REPORTABLE
Case No 581/91
/wlb

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

FUNANI MLOMO — Appellant

and

THE STATE — Respondent

CORAM: E M GROSSKOPF, MILNE JJA et NICHOLAS AJA

DATE OF HEARING: 25 May 1993

DATE OF JUDGMENT: 2 JUNE 1993

J U D G M E N T

/MILNE JA....

MILNE JA:

With leave of the trial court the appellant appeals against his convictions on three counts of murder and one count of assault with intent to do grievous bodily harm, and against the sentence imposed on one of the murder counts. The counts on which he was convicted of murder were counts one, four and six and the assault charge was count seven. On count one he was charged with the murder of Phakamisa Thompson Sikoki ("Sikoki"), on count four with the murder of Mbuyiseli Zenzile ("Zenzile") and on count six with the murder of Vuyane Gladman Nxati ("Nxati"). On count seven it was alleged that the appellant had stabbed one Bongwane Mgqobele ("Mgqobele"). The offences alleged in counts 1 and 4 were said to have been committed on or about 28 December 1987 and near Tjoksville and the offences alleged in counts six and seven on or about 3 June 1990 and at Goliath Street KwaNobuhle.

On counts one and four the appellant was sentenced in respect of each count to 9 years' imprisonment of which 6 years were to run concurrently with the sentence of 14 years' imprisonment imposed in respect of count six. A sentence of 2 years' imprisonment on count seven was also ordered to run concurrently with the sentence on count six. The effective sentence was therefore one of 20 years' imprisonment.

The identity of the three deceased was admitted. The medical evidence established that Sikoki's neck was slit from side to side, the jugular vein and carotid arteries having been severed on both sides, that he had been stabbed in the right eye and twice in the abdomen causing extrusion of the bowel in each case. These were only some of the injuries, there being a total of sixteen altogether. There were seven injuries to the body of Zenzile, but apart from a 15 mm superficial non-penetrating incision on the left side of his neck, there were no injuries to his neck and there were no injuries

to his abdomen and no injuries to either of his eyes.

On count one the State adduced the evidence of one Vumile Teyse ("Teyse"). He testified to an encounter between the appellant, one Kwekwe and Mayo on the one hand and the deceased Sikoki on the other, which he said took place on 28 December 1987 in a shebeen ("smokkel-kroeg"). On that date, according to Teyse, he was in a shebeen when the deceased arrived. He was followed by the appellant, Kwekwe and Mayo. The latter three were members of the UDF and they asked the deceased what he was doing there and accused him of being a member of Azapo. The deceased denied this and Mayo then said to the deceased that a man like him should not be shot with a gun because it would be a waste of a bullet and that a knife should be used instead. The appellant and his companions left the shebeen with the deceased. Teyse and a friend of his followed them to a clinic. There the appellant summoned other persons in the vicinity and

Teyse and his friend then decided to go and tell the parents of the deceased that the deceased had been taken away because his abductors thought he was a member of Azapo. Teyse did not see the deceased again.

There was also evidence from one Ngxonono to the effect that he saw the deceased being taken by about eight people in the direction of a kloof where the body of the deceased was later found.

On count four the State adduced the evidence of Zongesile Klaas ("Klaas") who testified to an encounter between the deceased Zenzile and the appellant which took place not in a shebeen but in a house. The evidence of Klaas was to the effect that a number of persons including the appellant, Kwekwe, Tase, Kwa and others broke into the house where Klaas and the deceased Zenzile were playing cards. Zenzile was stabbed in the house by Kwekwe, Tase and Kwa and he was then taken out

and further stabbed outside the house. The complainant on count five was called out of the house by the appellant and he was stabbed outside the house. (This complainant was apparently also known as "Small").

On counts six and seven the State adduced the evidence of Wandisile Nqakula ("Nqakula") and of Mgqobele. I shall deal with their evidence at a later stage.

