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Circulate to Judges:	NO
Circulate to Magistrates:	NO
Circulate to Regional Magistrates:	NO



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION – MAHIKENG**

Case No: CA 59 / 2024
Court a quo Case No: SH 13 / 2019

In the matter between:

MOSES DLAMINI

APPELLANT

and

THE STATE

RESPONDENT

CORAM: MFENYANA J, KHAN AJ *et* MAODI AJ

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be 10 February 2026.

ORDER

On appeal from: Regional Court for the North West Division held at Koster (Regional Magistrate Matebesi sitting as court of first instance):

- (i) Condonation for the late noting and prosecution of the appeal is granted.
- (ii) The appeal against conviction is dismissed.

JUDGMENT

KHAN AJ

Introduction

- [1] The appellant stood accused of two charges. Count 1, murder read with the provisions of section 51 (2) of the Criminal Law Amendment Act 105 of 1997. Count 2, contravention of section 49 of the Immigration Act 13 of 2002. On the 7 March 2023 the appellant pleaded not guilty to count 1 and guilty to count 2. The matter proceeded to trial in respect of count 1.
- [2] On the 19 June 2023 the appellant was found guilty on count 1. On the 31 July 2023 the appellant was sentenced to fifteen (15) years' imprisonment in respect of count 1 and two (2) years' imprisonment in respect of count 2, the sentences to run concurrently. Additionally, the appellant was declared unfit to possess a firearm.
- [3] On the 27 September 2023 the appellant applied for leave to appeal from the court a quo, which was granted. On the 31 March 2025 the appellant noted his appeal to this court, which appeal included an application for condonation for the late prosecution thereof. The appeal lies only against conviction on count 1.

Condonation

[4] In his application for condonation, the appellant indicated that he was assisted by Legal Aid South Africa and that immediately after the application for leave to appeal was granted he was advised that the records of the proceedings needed to be transcribed and that the matter will be forwarded to the High Court Unit at Legal Aid South Africa, Mahikeng. That he waited for Legal Aid as he had instructed them to proceed with the appeal and they only advised him in November 2024 that Mr Setumu was allocated to his matter. That the delay was not due to his fault. The Respondent does not oppose the application for condonation. The court is of the view that a proper case for condonation has been made out and condonation is accordingly granted.

[5] The appellant raises two grounds of Appeal:-

5.1 That the trial court erred in admitting the evidence of an alleged admission/confession of the appellant without holding a trial within a trial, thus rendering the trial unfair.

5.2 That the court erred in making a finding that circumstantial evidence was sufficient prove (sic) beyond reasonable doubt to convict the appellant on a charge of Murder and submits that the conviction be set aside.

Factual matrix:

[6] **State's case**

The state's case was premised on the statement made by the appellant to Magistrate Kleynhans on the 24 December 2018, the photo album, the section 121(7) by Phophosi Nkonyani of the Phokeng Forensic Pathology Services, the 212(4) affidavit and post mortem report by Professor B Botha, the forensic statement by Vusi August and the Biology report by P Naicker. All of which was admitted into evidence as exhibits with no objection from the defence.

[7] The statement made by the Appellant confirmed the following:

- i. That he was with the deceased at the deceased's home on the night of the 22 December 2018.
- ii. They were listening to music on his phone.
- iii. The appellant asked the deceased to loan him R50.00 and the deceased agreed but wanted the appellant to leave his phone with the deceased as security.
- iv. The appellant went to the bathroom and on his return asked for the money as he wished to leave. The deceased refused to give him the money stating that he had been buying the appellant liquor and that the appellant now owed him money.
- v. An argument ensued between the deceased and the appellant. The appellant tried to take his phone from the deceased. The deceased pushed the appellant against the corrugated iron of the shack and grabbed something that looked like a knife from his bedside and attempted to stab the appellant with it.
- vi. The Appellant grabbed the deceased's hand and twisted it and in the process the deceased got stabbed with his own knife. The deceased had partitioned his shack with iron bars and when the appellant grabbed his hand and turned with him, it hit against the iron bars and the knife stabbed him somewhere near his collar bone, he saw blood squirting out. The appellant then let go of the deceased's hand and managed to get out of the deceased's place and returned to the tavern to drink with his friends.

[8] The state intended calling two witnesses, but closed its case without leading any evidence.

Defence case

- [9] The appellant disclosed his defence in terms of s115(3) of the Criminal Procedure Act 51 of 1977 (the CPA) as that of self-defence. The appellant did not lead any evidence and closed his case.
- [10] The appellant argues that he was convicted on the basis of the evidence of the admission or confession that he made to the Magistrate and that the Court misdirected itself by not holding a trial within a trial regarding the admissibility of the evidence confession. Further that the prosecutor informed the Court that the defence had indicated during the pre-trial conference that they were not going to dispute the contents of the admission/confession which was incorrect. It is necessary to interrogate this statement.
- [11] It is apparent from the record that a pre-trial was held on the 2 March 2021, in terms of which the appellant and respondent agreed to admissions of some of the evidence and that the appellant indicated that the contents of the confession are placed in dispute. The appellant was represented by Ms Pheto of the office of the state attorney at this time.

