IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION: (MTHATHA) PORT ST JOHNS CIRCUIT COURT

Case No: CC14/2018

Date: 26 February 2020

Reportable

In the matter between

STATE

and

LAWRENCE GQOKI	**Accused No.1**
DAVID ZONGEZILE MANQANA	**Accused No.2**
MALIBONGWE JANGE MSOKOLO	**Accused No.3**

JUDGMENT

BROOKS J

[1] The three accused were charged with the following offences. Count 1, murder in that on or about 18 March 2017 and at or near Madakeni Locality, Gonlolo Administrative Area in district of Port St Johns, the accused did unlawfully and intentionally kill Thembile Mfobosa an adult male person. Count 2, attempted murder in that upon or about the same time and at or near the same place mentioned in count 1, the accused did unlawfully and intentionally attempt to kill Elliot Mera Khamba by shooting him with firearms. Count 3, possession of firearms in that upon or about the same time and at or near the same place mentioned in count 1, the accused did unlawfully and intentionally

possess firearms to wit one 9 millimetre parabellum calibre Norinco model 213 semi-automatic pistol with serial number 46002588 and other firearms whose calibre is unknown to the State. Count 4, possession of ammunition in that upon or about the same time and at or near the same place mentioned in count 1, the accused did unlawfully and intentionally possess ammunition, the number of which is unknown to the State.

[2] In the indictment it is indicated that the State intended to rely upon the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 in respect of the murder charge. In terms of this legislation in the event of a conviction on the charge of murder the court would be obliged to impose a minimum sentence of life imprisonment because the killing of the deceased was planned or premeditated and in killing the deceased the accused were acting in execution or furtherance of a common purpose or conspiracy. The court would only be able to impose a lesser sentence if it was satisfied that on the evidence before it substantial and compelling circumstances emerged which would justify the imposition of a lesser sentence.

[3] Before the accused pleaded to the charges that had been put to them, the court ascertained that they were aware of the nature and the application of the so-called minimum sentence legislation to count 1 in this matter and had taken the prospect of the imposition of the prescribed minimum sentence into account in their trial preparation.

[4] All three accused were represented throughout these proceedings. Their legal representatives confirmed that the accused were aware of the minimum sentence possibly being imposed upon them and had taken this into account in preparing their defence.

[5] All three accused pleaded not guilty to the offences with which

they were charged.

[6] The legal representatives confirmed that the pleas were in accordance with their instructions.

[7] As they are entitled to do, the accused elected not to outline the basis of their defence before the commencement of evidence.

[8] At the commence of the State case three witnesses gave evidence about certain events which occurred on the night upon which the deceased in count 1 was killed. More about this evidence will emerge towards the end of this judgment.

[9] Certain admissions were made by the accused in terms of section 220 of the Criminal Procedure Act 51 of 1977 (CPA). The relevant document handed in as EXHIBIT A reads as follows:

> "1. The person referred to as the deceased in this document generally is indeed the person mentioned in the indictment to wit Thembekile Mfobosa, an adult male person. That his body was at all times and occasions correctly identified as such.
>
> 2. The deceased died on 18 March 2017 at or near Madakeni Locality, Gonlolo Administrative Area in the district of Port St Johns as result of multiple gunshot wounds.
>
> 3. The deceased's body did not sustain any further injuries from the time it was removed from the place mentioned in paragraph 2 above until Dr Prince Mkhuseli Mancotywa performed a medicolegal post mortem examination on his body on 22 March 2017.

4. The post mortem report parked PM81/2017 as compiled by Dr Prince Mkhuseli Mancotywa during the said post mortem examination is true and correct in all its contents, including the observations, findings and conclusions stated therein.

5. Post mortem report be admitted as EXHIBIT B."

[10] It is indeed evident from the content of the post mortem report that the deceased died as a result of multiple gunshot wounds.

[11] The State indicated that it intended to introduce into evidence statements made by the three accused to commissioned officers and which amounted to confessions. Reliance was placed upon the provisions of section 217 of the CPA which permit of the introduction of such evidence against the accused person if it is proved that the statement was made freely and voluntarily and whilst the accused person was in his or her sound and sober senses and without having been unduly influenced thereto.

[12] The State also indicated that it intended to rely upon the pointing out which had been made by accused 3. In terms of section 219A of the CPA the State bore the onus of proof to show that the pointing out was done by accused 3 freely and voluntarily whilst in his sound and sober senses and without having been unduly influenced thereto.