The State also tendered evidence of a statement made by the appellant to a certain Captain Van der Sandt on 20 July 1988 and the record of the proceedings held in terms of section 119 of Act No 51 of 1977 ("the Act"). I shall refer to these proceedings as "the preliminary proceedings". A trial within a trial was held to determine the admissibility of the statement to Van der Sandt. The statement was held to be inadmissible because the Court was uncertain whether the appellant had been

induced by threats or undue influence on the part of the police to make the statement. I shall deal more fully in due course with the findings of the Court which led to this conclusion. It is necessary to do so because this ruling and the findings of the Court upon which it is based, are said to be relevant either to the admissiblity or the weight to be attached to certain admissions made by the appellant in the course of the preliminary proceedings.

The admissions made by the appellant in the course of these proceedings are of great importance to the State case - indeed, for reasons which will become apparent, they are vital to the success of the State case on count four.

According to one Sgt Dicker the appellant was arrested on 20 July 1988. He made the statement to Captain Van der Sandt the same day and the preliminary

proceedings commenced on the following day. After he had been joined as Accused No 9 in those proceedings three charges were put to the appellant. The first charge was that of murdering Zenzile. This was alleged to have occurred on 28 December 1987 at or near Tjoksville and it was alleged that the deceased had been assaulted "... deur hom keel af te sny en horn sodoende sekere dodelike wonde of beserings toegedien het . ..". (The reference to the deceased Zenzile's throat having been cut was in fact incorrect). The second charge related to the murder of Sikoki which was alleged to have been committed on the same date and at the same place and this also includes an allegation that the deceased was assaulted "... deur hom keel af te sny en hom sodoende sekere dodelike wonde of beserings toegedien het ...". The third was a charge of attempted murder, being a charge that the appellant had attempted to murder one John Lucas by stabbing him with a knife. This appears to relate to the complainant on count five in respect of which the appellant was found

not guilty. When these three charges were put to the appellant he pleaded guilty to both the murder charges and not guilty to the charge of assaulting Lucas.

The magistrate then proceeded to question the appellant in terms of section 112(1) (b) of the Act. He questioned him firstly with regard to the first charge and I reproduce in full the questions and answers which were given with regard to this particular charge.

"V: Is jy gedreig of beinvloed om skuldig te pleit?

A: Ja, die polisie het my gedreig om skuldig te pleit. Hulle het gese ek moet die aanklagte teen my erken. Ek was egter teenwoordig toe die voorval plaasgevind het. Ek en Qua en Kweke het egter elk 'n mes gehad en ons het toe die oorledene se keel afgesny -

V: Watter polisieman het jou gedreig?

A: Ek ken nie hulle name nie.

V: Wat het hulle aan jou gedoen?

A: Niks nie. Hulle het my nie geslaan nie. Hulle het net gese ek moet erken dat ek die misdaad gepleeg het.

V: Is jy vandag bang of voel jy bedreigd?

A: Nee.

V: So, nieteenstaande die feit dat die polisie gese het dat jy moet erken dat jy die misdaad gepleeg het, erken jy vandag <u>sonder dat die polisie teenwoordig is</u> dat jy die misdaad

gepleeg het? [My emphasis.] A: Ja. V: Is jy doodseker dat jy wil skuldig pleit en dat
jy wel die oorledene se nek afgesny het?
A: Ja.
V: Was jy op 28/12/87 in Tjoksville, Uitenhage? A: Ja.
V: Was jy alleen? A: Nee, ek en Qua en Kwekwe, Mayo, Sandile,
Pumelelo en nog 'n ander persoon was
teenwoordig. V: Waar het julle die oorledene ontmoet? A: Ons was in 'n smokkelkroeg en toe het die
oorledene daar ingekom. Toe hy ons opmerk, het
hy die smokkelhuis verlaat en weggehardloop.
V: Het julle die oorledene agtervolg? A: Ja.
V: Tot waar het julle hom agtervolg? A:
Tot anderkant 'n erf.
V: Het julle die oorledene ingehaal en gevang? A: Ja.
V: Wie het die oorledene gevang? A:
Ons almal.
V: Hoekom het die oorledene weggehardloop? A:
Omdat hy aan AZAPO behoort en al van ons by ons
huise gesoek het. V:
Behoort jy aan 'n groep? A:
Ja.
V: Watter groep? A:
UYCO.
V: Ken jy die oorledene? A: Ja. V: Toe julle die oorledene vang, wat het julle toe
met horn gedoen? A: Ons het hom geneem na 'n bos. V: Erken jy dat die oorledene se naam is Mbuyiseli
Zenzile?
A: Ja.