“Court: Thank you. Will the admissibility of any written statements, pointing out by the accused, forensic evidence as indicated, the confession, DNA results, section 212 of the CPA statements, post-mortem and chain evidence be put in dispute?”

Ms Pheto: No, Your Worship, safe for the contents of the confession, Your worship. As the court pleases.”¹

- [12] When the matter was set down for trial on the 7 March 2023, Mr Linga appeared for the appellant. It appears that a second pre-trial was held with Mr Linga, the

¹ Record page 127, lines 15 to 24

precise details of which are not before this court, the following was however placed on record:-

“PROSECUTOR: as the court pleases. Your Worship, during the pre-trial stages the defence have indicated that they are not disputing the post-mortem report including the chain evidence. Your worship. They further indicated that they are not disputing the photo album. They are not disputing the DNA results. They are also not disputing, Your Worship the statement that was made to the magistrate in chambers, Your Worship. May same be confirmed, Your Worship from the defence

COURT: Mr Linga?

MR LINGA: Your Worship the defence does confirm same, Your Worship, Just to seek clarity on one aspect, Your worship, the statement, what is the statement handing up the statement as, Your Worship? That is what we want to know.

COURT: The statement that was made in chambers?

MR LINGA: Yes, Your Worship

PROSECUTOR: Your Worship, that will be a con, rather admissions, Your Worship, made to the magistrate in chambers by the accused, not a confession as [indistinct], Your Worship.

COURT: Mr Linga, you have been answered?

MR LINGA: Yes, Your Worship. We have no objection, Your Worship, to such exhibits being handed up

COURT: As an admission?

MR LINGA: Yes, Your Worship.

COURT: Not confession Mr Mataboge?

PROSECUTOR: As the court pleases, Your Worship, Your Worship, before handing in the said statement, Your Worship, as an exhibit, I would like to read it on record, Your Worship?

MR LINGA: No objection, Your Worship from the defendant.

COURT: You may proceed, sir.²

² Record page 153, lines 17 to 25 and page 154 lines 1to 25

[13] It is apparent from the aforestated exchange that Mr Linga had no objection to the admission of the appellant's statement as an admission and neither did the appellant object to Mr Linga's submissions as being contrary to his instruction.

[14] The appellant argues that the court a quo erred in not holding a trial within a trial regarding the admissibility of the evidence confession and that it is improper for a court to leave it to the accused's legal representative without proper instructions from the accused to make an election on behalf of the accused not to hold a trial within a trial. This argument fails to appreciate that the appellant was present at court and could have objected at any stage if what his legal representative was conveying to the court was incorrect and not in keeping with his instructions. The appellant refers to the matter of *Gama v S*³ in support of his contention that a trial within a trial should be held,

[15] The issue in *Gama* was whether the evidence alleging that a confession had been made to an undercover operative, a captain in the South African Police Service, should have been tested by way of a trial within a trial to determine its admissibility.

The Court recorded, at paragraph 6

"It is necessary to record at the outset that the State did not alert the trial court at all that it would be tendering evidence which may amount to a confession. This was a fundamental miscarriage of justice. While the high court was correct in finding that the appellant had been wrongly convicted on the basis of the doctrine of recent possession, it also erred in confirming the conviction on the basis of the appellant's confession. If there had been any doubt as to whether the appellant's statement amounted to a confession, the prosecutor was duty bound to inform the trial court accordingly. The magistrate should in those circumstances have conducted the preliminary inquiry to determine firstly whether the appellant had

³ (127/2013) [2013] ZASCA 132 (27 September 2013)

made the statement and, if so, the nature thereof. If the finding was that it did amount to a confession, a trial within a trial had to be held to determine its admissibility.

*“It was further apparent from Touch’s testimony that neither the court nor the appellant’s legal representative raised any objection to the evidence relating to the confession or suggested that its admissibility be dealt with in a trial within a trial. **The appellant, in his own evidence, denied that he had made the confession**”⁴ (my emphasis).*

- [16] In Gama, the confession was made to an undercover police officer and the prosecutor failed to advise the court that a confession had been made at the outset. The confession was in addition subject to the proviso set out in s 217 of the Criminal Procedure Act 51 of 1977 (“the Act”), which the court referred to at paragraphs 7 and 8 of the judgement, to wit,

“Admissibility of confession

The principles underlying the admissibility of a confession are set out in s 217 of the Criminal Procedure Act 51 of 1977 (the Act), which provides that:

‘(1) 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

⁴ Gama v S (127/2013) [2013] ZASCA 132 (27 September 2013), paragraph 12

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;. . .

Thus, a confession made to a magistrate or justice does not fall within the scope of the proviso and is therefore admissible provided the requirements of section 217(1) relating to voluntariness are satisfied. A ‘peace officer’ is defined in s 1, as including ‘any magistrate, justice, police official, correctional official as defined in section 1 of the Correctional Services Act, 1959 (Act 8 of 1959). . .’ A commissioned officer of the SAPS is a member holding the rank of lieutenant or higher, and is in terms of s 4 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 read with the First Schedule to that Act, ex officio a justice of the peace and therefore entitled to take a confession. The underlying rationale of s 217(1) is based on the fundamental principle that no inducement or coercion be brought to bear on an accused person to confess. The confession made by the appellant to Touch raises the issue whether it was properly obtained.”