[13] The legal representatives objected to the production of the statements and the pointing out. They did so on the basis that the statements and the pointing out were not made freely and voluntarily and without undue influence having been brought to bear on the accused. In respect of all three accused the claim is made that subsequent to their arrest they had been severely assaulted by

members of the investigating team. It is convenient to deal briefly with the outline of the basis of the objection as it was advanced on behalf of each accused.

[14] Accused 1 asserted through his counsel that he had been assaulted and tortured by the police. Handcuffs had been tightened on him with such severity that they caused injury to the flesh. Needles had been inserted under the nails of some of his fingers. He had been subjected to suffocation using a plastic bag causing him to faint whereafter he was revived by having a bucket of water tossed over him. An iron rod was passed across the body and held in place with the hands cuffed behind the back. He stated that no constitutional rights were explained to him before he was presented with a form to sign. He claimed that he had not signed it but that it was signed by the police officer. He placed the contents of the statement recorded in issue. It was indicated that no interpreter was used, that the police officer wrote out a statement and that it was not read back to accused 1.

[15] Accused 2 placed a similar outline before court. He did not refer to the insertion of needles under his fingernails but in other respects he claimed to have been treated in the same way as accused 1.

[16] Accused 3 placed a similar outline before the court through his counsel. His was a little more explicit about the manner in which the iron rod was applied, indicating that it was placed below his thighs when he was in the squatting position and held in place by his forearms over which it passed while they were angled behind him and secured there by his hands being cuffed in front of his ankles. Like a trussed chicken he was suspended with his head hanging upside down, the two ends of the rod being placed on the ends of opposing tables with him hanging in the gap. He hung like this for a long time and was assaulted on his

waist and on his back whilst in this position. He too was subjected to suffocation using a plastic bag. He indicated that pepper spray had been placed inside it. Whenever he fainted he was revived by a bucket of water being thrown over him.

[17] In respect of the content of his statement accused 3 said he was confronted with the content of his statement which the police had obtained before his arrest and told repeatedly that he must admit his involvement in the offences. In his case too, the claim was made that his constitutional rights were never explained before the process of obtaining the statement was commenced, that no interpreter was used and that it was not read back to him.

[18] The outline of the objection to the production of accused 3's pointing out was that it did not comply with the requirements of the law. No *pro forma* had been used at all. The pointing out was conducted by an officer who was a member of the investigating team. Accused 3 claimed to have been subjected to severe assault and during the assault the question of what he might be able to point out was raised. In short the pointing out was not made freely and voluntarily.

[19] In the circumstances a trial-within-a-trial was heard. Not unexpectedly all the police personnel who were called to give evidence on behalf of the State denied having assaulted the accused in any way or of having seen any assaults being perpetrated upon them. The claim was made that their constitutional rights were explained to the accused whenever it was necessary to do so. In short all proper protocol had been observed.

[20] It is not necessary to set out in detail all the evidence put forward by the police officers' testimony. Certain aspects of the evidence

placed before court in the trial-within-a-trial established a number of objective factors which play a prominent role in the evaluation of the evidence led in the trial-within-a-trial. They can be listed briefly as follows.

[20.1] Accused 1 was arrested on 19 March 2017 and brought into Port St Johns Police Station in the early evening and was then questioned by a team of about eight police officers throughout the night.

[20.2] Accused 1 remained in custody and on 26 March 2017 he was taken to Lusikisiki Police Station to make a statement before Captain Sitsha. This was a commissioned officer who stated that it was the first time he had been asked to take a statement purporting to be a confession from an accused person. In completing the *pro forma* he recorded what he described as:

> "Scars on both hands made by handcuffs."

[20.3] No interpreter was used during the process in which Captain Sitsha recorded the statement made by accused 1. The reason he gave for this is that both he and accused 1 were Xhosa speaking. The *pro forma* presents itself in English. The answers and details recorded therein are in English. The statement was recorded in English.

[20.4] Initially, accused 1 was not legally represented when he first appeared in the Magistrate's Court.