V: Hoe het julle die oorledene na die bos geneem?
A: Que en Pumelelo het oorledene aan sy lyfband vasgehou terwyl ons na die bos gestap het. V: Hoe ver is die bos van die plek waar julle hom gevang het? A:
Ongeveer 200 meter.
V: Het die oorledene geworstel en hom teegesit? A: Ja. V: Wie het gese julle moet oorledene na die bos neem? A: Ons almal saam het so besluit. V: Waar het julle so besluit dat julle oorledene na die bos moet vat? A: Terwyl ons so gestap het het ons so besluit. V: Het julle besluit terwyl julle so stap met oorledene dat julle horn in die bos gaan doodmaak?
A: Ja.
V: Wie het so besluit? A: Ons almal saam. V: Wat het julle toe met oorledene in die bos gedoen? A: Ons het oorledene eers gevra wie van hulle groep se lede het van ons groep se lede vermoor. V: Het hy iets gese? A: Ja, hy het gese dat hyself betrokke was asook Xoliswa en Ace, Kana se jonger broers. V: Wat gebeur toe? A: Ons het horn gevra of hy weet hoeveel van ons lede hulle gedood het en hy het gese dis baie.
V: Wat doen julle toe? A: Ek, Qua, Kwe en Kayo het toe die oorledene begin steek met messe. V:
Watter tipe mes het jy gehad? A: 'n
Scotts knipmes.
V: Watter tipe messe het die ander gehad? A:
Okapies en vismesse.

V: Met julle almal messe gehad?
A: Ja.
V: Wie het gese julle moet oorledene steek?
A: Ons het oorspronklik besluit dat ons hom moet steek. V: Waar op sy liggaam het jy die oorledene gesteek? A: Op sy nek.
V: Hoeveel keer het jy hom op die nek gesteek? A: Twee keer. V: Het Qua, Kwe Kwe en Kayo ook die oorledene raak gesteek?
A: Ja.
V: Waar op sy liggaam? A: Oral op sy liggaam. V: Het die oorledene toe geval? A: Ja.
V: Wat gebeur toe? A: Pumelelo en Tasi het toe die oorledene se maag oopgesny met hulle messe. V: Toe Pumelelo en Tasi oorledene se maag oopsny, wat gebeur toe? A: Die derms het uit oorledene se maag gepeul. V: Wat gebeur toe?
A: Pumelelo het toe oorledene in die oë gesteek. V: Het jy toegekyk terwyl die oorledene se maag oopgesny word en hy in die oë gesteek word?
A: Ja.
V: Wat gebeur toe? A: Ons het die oorledene net daar gelos en geloop. V: Het die oorledene gebloei? A: Ja. V: Toe julle die oorledene verlaat, was hy reeds dood? A: Ja. V: Erken jy dat jy bedoel het om die oorledene te dood?

A: Ja.
V: Met jy inderdaad voorsien en besef dat jy die oorledene kan dood om tesame met ander mense die oorledene met messe te steek?
A: Ja.
V: Is die oorledene se keel afgesny? A: Ja.
V: Erken jy dat die oorledene 'n swartman is? A: Ja. V: Erken jy dat die oorledene op 28/12/87 oorlede is te Tjoksville a.g.v. die wonde en beserings wat jy en die ander persone die oorledene toegedien net? A: Ja. V: Erken jy dat oorledene geen verdere beserings opgedoen net vandat die lyk vanaf die toneel vervoer is en totdat daar 'n lykskouing op die oorledene uitgevoer is nie?
A: Ja.
V: Het jy geweet jy doen verkeerd?
A: Ja.
V: Het jy enige reg gehad om so op te tree?
A: Nee.
U 22/7/88 vir verdere ondervraging I/H polisieselle, Uitenhage.
(Get.) D.S. CLAASSEN
21/7/88 Op
22/7/88:
Verskynings soos op 21/7/88 Op
22/7/88:
Verskynings soos voorheen.
Beskuldigde 9 teenwoordig.
Verdere ondervraging deur die hof ingevolge Artikel 112(1)(b) Wet 51/77 t.o.v. aanklag 1 volg: V: Het die voorval in die dag of in die nag plaasgevind? A: In die dag. V: Hoekom het die ander persone die oorledene in

