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IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case No K/S 2/14

Date Delivered: 28 May 2014

In the matter between

THE STATE

V

DEON HILTON VAN NEL

Accused 1

BB

Accused 2

DEON ALWYN

Accused 3

MERVIN JACOBUS

Accused 4

ADRI JULIUS

Accused 5

JUDGMENT

PAKATI J

1. Mr Deon Hilton Van Nel, Mr BB, a minor of 14 years, Mr D[...] A[...], the deceased's [...] also known as S[...] P[...], Mr Mervin Jacobus and Mr Adri Julius, accused 1 to 5 respectively, are arraigned on three charges: In count 1 and 2 they are alleged to have raped the deceased, V[...] J[...], a ten year old girl. In count 3 they face a charge of murder of the deceased, V[...] J[...]. The incidents are alleged to have taken place on 01 December 2010 at or near Breipaal, Douglas, in the district of Van Herbert.
2. The accused are represented as follows: Accused 1 by Mr J Schreuder; 2 by Mr Fourie; 3 by Mr Van Tonder; 4 by Mr J Cloete and 5 by Mr P Fourie on the instructions of Legal Aid South Africa for all of them. The proceedings were conducted in camera and in the presence the minor's guardian, Mr H[...] M[...]. All the accused pleaded not guilty to the charges. Accused 1, 2, 3 and 5 denied knowledge of the offences. Accused 4's defence is an *alibi*. The evidence implicating accused 3 and 5 is contained in a statement ("Exh R") made by accused 2 and a confession ("Exh Q") by accused 4 after their arrest which will be dealt with at a later stage.
3. Ms S[...] J[...] also known as O[...] B[...], the sister to the deceased's grandmother, stayed with the deceased since she was seven months old. On 01 December 2010 she and the deceased were doing the laundry. At about 14h00 the deceased went to Cathy's Shop, in Breipaal, to exchange five cents coins for notes. That was the last time she saw the deceased alive. She and her family searched for her the whole afternoon/evening without success. During the search she met accused 3 and 5 who told her they had not seen her.

4. Mr Jan Julies, accused 5's brother, was at home at 2[...] N[...] Street, Breipaal. It was after 23h00 when he heard accused 5's voice outside his door. Accused 5 was in the company of accused 2, 3 and 4 looking for a specific cell phone. He did not open for them and refused to hand over the cell phone because it was late. An argument ensued between accused 5 and Jan. Accused 5 asked for a knife from accused 4 which he handed over to him. Accused 5 gained entry to the house through a window and threatened to stab Jan with it. Jan pushed accused 5 outside. Ms Julies, their neighbour, heard the noise and came to reprimand them. Accused 2, 3, 4 and 5 then left. The following day Jan saw the four accused seated under the patio at Ms Julies' house. He was moderately drunk.
5. On the day of the incident Mr Jakobus Hoogstander was asleep at home with his family when he heard his dog barking. He went to investigate and noticed nothing peculiar. He went back to bed. Around 23h30 he heard the dog barking more intensely this time. He woke up and peeped through the window. He noticed accused 3 and 5 standing on the other side of his fence facing him. He saw a black plastic refuse bag, which he initially thought was a black shirt, hanging on the fence. He looked in the direction of the barking dog and saw feet of a human being in between the dog's legs. He phoned the police but could not reach them. He then called his neighbour, Mr Johannes Nel, also known as Vaaltein, to come to the scene immediately. As Mr Nel approached Mr Hoogstander's house accused 3 and 5 noticed him and ran away. They were joined by two others whom he could not identify. They entered House No 2[...] A[...] Street, Mr Hoogstander's cousin's house, Ms Nosie (five houses away) in the same street.

