

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, BHISHO**

CASE NO: CC28/18

THE STATE

Versus

MSONDEZI NGQALENI

ACCUSED

JUDGMENT

STRETCH J.:

[1] The 43 year old accused, who was legally represented throughout his trial, has been charged with the rape and murder of his 12 year old niece, NN.

[2] It is alleged that the offences took place at Rhayi West in the Zwelitsha district between 4 and 9 April 2018.

[3] The accused pleaded not guilty and elected not to give a plea explanation.

[4] On Wednesday the 4th of April, the deceased and her brother **Sophephela** who had both contracted chicken pox, visited Grey Hospital in King William's Town for treatment. Sophephela left the deceased at the hospital to collect a referral form. When he returned, she was no longer there. He remained at the hospital until 7pm when he was given medical treatment. The deceased was still missing. She was also not at home. That night he and the accused searched for her. According to Sophephela the accused eventually abandoned the search and went to a shebeen. Sophephela however, persevered until late that night, but there was no trace of the deceased. He went back to the accused's home, where he used to live before. Everything was in darkness. He found this strange because the accused usually left the front light of the house on at night. He knocked at the front door. No response. He knocked at the bedroom window and again at the front door. There was still no answer. He went to the kitchen and tried to unlock that door with his key, but the door was bolted from the inside. This too he found strange. The door was not usually bolted from the inside. He pushed at the door and it opened slightly. He heard the accused's voice coming from the inside. The accused asked him what he wanted. He told the accused that the deceased was still missing. The accused did not comment. Instead, he said:

'Go to your gran. She is looking for you.'

[5] Sophephela returned to his grandmother's place where he and the deceased had been staying and resumed the search the next morning. When he passed the accused's home the accused enquired whether they had found the deceased yet. He told the accused that according to one Awonke, the accused and the deceased had been seen leaving the tavern together the previous night.

[6] The search continued for the rest of that week, but to no avail.

[7] That weekend the deceased's neighbour, one **Zonke Haya** saw the accused trying to erase a stain from his khaki trousers which the accused alleged had been left there when he slaughtered a goat.

[8] On Monday, 9 April, a woman from a neighbouring locality who was looking for stray livestock came across the deceased's lifeless body near the local cemetery. Members of the community and the police gathered at the scene. The accused was also there but just stood a distance away, smoking.

[9] That night a vigil was held at the deceased's home. According to Zonke Haya, when he asked the accused whether he was attending, the accused said:

'Why, are you suggesting that I killed my sister's child?'

[10] The accused did not attend the service held to grieve the shocking death of his deceased niece. He was seen observing the proceedings through the window of his home.

[11] According to Zonke Haya, the accused threatened him with violence the following day when he suggested that the accused had killed the deceased. This prompted Haya to call the investigating officer (Sgt Dastile). They managed to find a key for the accused's home and gained entry. According to Haya they observed blood spots in the deceased's home.

[12] During cross-examination it was put to Haya that the accused would deny having threatened him, and would also deny having said words to the effect that Haya was suggesting that the accused had killed the deceased.

[13] On Wednesday, 11 April 2018 the accused accompanied one Lt Col Mhluzi to his home and to the place where the deceased's body was found on which occasion it is alleged he pointed out certain things and made certain admissions. It was indicated on the accused's behalf by his lawyer that the accused disputed the admissibility of this evidence and that the information which he gave to the police was not tendered "freely and voluntarily" on the following grounds:

- a. His constitutional rights were not explained to him.
- b. He was promised bail.
- c. He was handcuffed tightly to a chair and left on his own for about three hours. During this period he was not permitted to use the bathroom. He was told to “do his business in his pants”.
- d. He was “verbally” assaulted in the sense that he was “threatened”.

[14] The State accordingly embarked upon a trial within a trial to prove the admissibility of that which transpired at the so-called pointing out.

The trial within a trial

[15] The investigating officer, detective sergeant **Dastile** has been a member of the SAP for 11 years, having served nine of these as a detective. He arrested the accused on a charge of murder after three on the afternoon of Tuesday, 10 April 2018. He was a constable at that time. By 16:20 he had already advised the accused of all his constitutional rights as set forth in section 35 of the Constitution and as reflected in a notice of rights in terms of the constitution (commonly known as form SAPS 14A). The form provides for the detainee to be informed of the reasons for his detention. Thereafter his rights (as both a detainee and an arrestee) are listed in full, ending with an invitation in bold print which reads:

‘You can exercise all the abovementioned rights at any stage during your detention.’