[17] Gama is distinguishable from the present matter in a variety of ways,

- i. The confession in Gama was made to an undercover policeman involved in the matter, not an independent Magistrate.
- ii. The prosecutor in the Court a quo, at the onset, advised the Court that a statement was made by the appellant to a magistrate and was going to be handed up as an exhibit and that this was by agreement with the appellant’s legal representative Mr Linga, who confirmed that he had no objection thereto.

- iii. The accused in Gama denied that he made a confession and despite this and in the absence of an objection by his legal representative the matter continued.
- iv. Neither the appellant nor Mr Linga disputed the admission of the statement.
- v. At no point did the appellant correct his legal representative, Mr Linga or object to what Mr Linga was saying before the Court *a quo*.

[18] It is particularly important to have regard to what the Court in Gama said at paragraph 13 of the judgement:-

*“The admissibility of a confession where the question is whether it was freely and voluntarily made and where it is disputed on the ground that it was obtained in violation of other fundamental rights, and where the facts are not common cause between the parties, is to be adjudicated upon at a trial within a trial, an insulated enquiry where only the admissibility of a confession is determined independently of the question of guilt. The defence is entitled to lead evidence in rebuttal. It was for the prosecutor to inform the court and the defence that it intended to lead evidence of a confession made by the accused as part of the State’s case. **If the defence had raised an objection a trial within a trial would have had to follow,**” (my emphasis).*

[19] The appellant further argues that the preliminary questions on the admission/confession document indicates that the appellant was never informed of his right to legal representation by the police. Whether this is in fact correct is questionable as no evidence was led in this regard. It is however evident from the exchange between the Magistrate and the appellant that the appellant was warned of his rights to legal representation before he made his statement and the appellant indicated that he understood and wished to proceed with the statement

The appellant at no time raised a violation of his constitutional rights which is apparent from the following exchange

"Since your arrest, have you been informed about your rights to remain silent, of the consequences of not remaining silent to wit that anything you are saying can be used in evidence against you, not to be compelled to make any admission or confession that could be used in the evidence against you, to be informed of the reasons for being detained, to choose and consult with legal practitioner of your own choice?" To have legal practitioner assigned to you by the Legal Aid Board at state's expense if substantial injustice would otherwise result?

Yes, except about my rights to be legally represented.

Now if any of these rights were explained, the said rights must be explained now and it must be noted down which rights have been explained. ***I now explained deponents rights to legal representation to him as set out above'***

Question

"You are now again informed that you have the right to consult with a legal practitioner before making any statement, to be represented by legal practitioner whilst making a statement, you may also apply for Legal Aid prior to me proceeding further with your statement, an attorney will then be provided to you free of charge.

Do you understand? Yes.

Do you want to consult with legal practitioner before making a statement?

No.

Do you want a legal practitioner to be present whilst making a statement?

No.

I am a magistrate. I have nothing to do with the investigation of any charges against you. The police, the prosecution and I are not working together in this regard. You can speak freely and without any fear. This is not a court session, I am not busy with the trial against you. Do you understand this and accept this? Yes.

You are under no obligation to make any statement. You have the right to remain silent. You are not obliged to incriminate yourself by making an admission or a confession. if you do make a statement I write it down and it may be used in evidence in a court against you.

Do you understand? Yes.

Do you want to make a statement notwithstanding this warning? Yes.

You must take me into your confidence. If something out of the ordinary has happened to you since your arrest to cause you to come to me to make a statement, you must make it known to me. I undertake to bring it to the attention of a police officer to investigate it.

Do you understand? Yes.

Who brought you to my office? A policeman, I do not know his name.

What caused you to come to my office?

The police told me if I wanted to confess, they will arrange that I be brought here when I am prepared to make a confession. I was indeed brought here to you.

Did anybody tell you what to come and say in your statement? If so, when was it, who was it and what was said to you? No

If nobody told you what to come and say in your statement, where do the content of whatever you want to tell me about originate from? I am the one who did it and I want to tell you about it.

Did you previously make a statement to anybody regarding the charge or charges against you? If so, when and to whom did you make a statement?

No

Why did you want to repeat the statement before me? Not Applicable

Have you been assaulted by anybody in order to get you to come to make a statement? if so when were you assaulted, by who were you assaulted?

No

Do you fear any bodily harm if you refuse to make a statement? if so what do you fear and why? No

Did anybody influence you to make a statement? If so, when by whom and how were you influenced? No

Did anybody encourage you to make a statement? if so, when, by whom and what does the encouragement entail? No

Did anybody tell you that when I am asking these questions to you, you are not to inform me that you have been assaulted, threatened, influenced or been told what to say to me by anybody else (for example a co-accused or someone in the holding cells)? If so, when, by whom and what was the nature thereof? No.

Does it play any role in your decision to make a statement? If so, in what way does it play a role? Not applicable.

Were any promises made to you in order to persuade you to make a statement? If so, whom made it and what was the nature thereof? No.

Do you expect any benefits if you do make a statement? If so, what is the nature of the benefits that you expect? No.

I informed the deponent as follows. You cannot expect any benefits even if you do make a statement. Do you understand this? Yes.

Since you cannot expect any benefits from making a statement, are you still prepared to make a statement? Yes.

