

IN THE HIGH COURT OF SWAZILAND

CRIMINAL CASE NO./104/99

In the matter between:

**REX
VS**

1. **MALUNGE BARTARIA**
2. **LOGWAJA BARTARIA**
3. **DZELIWE MATSENJWA**

CORAM	:	MATSEBULA J
FOR THE CROWN	:	
FOR THE DEFENCE	:	

RULING ON A VOIRE DIRE AS TO THE ADMISSIBILITY OF AN EXTRA-JUDICIAL STATEMENTS BY ACCUSED PERSONS

30TH MARCH 2001

The three accused are indicted on one count of murder. The allegation being that upon or about the 6th October 1998 and at or near Maphungwane area in the Lubombo District, the accused persons acting jointly and in the furtherance of a common purpose did unlawfully and intentionally kill Amos Tsabedze.

They pleaded not guilty and accused no.1 and 2 were represented by Mr. Vilakazi and accused no.3 represented by Mr. Mkhathswa whilst Mr. Maseko represented the Crown.

The court was not informed at the onset that certain documents allegedly made before Magistrates by accused no.1 and 2 would be challenged in such a manner that it would be necessary to have a trial within a trial. But in view of the plea of not guilty by the accused, it is immaterial at what stage a trial within a trial is commenced. This is because by virtue of their plea of not guilty they put into issue everything during their trial. This, will of course, include the making of the alleged contested documents so that the Crown would, of necessity have to prove that the alleged extra-judicial statements were made in conformity with Section 227 of the **CRIMINAL**

PROCEDURE AND EVIDENCE ACT 67/1938 as amended. However it is desirable, for the sake of convenience that the defence indicates that extra-judicial statements would be challenged. If, this is done it enables the Crown to have all the witnesses at hand. (see **R VS MAGUNGWANE SHONGWE AND OTHERS 1982-1986 PART 2**). The defence should also as far as possible indicate the general nature of the objection to the admissibility of such extra-judicial statements.

The question that arises at this stage, is whether the deponents i.e. accused no.1 and no.2 made their statements freely and voluntarily in terms of Section 275 of the **CRIMINAL PROCEDURE AND EVIDENCE ACT 67/1938**. There can be no doubt that when accused no.1 appeared before the then Principal Magistrate PW10 Mr. Kenneth Nkambule, accused no.1 was thoroughly and abundantly made aware of his rights. The fact that he had been referred to the Principal Magistrate was explained by the witness PW11 2538 Constable Jerome Ndlangamandla. After accused no.1's arrest PW11 informed him of his mission and warned him in terms of the Judges' Rules. He asked him if he wished to say something concerning the murder charge. It was PW11's evidence that accused no.1 had answered in the affirmative. PW11 then took a statement from accused no.1.

PW11 formed the opinion that the statement made by accused no.1 was in the nature of a confession. PW11 then advised accused no.1 of the legal position and asked him if he still wished to make the statement before a judicial officer. Accused no.1 answered in the affirmative. Accused no.1 was then referred to PW10 Kenneth Nkambule. PW10 did not confine himself to the questions contained in the preformar but went to an extent of further advising accused no.1 that he did not have to fear to change his mind and to decline to the making of the statement if he so felt. Accused no.1 persisted and the statement was made.

PW8 Magistrate Mcabango Philemon Dlamini stated in evidence that in the light of Question 10 and the answer thereto. Question 10 reads: "Were any threats made to you which induced you to make this statement? If so, by whom and what was said to you?" and the answer thereto reads as follows: "Yes, I do not know his name and surname. The police officer said I would see what I have never seen if I do not talk". PW8 repeatedly asked accused no.2 whether he was still willing to make the statement and it was his evidence that accused no.2 persisted that he still wanted to make the statement.

In so far as the warning by the police officer PW11 stated that he followed the same procedure as followed in respect of accused no.1. Accused no.1 and 2 also went into the witness stand and gave evidence that totally denied the evidence of police officers. They told the court that they had been assaulted, tubed and threatened by these witnesses. They gave evidence that included very crucial and important aspects of assault which were never put by counsel to the Crown witnesses. (See **DOMINIC MNGOMETULU & OTHERS CRIMINAL CASE NO.96/88**) They insisted that they had instructed their counsel (See also **S VS P 1974(1) SA581 @582E-G**) Mr. Vilakazi about these facts which surfaced for the first time in their evidence in chief and especially under cross-examination. It is clear that Mr. Vilakazi was not given proper instructions. After the submissions by Mr. Maseko on behalf of the Crown, Mr. Vilakazi had nothing to say and decided not to address the court and said he left the matter in the hands of the court.

