REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DURBAN

CASE NO. **CC 157/10**

In the matter between:

THE STATE

versus

INNOCENT MSHANA MKHIZE

JUDGMENT

GOVINDASAMY AJ

[1] The accused was charged with two counts of murder. The charges stem from incidents which took place at Block "A" of Kranskloof Hostel at Kwa Dabeka, Pinetown on 1 November 2008 and 5 February 2009 when Zanele Pretty Mtshali and Cyprian Ayanda Nzuza met with their fate.

[2] The charge in respect of Count 1 emanates from an incident on the 1 November 2008 when the accused is alleged to have unlawfully and intentionally killed Zanele Pretty Mtshali. In terms of the summary of substantial facts the deceased was the girlfriend of Manqoba Mnguni. Both of them were standing on a road near Kranskloof Hostel when the

accused arrived with his friend Mbutho armed with firearms in search of Manqoba Mnguni. Manqoba Mnguni fled. The deceased also ran away. It turned out that she was shot many times and died at a room in the hostel.

[3] The charge in respect of Count 2 emanates from an incident on the 5 February 2008. According to the summary of substantial facts the deceased, Cyprian Ayanda Nzuza was shot and killed in circumstances unknown to the State when the accused and his companions armed with firearms confronted the deceased at Kranskloof Hostel.

[4] Mr. TP Pillay represented the accused and Mr. De Klerk represented the State.

[5] At the commencement of the trial, the accused pleaded not guilty on both counts. He denied the charges against him on the basis that he was not present in Claremont, Pinetown when the crimes were committed. He explained that he was on bail since September 2007 on a charge of theft of a motor vehicle and one of his bail conditions was that he does not enter the Claremont area. He lived in Greytown with his mother.

[6] At the trial the prosecution called three witnesses with regard to Count 1 and one witness with regard to Count 2.

[7] **Zandile Zulu,** the first witness, testified that she is a Constable stationed at Kwa Dabeka Police Station and has 3 years and 8 months service with the SAPS. On the 1st November 2008 she together with Reserve Constable Govender was called to attend the shooting incident at Kranskloof Hostel. When they arrived at the hostel at about 5:50 pm, they found many people there. The deceased suffered gunshot wounds to the stomach, the jaw and the left leg. The Investigating Officer and a photographer were called

to the scene.

[8] **Khehla Mnguni,** the second witness, testified that Zanele Mtshali, the deceased was the girlfriend of Manqoba, his brother. A child was born out of their relationship. His brother passed away in April 2009. He saw the accused and his companion Mabutho approach Manqoba and the deceased from behind. It was after sunset and he could see them clearly from a distance of about 20 – 30 metres. Manqoba and the deceased were at that stage standing under a bridge whilst he was standing at a higher level looking down from the second floor of the hostel. The accused and his companion were carrying firearms, with the barrels facing downwards. Manqoba ran away. The deceased, Mtshali ran to her aunt's house. Although he heard a lady crying, he could not see what was happening. He heard the sound of gunshots. He did not proceed to the scene. He knew that his brother and the accused did not see eye to eye due to the past conflict between them. .

[9] **Aaron Dissan**, is 21 years old with a Standard 4 level of education. He testified that he is the uncle of Khehla Mnguni. He knew the deceased, as she is the girlfriend of his brother Manqoba Mnguni. On the 1 November 2008, he was at the Kranskloof Hostel when he heard gunshots at about 2:00 – 3:00 pm. He went to investigate. He identified the deceased's body and later reported the incident to the deceased's parents. He knew the accused by sight but had not seen the accused on the day of the incident.

[10] In so far as Count 2 is concerned, the prosecution called one witness, **Constable Patricia Dlamini**, who only identified the body of the deceased, Nzuza. No further evidence was adduced.

[11] The usual formal admissions were made by the accused in respect of both

counts in terms of Section 220 of the Criminal Procedure Act (CPA).

[12] The prosecution sought to prove an alleged confession made by the accused, to one Captain Eva, within the meaning of Section 217(1) of the Criminal Procedure Act 51 of 1977. The accused objected to the reception of the confession on the basis that it was inadmissible, in that, he was assaulted and threatened to make a statement.

[13] A trial-within-a-trial ensued. The State called four witnesses in order to prove the confession. In summary their evidence is as follows:

[14] **Inspector Shandu** the investigating officer, with 20 years experience in the SAPS, testified twice in the trial. On the second occasion, he was re-called by the court in order to clarify certain important issues.

[15] He was seized with the dockets on 3 November 2008 and 9 February 2009, in respect of both offences referred to, in Counts 1 and 2 respectively. Upon receiving information that the accused was detained at Greytown for another offence, he proceeded to Greytown on 27 August 2009 and brought the accused to Kwa Dabeka Police Station. He arrested the accused there and then.On 3 November 2009 he interviewed the accused and informed him of the charges against him. A warning statement was obtained from him. He further testified that the accused wanted to make a statement concerning the crimes. He contacted Captain Delport, his Commander. On the 5 November 2009, Captain Delport arranged for the accused to be taken to Captain Eva at Cato Manor police station where the accused's statement was obtained.