Are you under the influence of any intoxicating liquor and or drugs? No.

Is there anything else that you want to bring to my attention? No.

Do you have any injuries in or abrasions? Please show it to me if it is visible. I am not injured in anyway.

Own observations regarding other injuries than shown to me. I see no injuries.

How did you sustain all these injuries? Not applicable since there were no injuries. Remarks regarding the appearance, condition of the deponent (for example (crying, sits with head downwards, nervous, appears calm, et cetera). The deponent is still sitting opposite me and he is mentally stable."

With the description of the attire that he wearing on the date in question. "I then informed the deponent as follows. I will if necessarily ask you questions to clarify any matters raised in your statement. You are under no obligation to answer any of these questions. You may remain silent or refuse to answer. Do you understand? Yes."⁵

[20] It is apparent from the exchange above that the appellant was informed of his right to remain silent, that he was not obliged to incriminate himself and that if he made a statement it could be used in evidence against him, the appellant was further advised of his right to consult with a legal practitioner before making any statement, to be represented by a legal practitioner whilst making a statement and that he could apply for legal aid prior to the Magistrate proceeding further.

[21] To all of this the appellant indicated that he understood and that he wished to proceed. When the trial proceed on the 7 March 2023, the objection made to the statement at the pre-trial held on the 2 March 2021 was not pursued.

[22] In argument, the appellant relied on his statement,

"Mr Linga argued that the onus lies with the state to proof its case beyond reasonable doubt, that the state is relying on accused's statements and the said statement is the accused's version.

He further argued that the state is [mechanical failure 14:35] That accused gave his version in the said statement that it was only him and the

⁵ Record, pages 157 to 161

deceased in the shack playing music with his cell phone and he borrowed R50 from the deceased and he agreed.

That the court should accept the accused's statement as the truth (my emphasis) and the state is saying the court should accept it and find accused guilty of his own statement. He argued further that an expert should have been called to tell the wound is a slash or deep wound, because state is not an expert.⁶

[23] For the appellant to now allege that the statement should not have been admitted into evidence without holding a trial within a trial is opportunistic. The appellant did not at any point place the statement in dispute except for one occasion at a pre-trial held on the 2 March 2021, which objection was never pursued at the trial of this matter. The appellant relied on the statement given to Magistrate Kleynhans and argued that the court should accept this statement as the truth. Consequently, I hold the view that the findings of the Court a quo were justified and I find no room for interference in that regard.

[24] The second ground of appeal is that the Court erred in finding that circumstantial evidence was sufficient to prove beyond reasonable doubt to convict the Appellant on a charge of murder.

[25] In *S v Cupido*⁷, the court held it is trite that the factual findings of a trial court are presumed to be correct. Therefore, a party seeking interference therewith must demonstrate that there was a misdirection on the part of the trial judge which can be clearly identified in order to justify interference with those findings on appeal, otherwise a court of appeal will not interfere.⁸

⁶ Judgement, page 191, lines 11 to 25

⁷ (1257/2022) [2024] ZASCA 4 (16 January 2024) at para 23

⁸ *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705–706; *Santam Bpk v Biddulph* 2004 (5) SA 586 (SCA) [2004] 2 All SA 23 para 5; *R B v Smith* [2019] ZASCA 48;2020 (4) SA 51 (SCA) para 22; *HAL obo MML v MEC for Health, Free State* [2021] ZASCA 149; 2022 (3) SA 571 (SCA) para 87.

[26] The appellant pleaded self-defence, but closed his case without calling any witness or testifying and relied on the statement he had made.

[27] In *S v Cupido*,⁹ the court recorded that,

“exculpatory statements in explanations of the plea should, as a general rule, be repeated by the accused under oath in the witness-stand for them to have any value in favour of the accused.¹⁰ In S v Mkhize¹¹ it was stated: ‘It follows that any statement made by an accused or any answer to questions put to him in terms of s 115 has no evidential value.’¹² Unlike formal admissions made in terms of s 220, exculpatory statements made in terms of s 115 do not constitute proof of the facts and furthermore do not relieve the State of the burden of proving those facts. When a defence is raised in the exculpatory part of an explanation of plea, the State need only negate that defence to the extent of a prima facie case.¹³

Furthermore, an accused person is under no obligation to testify. However, once the prosecution had produced sufficient evidence that establishes a prima facie case, such evidence may become conclusive if not dislodged by credible evidence of the accused. Thus, absent a credible version from the accused, the version advanced by the prosecution, if found credible, has to be accepted. In S v Dlamini and Others¹⁷ Kriegler J emphasised the importance of freedom of choice in a democracy. He stated that liberty to make choices brings with it a corresponding responsibility and ‘often such choices are hard’.

⁹ (1257/2022) [2024] ZASCA 4 (16 January 2024) at paragraphs 32 to 35

¹⁰ *S v Malebo en Andere* 1979(2) SA 636 (B); *Sesetseen 'n Ander* 1981 (3) SA 353 (A) at 374A-376H.

¹¹ *S v Mkhize* 1978 (2) SA 249 (N).

¹² *S v Mkhize* 1978 (2) SA 249 (N), at 251B. See also *S v Dreyer* 1978 (2) SA 182 (NC); *S v Malebo en Andere* 1979 (2) SA 636 (B) at 640C-H; *S v Selane* 1979 (1) SA 318 (T) at 320G.

