THE SUPREME COURT OF APPEAL REPUBLIC OF SOUTH AFRICA

JUDGMENT

In the matter between:

Case No: 479/09

SHIKO PHINEAS MATLOU **First Appellant**
WILLIAM SEKWATI SERUMULA **Second Appellant**

and

THE STATE **Respondent**

Neutral citation: **Matlou v The State (479/09) [2010] ZASCA 52 (31 March 2010)**

Coram: CLOETE, BOSIELO et LEACH JJA

Heard: **16 MARCH 2010**

Delivered: **31 MARCH 2010**

Summary: Criminal law – appeal against conviction on charges of murder and robbery with aggravating circumstances – whether incriminating statements were admissible – whether evidence of the pointing-out of the deceased's body and a firearm was admissible.

ORDER

On appeal from: the North Gauteng High Court, Pretoria (Jordaan J sitting as court of first instance).

1. The appeal by both appellants in respect of the count of murder is upheld. The conviction and the sentence imposed on this count are set aside.

2.1 The appeal by both appellants in respect of the count of robbery with aggravating circumstances is upheld to the extent that a conviction of theft of a Mazda bakkie (registration BCB 759 N), a welding machine and an angle grinder is substituted.

2.2 The sentence imposed on both appellants in respect of the count of robbery with aggravating circumstances is set aside and substituted with a sentence of imprisonment for six years. The sentence is antedated to 25 April 2003 in terms of s 282 of the Criminal Procedure Act 51 of 1977.

3. The appeal by the first appellant in respect of the count of unlawful possession of a firearm is upheld and the conviction and the sentence imposed on this count are set aside.

JUDGMENT

BOSIELO JA

[1] This appeal raises the perennial legal conundrum concerning the admissibility of evidence of pointings-out obtained as a result of assault by police officers on arrested persons.

[2] The appellants were charged before Jordaan J in the North Gauteng Circuit Court, sitting in Tzaneen on charges of murder, robbery with aggravating circumstances, theft of a firearm, unlawful possession of a firearm to wit a 9mm Parabellum semi-automatic pistol with serial number 407409 and unlawful possession of an unknown quantity of ammunition.

[3] At the end of the trial, the first appellant was convicted of murder, robbery with aggravating circumstances and unlawful possession of a firearm, a 9 mm Parabellum semi-automatic pistol. He was sentenced to life imprisonment in respect of murder, 15 years in respect of robbery with aggravating circumstances and three years in respect of the unlawful possession of the firearm.

[4] The second appellant was convicted in respect of both the count of murder and the count of robbery with aggravating circumstances. He was sentenced to life imprisonment in respect of murder and 15 year's imprisonment in respect of robbery with aggravating circumstances. Both appellants are appealing against all their convictions with the leave of the court below.

[5] The appellants launched a two-pronged attack against their convictions. The appellant's main attack is against the admission by the court below of the

evidence of the pointing-out of the deceased's body and a firearm by the first appellant to the police. The essence of the attack is that these pointings-out form part of the incriminating statements made by the two appellants to a magistrate which were found to be inadmissible. The submission was that the evidence of the pointings-out should have been excluded with the confessions which were made to the magistrate. The second attack is against the admission of the incriminating extra-curial admissions made by the first appellant in the presence of the police to Mr Elvis Senyolo (Elvis) and the deceased's widow.

[6] In order to facilitate an easy understanding of the legal issues involved herein, a brief resumé of the salient facts of this case is necessary. On 13 March 2002, the deceased left his home at Ga-Dikgale for his place of employment at Ga-Sekgopo. The deceased stayed there during the week, returning to his home during week-ends. When he did not arrive home on Sunday 17 March 2002, his wife Mrs Mamaila Lenah Sehlabana (Sehlabana) went to look for him at his place of employment. The deceased was not there. She discovered that some of his property, namely, his vehicle, blankets, a mattress, welding machine and a grinder were missing. She tried to contact the deceased via his cellular phone but without success. She then went to report the fact that the deceased was missing at a local police station.