6. Mr Hoogstander called the police again. Upon their arrival he pointed to them the body of a young girl whose lower part of the body was naked. A black refuse bag covered her head and neck. With the removal of the plastic bag by the police he noticed an open wound on the left side of the neck. He testified that two street lights on both sides of his house illuminated the area. Accused 3 and 5 grew up in front of him and he knew them well.
7. Mr Piet Visser, a sergeant in the South African Police Services (SAPS), was on stand-by duty on the night of the incident when he received a complaint about a murder around 00h02. He immediately visited the scene with three other colleagues, constables Baartman, Erasmus (a female officer) and Plaatjies. He corroborated the evidence of Mr Hoogstander as to the condition in which he found the deceased. He added that the deceased was lying in a corner of the yard. Her upper body was covered with a black plastic refuse bag from the head to just below the ribs. He observed two wounds on the front part of her neck. She wore a green t-shirt and a brown skirt pulled up to below the hip. She had no panty on. The green top was bloodstained. On further investigation he noticed a black plastic refuse bag hanging on the fence not far from where the deceased's body was lying. At that stage W/O Henry Andrew De Wee, the investigating officer, arrived and took over the scene. It was put to Sgt Visser that he earlier arrested accused 3 and 5 in connection with a housebreaking case but he denied it.
8. W/O De Wee's testimony is to the effect that around 02h00 when he got to the scene he noticed that the deceased's clothing was bloodstained and full of soil. The black plastic bag next to the body was stained with dried blood. He observed a stab wound on the left side of deceased's neck and

other wounds on the neck and chest. He then called the officers from the Local Criminal Record Centre (“LCRC”) and Pathology Services to take over the scene. Mr Tshepo Mogoiwa, an LCRC official, took the photos. The forensic pathology officials conveyed the body to the mortuary.

9. W/O De Wee visited the said house to which the suspects fled, which was pointed out to him by Mr Hoogstander, and found accused 2, 3, 4 and 5 asleep. He later took them to Dr Marolong to draw blood for DNA analysis. After the blood samples were sealed the same were transported to the forensic laboratory in Cape Town.
10. In the early hours of the morning around 04h00 Ms J[...] heard a knock on her door. She opened and discovered that it was accused 3 and 5. Accused 3 enquired from her whether the deceased was home. She told him that she was still not home. He informed her that they were from the police station and the police suspected them of having killed a young girl. At that stage she did not know of anyone who had been killed. She wanted to know if someone had been killed which accused 3 confirmed. She then called the police and made a report to them. She gave them the description of the child whereupon they confirmed the death of the deceased.
11. Dr Denise Lourens who performed the autopsy report recorded the chief autopsy findings as follows:
 - “a. Female child.*
 - b. Stab wounds of the neck with injuries to both internal jugular veins, the trachea, the oesophagus, the spinal column and the spinal cord.*
 - c. Pale organs.*

d. Extensive and severe injuries to the genitalia.”

She concluded that the cause of death was stab wounds to the neck.

12. Dr Lourens testified that the abrasions of the body were caused by blunt trauma while the stab wounds to neck were caused by a blunt knife blade. The deceased bled profusely which led to her death. In total she sustained nine stab wounds, three of which were fatal. The deceased also sustained post mortem abrasions on the right cheek, left chin, posterior upper leg, posterior left leg and right calve. In her opinion these injuries were sustained after the deceased had died. Her body was moved to a different location. The deceased's tongue protruded with drying of the tip of the tongue and the bottom lip. She testified that that is consistent with strangulation due to pressure on the neck. There was blood in between the ribs caused by blunt trauma consistent with kicking, a blow by a knee or with a fist. Blood also filled the airspaces. The abrasions on the lateral aspect of the right upper arm with small abrasions positioned in a row on the one side of the bruise are consistent with wounds caused by a firm grip of a hand on the arm. The deceased had extensive sand soiling of the hands.

13. Regarding the deceased's genitalia Dr Lourens recorded thus:

“Bloody fluid ran from the vagina. No panty was with the body. The pubic hair was sparse and in a very early stage of development. The breasts showed no signs of development. The vagina showed a tear lengthwise from the hymen region up to the cervix. The tear was wide and from the 3h to the 9h position. The depth of the tear was almost the full thickness of the wall between the vagina and rectum. Only a thin “membrane” of tissue separated the two openings. In 1[1h position]

there was a full thickness tear between the vagina and rectum. The vagina was contaminated with faeces. Severe contusion of the proximal vagina was present in the 3h, 6h and 9h positions. Severe contusions were also present surrounding the urethra. The anal opening was dilated with severe contusions in the 3h and 9h positions.”