[16] This portion is followed by what is headed ‘certificate by detainee’ and then a third section headed ‘certificate by third person as witness (if required)’. The middle section reads as follows (the manuscript portions are in italics):

CERTIFICATE BY DETAINEE

I, *Msondezi Ngqaleni* (name of detainee) hereby certify that I have been informed in *English* (state language) of my rights in terms of the Constitution

as set out above by *D/Cst P. Dastile* (name of person who informed the detainee) and that I understand the contents thereof.

DATE (informed) *2018-04-10* TIME (informed) *16:20* PLACE (informed)
Zwelitsha

SIGNATURE/THUMBPRINT OF DETAINEE

SIGNATURE OF PERSON WHO INFORMED THE DETAINEE

[17] It is common cause that both Dastile and the accused signed this portion of the notice, which explains why a third person was not required to complete the third section.

[18] It is clear *ex facie* the form itself that the third section caters for the situation where a detainee refuses to sign for the certificate, in which case a third party is required to confirm the following:

- a. The identities of the third party, the detainee and the person who informs the detainee of his rights;
- b. The language of communication;
- c. The rights which were communicated to the detainee;
- d. The fact that the entire form was explained to the detainee;
- e. The fact that the detainee refuses to sign;
- f. The date, time and place;
- g. The signature of the third person.

[19] According to Dastile he explained the accused's rights to him in full for the second time on the following day (Wednesday, 11 April) at 10:25am when he obtained the accused's warning statement. These once again included the right to remain silent and the consequences of waiving such right, the right to legal aid or a lawyer of his choice, the right to consult with a lawyer, and the right to apply for bail. He also explained to the accused that this was a serious matter and that he should be careful about what he chooses to say.

[20] The accused nevertheless made a statement to him which was of such a nature that he arranged for Lt Col Kananda to hand the matter over to an independent commissioned officer. This was where Lt Col **Mhluzi** came into the picture. This also happened to be the third occasion (according to the prosecution), that the accused was fully appraised of his constitutional rights.

[21] At the time of giving evidence Mhluzi had been a policeman for 33 years. When he took charge of the pointing out he held the rank of a captain and was stationed at King William's Town. He said that he was familiar with the procedure as he had conducted quite a number of pointings out before. He meticulously and carefully took the court through a detailed six-page form which he had completed before and after the pointing out itself. According to the form, and on 11 April 2018, he was telephoned to take charge of a pointing out for Sgt Dastile by one Lt Col Kananda. He agreed and the accused was brought to his office.

[22] It was put to the witness on the accused's behalf that "the form was just given to him and he was told to sign without the contents being explained." In particular, the accused's rights in terms of the constitution were not explained to him. The witness explained that he strictly complied with each and every point reflected in the form. It was his first meeting with the accused. He knew nothing about the case as it did not fall within his policing precinct.

[23] The State also presented the evidence of the person who escorted the accused to and from the pointing out, as well as unchallenged medical evidence that the accused was free of injuries both before and after the pointing out.

[24] The **accused** thereafter took the stand in the trial within a trial. He said that on Tuesday, 10 April his sister-in-law had summoned the police in connection with a protection order which she had against him. It was then that the police were also informed that the accused had said that he had killed a child. He was arrested. This was between 9 and 10am. He was taken to Zwelitsha police station where Dastile obtained bucal swabs from him. Thereafter Dastile handcuffed him and abandoned him in a back room for two to three hours. Four policemen returned and demanded

the truth, accusing him of having killed “this child”. He denied this. They said “Listen to us. We know you are coming from prisons.” Thereafter they just said “sign here” without explaining his rights to him. Because they were knocking off, Dastile had taken him to the charge office and had asked another policeman to produce the document “with the rights on it”. This other policeman completed the document, tore out the accused’s copy thereof, and instructed him to sign without explaining anything to him. He did not do the pointing out “freely and voluntarily”. He did it because Dastile had said that if he made a confession Dastile would give him bail.