¹³ *S v Mothlapingen 'n Ander* 1988 (3) SA 757 (NC).

The trial court considered that the Appellant had the right to remain silent but does so well advised of the consequences of the exercise of his right to remain silent. The applicant silence indicates that he is not taking the court into his confidence and that the only evidence adduced on behalf of the state was the only evidence that was before the trial court.

[28] It is apparent from the Judgment that the following facts were not in dispute:

- i. *That the deceased and the appellant was in the shack on the day in question.*
- ii. *That the appellant was with the deceased prior to his death*
- iii. *That, according to the post mortem report the deceased had an incised wound on the left hand side of the neck (sic) penetrated through the soft tissues.*
- iv *That the deceased had a stab wound of front left hand side lower part of chest penetrated through liver*
- v *That there were three cuts on the body.*
- vi *That the person on the photo album is the deceased*
- vii *That the appellant's pair of jeans were taken for DNA analysis.*
- viii *That the DNA analysed from the appellants pair of jeans matched that of the deceased DNA.*
- ix *That the state and the defence did not leads evidence safe to say the admission of all exhibits from A to E.¹⁴*

[29] In *S v Cupido*¹⁵, the court stated

“Where there is direct evidence of the commission of an offence, as in this case, the failure to testify or the giving of a false alibi – whatever the reason therefor – ipso facto that tends to strengthen the direct evidence of the State. Since there is no testimony to gainsay it there is less occasion or material for doubting it.

¹⁴ Judgement page192, lines 9-25

¹⁵ (1257/2022) [2024] ZASCA 4 (16 January 2024) at paragraphs 37 to 38

In Osman v Attorney-General, Transvaal¹⁶, the Constitutional court went further and stated:

Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice.¹⁷

“

Accordingly, the appellant made his choice not to give evidence at his own peril. He made his bed with his eyes open. It is not unfair now to say that he should lie on it. “

- [30] The statement that the appellant relied upon established that he was with the deceased at the time of his death and when *on his version*, the deceased stabbed himself by hitting the iron bar in the shack. The appellant admitted the post-mortem report which confirmed that the deceased had an incised wound on the left side of the neck penetrated through the soft tissues, a stab wound on the front left side lower part of the chest penetrated through the liver and 3 cuts on the body.
- [31] The appellant then failed to give evidence of the self defence that he pleaded. The appellant had a duty to establish that his version was reasonably possibly true. The onus of proof remained with the state to prove its case beyond reasonable doubt, including negating the defence of self-defence.

¹⁶ *Osman v Attorney-General, Transvaal* [1998] ZACC 14; 1998 (2) SACR 493 (CC) (*Osman*); *S v Boesak* [2000] ZACC (25)[2000] ZACC 25; ; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 para 24; *S v Chabalala* 2003 (1) SACR 134 (SCA) para 20.

¹⁷ *Osman v Attorney-General, Transvaal* [1998] ZACC 14, paragraph 22

[32] The rules applicable when dealing with circumstantial evidence, was enunciated by Watermeyer JA in *R v BLOM*¹⁸, must be considered.

“(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn;

(2) 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 inference sought to be drawn, is correct.”

[33] The approach that a court should adopt in approaching evidence was enunciated by Heher AJA (as he then was) in *S v Chabalala*¹⁹,

“The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are 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 weigh so heavily in favour of the State as to exclude any reasonable doubt about the accused’s guilt.”

[34] The court a quo considered the circumstantial evidence²⁰ from the admitted exhibits and drew an inference that the appellant caused the death of the deceased. It is evident from the judgement that the inference and the proven facts were considered and the only inference that could be ascertained from the proven facts was that the appellant’s actions resulted in the death of the deceased.

[35] In my view the trial court committed no misdirection in this regard. For all the reasons stated above the appeal must fail. I make the following order:

¹⁸ 1939 AD 188 at 202 and 203

¹⁹ 2003 (1) SACR 134 (SCA) para [15]

²⁰ Judgement at pages 197 and 198

Order

1. Condonation for the late noting and prosecution of the appeal is granted.
2. The appeal against conviction is dismissed.

J. L KHAN

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,
NORTH WEST DIVISION, MAHIKENG**

MAODI AJ

Introduction

[36] The appellant faced two charges at the court a quo. Count 1 was murder read with the provisions of section 51 (2) of the Criminal Law Amendment Act 105 of 1997. Count 2 was contravention of section 49 of the Immigration Act 13 of 2002. On the 7 March 2023 the appellant pleaded not guilty to count 1 and guilty to count 2. The matter then proceeded in respect of count 1 with the state having to prove the appellant's guilt. On the 19 June 2023 the appellant was found guilty on count 1. On the 31 July 2023 the appellant was sentenced to fifteen (15) years' imprisonment in respect of count 1; and two (2) years' imprisonment in respect of count 2, with the sentences to run concurrently. He was also declared unfit to possess a firearm.

[37] On the 27 September 2023 the appellant applied for leave to appeal from the court a quo, which was granted. On the 31 March 2025 the appellant noted his appeal to this court, which appeal included an application for condonation for the late prosecution thereof. The appeal is only against conviction on count 1.