From the evidence led by the Crown, it appears to me that the questions in the preformar documents put to deponents by the Magistrates, the deponents appeared before the Magistrates on their own free volution and made the statements freely and voluntarily without any influence having been brought to bear upon them. The conflicting evidence when the accused gave evidence in chief and when they were cross-examined by the Crown and their failure to have properly instructed their counsel clearly tends to support the view that on very reasonable and probable grounds the Crown succeeded in discharging the onus resting on it.

As was pointed out by Mr. Maseko for the Crown, very vital aspects of the story by the two accused in evidence in chief and answers under cross-examination were never put to the Crown witnesses who testified in the trial within a trial. This clearly is indicative that the accused never informed their counsel of these vital facts. (see in this regard **DOMINIC MNGOMETULU AND OTHERS CRIMINAL APPEAL CASE NO.96/88** and **S VS P 1974(1) 581 @582 E-G.**)

Considering the evidence in its totality, I find that the evidence by accused no.1 and 2 riddles with contradictions to an extent that no court of law properly applying its mind to the issues can accept the accused's accounts of what preceded their being taken to the Magistrates for the making of the contested admissibility of their statements. These statements were made freely and voluntarily without any undue influence being brought to bear on the accused. In the result, I hold and find that the statements made by the accused no.1 and 2 were done freely and voluntarily. Therefore, the statements are admissible.

Even though a plea of not guilty by accused persons puts everything in issue in so far as the onus rests on the Crown to prove, not only that the contested statements made by the deponents were made freely and voluntarily but also that the onus resting on the Crown should be discharged in so far as whether or not the deponents are the persons who made the contested statements (See **YELOLO 1981(1) SA1002A.**) It is common cause that the accused made the statements before the respective Magistrates. This has not been challenged.

In my judgment it is apparent that on the documents themselves that their making by the accused no.1 and 2 were not forced. (see **YELOLO SUPRA.**) In the result the statements are admissible.

J.M. MATSEBULA

JUDGE

JUDGMENT

09/06/01

The three accused stand charged on one count of murder. It is being alleged that upon or about the 6th October 1998 at or near Maphungwane area in the Lubombo District, the accused acting jointly and in furtherance of a common cause did unlawfully and intentionally kill Amos Tsabedze.

Accused no.1 and 2 are represented by Mr. Vilakati and the third accused is represented by Mr. Mkhathshwa. The Crown is represented by Mr. Maseko who is instructed by the Director of Public Prosecutions.

On 12th September 1999, a pre-trial conference was held at which it was recorded that the witness who had identified the deceased would be dispersed with and the identity of the deceased was not in dispute.

At the commencement of the trial, on the 16th August 2000 the accused pleaded not guilty. Accused no.1 and 2 were alleged to have made statements before two different Magistrates and these were being contested by Mr. Vilakati.

However, the court was not made aware at the commencement of the trial, that accused nos 1 and 2 had made statements before judicial officers and that these statement i.e. their admissibility

would be contested. However, in view of the accused no.1 and 2's plea of not guilty no miscarriage of justice was occasioned, as their plea of not guilty put into issue everything that was a material and the Crown was duty bound to prove its case beyond a reasonable doubt. This proof would of necessity also include the making of the alleged statements by accused no.1 and 2. This court would however enjoin parties representing accused and the Crown to give a clear indication to the court at the commencement of a trial that admissibility of statements made before judicial officers are being contested. In such event the Crown would be well advised to embark on a trial within a trial and have all the necessary witnesses ready to give evidence at such a trial.

A trial within a trial was conducted and this court gave its ruling on the 30th March 2001 in which the court held that the contested statements were admissible. The court does not wish to again go into detail on the ruling on the **voire dire** as to the admissibility of the said extra judicial statements made by accused no.1 and 2 suffice it that the ruling now forms part of the judgment of this court.

Turning to the main trial, it is appropriate to set out the relationship between accused no.1, 2 and 3 before dealing with the merits of the case. Accused 1 and 2 are brothers and accused no.3 is their aunt; in the sense that she is the young sister of accused no.1 and 2's mother. The deceased was her husband.

According to her evidence she got married to him at a very young age. As a result of their marriage seven live children were born and they are all minors. She loved the deceased so much that she did not wish to entertain the thought of parting with him. She was caught up in what I may call a triangle difficulty. This triangle consisted of "Love Separation and Hate".