[7] On Saturday 23 March 2002, one Captain Mainetja received some information from an informer. He and Inspector Lephala commenced a search for the first appellant. They later arrested him in the early hours of Sunday morning. They explained his rights to him. As the first appellant indicated that he did not want to have a legal representative, they continued to interrogate him. He later admitted having killed the deceased but stated that he was not alone. Mainetja's evidence is to the effect that notwithstanding a further advice by him to the first appellant, he persisted to refuse the assistance of a legal representative. According to Mainetja, the first appellant told him that he and Mr Kgashare Elvis Senyolo (Elvis) killed the deceased. The first appellant took the police to Elvis'

home where they arrested Elvis who denied knowledge of the killing of the deceased. The first appellant told the police that they were in fact three including accused 2. The first appellant agreed to assist the family of the deceased to retrieve a firearm.

[8] On the same Sunday morning the first appellant took the police to a deserted place approximately 30-45 km away. It was in a bush. However, as it was still dark they found nothing but smelt a bad odour as if an animal had died. The first appellant then took them to another place, which was some 100 km away. He then told them that he had hidden the firearm there and that only he knew about it. Upon arrival at that place they all alighted. The first appellant pointed a spot out from where Mainetja retrieved a firearm hidden under a tree in a bush. He later took the police to where they retrieved the missing welding machine and grinder, which they impounded.

[9] They then returned to the original place where they had earlier failed to find the deceased's body. Upon arrival they found a spent cartridge. The appellant then told the police that that is where he shot the deceased on his chest to make sure that he is dead. They later found the deceased's decomposed body in a ditch deeper into the bush. The deceased's spouse identified the body to be that of deceased. As part of the head of the body was missing she asked what had happened to it. The police told her to ask the first appellant, whereupon he replied that when they threw the deceased's body there his head was still intact.

[10] Elvis testified that he knows both appellants. They are both his aunt's sons. He confirmed that one Friday the two appellants arrived at his home. The first appellant was driving a vehicle, a Mazda bakkie. The two appellants asked him to take them to a traditional doctor at a place called Shawela. After they had seen the traditional doctor, he and Edwin drove with the second appellant, apparently to go and look for small change to pay the traditional doctor. The first

appellant remained behind as he had fallen asleep. On the way the second appellant lost control of the vehicle and it overturned. The second appellant gave Elvis R2 000 and a cellular phone to Edwin. On Saturday morning the police came to arrest him. When he asked why the police were arresting him, the police said he must ask the second appellant, whereupon the second appellant said it is because they both killed a person. According to Sihlabana and Elvis, the first appellant was never assaulted or threatened to make the pointings-out as well as the utterances which he made in their presence.

[11] As the appellants disputed that their statements were made freely and voluntarily, a trial-within-a-trial was held. At the end of the trial-within-a-trial, the learned judge excluded the evidence of pointings-out relating to the deceased's body and firearm, but found that the discovery of the deceased's body and the firearm by the police were admissible.

[12] Mr Phetole Manthakga (Manthakga) testified that the grinder was retrieved by the police from him on 24 March 2002. The welding machine was retrieved from Mr Mohale David Machete (Machete). According to the police it is the first appellant who took them to these people. It is not in dispute that the motor vehicle (Mazda bakkie), the grinder and the welding machine were identified by the deceased's wife as the deceased's property.

[13] The first appellant did not testify in his defence whilst the second appellant did. The second appellant denied any involvement in the killing of the deceased. He furthermore denied ever driving in the deceased's vehicle or giving some R2 000 to Elvis or a cellular phone to Edwin.

[14] In his evaluation of the evidence, the learned judge rejected the second appellant's version as false. The learned judge found that there was sufficient circumstantial evidence, in the absence of an acceptable explanation, to come to the conclusion that the appellants were involved in one way or another in the

killing of the deceased. He also found that the deceased died a violent death. Furthermore, the learned judge found that both appellants were in possession of property belonging to the deceased soon after the deceased's death. Concerning the first appellant the learned judge found further that the fact that he pointed out the firearm to the police is proof that he possessed it.

[15] The crisp issue in this appeal is whether the learned judge was correct in admitting the evidence of the pointings-out regarding the deceased's body and the firearm by the first appellant, notwithstanding the fact that they formed part of confessions and admissions which had been found to be inadmissible because of the assault perpetrated on the first appellant.