[38] The grounds of appeal are contained in the notice of appeal and are that:

38.1 The trial court erred in admitting the evidence of an alleged admission/confession of the appellant without holding a trial within a trial, thus rendering the trial unfair.

38.2 The court erred in making a finding that circumstantial evidence was sufficient prove beyond a reasonable doubt to convict the appellant on a charge of Murder.

38.3 The appellant submits that the conviction be set aside.

Condonation

[39] In his application for condonation, the appellant provided exhaustive reasons for same. The condonation application is not opposed by the respondent. I find that the appellant has succeeded in his application for condonation. Condonation is therefore granted.

Background and evidence

[40] On the 24 December 2018 the appellant was brought before Magistrate A. Kleynhans of Koster Magistrate Court where he made a confession. In or during the confession the appellant indicated to the magistrate that although he was warned of all his rights by the police, he was not warned of his rights to legal representation before he was brought for confession. The magistrate proceeded to warn the appellant of his rights to legal representation before he made a confession, to which the appellant indicated that he understood and wished to proceed with the confession.

[41] On the 2 March 2021 a pre-trial conference was held where the appellant and respondent agreed to admissions of some of the evidence. The appellant however indicated that the contents of the confession are placed in dispute. There seems to have been another (second) pre-trial conference but according to the heads of argument of the respondent, the record of the said pre-trial conference is not available.

[42] The matter then proceeded on the 7 March 2023 before the court a quo. The appellant made a plea explanation to the effect that he acted in self-defence in respect of count 1. The respondent indicated that the appellant has admitted the post-mortem report, chain of evidence, the photo album and DNA results. The respondent further informed the court a quo that the appellant does not dispute the statement he made to a magistrate in chambers. The appellant sought clarity as to whether the said statement is handed in as a confession or what, to which the respondent replied that it is handed into record as an admission and not a confession. The respondent read the statement into record, handed same into record and it was marked as exhibit "A".

[43] The court a quo then enquired on why the statement indicates that the appellant provided information in iSizulu when making the statement but elected to proceed in Setswana in the proceedings. The appellant confirmed that he is fine with Setswana. A photo album was handed into record as exhibit "B". Exhibit "C" was the section 212 affidavit by Professor BL Botha who performed the post-mortem and affidavit by Phophosi Nkonyani of the Phokeng Forensic Pathology Services.

[44] The forensic statement compiled by police officer Vusi Rikhotso was accepted as exhibit "D" while the biology report by P Naicker was accepted as exhibit "E".

[45] The respondent closed its case without leading any evidence and relied only on the exhibits handed into record. The appellant also closed his case without leading any evidence.

Findings by the court a quo

[46] The court a quo convicted the appellant based on his statement which was handed in as exhibit “A” together with the other exhibits without any other evidence. The court a quo found that the appellant’s silence indicates that he was not taking the court into his confidence. As a result the evidence adduced on behalf of the respondent was the only evidence that was before the court a quo as the appellant failed to testify.

[47] The court a quo further took the appellant’s plea explanation into consideration in its judgment. The court a quo found that the blood samples of the deceased matched the blood samples found on the appellant’s pair of jeans which he was wearing on the day of the incident. The court a quo found that it is not in dispute that the pair of jeans was found after the death of the deceased and found at the accused’s house.

Analysis and reasons for judgment

[48] The authorities are clear that the onus remains on the state to prove the accused’s guilt beyond a reasonable doubt. Once the state has acquitted itself of this onus, it is then upon the accused to provide evidence which is reasonably possibly true so that his version can be accepted. The accused has no obligation to assist the state in proving its case and his explanation does not have to be beyond a reasonable doubt.

[49] In ***S v M 2006 (1) SACR 135 (SCA)*** at para 189, the court stated that:

“The point is that the totality of evidence must be measured, not in isolation, but by assessing properly whether in the light of the inherent strengths, weaknesses, probabilities and improbabilities on both sides the balance weighs so heavily in favour of the state that any reasonable doubt about the accused’s guilt is excluded.” See also ***S v Chabalala 2003 (1) SACR 134 (SCA)*** at para 15.

- [50] The appeal lies only against count 1 and I restrict myself to the said charge. The appeal is based on the acceptance by the court a quo of the admission/confession statement by the appellant and also the circumstantial evidence based on the exhibits handed into record. The appellant submits that a trial within a trial should have been held, more so since the appellant indicated during the taking of the said statement that the police are the ones who asked him if he wants to make a confession without informing him of his rights to legal representation. Further that the appellant, at the start of the trial, indicated to the court a quo that they dispute the contents of the said statement.
- [51] From the record, it is clear that there has been a chain of irregularities and misdirection. At the taking of the statement by the accused, which occurred before Magistrate Kleynhans, the moment the appellant indicated to him that he was told by the police to make a confession and that he was not informed of his rights to legal representation, the magistrate should have stopped right there and not go further. This was irregular on its own.
- [52] Section 73(1) and (2A) are clear that the accused is entitled to the assistance of a legal adviser from the time of arrest. Section 73 (2B) requires that the accused be given a reasonable opportunity to obtain legal representation. The fact that the magistrate informed the appellant of his rights to legal representation and immediately proceeded to take a statement from the appellant does not cure the defect occasioned before the appellant was brought to him. Also, it does not comply with section 73 (2B).
- [53] At the pre-trial, the appellant indicated that he objects to the contents of the statement. This was repeated at the court a quo on the day the appellant was asked to plead to the charges. His representative informed the court a quo that they object to the contents of the statement. Yet the court a quo accepted the

statement and relied on same, amongst others (circumstantial evidence), to convict the appellant. This was irregular.