die oë gesteek?
A: Ek weet nie.
Verrigtinge word op aanklag 1 gestaak hangende P.G. beslissing."

The magistrate then questioned the appellant in terms of the same subsection on the second charge and I set out in full the questions and answers in this regard.

"V: Was jy op 28/12/87 in Tjoksville, Uitenhage?
A: Ja.
V: Was jy alleen?
A: Nee, ek en Qua en Kwe Kwe, Kayo, Sandilo, Pumelelo en nog 'n ander persoon was teenwoordig.
V: Waar het julle die oorledene ontmoet?
A: Hy was in 'n huis te Tjoksville.
V: Het julle in die huis ingegaan?
A: Ja.
V: Wat het julle toe in die huis gedoen?
A: Ons het vir Mbuyiseli en 'n ander persoon, Small, in die huis gekry.
V: Wat gebeur toe?
A: Ons het beide die persone na buite gevat.
V: Wat het buite gebeur?
A: Ons het albei die persone buite die huis gesteek met messe.
V: Vir wie het julle eerste gesteek?
A: Vir Mbuyiseli.
V: Het jy vir Mbuyiseli raakgesteek?
A: Ja.
V: Waar op sy liggaam?
A: Op sy lyf.
V: Hoeveel keer het jy horn gesteek?
A: Twee keer.
V: Het die ander persone wat saam met jou was, ook

messe gehad? A: Ja, messe en pikstele. V: Het die ander persoon wie [sic] saam met jou was, ook vir Mbuyiseli gesteek?
A: Ja.
V: Het Mbuyiseli geval? A: Ja. V: Is Mbuyiseli dieselfde persoon as die oorledene in aanklag 1?
A: Nee.
V: Het julle toe vir Small met messe gesteek? A: Ja.
V: Hoeveel keer het jy vir Small gesteek? A: Nee, ek het hom nie gesteek nie, ek het hom net geslaan met die piksteel. V: Het jy 'n piksteel ook gehad? A: Ja. V: Hoeveel keer het jy vir Small met die piksteel geslaan? A: Twee keer op sy lyf en hy het toe weggehardloop. V: Het van die ander persone ook vir Small gesteek met messe? A: Ja, slegs Kwe Kwe het hom gesteek. V: Wat het toe gebeur? A: Small het toe weggehardloop. V: Waar was Mbuyiseli toe Small weggehardloop het? A: Hy het op die grond gele.
V: Het Mbuyiseli stil gele op die grond of nie? A: Hy het nog geroer. V: Het hy gebloei? A: Ek weet nie. V: Is Mbuyiseli dieselfde persoon as Pakamisa Sikoki? A: Ek weet nie.
V: Was beide persone swartmans?
A: Ja.

V: Hoekom het julle die twee persone so aangerand? A: Hulle is lede van die AZAPO groep. V: Wie het gese julle moet die oorledenes gaan haal? A: Niemand nie - ons het gegaan om te gaan drink en toe het on[s] 'n lig in die huis sien brand en toe ingegaan. V: Weet jy of Small oorlede is? A: Nee. V: Jy weet ook nie wat Small se naam is nie? A: Nee."

The magistrate then recorded a plea of not guilty:

"... aangesien die hof nie oortuig is dat beskuldigde erken dat die persoon wie [sic] hulle aangerand het inderdaad oorledene is nie en ook omdat beskuldigde nie weet of die persoon wie [sic] hulle aangerand het, dieselfde persoon as die oorledene is nie."