Under cross-examination he said that the interview lasted for an hour. He communicated with the accused in IsiZulu and for this reason there was no need for an interpreter. He asked the accused whether he wished to

make the statement to a Magistrate or an independent Police Officer. He explained the difference between a statement make to a magistrate and to a Police Officer. A magistrate is independent and does not take sides but if he makes the statement to a Police Officer, the weight of the statement would not be the same, should he made a statement to a magistrate. The accused informed him that he wanted to make the statement to a Police Officer. The accused was not taken to a doctor because he did not complain of any injuries. It is not the usual procedure for an accused to be taken to a doctor before and after the taking of a statement. He denied that the accused's rights were not explained to him and that he did not request to make a statement to a police officer. He took leave during September and October 2009 and he was therefore unable to take a warning statement from the accused before 3 November 2009. When it was put to him that he should have taken a warning statement from the accused before the end of August 2009, he conceded that he should have done so. When it was put to him that the accused should have been charged and taken to court within 48 hours after his arrest, he conceded that this should have been done.

[16] He admitted that Khehla Mnguni's statement was taken by him only on 26 April 2010, insofar as the offence referred to in Count 1 is concerned. When questioned why the statement was taken one year and five months after the offence in Count 1, he said that Khehla ran away from Kranskloof Hostel and he could not be located. When it was put to him that without Khehla's statement there was nothing else to link the accused to the offence in Count 1, he said that there were other witnesses, namely Bheki and Manqoba Mnguni. When questioned why it took so long to arrest the accused, he explained that the accused fled the area and could not be found until he was located in Greytown.

[17] Captain **Hendrik Frederick Delport** testified that he is stationed at the

Kwa Dabeka police station. He is the Commander who oversaw Inspector Shandu's work. Inspector Shandu approached him on the 3 November 2009 for assistance. He wanted a statement to be taken from the accused. He arranged for Captain Eva of the Organised Crime unit at the Cato Manor police station for the statement to be taken on the 5 November 2009. He had difficulties in arranging for the statement to be taken any earlier. He booked the accused out from the cells on the morning under OB entry No. 372 and booked him in under OB entry No.381 later that morning. He proceeded to Cato Manor where the accused was handed over to Captain Eva. He was accompanied by Warrant-Officer Geyser. The latter personally handed the accused over to Captain Eva. After handing over the accused both he and Warrant Officer Geyser drove around the area and when Captain Eva had finished taking the statement from the accused, they went back to fetch the accused. He further testified that the accused was not influenced or forced to make a statement to Captain Eva.

[18] Under cross-examination he said that they waited for approximately an hour before they picked up the accused from Captain Eva. It took about 15 – 20 minutes to travel from Kwa Dabeka to Cato Manor. The return trip took approximately the same time. Under further cross-examination, he denied that:-

- He and Warrant-Officer Geyser were present at the interview when Captain Eva took the statement from the accused;
- They handed a document over to Captain Eva ;
- He personally took the accused to Captain Eva as he remained in the vehicle;
- Warrant-Officer Geyser placed a rubber glove over the head of the accused which covered the area of his face when he was present.
- He drank beer from a bottle

- The accused was assaulted a few times by means of the rubber glove being placed over his head.
- That accused was forced to make the statement to Captain Eva as a result of the assault;

According to Captain Delport he booked out the accused for further investigation. When it was put to him that in regard to the entry at 372 at 7h45 that there is a distinction between "*further investigations*" and "*to obtain a confession*", his response was that the charge office personnel usually write it down in this way. It was further put to him that the O.B. entry should actually read "*booked out for a confession to be obtained*" and this would have indicated with absolute clarity why and for what purpose the accused was being booked out. He conceded that if the accused was gagged in the manner as described by Mr. Pillay, there should be no visible injuries.

[19] Warrant Officer **Sandt Morgan Geyser** testified that he is stationed at SAPS Kwa Dabeka and works under the command of Captain Delport. He accompanied Captain Delport when the accused was taken to Captain Eva. Approximately 1½ hours later he received a phone call from Captain Eva who said that he could fetch the accused. He did so. The accused, Captain Delport and he drove back to Kwa Dabeka police station. He personally took the accused to Captain Eva but was not present when the statement was obtained from the accused.

[20] Under cross-examination he denied that any documents were handed to Captain Eva. He denied placing a rubber glove over the head of the accused as he was not present. When questioned by the court, he said that he did not know for how long accused was kept in custody. As to his state of mind, he said that the accused appeared to be calm and quiet. The accused did not say that he was going to make a statement to

Captain Eva. He could not say what kind of injuries a rubber glove could cause but possible scarring on the face could occur. The accused appeared to be in the same physical and mental condition after his visit to Captain Eva.