[20.5] During his evidence in the trial-within-a-trial on 6 June 2019, accused 1 showed the court the residual effect of injuries. The little finger of his right hand is crooked. Under the nail was a blackish substance which looked like dried coagulated blood. The left forefinger showed the nail newly growing out of the nail bed. The accused stated that after the injuries received at the hands of the police, the old nail on this finger had eventually become detached and fallen off. A scar on

his right wrist which was commensurate with healed flesh wounds caused by over tightened handcuffs was visible. He also showed the court scars on both his shins.

[20.6] Accused 2 was taken to the police station by his attorney on 29 March 2017. He was handed over to the police and his attorney left. He was interviewed until very late that night. The interview was recommenced on the morning of 30 March 2017 and thereafter lasted most of the day.

[20.7] At 09h00 on 31 March 2017, accused 2 was taken to make a statement before Captain Monyeki, police officer stationed at Port St Johns police station. On the *pro forma* the officer notes that he had reported injuries and further notes as follows:

> "Indeed accused has got two scratches of handcuffs on both wrists."

[20.8] No interpreter was used by Captain Monyeki. The *pro forma* utilised is printed in English and the answers and details recorded therein are recorded in English. The statement apparently taken from accused 2 was recorded in English.

[20.9] On the same day after appearing before Captain Monyeki, accused 2 had his first appearance in the Magistrate's Court. EXHIBIT N is a transcript of the proceedings. It reveals that the magistrate saw injuries on accused 2 and ordered that he be given access to doctors.

[20.10] At the first appearance before the magistrate on 31 March 2017, accused 2 was represented by the same attorney who had accompanied him to the police station on 29 March 2017.

[20.11] Accused 3 was arrested on 7 April 2017. He had been in Gauteng at the time. He had boarded transport to bring him down to

Port St Johns. Immediately upon his arrival he went to his attorney who accompanied him to the police station and then left him. The interview with accused 3 lasted the whole day until approximately 6 pm.

[20.12] The pointing out made by accused 3 and conducted by Colonel Mkovana, another police officer stationed at Port St Johns, was done at night on 7 April 2017. No *pro forma* was used. No interpreter was involved.

[20.13] On 8 April 2017 at 13h48, accused 3 was taken to make a statement before Colonel Mtirara, a police officer stationed at Mthatha. He recorded in the *pro forma* that,

"No injuries observed."

[20.14] No interpreter was used during the exchange between Colonel Mtirara and accused 3. Again the reason given for this was that both he and accused 3 were Xhosa speaking so there was no need for an interpreter. The *pro forma* used by Colonel Mtirara was printed in English. The answers and the comment recorded thereon are in English. The statement taken from accused 3 was recorded in English.

[20.15] On 10 April 2017, accused 3 appeared for the first time in the Magistrate's Court. He was represented by the attorney who had taken him to the police station a few days earlier. The magistrate was told that accused 3 had been assaulted by the police and had suffered injuries. The magistrate ordered the investigating officer to take accused 3 for immediate medical treatment.

[20.16] Accused 3 was taken to the Port St Johns Health Centre. His medical file contents show that he was seen by a nurse there. Her note reads as follows:

"Back and painful feet – after being beaten by community.

Painful hands. Police case."

The words police case have been underlined twice.

[20.17] Accused 3 was then seen by the doctor. On his form she records the treatment given to have been a Voltaren injection and the provision of paracetamol and Brufen tablets and a muscle rub. She also prescribed that he be reviewed at the nearest hospital.

[21] Each of the accused testified in the trial-within-a-trial. In each instance the *modus operandi* of the investigating team was described in the same way by the accused. A quite remarkable form of assault was described whereby the accused were made to crouch on the floor with their hands clasped in front of their shins. They were then handcuffed in this position with an iron rod being passed behind their backs and across each forearm. Each end of the iron rod was then placed on a table and the accused allowed to hang in the gap between the tables. Immobilised in this position, the distribution of their body mass meant that the centre of gravity was located in the chest and shoulders and they hung upside down with their heads pointing towards the floor. This exposed the hands, shins and lower backs to assault. Each accused described being exposed to partial suffocation where a plastic bag was passed over their heads and tightened around the neck to deprive them of oxygen. It appears that on occasions pepper spray was introduced into the bag to increase the discomfort experienced by the accused. All three accused described passing out through a deprivation of oxygen and being revived by being sloshed with a bucket of cold water.