Counsel for the appellant, to whom we are indebted for his assistance, mounted a threefold attack on the admissibility of the record of the preliminary proceedings. It is common cause that when these proceedings commenced the appellant was informed neither of his right to legal representation nor of his right to apply for legal aid. It was submitted that this amounted to an irregularity resulting in a failure of justice.

That was the first leg of the attack. The second was that the State had failed to discharge the onus of showing that the admissions made by the appellant at the preliminary proceedings were made voluntarily. The third leg was that ex facie the record of those proceedings, the admissions that the appellant had made with reference to Zenzile had been applied to the charge in respect of the murder of Sikoki and vice versa.

I deal with the lastmentioned submission first. It is quite apparent from the record of the preliminary proceedings that at that stage the appellant did not know the name of the first deceased and that he knew the second deceased as Mbuyiseli. It is also apparent that he was intending to describe two murders that he was involved in, each of which occurred on 28 December 1987 and each in the Tjoksville area. One of these murders which he describes clearly relates to Sikoki and the other which he describes clearly relates to Zenzile.

Notwithstanding the error in the charge earlier referred to with regard to the injuries suffered by Zenzile, it is abundantly apparent, in my view, that when the appellant was being questioned with regard to what was count one in the Magistrate's Court proceedings he was referring to Sikoki and not Zenzile. There were injuries to the eye and stomach on Sikoki which were clear and distinctive and there were no such injuries on Zenzile. There was a literal cutting of the throat of Sikoki and there was no such injury but only a superficial wound to the neck of Zenzile. When describing the second murder he correctly named the deceased as Mbuyiseli but apparently did not know the surname was Zenzile. Furthermore, as already stated, the identity of the deceased was expressly admitted at the commencement of the trial in the court a quo. There is accordingly no substance in this line of attack.

I deal now with the effect of the failure of

the magistrate to advise the appellant of his right to legal representation and to seek legal aid at the commencement of the preliminary proceedings. He should have been so advised. In S v Mabaso & Ano 1990(3) SA 185 (A) at 204G it was held that the magistrate's failure to inform the appellants of their right to representation before they pleaded would amount to an irregularity only if the appellants were shown to have been ignorant of that right. In S v Rudman & Ano; S v Mthwana 1992(1) SA 343 (A) at 391G Nicholas AJA said in this regard:

> "I am inclined to think that the better view is that a failure to inform an accused of his right to representation is an irregularity unless it is apparent to the magistrate, for good reason, that the accused is aware of his rights (eg from his own statement or from the circumstances - for instance, that the accused is an attorney}. Certainly it is the safer course always to inform the accused of his rights."

The learned Judge then went on to say that it was for the appellant to show that the failure of justice resulted from the irregularity and that he could have done so, for example, by submitting to the Court of Appeal and to the

magistrate for his comments an affidavit setting out that he was unaware of his rights, and that if he had been informed of them he would have tried to secure representation, at least through the Legal Aid Board. There was no such affidavit before the Court of Appeal, and consequently it had not been shown that the irregularity resulted in a failure of justice. Counsel for the appellant submitted that Mabaso's case had been wrongly decided. While I still firmly adhere to the dissenting view which I expressed in Mabaso's case, I would certainly not be prepared to hold that the view of the majority was plainly wrong and, what is more, the line of reasoning followed by the majority in Mabaso's case was, as appears from the above passage, followed in Rudman's case. It was therefore necessary for the appellant's counsel to argue that Rudman's case was also wrongly decided but he was unable to advance any cogent grounds for such a submission. The reasoning of the majority in Mabaso's case accordingly states the law on

this subject. It was there held that the failure to inform the accused of his right to legal representation could not render inadmissible the admissions made at section 119 proceedings any more than such a failure would render inadmissible a pointing out by him or a confession made to a magistrate (at p 209A-E). Nor, so it was held, is it unjust or inequitable that this should be so (at p 209F-G). The appellant's argument must therefore be rejected.