Dr Lourens testified further that to have tissue bleeding/contusion of the pelvis in the region of the “pouch of Douglas” situated behind the uterus one needs to hit hard in between the legs. It can also be caused by raping a person. The deceased was penetrated vaginally and anally. The injuries sustained around these areas were very severe and were sustained whilst she was still alive. Dr Lourens testified further that the deceased’s experience was extremely painful more than what a woman in labour experiences. Her genitalia were very small to accommodate this.

14. Swabs from the mouth, vulva, vestibule, vagina and perineum, anal opening and rectum, nails and web spaces, foreign hair on the body, white fluff over the pubic region, hair of the face, chest and neck, combings of the hair and scalp hair were retained for analysis. The deceased’s clothing was placed in a plastic evidence bag and handed over to Const Van Zyl.
15. When Dr Lourens was asked to give an opinion in instances where penetration is established but no male semen is found in the victim’s body she said that is possible under the following circumstances:
 - 15.1 When the perpetrator uses a condom;
 - 15.2 When ejaculation takes place outside the vagina;
 - 15.3 When a victim stands up the semen runs out of the body. In the deceased’s case the body was shifted resulting in the body fluids getting lost in the process;

- 15.4 During the interval from the period of the assault, rape and murder evidence can be lost;
- 15.5 When a woman passes urine semen can be washed out. In the case of the deceased she had an empty bladder during post mortem. It was not clear to Dr Lourens whether she started off with the empty bladder or not;
- 15.6 When there is anal penetration sperms do not survive long in faeces, especially in deceased's case where the vagina was soiled with faeces;
- 15.7 When a male person has an erection and ejaculates, semen comes out but if he has no DNA, none will be found because he is not in a position to have children because of sterility or that he did a vasectomy;
- 15.8 It is possible for a terrible tear of the vagina that bleeds to wash away semen in the vagina as in the case of the deceased.
16. Dr Lourens also explained the possibility of sexual penetration by more than one perpetrator but only one perpetrator's DNA was positively identified; accused 1's. She said it is possible for a victim (the deceased in this case) to be raped by a number of persons and yet only one accused's DNA is isolated. She stated that some men deposit sperms that survive longer than others. It is possible that semen earlier deposited is pushed out with an erect penis leaving the semen deposited last. The doctor indicated that the knife that appears in Exh "D" photos 3 and 4 was most probably the kind of knife used as the murder weapon when one looks at the shape of the wounds. She could not tell if it was possible that one person or a number of persons attacked the deceased because she was a tiny young girl but one person could have overpowered her easily.

17. Dr Lourens estimated the deceased's time of death as closer to the time that she went missing just after she ate her last meal during the day rather than when her body was discovered. She based her opinion on the fact that there were multiple fly eggs deposited in the region of the deceased's neck and chest because of the stab wounds. She testified that flies invade a dead body very quickly if there is blood and are active during the day rather than night time.
18. Ms Cindy-Lee Juliana Sauls, a W/O in the SAPS attached to the Biology Unit of the Forensic Science Laboratory as a Forensic Analyst and a Reporting Officer, testified that on 02 September 2013 she received the case file. She evaluated the results from the samples that were subjected to DNA analysis by a process requiring competence in biology. She obtained the results via the STR-DNA analysis system. From the results she made the following findings:

“4.1 The DNA result from the Intra-Vaginal Swab 09D7AC1075GV (“DR 593/10”) and Skirt FSC-1024405 matches the DNA result from the reference sample 11D4AC6187MX (“Deon Van Nel”). The most conservative occurrence for this DNA result is 1 in 49 billion people.

