**REPORTABLE**

**IN THE HIGH COURT OF SOUTH AFRICA**

**KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

**CASE NUMBER: AR 189/2016**

In the matter between:

**THENJIWE IGNATIA GRIFFITHS** Appellant

and

**THE STATE** Respondent

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**JUDGMENT**

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**MADONDO AJP: (Van Zÿl, J. et Steyn, J. concurring)**

[1] During December 2014, in Pietermaritzburg High Court, Seegobin J convicted the appellant Thenjiwe Ignatia Griffiths of the murder of Allan Lewis Griffiths, her husband, as well as robbery with aggravating circumstances. He sentenced her to life imprisonment for murder and fifteen (15) years imprisonment for robbery with

aggravating circumstances. With the leave of the court *a quo* the appellant now appeals to this Court against the conviction only.

[2] The appellant's conviction was, first, based on the narration of hearsay evidence by certain witnesses in that the inference was not drawn from the witnesses' personal experiences but from the statements / reports that the deceased had allegedly made to those witnesses. This came as a result of that the court *a quo* was, in terms of s 3(1)(c) of the Evidence Act 45 of 1988 (the Law Evidence Act), of the opinion that it was in the best interests of justice to accept such evidence. Second, on the circumstantial evidence in the form of a pointing out in terms of s 218(2) of the Criminal Procedure Act 51 of 1977 (the Act), in that the police discovered the body of the deceased as a result of the information the appellant had allegedly given to them. In this regard the Court concluded that the State had succeeded to establish a necessary link between the conduct of the appellant, of pointing out the body of the deceased, and the knowledge of the commission of the crimes charged on her part. Third, on that the appellant shared a common purpose with the hijackers to kill the deceased.

[3] The appellant was arraigned before the Pietermaritzburg High Court on the charges of murder and robbery with aggravating circumstances. In count 1 the State alleged that on or about 20 January 2006 and at or near Colenso area in the district of Colenso, the accused unlawfully and intentionally killed Allan Lewis Griffiths, an adult male person.

[4] In count 2 the State alleges that on the date and place mentioned in count 1 the accused unlawfully, and with intent to rob, assaulted Allan Griffiths, to induce submission in the aforesaid person, and took and stole from him a Toyota Corolla sedan motor vehicle, the property, or in the lawful possession of the aforesaid person and thus robbed him of the same. The appellant pleaded not guilty to both counts.

[5] Attached to the indictment was the summary of substantial facts setting out the case that the State intended to prove against the appellant as follows:

> 'During 2005, the accused met the deceased, a 60 year old pensioner, who was an alcoholic, at a club in Richards Bay. Soon thereafter, the accused and the deceased got married to each other.
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> After some weeks, the deceased wanted to terminate his marriage to the accused. The deceased claimed that the accused was assaulting him and being abusive to him.
> The deceased also took steps to end his marriage with the accused by approaching an attorney. He obtained a domestic violence interdict against the accused. The accused controlled the deceased to such an extent that he had no freedom of movement. The accused prevented the deceased from making contact with his family.
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> Sometime later, the accused decided that the deceased was to be killed. To achieve this end, the accused procured the services of persons to assist her in killing the deceased.
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> During the early hours of the morning of Friday, 20 January 2006, the accused and the deceased were travelling in the deceased's Toyota Corolla motor vehicle from Gauteng to KwaZulu-Natal. By that time, the accused had arranged that the persons who were to assist her in killing the deceased were to pose as hitch hikers wanting a lift on the road, which the accused and the deceased were travelling on.
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> En route to KwaZulu-Natal, the deceased stopped the vehicle in which he was driving to give a lift to the accomplices of the accused.
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> At some point on the journey, in the Colenso area, the accomplices attacked and assaulted the deceased.
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> In the course of the attack upon him the deceased was strangled and sustained injuries to the chest. The deceased died as a result of asphyxia.
> The accused was dropped off on the side of the road. The accused made her way to the police station at Estcourt where she made a statement alleging that she and the deceased were the victims of a hijacking.
>
> After dropping the accused, the accomplices of the accused left in the deceased's vehicle. The accomplices dumped the body of the deceased on a deserted district road and later drove to the N3 highway where they abandoned the vehicle.
>
> At all material times the accused acted in concert and in the execution of a common purpose to kill and rob the deceased.'

<u>State Case</u>

The evidence of the State in the court *a quo* can briefly be summarised as follows:

[6] The deceased, a 60 year old white male, and the appellant, a 25 year old black female, first met at the adult entertainment restaurant, Di Capriccio, where the appellant was employed as a call-girl. The deceased used to take her to his home for a night at the cost of R1 300 (one thousand and three hundred rand). A love relationship then developed between them and they got married to each other on 28 April 2005.

[7] The evidence the State presented, tended to show that the appellant married the deceased for material things, i.e. money and property. According to the State as the couple were married in community of property the appellant was entitled to half of the deceased's estate. The gross value of the deceased's estate was R893 000.00(eight hundred and ninety-three thousand rand). The deceased received the pension of R4 500 (four thousand and five hundred rand) per month. The value of the deceased's house at […] H., Veldvlei, Richards Bay, was estimated to be R700 000 (seven hundred thousand rand).

[8] During the evening of 19 January 2006, the deceased and the appellant were travelling in the deceased's motor vehicle, a Toyota Corolla, from Gauteng to Pietermaritzburg; visiting the appellant's family. Whilst they were in the vicinity of Colenso the deceased pulled off the road and parked on the side of the road and it was at that moment that the hijackers struck. The couple were hijacked. The deceased was later found dead in the tall grass on 20 January 2006, a short distance away from where the hijackings had allegedly taken place. The deceased's cause of death was asphyxia by strangulation.

[9] The State presented evidence to show that the appellant masterminded the killing and robbery of the deceased for monetary and property gain. In order to secure conviction on the charges of murder and robbery with aggravating circumstances, the State relied on the narration of hearsay evidence by certain witnesses relating to the statements the deceased allegedly made to them as well as the fact that subsequent to the hijacking incident the appellant allegedly pointed out the body of the deceased to the police in terms of s 218(2) of the Act as the

intermediate facts supporting the inference that the appellant was responsible for the death of the deceased.

[10] The statements the deceased had allegedly made to the state witnesses were to the effect that the appellant had physically and emotionally abused the deceased, depriving him of his freedom of movement by detaining him as a virtual prisoner in his own home; she overspent on the deceased`s Edgars account; she depleted the deceased`s bank account to such an extent that it went into an overdraft; she cleared the deceased`s house of furniture and she violently abducted the deceased from his house at Richards Bay to certain premises at Midrand, Gauteng, where she held him captive until the day he met his death.

[11] Josias Conradie Marais, a Richards Bay attorney practising under the name and style of Connie Marais Attorneys, testified that on 12 May 2005 he consulted both the deceased and the appellant. Following such consultation Marais drew up a joint will for the parties, as they were married in community of property, setting out how each fifty percent of the joint estate moneys devolve on the death of each party. The deceased’s portion of the estate would devolve upon his three children in equal shares. The appellant nominated her mother, Pauline Mthembu, of […] T. Road, Unit […], as the beneficiary to her estate in the event of predeceasing her mother. The parties returned to Marais’ office on 18 May 2005 for signature.

[12] On 6 June 2005 the deceased visited Marais’ office alone for consultation purposes. During such consultation the deceased told him (Marais) that he intended to divorce his wife, the appellant. The deceased went on to state that he and the appellant had met each other at Club Di Capriccio where the appellant was working as a prostitute. The deceased used to pay an amount of R1 300 (one thousand and three hundred rand) for taking the appellant out for a night.

[13] The deceased narrated to Marais that the appellant was physically and emotionally abusing him. The appellant had assaulted the deceased by scratching him on the arm. Dr. Gary Cloete treated the deceased for an injury on his arm and put a bandage thereon. The deceased told Marais that the appellant had overspent on the deceased’s Edgars account when making purchases at Edgars, using the

deceased’s card. The appellant had on three occasions locked the deceased inside his house. The appellant had taken with her car keys, identity document, credit cards and a cheque book. As a consequence, the deceased had stopped the cheque book and cancelled the credit cards. The deceased told Marais that he sought a divorce from the appellant.

[14] The deceased went on to say that since his marriage with the appellant, there were persons that had moved in to stay with him in his house. He referred to such persons as the appellant’s cousins and he, the deceased, stated that he was then seeking a restraining order against them. The deceased then undertook to furnish Marais with the particulars and details of such persons. Since the deceased was in a hurry Marais scheduled another consultation meeting with the deceased for 17 June 2005.

[15] On the appointed date the deceased once again, came alone. On 17 June 2005 the deceased appeared to Marais to be more relaxed and the bandage on his arm had been removed. According to Marais the deceased’s arm was black and quite badly damaged.

[16] The reason for the deceased wanting a divorce was that the appellant had left him all by himself on 6 June 2005 for Johannesburg and he had not heard from her since. At the time the deceased gave Marais instructions for a divorce, according to Marais, he had had something to drink but Marais could understand him. He, the deceased, was able to communicate properly.

[17] Marais also acted as an executor in the winding up of the deceased’s estate. He secured the deceased’s bank account. The deceased had only the First National Bank Account. He was in receipt of a monthly pension of approximately R4 500 (four thousand and five hundred rand) from the Joint Municipal Pension Fund. The appellant would by virtue of the marital regime benefit from the fund upon the death of the deceased. The value of the deceased’s house at […] H., Velddenvlei, Richards Bay, was estimated at R700 000 (seven hundred thousand rand).

[18] Marais had previously received correspondence from the appellant's attorneys, Siva Chetty, stating that they were under pressure from the appellant to have the deceased's estate wound up. They further, stated that according to their instructions by the appellant, the deceased had communicated to Marias that his state was worth approximately R 5 million. However, Marais denied that the deceased had said such a thing to him.

[19] Under cross-examination, by Mr. Matthews for the defence, Marais conceded that he was only testifying about what the deceased had told him and that he could not vouch for the correctness and truthfulness of what the deceased had told him. When Mr Matthews put to him that the slip for the purchase made at Edgars was generated on 6 June 2005, which was the day on which the deceased went to Marais' office for consultation, Marais could not provide any intelligible answer.

[20] To a certain extent, Marais' evidence finds support in the evidence of Caroline Riddle of Kloof, who testified that the deceased was her brother. She and the deceased had a good relationship and the deceased confided in her a lot. The deceased had divorced Caroline Mallon who lived close by the deceased's house and who was also an employer of Doris Ntinga, the deceased's domestic worker. The deceased had been in the employ of the Richards Bay Municipality as an assistant town engineer, and he had at the time of his death been boarded from his employment.

[21] Riddle stated that she first got to know about the deceased's marriage with the appellant when the deceased telephoned her from his house. According to Riddle, within two weeks of the marriage to the appellant, the deceased asked her for help saying that he made a mistake by marrying the appellant. She then immediately drove to the deceased's house at Richards Bay and the deceased told her what had happened.

[22] She found the deceased without money, food and transport. He told her that the appellant had gone to Gauteng and that she had taken his wallet, identity document and a car with her. Two other women, who were allegedly the appellant's cousins, had then moved in to stay with the deceased in the house. On 6 January

2005, she, Riddle, took the deceased to an attorney, Josias Conradie Marais, for consultation since he, the deceased, sought a divorce. The deceased also intended to make a new will in which he would bequeath his estate to his three children. On 17 June 2006, after the consultation, Riddle accompanied the deceased to Empangeni Magistrates' Court where they both made an application for a protection order to be issued against the appellant and two other women, Ayanda Mthembu and Pretty Lucia respectively. Riddle was present during the consultation.