[21] Captain **Neville Bernard Eva** testified that he is employed in the Organised Crime Unit stationed at Cato Manor. He has 26 years service in the SAPS. He was telephonically approached by Captain Delport in November 2009 to take down a statement from the accused. The accused was brought to him by Inspector Geyser from Kwa Dabeka on the morning of 5 November 2009.He conducted an interview with the accused and took down his statement on a printed form, Exhibit "C". The accused and an interpreter were present. The statement, 4½ pages in length was read back from IsiZulu into English, and vice versa to the accused who was satisfied with the contents of the statement and affixed his fingerprints on each page. He signed it as well.

[22] Under cross-examination, he denied that Warrant Officer Geyser gave him a document that he read in English and that it was interpreted in IsiZulu. He denied that Warrant-Officer Geyser assaulted the accused by placing a rubber like glove over his head. He denied that Warrant-Officer Geyser was in his office. The interpreter, Inspector Ngcongo is currently ill and bedridden. The statement was taken between 08:05 am and 09:30. When the witness was asked about the state of mind of the accused, he replied that the accused was calm and relaxed.

[23] Mr. De Klerk informed the court that he intended calling a further witness Inspector JMK Ngcongo to give evidence on behalf of the State. However, he said that the witness is bedridden and he therefore cannot make it to court. Accordingly, it was decided to obtain his evidence on commission. Suitable arrangements were made by Mr. De Klerk in this

regard. The following morning the prosecution and defence teams, the court interpreter, the accused - accompanied by the police officers and correctional service members, the assessors and I proceeded to Bhekithemba SAPS, in Umlazi. The evidence of the witness was taken down in the car park whilst he was seated in a motor vehicle. As there was no recording equipment, his evidence was taken down in long hand.

[24] Inspector **Jameson Mandla Khanyise Ngcongo** testified that he is stationed at the Organised Crime Unit in Cato Manor. He has 23 years experience. One of his duties was to act as interpreter for non IsiZulu speaking colleagues and to interpret from IsiZulu to English and vice versa when a statement is taken down. On 5 November 2008 he assisted Captain Eva in taking down a statement from the accused. He confirmed that his signature and that of Captain Eva appeared on the document marked Exhibit "C". He confirmed that the accused's rights were explained to him in IsiZulu and that the accused's answers were then recorded on the statement. He further testified that the document was read back to the accused in IsiZulu after it was recorded by Captain Eva. The only persons present were the accused, Captain Eva and himself when the statement was recorded. The accused was not influenced, assaulted or forced in any way to make a statement.

[25] In cross-examination it was put to him that Captain Delport and Warrant Officer Geyser were present when the accused was interviewed. He denied this. He denied that one of the two police officers handed a document over to Captain Eva and that he started reading from this document. He also denied saying in IsiZulu the following "We want you to talk something that you know and you must not talk lies". He denied that he told the accused to speak the truth because these white people will kill him (the accused). He denied that the accused told him that he does not know anything about the case. He denied that Captain Eva suggested to

the accused what to say in the statement through him. When it was put to him that the accused would say that he was assaulted by Warrant-Officer Geyser, he denied that Warrant-Officer Geyser was in the office when the statement was taken.

[26] Under further cross-examination he denied that Warrant Officer Geyser put rubber gloves over the accused's face covering his nose and mouth and before the accused lost consciousness, Warrant Officer Geyser would then take it off. It was put to him that apart from the accused telling Captain Eva through him about his past injuries, he did not tell Captain Eva anything further. He denied this and stated that the statement recorded down was narrated by the accused and he would then interpret it and take it down. He insisted that accused narrated everything freely and voluntarily and that he was not assaulted. It was put to him that the accused will also say that his rights were not explained to him by the interpreter. He denied this. His rights were explained and he was satisfied. They both then signed the document.

He denied that the document was not read back to the accused or interpreted to him. He insisted that the statement was read back to the accused and that he was satisfied. The accused thereafter affixed his thumbprint on the document and he also signed it.

[27] The court requested sight of the original statement. The witness, when questioned by the bench could not recall the time of commencement of the interview but assumed it was about 8:00 am. He stated that when the accused was brought before Captain Eva and him, he explained the rights of the accused to him. Captain Eva would then ask questions which the witness would then interpret. He further stated that he commenced taking down the statement from page 1 and proceeded until the end. The witness testified that he did not want a lawyer when he as asked if he required

one. He waited to speak to a Commissioned Officer. He further testified that no undue influence was placed on the accused whilst interpreting the document to him. When asked about his physical appearance the witness indicated that the accused appeared relaxed. The witness was asked to look at point 22 on page 9. He testified that the accused initially said he did not know when the incident took place regarding this matter. When Captain Eva began writing this information down on the statement, he then changed his mind and stated that he could recall that he was arrested during October/November in connection with this case.