4.2 The donors of the reference samples 08D3AA8426MX (“[Adrie] Julies”) and 10D4AA8435MX (“[Bostander] Benedict”) were excluded as the donors of the DNA on the Intra-Vaginal Swab 09D7AC1075GV (“DR 593/10”), Vestibule Swab 09D7AC1075GB (“DR 593/10”) and Skirt FSC-1024405.”
19. Ms Sauls testified further that she made a correction on page 2 of her report (Exh “P”) because of an error made in certain columns referring to Mervin Jacobus (accused 4). The information in the third column was

switched around with information in the fourth column, the fourth with the sixth and the seventh with the eighth. This, she stated, has no effect on her conclusion as the results remain the same even if reproduced or sent to another laboratory. After she compiled the results they were reviewed by Liut Spurr. When Ms Sauls received the samples in respect of accused 1 the results with regards to the rest of the accused had already been interpreted and reported by W/O Kenny. She only received the docket in September 2013 to interpret and report the results with regards to accused 1.

20. The admissibility of the statement by accused 2 (“Exh R”) and the confession by accused 4 (“Q”) was contested on the grounds that they had not been freely and voluntarily made and without undue influence. However, Ms Van Heerden for the State and Mr Fourie on behalf of accused 2 by consent stated that no trial-within-a-trial in respect of the statement made by accused 2 was required. In this statement accused 2 stated that he, accused 3, 4 and 5 were walking in the main road when they saw four young girls, the deceased being one of them, playing along the road. Accused 3 and 5 dragged the deceased from the street to the field. Accused 2 and 4 left accused 3 and 5 in the field with the deceased. A few minutes later they came back and found the deceased’s body placed in a black refuse bag. Accused 2 observed that accused 3 had a bloodied knife in his hand. They all left the body in the field and proceeded to accused 3’s home where he (accused 4) wiped the bloodied knife clean. After a while they returned to where they left the deceased’s body. Accused 3 and 5 carried the deceased’s body contained in the refuse bag and dumped it in Mr Hoogstander’s premises. They went to accused 3 and 5’s place of residence where W/O De Wee found them asleep. Accused 3 threatened to kill accused 2 if he told anyone about the

death of the deceased. Accused 2 denied knowledge of the offences. His statement is clearly exculpatory.

21. Ms Van Heerden made an application for the admissibility of the statement made by accused 2 against accused 3 and 5 in terms of s 3 (1) (c) of the Law of Evidence Amendment Act, 45 of 1988. The section provides:

“3. (1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –

...

(c) [T]he court having regard to –

- (i) [T]he nature of the proceedings;*
- (ii) [T]he nature of the evidence;*
- (iii) [T]he purpose for which the evidence is tendered;*
- (iv) [T]he probative value of the evidence;*
- (v) [T]he reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;*
- (vi) [A]ny prejudice to a party which the admission of such evidence might entail; and*
- (vii) [A]ny other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.”*

22. I considered the fair trial rights of accused 3 and 5 and whether it was in the interests of justice to receive hearsay evidence in a statement made by accused 2 against accused 3 and 5. In an unreported case of **S v MOSES**

LITAKO AND OTHERS Case No. 584/2013 delivered on 16 April 2014 Navsa and Ponnann JJA (Leach & Petse JJA, Swain AJA concurring) held in para 54:

“[54] It is not immediately apparent on what basis such a distinction [between admissions and confessions] can be drawn. As we have shown with reference to the earlier authorities, no such distinction existed at common law. Moreover, s 219A in terms provides that ‘[E]vidence of any admission made extra-judicially by any person in relation to the commission of an offence shall...be admissible in evidence against him’ (our emphasis). Quite clearly the ‘any person’ and ‘him’ refer to one and the same person – the maker of the statement. Thus although there is no statutory bar as with a confession, the legislature, consistent with the common law, albeit less emphatically, has secured the same protection in a 219A for a co-accused in respect of an admission as it did in respect of a confession in s 219. Moreover, from the perspective of the one accused, who may be implicated in the statement of another, one strains to discern a sound jurisprudential basis for the distinction. In application of this distinction, let us assume that A makes a statement that implicates his co-accused, B, as well as himself: Whether or not the statement constitutes a confession or merely an admission would no doubt be determined solely with reference to its maker, A. If it is ruled to be a confession, then irrespective of what it says in respect of B it will not be admissible against B. If, on the other hand, it is held to be an admission, then it would be admissible against B. It thus matters not whether A’s confession only touches tangentially upon B or that his admission, although largely exculpatory in respect of himself, is devastating in respect of B. That the characterisation of a statement as a confession or an admission could determine, without more, whether it falls to be admitted as evidence