The deceased, it is common cause was the most brutal and cruel man in the area. He treated her in the most brutal fashion by assaulting her and the children so that some of them decided to desert him and left for good. Accused no.3 was in an unfortunate position in that she had no living parents. When her husband would assault her she would occasionally flee and found refuge with her maternal uncle, who was himself a sickly man. Deceased would then come to the uncle's homestead armed with spears and threatened to kill the uncle if he accommodated her at his homestead. Ultimately the uncle advised accused no.3 not to go and seek refuge at his homestead for fear that he would himself be

assaulted by deceased.

It is also common cause that on occasions the deceased would assault accused no.3 and the minor children and accused no.3 would flee and sleep in the veld and come back in the morning full of morning dew on her head and feet.

It is against the above backdrop, that I will now turn and consider the evidence in greater detail.

The Crown opened its case by calling PW1 Sibongile Irene Ndzabandzaba. It was her evidence that she knew accused no.1, 2 and 3. They all resided in the Maphungwane area where she had been residing for a period of plus minus ten years at the time when this crime was committed. She also knew the deceased. Accused no.1 and 2 are born of her husband's cousin. Deceased and accused no.3 were close neighbours and they were her relatives.

It was her evidence that deceased and accused no.3 initially enjoyed a relatively happy marriage but later problems started. According to PW1 the problems centred around a persistent arrival of a strange motor vehicle at accused no.3's homestead. Accused no.3 never told PW1 what sort of problems the arrival of this motor vehicle created for her. It was her evidence that this strange motor vehicle would arrive and she, accused no.3 would be forced by the presence of this motor vehicle to go and spend a night in the veld and only come back in the morning.

PW1 said accused no.3 totally declined to divulge what problems the arrival of this motor vehicle caused her. Nor did accused no.3 link any problem of the arrival of this motor vehicle with her husband. PW1 was unable to advise accused no.3 what to do about the arrival of the motor vehicle. However, accused no.3 of her own accord decided to go and report the matter to the "indvuna" of the area. According to PW1 accused no.3 told the "indvuna" that she suspected that the arrival of the motor vehicle had something to do with her husband.

PW1 told the court that during the month of October 1998 she was approached by accused no.3 and she told her that she was leaving for her relative's homestead. However, no sooner had she left her husband the deceased sent someone to fetch her back. Accused no.3 came back. There was, around this time, a wedding at Mgodloza's place and PW1 invited accused no.3 to go and attend this wedding.

It was PW1's evidence that within plus minus two weeks of accused no.3's return to her homestead from her relatives deceased was reported killed. Before the death of the deceased, accused no.3

told PW1 that she had come back to the deceased because he had sent someone to fetch her. It was further her evidence that accused no.3 told her that the problem of the motor vehicle was still very much alive and that she was uncertain whether she would continue to stay with the deceased.

PW1 said it was during one of their meetings with accused no.3 that accused no.3 confided to her that she had reached a stage where she contemplated a retaliation or revenge. PW1 said accused no.3 never told her how this revenge was going to be carried out.

It was her evidence that on her way to attend the wedding, she was asked by accused no.3 to contact accused no.2 and tell him that his parcel was ready. Accused no.3 came to PW1 on a Sunday or Monday early and had in her possession a sum of E100 00 which she said her husband gave her in order to go and purchase maize grain. Accused no.3 asked PW1 to accompany her in search of the maize grain. They both went to Dabukile's homestead. It was at this homestead that they came across accused no.2 erecting the fence at this homestead. It was her evidence that accused no.2 and 3 asked her to excuse them for a moment by moving away from them. PW1 said she complied with their request and went and stood at a distance at which she could not hear what was being discussed by accused no.2 and 3. They discussed for a period of plus minus an hour. When she came back she asked if PW1 had an amount E20 00 and informed PW1 that she had finished her discussion with accused no.2 unfortunately the money in her possession was fast. PW1 told accused no.3 that she did not have E20 00. Both accused no.2 and PW1 returned home.