[28] We returned to court. Thereafter I made a ruling to the effect that the evidence obtained on commission from Inspector Ngcongo be and forms part of the record of the trial in this case.

[29] The State thereafter closed its case in so far as the trial-within-a-trial is concerned. The accused testified in his own defence in the trial-within-a-trial.

[30] The accused testified that he had an interview with Inspector Shandu on the 3 November 2009 at Kwa Dabeka Police Station. Inspector Shandu did not explain his rights to him. He did not want to make a statement to a police officer on the 4 November 2009 or any time thereafter. He was taken by motor vehicle to Cato Manor on the 5 November 2009 by Warrant-Officer Geyser and Captain Delport. When they (all three of them) arrived at Cato Manor they proceeded to an office where they found a big white male, Captain Eva. Captain Eva called Inspector Ngcongo to interpret for him. One of the other police officers was in possession of a document. He handed it to Captain Eva. Captain Eva spoke to Inspector Ngcongo. He did not hear the nature of their conversation nor the language in which they were speaking. Inspector Ngcongo insisted that he must tell only the whole truth because everything was written down. When

he said that the document is incorrect, Warrant Officer Geyser choked him by pulling a tube-like glove over his face. It happened on 3 occasions.

[31] Under cross-examination, he denied that he that he made the statement freely and voluntarily. He confirmed that Inspector Ngcongo interpreted from English to Zulu and vice versa. He re-iterated that Captain Delport and W/Officer Geyser were present at that interview and they put a tube over his face. He denied that Inspector Ngcongo explained his rights to him. The police officers told him to affix his thumbprint and signature to the document. He confirmed that Inspector Shandu fetched him from Greytown police station in August 2009 for a different case but only spoke to him on 3 November 2009 at Kwa Dabeka police station about this case. He testified that a warning statement was taken from him on 3 November 2009 but he did not sign any statement. He denied that he was told that he will be making a statement on 5 November 2009. He got to know this for the first time in court. Captain Eva forced him to sign the statement.
They asked him about his previous scars and injuries.

No promises were made to him. They told him to tell the truth and if he does not, he was going to die. He denied any knowledge of what was in the written document. He agreed to some suggestions, but when he disagreed on other things, they would put a rubber glove over his face. When it was put to him that he was not truthful to this court and what he told the police was done freely and voluntarily and that he was never assaulted, he denied this.

[32] The defence closed its case in the trial- within-a- trial without calling any further witnesses. Both Mr. De Klerk and Mr. Pillay made submissions in argument on whether or not the alleged confession should be admissible. Mr. De Klerk argued that it should be admissible whereas Mr. Pillay submitted otherwise.

[33] I must now consider whether or not the alleged confession is admissible. It is a trite principle of our law that the onus is on the State to prove beyond a reasonable doubt that the confession was made freely and voluntarily and without any undue influence by the accused whilst in his sound and sober senses.

[34] The issue of the admissibility or otherwise of a confession in this case is of critical importance.

[35] The relevant provision of the Constitution is Section 35 (1) which reads: "*Everyone who is arrested for allegedly committing an offence has the right*"-

> [a] to remain silent;
> [b] to be informed promptly-
> (i) of the right to remain silent; and
> (ii) of the consequences of not remaining silent;
> [c] not to be compelled to make any confession or admission that could be used in evidence against that person;
> [d] to be brought to court as soon as reasonable possible, but not later than-
> (i) 48 hours after the arrest: or
> (ii) the end of the first court day after expiry of 48 hours, if 48 hours expired ordinary court hours or on a day which is not an ordinary day;
> [e] at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and
> [f] to be released from detention if the interests of justice permit, subject to reasonable conditions.

[36] Section 50(1) of the CPA provides that the accused, after his arrest, be detained for a period not exceeding 48 hours unless he was brought before a lower court and his further detention was ordered by that court. As can be seen, Section 50 of the CPA was designed to discourage police officers from secretly and irregularly arresting and detaining an accused.

[38] Section 39(3) of the CPA provides for lawful detention during the period between lawful arrest and the first court appearance, but does not legalise the accused's detention until accused is eventually charged.

[39] Against this background I will now turn to deal with the salient features of the evidence in this case. The most disturbing aspect was that the accused was not brought to court within 48 hours of his arrest on 27 August 2009 or within 48 hours from 3 November 2009 when his warning statement was taken.

[40] The detention of the accused who was lawfully arrested was put under scrutiny when he was not brought to court within 48 hours in terms of Section 35(1)(d) of the Constitution read with Section 50 of the CPA .