*against a co-accused in and of itself provokes anxiety. What if where a trial court rules incorrectly that a statement is an admission and admits it into evidence against a co-accused and then a court of appeal subsequently characterises the statement a confession? This appears to have happened in **Molimi [2008 (2) SACR 76 (CC) paras 26-29)]**. What if the co-accused is cross examined on a statement that ought not to have been admitted into evidence against him? It is possible to imagine a range of other irregularities that could possibly flow from that incorrect characterisation. But the more important question that those hypothetical postulations provoke is whether, flowing from that, there is a danger of the conviction being vitiated. None of this has hitherto occupied the attention of our courts perhaps because prior to Ndhlovu the position was quite straightforward – an extra-curial statement was inadmissible against a co-accused. And that rule applied to both admissions and confessions alike.”*

23. The Court stated further at para 65 as follows:

“[65] This rule excluding the use of extra-curial statements made by one accused against another was not solely based on its hearsay nature, although that in itself would have constituted sound reason for excluding such evidence. It has always been stated that an admission made by one person is normally irrelevant when tendered for use against another. From the State’s perspective it would usually be dealing with statements made by co-accused persons which, in itself, ought to bring with it a caution. The shifting of blame from one co-accused to another to avoid conviction is not uncommon in our criminal justice system. Furthermore, other than when one is dealing with vicarious admissions or statements made in furtherance of a conspiracy, neither of which is applicable in the

present case, it is difficult to see how one accused's extra-curial statement can bind another. Co-accused, more often than not, disavow extra-curial statements made by them and often choose not to testify. They cannot be compelled to testify, and in the event that an extra-curial statement made by one co-accused and implicating the others is ruled admissible and he or she chooses not to testify, the right of the others to challenge the truthfulness of the incriminating parts of such a statement is effectively nullified. The right to challenge evidence enshrined in s 35(3) (i) of the Constitution is thereby rendered nugatory. In this regard, the decision of the Canadian Supreme Court in Perciballi is instructive.” (Emphasis added)

In the circumstances I found the statement of accused 2 admissible against him and inadmissible against accused 3, 4 and 5.

24. In his confession accused 4 implicated accused 2, 3 and 5 as well as himself in the commission of the crimes. He explained that he, together with accused 2, 3 and 5 visited different places on the day of the incident. At one stage they had a disagreement with Jan (accused 5's brother) regarding a cell phone. Later they found four young girls playing next to the road. They chased three of them and grabbed the fourth one (the deceased). The deceased informed them that she was going to report the incident to 'O[...] B[...]’ referring to Ms J[...]. They took the deceased to the field where they raped her in turns. Accused 3 took the knife from accused 4 and stabbed her. Accused 4 took the bloodstained knife from accused 3 and wiped it clean. Accused 5 fetched a black plastic refuse bag from his home. Accused 3 and 5 put the deceased's body inside the bag. They carried the body and dumped the bag in Kowie's (Mr Hoogstander's) premises. From the evidence of both investigating

officers, Capt Oliphant and W/O De Wee there was no explanation as to who these children were (the ones who played with the deceased), whether their presence was investigated but none of the alleged children testified.

25. During the trial-within-a-trial accused 4 testified and admitted having made the confession before the Magistrate but alleged that Capt Oliphant instructed him what to say. Following the trial-within-a-trial I found the confession admissible against accused 4. With reference to s 219 of the CPA which provides that no confession made by any person shall be admissible as evidence against another person, I ruled accused 4's confession inadmissible against accused 2, 3 and 5.

That concluded the State case.

26. At this stage accused 2, 3 and 5 applied for discharge in terms of s 174 of the CPA. This section provides:

“174 Accused may be discharged at close of case for prosecution

If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.”

The application was dismissed because I reckoned that if the confessors testified there was a reasonable possibility that accused 2 and 4 might implicate their co-accused. However, the accused closed their cases and elected to exercise their constitutional right to remain silent and called no witnesses to testify.