[22] The interviews of each accused were described by them as being very long. The assaults were described by them as being aimed at getting the accused to admit their involvement in the offences for which they had been arrested. The length of the interviews was also

confirmed by the evidence given by the police. The purpose of the interviews was obvious. The police wanted to get to the bottom of the mystery surrounding the death of the deceased. Essentially all that was in dispute between the State and the defence team was the manner of the interrogation of the accused.

[23] The approach to be adopted towards the trial-within-a-trial in the present matter is set out clearly in *Gcam-Gcam v the State* 2015 (2) SACR 501 (SCA) where the following was stated by Cachalia JA at paragraph 49:

> "When confronted with confessions made by suspects to police officers whilst in custody, even when those officers are said to be performing their duties independently of the investigating team, courts must be especially vigilant. For such people are subject to the authority of the police, are vulnerable to the abuse of such authority and are often not able to exercise their constitutional rights before implicating themselves in crimes. Experience of courts with police investigations of serious crimes has shown that police officers are sometimes known to succumb to the temptation to extract confessions from suspects through physical violence or threats of violence rather than engage in the painstaking task of thoroughly investigating a case. This is why the law provides safeguards against compelling an accused to make admissions and confessions that can be used against him in a trial."

[24] It is trite that in establishing whether a statement amounting to a confession complies with the provisions of section 217 of the CPA the onus rests upon the State. Proof of the admissibility of the confession must be established beyond a reasonable doubt.

[25] In the analysis of the evidence it is not required of an accused person to put up a credible version to refute the evidence of the police. The proper form for the assessment of the evidence of the accused was stated in *Gcam-Gcam* at paragraph 48 to be as follows:

> "All that was required of the appellant was to present a version that was reasonably possibly true, even if it contained demonstrable falsehoods."

[26] In the present matter all three accused gilded the lily in their contest of the admissibility of their confessions. For example, there were claims made *inter alia* that an accused had been rehearsed in what to say by the police using a different statement. He in fact made no statement. He simply signed a statement that was provided by the commissioned police officer and had not even signed the purport confession. It is clear that the accused wish to create the impression that they were not the authors of the statements which have been recorded. These elements of the version offered by the accused appear to be palpably false. That this is so was demonstrated by legitimate cross-examination on the content of their statements and by an assessment of the overall evidence given by the commissioned officers.

[27] However objective evidence of assaults perpetrated on the accused was noted by the magistrate in respect of accused 2 and accused 3. The residual effects thereof on the body of accused 1 were demonstrated to this court. The complaints made by accused 3 to the Port St Johns Health Clinic produced treatment in the form of anti-inflammatory medication. The type of assault described by the accused would produce painful inflammation of the joints and muscles. This much was admitted by the doctor from the Port St Johns Health Centre who gave evidence. In all other respects she was an extremely unsatisfactory witness, prone to emotional outbursts and implosions in

court which led to her running out of court in the middle of her evidence without seeking leave to do so.

[28] Accused 3 had stated that when he met up with the doctor at the health centre, she smelled of liquor. Attempts to establish whether this was indicative of some sort of unprofessional behaviour on her part led to an overly aggressive and outraged defensive response from the nurse who also gave evidence. It is plain that between the nurse and the doctor there was a traumatising fear that her evidence may be found wanting. At best for them, this was so because the court formed the distinct impression there had been no proper examination of accused 3 whereas there should have been. It was impressed upon the doctor by the court that a person in her position performs a vital function when called upon to examine someone who has alleged to have suffered a police assault. The advantage brought with it is an opportunity of contemporaneous examination of such an accused person that cannot be overemphasised.

[30] Under cross-examination the challenge was made to the nurse to explain the origin of her note to the effect that accused 3 had been "beaten by community". Part of her testimony had been that she had seen that he was limping. The uncontested evidence of accused 3 was that as soon as he had arrived from Gauteng he had presented himself at the police station and had been taken into custody. There had simply been no contact with members of the local community. The suggestion made to the nurse was that this detail was false and was inserted to detract from the impression that the injuries had resulted from assaults in the hands of the police. This was met with a denial almost as vehement as the denial that the doctor had been under the influence of liquor and gave off the residual smell of its earlier intake when she saw accused 3. However, despite her indignation the nurse could not

explain the origin of her note.