Circumstantial evidence

[54] In *Mahlalela v S (396/16) [2016] ZASCA 181 (28 November 2016)* at para14 it is stated that:

“(14) ... It is trite that in cases based on circumstantial evidence the courts are enjoined to follow the judgment in *R v Blom* 1939 AD 188 at 202. The two ‘cardinal rules of logic’ relating to inferential reasoning in cases based on circumstantial evidence set out in *Blom* are:

(1) The inference sought to be drawn must be consistent with all proved facts. If it is not, the inference cannot be drawn.

(2) 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 inference sought to be drawn is correct.

(15) The difficulty is that proved facts envisaged in *Blom* are facts proved beyond reasonable doubt. Intermediate inferences, too, must be based on proved facts. Inferences may not be drawn from other inferences.”

[55] The court a quo was sitting only with admissions made in terms of the chain evidence. The statement by the appellant (which I have already found that it was irregularly obtained), post-mortem, the DNA, the photos of crime scene, forensic investigations and findings. There is no evidence before the court a quo as to how the appellant was arrested and what happened from the time of his arrest, through the making of a statement to Magistrate Kleynhans, to the plea explanation of self-defence and denial of the contents of the statement, despite the appellant’s objection to the contents of the statement.

[56] The court a quo found that the appellant was with the deceased on the day of the incident and that the blood found on the appellant's pair of jeans matched that of the deceased by DNA tests. The pair of jeans were found at the appellant's house. As to how the pair of jeans were found and what happened to link them to the DNA of the deceased, remains a mystery as no one has testified to that effect. There is only statements by forensic experts who state that the pair of jeans were found at the appellant's house.

[57] The only causal link, which merges or brings the forensic evidence or chain evidence together, is the statement made by the appellant to Magistrate Kleynhans. Without that statement, there cannot be any application of circumstantial evidence. I have found the statement irregularly obtained. Therefore, the chain evidence is rendered null and void ab initio. This vitiates the whole proceedings in respect of count 1.

Order

[58] I therefore make an order as follows:

1. The appeal is upheld.
2. The conviction of the appellant on count 1 is set aside.

J. T. MAODI
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,
NORTH WEST DIVISION, MAHIKENG

Mfenyana J:

[59] This appeal served before the Full Bench of this Division. At the request of the Judge President of this Division, on 8 December 2025, I was roped in as a third judge after the matter had been argued before Khan AJ and Maodi AJ, who could not agree on the outcome of the appeal, save for the issue of condonation. I have had the benefit of the record of proceedings before the court *a quo*, *albeit* incomplete, as well as the heads of argument on appeal. This judgment is limited to the merits of the appeal.

[60] I consider it necessary to, at the outset, deal with the adequacy or otherwise of the record of the trial. On reading the record, I was satisfied that it was sufficiently detailed to adjudicate the appeal and that doing so would not prejudice the appellants in any way. I am guided in this regard by the decision of the Supreme Court of Appeal (SCA) in **Chabedi**²¹ echoed by the Constitutional Court in **Schoombee**²² that “the requirement is that the record must be adequate for proper consideration of the appeal”. As in *Schoombee*, the available record is detailed and specific for this court to consider the appeal.

[61] I have also had the benefit of reading the judgments by Khan AJ and Maodi AJ. I agree with Maodi AJ only insofar as he finds that the court *a quo*’s acceptance of the admission by the appellant amounts to a misdirection. As is apparent in

²¹ *S v Chabedi* [2005] ZASCA 5; 2005 (1) SACR 415 (SCA)

²² *Schoombee and Another v The State* [2016] ZACC 50.

the succeeding paragraphs, this finding remains unaffected by the other ground of appeal.

[62] I agree with Khan AJ insofar as she concludes that the appeal should fail. I, however, do so for slightly different reasons. I set out to deal with those reasons hereunder.

[63] When the pre-trial was held on 2 March 2021, the following engagement transpired between the court and Ms Pheto, the legal representative of the appellant at the time:

“Court: Thank you. Will the admissibility of any written statements, pointing out by the accused, forensic evidence as indicated, the confession, DNA results, section 212 of the CPA statements, post-mortem and chain evidence be put in dispute?

Ms Pheto: No, Your Worship, safe for the contents of the confession, Your worship. As the court pleases.”

[64] When the trial resumed on March 7, 2023, Mr Linga, who represented the appellant from that day forward, was asked once again if the appellant contested the admission of the statement made to the magistrate in chambers. Mr Linga replied that the appellant did not dispute the admission of that statement. This contradicted the appellant's earlier response, in which he had disputed the statement.

[65] I must express my difficulty in understanding the approach taken by the court *a quo* in this regard. On 2 March 2021, the appellant, through his legal representative, disputed the contents of the statement made to the magistrate. At that point, the court should have ordered a trial within a trial to address the appellant's concerns and assess the reliability and admissibility of the statement. Instead, the court admitted the statement without conducting such an inquiry, which is irregular. The appellant's response was part of the court record but seems to have been overlooked.