[25] During cross-examination the accused conceded that he was not restrained in any manner when Dastile escorted him to the police station. Indeed, Dastile even allowed him to leave the police station to go out and buy cigarettes. This was between 10 and 11 that same morning. Dastile then asked him to come with them to a back room. They locked him in this room and left, promising to return soon. He sat in this room. He waited and waited. After about an hour another policeman arrived and asked what he was doing there. This policeman then handcuffed him (not Dastile at all). He stayed there for another two hours.

[26] He also conceded that there was no bad blood between him and Dastile. He agreed that he could speak and read English, and that the notice reflecting his constitutional rights was given to him when he was charged on Tuesday, 10 April. He confirmed having signed the second page of his warning statement (setting out his rights), as well as the constitutional notice which he signed when he was arrested on 10 April and which he kept in his pocket for several days. Despite this, and his sound command of the English language, he declined to read this form which he had been carrying on his person day in and day out. Significantly, his final words were that if he had read the notice, he would have elected to remain silent.

Returning to the main trial

[27] For reasons which I will deal with in due course, I ruled the evidence pertaining to the pointing out admissible and Lt Col Mhluzi was recalled in the main

trial to place evidence before the court as to what was said and done during the actual pointing out. In short, Mhluzi testified from his contemporaneous notes that the accused first took him and the official photographer to a certain house. When they parked outside this house, he had a further conversation with the accused which is recorded as follows:

‘Q: Do you still want to continue with the pointing out?

A: Yes.

Q: Are you sure?

A: Yes.

Let me remind you that you are not obliged to do this and whatever you say will be taken down in writing and will be used as evidence against you.

A: Yes you told me in the office.’

[28] Thereafter the accused lifted the crime scene tape and led them to the bedroom where he pointed out the bed where he had committed the alleged offence. He then took them to an open field where he pointed out a spot between the trees where he had dumped the deceased’s body. He made a verbal statement which Lt Col Mhluzi recorded as follows:

‘On Wednesday 2018/04/04 at about 00:00am I was sleeping in my room alone at Rhayi West Location, Kingwilliamstown. I heard a knock at the door and I woke up to open the door. My nephew (sic) Nomabhelu Ngqaleni came in and said she wanted to sleep in my bed.

The two of us slept together in my bed. After some time, I touched her genitals. She woke up and asked me as to what I was doing. She said she doesn’t want to be touched and she was going to report me to he (sic) mother. She tried to stand up but I held her fast. She resisted but I held by her throat and strangle her for a long time.

When I stopped I noticed that her body was weak. I could realise that she was already dead. I started to become nervous and I dress up myself. I lifted her

body up and went out of the house. I crossed the main tarmac road and I went to the open field. I dumped her body under the tree and went back to my room and slept.

I am now feeling sorry of what I did because that day I was under the influence of liquor.'

[29] Thereafter they returned to base where Lt Col Mhluzi allowed the accused to read his notes and the statement which the accused had made during the course of the pointing out.

[30] He did so without translating from the recorded English as it was obvious to him that the accused had a good command of the English language. After reading through all the documents the accused said that he was satisfied and left.

[31] Mhluzi added that during the course of this trial (on 1 May 2019) he and Dastile paid a visit to the spot where the deceased's body was found on Monday, 9 April 2018. It was the same spot which the accused had pointed out to him on 11 April 2018, as the place where he (the accused) had dumped the deceased's body in the early hours of the morning of Thursday 5 April 2018. This evidence was confirmed by Dastile.

[32] It was put to both these witnesses that the reason the accused pointed out the spot in the field was because he and the local community went there when it was announced that the deceased's body was lying there. He denied having said to Mhluzi that that was the spot where he had dumped the deceased's body. Mhluzi reiterated that he was not aware of the point where the deceased's body had been found until the accused pointed it out and admitted that he had dumped the deceased's lifeless body there. It was further put to Mhluzi that the accused simply took Mhluzi to his room to point out where he stayed, but that he at no stage confessed to Mhluzi that he had committed a crime there.

[33] It was again put to Mhluzi that the accused's instructions were that he was "mistreated" by the investigator and promised bail if he did the pointing out.