[41] Inspector Shandu was unable to explain with any clarity why he brought the accused to court for the first time only on 6 November 2009.His response that he went on leave some time during September and October 2009 and therefore only took a warning statement from the accused on 3 November 2009, after informing him of the charges against him, does not make any sense whatsoever.

[42] The enormity of his unlawful detention was compounded by obtaining a confession from him on 5 November 2009, when he should have made his

first appearance in court. This does not mean that the accused should not have been brought to court within 48 hours after his arrest on the 27 August 2009. Inspector Shandu is an experienced police officer and should have known better. It calls into question his motive and reflects poorly on his credibility and reliability. In this regard Captain Eva testified that he read the accused's rights in terms of Section 35 of the Constitution, which included, amongst others "*to be brought before a court as soon as reasonably possible but by no later than 48 hours after his arrest*". With all his experience he should have realized that the accused should have been in court rather than with him. This also reflects poorly on his credibility and reliability.

[43] The evidence certainly does not show in any way that the exceptions to the 48 hour time limit are applicable to this case. The accused's right in terms of Section 35(1)(d) was violated, plain and simple. In terms of Section 35(1)(d) of the Constitution the accused on being arrested or detained has the right to be brought before a court within 48 hours. The fact that he was only brought to court on 6 November 2009, was a serous breach of his Constitutional right and "*made a mockery of his fundamental right"* using the words of **Bosielo AJP** (as he was) in State v Maasdorp 2008(2) SACR 296 (NC).

[44] **Kriegler J** in Ex parte Minister of Safety and Security and others: in re: S v Walter and Another 2002 (7) BCLR 663 (CC) at 666 H–J pointed out that Chapter 5 of the Criminal Procedure Act 51 of 1977 makes plain that the purpose of arrest is to bring suspects before court for trial. It also specifies when and in what manner a person may be arrested. This is in conformity with the Constitution, which in section 35 (1) (d) balances the temporary deprivation of liberty inherent in arrest against "the right" …… to be brought before a court as soon as reasonably possibly".

[45] Nico Steytler in his book Constitutional Criminal Procedure, 1998 Edition, Butterworths, at Page 126 explains that "the right of an arrested accused to be placed promptly under the authority of a court, within 48 hours being the outer limit, determines the lawful duration of detention in the hands of the police. A positive obligation is thus imposed on the detaining authority to bring an arrestee before court within that period. The right to be brought to court is circumscribed, first, by a general standard that it must be done "as soon as reasonably possible" and, second, by an outer limit of 48 hours.

[46] The court in Sias v Minister of Law and Order 1991(1) SACR 420(G) 420 AT G-I had to consider whether it was permissible to detain a person for longer than 48 hours and held that s 50 of the Criminal Procedure Act 51 of 1977 which prescribed, subject to certain provisions, the 48-hour maximum period had been enacted to protect people from being held in detention for long periods without proper authority.

[47] In State versus Shabalala and Another 1996(1) SACR 627 (A) **Nedstadt JA** had to consider a similar question, that is whether the confessions were admissible inspite of the unlawful detention of the appellants. Although the Appellant Division held that the illegality of their arrest and subsequent detention in no way influenced the appellants to confess and therefore admitted the confessions, the case can be distinguished on the basis that there was no constitutional challenge in terms of Act 200 of 1993, which was unfortunate given our country's changed circumstances in our new found constitutional democracy. It is important to note that in this case the contention that the evidence was illegally obtained was not persisted in by the Appellant.

[48] The only remaining question is whether the confession should be admitted against the accused. It was during his unlawful detention that the

confession was obtained. This is the crux of the problem. Can it be said that the confession was properly and legally taken during the accused's unlawful detention? I do not think so.

[49] Since 27 April 1994 the constitutional rights and in particular s 35 (1) (d) has placed an imperative on all criminal trials to be conducted in accordance with the "*notions of basic fairness and justice*" as was observed by **Van Reenen J** in State v Coetzee en Andere 1995(2) SACR 742 (C) at 747 F-G.

[50] The evidence obtained in violation of the accused's fundamental right is inadmissible. See S v Viljoen 2003(4) BCLR 450 (T) at 458 F also at 461 [35 – 36].