[16] Counsel for the appellants submitted that the entre evidence of pointings-out which include the discovery of the deceased's body and the firearm should have been excluded as they all formed part and parcel of each other. This contention is based on the fact that first appellant was assaulted by the police during these pointings-out. Counsel contended that all this evidence is tainted by the assault by the police on first appellant. Counsel argued further that if this evidence is excluded, there would be no evidence regarding the crucial aspects concerning the place, date and cause of the deceased's death. In the result this would mean that the allegation that the deceased was shot with a firearm when he was robbed of his belongings remained unsupported by any evidence. It follows, so it was argued, that the only competent verdict in the circumstances would be simple theft of the deceased's property (Mazda vehicle, grinder and welding machine).

[17] On the other hand, counsel for the respondent argued that the State had adduced sufficient circumstantial evidence which proved conclusively that both appellants were involved in the killing of the deceased. This submission was based on the evidence of both the deceased's spouse and Elvis that the first appellant was never assaulted in their presence when he allegedly made the pointings-out, Accordingly it was contended that the court below was correct in accepting the evidence of pointings-out of the deceased's body and the firearm. Counsel argued further that the fact that both appellants were found driving the deceased's vehicle coupled with the fact that they possessed some of his belongings soon after his death which they either gave away or sold for a

pittance, justify the conclusion that they were both involved in the killing of the deceased.

[18] The following facts are either common cause or not seriously disputed: the deceased was known to the appellants; the deceased was killed between 13 and 15 March 2002; some items of property belonging to the deceased were stolen during the same period, both appellants were seen driving a Mazda vehicle, later identified to belong to the deceased soon after the deceased's death; the first appellant sold the deceased's welding machine for R100 to Machete on 20 March 2002, the first appellant gave away the grinder to Manthakga on 18 March 2002 for having helped him to tow away the deceased's stolen vehicle; the second appellant gave the deceased's cellular phone to Edwin. Of great significance is the fact that all these items which were proved to belong to the deceased were possessed by the appellants soon after the deceased's death.

[19] I am prepared to accept that the very fact that the appellants were in possession of the deceased's stolen property soon after his death, might justify the inference that the appellants were involved in the deceased's death. I must confess that such an inference appears to be both reasonable and compelling. However, it can hardly be said to be the only reasonable inference consistent with the proven facts. What compounds the problem is that there is no evidence as to when and how the deceased was killed. It is noteworthy that, notwithstanding the respondent's allegations that the deceased was shot, the post-mortem report does not support such a finding. It follows, in my view, that such an inference cannot be drawn as it would be in conflict with the salutary principles enunciated in *R v Blom,* 1939 AD 188.

[20] I find that the learned judge erred in accepting the evidence of the pointings-out by the first appellant. I agree with appellants' counsel that the fact that when the first appellant made a confession to the magistrate on 26 March 2002, he still had injuries which appeared to be fresh, suggests strongly that the

assault meted to him must have been serious. I find the submission by respondent's counsel that it is possible that the second appellant was only assaulted by the police after he had already made the pointings-out to be without merit. Why would the police assault him if he had already incriminated himself by pointing-out highly incriminating evidence. To my mind, it makes perfect sense and accords with logic that the first appellant could only have been assaulted by the police before the pointings-out in order to coerce him to do so. Undoubtedly, such evidence would have been obtained in contravention of the first appellant's rights ensconced in s 35(1)(a); (b); and (c) of the Constitution, Act 108 of 1996, which provides:

(a) '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;'.

[21] The question that instantly comes up for consideration is what should happen to the first appellant's evidence of pointings-out. This aspect is governed by s 218(2) of the Criminal Procedure Act, 51 of 1977 (the Act) which provides that:

'Evidence may be admitted at criminal proceedings that anything was pointed out by an accused appearing at such proceedings or that any fact or thing was discovered in consequence of information given by such accused, notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible in evidence against such accused at such proceedings.'

[22] Undoubtedly, there is a direct clash between s 218(2) of the Act and s 35(1)(a); (b); and (c) read with s 35(5) of the Constitution. It is this conflict which we are required to resolve in this appeal. The answer to this somewhat intractable legal conundrum lies in s 35(5) of the Constitution which provides:

'Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.'