[23] The deceased was not in a state of good health and as a result Riddle took him to a chemist for medication. The deceased was suffering from a bipolar disorder which required medication to control it. The deceased had a bandage on his arm. Riddle testified that although the deceased was not good emotionally and physically, he was *compos mentis* (in sound mind). She conceded that the deceased was an alcoholic but she stated that on the day in question he was sober.

[24] On the same day, Riddle organized that the locks of the deceased's house be changed for the deceased's protection. Ntinga had a set of keys to the deceased's house in her possession to use when she came to do her cleaning duties. The other set of keys was with Caroline Mallon, the deceased's ex-wife. Riddle stated that she kept in touch with the deceased, telephonically, for several weeks until his disappearance.

[25] Mallon reported to Riddle that the deceased had disappeared from his home and that he had abandoned his house. Riddle then proceeded to Richards Bay Police Station to make a missing person's report to Warrant Officer Taylor. From the police station Riddle, in the company of Taylor, proceeded to the deceased's house. On their arrival there, the two saw blood all over the dining room and lounge. The house was cleared of furniture. The other room was locked from the inside and in order to gain entry into that room the police kicked its door open. The deceased had not told his sister, Riddle, of his plan to move to Gauteng.

[26] When Riddle later made contact with the appellant, the latter told her to stop interfering with the deceased as he then belonged to her. The appellant went on to threaten Riddle saying that she knew where she, Riddle, lived and worked.

[27] Before her departure to overseas for a holiday, Riddle persuaded the appellant to allow her to see the deceased. The appellant agreed to meet her outside Pine Town Police Station but the appellant did not honour the appointment. When she, Riddle, phoned the appellant, the latter laughed at her saying that she thought that she was stupid if she, Riddle, indeed expected that the appellant would meet her. On her return from the overseas trip, Riddle heard that the deceased had been a victim to armed robbery. Later, Coetzee, a police officer, told her that the body of the deceased had been discovered.

[28] The evidence of Riddle finds corroboration in the evidence of Warrant Officer Craig Taylor with regard to what transpired after the deceased had been reported missing. Taylor testified that Riddle made a report to him that the deceased was missing. As a result, a missing person's file was opened. Together with Riddle, he proceeded to the deceased's house where he observed signs of blood in the dining room. When he telephoned the deceased on his cellular phone the call was cut off. When he phoned the appellant, the appellant told him that she and the deceased were happily married and that the deceased was fine. The appellant furnished Taylor with their residential address, […] C. Road, Midcity, Midrand. Taylor then told the appellant that he had received a missing person's report and when he asked to talk to the deceased the call was terminated.

[29] Taylor received information relating to a cheque being cleared for payment. He then phoned the First National Bank to get the bank to delay clearing the cheque. However, his attempts were unsuccessful because the bank had already cleared the cheque.

[30] Taylor testified that he had previously met the deceased in June 2005 when he received the interim protection order to serve on the appellant. He went to the deceased's house to serve it on the appellant but she was not there. Taylor described Club Di Capriccio as an adult entertainment club situated in the Richards Bay CBD.

[31] Under cross-examination, Taylor explained that there was a little blood in the grouting of the floor tiles of the dining room or lounge area. He concluded that an attempt had been made to freeze the deceased's bank account and to stop the cheque on the ground that the deceased had been abducted. Taylor stated that he conveyed the message to the bank that the deceased had been abducted. It was put to Taylor on behalf of the appellant, that the deceased told him that he had not been abducted and that he should stop fooling around with his bank account. Taylor responded by saying that he did not remember such a conversation taking place.

[32] Doris Ntombinkulu Ntinga, the deceased's domestic worker, testified about some of the events that preceded the disappearance of the deceased. She stated that she was in the employ of the deceased at the suburb, Veldenvlei, Richards Bay since 1993. She worked for the deceased once a week on a Thursday. One day she met the appellant for the first time at the deceased's house and the deceased was also present. The appellant told her that she was in love with the deceased, and that they were going to get married. She said that in fact they, the deceased and the appellant, were on their way to get married. At 11h15 they returned home and had champagne together.

[33] The deceased took the appellant to Pietermaritzburg. When Ntinga came to work again the following week, the deceased told her that he and the appellant had got married. On this occasion the deceased was in the company of the appellant's two sisters. On the same day the appellant departed, leaving the deceased in the company of her two sisters.

[34] On another day, when Ntinga reported for duty at the deceased's house, the deceased told her that the appellant had gone away with his car keys and his wallet including his bank cards. A month later, whilst Ntinga was on her way home after work, the appellant in the company of certain persons stopped her and demanded the set of keys to the deceased's house which were in Ntinga's possession and she gave them the keys. Subsequent to this, Ntinga did not see the deceased again.

[35] Ntinga returned to the deceased's house on the following Thursday and she found that there was no one in the house. On the next Thursday, she found that

there was no electricity in the lounge and that the dogs had not been fed. She went and reported this to Caroline Griffiths-Mallon, the ex-wife of the deceased. The partner of the deceased’s ex-wife came to collect the dogs. Ntinga then left the house.

[36] When Ntinga contacted the deceased on his cell phone, the appellant answered the call. She, Ntinga, asked to talk to the deceased. When she asked the deceased where he was, the deceased responded saying that he was in Pietermaritzburg. When she asked if the deceased was safe, the appellant responded saying that he was safe. When this happened, Ntinga realised that the cellular phone had been removed from the deceased’s possession.

[37] When Ntinga returned to the house, she discovered that the house had been cleared of the furniture. The deceased had not notified her that the furniture would be removed. She advised the deceased’s ex-wife of this situation. The deceased did not tell Ntinga that he was terminating her services, nor had the deceased advised her that he was then moving to Gauteng. The deceased’s sister, Riddle, had at some stage had the deceased’s house locks changed. Ntinga had a set of keys in her possession so to be able to gain entry into the house when she reported for duty.

[38] Vishen Singh, an operations manager, in the employ of the First National Bank attached to the City Square Branch, testified about the financial state of the deceased immediately before his death. He stated that the bank statements revealed that the bank account of the deceased was drained until it went into an overdraft shortly before the deceased met his untimely death. Certain amounts of money were withdrawn from the deceased’s bank account at the ATMS, using a bank card. Singh testified that in such event a customer would have had a pin-code to use the bank card at the ATM.

[39] Cheque number 1095 in the amount of R20 000 (twenty thousand rand) was cashed over the counter at Richards Bay FNB Branch on 31 October 2005. Singh testified that when a cheque is cashed, the teller phoned the client to confirm whether he or she has issued a cheque. If he or she answers in the affirmative and confirms the identity of a payee, the cheque is then made payable. This procedure

started two or three years ago before Singh's testimony at the court *a quo*. Previously, if the cheque was made out cash, it was not necessary to confirm it with the drawer or client.

[40] Various cheques on different occasions were cashed at Richards Bay FNB Branch until the deceased's bank account went into overdraft. Singh conceded that the First National Bank had specimen signatures of the deceased. Singh said that when an item is cashed and the person does not have a cheque or a card mechanism, he or she would go to the teller and request encashment for whatever amount it is.

[41] Under cross-examination Singh testified that, as it was then, it could not be established whether the cheques in question were cashed by the account holder or by somebody else, to whom the deceased might have issued a cheque since the vouchers were not available. According to Singh cheques are sent back to the clients for their records.

[42] Mr Matthews for the defence put to Singh that the deceased issued a cheque in the amount of R91 500 (Ninety one thousand and five hundred rand) in favour of persons from whom he had purchased a motor vehicle. The cheque could not be paid out because the signature differed from the bank specimen signature. When the deceased went to enquire into the matter the bank staff told him that his account had been frozen on the allegation that he, the deceased, had been abducted. After the deceased had communicated to bank staff that he had not been abducted, he drew another cheque and the bank honoured such cheque. Singh conceded that a cheque was not paid because the signature differed with the bank specimen signature.

[43] Singh stated that a request for a statement or balance enquiry is done inside the bank. One cannot make a request for a statement or balance enquiry on another's bank account. Nor can one have a card replacement if one is not an account holder. As the primary account holder, the deceased if he wanted a bank to issue a card to his wife, the appellant, she would have been a second account holder.

[44] Ntombenhle Angel Hlophe, a constable in the South African Police Services stationed at Estcourt Police Station, testified that whilst performing charge office duties on 20 January 2006 one of her colleagues brought the appellant into the charge office, as a victim of a car hijacking. The colleague in question had been performing duties at Ultra City on the N3 highway. The appellant was clad in a bra and a cloth which covered her lower torso (lower part of her body) including the pubic area.

[45] Seeing that the appellant was undressed, constable Hlophe took her into an office away from the public. Hlophe left the appellant in the office with the intention of giving her time to regain composure, as she appeared to her to be in a state of shock. An hour later, Hlophe commenced questioning the appellant about what had happened and her personal details. She, Hlophe, and the appellant were conversing in Zulu. Hlope then obtained the statement from the appellant, thereafter, the appellant read the statement and she was satisfied that her statement had correctly been recorded. Hlophe took the statement from the appellant at 04h33.

[46] Captain Cronje arrived and enquired from Constable Hlophe whether everything was in order and she answered in the affirmative. Hlophe then took the appellant to the female quarters at the police station, where the appellant took a shower and Hlophe gave her some clothes to wear. Subsequently, Hlophe took the appellant back to the charge office and handed her over to Captain Cronje as she, Hlophe, was then going off duty.

[47] Under cross-examination Mr Mathews for the defence put to Hlophe that the appellant would deny that the lower part of her body was covered with a cloth, and state that she was stark naked. Hlophe denied all this. She also denied that the appellant was made to sit naked in the charge office and that the male police members in the charge office referred to her as a prostitute from the highway. Once again, she denied that the appellant, when she made a statement to her, was frightened and confused. She went on to state that at the time when the appellant made the statement she had fully recovered and she was in a fully composed state.

[48] Goodwill Madoda Nzimande, a lieutenant in the South African Police Services attached to the Serious and Violent Crime Unit in Pietermaritzburg, testified that during January 2006 he was holding a rank of a warrant officer. On 20 January 2006, he was on duty and whilst on duty he received a report that the appellant's husband, the deceased, had gone missing. At the time the appellant was at Colenso Police Station. Nzimande in the company of Detective Warrant Officer Ndlela proceeded to where the appellant was, with the intention of interviewing her and finding out what had happened. The appellant was then a witness to the disappearance of her husband.

[49] After Nzimande and Ndlela had introduced themselves to the appellant they took her into an office at Colenso Police Station. On questioning the appellant Nzimande was not satisfied with what she was saying and to him it appeared as if she had some knowledge of the deceased's disappearance. At that junction Coetzee joined them, i.e., Nzimande, Ndlela and the appellant. At that point Ndlela left the office to talk on a cellular phone outside.

[50] On his return to the office Ndlela reported to Nzimande that he had talked to the deceased's sister, who made a report to him. This report had the effect of changing the status of the appellant from being a complainant to that of a suspect in the kidnapping and disappearance of the deceased.

[51] Nzimande then informed the appellant that she was then under arrest on the charge of kidnapping or abduction. He subsequently informed the appellant of her constitutional rights. After informing the appellant thus, Nzimande then enquired from the appellant whether she intended to exercise any of the rights he had explained to her. She responded saying that she wanted an attorney and furnished Nzimande with the name of the attorney, Siphiwe Ngwenya.