27. That the deceased was raped and murdered is common cause. Accused 2 in his statement placed himself on the scene of the rape and murder though he says he did not see who raped and killed the deceased. Accused 4 admitted having raped the deceased once. Accused 3 and 5 denied the allegations against them. The critical question, however, is whether accused 1, 2, 3, 4 and 5 committed the offences charged or any competent verdicts.
28. The State tendered evidence which is circumstantial in nature. No one, apart from the accused or some of them, witnessed the rape and murder of the deceased. The State case rested upon the DNA results, the eyewitness evidence which did not go far enough, the inculpatory statement of accused 2 against accused 3 and 5 and the confession by accused 4. In **S v REDDY AND OTHERS 1996 (2) SACR 1 (A)** at 8c-g Zulman AJA held:

*“In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oft-quoted dictum in **R v BLOM 1939 AD 188** at 202-3, where reference is made to two cardinal rules of logic which cannot be ignored. These are, firstly, that the inference sought to be drawn must be consistent with all the proved facts and, secondly, the proved facts should be such ‘that they exclude every reasonable inference from them save the one sought to be drawn.’ The matter is well put in the following remarks of Davis AJA in **R v DE VILLIERS 1944 AD 493** at 508-9:*

‘The court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way; the Crown must satisfy the Court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence.’”

29. Mr Schreuder, on behalf of accused 1, argued that there were a number of discrepancies which render the DNA evidence tendered by W/O Sauls unreliable. W/O Sauls, according to him, failed to explain why the Court should place reliance on her evidence of evaluation and interpretation alone in the absence of any other evidence of an analyst whose readings she worked on. He argued further that Const Van Zyl, who received the samples from Dr Lourens, allocated a different number (DR539 instead of 593) on the package when dispatching it for analysis. W/O De Wee explained that even though the number allocated by Const Van Zyl was inversed the Douglas Cas 5/12/2010 was correct on the face of the document (Exh “FF”) dispatching the samples to the forensic laboratory. When W/O De Wee compiled Exh “FF” with Capt Oliphant the exhibits were in his possession. Accused 1 at that stage had not yet been a suspect in this case. The samples only referred to accused 2 to 5. Capt Oliphant corroborated W/O De Wee’s evidence that they compiled Exh “FF” and he personally took the said exhibits to the forensic laboratory in a sealed condition. Amongst the exhibits that Capt Oliphant received was a knife

pointed out to him by accused 4. However, no positive DNA results were found on it. His evidence was not contested.

30. When W/O Sauls was asked by Mr Schreuder why was the data she had in para 4 of her report (“exh P”) not contained in W/O Davids’ report, she explained that W/O Davids only works with raw data. She verifies the profiles and check if they adhere to the quality guidelines. Once she is satisfied she accepts them and converts them into electronic data on the forensic system for W/O Sauls to view, evaluate and interpret the results. According to her W/O Davids could not compile a table with columns as appears in (“Exh P”) because she does blind analysis of the results meaning she does not know what profiles will be used at the end of the day by the reporting officer. Ms Sauls in whose report the results are reflected, does the interpretation of the results which is why the results are found in her report and not in W/O Davids’ report. W/O Sauls explained chronologically the procedure followed when the exhibits are analysed from the presumptive testing process right up to the stage where she evaluates and interprets the results. Through this process the DNA cannot be changed. In this regard her evidence was uncontroverted.

31. Ms Van Heerden submitted that although the confession of accused 4 is not evidence against accused 2, 3 and 5 the Court should nevertheless take cognisance of the facts contained in it and convict accused 2, 3 and 5 as charged on all counts. Mthiyane JA in **S v MAKEBA AND ANOTHER 2003 (2) SACR 128 (SCA)** at 133 para 14 had this to say:

“The use of Mbongqi’s confession as corroboration for Skhumbuzo’s evidence was a fatal flaw in the assessment of his evidence. Section 219 of the Criminal Procedure Act, 51 of 1977, forbids it. That section provides:

‘No confession made by any person shall be admissible as evidence against another person.’