[23] Relying on the authority of *R v Samhando* 1943 AD 608 and *S v Sheehama* 1991 (2) SA 860 (A) the learned judge admitted the evidence concerning the alleged discussion which the first appellant allegedly had with the deceased's spouse during which, at the suggestion by the police, she asked him where the deceased's missing head was and to which he replied that when he threw the deceased's body in the bush, it still had its head intact. The learned judge found that this conversation is in a different category as opposed to a disclosure to the police. He further found that the first appellant could either have responded or refused to respond to this question by the deceased's spouse. To my mind, the learned judge erred in this respect. It is clear that the first appellant was under arrest and in the presence of more than one police at this critical stage of the investigation. It is the police that instigated or prompted the deceased's spouse to ask the first appellant this question which elicited such an incriminating response. The possibility that the first appellant was under the undue influence of the police at the time cannot be excluded. To my mind, this negated any volition which he might have had to refuse to answer. See *R v de Waal* 1958 (2) SA 109 (GW) at p 111A-112F.

[24] Secondly, the learned judge admitted the evidence on the basis that, had it not been for the pointings-out by the first appellant, the police would not have discovered the deceased's body. The same reasoning underpinned the admission relating to the pointing-out and discovery of the firearm. Once again the learned judge ignored the fact that these pointings-out happened at the instance and in the presence of the police. There is no evidence that the first appellant had been advised of his right to remain silent, or not to make any statement that might incriminate him and what the purpose and legal consequences of not remaining silent or making pointings-out are. Evidently all this was done in contravention of the rights of the first appellant as embodied in s 35(1)(a); (b); and (c) of the Constitution.

[25] It is unfortunate, if not regrettable, that the learned judge never considered the applicability of s 35(1) read with s 35(5) of the Constitution and their impact on the admissibility of the impugned evidence. It is furthermore regretable that it does not appear from the record that the learned judge's attention was drawn to the approach adumbrated by Van Heerden JA in the seminal judgment of *S v January; Prokureur-Generaal, Natal v Khumalo* 1994 (2) SACR 801.

[26] Cachalia JA succinctly set out the legal position regarding the admissibility of such evidence before and after our new Constitution in *S v Mthembu* 2008 (2) SACR 407 (SCA) at paras 22 and 23 as follows:

'[22] In the pre-constitutional era, applying the law of evidence as applied by the English courts, the courts generally admitted all evidence, irrespective of how obtained, if relevant. The only qualification was that "the judge always (had) a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused." And where an accused was compelled to incriminate him or herself through a confession or otherwise the evidence was excluded. However, real evidence which was obtained by improper means was more readily admitted (and also because its admission was governed by statute). The reason was that such evidence usually bore the hallmark of objective reality compared with narrative testimony that depends on the say-so of a witness. Real evidence is an object which, upon proper identification, becomes, of itself, evidence (such as a knife, firearm, document or photograph – or the metal box in this case). Thus, where such evidence was discovered as result of an involuntary admission by an accused, it would be allowed because of the circumstantial guarantee of its reliability and relevance to guilt – the principal purpose of a criminal trial. As a rule, evidence relating to the "fruit of the poisonous tree" was not excluded.'

[27] There was however some resistance to this line of reasoning deriving from normative considerations. In *S v Sheehama,* Grosskopf JA stated that it was a basic principle of our law that an accused cannot be coerced into making a self-incriminating statement. He thus held that s 218(2) of The Criminal Procedure Act 51 of 1977 did not authorise evidence of forced pointings-out even though it arguably did so. And in *S v Khumalo* 1992 (2) SACR 411 (N) at 420 Thirion J said that involuntary statements made by accused persons are inadmissible against them, not only because they are untrustworthy as evidence but, quoting Lord Hailsham, 'also, and perhaps mainly, because in a civilized society it is vital that persons in custody or charged with offences should not be subjected to ill-

treatment or improper pressure in order to extract confessions'.[1] With the advent of the new constitutional order looming Van Heerden JA, in *S v January; Prokureur-Generaal, Natal v Khumalo,* confirmed this line of thinking when he observed that there has '(i)n this century . . . rightly been a marked shift in the justification for excluding. . . involuntary confessions and admissions, and it is now firmly established in English law that an important reasons is one of policy.'[2] In making this observation he was able to depart from the reasoning in earlier cases, referred to above, which had placed their emphasis only on the relevance and reliability of the evidence. He thus held that proof of an involuntary pointing-out by an accused person is inadmissible even if something relevant to the charge is discovered as a result thereof.'[3]