[31] It is also noteworthy that both accused 2 and accused 3 claimed that when they went before the commissioned officers they indicated that they wanted the assistance of their legal representatives. The police denied that this was so. The relevant entry on the *pro forma* supports the police version. And yet both accused 2 and accused 3 had been escorted to the police by their attorneys. Both were represented by the same attorney as at their first appearances after confessions had been obtained. Clearly accused 2 and accused 3 had an established relationship with the relevant attorneys. It seems most unlikely that accused persons in those circumstances would have been content to make self-incriminating statements without their attorneys being present. The court has considerable doubt as to whether such an invitation was ever even extended to the accused. Even if it was, it is plain on their version that the reasonable possibility exists that their requests were ignored.

[32] Accused 1 described in his evidence that subsequent to being trussed up and made to hang between two tables over an extended period of time he could not walk properly. He tried to go up and down the stairs in order to relieve his condition but this had not been successful. Indeed, after the protracted assault, accused 1 had been handed over to another policeman with the instruction that he should be exercised.

[33] Not only are the complaints raised by the accused in respect of their injuries and such evidence thereof as was seen compatible with the nature of the alleged assault, the extensive length of time taken over the interviews of each accused also provided more than ample opportunity for such assaults to be made.

[34] In the circumstances the court was of the view that a reasonable possibility existed that the accused had all been assaulted in the manner described by them and that the resultant confessions and the pointing out made by accused 3 were not made freely and voluntarily and without undue influence. In the circumstances the ruling was made that the statements made to the commissioned police officers and the pointing out made by accused 3 would not form part of the evidence against the accused.

[35] The State then closed its case.

[36] An application was immediately made on behalf of the three accused for their discharge in terms of the provisions of section 174 of the Criminal Procedure Act.

[37] Ms Ngxingwa, who appeared on behalf of the State very properly conceded that in the circumstances of this matter she was unable to oppose the application. Notwithstanding the concession it is necessary for the court to consider the evidence placed before it in the main trial and to determine whether or not there is any evidence upon which a reasonable court acting carefully may convict the accused. *State v Khanyapa* 1979 (1) SA 824 (A) 838.

[38] The evidence of the first three state witnesses related to the sighting of the motor vehicle owned by accused 1 on the night of the events which gave rise to the charges which the accused faced. The evidence described something of a chase being giving to that vehicle with an exchange of gunfire occurring. The motor vehicle is later found at the home of accused 1 and is taken into the police station. Although there is extensive evidence relating to the suspicious manner in which

the vehicle was driven about on the night in question, nowhere in the evidence is the accused identified as being in the motor vehicle. There is also some evidence of an historic conflict between accused 3 and the deceased in count 1. The dispute seems to have involved cattle belonging to the deceased. Evidence given of events on the night in question at the home of the deceased where he was shot does not identify any of the protagonists.

[39] Accordingly there is circumstantial evidence against accused 1 and to a very limited extent against accused 3. Two cardinal rules of logic applied to the necessary process of reasoning by inference that arises when such evidence is evaluated:

> 1. The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.
>
> 2. The proved facts should be such that they exclude every possible inference to be drawn from them, save from the one sought to be drawn. If they do not exclude other reasonable inference, then there must be a doubt whether the inference sought to be drawn is correct. *R v Blom* 1939 (AD) 188 at 202 to 203.

[40] The evidence suggests that the vehicle belonging to accused 1 was driven in a suspicious manner in the vicinity of the homestead of the deceased in count 1 on the night of his death. It also suggests that its driver wanted to get away from that area as quickly as possible and did not want to be followed. The inference sought to be drawn would be that accused 1 drove the vehicle on the night in question and was responsible for the death of the deceased in count 1. However other inferences are not excluded such as the possibility that someone else drove the motor vehicle and accused 1 was not in it and did not in fact chase the deceased in count 1 to the homestead of the deceased.

Accordingly, there remains doubt that the inference sought to be drawn is correct.

[41] The same test reveals that the inference sought to be drawn that accused 3 had some sort of grudge against the deceased in count 1 and participated in his killing is not the only inference to be drawn from the fact that they may have argued over cattle in the past. Accordingly, there must be doubt as to whether the inference sought to be drawn is correct, namely that he was one of the attackers on that night.

[42] No evidence whatsoever was placed before the court from which any inference could be drawn relating to the offences set out in counts 2, 3 or 4.

[43] In such circumstances accused 1 and accused 3 must be given the benefit of the doubt.

[44] No evidence outside that contained in his confession was placed before the court in respect of accused 2 and pertaining to any of the offence with which he was charged.