*Even indirect use of the confession for purposes of corroboration is not permitted. In **R v Baartman [and Others 1960 (3) SA 535 (A)]** an accused had made a confession and the trial Court in convicting the other accused had excluded from its consideration the statements in the confession which had directly implicated the other accused, but had used the confession to establish an essential part of the chain of circumstantial evidence leading to their conviction. On appeal it was held that the trial Court had relied on inadmissible evidence and the appeal was allowed. It follows, therefore, that no reliance should have been placed on Mbongqi’s confession as corroboration for Skhumbuzo’s evidence, either directly or indirectly.”*

It is therefore clear from **Makeba’s** decision above that neither the confession by accused 4 nor the statement by accused 2 (See **Litako’s** case in para 22 above) may be taken into account against accused 2, 3 and 5 with regards to the commission of the offences.

32. There is direct evidence implicating accused 1 with regards to the rape charges. In **S v MTHETHWA 1972 (3) SA 766 at 769D-E** it was held:

“Where, however, there is direct prima facie evidence implicating the accused in the commission of the offence, his failure to give evidence,

whatever his reason may be for such failure, in general ipso facto tends to strengthen the State case, because there is then nothing to gainsay it, and therefore less reason for doubting its credibility or reliability.”

33. Heher AJA in **S v CHABALALA 2003 (1) SACR 134 (SCA) 142** para 21 stated:

“The appellant was faced with direct and apparently credible evidence which made him the prime mover in the offence. He was also called on to answer evidence of a similar nature relating to the parade. Both attacks were those of a single witness and capable of being neutralised by an honest rebuttal. There can be no acceptable explanation for him not rising to the challenge. If he was innocent appellant must have ascertained his own whereabouts and activities on 29 May and been able to vouch for his non-participation...To have remained silent in the face of the evidence was damning. He thereby left the prima facie case to speak for itself. One is bound to conclude that the totality of the evidence taken in conjunction with his silence excluded any reasonable doubt about his guilt.”

34. In **S v BOESAK 2001 (1) SA 912 (CC) 923** para 24 Langa DP as he then was, held:

“The right to remain silent has application at different stages of a criminal prosecution. An arrested person is entitled to remain silent and may not be compelled to make any confession or admission that could be used in evidence against that person. It arises again at the trial stage when an accused has the right to be presumed innocent, to remain silent, and not to testify during the proceedings. The fact that an accused person

is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence.”

35. Ms Van Heerden for the State requested the Court to convict accused 1 of murder due to his failure to testify. In examining the evidence in totality and taking into account what was said in **R v Blom**’s case (para 28 supra) *‘that the inference sought to be drawn must be consistent with all the proved facts and, the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn’* there is no sufficient evidence to sustain a conviction against accused 1 on the murder charge. It must be stressed that there is no *onus* on an accused to prove his innocence. A mere suspicion, strong as it might be, is not adequate to confirm his conviction. Convictions based on suspicion or speculation, as the court stated in **S v T [2005 (2) SACR 318 (E)]**, are *‘the hallmark of a tyrannical system of law’* and *‘South Africans have a bitter experience of such a system and where it leads to’*. That system cannot and ought not in our constitutional democracy, be countenanced. See **S v MOLIMI 2008 (2) SACR 76 (CC)** at 100E-G.
36. It is important to note that accused 2 did not incriminate himself in his statement not even to a lesser charge or competent verdict. Mr Hoogstander watched and noticed accused 3 and 5 standing outside the yard next to where the deceased’s body was lying. It is clear that at that

stage accused 3 and 5 were not aware of Mr Hoogstander's presence because they ran into House No 2[...], A[...] Street, when they saw Mr Nel walking towards his house. Accused 2 and 4's alleged presence was brought about when Mr Van Tonder, on behalf of accused 3, put it to Mr Hoogstander that accused 3 was not standing in front of his house but walked past it in the company of accused 2 and 4. This was not disputed by accused 2 and 4. In fact, accused 2 admitted in his statement that W/O De Wee found him with accused 3, 4 and 5 sleeping at the said house. The crucial question is whether it can be said that the only reasonable inference is that if accused 2 was running with accused 3 and 5 therefore he took part in the rape and murder of the deceased.