[51] I am in agreement with the learned Judge Patel in ***Viljoen's*** case that there is no discretion afforded to a judicial officer when he/she is confronted with a situation when evidence is obtained unconstitutionally. To admit such evidence, contaminated as it is, will be a violation of the accused's rights and above all will be prejudicial to the administration of justice. Our founding fathers and I highlight in particular our first President, in our Constitutional democracy, Mr. Nelson Rolihlahla Mandela's words in the well known Rivonia treason trial, after he was arrested in 1963 at Howick, Kwa-Zulu Natal,

> *"I have fought against White domination, and I have fought against Black domination. I have cherished the ideal of a democratic and free society in which all persons live together in harmony and with equal opportunities. It is an ideal which I hope to live for and to achieve. But if needs be, it is an ideal for which I am prepared to die."*

[52] This profound submission reflects the ideals upon which our Constitution

is based. The fundamental rights contained therein cannot be waived or flouted in anyway, not by police officers in our present day society or by any other citizen. The actions of Inspector Shandu and the other police officers called by the State to prove the alleged confession reflects an attitude of the apartheid State. In ***S v Burger & Others*** **2010(2) SACR 1 (SCA) at page 10, para 39,** Navsa JA said:

> *"South Africa is not a police State. Section 35 of the Constitution is emphatic about the rights of arrested, detained and accused persons. These rights are not to be flouted. The police's methods…….. reflect an attitude reminiscent of the darker days of South Africa's history and have no place in our present democratic order. It should be dealt with by the relevant authorities".*

[53] Assuming that the confession cannot be attacked on a Constitutional basis then it is necessary to reflect on the evidence of the State witnesses against that of the accused, in order to determine whether or not their evidence was satisfactory. I may add that in this regard great caution should be exercised before deciding whether the contents of a confession should be admissible or not.

[54] The confession was taken by Captain Eva on 5 November 2009 at the Cato Manor Police Station and was completed just before 9h30. The accused was brought to Captain Eva by Inspector Geyser of the Kwa Dabeka police station. The interpreter was Detective Inspector Ngcongo, also a member of the Organized Crime Unit in Cato Manor.

[55] From the evidence, in cross-examination, Captain Eva denied that the accused was assaulted on various occasions, when a rubber like glove was pulled over his head and face, thereby suffocating him, causing him in each instance to suffer a loss of oxygen, short of unconsciousness. He also denied that both Captain Delport and Warrant Officer Geyser were

present when these alleged assaults took place.

[56] Both Captain Delport and Warrant Officer Geyser said that whilst the confession was being recorded and taken down by Captain Eva and the interpreter, Inspector Ngcongo, they were “killing time” by driving around in the area.

[57] The interpreter, Inspector Ngcongo testified that he did not explain to the accused that he could make a statement to a magistrate. Furthermore he does not know whether Captain Eva told him that the accused could make a statement before a magistrate.

[58] Page 3 of the document (confession) stated that the accused requested to have his statement recorded by Captain Eva and not a magistrate. This, according to Inspector Ngcongo was interpreted by him.

[59] The next immediate section of the document reads <u>because</u> [set out steps taken to secure the services of a magistrate].

[60] If the interpreter did not explain this right to the accused it is logical that Captain Eva did not do so as the latter was speaking in English and recording the statement. Inspector Ngcongo was interpreting everything from English to IsiZulu and vice versa from the document – Exhibit “C”, in terms as recorded by Captain Eva.

[61] Exhibit “C” specifically calls for information and the steps taken to secure the services of a magistrate. It is not sufficient to record the words of the accused “*after he spoke to the person he wanted to make a statement to an officer*”. Captain Eva and Inspector Shandu failed the accused. Captain Eva’s testimony that the accused waived his right to have his statement recorded by a magistrate does sound suspicious and

contradicts the evidence of Inspector Shandu in this regard. The accused's version in that regard is reasonably possibly true and not that of Captain Eva.

[62] Exhibit "C" contains twelve pages of elaborate questions which precede the 4½ pages of the actual statement of the accused which can effectively be said to be the confession itself. These questions are intended to afford the accused, who has been in police custody, effective protection against improper conduct including violence and threats to compel the accused to make a confession.

[63] It is against this backdrop that one has to consider the accused's strong claims that he was assaulted during the interview when the confession was obtained. Why should the accused be disbelieved and Inspector Shandu and the other police officer's be heard to be telling the truth, when in the first place they violated the accused's right not to be unlawfully detained.

[64] A number of other concerns arise from the evidence of the police officers.

[65] According to the O.B. Register the accused was booked out by Captain Delport on Thursday, 5 November 2009 at 7h45 for further investigation. The accused was detained at Kwa Dabeka Police Station in Claremont, Pinetown. The accused was transported by motor vehicle to the Cato Manor Police Station and was accompanied by Captain Delport and Warrant Officer Geyser. It took about 15 to 20 minutes. They waited for about an hour before picking up the accused from Cato Manor Police Station. At 9h50 the accused was brought back to Kwa Dabeka Police Station. Give or take that the time spent in travelling to and from Kwa Dabeka Police Station and Cato Manor Police Station was 30 – 40 minutes, then the interview with Captain Eva when the confession was

obtained, took not more than one and a half hours. During all this time, they drove around the area to "*kill some time*". Inspector Ngcongo said that the interview with the accused took some time, more than 2 hours. This cannot be so as Exhibit "C", page 12 stated that the document was handed back to Inspector Geyser at 9h30. The actual statement of the accused is some 4½ pages in length, in addition to the 12 pages which is found in Exhibit "C". There is something fishy about the time within which the confession was taken, taking into account that the statement had to be interpreted to the accused from English into IsiZulu and vice versa. Was the confession taken down properly and in accordance with the procedure laid down therein? I think not; if the time taken was less than one hour.