[34] It is common cause that **Dr Stuart Dwyer** performed an autopsy on the deceased's body in Grahamstown on 11 April 2018, coincidentally on the same day on which the accused did the pointing out. Dr Dwyer recorded his chief post mortem findings as "decomposed remains" and "fractured hyoid bone". He concluded that the cause of death was not inconsistent with hypoxia owing to extrinsic upper airway obstruction. The body presented with secondary post-mortem changes such as rigor mortis, slipping and discoloured skin, putrefaction, and multiple maggots. The brain tissue was liquified. The genital organs presented with lacerated lesions of the labia minora, which were possibly aggravated by decompositional changes. He could not exclude "post vaginal penetration". The genitalia also presented with a bloody discharge which could also have been related to decompositional changes.

[35] The external appearance of the body as described by the doctor is confirmed in material respects by the **photos** which were taken of the child's body where she was found in the field. The photos present the maggot-riddled decomposing and bloated body of a young female, fully clothed in a denim jacket and jeans, a white T-shirt, underwear and Nike running shoes. The fly of the jeans is unbuttoned, and the zipper appears to be pulled all the way down.

The defence case

[36] The **accused** testified in his defence. He confirmed that the deceased was his niece and said that he last saw her on Tuesday 3 April 2018. He confirmed the evidence of her brother about the search which was conducted for her when she did not return from the hospital on Wednesday 4 April, in all material respects, save for denying that he went to the shebeen after having abandoned the search. The accused says he went straight to bed. On the following day (Thursday, 5 April) the deceased's brother passed his house a couple of times and reported that they had still not found the deceased.

[37] That following Monday afternoon (9 April) a neighbour reported that "someone" had been found on the other side of town. He went there with the community members and saw that it was the deceased. He says he was shocked.

[38] The following day (Tuesday, 10 April) Dastile arrived at his house at about 9am in the company of his brother, his sister-in-law and three other policemen. They were there about a protection order which his sister-in-law had against him. At some stage, his sister-in-law mentioned that the accused had confessed that he had killed the deceased. His sister Anathi had also mentioned to him that his sister-in-law was spreading the word that the accused had been going around saying that he had killed the child.

[39] According to the accused his sister-in-law was spreading these rumours because she wanted him to be arrested so that she could take over his big house, and because he had complained to her husband about the way she dressed. He was also of the view that Dastile and his sister-in-law were conspiring against him because they attended the same church. Dastile had apparently informed him that a dog had been taken to his house and that the dog had proved that he killed the deceased. He was arrested and threatened by four policemen at their offices and was told that he would not be released until he confessed that he had killed the child. They said that they would deprive him of his rights and assault him until he defecated himself. They did not accuse him of rape at all.

[40] They abandoned him in a locked office for two to three hours. During this period another policeman entered the office and handcuffed him to a chair. His rights were never read to him. He eventually admitted that he had killed the deceased because the police threatened to detain him indefinitely. When they asked him how he killed the deceased, he said that he assaulted her.

[41] He was told to say at the pointing out that he had killed the child in his room. However, when he pointed out his room, he merely said that this was where he slept. Mhluzi then said: "How did you assault the child?", to which the accused responded that he slapped her with an open hand. Mhluzi was writing when he said this. Mhluzi asked him what happened after he slapped the child. He said, "The child died". He did not tell Lt Col Mhluzi that he touched the deceased's genitalia and that he had strangled her thereafter (as recorded by Mhluzi). He said that this information must have come from Dastile. This, despite the fact that Dastile later testified that the post

mortem results (confirming that death was caused by oxygen deprivation to the upper airway and that the deceased has sustained a neck fracture) were not known to the police at the time of the pointing out.

[42] According to the accused Mhluzi then told him to point out the spot where the deceased's body was found. Dastile had also instructed him to point out this spot. He did not say that this was where he had dumped the deceased's body. Mhluzi also never read his notes back to the accused. He also did not give the notes to the accused to read by himself as he testified.

[43] The accused alleged that the entire pointing out had been pre-planned by Dastile and Mhluzi and that they had decided in advance what was going to be recorded in Mhluzi's notes. He was however, unable to explain why Mhluzi questioned him at all as to what had transpired, if Mhluzi knew what he was going to record in advance.