[45] For these reasons the accused are entitled to be discharged at the close of the State case.

[46] This case presents another example of one where the State case is almost entirely predicated on confessions made by the accused. There is nothing in principle to be stated against a prosecution proceeding in such circumstances. However ultimately a number of fundamental flaws in the manner in which the police handled their investigations into this matter placed the success in its prosecution beyond even the undoubtable skill of Ms Ngxingwa.

[47] Serious issues emerged which call for comment. It is in the interests of justice that inroads are made into the rising levels of serious crime in this country. Much time is devoted to the preparation of and annual report by the Minister of Police in which comparative statistics are set out. This is done in an attempt to address the public demand for a lowering in the levels of crime by the activities of the police. This expectation is matched in intensity only by the public expectation that there should be an increase in the number of convictions flowing from an increase in the rate of success shown by the competent performance by public prosecutors of the duties allocated to them.

[48] Experience of the court with the investigation of serious crime by police officials demonstrates increasingly a preference to take a suspect before a commissioned officer to obtain a confession rather than to take a suspect before a magistrate. Amongst others this court has expressed reasons why it is preferable to take a suspect before a magistrate. In State v Ntantiso and 2 others CC04/2015 ECHM date of judgment 23 August 2017, the following was stated:

> "Be that as it may, a consideration of the submission on the point provides an opportunity to revisit an expression of the view that it is more desirable that an accused person be taken to a magistrate for the purposes of making a statement with a view to it being submitted as a confession in terms of the provisions of section 217 of the Criminal Procedure Act 51 of 1977, than that an accused person be taken to a police officer for the same purpose. The requirements for admissibility in section 217 of the Criminal Procedure Act 51 of 1977 are aimed at ensuring fairness. The

rationale for the exclusion of a confession under that section is threefold, namely the potential unreliability of the confession, the privilege against self-incrimination and the importance of proper behaviour by the police towards those in custody. *State v Khan* 1997 (2) SA 611 (SCA). The vital role to be played by a magistrate in this regard has been stressed for many years. Van den Heever JA stated:

'The very object of bringing an accused person before a magistrate is to safeguard him against duress or undue influence in making a statement which may be used as evidence against him. As Innes CJ pointed out in Barlin's case at p 465, even the authority and the ascendancy of a policeman – his *ius reverentiale* - may conceivably affect the exercise of free will unduly in certain circumstances.'

R v Kuzwayo 1949 (3) SA 761 (AD) 768. The citation for Barlin's case is *R v Barlin* 1926 (AD) 465. None of the wisdom evident in the principles stated by Van den Heever JA has diminished with the passage of time. Indeed, in the era of a constitutional democracy in our country it is even more desirable that for the purposes of making a confession which may be used as evidence against him or her, an accused person should preferably be brought before a magistrate in whose judicial independence members of the public should be confident, rather than before a peace officer who is a member of the same agency of the state as the investigating officer or team whose business is the pre-trial investigation of the accused person's potential involvement in any case under investigation.

> This would avoid the undesirable impediment in ensuring that a confession has been made freely and voluntarily and without undue influence which may otherwise be imported if an accused person is brought before a peace officer who may be connected with the investigation team or who may be perceived by the accused to be so connected. No new duress is imported by the identity of the person as a Magistrate and a constitutional climate is created in which an accused person feels free to speak of any undue influence, or worse, which he or she may have experienced at the hands of the police. Ultimately this is an approach which would enable more than hinder the attainment of that constitutional goal, a fair trial."

[49] It is clear from the evidence in the present matter that the investigation team sometimes elected to make use of commissioned officers who were either part of the investigation team or part of the personnel at the same police station when seeking the recordal of a confession or a pointing out. At best the investigation team were at liberty to approach specific commissioned police officers with whom they may or may not have had an historic relationship of favourable cooperation. At worst, they were free to turn to inhouse commissioned officers to be of assistance in their moment of need. If this is the blueprint of the plan for an investigation leading to the obtaining of a confession, it is characterised immediately by a possibility of "inhouse cooperation" being relied upon when necessary to overlook unprofessional transgression of fellow members of the police force, ignoring signs of what otherwise might emerge as reasons to find that the statement does not comply with the provisions of section 217 of the CPA. Armed with such a blueprint an investigating team is more likely

to succumb to the temptation of abusing its power and authority over a suspect under investigation than it would otherwise be if it knew that any confession produced by the investigation could only be recorded by a magistrate.