[28] What comes forcefully to the fore is the ever-present tension between the State's obligation or duty to see to it that people who commit crimes are arrested, investigated, prosecuted and held accountable for their deeds and its equally important and onerous duty to ensure that the conduct of those saddled with the duty and responsibility to investigate and prosecute offenders is proper and above board. That it is sometimes difficult to resolve this tension admits of no doubt. This difficulty is described by Kriegler J in *Key v Attorney General, Cape Provincial Division And Another* 1996 (2) SACR 113 (CC) at para [13] as follows:

'In any democratic criminal justice system there is a tension between, on the one had, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale. To be sure, a prominent feature of that tension is the universal and unceasing endeavour by international human rights bodies, enlightened legislature and courts to prevent or curtail excessive zeal by State agencies in the prevention, investigation or prosecution of crime. But none of that means sympathy for crime and its perpetrators. Nor does it mean a predilection for technical niceties and ingenious legal stratagems. What the Constitution demands is that accused be given a fair trial. Ultimately, as was held in *Ferreira v Levin,* fairness is an issue which has to be decided upon the facts of each case, and the trial Judge is the person best placed to

[1] Quoting Lord Hailsham in *R v Wong Kam-ming* [1980] AC 247; [1979] 1 All ER 939 (PC) at 261.

[2] A 807g-h.

[3] See generally DT Zeffertt, AP Paizes and A St Q Skeen T*he South African Law of Evidence* (2003) at 500-505.

take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted.'
See also *S v Pillay & Others* 2004 (2) SACR 419 (SCA) para [11].

[29] Reverting to the facts of this case, it is clear from the proven evidence that the evidence of the pointings-out by the first appellant and the concomitant utterances made by him were crucial to the State's case. Evidently the pointings-out led to the discovery of the deceased's body as well as the firearm. What is also clear is that these pointings-out were made soon after the first appellant had been arrested. The first appellant alleged that he was seriously assaulted, inter alia, by being repeatedly hit with an electric cable by the police throughout his arrest. The police denied any assault on the first appellant. However, when the first appellant appeared before the magistrate to make a confession some two or three days after his arrest, he exhibited to him some injuries on his body. It is noteworthy that the magistrate independently observed that the injuries appeared to be recently sustained. It is fair to conclude that the injuries meted out on the first appellant were inflicted by the police between the time of his arrest and appearance before a magistrate. To my mind, pure logic and common sense dictates that the assault must have been perpetrated with the primary purpose of inducing the first appellant to co-operate and assist the police in their investigation which led to the discovery of the deceased's body and the firearm.

[30] There is no suggestion that these pointings-out would have been made without the assault. I agree with counsel for the first appellant that this evidence was irredeemably tainted by the assault on the first appellant. I have no doubt that admitting such evidence would not only render the trial unfair but would also, as Cachalia JA quoting Lord Hoffman's remarks in *Mthembu's* case remarked at para 36: '. . . it is tantamount to involving the judicial process in "moral defilelment."' This 'would compromise the integrity of the judicial process (and) dishonour the administration of justice.' I harbour no doubt that the evidence should not have been admitted. See *S v Potwana & Others* 1994 (1) SACR 159 (A) at p 164a-b; *S v Tandwa & Others* 2008 (1) SACR 613 (SCA) para [89].

[31] Both counsel were agreed that, should we exclude the evidence of pointings-out, the counts of murder, robbery with aggravating circumstances (involving the alleged shooting of the deceased with a firearm) and unlawful possession of a firearm would have to fall away. However, the evidence of Mathakga about how the first appellant gave him a grinder on 18 March 2002 after he had towed the Mazda vehicle for him; Machete about his purchase of the welding machine on 20 March 2002 from the first appellant for R100; Edwin and Elvis about how both appellants came to their home in the Mazda vehicle during or about 15 March 2002; Edwin's evidence that the second appellant gave him a cellular phone; remains unaffected by the exclusion of the evidence of the pointings-out.

[32] This evidence stands as an unshakeable edifice against them. They failed to proffer any reasonable explanation for their possession of the deceased's property soon after he was killed. To my mind, the fact that there is no evidence regarding when and how the deceased was killed, in particular the failure by the doctor who did the post-mortem examination to find any evidence of wounds caused by bullets, leads to the inexorable conclusion that the appellants could only be legitimately convicted of theft of the deceased's property as there is no doubt that the items of property referred to above were positively identified as belonging to the deceased.