[44] During my questioning of the accused to obtain clarity on certain aspects, he told me (in response to a totally unrelated query), that after he had made the pointing out Dastile sent him to a "judge" in Zwelitsha to make a confession. Just before he went into the judge's office, Dastile reminded him that he would get bail of R500. He told the "judge" that Dastile had promised him bail and that he had been threatened, whereafter the "judge" aborted the proceedings without taking his statement. He said that when he did the pointing out, he did not know the cause of death, as Dastile was still waiting for the autopsy results.

[45] Finally, when the prosecutor put to him that he had touched the deceased's private parts, and that she had objected in response to which the accused strangled her and dumped her lifeless body in a field, his reply was: "That is what I was told by the Colonel".

[46] The new feature of the accused's evidence (that he was taken to a judicial officer in Zwelitsha, having had a number of previous opportunities to raise this both through his lawyer and particularly when he testified in the trial within a trial) came as a surprise. In order to obtain clarity on this aspect, I recalled Sgt **Dastile**. Dastile

confirmed that the accused voluntarily went to make a confession to a magistrate in Zwelitsha (Twani Esq.) the day after he did the pointing out and confessed, but that no statement was taken, because the accused had apparently told the magistrate that he was threatened by the police. Dastile said that he was surprised that the accused had said this and asked him why he was now making this averment. According to Dastile the accused simply ignored him and treated him with a different attitude. Dastile confirmed for the fourth time that the accused was aware of his rights when he did so, and that no promises had been made to him. He produced a standard typed form *ex facie* its contents intended to be the preamble to an envisaged statement in terms of section 217(1)(b) of the Criminal Procedure Act 51 of 1977 (the Act).

[47] It is common cause that the form reflects that the accused was seen by Twani Esq in his private office in Zwelitsha on Thursday, 12 April 2018 at 2:25pm. His constitutional rights to legal representation were explained to him in full. When asked whether he understood the explanation, his response was:

‘I will make a statement without legal assistance... It is because I know what I have done.’

[48] He was also advised fully of his right to remain silent, and that if he waived this right, anything he elected to say could later be used as evidence against him in a court of law. Significantly, he again confirmed that he understood the explanation.

[49] Thereafter the magistrate recorded that the accused was calm and collected and appeared to be in his sound and sober senses. He was again asked whether he still wished to make a statement, notwithstanding that it had been specifically explained to him that the statement could be used in evidence against him. He replied yes. He was asked whether he had any injuries, to which he replied no.

[50] The following questions and answers are of significance, and I record them verbatim:

6.4 Did any person, including the police, assault you or threaten you to make a statement? Reply: I was threatened by the police.

6.5 Have you been influenced by any person to make a statement? Reply: Yes.

6.6 Were you encouraged by any person to make a statement? Reply: Yes.

6.7 Were any promises or inducements made to you if you should make a statement?

Reply: I was told if I confess the matter will be quickly disposed of.'

[51] Thereafter the questioning was prematurely terminated. The following is recorded on the last page of the preamble:

'Court abandoned the confession in view of what the deponent has said in paragraph 6.4 that he was threatened by the police.'

The admissibility issue

[52] It goes without saying that what was recorded by Lt Col Mhluzi amounts to both a confession that the accused sexually assaulted the deceased whereafter he killed her in his home and tried to secrete her body elsewhere.¹ In order for me to receive this as evidence against the accused I must find that the State has proved beyond a reasonable doubt that the relevant provisions of section 217 of the Act have been satisfied. They read as follows:

(1) Evidence of any confession made by any person in relation to the commission of any offence, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses

¹ See for e.g S v Makhaye 2007 (1) SACR 369 (N) at 374. There the statement by the appellant that he had 'killed' his girlfriend was held to constitute a confession, even though the statement standing alone did not preclude the raising of a defence such as private defence. This was so because the appellant had not (as in the case before me) raised any such defence and had in his evidence maintained that he had not harmed the deceased at all.

and without having been unduly influenced thereto, be admissible in evidence against such a person at criminal proceedings relating to such offence: Provided –

- (a) That a confession made to a peace officer, other than a magistrate or justice... shall not be admissible in evidence unless confirmed or reduced to writing in the presence of a magistrate or justice.²

[53] At the commencement of the *voir dire* the accused admitted to having made a pointing out and to having made a confession to Lt Col Mhluzi, but disputed the admissibility of this evidence (on the basis that it was not parted with freely and voluntarily) on four grounds:

- a. His rights were not explained to him.
- b. He was promised bail.
- c. He was handcuffed, left on his own for three hours and deprived of toilet privileges, by Dastile.
- d. He was threatened.