[66] Both Captain Delport and Inspector Geyser were adamant that they were not present when the confession was obtained from the accused. They were driving around in the area to kill time. This behavior does not accord with their impeccable service records in the SAPS. Surely they could have been involved in other police work, they are on duty 24 hours a day and furthermore it was just after 8h00 with the whole day ahead of them. It is hard to believe that they would be using state resources by driving around to kill time when there is so much police work to do. What they tried to do is to show that they played a minimal role in the taking of the confession. The accused was equally adamant that both these police officers were present when the confession was obtained by Captain Eva and interpreted by Inspector Ngcongo. In addition it was Inspector Geyser who assaulted him. The accused's version in this regard is more probable.

[67] According to Inspector Shandu, Mnguni's statement was only obtained on 26th April 2010. This is more than one year and 5 months after the incident in Count 1 took place. His explanation that the witness could not be found after he left the Claremont area is truly strange. If he was the

only eye witness to the incident on 1st November 2008, rather than run away from the area, he would have been expected to have made a statement to the police. It was his brother's girlfriend who was killed. Moreover, the deceased and his brother had a child from their relationship. This raises suspicion.

[68] Captain Delport was the Commanding Officer, who oversaw Inspector Shandu's work. He ought to have therefore known that the accused was not brought to court within 48 hours after his arrest and should have advised Inspector Shandu of the violation of the Accused's constitutional right and should have taken the accused immediately to court rather than the Cato Manor police station where the confession was taken from accused.

[69] According to Captain Delport he booked the accused out for further investigation. When it was put to him in regard to the entry at 372 at 7h45 that there is a distinction between "*further investigation"* and "*to obtain a confession".* His response was that the charge office personnel usually write it down in this way. It was further put to him that the O.B. entry should actually read "*booked out for a confession to be obtained"* and this would have indicated with absolute clarity why and for what purpose the accused was being booked out. The version of the accused that he did not know that a confession was being taken from him, therefore has a ring of truth about it

[70] The manner, in which the accused testified that he was assaulted, would cause him no visible injuries; and in this regard Captain Delport confirmed such assaults will not show any visible injuries. Here again, the accused's version that he was assaulted and threatened to "*talk something he knows and that he must not tell lies"* is reasonably possibly true.

[71] Inspector Shandu testified that he took leave during September and October 2009 and for this reason, he was unable to take a warning statement from the accused any time earlier than 3 November 2009. If this was so, then why was the investigation docket not handed over to somebody else by Captain Delport, Shandu's Commander in charge. Captain Delport himself could have easily taken over the docket, and in accordance with the accused's Section 35 rights, the accused's warning statement should have been taken on or about 27 August 2009 and he should at the same time but by no later than 48 hours been brought to court. All of this can only be described as poor or shoddy police work by experienced police officers, apart from the suspicion which arises.

[72] The accused's evidence was satisfactory and cannot be faulted in any way. His evidence cannot be rejected as not being reasonably possibly true. It was improper, in the first place, to take his confession, when he should have at that time been in the court where the element of suspicion would have been removed altogether. It was in this later atmosphere that the accused would have been in better hands and to have his rights explained to him in open court by an independent judicial officer.

[73] Even if the alleged confession, which I have not seen, contained evidence which raised a strong suspicion of the accused's involvement in the murders, the court cannot convict the accused merely because his version is devoid of any credence. There is no *onus* on the accused to prove his innocence. A mere suspicion, strong as it may be, is not sufficient to convict him. See ***Molimi v State*** **2008 (5) BCLR 451 (CC) at 453 H-I**.

[74] The following passage in ***State v Maasdorp 2008 (2) SACR 296 (NC)*** **at para 21** is apt:

"Given the historical evolution of confessions in this country and the countless reported cases of incidents of abuse of their power and authority by the police, one expects that where there is some indication of improper conduct which could have had an undue influence on the accused to make a confession, …….. *("that confession should be declared inadmissible*"). Self-evidently, such conduct is congruent with the basic tenets of fairness to an accused person, which underpins the right of every accused person …….. not to be compelled to make any confession or admission that can be used in evidence against such person. This is particularly important when viewed against our grim and horrible past history of torture and intimidation of accused persons whilst in police custody."

[75] Taking all the factors cumulatively I am not satisfied that the confession was made freely and voluntarily by the accused and without any undue influence. The prosecution has failed to prove beyond a reasonable doubt that a confession was made in terms of the requirements of Section 217(1) of the Criminal Procedure Act. The confession is therefore inadmissible.