[50] All too frequently commissioned officers who record confessions do not use the services of an interpreter. That he or she and the suspect may both speak the same language, in this case isiXhosa, is not the only consideration. Questions on the *pro forma* are set out in English. So too are the answers recorded as having been made by the suspect. The statement itself is recorded in English. What is never known is the competency in English of any particular commissioned officer. He or she is not a sworn interpreter. In court proceedings, they most often give evidence making use of the services of an interpreter. The reliability and accuracy of the statement is frequently called into question. It is frequently asserted that the statement was not recorded correctly and was not read back to the suspect, whether in English or in the language of it origin. Many of the routine concerns surrounding the accuracy of the record of proceedings pertaining to the obtaining of a confession and the level of compliance therefor required by the Constitution of those taking the statement could be overcome by having the additional input of a sworn interpreter during the process. Interpreters form an integral part of the Magistrate's Court proceedings. They are almost invariably used by magistrates where a confession is recorded. The comments made in Ntantiso can be added to by the observation that the use of an interpreter would also be of great assistance in the attainment of the constitutional goal, a fair trial.

[51] The evidence discloses that the very nature and quality of investigation in this matter would probably have been materially affected for the better if the investigation team had only had one option

when it came to recording a confession, that of taking the accused before a magistrate.

[52] It is a reality of our times that members of the public are more trusting of members of the judiciary than they are of members of the South African Police force. The emergence of cases such as the present in which police brutality is revealed goes a long way towards the deterioration of the reputation of the South African Police Service in the eyes of members of the public. One of the direct effects that the deterioration of this reputation has is afforded by the example of an explanation given by many an accused person appearing in our courts who states that no mention of an assault was made to a commissioned police officer because he or she was just another member of the same force at whose hands the accused had suffered. Yet all of this could be avoided, from the poor level of integrity demonstrated in some investigations to the failure of the prosecution to secure the admission into evidence of a confession, if police investigators were obliged to use magistrates for the recordal of confessions.

[53] The time may well have arrived for the legislature to give serious consideration to the amendment of the CPA to remove the possibility that a confession might be recorded by a commissioned officer of the same force which is charged with investigation duties. This would go a long way to ensure that the quality of investigative work shows the improvement which is necessary to ensure an improvement in the rate of successful prosecutions for serious crimes in this country. I have little doubt that if members of the South African Police Services were aware that at some point during their investigation there may well be magisterial scrutiny of the background leading to the recordal of a confession, there would be a resistance on the part of the investigation team to resort to the improper use of police force or violence.

As a result of the lack of acceptable evidence placed before this court the following orders are made:

ACCUSED 1

- On COUNT 1, the charge of murder, you are found NOT GUILTY and discharged.
- On COUNT 2, the charge of attempted murder, you are found NOT GUILTY and discharged.
- On COUNT 3, the charge of the unlawful possession of a firearm, you are found NOT GUILTY and discharged.
- On COUNT 4, the charge of the unlawful possession of ammunition, you are found NOT GUILTY and discharged.

ACCUSED 2

- On COUNT 1, the charge of murder, you are found NOT GUILTY and discharged.
- On COUNT 2, the charge of attempted murder, you are found NOT GUILTY and discharged.
- On COUNT 3, the charge of the unlawful possession of a firearm, you are found NOT GUILTY and discharged.
- On COUNT 4, the charge of the unlawful possession of ammunition, you are found NOT GUILTY and discharged.

ACCUSED 3

- On COUNT 1, the charge of murder, you are found NOT GUILTY and discharged.
- On COUNT 2, the charge of attempted murder, you are found NOT GUILTY and discharged.
- On COUNT 3, the charge of the unlawful possession of a firearm, you are found NOT GUILTY and discharged.

- On COUNT 4, the charge of the unlawful possession of ammunition, you are found NOT GUILTY and discharged.

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RWN BROOKS
JUDGE OF THE HIGH COURT
Appearances

For the State:	Adv N Ngxingwa National Director of Public Prosecutions Old Broadcast House 94 Sissons Road Fort Gale MTHATHA
For Accused No 1 Instructed by	Mr M Notununu Mpumelelo Notununu & Associates Owen Street MTHATHA
For Accused No 2 & 3 Instructed by	Mr T Qina T. Qina & Sons Attorneys Madeira Street MTHATHA