[66] In my view, it does not matter that the appellant had a change of heart on the second occasion. The main issue is that he had already disputed the statement. To the extent that the court *a quo* did not clarify the reasons for the appellant's change in stance regarding the admission of the statement, it erred.

[67] Section 217 of the Criminal Procedure Act (CPA)²³ governs the admissibility of confessions. It provides that where a confession by an accused has been made to a magistrate or has been confirmed and reduced to writing, it shall be admissible in evidence against that accused and shall be proved to have been made freely and voluntarily, in his sound and sober senses, unless the contrary is proved.

²³ Act 51 of 1977.

[68] In **Gama v S**²⁴, a decision of the Supreme Court of Appeal (SCA), relied on by the appellant, the SCA held that:

“The admissibility of a confession where the question is whether it was freely and voluntarily made and where it is disputed on the ground that it was obtained in violation of other fundamental rights, and where the facts are not common cause between the parties, is to be adjudicated upon at a trial within a trial, an insulated enquiry where only the admissibility of a confession is determined independently of the question of guilt. The defence is entitled to lead evidence in rebuttal. It was for the prosecutor to inform the court and the defence that it intended to lead evidence of a confession made by the accused as part of the State’s case. If the defence had raised an objection a trial within a trial would have had to follow,”

[69] From the above, it follows that if the defence raises an objection to the admissibility of a confession, a trial within a trial must be held. It did. What followed thereafter is, in my view, immaterial and should, in any event, not have happened. Accordingly, it was necessary to establish the correctness and the admissibility of the confession.

[70] To my mind, the determination of the correctness of the confession and the admissibility thereof are not issues this court is seized with. Neither is the question whether or not the statement was obtained irregularly. It is material to the assessment of the first ground of appeal that a trial within a trial ought to have been held.

[71] I do not share my sister’s sentiments about the court *a quo*’s election to focus solely on the proceedings of 7 March 2023, completely disregarding the record

²⁴ (127/2013) [2013] ZASCA 132 (27 September 2013).

of 2 March 2021. If I had needed to engage with that conclusion, my inclination would have been to disagree with it.

[72] On the second ground of appeal relating to circumstantial evidence, ***R v Blom*** is instructive. It states as follows, regarding inferential reasoning:

(1) “The inference sought to be drawn must be consistent with all proved facts. If it is not, the inference cannot be drawn.

(2) 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 inference sought to be drawn is correct.”

[73] In the present case, the proven facts are that the deceased’s death was a result of sharp, forced trauma to the chest and neck. This is according to the post-mortem report. Secondly, the DNA analysis indicates that the appellant’s DNA matched the DNA found on the deceased. This conclusively proves that the appellant was in the company of the deceased when he was killed. The appellant did not challenge this evidence. Third, the appellant does not dispute his presence at the deceased’s shack insofar as he pleaded that he acted in self-defence.

[74] The appellant, in his plea explanation, stated that he killed the deceased in self-defence. Ordinarily, an explanation setting out the basis of self-defence is not regarded as evidence given under oath but as a formal statement. An accused person who pleads self-defence is required to demonstrate that it was

necessary to avert an attack and has employed reasonable means directed at the attacker to avert such an attack. The averments made by the appellant are informal admissions, and this court is at large to have regard thereto in its judgment.

[75] Once an accused raises a plea of self-defence, the essence thereof is that he admits to the intentional killing of the person concerned but argues that their actions were justified or legally permissible. It was held in *De Oliveira*²⁵ that the killing of a person is *prima facie* unlawful. In the present case, the appellant would have had to lead evidence to rebut the presumption of unlawfulness. Absent such evidence, the requirement of unlawfulness would have been satisfied. In pleading self-defence, the appellant admitted the elements of the offence, save for unlawfulness.

[76] Not all the facts considered by the court *a quo* depend on the confession made to the magistrate. The above facts, which are not in dispute, stand independently of that confession. Thus, regardless of the discounting of the confession, the proven facts are sufficient for the court to have returned a verdict of guilty. In doing so, the court *a quo* was well within the bounds of the logic required in inferential reasoning. The forensic evidence was not challenged by the appellant, despite having placed himself at the scene of the crime in his plea explanation. Considering the totality of the circumstantial evidence, there can be no other reasonable inference in the circumstances,

²⁵ *S v De Oliveira* [1993] ZASCA 62; 1993 (2) SACR 59 (A); See also: *David Papiki Komane v The State* (51/2019) [2022] ZASCA 55 (20 April 2022).

other than that the appellant is guilty of the murder of the deceased.
Consequently, this ground of appeal falls to be dismissed.

[77] In the result, I make the following order:

- a. The appeal against conviction is dismissed.

S MFENYANA
Judge of the High Court
Northwest Division, Mahikeng

APPEARANCES

For the appellant:

Adv M. E. Setumo

Instructed by:

Legal Aid SA

For the respondent

Adv. K. Phetlhu

Instructed by:

NDPP – North West Division

Date judgment reserved:

16 May 2025

Date of Judgment:

10 February 2026