The remaining line of attack however presents more difficulty. Statements made by an accused person at section 119 proceedings may be attacked on the ground that-they were made as a result of duress. S v Shabalala 1986(4) SA 734 (A) at 746G-I. Furthermore, it seems to be the position that the onus is on the State and that if there is a reasonable possibility that an accused person made the particular statements in question as a result of duress then their weight is "neutralised". Shabalala's

case at 746I - 747C. True, this was conceded by the State in that case and the Court assumed that to be the position without going so far as to decide that it was the position. I shall however make a similar assumption in this case. On that basis the State is confronted with the difficulty that the trial court found that the State had not discharged the onus of proving that when the appellant had made a statement to Capt Van der Sandt the day before, that is to say 20 July, he did so without being unduly influenced thereto. Furthermore, the appellant gave evidence at the trial within a trial and in the course of that evidence he said firstly, that Sgt Dicker had told him to repeat to the magistrate what had been recorded in a statement which he, the appellant, had made the preceding day to Sgt Dicker, and which was in similar terms to the statement he made thereafter to Capt Van der Sandt. He said furthermore, that Sgt Dicker had come into court during the questioning by the magistrate in terms of section 112(1) (b) in relation to the first

charge at the stage when he had just said that he had pleaded guilty as a result of being threatened, and, so he said, it was for that very reason that he then changed his tune and said that he wished to plead guilty in spite of the threats. Had the appellant repeated this evidence when the trial proper recommenced after the trial within a trial there would have been considerable cogency in this argument. He did not do so. In fact, the only evidence given by the appellant was at the trial within a trial which was held in order to determine the admissibility of the statement which he made to Capt Van der Sandt. When the record of the preliminary proceedings was put in no objection was taken thereto by the appellant's counsel on the ground that the statements made at those proceedings were not freely and voluntarily made. That aspect of the matter was canvassed when Dicker was once again called as a witness in the trial proper, but Dicker said that he had not threatened the appellant in any way nor applied any pressure on him to

plead guilty and that he had not been present at any stage during the preliminary proceedings. Although he could not be certain on this point the magistrate conducting those proceedings said in his evidence that it was his impression that he could not have put the following question to the appellant had Dicker been present in court at the time:

> "So, nieteenstaande die feit dat die polisie gesê het dat jy moet erken dat jy die misdaad gepleeg het, erken jy vandag sonder dat die polisie teenwoordig is dat jy die misdaad gepleeg het? A: Ja." (My emphasis.)

Evidence was also adduced from the sergeant in charge of the cells at the court where the preliminary proceedings took place, to the effect that the appellant had not, as suggested in the cross-examination of Dicker by the appellant's counsel, been taken out by Dicker during the day when those proceedings took place. It is clear that what an accused person says at a trial within a trial may not be used against him on the merits. S v De Vries 1989(1) SA 228 (A) at 233D - 234G. It is also clear that

the accused is not entitled to rely on such evidence when it comes to the merits. De Vries's case at 234A-B and S v Sithebe 1992(1) SACR 347 (A) at 349a - 351e. Counsel for the appellant however referred to the as yet unreported decision of this Court in Mjikwa v Die Staat (Case No 37/1992 in which judgment was delivered cm 4 March 1993) and in particular the following passage in the judgment:

> "In sy betoogshoofde het die respondent [the State] se advokaat aangevoer dat die getuienis van die appellant in die tussenverhoor buite rekening gelaat moet word by ' n beoordeling van die 'meriete' van die saak, en bepaaldelik die al of nie vrywilligheid van die aanwysings. Voor ons het hy nie met hierdie argument volhard nie. En tereg so. Al wat ek hoef te se, is dat die kwessie van die toelaatbaarheid van 'n aanwysing net so min as die van die toelaatbaarheid van 'n bekentenis op die meriete van ' n saak betrekking het. Getuienis wat tydens ' n tussenverhoor gegee is, kan dus in aanmerking geneem word by beslegting van die vraag of 'n bekentenis of buitegeregtelike erkenning vrywilliglik gemaak was."