[52] Nzimande then gave her his cellular phone in order for her to make a phone call to Ngwenya. The appellant talked to Ngwenya and thereafter Nzimande in turn talked to Ngwenya. He told Ngwenya that he had arrested the appellant and Ngwenya stated that he had no problem, they (Nzimande and Ndlela) could go

ahead and question the appellant. Nzimande then told Ngwenya that the appellant would be detained at Loop Street Police Station.

[53] On their way to Pietermaritzburg Nzimande and Ndlela put questions to the appellant. To Nzimande, the appellant appeared to be relaxed and she was also engaged in general conversation with Nzimande and Ndlela. As they were approaching Howick, the appellant made a report to Nzimande. Following such report, Nzimande stopped the vehicle in which they were travelling, and reminded the appellant of her constitutional rights. Nzimande turned the vehicle and headed towards Colenso. The appellant directed them, i.e., Nzimande and Ndlela, to D52 Road. As it was then getting dark, they could not see the area and they travelled back to Pietermaritzburg. The appellant was detained at the Loop Street Police cells for the night. In the morning on the following day, Nzimande and Ndlela booked the appellant out of the Loop Street Police cells and drove her back to D52 Road.

[54] Before taking the appellant back to D52 Road, Nzimande enquired from her whether she was still prepared to do a pointing out. He also explained to her that she had the right not to point anything out, and if she elected to point something out to them that would be used as evidence against her in a subsequent trial. Nzimande then afforded her an opportunity to consult her attorney in this regard but she declined to have any attorney present.

[55] On reaching D52 Road, the appellant requested Nzimande to drive slowly. At the time the appellant was seated behind Nzimande who was then driving a double-cab bakkie in which the three were travelling. Nzimande observed her looking to the right hand side of the road. At some point, she requested Nzimande to stop the vehicle. At the time Nzimande could not see anything as the grass was tall on the side of the road. Nzimande then alighted from the vehicle, leaving the appellant and Ndlela in the vehicle. He then proceeded to the place the appellant was pointing out to him.

[56] On reaching the spot the appellant had pointed out, Nzimande discovered the body of the deceased. He then measured the distance from where he had discovered the body of the deceased to the point at which one turns onto D52 Road.

The distance was 3.9 kilometres. According to Nzimande there was nothing distinctive about the spot where the body of the deceased lay.

[57] Nzimande removed an identity document from the deceased's breast pocket. He compared the photograph, in the identity document, and the face of the deceased and he found it resembling the deceased. The appellant was made to wait in the vehicle. The appellant did not appear shocked or surprised by the discovery of the body of the deceased. It appeared to Nzimande that the deceased had been strangled to death by means of a rope or similar object.

[58] Under cross-examination, Nzimande stated that the appellant had without inducement made a report which caused them to turn around and return to Colenso area. In response to the appellant's version, that it was in fact Ndlela who spotted the body of the deceased whilst standing on the back of the bakkie, Nzimande stated that it did not happen in that way. According to Nzimande it was the appellant who pointed to them the spot where the body of the deceased was later discovered.

[59] Mr. Matthews for the defence put to Nzimande that the appellant would admit that she led Nzimande and Ndlela to the place where the body of the deceased was later discovered. But, according to the appellant this happened after Nzimande and Ndlela had verbally and physically abused her by insulting and kicking her with booted feet on the buttocks. Nzimande denied all this.

[60] The evidence of Nzimande finds support in the evidence of Lieutenant Ndlela, who was at the time a warrant officer in the South African Police Services attached to the same unit as Nzimande, in all material respects.

[61] Warrant officer Bashir Ahmed Khan, a member of the local Criminal Record Centre stationed at Ladysmith, testified that he attended the scene on January 2006. He took photographs on the scene of the crime and prepared a photo album of the scene. The scene was on a gravel road, D52, running from road, P294, between Colenso and Winterton. The road in question is used mainly by the farming community. The body of the deceased was found lying obscured by long grass,

approximately 4 metres away from the edge of the gravel road. It was not visible unless one were to observe it from an elevated position.

[62] Protas Lucky King, a provincial traffic inspector in the employ of the Road Traffic Inspectorate of KwaZulu-Natal, testified that on 22 January 2006 he was on duty and whilst performing patrol duties on the N3 Freeway he came upon a silver Toyota Corolla bearing registration letters and number S[…]GP on the North bound carriageway of the N3 Freeway. This point was approximately 10 km away from the bridge on the N3 Freeway, where it crosses over P294 Road. On the following day, the vehicle was still on the same spot. On opening the vehicle King discovered that the interior of the vehicle was partially burnt.

[63] Dr. L Badul, who performed a post-mortem examination on the body of the deceased, found the cause of the deceased's death to be asphyxia brought about by strangulation. The deceased had strangulation marks around his neck. Some ligature had been used to strangle the deceased. The deceased had his 4$^{th}$ and 5$^{th}$ ribs fractured, and as a result the deceased's left lung got perforated. This according to Dr. Badul was indicative of considerable pressure being exerted to the deceased's chest-wall. This concludes the evidence for the State.

[64] At the close of the State case the defence asked for the appellant's discharge in terms of s 174 of the Act on the ground that the State case entirely rested on the interpretation of the provisions of s 218(2) of the Act, relating to the pointing out. The test was whether there was sufficient evidence on which a reasonable man could convict. The Court *a quo* ruled against the appellant on the ground that in its view the State had established a *prima facie* case against the appellant which called for an answer.

<u>Defence case</u>

[65] At the close of the State case the appellant testified in her favour that the deceased was her husband, they got married to each other on 28 April 2005 at Richards Bay. They first met each other during 2004 in Pietermaritzburg whilst she was walking along the road, after attending a modelling class at Irene's Modelling School. It was a very hot day. The deceased stopped his vehicle and offered her a

lift which she accepted. The deceased then enquired from the appellant as to whether she was employed and to which she answered in the negative. The deceased then told her that there was an employment which he could offer her. The deceased and the appellant then exchanged telephone numbers. The deceased subsequently dropped her at Market Square.

[66] Three weeks later, the deceased phoned the appellant. He requested her to pay him a visit. The appellant accepted the deceased's request and on the following day she set out on a journey to Richards Bay. The deceased travelling in his vehicle met her in town at Richards Bay and took her home. On arrival there, the appellant discovered that the deceased was staying alone in the house.

[67] The love relationship between the two of them then started. The two lived together before marrying each other. Shortly, before the marriage the deceased phoned the appellant's mother to tell her that he intended to marry her and that he would pay labola in the amount of R20 000 (twenty thousand rand) for her. The appellant and the deceased subsequently travelled to Pietermaritzburg where the deceased gave the appellant's mother a cheque which she later duly cashed. The deceased and the appellant returned to Richards Bay where they got married and lived happily together.

[68] In the period between the appellant's moving in with the deceased and his death, she had only spent two nights apart from the deceased when she was ill. During 2005 the deceased declared that the couple should relocate to Gauteng Province so that they could get away from his family members who were interfering with their relationship and opposed to their marriage. As a result, the couple moved into a house in Concerto Road, Midrand, Gauteng, where they continued living together as husband and wife.

[69] The couple moved to Gauteng Province during October 2005. Whilst they were still trying to put up their Richards Bay house for sale, they stayed at the hotel. The deceased then approached Pam Golding properties in Gauteng for the sale of the Richards Bay house. In turn, the Pam Golding properties Gauteng branch communicated with a Richards Bay Pam Golding properties branch with regard to a

sale of a house at Richards Bay. Eventually, the couple bought a property in Johannesburg, Midrand, house number […] C. Road.

[70] The deceased then decided to purchase a Renault Motor vehicle, black in colour. After making payment for the vehicle with a cheque, the bank advised the deceased that there was something wrong with the cheque. As a result, both the deceased and the appellant proceeded to the bank since the deceased had to come to the bank personally. Her husband, the deceased, never told her that he was divorcing her and nor had he told her that he had sought a protection order against her.

[71] During the evening of 19 January 2006, the deceased and the appellant were travelling in a motor vehicle from Midrand to Pietermaritzburg, visiting the appellant's family. They had left Gauteng between 18h30 and 19h00. It was only the two of them in the vehicle. They took a Newcastle route since the deceased was avoiding traffic police as he was then driving under the influence of alcohol.

[72] As they approached Colenso the deceased pulled off the road saying that he had heard some noise coming from the front of the vehicle. Both the deceased and the appellant alighted from the vehicle. The deceased opened the bonnet of the vehicle and attended to a part that he said had broken off or split. The appellant did not know what part it was. After the deceased had put that part together, the couple returned to the vehicle. It was at the juncture that a 1400 white bakkie appeared and pulled off in front of the couple's vehicle. Three males alighted from the vehicle. Two of them approached the deceased. One of the two was carrying a 5 litre petrol container in his hands. They approached her husband's side of the vehicle. Before they could say anything, her husband said that 'these people must be wanting petrol'. He then opened a window. One of the assailants acted as if he was saying something to the appellant's husband, the deceased. He then pointed a firearm at the deceased's head and ordered him to alight from the vehicle and get to the backseat. Also the one who was on the appellant's side ordered her to alight and get into the backseat of the vehicle. The couple followed all the instructions the would be robbers were issuing to them.

[73] One of the assailants climbed behind the steering wheel of the deceased's vehicle and the other one got into the backseat and sat with the couple. The third one drove the 1400 white bakkie, following the deceased's vehicle. The vehicle drove off in the direction of the freeway. Whilst driving the petrol warning light came on. The appellant knew that they were low on petrol, as her husband has said that they were going to stop at Ultra City and refill the vehicle with petrol, before the hijacking. The vehicle drove until it came to the D52 Road where it stopped. One of the assailants or would be robbers, who was seated with the couple on the backseat, told the appellant to take off her clothes. The appellant complied with the instruction until she was left with only a bra on. The would be robber then asked the appellant to suck his penis.

[74] The one on the driver's seat objected to that taking place inside the vehicle. He then told the other robber and the appellant to alight from the vehicle. The would be rapist took the appellant to the back of the vehicle where he attempted to rape her. However, he had a problem of getting a full erection. Whilst attempting to rape the appellant, the would be rapist was disturbed by the light of an oncoming vehicle. He then jumped back into the vehicle which drove off, leaving the appellant out of the vehicle. She then found an opportunity to flee into the bushes. The vehicle made a U-turn, facing the opposite direction, and it disappeared from sight. The appellant did not see which route it took.

[75] Although the appellant was semi-naked she managed to make her way to the N3 where she found a truck which took her to Ultra City. When the truck driver phoned the police, the latter told him that there were members of the police attending the accident scene at the Ultra City. The truck driver should drop the appellant at the scene and she would find the police waiting for her. There she happened to find the police who later conveyed her to Estcourt Police Station. At this police station she was made to sit stark naked. The male police officers mocked and referred to her as the prostitute from the highway. This happened before Constable Hlophe took the appellant to the office to make a statement. Hlophe assisted the appellant by connecting her with her mother. Her mother eventually came to Estcourt Police Station bringing the appellant clothes. The appellant together with her mother were later taken to Colenso Police Station.

[76] At Colenso, Nzimande and Ndlela came and took her to the office wherein they questioned her in an abusive manner. They assaulted her by kicking her with booted feet and manhandled her. Subsequently, they took her to Pietermaritzburg. Nzimande and Ndlela also took her to the park where they further physically abused her until she wetted herself. They told her that if she were to share her money with them they would take her back home.

[77] As she also desired that her husband be found, the appellant agreed to take Nzimande and Ndlela to the place where she last saw the vehicle in which she and her husband had been travelling, after the hijacking. Nothing was found. They returned to Pietermaritzburg and she was detained at Loop Street Police Cells. On the following day, Nzimande and Ndlela took the appellant back to the road which she had on the previous day pointed out to them, as the place where she had last seen the deceased's vehicle. The three were travelling in a double cab bakkie. The appellant was made to stand on the back of the bakkie with Ndlela. Whilst the appellant, Nzimande and Ndlela were travelling in a bakkie along the road Ndlela spotted the body of a person lying in the tall grass, on the right hand side of the road.