[54] However, when Dastile testified a different version was put to him, namely, that Dastile simply gave the accused a bunch of papers, and told him that if he signs the papers he will get bail. Dastile did not even explain to the accused what he was signing. It was only once he had signed the “papers” that he was permitted to go to the toilet. Prior to this Dastile had kept him handcuffed to a chair in a locked room on his own for three hours. Dastile also did not read his rights to him.

[55] A similar version was put to Lt Col Mhluzi, namely that a form was just given to him and he was told to sign, without Mhluzi having explained the contents to him. It was put to the Colonel that Dastile had also told the accused that if he signed Lt Col Mhluzi’s forms, he would get bail. The part about signing the Colonel’s papers was not put to Dastile for his comment.

² It is common cause that Lt Col Mhluzi was then a captain and such a justice of the peace.

[56] When the accused testified in the trial within a trial, a third bouquet of versions was introduced, namely:

- a. That he was left in the locked room for two to three hours;
- b. That thereafter Dastile took him to the charge office and asked another policeman to “take out the document with rights on it”.
- c. That this policeman then filled out a document, tore out the accused’s copy and told him to sign without explaining to him what he was signing.
- d. That Dastile had told him that if he made a confession, Dastile would give him bail.
- e. He explained in some detail how Dastile had cuffed his hands behind his back, which were pressing tightly into the chair where he was seated. He said it felt as if his hands were being “choked” and his arms were swelling up.

[57] However, during cross-examination it transpired that Dastile did not handcuff him at all, but that he was handcuffed by a completely different policeman who had seen him sitting quite freely in a back room waiting for Dastile to return. It also transpired that the form which Dastile had apparently ordered him to sign upon his arrest and in exchange for bail, which later became a form which someone in the charge office had made him sign, was the SAPS14A form which Dastile confirmed he himself had signed after he had explained the accused rights to him, and that the accused signed acknowledgment that Dastile had explained his rights to him and that he understood them.

[58] In response to my questions the accused presented a fourth version about this document, namely that the form had already been completed and he was simply told by Dastile to sign it. Be that as it may, it is in any event common cause that the accused kept a copy of this form for himself and on his person for at least a day before he made the pointing out. In my view, it is highly improbable (in the light of his proficiency in the English language) that he would not, in any event, have acquainted himself with the contents thereof.

[59] In my view both Dastile and Mhluzi acquitted themselves extremely well when they testified in the trial within a trial. Both witnesses were well dressed and groomed, and addressed the court calmly, quietly, confidently and respectfully. They were not moved during cross-examination. I have no doubt that they explained the accused's rights to him in accordance with their testimony. By the same token, I do not believe that Dastile induced the accused to make a pointing out and a confession with a mere promise of bail. If this had been the position, it is highly likely that he would have told this to the magistrate (whom he apparently trusted) in no uncertain terms. If he had been deprived of ablution facilities over a lengthy period of time and if he had been told that he could simply defecate himself, I have no doubt that he would have told the magistrate this as well.

[60] The accused insisted, during the trial within a trial on stressing that he had not read the constitutional warning form. He added, quite spontaneously and without having been prompted to do so, the following words before he stepped out of the witness box:

'If I had read this (referring to the SAP14A) I would have elected to remain silent'.

[61] To my mind these words have significant implications for the accused, particularly in view of the magistrate's recording that he did not take a confession from the accused because the accused told him that he had been threatened. I mention but a few:

- a. The accused's instructions regarding the nature, the significance and the impact of these alleged threats, which in part induced him to make a pointing out and a confession are not at all clear. Indeed, despite having had a number of opportunities to describe these threats in the trial within a trial, and despite having raised his hand on a number of occasions to give his lawyer instructions during the trial within a trial, the accused failed to describe any threats, and particularly not threats which were sufficiently serious to induce him to make a pointing out and a confession.