37. Mr Hoogstander did not see accused 3 and 5 dumping the deceased's body. He only saw them standing next to the body and ran away when Mr Nel approached. This evidence is not enough to sustain a conviction of rape and murder or an accessory to murder by disposing of the body. In my view the State has a duty to prove its case beyond a reasonable doubt against them and has not done so.

38. At the beginning of the trial in his plea-explanation accused 4 denied knowledge of the offences and raised an *alibi* defence. He said he was with accused 2, 3, and 5 at the house of a certain Boompie Fish. The question is if that is the case how did it come about that he made a confession before the Magistrate after his arrest detailing what happened on the day of the incident thereby contradicting his *alibi*? It is trite that, where an *alibi* is raised, there is no burden on an accused to prove his *alibi*. The *onus* rests on the State to prove that his *alibi* is false. See **S v**

SHABALALA 1986 (4) SA 734 (A) at 736B. On the face of his confession his *alibi* cannot stand.

39. According to his confession accused 4 took the bloodied knife from accused 3 and wiped it clean. Accused 3 was not charged with the offence of defeating or obstructing the course of justice. It would therefore not be competent to convict him of such an offence because that offence is not a competent verdict to murder. There is also no independent evidence that accused 2 to 5 removed the deceased's body to where it was ultimately found except what is revealed in the statement and confession of accused 2 and 4. Ms Van Heerden argued that the fact that accused 2, 3, 4 and 5 ran away from the scene when they saw Mr Nel instead of alerting the police or offer assistance, is suspicious. Their conduct, suspicious as it might be, is not supported by evidence and is not sufficient to sustain a conviction on murder. An omission may lead to liability if there is a legal duty upon a person to act positively. According to general principles mere passivity is not sufficient to render a person liable as accessory after the fact; more particularly, the mere omission to report a crime that has been committed to the police cannot be construed as conduct amounting to being an accessory after the fact to the crime. See **S v PHALLO AND OTHERS 1999 (2) SACR 558 (SCA)** at 567c-d.
40. Where proof of prior agreement between the participants can be established the State can rely on the common purpose doctrine to draw an inference that each perpetrator associated himself with the others. However, if there is no such proof of prior agreement the following five

requirements according to **S v MGEDEZI AND OTHERS 1989 (1) SACR 687 (A)** at 705I-706C, must be met:

- 40.1 The accused must have been present at the scene where the violence was being committed;
- 40.2 The accused must have been aware of the assault on the victim;
- 40.3 He must have intended to make common cause with those who were actually perpetrating the assault;
- 40.4 He must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others; and
- 40.5 He must have had the requisite *mens rea*.

In the present case the State failed to prove these elements.

- 41. It is pointed out for the record that when W/O De Wee found accused 2 to 5 sleeping at House No 2[...] A[...] Street accused 1 was not present. The place where the deceased was raped and killed could not be established. The scene of the murder must have been full of blood. Unfortunately the time lapse between the rape, the murder and the disposal of the body could also not be established. It is for this reason, amongst others, that it cannot be inferred as the only reasonable inference that accused 1 was complicit in the murder.
- 42. In my view the State proved its case beyond a reasonable doubt that accused 1 raped the deceased twice (once anally and once per vagina) and accused 4 once. The State failed to prove beyond a reasonable doubt that the accused murdered the deceased.

The following verdicts are returned.

- 1. On count 1 (RAPE): Accused 1 is found guilty as charged for the rape of the deceased, V[...] J[...].**
- 2. On count 1 (RAPE): Accused 4 is found guilty of rape of the deceased, V[...] J[...].**
- 3. On count 2 (RAPE): Accused 1 is found guilty as charged for the rape of the deceased, V[...] J[...].**
- 4. On count 2 (Rape) Accused 4 is found not guilty of the rape of the deceased, V[...] J[...].**
- 5. On count 3 (MURDER): Accused 1 and 4 are found not guilty of the murder of the deceased, V[...] J[...].**
- 6. Accused 2, 3, and 5 are found not guilty on all the counts and are discharged.**