[78] The appellant denied taking the deceased's car keys and bank cards. The appellant stated that, with the permission of the deceased, she purchased some items at Edgars, using the deceased`s card. However, the latter did not tell her how much money she should use. Her husband would sign for the purchases she had made. She did not have signing powers. The deceased used to be present whenever she made purchases at Edgars as he would sign for them.

[79] The appellant denied that she had ever been at the Club Di Capriccio Restaurant. She also denied having any sister or cousin with the name of Ayanda Mthembu and Pretty Lucia. The persons she knew as her relatives were Ntombifuthi Mthembu and Zandile Mthembu. They visited her at Richards Bay. They only spent two nights with her there. She stated that whilst under the influence of alcohol the deceased fell and injured his own arm.

[80] The deceased used to refuse to talk to his sister over the phone. The deceased's sister then threatened to report to the police that the appellant had kidnapped her brother. At some stage, the deceased's bank account was frozen and the deceased asked the bank staff to unfreeze it.

[81] The appellant pointed out to Narrainsamy Naidoo, a practising attorney of Siva Chetty & Co, a house which she and the deceased occupied in the Midrand, Gauteng area. Naidoo confirmed that the appellant showed him the house number […] C. Road. He took photographs of the property and later compiled a photograph album of the property concerned. Naidoo testified that it was the agent of Pam Golding of Roodepoort branch who was involved in the purchase of the property in Gauteng as well as the sale of the Richards Bay house. The deceased wanted Pam Golding to sell the Richards Bay house on 18 November 2005.

[82] The appellant's evidence finds corroboration in her mother's evidence, Nothi Pauline Mthembu, with regard to the appellant's meeting with the deceased, the payment of labola and her emotional and physical abuse by Nzimande and Ndlela at Colenso Police Station. Pauline Mthembu testified that the treatment meted out to her daughter not only caused her to cry but also other female police officials stationed at Colenso, who were present there. She saw the police assaulting her daughter by kicking her with booted feet. This had been preceded by a cry emanating from the officer where the appellant, Nzimande and Ndlela were.

[83] Simphiwe Ngwenya, a practising attorney of Siva Chetty & Co, testified that he could recall the hijacking incident involving the appellant. The appellant phoned him from Colenso Police Station about the matter and he informed her that he would come to Colenso Police Station, and that she should not say anything to the police until he arrived. Subsequently, Ngwenya learnt from a certain Nomtesha that the police had taken the appellant to Loop Street Police Station with them. On the following day, Ngwenya proceeded to Loop Street Police Station to see the appellant but he could not find her there, and her whereabouts were unknown.

[84] Under cross-examination, Ngwenya denied that he told Nzimande and Ndlela that he would have no problems should they go ahead interviewing the appellant in

his absence. He added, saying that as an attorney he would have liked to be present at the time the police were interviewing the appellant. This concluded the evidence for the defence.

<u>Findings by the court *a quo*</u>

[85] The court *a quo* rejected the version of the appellant as false beyond all reasonable doubt and accepted the evidence of the State witnesses; Marais and Riddle of a hearsay nature and the direct evidence as being reliable, truthful and more probable. It took the view that it was in the best interests of justice to accept such hearsay evidence in terms of section 3(1)(c) of the law of Evidence Act, as it was relevant to prove the facts in issue. When it made the ruling on the admissibility of hearsay evidence, the court *a quo* stated that it would give reasons later in the judgment. But, unfortunately, such reasons are not found in the four corners of its judgment. It might have been due to an oversight that the court omitted to give reasons for its ruling on the admissibility of hearsay evidence.

[86] Also, in convicting the appellant the court *a quo* relied much on the provisions of s 218(2) of the Act in that the police discovered the body of the deceased as a result of the information the appellant had given to them. The court *a quo* found that the appellant was involved in the killing of the deceased and robbery of the deceased and that the motive for the killing on the part of the appellant was to get money as an estate late of the deceased, as her husband. The court rejected the appellant's version that she and the deceased both fell victim to hijackers and that she managed to escape. The court found that the appellant shared common purpose with the hijackers of the deceased's vehicle.

[87] The learned judge of the court *a quo* found that the only reason the appellant married the deceased, who was much older than her and an alcoholic, was to get money. As the appellant and the deceased were married in community of property the appellant was entitled to half of his estate. The deceased received a pension of R4 500 (four thousand and five hundred rand) per month. By 3 January 2006 the deceased's account was overdrawn by R3 764.78 (Three thousand and seven hundred and sixty-four rand and seventy-eight cents). The bank statements revealed

that numerous ATM cash withdrawals were made on a daily basis from the deceased's account. The court *a quo* found that by the time of the deceased's death on 19 January 2006 his account had severely been depleted.

[88] The court ruled the pointing out by the appellant admissible mainly on the ground that Nzimande and Ndlela as seasoned police officers would not have opened themselves up to criminal liability by viciously assaulting the appellant at a police station, which was not their normal headquarters, in full view of witnesses. Neither the appellant nor her attorney or her mother took any steps to lay any complaints against both the police officers in this regard.

[89] Further, the court, in this regard, held that the policemen were concerned about finding the deceased alive due to the missing person's report which was put out by his family. By her own admission under cross-examination the appellant herself was anxious to find the body of the deceased and she accordingly agreed to take them to the place where she had last seen the deceased's vehicle. It was the appellant who directed the police to the area. The court concluded that the voluntariness on the part of the appellant when such pointing out was made had been proved.

[90] The court *a quo* went on to hold that a striking feature of Nzimande evidence was that when he informed the appellant that he had found the deceased he observed that she showed no surprise or shock whatsoever. The court took the view that her reaction seemed to confirm that she knew all along that the body of the deceased was lying somewhere in the area to which she directed the police officers. Accordingly, it concluded that the discovery of the deceased's body would never have taken place without the help from information presented by the appellant. In the premises, the court *a quo* found it reasonable to infer that she bore knowledge all along as to what happened to the deceased during the evening of 19 January 2006.

[91] The court *a quo* rejected the version of the appellant that she and the deceased were hijacked and that the hijackers drove off with the deceased after an attempt to rape her had aborted as being false. The court found it improbable that the hijackers after driving off with the deceased, they would then kill him and come

back to dump his body in the immediate vicinity from where he had been abducted. The court found that the deceased and the appellant were never hijacked. But, the deceased' death was a consequence of a highly elaborate and well thought out plan to get rid of him.

Discussion

[92] Hearsay evidence can be defined as evidence of communication by a non-witness tendered to prove the truth of that which the non-witness intended to communicate. Hearsay evidence was redefined in s 3(4) of the Law of Evidence Act to mean evidence whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence.

[93] Evidence is admissible when it has to be taken into account by the court in determining whether the facts in issue have been proved or not. The basic rule is that to be admissible evidence it must be relevant. Section 210 of the Act provides

> 'no evidence as to any fact, matter or thing shall be admissible which is irrelevant or immaterial and which cannot conduce to prove or disprove any point or fact at issue in criminal proceedings.'

[94] Generally, hearsay evidence is not admissible. The primary reason for the exclusion of hearsay evidence is its general unreliability simply on the ground that it rests, for its evidential value, on the untested memory, perception sincerity and narrative capacity of a declarant or actor who was not subjected to the oath, cross-examination or any other procedural devices.

[95] However, s 3(1)(c) provides an exception to the general exclusionary rule of hearsay evidence provided the requirements set out in paragraphs (a), (b) or (c) are satisfied. In terms of s 3(1)(c) the court has a discretion to receive hearsay evidence whenever it is 'of the opinion that such evidence should be admitted in the interests of justice'. The admissibility of all hearsay evidence rests on two basis; trustworthiness and necessity. To put it differently the evidence in question must carry the 'hallmark of truthfulness and reliability' for its reception to be doubtlessly justified; see *S v Mokoena and others* 2006 (1) SACR 29 (W) at 47f.

<u>Section 3(1)(c)</u>

[96] Section 3(1)(c) enjoins the court to take into account both the probative value and the prejudicial effect of an item of hearsay evidence in determining its admissibility. In determining whether it is in the interests of justice to admit hearsay evidence, the court must have regard to the factors mentioned in s 3(1)(c). The section requires the court to consider at least six factors specified in paragraph (c) before making a finding in terms of that paragraph. The court would only after it has given regard to each of the factors specified in s 3(1)(c) cumulatively, be in a position to decide whether or not it is in the interests of justice to admit the hearsay evidence; see *S v Shaik and others* 2007 (1) 240 (SCA) para 170; *S v Molimi* 2008 (2) SACR 76 (CC) paras 35 to 38.

[97] Hearsay evidence will be admissible if the court having regard to the factors set out in paragraph (c) is 'of the opinion that such evidence should be admitted in the interests of justice'. However, it is not open to an appeal court to exercise its discretion to receive hearsay evidence under this section; see *S v Ndlovu and another* 1993 (2) SACR 69 (A) at 73a-c.

[98] Factors that have to be considered under s 3(1)(c) of the Law of Evidence Act are: the nature of the proceedings; the nature of the evidence; the purpose for which the evidence is tendered; the probative value of the evidence; the reason why the evidence is not given by the person upon whose reliability the probative value of such evidence depends; any prejudice to a party which the admission of such evidence might entail and any other factor which should in the opinion of the court be taken into account; see also *Savoi and others v National Director of Public Prosecutions and another* 2014 (1) SACR 545 (CC) para 49.

<u>(i) The nature of the proceedings</u>

[99] Being criminal proceedings the onus was on the State to prove the appellant's guilt beyond a reasonable doubt in a fair trial which in terms of the Constitution entails the right to challenge the evidence (s 35). However, the right to challenge evidence does not always encompass the right to cross-examine the original declarant; see *S v Ndhlovu and others* 2002 (2) SACR 325 (SCA) para 24; *S v Shaik and others* 2007 (1) SA 240 (SCA) para 171. In the criminal proceedings the

presumption of innocence and the right to challenge evidence (which are now constitutionally recognised features of the broader right to a fair trial) put a brake on reception of hearsay evidence in criminal trials against the accused. See s 35(3) (h) and s 35(3)(i) of the Constitution of the Republic of South Africa, 1996 (the Constitution).

<u>(ii) The nature of the evidence</u>

[100] Since in the case of hearsay evidence the witness is not subjected to the trial devices designed to identify, assess and eliminate those aspects of the evidence that render it potentially unreliable, it is important for a court to (a) understand what the potential dangers are; (b) consider the extent to which those dangers actually arise in the case before it; and (c) identify factors that tend to reduce or even eliminate those dangers. The dangers which a court must be alert to are: (i) insincerity on the part of the absent declarant or actor; (ii) erroneous memory; (iii) objective perception and (iv) adequate narrative capacity. It is only after considering these factors that the court is in a position to determine whether the hearsay evidence is sufficiently reliable to warrant its reception (subject to other factors in s 35(c)).

<u>(iii) The purpose for which the evidence is tendered</u>

[101] In *Hlongwane and others v Rector, St. Francis College and others* 1989 (3) SA 318 (D) at 324E-F the court considered the fact that hearsay evidence was tendered to establish a fundamental issue as opposed to a subordinate or side issue to be a fact that weighed against reception. In *S v Mpofu* 1993 (2) SACR 109 (N) at 116h-j Alexander J took the view that evidence that otherwise relevant should be admitted if it carries 'the hallmark of truthfulness and reliability'. In *S v Ramavhale* 1996 (1) SACR 639 (A) at 649a-e Schutz JA said:

> '[A court] should hesitate long in admitting or relying on hearsay evidence which plays a decisive or even significant part in convicting an accused, unless there are compelling justifications.'