[76] That is not the end of the matter. The court has to assess the evidence in relation to each count in this case, in order to determine the guilt or otherwise of the accused.

[77] It is important to bear in mind that the State closed its case once I found that the confession was inadmissible. The Defence also closed its case, without calling any witnesses. The accused also did not testify in his own defence.

[78] It is not in dispute that on 1st November 2008 at about 17h50 the body of Pretty Mtshali was found in a room at Kranskloof Hostel, Kwa Dabeka,

Pinetown. She died from a gunshot wound to the chest with involvement of the left lung and heart. She also suffered multiple gunshot wounds to the lower limbs.

[79] Zanele Pretty Mtshali is the deceased referred to in Count 1.

[80] In respect of Count 1, the only significant evidence is that of **Khehla Mnguni**. He indirectly implicated the accused in the murder of Zanele Mtshali.

[81] None of the other two state witnesses implicated the accused in the commission of the offence described in Count 1.

[82] The evidence of the three State witnesses are largely circumstantial. Although Khehla Mnguni was an eye witness, he is a single witness, who in any event did not see any shooting. More importantly he claims that it was after sunset and he could see the accused and his friend, Manqoba from a distance of about 20-30 metres. At that stage the deceased and his brother were standing under a bridge. There is a big time difference between his version and that of Aaron Dissan, who heard gunshots between 2-3pm. In addition, his brother Manqoba was involved in a relationship with the deceased and a child was born of this union. His brother and the accused were at loggerheads and did not see eye to eye. His brother died in April 2009.

[83] Interestingly, he did not proceed to the scene of the incident. Soon after he saw the accused and his companion Mabutho, both of whom were carrying fire-arms, with the barrels pointing to the ground, arrived, he fled and was nowhere to be seen.

[84] Another interesting aspect is the fact that he only made a written

statement to Inspector Shandu, the Investigating Officer, on 26th April 2010, that is more than one year and five months after the incident in Count 1. His actions are hardly that of the expected conduct of a person who witnessed a series of events prior to the death of the deceased. Surely, it is expected of him to have gone to the police immediately after the incident to report what he saw and heard.

[85] The testimony of Constable Zulu and Aaron Dissan does not take the matter further. Constable Zulu attended the scene of the shooting and identified the body of the deceased. Aaron Dissan is Khehla Mnguni's uncle. When he heard gunshots he went to investigate. However, he did not see the accused at all on the day of the incident.

[86] Khehla Mnguni has a motive to implicate the accused. He knew that his late brother Manqoba was not on good terms with the accused. Furthermore, the deceased was his brother's girlfriend and they had a child together. "Blood is thicker than water", as the saying goes.

[87] As far as Count 2 is concerned the State relies only on the evidence of Constable Dlamini. She identified the body of Cyprian Ayanda Nzuza who died of multiple gunshot wounds with multiple organ involvement on 5th February 2009 at Kranskloof Hostel, Kwa Dabeka, Pinetown.

[88] It is clear as crystal that save for the evidence of Khehla Mnguni, the State case in respect of both counts of murder is based almost entirely on the confession made by the accused. Since the confession is inadmissible, the State case in respect of both counts is rather weak. No reasonable court can and may convict an accused on such flimsy evidence. The accused had no case to meet and therefore his choice in not giving evidence can be appreciated in these circumstances.

[89] This brings me to the point that has been nagging me for some time. Why is it that when the only evidence implicating the accused in this case and in general, is an alleged confession the order of the day? There is invariably no other reliable and credible evidence brought before the court. Something must be wrong with the police investigation, notwithstanding some of the difficulties which the police authorities face on a daily basis in our country.

[90] The learned **Judge Nkabinde** writing for the Constitutional Court in ***Molimi at page 471 at para 50*** held that:

> *"It is a cardinal principle of our criminal law that when the State tries a person for allegedly committing an offence, it is required, where the incidence of proof, is not altered, by statute (and it is not so in this case), as is the case in this matter, to prove the guilt of the accused beyond a reasonable doubt,……., the accused is entitled to an acquittal".*

[91] It is sad and I may add unfortunate that both the deceased persons in this case lost their lives under violent and inexcusable circumstances. It may well be that the accused in this matter is involved in the commission of the offences in Counts 1 and 2. However, this is only a suspicion, given the paucity and lack of evidence before me. The court cannot convict the accused merely because the accused is suspected to be involved in the commission of the offences in question. Credible and reliable evidence is required to be placed before the court if the court has to convict an accused person.

[92] I am not convinced that the remaining evidence is enough to prove the guilt of the accused beyond a reasonable doubt.

[93] Accordingly, we find that the State has failed to prove the case against the

accused in respect of both counts of murder. The accused is found not guilty and discharged.