's evidence about the accused is corroborated by that of Ondela.
- [74] The accused testified that when he arrived at the Diya homestead on the 06 November 2016 after he heard about the killing of the deceased the first person he saw was Ondela. This is in line with Ondela's evidence that she saw the accused in his room. He further testified that they met at the door to his room, turned back inside the room where Ondela became emotional and cried. He then asked her to sleep in his bed until she felt better and left her sleeping in his bed. This version of Ondela sleeping in his bed was like, many other pieces of evidence, never put to Ondela when she testified.

- [75] Because there are numerous instances in which the accused version was not put to the state witnesses it is instructive that I should state what the law is in this regard. In *Smal v Smith* 1954 (3) SA 434 Claassen J had this to say:

"It is, in my opinion elementary in standard practise for a party to put to each opposing witness so much of his case or defence as it concerns that witness."

- [76] In *S v Abader* 2008 (1) SACR 347 at 356 it was held that the duty to put an accused's version to a witness is not an inflexible axiomatic rule cast in stone. The rationale of this rule and the duty is that, if it is intended to argue that the evidence of the witness should be rejected, he should be cross examined so as to afford him an opportunity of answering points supposedly unfavourable to him.

- [77] In *President of the Republic of South Africa and others v South African Rugby Football Union and others* 2000 (1) SA 1 (CC) the Constitutional Court stated the legal position as follows:

"The institution of cross examination not only constitutes a right, but also poses certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness"

attention to the fact by question put in cross examination showing that the imputation is intended to be denied and to afford the

witnesses opportunity, while still in the witness box of giving any explanation open to the witness and of defending his or her

character. If a point in dispute is left unchallenged in cross examination, the party calling the witness is entitled to assume that the unchallenged witness' testimony is accepted as correct."

[78] The defence called its next witness Nkazimlo Robert Diya who testified that he is the nephew of the accused. This witness

was called to prove accused's defence of alibi. The accused had testified that he left Plangeni for his home at Gcilima

location in Margate on the 03 November 2016 and returned only on the 06 November 2016 when he was informed by Ondela that the deceased had died. It soon became clear that this witness was intent on misleading the court. The most glaring feature of this attempt was his denial that he had spoken to defence counsel about the case. This bothered me as it suggested that defence counsel was calling a witness with whom he had not consulted. I sought to establish this fact from defence counsel who advised of his utmost surprise at the witness who was lying about the consultation they had.

[79] In *Take and Save Trading CC and others v Standard Bank of SA Ltd* 2004 (4) SA 1 (SCA) Harms JA stated that:

"A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side and a Judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A Judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceeding according to recognised rules of procedure but to see that justice is done...." Fairness of court proceedings requires of the trier to be actively involved in the management of the trial, to control the proceedings, to ensure that public and private resources are not wasted, to point out when evidence is irrelevant, and to refuse to listen to irrelevant evidence. A supine approach towards litigation by judicial officers is not justifiable either in terms of the fair trial requirement or in the context of resources...."

[80] Defence Counsel asked for a short adjournment after which he applied for the evidence of his witness Nkazimlo Robert Diya to be expunged as it was clear to him that the witness was lying. This application was not opposed by the state.

[81] The defence closed its case without having called any witness to corroborate the alibi defence. This is strange considering that the accused's version is that when he arrived at his home on the 03 November 2016 and left on the 06 November 2016 the whole time his mother and sisters were there but he did not call any of them save for the witness whose evidence was a clear attempt at misleading the court.

[82] I am mindful of the approach to alibi defence as was stated in *R v Hlongwane* 1959 (3) SA 337 (A) by Holmes AJA where he said that:

“The legal position with regard to an alibi is that there is no onus on an accused to establish it and if it might be reasonably be true he must be acquitted. But it is important to point out that in applying this test the alibi does not have to be considered in isolation. The correct approach is to consider the alibi in the light of the totality of the evidence in the case, and the court’s impressions of the witnesses.”

[83] This takes me to the case of *S v Van Der Meyden* 1999

(2) SA 79 (W) at 82 C-D in which Nugent J remarked as follows:

“The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt and the

logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning

which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the

Court has before it. What must be borne in mind, however, is that the conclusion which is reached ...must account for all the evidence.”

[84] In this case Mr Khowa testified that accused left Flagstaff for Plangeni on the 03 November 2016 and was to have returned on the 04 November 2016. He did not return. He is seen by two witnesses in the afternoon of the 05 November 2016 the very day he claims to have been in Gcilima location in Margate. The deceased’s injuries are as he described in his confession

before Captain Ntlangula in most material respects. This is further corroborated by other evidence like the photos as well as the post mortem report.

[85] The detail contained in the confession is such as to leave no doubt that it was given by someone who knew how the deceased was killed.

[86] The accused did not tell captain Ntlangula about being assaulted, tortured or even threatened despite being asked about these matters repeatedly in the confession form.

[87] The accused evidence was riddled with outright lies and inconsistencies as to put beyond doubt that it is so full of inherent

improbabilities as to be false. The accused was simply unable to challenge the corroborated evidence of the state witnesses.

He changed his version about the confession from saying it all came from Sgt Nqoko to saying it was partly his and partly that of Nqoko.

[88] In R v Skosana 1960 (4) SA 723 (A) at 729 C-D Van den Heever JA stated that there is no limitation placed upon the kind of evidence which may adequately confirm the confession or prove aliunde the commission of the offence charged. In this case there is abundance of such evidence as pointed out above. Therefore

section 209 of the CPA is more than adequately satisfied. This section provides that:

“An accused may be convicted of any offence on the single evidence of a confession by such accused that he committed the offence in question, if such confession is confirmed in a material respect or, where the confession is not so confirmed, if the offence is proved by evidence other than such confession, to have been actually committed.”

I have therefore come to the conclusion that the guilt of the accused has been proved beyond reasonable doubt and the accused is

accordingly found guilty of murder as charged.

MS JOLWANA

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the State: M MAKHUBALO

Instructed by: NDPP

MTHATHA

Counsel for the Accused: M SAKHWE

Instructed by: LEGAL AID BOARD

Matter heard on: 21 February 2018

Judgment

handed down on: 22 February 2018

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