<u>(iv) The probative value of the evidence</u>

[102] Legal relevance is a function of two variables, the probative value of the evidence and its prejudicial effect, and evidence may only be said to be legally

relevant if the first outweighs the second. Legal relevance is a necessary condition of admissibility.

(v) The reason why the evidence is not given by the person upon whose liability the probative value of such evidence depends

[103] The declarant may not testify simply because he or she has passed away or is unavailable. The admissibility of all hearsay evidence is rested on the two pillars of trustworthiness and necessity. In *S v Ndhlovu and others* 2002 (2) SACR 325 (SCA) para 44 the court found high probative force in the powerful way in which all the evidence interlinked and completed the mosaic of the State case. In *Skilya Property Investments (Pty) Ltd v Lloyds of London Underwriting* 2002 (3) SA 765 (T) at 804C-D the court took into account the manner in which the hearsay reinforced the other evidence and supported the basis of a suspicion.

(vi) Any prejudice to a party which the admission of such evidence might entail

[104] The hearsay declarant or actor does not testify in open court subject to the careful scrutiny of a judge, triers of fact, adversary, counsel and spectators; there is no oath; no factual platform established from which to infer a capacity and an opportunity for accurate description; he or she does not speak in response to questions which give shape to his or her testimony and lend to it both context and coherence; and, perhaps most significantly, there is no cross-examination to clarify confusion, expose dishonesty or error or extract information favourable to the adversary which might act as a counter-weight to the original information.

(vii) Any other factor which should in the opinion of the court be taken into account

[105] A court is under s 3(1)(c) required to consider all these dangers, as well as other factors set out in that paragraph, before deciding whether it is in the interests of justice to admit the evidence. Since these factors overlap it is more reasonable and advisable to give effect to their combined weight than to regard each as a separate determination of admissibility; see *Makhathini v Road Accident Fund* 2002 (2) SACR 511 (SCA) at 522C-D; *Skilya Property Investments (Pty) Ltd v Lloyds of London Underwriting* 2002 (3) SA 765 (T) at 800I – J.

Constitutionality of section 3(1)(c)

[106] The reception of hearsay evidence on the ground that it is in the interests of justice to do so must also pass the constitutional muster relating to the fairness of the trial. In *S v Ndhlovu and others* 2002 (2) SACR 325 (SCA) the constitutionality of s 3 was at issue and the Supreme Court of Appeal found that the scheme and the formulation of the section were consonant with the Constitution in that account had to be taken of the nature of the proceedings, and importance of a fair trial in determining whether it was in the interests of justice to receive hearsay evidence against an accused person in a criminal trial. The admission of hearsay evidence against an accused did not violate the accused's right to challenge the evidence by cross-examination, since the Constitution did not guarantee an entitlement to subject all evidence to cross-examination; it contained the right (subject to limitation) to 'challenge the evidence'. Where that evidence is hearsay, the accused is entitled to resist its admission and scrutinise its probative value but, if the interests of justice require its reception, the accused does not have the right to cross-examine the original declarant.

<u>Court *a quo*`s Reception of Hearsay Evidence</u>

[107] The court *a quo* ruled the hearsay evidence by Marais, and Riddle, which the State had tendered in order to prove the truth of the reports/statements the deceased had allegedly made to these witnesses, admissible in terms of s 3(1)(c) of the Law of Evidence Act on the grounds that it was in the best interests of justice to do so. The court *a quo* then undertook to provide reasons for its ruling later in the judgment, which it failed to do. The result is that the court *a quo* did not advance any reasons for its acceptance of the hearsay evidence. This Court has no power to advance reasons for the reception of the hearsay evidence on behalf of the court *a quo*. But, this Court has power to assess and analyse the evidence presented in the court *a quo* and decide whether the acceptance of the hearsay evidence in the present case was justified. In any event, allowing hearsay evidence will always be prejudicial to the party against whom it is allowed. That is so, because the original declarant cannot be cross-examined; see *S v Mokoena and others* 2006 (1) SACR 29 (W) at 47f.

[108] The State had tendered the evidence of Marais, and Riddle in order to prove the truth of the reports/statements the deceased made to them. These statements

were to the effect that the appellant had physically and emotionally abused the deceased; deprived him of his freedom of movement; overspent on the deceased's Edgars account; removed furniture from the deceased's house and that she ultimately abducted the deceased to Gauteng where she held him captive until he met his death, on 20 January 2006.

[109] For the reports/statements to be accepted as being truthful and reliable, the court must be satisfied that at the time the deceased made such reports/statements he was in full possession of his senses. The deceased had been diagnosed as being bipolar and he was on medication for such reason. Riddle testified that when she came to the deceased's house on 6 June 2005 the deceased was not in a good state of health and he had not taken medication for some days. It was against that background she took him to the chemist and bought him medication. No medical evidence was ever tendered as to what impact the lack of medication for some days on the part of the deceased would have had to his mental condition. The only evidence tendered in this regard was that of Marais and Riddle who expressed an opinion that the deceased was of sound mind. No reliance can be placed on such an opinion by Marais and Riddle since they were not qualified to express such an opinion. Marais testified that the deceased was an alcoholic and that even on the day of the consultation he had had something to drink though according to Marais he was not intoxicated. This was once again Marais' opinion as it could not be said with certainty what the alcohol content in the blood was, and ultimately what his, the deceased's, mental capacity was. In the premises, the truthfulness, the correctness and the reliability of the reports/statements he made to these witnesses could not be guaranteed.

[110] On 6 and 17 June 2005 respectively, Riddle claimed to have been present during the consultation between Marais and the deceased. Whereas Marais states that on these two occasions the deceased was alone. This creates a serious doubt as to whether Riddle had even been present during the consultation meetings between the deceased and Marais. With regard to the appellant's alleged overspending on the deceased's Edgars account, it was not in dispute that the slip for the purchases made was generated on 6 June 2005; this was the day of the consultation. The deceased told Marais and Riddle that the appellant had gone to

Johannesburg some time ago. Further, Riddle testified that on the day in question she was with the deceased from the time she arrived at the deceased’s home until they both went to Marais’ office for consultation. This would mean that the deceased could not be with the appellant at Edgars to authorise purchases she had allegedly made, as it was always the case when the appellant were to make purchases on the deceased`s Edgars account.

[111] After Riddle had reported the deceased missing to Taylor, both Riddle and Taylor proceeded to the deceased’s house. On their arrival there, they found blood all over the lounge and dining-room even though they did not agree on the quantity thereof and the area where it was in the house. Under cross-examination, Taylor conceded that in his initial police statement he made no mention of that there was blood in the dining room and the lounge of the deceased. Taylor could reasonably have been expected to have recorded this in his statement, as it was still fresh in his mind. More so, Taylor conceded that he did not involve the local criminal record centre in order to have blood, allegedly found in the deceased’s house, analysed. Therefore, it could not be said whether the blood in question was of an animal or human being, let alone it being the blood of the deceased. By the evidence relating to the presence of blood in the deceased house, the State intended to show that the deceased had violently been abducted from his house. No such proof was tendered.

[112] By tendering the evidence that the deceased, when he came to Marais’ office for consultation, had an injury to his arm, the State intended to prove that the appellant was physically abusing him. Marais’ evidence as to how the deceased got injured to his arm could not find any corroboration from the evidence of Riddle, who could not tell how the deceased sustained an injury to his arm. Nor was the medical practitioner, who allegedly treated the deceased for such an injury, called to testify. In the premises, it could not be said that the explanation the appellant proffered that the deceased sustained such injury when he fell down during his intoxication, was improbable let alone being false beyond reasonable doubt.

[113] By the evidence of Marais that the deceased had complained to him that his wife had on three occasions locked him inside his house, the State intended to show that the appellant deprived the deceased from freedom of movement and kept him

captive in his own house. However, that the deceased told Marais that on the third occasion the appellant locked him outside the house, detracts seriously from the truthfulness and correctness of the statement that the appellant deprived the deceased freedom of movement since locking the deceased outside the house was not consistent with the intention to deprive the appellant of his freedom.

[114] The evidence by Doris Ntinga that the appellant, before the disappearance of the deceased, removed the keys to the deceased's house from her possession constituted an assertion by implication that the appellant was responsible for the subsequent removal of the furniture from the deceased's house. In my view, this evidence was legally irrelevant, due to its unreliability, to be accepted as accurate proof that it was the appellant who had removed furniture from the deceased's house either before or after the deceased's alleged abduction.

[115] With regard to the evidence tendered to support the allegation that after abduction the appellant kept the deceased captive on a certain premises at Midrand, Gauteng, Riddle gave Taylor the contact number of the deceased, in order to assist in tracing the deceased. Subsequent to that, Taylor had a telephonic conversation with the deceased on 17 November 2005. He also received a message from the appellant that she and the deceased were happily married and that they were then residing at […] C. Road, Midrand, Gauteng. However, he, Taylor, made a feeble attempt to verify the alleged physical address of the appellant and the deceased at Midrand. He only contacted Sergeant Kwesi of Midrand Police Station to look for the physical address in question. Kwesi allegedly looked for the place in the map and said that it did not exist. Nor did Taylor take any further steps to verify the alleged physical address. Nor did he contact Pam Golding or the deceased's daughter, who was by then also resident in Gauteng, to help in this regard. Sergeant Kwesi did not testify as a witness. Riddle had been given a contact number of the Pam Golding agent who was then selling the property to the appellant and the deceased at Midrand. There was nothing to show that such agent was ever contacted to verify the whereabouts of the appellant and the deceased at Midrand.

[116] It is unlikely that the appellant having abducted and kept the deceased captive on a certain premises at Midrand, before his death, she would allow him to have

telephonic conversations with persons like Ntinga and Taylor. The evidence shows that shortly after the disappearance of the deceased, Ntinga contacted the deceased telephonically and enquired from him his whereabouts and after the state of his health. The deceased responded, saying that he was in Pietermaritzburg and that he was in a good state of health. Taylor also had a telephonic conversation with the deceased and he later received a message from the appellant that she and the deceased were happily married and residing at 1387 Concerto Road, Midrand, Gauteng. It was only Riddle that the appellant disallowed telephonic contact with the deceased. This could be consistent with the appellant's version that the deceased did not want to have contact with the members of his family, for fear that they would interfere with their marriage.

[117] Whilst in Gauteng the couple, the deceased and the appellant, still had contact with the Pam Golding Branch in Gauteng and Pam Golding Richards Bay Branch. It was a Pam Golding agent who helped the couple to acquire property at Midrand. They also telephonically contacted Pam Golding at Richards Bay to put up their house at H. for sale in order for them to be able to purchase property in Gauteng. This is evident in the testimony of Riddle that on enquiring about the sale of the house at Richards Bay, the Pam Golding staff advised her that they had received a telephone call from Mr Griffiths to put the house up for sale. A member of Pam Golding then furnished Riddle with the contact number of a Pam Golding agent in Gauteng who was then helping the appellant and the deceased to acquire property in Gauteng.

[118] More so, Taylor tried in vain to freeze the deceased's bank account or to stop a cheque at Midrand First National Bank on the allegation that the deceased had been abducted. The deceased personally proceeded to the bank and told the bank staff that he had not been abducted, and as a consequence the cheque was cleared. In a telephonic conversation between the deceased and Taylor, the former told the latter that it must get into his head that he was not abducted and to stop fooling with his bank account. Taylor said that he did not remember that conversation taking place. It could be that the conversation did take place between the two but Taylor could not remember. In the premises, the possibility of such conversation taking place could not be excluded.