- b. The accused's attorney would have this court accept that the accused opened up to the magistrate because the magistrate was not affiliated with the police. This suggestion is highly improbable. If the accused had a pressing need to tell someone independent about threats he could have done so when he was examined by two different health care practitioners before and after the pointing out. It is not suggested that he did so. The undisputed reports from the hospital strongly suggest the contrary.
- c. Indeed, he did not even explain the nature and extent of these threats to the magistrate, and on top of that he completely forgot to tell the magistrate that he was promised bail if he did a pointing out and confessed, even though, on his version, Dastile had reminded him about the bail immediately before he entered the magistrate's office.
- d. The accused's evidence during the trial within a trial was really very simple and hinged to a large degree on his lack of knowledge that he had a right to remain silent. On his own version, he confessed because he was not aware of the fact that he had a choice, and for no particular other reason. Yet, when the magistrate not only informed him of the right to remain silent and the implications of not remaining silent, he not only indicated that he understood, but elected to nevertheless proceed with the statement.

[62] As I have said, I ruled the pointing out and the confession admissible at the end of the *voir dire*. In general, such a ruling is provisional and conveys an interlocutory decision: should new facts bearing on the admissibility of the confession come to light at a later stage (as has transpired in this case), it is the court's duty to reconsider the issue, and if necessary, overrule its own decision.³

[63] For the reasons which I have already mentioned, I am not however inclined to do so. It is clear to me that the bald allegation that he was threatened by the police was either not seriously made by the accused, or was mentioned on the spur of the moment. Differently put, the requirements for the admissibility were, in my view, properly satisfied at the time when the accused made the pointing out and the confession. The vague mention of threats thereafter to a different justice of the

³ See *S v Mkwana* 1966 (1) SA 736 (A) 743

peace does not, in the particular circumstances of this case, taint the pointing out and the confession.

[64] The accused has been an appalling witness throughout this trial, frequently changing his version. I have alluded to examples. His attempt to approbate and reprobate in this regard is yet another example of his fickleness. In short, courts are required to make a fair-minded practical judgment of these situations based on the unique facts and circumstances of each case.⁴

[65] The ruling regarding the voluntariness of the pointing out and the confession accordingly stands.

[66] That is not the end of the matter however. The issue of voluntariness having been insulated and ruled upon, I now turn to the issue of the accused's guilt.

[67] As I have said, the accused deviated materially from his initial version that he did make a pointing out and a confession, to a diluted rendition that he simply pointed out his home and where members of the public found the body, and that any information reflected in Lt Col Mhluzi's notes must have come from Dastile and/or Mhluzi. I have some difficulty with that proposition for several reasons. For one, it is common cause that the deceased's body was bloated, badly decomposed and covered in maggots when she was discovered. This is clear from the photograph album. It would have been virtually impossible for any lay person to express a reliable view as to the cause of death. It is also not in dispute that the autopsy on the deceased's body was conducted virtually simultaneously with the time that the accused is recorded to have said the following:

'She tried to stand up but I held her fast. She resisted but I held her by the throat and strangle her for a long time. When I stopped I notice that her body was weak. I could realised that she was already dead'.

⁴ See S v Mpetha & others 1983 (1) SA 576 (C) 588

[68] In short, the cause of death recorded by Col Mhluzi was clinically confirmed and dovetailed perfectly with the findings of the pathologist. In my view, this is no mere coincidence. The factually correct explanation given for the deceased's death was recorded by Mhluzi because that is what the accused told him. The accused who, at that stage, was the only person who could say how she met her death. The suggestion by the accused's attorney that Dastile and Mhluzi could have taken a calculated guess which transpired to have been correct, is in my view irresponsible and speculative. In any event, if Dastile and Mhluzi were cohorts in setting the accused up, one would have expected them to wait out the post mortem results before contriving a statement purported to have come from the accused.⁵

[69] Secondly, the accused's confession records that he touched her genitals and that she objected to that and threatened to tell her mother so he strangled her to silence her. Again, this information could only have emanated from the accused. It is highly improbable that police attempting to create a murder motive would mention mere touching of the genitals, particularly when the body was found with the trouser zipper having been pulled completely down.