In that case it was found by the trial court after a trial within a trial, that the State had not proved that a confession had been made voluntarily. Before the trial

within a trial however, evidence had been given that the appellant had pointed out certain places to a captain in the police. No objection had been taken to the evidence regarding the pointing out because, at that stage counsel was not aware of the decision in S v Sheehama 1991(2) SA 860 (A). By the argument stage at the trial however, counsel were aware of that decision and it was submitted that the State had not proved that the pointing out had been voluntary. This submission was rejected by the trial court but accepted by this Court. On the facts of that case it seems to me, with respect, that the conclusion of this Court was correct. The position there was that the pointing out occurred only nine hours after the making of the confession which had been held to be inadmissible. Furthermore, it was found that the appellant was asked to point out places

> "... na aanleiding van die inhoud van sy bekentenis. Dit is ewe waarskynlik dat die beweegrede vir die afle van die bekentenis deurgewerk het by die maak van die aanwysings. Anders gestel, dit is nouliks denkbaar dat die onvrywilligheid waarmee die bekentenis afgelê is binne enkele ure in die niet

> vervaag het. Die samehang tussen die bekentenis en die aanwysings, betreffende beide toepaslikheid en tydstip was net eenvoudig te groot om met so 'n moontlikheid geruim te word."

In other words, it was, in my respectful view, unnecessary for this Court to have relied cm anything which the appellant said at the trial within a trial. It is true that in this case also a very short time elapsed between the making of the confession and the preliminary proceedings, but such proceedings are not "buitegeregtelik". As pointed out by Nestadt JA in Shabalala's case supra at p 746F-G it is weight not admissibility that is the issue in these circumstances. Moreover, as I have already pointed out, the court a quo having ruled that the statement to Capt Van der Sandt was inadmissible, the trial then proceeded and the State then recalled Sgt Dicker to testify in the trial proper. This evidence was not given during a trial within a trial and must therefore have been given "on the merits". In his

evidence he testified to the fact that he was not present

at any time in court during the section 119 proceedings and that he had not influenced the appellant in any way to plead guilty or to say anything that he said at the preliminary proceedings. It may be that the failure of the appellant to answer this evidence distinguishes this case from the issue which was under consideration in Mjikwa's case. As the learned judge who delivered the judgment in Mjikwa' s case was party to the judgment in Sithebe's case it seems improbable that he intended to lay down a different principle of law. If it was intended in the passage referred to above to depart from what was said by this Court in the De Vries case and in Sithebe's case then I must respectfully differ.

In any event, even if the evidence of the appellant at the trial within a trial were to be taken into account cm the facts of this case, I am satisfied that the State discharged the onus of showing that what the appellant said at the preliminary proceedings was

said voluntarily. The trial court found that the appellant's evidence given at the trial within a trial was conflicting and unsatisfactory, that it did not accord with certain propositions that had been put by his counsel to witnesses for the State and that aspects of his evidence about what had happened in Capt Van der Sandt's office when he made the confession were untruthful without any doubt. In fact the trial court expressly found that it could not accept the evidence on important aspects of his evidence. It is true that although the trial court only referred expressly to the unreliability of certain evidence of Capt Van der Sandt, it was necessarily implicit in the Court's finding that the appellant's evidence that he was arrested five days-before the 20th might reasonably be true, that the evidence of Sgt Dicker that he arrested the appellant on the 20th was equally open to criticism. The trial court must however, have been fully conscious of its own findings/with regard to Dicker at the trial within a

trial and nevertheless found that the appellant "nie gedwing was om op die klagtes skuldig te pleit nie". There is no good reason to differ from this finding.

It follows that in my judgment the record of the preliminary proceedings carries its full weight as evidential material.

The court a quo found that Teyse was a good witness. As I have already mentioned the appellant did not testify on "the merits". There are no good grounds for disturbing the verdict in the case of count one.