[119] The State in its evidence in this case failed to exclude the possibility of the deceased being of unsound mind when he allegedly made the reports/statements to the State witnesses, Marais and Riddle, in particular, which to a certain extent not coherent, as outlined above. Absent proof that the deceased was indeed of sound mind when he made the statements to the witnesses, the evidence relating to the reports/statements the deceased allegedly made to the state witnesses was not legally relevant to be accepted as the truth of what actually transpired and that such events had connection with the death of the deceased.

[120] The general rule is that all the facts relevant to the issue in legal proceedings may be proved. The facts in issue in a criminal case are determined on the basis of the elements of the crime in question. The facts relevant to the facts in issue must be logically connected with the facts in dispute. In the present case, the State failed to establish any logical connection between the allegations of the physical abuse of the deceased by the appellant, the appellant's overspending on the deceased's Edgars account, detention of the deceased in his own house, abduction and the holding of the deceased captive at a certain premises in Gauteng by the appellant and the death of the deceased.

<u>Circumstantial evidence</u>

[121] In convicting the appellant the court *a quo* solely relied on circumstantial evidence in the form of hearsay evidence relating to the alleged physical abuse of the deceased; detention of the deceased in his own house; siphoning of his money from his bank account; abduction and ultimately holding of the deceased captive in Gauteng by the appellant as well as the alleged pointing out of the deceased's body to the police by the appellant as the intermediate factors supporting the inference that the appellant was responsible for the death of the deceased.

<u>Cardinal rules of reasoning by inference</u>

[122] In *R v Blom* 1939 AD 188 at 202-203 the Appellate Division laid two cardinal rules of reasoning by inference as follows:

(a) The inference to be drawn must be consistent with all the proved facts, if it is not, then the inference cannot be drawn;

(b) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inferences sought to be drawn is correct.

[123] Circumstantial evidence, of course, rests ultimately on direct evidence and there must be a foundation of proved or probable fact from which to work; see *R v Mtembu* 1950 (1) SA 670 (A) at 679-680, as per Schreiner JA. The hypotheses of physical abuse, holding of the deceased captive at his own house, siphoning of his money, overspending, abduction and ultimately detention of the deceased at the premises in Gauteng by the appellant (as the intermediate facts to the appellant`s guilt of the crimes charged), should be proved beyond reasonable doubt before any inference can be drawn from them. Therefore, it follows that the appellant could not be found guilty of murder and robbery unless such hypotheses had been proved beyond reasonable doubt; see *Chamberlain and Another v The Queen [No.2]* (1984) 153 CLR 521. Each of these facts must be proved beyond reasonable doubt; see *R v de Villiers* 1944 AD 493 at 508.

[124] The court *a quo* identified certain situations, as demonstrated above, where in its view intermediate facts constituted indispensable links in the chain of reasoning toward an inference of guilt. The court is not permitted to convict an accused if there is a reasonable doubt as to his guilt, no mode of reasoning can be countenanced that yields a result at odds with this policy.

[125] The intermediate facts are essential to the proof of guilt. The proved facts should be such as to render the inference sought to be drawn more probable than any other reasonable inference. The facts as a whole must exclude all other inferences. The proof of intermediate facts must be consistent with a finding that the onus has, at the end of the day, been discharged by the party bearing it. The proof of intermediate facts can only in this way be regarded as a link in the chain of inferences. At the court *a quo,* in the present case, the evidence the State presented in this regard had too many holes, as indicated above, to exclude a reasonable doubt as to the appellant’s guilt in the commission of the crimes charged.

[126] In order to justify the inference of guilt the exculpatory factors must be incompatible with the innocence of the accused, and incapable of explanation upon the reasonable hypothesis than that of guilt; see *S v Thwala* 2014 (1) SACR 414 (KZP); *Wills Principles of Circumstantial Evidence* 7th ed (1936) edited by VRN Gathis and Kushna Machiriat at 320. The question follows in the present case is whether there was evidence before the court *a quo* from which inference could be drawn which would have the effect of excluding the alternative hypothesis of innocence on the part of the appellant.

[127] As a general rule, all facts that are relevant to the issue in legal proceedings may be proved. A fact is relevant when an inference can properly be drawn from it as to the existence of a fact in issue; see *R v Trupedo* 1920 AD 58. In which event, the inference the court draws will be a reasonable one and therefore relevant to the facts in issue. For evidence to be admissible in this regard, it must at least afford a reasonable inference as to the principal matter in dispute. In other words, evidence which does not meet at least this minimum requirement is simply irrelevant, and is inadmissible on that ground. In the present case, the evidence the State presented did not meet this minimum requirement and as a consequence, the inference sought to be drawn was incorrect. As there were no proved facts it is not necessary to inquire into whether or not the proved facts were such as to exclude other inferences. The evidence was therefore inadmissible as no inference could properly be drawn from it.

<u>Proof as to the appellant's guilt</u>

[128] In a murder case, the State had to prove that the accused intentionally and unlawfully "killed" the deceased in the sense that she was responsible in law for the conduct which the law regards as having caused the death of the deceased; see *The South African Law of Evidence (formally Hoffman and Zeffert)* (2003) DT Zeffert et al at 98. Proof of intermediate facts, namely that the appellant physically abused the deceased; kept him as a virtual prisoner in his own house; overspent on his Edgars account; abducted the deceased and held him captive in Gauteng and that she depleted his bank account immediately before his death, the State tendered as a *conditio sine qua non* of a finding that the appellant was guilty of the crimes charged, did not exclude a reasonable doubt as to the guilt of the appellant. Nor did the State

present any evidence tending to implicate the appellant directly in the commission of murder and robbery with aggravating circumstances.

Appellant`s alleged pointing out of the deceased's body

[129] Instead, in order to sustain a conviction on the charge of murder against the appellant the State relied on the appellant's alleged pointing out in terms of s 218(2) of the Act of the body of the deceased to the non-commissioned police officers; Nzimande and Ndlela. Section 218(2) of the Act provides:

> 'Evidence may be admitted at criminal proceedings that anything was pointed out by an accused appearing at such proceedings or that any fact or thing was discovered in consequence of information given by such accused, notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible in evidence against such accused at such proceedings.'

[130] With regard to the appellant's alleged pointing out of the body of the deceased to the police, the learned judge concluded by saying 'we accordingly conclude that the discovery of the deceased's body would never have taken place without the help from information provided by the accused. It is thus reasonable to infer that she bore knowledge all along as to what happened to the deceased during the evening of the 19 January 2006'.

[131] It was common cause that the pointing out was part and parcel of an inadmissible confession made to non-commissioned police officers, Warrant Officer Nzimande and Detective Warrant Officer Ndlela. The voluntariness of the confession the appellant allegedly made to the non-commissioned police officers was not proved through a trial-within-a trial. Nor was it known, what the appellant had said to the police officers which led to the pointing out of the deceased's body.

[132] Section 218(2) entitles the prosecution to adduce evidence of the pointing out of a thing or the discovery of a fact, and to that end an accused is precluded from objecting to such evidence on the ground that the pointing out or information forms part of an inadmissible confession. However, this does entitle a prosecutor to lead evidence of an inadmissible confession, for that would be to emasculate the provisions of s 217. Nor does s 218(2) authorise the production of a confession in

the guise of a pointing out. In *S v Mbele* 1981 (2) SA 738 (A) at 743B-C Kotze JA said*:*

> ‘Hierdie artikel wettig slegs die aanwysings en nie die voorlegging van ‘n bekentenis onder die skyn van ‘n aanwysing nie.’

See also *S v Magwaza* 1985 (3) SA 29 (A) at 36.

[133] The fact that a pointing out forms part of an inadmissible confession is, by virtue of s 218(2) irrelevant to the question of its admissibility. Subsection (2) allows a court to receive evidence that something was either pointed out by the accused or discovered as a result of information given by him, even if the pointing out or information forms part of an inadmissible confession or statement by him.

[134] In *R v Samhando* 1943 AD 608 the appellant had been convicted of murder. The prosecution tendered evidence of an admission, made by the appellant after the application of considerable violence, and evidence that he had pointed out to his interrogators an orange tree where the blood stained clothing of the deceased had been concealed. He also pointed out an axe about five hundred yards away from this tree. The court *a quo* excluded the evidence of the admission but received the evidence of the pointing out. The Appellate Court held that the evidence had been correctly received since the appellant’s knowledge of where these items had been concealed was highly relevant to his guilt. *Samhando’s* case then became the authority for the proposition that evidence that something had actually been discovered as a result of an involuntary pointing out was admissible in our law. At the time of this decision evidence of pointing out was governed by s 274 of the Criminal Procedure and Evidence Act 31 of 1917, the precursor of s 218 of the present Act.

[135] In *R v Duetsimi* 1950 (3) SA 674 (A) the court held that where an accused makes a statement, which did not amount to confession the fact that it was not made freely and voluntarily would not prevent the prosecution from providing (1) things discovered as a result of the statement and (2) the fact that the accused had pointed them out. That something had actually been discovered as a result of an involuntary pointing out was admissible in our law.

[136] However, in *R v Duetsimi* case at 677A-B *Samhando's* case was distinguished and Schreiner JA said:

> 'It seems to be clear that all the pointing out was part of a single course of contract, and if it was an elaboration of an inadmissible confession the whole of it should have been excluded.'

[137] In *R v Nhleko* 1960 (4) SA 712 (A) the court held that s 218(2) allows nothing more to be proved than the pointing out of a place or thing. In *S v Nkwanyana* 1978 (3) SA 404 (N) at 405H Hoexter J defined 'pointing out' as an 'overt act whereby the accused indicates physically to the inquisitor the presence or location of something or someplace actually visible to the inquisitor.' The mere pointing out is not sufficient by itself to prove his knowledge of the thing pointed out in some fact connected with it. The element of discovery does not provide absolute guarantee of the trustfulness of the inadmissible confession.

[138] In *S v Sheehama* 1991 (2) SA 860 (A) the Appellate Court moved away from the *Samhando* decision by holding that the pointing out should be viewed as admissions by conduct and that their admissibility should be governed by the provisions of s 219A and 217 of the Act relating to admissibility and confessions respectively. In other words, the pointing out must have been freely and voluntarily made. This is based on two deep rooted principles of our law: first, that involuntary statements made by an accused are inadmissible against him. Not only because they are untrustworthy as evidence but mainly because in a civilised society it is vital that persons in custody or charged with offences should not be subjected to ill-treatment or improper pressure in order to extract confessions and, second, that no one can be compelled to give evidence incriminating himself.

[139] Section 219A(1) provides:

> 'Evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in evidence against him at criminal proceedings relating to that offence ...'

In *S v Khumalo* 1992 (2) SACR 411(N) the court took the view that the decision in *Samhando* was rendered inapplicable by the combined operation of s 219A and the decision in *Sheehama* that a pointing out is an admission by conduct.
[140] In *S v Jordaan* 1992 (2) SACR 498 (A) the court held that the discovery of weapons as a result of a pointing out by the accused constituted "n uitsonderings geval waar `n gedwonge uitwysings in elke geval toelaatbaar sou wees.' For this proposition the court relied on the decisions in *Samhando* and *Sheehama* cases. In *Jordaan* the accused had not alleged that the pointing out had been induced by force or undue influence.