[33] It follows that the appeal must succeed to the extent that the appellants are acquitted on all the other counts except theft of the Mazda vehicle, the grinder and the welding machine. Evidently the fact that the appellants have now been convicted of theft demands that we interfere with the sentence imposed on them and to replace it with a sentence that is balanced and fair to both the appellants and society in general and which is commensurate with the gravity of the offence for which they have been convicted.

[34] Both appellants were first offenders. Since their arrest they were both held in custody. Crucially they have already served a substantial part of their sentence since they were sentenced on 25 April 2003. Fairness and justice demand that we take these factors into account and accord them their proper weight in determining an appropriate sentence. However, these should be balanced against the following facts. Both appellants worked with the deceased. The appellants showed no respect for the deceased's property. The welding machine was sold for a paltry R100 whilst the grinder was given away for some towing service. The vehicle belonging to the deceased was damaged when the second appellant capsized it. Thereafter they simply abandoned it. To my mind this amounts to sheer arrogance. In the circumstances of this case, I think that a sentence of six years' imprisonment would serve both the interests of society as well as remain fair and balanced.

[35] In the result the following order is made:

1. The appeal by both appellants in respect of the count of murder is upheld. The conviction and the sentence imposed on this count are set aside.

2.1 The appeal by both appellants in respect of the count of robbery with aggravating circumstances is upheld to the extent that a conviction of theft of a Mazda bakkie (registration BCB 759 N), a welding machine and an angle grinder is substituted.

2.2 The sentence imposed on both appellants in respect of the count of robbery with aggravating circumstances is set aside and substituted with a sentence of imprisonment for six years. The sentence is antedated to 25 April 2003 in terms of s 282 of the Criminal Procedure Act 51 of 1977.

3. The appeal by the first appellant in respect of the count of unlawful possession of a firearm is upheld and the conviction and the sentence imposed on this count are set aside.

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L O BOSIELO

JUDGE OF APPEAL

CLOETE JA (Leach JA concurring):

[36] I have had the advantage of reading the judgment of my colleague Bosielo JA. I have reached the same conclusion, but I prefer to state my own reasons.

[37] The two appellants were convicted of robbing and murdering the deceased with a firearm and the first appellant was also convicted of the unlawful possession of that firearm. I should say at the outset that the first appellant gave no evidence in the main trial and the rejection by the trial court of the second appellant's evidence was not challenged on appeal.

[38] It was formally admitted by the appellants that the deceased died between 13 and 15 March 2002 in consequence of injuries sustained between those dates. The post mortem report, also formally admitted, was inconclusive as to the cause of death as the body (which was admitted to be that of the deceased) was in an advanced state of decomposition. The deceased had been partially decapitated but there was no evidence to suggest how this might have come about.

[39] Both appellants worked together with the deceased. The evidence led by the State showed the following sequence of events. On Friday 15 March 2002 the appellants were seen together in the deceased's Mazda LDV and they both drove it; it was damaged when it turned over whilst the second appellant was at the wheel; and the second appellant gave the deceased's cellular telephone to Mr Edwin Motlakale Senyolo. On Monday 18 March, Mr Phetole Alfeus Manthakga towed the Mazda with his tractor at the request of the first appellant, for which the first appellant gave him the deceased's angle-grinder. On Wednesday 20 March, the first appellant sold the deceased's

welding machine to Mr Mohale David Machete for R100 to enable him to put petrol in the Mazda. The conduct of the appellants in dealing with the deceased's property as they did gives rise to the inference that they were aware of his death when they did so.