[70] Thirdly, the statement recorded as the accused's closing statement is one of remorse or at the very least regret. It reads:

‘I am now feeling sorry of what I did because that day I was under the influence of liquor.’

[71] Once again, it is highly improbable that malicious policemen would opt for mitigatory statements in a confession. Significantly also, whilst the accused for some reason denies that he visited the tavern after abandoning the search, and denies having imbibed liquor that night, Sophephela's spontaneous evidence and uncontradicted evidence was that the accused indeed visited the shebeen that night, and that Awonke had said that the accused and the deceased were seen leaving the shebeen together.

⁵ Affidavits and evidence in the B-clip of the docket is usually filed chronologically, A1 being the first document and so forth. Further corroboration for Dastile's version that they obtained the autopsy results some time after the pointing out is found in the fact that the pointing out is marked A17 whereas the post mortem report is marked A28.

[72] The confession and the pointing out made by the accused form the high-water mark of the State's case against him. This being the case, this court ought to make its best endeavours to search for corroboration and circumstantial evidence (other than the probabilities which I have already referred to) to attach sufficient weight to the confession to support a finding that the only reasonable inference to be drawn in the circumstances is that the accused sexually violated and murdered the deceased. Such may be found in the following:

- a. Sophephela's unchallenged evidence regarding the accused's strange and out of character conduct late on the night of the deceased's disappearance. It was most unusual for the accused to switch all the lights off and to bolt the door from the inside. He never bolted the door and he always left the front light burning.
- b. The accused's initial silence in the dark house when Sophephela repeatedly attempted entry, only responding when Sophephela managed to push the door open.
- c. The accused nonchalant and neutral reaction to the fact that his little niece was still missing. Instead he merely told Sophephela that his grandmother was looking for him.
- d. The accused's reluctance to gather close to the deceased's body when it was found, as described in the undisputed evidence of Zonke Haya.
- e. The deceased's failure to attend the night vigil held on behalf of his niece.
- f. The accused's feeble attempt at suggesting that his sister-in-law was saying that he had confessed to the deceased's murder because she did not take kindly to his comments about her clothes and because she wanted him arrested so she could take over his house.

[73] For all these reasons I am satisfied that the confession is sufficiently reliable (as supported by the circumstantial evidence, the probabilities and the mere fact that the accused presented as a very poor witness) for convictions to follow.

[74] There is one further aspect which I need to address. Section 209 of the Act specifies 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.

[75] As stated in *R v Blyth* 1940 AD 355 at 364, confirming evidence means evidence outside of the confession which corroborates it in some material respect. In *Blyth's* case the accused's confession that she had murdered her husband by arsenical poisoning was held to be confirmed by the presence of arsenic in the body. In the matter before me, the accused's confession that he strangled the deceased until she died, has been confirmed by the clinical evidence that the body presented with a fractured hyoid bone and that the cause of death was not inconsistent with hypoxia owing to extrinsic upper airway obstruction.

[76] The prosecutor has informed me that he is not pressing for a conviction on rape, but on the statutory competent verdict of sexual assault in contravention of section 5 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Sexual Offences Act).

[77] This section states that any person who unlawfully and intentionally violates a complainant without his/her consent, is guilty of the offence of sexual assault. Section 1 of the Sexual Offences Act describes sexual violation as (inter alia) any direct or indirect contact between the genital organs (in this case the deceased's genital organs) of one person, and any part of the body of another person (in this case the finger or fingers of the accused). The deceased's body was found with the zipper of her trousers completely down and her underwear exposed. The clinical findings confirm lacerated lesions of the labia minora, a bloody discharge to the genital organs and the comment that post vaginal penetration cannot be excluded.

[78] To my mind this is sufficient evidence aliunde to confirm the offence of sexual assault (in the common law described as indecent assault).

[79] In the premises I make the following order:

On count one, the charge of murder, I find the accused guilty.

On count two, the charge of rape, I find the accused not guilty.

On the competent verdict of sexual assault in contravention of section 5 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, I find the accused guilty.

I. T. STRETCH

9 May 2019

JUDGE OF THE HIGH COURT

Counsel for the State: Mr Kruger

Counsel for the defence: Mr Erasmus