[141] In *S v Mokahtsa* 1993 (1) SACR 408 (O), the court held that the supplying of information which led to the discovery of something which was involved in the commission of the offence amounted to an admission by conduct, at least in so far, as it indicated knowledge on the part of the accused of the incriminating object. Since the accused had supplied this information under duress, the admission had not been voluntarily made and was accordingly inadmissible.

[142] Section 218 creates no special immunity to the general conditions for the admissibility of admissions and confessions set out in ss 219 and 217. In *S v January; Prokureur-General, Natal v Khumalo* 1994 (2) SACR 801 (A) Van Heerden JA found that the *Samhando* exception was overridden by the provisions of s 219A (1). In this case, the Appellate Division held that proof of a pointing out by an accused which is involuntary by reason of something said or done by a person in authority is inadmissible in a criminal trial even if something relevant to the charge is discovered as a result thereof. The admissibility of the statement and pointing out was contested by the appellant on the grounds that it had been induced by an assault on him.

[143] Section 218(2) expressly provides that the evidence is admissible even if the fact is discovered against the 'wish or will' of the accused. In *S v Ismail and others (1)* 1965 (1) SA 446 (N) at 450H Milne JP pointed out that the words refer to the actual discovery of the fact sought to be led in evidence and not the confession containing the information which led to the discovery.

[144] The section is now to be read as meaning that a pointing out that forms part of an inadmissible admission or confession may be received if it is not otherwise inadmissible and if it is not otherwise, among other things, that the pointing out was not freely and voluntarily made and it is appropriate, in the first place, to view it as constituting an admission or a confession. In a case of a pointing out the probative value of the pointing out depends, to some extent, on the credibility of the accused. There is a need to exclude involuntary admissions in order to preserve the fairness of the trial, the integrity of the judicial process and interests of justice.

[145] Section 217(1)(a) provides:

> '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: Provided-
>
> (a) that a confession made to a peace officer, other than a magistrate or justice, or, in the case of a peace officer referred to in section 334, a confession made to such peace officer which relates to an offence with reference to which such peace officer is authorized to exercise any power conferred upon him under that section, shall not be admissible in evidence unless confirmed and reduced to writing in the presence of a magistrate or justice'.

[146] Accused cannot by waiver or consent render admissible a statement which the legislature has expressly and unconditionally declared to be inadmissible, see *R v Perkins* 1920 AD 307 at 311. There are two separate, but related, enquiries that have to be carried out in determining the admissibility of a confession or admission: first, whether the requirements of ss 217 and 219A have been satisfied, and, second, whether, in all the circumstances, the accused has had a fair trial. In *S v Nombewu* 1996 (2) SACR 396 at (E) 420c-d the court held:

> 'If the court finds that the accused acted freely and voluntarily and that the evidence is relevant it shall allow such evidence; unless, separately, it exercises its general discretion to exclude it in the interests of a fair trial.'

[147] In *S v Naidoo and another* 1998 (1) SACR 479 (N) the court held that evidence that had been obtained by the State as a result of a deliberate and

conscious violation of constitutional rights should be excluded. The evidence which is obtained in an illegal manner can be excluded on two grounds: namely; (a) the accused cannot be compelled to provide evidence against himself; and (b) evidence which is obtained by duress from the accused cannot be used against him; see also *S v Nel* 1987 (4) SA 950 (W).

[148] The exclusion of evidence arose from the "need to ensure the fairness and integrity of the criminal process at least from arrest up to and including the trial"; see *S v Melani and others* 1996 (1) SACR 335 (E) at 351b. "Illegally obtained evidence" refers to evidence gathered as a result of a gross violation of a person's rights which may render the perpetrator or State liable, whilst improperly obtained evidence may result from some deceit which may be unfair or improper without bearing the additional taint of being illegal; see Zeffert *et al The South African Law of Evidence* (2003) at 625.

[149] In *S v Nombewu* 1996 (2) SACR 396 (E) the court held that there was a judicial discretion to exclude admissible statements when the probative value was out-weighed by the prejudicial effects and possibly, that the power existed to exclude such evidence when it would be unfair to admit it. The right not to be compelled to make an admission or confession has been elevated to constitutional right in s 35(1)(c) of the Constitution. The Constitutional Court in *Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others* 1996 (1) SA 984 (CC) accepted that there was a general discretion to exclude improperly obtained evidence; see *S v Magwaza* 2016 (1) SACR 53 (SCA).

[150] Section 35(5) of the Constitution provides:

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

Section 35(1)(c) provides that every person who is arrested for allegedly committing an offence has the right not to be compelled to make any confession or admission that can be used against that person: such a person has also a right to remain silent as well as to be informed promptly of that right and of the consequences of not remaining silent (s 35(1)(a)(b)), in a language that person understands (s 35(4)). A detained person has a right 'to choose, and to consult with, a legal practitioner, and not to be compelled to give self-incriminating evidence (s 35(3)(j)).'

[151] In *S v Matlou and another* 2010 (2) SACR 342 (SCA) para 30 the Supreme Court of Appeal was confronted with a situation where the trial court had taken into account the fact that the appellant, in a murder trial, had pointed out the deceased's body and a firearm to the police, even though the pointing out had been induced by an assault on him by the police. At para 22, Bosielo JA found that there was a direct clash between ss 218(2) and 35(1)(a)(b) and (c) read with s 35(5) of the Constitution. He concluded that the admission of the evidence would not only render the trial unfair but would involve the judicial process in a moral defilement, compromise the integrity of the judicial process and dishonour the administration of justice; see also *S v Mthembu* 2008 (2) SACR 407 (SCA) para 36. The pointings out were excluded because they were not freely and voluntarily made.

[152] The onus rests on the State to prove beyond a reasonable doubt that a confession was freely and voluntarily made. In the present case, it was common sense that the pointing out was part and parcel of an inadmissible confession made to non-commissioned police officer; Warrant Officer Nzimande and Detective Warrant Officer Ndlela, who were Peace Officers, but not Justices of the Peace. A Justice of the Peace is a commissioned officer of the South African Police Service who holds a rank of lieutenant or higher, and is in terms of s 4 of the Justices of the Peace and Commissions of Oath Act 16 of 1963 read with the First Schedule of the Act, *ex officio* a justice of the peace and therefore entitled to take a confession according to the underlying rationale of s 217 (1) (a) of the Act.

[153] A confession made to a peace officer should not be admissible into evidence unless confirmed and reduced to writing in the presence of the magistrate or justice of the peace. If a confession does not comply with the requirements of s 217(1)(a) of the Act, in that a confession statement was made to a peace officer but not reduced to writing and confirmed as required in s 217, it can only be admissible as an admission.

[154] In the *Sheehama* case, the court held that a pointing out is essentially a communication by conduct, and it amounts to an extra-curial admission as embodied in s 219A of the Act. "Pointing outs are not per se admissible but must be made freely and voluntarily; and where this is in issue, such admissibility should be proved by the State in a trial-within-a-trial *Mhlongo v S* [2015] ZAKZPHC 9.

[155] The evidence of a pointing out in terms of s 218(2) in the present case amounted to an admission. However, it should be made freely and voluntarily. For, it is a basic principle of our law that an accused cannot be forced to incriminate himself against his will. Forced pointing outs are not admissible as admissions are subject to the rules of admissibility relating to admissions because their reception runs counter to our legal policy that no one should be forced to give evidence incriminating himself. If the court finds that the accused acted freely and voluntarily and that the evidence is relevant, it shall allow such evidence, unless, separately, it exercises its general discretion to exclude it in the interests of a fair trial.

[156] The evidence that was obtained in a manner that violates the Bill of Rights and its admission would render the trial unfair or be otherwise detrimental to the administration of justice runs counter to the provisions of s 35(3) and (5) of the Constitution, in particular. In the present case, according to the appellant, she pointed to the police the place where she last saw the hijacked motor vehicle. Whereas the police officers, Nzimande and Ndlela, stated that the appellant pointed out to them the spot where the body of the deceased was later found. On that basis, the court *a quo* imputed knowledge of the commission of the crime of murder on her. It then concluded that all along the appellant had known that the body of the deceased was lying on the spot where it was discovered.

[157] Before such conclusion was drawn, the court *a quo* did not focus on the voluntariness of the pointing out that the appellant allegedly made. The appellant stated that prior to her taking the police officers to the spot where the pointing out was allegedly made the police officers, Nzimande and Ndlela, assaulted her by kicking her with booted feet on the buttocks and they verbally abused her. Simply because the appellant said that she was also anxious to have the body of her husband, the deceased, found, the court *a quo* concluded that she had pointed out

the spot in question to the police offices freely and voluntarily without any proof to that effect. Voluntariness on the part of the appellant had never been determined through a trial-within-a-trial, let alone that she had knowledge of the commission of the crimes charged. The reasonable doubt of the appellant's innocence was not excluded. Whether an accused pointed out the place where a crime had been committed, and whether the accused was implicated in the commission of the crimes charged depended entirely on the facts of the present case. The State relied on the hypotheses of an assault on the deceased, abduction, overspending on an Edgars account, holding of the deceased captive in Gauteng and depletion of the deceased's bank account allegedly by the appellant as the strong indicators that the appellant was responsible for the death of the deceased. The court *a quo* found the fact that as a result of the information given by the appellant to the non-commissioned police officers the body of the deceased was found as a guarantee of truthfulness and reliability of the information allegedly given.

[158] The Court *a quo* found that the appellant had no income of her own. She was completely dependent on the deceased, financially. Her conduct from the inception of her relationship with the deceased, according to the court *a quo*, suggested that she was not really interested in him but in his money and the material things he could provide her. The court *a quo* seemed to have been carried away with the hearsay evidence that the State had tendered that the appellant was a young, capricious call-girl who married the deceased for material things i.e. his money and property, and as a result it gave inadequate consideration to the weight to be attached to the evidence that the State had tendered in this regard.

[159] The voluntariness of the confession the appellant allegedly made to the non-commissioned police officers was not proved through a trial-within-a-trial. Nor was it known what the appellant had said to the police officers which led to the pointing out of the deceased's body. If the report the appellant made to the police officers was an admission, not a confession, there was nothing preventing the State from tendering evidence relating to the contents thereof in terms of s 219A. The State would only prove that the appellant had made such extra-judicial admission, in relation to the commission of the crimes of murder and robbery with aggravating circumstances, freely and voluntarily. However, the State did not tender any such evidence.

[160] What is admissible in terms of s 218 of the Act, is the evidence of a fact discovered in consequence of information derived from a confession or other statement (including the pointing out). However, evidence of knowledge on the part of the accused is not admissible. In *January* case Van Heerden JA said (see pages 808I – 809A):

> 'Hence s 218(1) also does no more than to declare admissible evidence of a *fact* discovered, or of which knowledge was obtained, in consequence of information given (whether by conduct or otherwise), by the accused, and not also of the information so given. In other words, the subsection does not permit proof of a link between the accused and the discovery or knowledge gained of such a fact.'

[161] Section 218(1) provides:

> '(1) Evidence may be admitted at criminal proceedings of any fact otherwise admissible in evidence, notwithstanding that the witness who gives evidence of such fact, discovered such fact, or obtained knowledge of such fact only in consequence of information given by an accused appearing at such proceedings in any confession or statement which by law is not admissible in evidence against such accused at such proceedings, and notwithstanding that the fact was discovered or came to the knowledge of such witness against the wish or will of such accused.'

This means that even if an admission or confession is inadmissible, facts discovered as a result of information in the statement are receivable in evidence. But the admission or confession itself remains inadmissible even though its genuines may be said to have been confirmed by the facts discovered.