Dealing now with count four, there is no doubt that Zenzile died as a result of the attack upon him by a number of persons on the night alleged. The appellant's counsel submitted that the witness Klaas was so vague and his evidence was so contradictory and unsatisfactory that no reliance can be placed on his evidence save where it

is clearly and unequivocally confirmed by the appellant's own version at the preliminary proceedings. I agree with this submission. It is accordingly necessary to determine whether the admissions made by the appellant at the preliminary proceedings together with his plea of guilty to the charge of murdering Zenzile establish his guilt. The first question that must be considered is whether the appellant was proved to have contributed causally to the killing of Zenzile. The effect of the evidence of the district surgeon, Dr Du Plessis, was that Zenzile had seven wounds all of which could have been inflicted with a knife. One of these was a wound which penetrated the heart. This on its own could have caused the death of the deceased. He also mentioned stab wounds into the lung as wounds which could also cause death. On a reasonable reading of his evidence the other wounds could not have caused death on their own. It seems, for example, that the 15 mm superficial non-penetrating incision on the left side of the neck and the 40 mm

incision extending from the lip to the chin could not have caused death. It appears from the post mortem report that there was an incision between ribs seven and eight on the left hand side of the body of Zenzile and a further incision "posteriorly between ribs 8 and 9 on the right". There was an incision in the lower lobe of both the right and the left lung. The appellant said that he had stabbed Zenzile and when asked where on the body he had stabbed him he replied that he had stabbed him twice "op sy lyf". In the context this means that he stabbed him on the trunk twice and assuming in favour of the appellant that he did not inflict the wound which penetrated the heart it seems probable that he inflicted at least one. of the wounds which penetrated a lung. I shall assume however that the appellant was not shown to have contributed causally to the killing of Zenzile. There was no proof of any prior agreement between the appellant and the others who stabbed the deceased and on that basis the State had to establish the prerequisites

laid down in S v Mgedezi & Others 1989(1) SA 687 at 705J - 706C. He was clearly present at the scene where' the deceased was being stabbed, he was aware of the assault by the others in his party and he manifested his sharing of a common purpose with the perpetrators of the assault by himself stabbing the deceased. He stabbed the deceased in the trunk twice with a knife. He accordingly had the requisite mens rea in the sense that he must at least have foreseen the possibility of Zenzile being killed and nevertheless he performed his own stabbing with recklessness as to whether or not death ensued. It follows that the appeal also fails with regard to count four.

There is in my view no substance in the appeal with regard to counts six and seven. Two eyewitnesses, Wandisile Nqakula and Mgqobele, gave evidence with regard to this count. Nqakula said that he saw the appellant stabbing the deceased with a knife. Mgqobele also puts

the appellant on the scene as one of the persons who were attacking a person who was clearly the deceased Nxati. (Mgqobele was also the complainant on count seven.) Both these witnesses were average witnesses and the trial court accepted their evidence. It was put in cross-examination that the appellant was not even in the vicinity on the night in question but, as already mentioned, the appellant testified only at the trial within a trial. Some legitimate criticisms were made of the two eyewitnesses but in my judgment they are not sufficiently material to warrant the finding that the learned trial judge erred in accepting their evidence in the absence of any countervailing evidence from the appellant.

On count 6 the appellant was sentenced to 14 years' imprisonment. It was not submitted that the trial court had in any way misdirected itself with regard to sentence but it was submitted that the sentence was

shockingly inappropriate. It was further submitted that the excessive severity of this sentence was apparent taking into account that the trial court had imposed only 9 years' imprisonment on count one and on count four whereas it imposed 14 years' imprisonment on count six. The trial court's reason for imposing the heavier sentence was that the appellant was only seventeen and a half when he committed the offences which are the subject of counts one and four whereas he was twenty years old when he murdered Nxati. Greater maturity brings with it a greater ability to exercise an independent judgment. Furthermore, it is legitimate to take into account that although the appellant had, at the time when he murdered Nxati, not yet been convicted of the other murders he had nevertheless committed them. In each of the murders there was a group attack upon one unarmed person which makes the offfence particularly reprehensible. The learned trial judge gave due weight to the factors referred to in S v Ncaphayi en Andere 1990(1) SACR 472

(A) at 495a-b and the sentences taken together as a whole

are in my view entirely appropriate.

The appeal is dismissed.

A J MILNE
Judge of Appeal

E M GROSSKOPF JA]
] CONCUR
NICHOLAS AJA]