[40] The first appellant was arrested at about 11 pm on Saturday 23 April 2002. Thereafter, during the same night, Mr Elvis Kgashane Senyolo ('K S Senyolo') was arrested. When he asked why, the police told him to ask the first appellant; and when he did so, the first appellant said that it was because the two of them had killed a person (which K S Senyolo immediately denied). After K S Senyolo had been arrested, the first appellant took the police to a place where he attempted to point out something, but it was too dark to see. At about 6 am the next morning (Sunday 24 April) the first appellant took the police to Machete's home where they took possession of the deceased's welding machine and thereafter, approximately an hour later, he took them to Manthakga's home, where they took possession of the deceased's angle-grinder. Later the same morning they returned to the place ─ termed by the trial court "n verlate plek' ─ where the first appellant had earlier attempted to point out something and the first appellant there pointed out the place where he said he had disposed of the body of the person he had killed. There was an empty cartridge case on the scene. The deceased's widow was called by the police and in her presence the deceased's body was found hidden in a hole amongst rocks. She asked what had happened to the deceased's head and the first appellant replied that when he had thrown the body there, it had still had a head. Also on the Sunday morning the first appellant pointed out to the police a hidden firearm. Two days later, on Tuesday 26 April, each appellant made an incriminating statement to a magistrate.

[41] After a trial within a trial, the trial court found that the State had not excluded the possibility that the first appellant had been assaulted and accordingly, that it had not established that his statement to the magistrate

had been freely and voluntarily made. The principal reason for this conclusion was the fresh injuries he showed the magistrate which were inconsistent with the State case that he had never been assaulted. I am unpersuaded that there is any basis to interfere with this finding. The second appellant's statement to the magistrate was excluded for different reasons. However, the trial judge took into account the statements made by the first appellant to K S Senyolo and to the deceased's widow and the fact that it was he who had pointed out the deceased's body and a firearm to the police. The trial judge relied on the decisions of this court in *R v Samhando*[4] and *S v Sheehama*[5] as entitling him to do so. Neither the decision of this court in *S v January*; *Prokureur-generaal Natal v Khumalo*[6] nor the implications of s 35(1)(a) and (c) of the Constitution, were apparently drawn to his attention. It is at least a reasonable possibility that the assault on the first appellant, which the trial court found may have occurred, commenced shortly after his arrest and in consequence, that all the pointings out and statements made by him, up to and including his statement to the magistrate, were not freely and voluntarily made. All that evidence therefore falls to be excluded.

[42] I find it unnecessary to consider whether the fact that the deceased's body, angle-grinder and welding machine were found should also be excluded from consideration (contrast *S v Tandwa*[7] and *S v Mthembu*[8] with the dissenting judgment of Scott JA in *S v Pillay & others*[9]). It was the evidence of the police that none of these things would have been found but for the first appellant's pointing out their whereabouts.[10] Even if the evidence is admitted

[4] 1943 AD 608.
[5] 1991 (2) SA 860 (A).
[6] 1994 (2) SACR 801 (A).
[7] 2008 (1) SACR 613 (SCA).
[8] 2008 (2) SACR 415 (SCA).
[9] 2004 (2) SACR 419 (SCA) para 8:
'I would imagine, for example, that most fair-minded people, certainly in South Africa with its high crime rate, would baulk at the idea of a murderer being acquitted because evidence of the discovery of the victim's concealed body would render the trial unfair.'
[10] The significance of this evidence appears from both the majority (paras 87 to 89) and minority (paras 7 to 9) judgments in S v Pillay & others, above, n 6.

in terms of s 35(5) of the Constitution, there is not sufficient evidence to convict either of the appellants of murder, robbery or possession of a firearm. So far as the murder is concerned, there are several hypotheses consistent with the proved facts and inconsistent with the appellants' guilt, one being that the one appellant killed the deceased without the complicity of the other and then agreed to share the deceased's possessions once the other found him out. So far as the robbery is concerned, there is no evidence that violence was used by either appellant to deprive the deceased of his property, much less (as alleged in the indictment) that there were aggravating circumstances present because a firearm was used. The finding of the firearm is a completely neutral fact. For that reason, the conviction of the first appellant for possession of it must be set aside.

[43] Counsel for the appellants correctly accepted that the evidence established that they were guilty of theft of the deceased's property, including his motor vehicle. Taking into account all the purposes which underlie the imposition of sentence, and giving due weight to the personal circumstances of the appellants ─ particularly that they were first offenders ─ I consider that a sentence of six years' imprisonment would be just.

[44] It is for these reasons that I concur in the order made by my colleague Bosielo JA.

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T D CLOETE
JUDGE OF APPEAL

APPEARANCES:

For appellant: M K STEENEKAMP

Instructed by:
Legal Aid Board

For respondent: J H C VAN HEERDEN

Instructed by:
Director Public Prosecutions, Pretoria
Director Public Prosecutions, Bloemfontein