[162] In *R v Tebetha* 1959 (2) SA 337 (A) at 343A-B the court held the provisions of s 218(1) did not permit proof of a link between the accused and the discovery or knowledge gained by a fact discovered. The fundamental reason for excluding admission by an accused is that it is untrustworthy as testimony. That would lead to admission or otherwise inadmissible confession.

[163] In the *Tebetha* case, at 346C-D, with regard to a pointing out, Hoexter JA said the following:

> 'When a person points out a thing, the pointing out is his act and proves that he has knowledge of some fact relating to that thing. In the case of the discovery by the police of a thing, there is no proof of knowledge of any fact in relation to that thing on the part of the person under trial unless there is proof that the discovery was made in consequence of information given by such person . . .'

[164] In the present case, it was in dispute whether the body of the deceased was pointed out by the appellant or by the police. The information the appellant had allegedly given to the police was not disclosed and it therefore remained unknown what she had said, let alone that what she said, she had said it feely and voluntarily. All this, could only have been established through a trial-within-a-trial proceedings, which in the present case did not take place.

[165] In the premises, no knowledge of the discovered body of the deceased could legitimately have been imputed on the appellant. In the circumstances, the version of the appellant that she only pointed to the police a general area where she had last seen the hijacked vehicle could not be said to be improbable that it could not be reasonably possibly be true. Proof of the link between the commission of the crime of murder and the pointing out of the body of the deceased, should have been established through a trial-within-a-trial. The pointing out must have been made freely and voluntarily for it to be admitted as evidence before court; see *Sheema* case at 877G-H.

[166] The confession, from which the information resulted in the discovery of the body of the deceased, was itself inadmissible. Even if it can be said to have been made freely and voluntarily, it is inadmissible on the ground that it was made to non-commissioned police officers and it was not reduced to writing or confirmed before a magistrate as s 217(1)(a) of the Act directs.; see *S v Ismail and others (1)* 1965 (1) SA 446 (N). This will remain the position even if it can be said that the body of the deceased was discovered as a result of the information the appellant had given to the police and that the discovery of the body provided a guarantee of truthfulness and reliability of the information given. The same applies where it is said that following the information the appellant gave to the police, she pointed out the body of the deceased to the police.

[167] The onus was on the prosecution to prove beyond a reasonable doubt that the knowledge allegedly demonstrated by the appellant could only have been acquired through her participation in the commission of the crimes charged; see *S v Gwevu and another* 1961 (4) SA 536 (E) at 537E-F; *S v Shabalala* 1986 (4) SA 734 (A) at 748I-J. The evidence in the present case cannot be said that it is such that the appellant could only have acquired the knowledge of the killing of the deceased through her participation in the commission of the crimes charged. The appellant was present when the robbers hijacked the vehicle and when the robbers drove a vehicle with the deceased in it, leaving her on the scene. The State did not tender any evidence to the contrary. The innocent explanation of knowledge on the part of the appellant could not be said that it was at odds with the evidence tendered before the court *a quo*.

[168] An accused has a right to a fair trial, which is to be conducted in accordance with the "notions of basic fairness and justice", and the admission of a confession in the absence of a trial-within-a-trial in the circumstances of the present case offends such notions. The court admitted the evidence for its testimonial value rather than its circumstantial value. The underlying rationale of s 217(1) is the fundamental principle that no inducement or coercion is to be brought to bear on an accused person to confess. The evidence that the State tendered in this regard did not exclude this possibility of inducement or coercion on the part of the police officers.

[169] The court *a quo* held that the argument advanced by the State was one of those cases where the accused was enmeshed by the web of circumstances which were cohesively linked to each other calling for a truthful response which she just failed to forward. The court *a quo* was of the view that the State had succeeded in establishing a network of facts around the accused which were so coherent in their texture that they afforded no opportunity for her to break through them. According to the court *a quo* a glaring motive ran like a golden thread though out the State case. It was a thread of greed, manipulation and deception on the part of the appellant which culminated in the killing of the deceased.

[170] The analysis of the evidence in this case shows that the link of the chain of reasoning by inference which might have been existing between the intermediate facts and the guilt of the appellant broke when the State failed to prove beyond reasonable doubt the hypotheses of an assault on the deceased, his detention in his own house as a virtual prisoner, overspending on Edgars account, abduction of the deceased and ultimately holding him captive in Gauteng by the appellant, as a *conditio sine qua non* the appellant’s guilt of murder and robbery with aggravating circumstances. As these facts could not be proved beyond reasonable doubt no inference could properly have been drawn from them. The State had tendered such evidence for no other purpose than proving the truth of its contents. For such facts to form a foundation from which an inference of the appellant`s guilt is to be drawn they must have been proved beyond all reasonable doubt. As these were assertive statements or facts, the danger of insincerity could not be excluded on the part of the deceased as a declarant.

[171] The probative value of most of the evidence relating to the intermediate facts, as outlined above, depended much on the credibility of the deceased as a declarant and the truthfulness of his statements to hearsay witnesses. A witness`s credibility means not only his or her honesty but also his or her power of perception; memory and accuracy of narration. The statements the State relied on for its case were not made under oath, and the appellant had therefore been deprived of the opportunity to question the deceased as the maker of most of the statements in order to clarify confusion, express dishonesty or error on the part of the deceased. As a consequence the court failed to probe and assess the danger of hearsay evidence. More so, the State did not tender any independent corroborative evidence tending to support its version and hence to enhance the reliability of the deceased’s account to hearsay witnesses. The appellant was once again deprived of the opportunity, through cross-examination, to cast doubt on the reliability and the truthfulness of the deceased, as a declarant.

[172] The evidence relating to the physical abuse of the deceased, deprivation of his freedom of movement, abduction and ultimately holding of the deceased captive on certain premises in Gauteng by the appellant, as intermediate facts to the appellant’s guilt, and the alleged pointing out by the appellant of the body of the

deceased to the non-commissioned police officers, Nzimande and Ndlela, had little probative value and at the same time a strong potential to prejudice the appellant. This evidence was therefore, logically relevant but legally irrelevant as potential for prejudice to the appellant outweighed its probative value. In the premises, it should not have been accepted as evidence tending to prove the guilt of the appellant.

[173] Given the nature of the evidence the State led in so far as to the appellant's conduct from the outset was concerned, the court *a quo* did not consider the State's failure to lead evidence with regard to certain serious allegations, as contained in the indictment and in its summary of substantial facts, to be of any real consequence. The State failed to establish any logical connection between the intermediate facts and the killing and robbery of the deceased. The State did not tender any evidence to the effect that the appellant conspired with certain persons to kill the deceased. Nor did it prove that the appellant unlawfully and intentionally killed the deceased or that she, in any manner, participated in the killing of the deceased.

[174] The evidence the State tendered to prove the appellant`s guilt of the crimes charged varied greatly from the allegations the State made in its summary of substantial facts. In this regard, the court *a quo* held that the purpose of the summary of substantial facts was merely to inform an accused person about the nature of the case he or she is facing by setting out material facts on which the prosecution relies. For its decision, the court *a quo* relied on *S v Van Vuuren* 1983 (1) SA 12 (A) at 21E. Also s 144(3) of the Act makes it plain that the Attorney-General (Director of Public Prosecutions) is not bound by the contents of the summary.

[175] Though in the *Van Vuuren* case the court held that the State is not required to set out exactly what evidence will be led to prove the allegations against the accused, the fact that the evidence the State presented is at great variance with the summary of substantial facts raises eyebrows. In *S v Kgoloko* 1991 (2) SACR 203 (A) at 206B the Appellate Division held that 'there is, however, no reason why a court should not, in assessing the weight to be attached to the State case compare the evidence actually led with the summary of what the State intimated it intended to prove'; see also *S v Fhetani* 2007 (2) SACR 590 (SCA) para 4. Further, in my view,

the fact that the evidence the State presents, differs markedly from the summary of substantial facts may impact negatively on the fairness of the trial. In preparing for trial an accused will expect to meet the case the State has foreshadowed in the summary of substantial facts, only to find that on the trial date the State presents a different case altogether. That will prejudice the accused in various ways.

[176] The court *a quo* found the version of the appellant not explicable on any credible basis why the deceased would have sought a divorce and would have gone to the lengths that he did obtain interim protection order against the appellant and her relatives if not for the reason that he was being abused, materially deprived of his freedom and completely controlled by the appellant. This finding had the effect of imposing an onus on the appellant to prove her innocence, which in law she did not have.

[177] On the whole the court *a quo* found that the State had succeeded to prove the guilt of the appellant beyond all reasonable doubt. It then took the view that it was well established that the State was not required to plug every loophole or counter every speculative argument and parry every defence which can be conceived by imaginative counsel without sharp evidence to substantiate it. The court *a quo* stated that it was enough that the State presented a strong *prima facie* case which called for a reasonable and truthful response. According to the court *a quo* the various pieces of evidence presented by the State fitted into each other like a jigsaw puzzle. The court *a quo* then concluded by holding that the only reasonable inference to be drawn from all the established facts was that the appellant, acting in concert and in execution of a common purpose with persons unknown, was involved in the killing and robbing of the deceased during the night of 19/20 January 2006.

[178] In evaluating and weighing up the evidence, the correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are in indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude a reasonable doubt about the accused's guilt; see *S v Chabalala* 2003 (1) SACR 134 (SCA) at para 15.

[179] The court *a quo* stated that the evidence must be considered in its totality; the guilt of the appellant was to be inferred from the cumulative effect of all the facts and that it was not necessary that each individual piece of evidence must be proved beyond reasonable doubt. The court *a quo* was of the view that it was trite law that it was entitled to find that the State had proved a fact beyond reasonable doubt if a *prima facie* case had been established and the appellant failed to gainsay it. It concluded by saying that there was no obligation on the State to close every avenue of escape which might be open to the appellant. It went on to criticise the testimony of the appellant as having contradictions relating more particularly to the alleged rape on the appellant. The court *a quo* then found the appellant to be a mendacious and cunning person.

[180] Though such criticism against the appellant's testimony is legitimate and valid the State had not succeeded to establish a *prima facie* case against the appellant. The State did not tender any direct evidence tending to prove that the appellant had unlawfully and intentionally robbed and killed the deceased at all. Nor did it prove that she in any way participated in the commission of the crimes charged. Therefore, I have not found it necessary to numerate contradictions in the appellants' testimony and to reject it as false beyond reasonable doubt.

[181] The court *a quo* failed to exclude the hearsay evidence which the State had tendered to prove the truth of what the deceased had told the State witnesses Marais, Riddle and Ntinga, as having little probative value and prejudicial to the appellant. The court *a quo* thereby failed to prevent the appellant from being unfairly prejudiced by the reception of such evidence.

[182] The court *a quo* also misdirected itself by failing to exclude the evidence of the pointing out which had emanated from an inadmissible confession. In failing to do so, the court *a quo* acted irregularly. Further, there was no admissible evidence against the appellant justifying her conviction on the charges of murder and robbery with aggravating circumstances. In my judgment the misdirection and irregularities, as detailed above, resulted in a serious failure of justice. As a consequence, conviction should not be allowed to stand.

<u>Order</u>

[183] In the result, the appeal against conviction on both counts is upheld. Consequently, both conviction and sentence imposed by the court *a quo* are hereby set aside.

MADONDO DJP

I agree

VAN ZŸL J

I agree

STEYN J

APPEARANCES:

| | | |
|---|---|---|
| For Appellant | : | **S MATTHEWS** |
| | | (Instructed by Narain Naidoo & Associates Ref: N Naidoo/Desiree/G10 - 033 3458146) |
| For Respondent | : | **D A PAVER** |
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| Date argued | : | 25 November 2016 |
| Delivered | : | 6 April 2017 |