On a Tuesday the following day at 10am accused no.2 came to accused no.3 who was in the company of PW1. This was at PW1's homestead. Accused no.2 stood outside the fence and requested PW1 for some water to drink. PW1 said, she told accused no.2 that in terms of the Swazi Law and Custom one does not remain outside of the homestead and ask to be given water to drink if he needed water to drink. He was expected to come in the homestead; whereupon accused no.2 entered into PW1's homestead and was given the water to drink. Accused no.2 quenched his thirst and then asked to go and call accused no.3. PW1 stated in her evidence that she declined to go and call accused no.3 as accused no.3's husband was around and that she feared he might object that his wife being called to speak to another man. It was PW1's evidence that accused no.2 persisted. However, by this time accused no.3 had notice the presence of accused no.2 and she in turn send a child to inform accused no.2 that she and accused no.2 should go into the bush and meet there. This bush was situated below PW1's homestead. Accused no.2 declined to meet with accused no.3 in the bush. Accused no.3 then decided to come to

PW1's homestead. PW1 was sitting at the doorway. Accused no.3 then invited accused no.2 into the sitting room of PW1's homestead; and PW1 was also invited to join them in the sitting room. PW1 accepted the invitation as she did not think they were going to discuss the marital problems of accused no.3. At this stage one LaMkhabela also arrived and joined them in the sitting room. Accused no.2 then set the ball rolling and told the women present there that he and others had not been able to execute the assignment. Accused no.2 said this assignment could not be executed because the people who were to execute the assignment were amongst others an "inyanga". Accused no.2 said the "inyanga" was not happy with carrying out the execution of the assignment because accused no.3 had already informed third parties about the execution. She had, for example told PW1 and LaMkhabela.

PW1 said she and LaMkhabela were confounded as to what accused no.3 had told them what she should not have. However, accused no.3 came to their rescue and allayed their confoundment and told them accused no.2 was referring to nothing more than what she accused no.3 had told PW1 about her retaliation or revenge on her husband. It was at this stage that accused no.2 told both PW1 and LaMkhabela that they should not dare tell anyone in the event that something untoward happens. They were warned that if they did tell someone they would land into serious trouble. PW1 said in her evidence that she understood accused no.2 and 3 to mean that they should not dare tell anyone about the revenge/retaliation on accused no.3's husband. PW1 said accused no.2 asked accused no.3 why she had divulged their secret. PW1 said she immediately told accused no.2 that accused no.3 had told her what this revenge would entail. Accused no.2 then left. After accused no.2 had left LaMkhabela asked accused no.3 if there was any possibility that she accused no.3 could contemplate such a thing as a revenge on her husband. Accused no.3 said she had no option but to revenge.

PW1 said this meeting lasted from 1pm - 3pm. A meeting between accused no.2, 3, LaMkhabela and PW1. PW1 said accused no.3 warned them seriously not to talk about this and they then parted. That very evening accused no.3 came to PW1's homestead wearing a half slip, she was in the company of all her children except one child. There was also a herdboy. PW1 asked accused no.3 what the matter was. She asked if her husband has assaulted her again. PW1 suspected assault on her because he had seen accused no.2 around. Accused no.3 told PW1 that the motor vehicle had been to her homestead again and that she fled when certain people were attacking her husband. She said the attackers surrounded her husband's bed.

It was PW1's evidence that she told accused no.3 that she could not

assist her but instead advised her to go to the main homestead and make a report there. PW1 said accused no.3 asked PW1 to accompany her to the main homestead and assist her in raising an alarm. PW1 decline. She said she feared they might meet the motor vehicle and the attackers accused no.3 used to complain about. At the insistence of accused no.3 and PW1 agreed.

Deceased was discovered dead with his mouth open. It was PW1's evidence that when accused no.3 came and made the report she never said who the attackers were but simply said the usual motor vehicle had arrived; nor did she say how many people were attacking her husband. The matter was then reported to the police station. PW1 was then shown certain photos and identified the person in those photos as the deceased. The photo was handed in as exhibit "2".

Lastly PW1 said during the month of October she never had an occasion of seeing accused no.1, 2 and 3 being together.

PW1 was cross-examined by Mr. Vilakati on behalf of accused no.1 and 2. This witness stood her grounds to the letter. PW1 was so honest, in the court's opinion that if she had anything against any of the accused she could easily had suggested that because PW1 and accused no.3 did not get the maize grain they had set out to purchase accused no.3 gave the E100.00 to accused no.2 for the execution. However PW1 stuck to her story she gave in her evidence in chief. I accept PW1's evidence ***in toto***.

PW1 was also cross-examined by Mr. Mkhathshwa on behalf of accused no.3. In answering one of Mr. Mkhathshwa's questions PW1 said she doubted the story of a strange motor vehicle which according to accused no.3 came regularly to accused no.3's homestead. It was her evidence she herself had never seen such a motor vehicle. PW1 admitted that on some previous occasions accused no.3 would also come to her homestead and would also say she is fleeing from the presence of the motor vehicle. It was one of her answers to questions put by Mr. Mkhathshwa that eventually PW1's mother advised accused no.3 to go and report the matter to the police.

PW1 said notwithstanding that she herself had never seen the motor vehicle on one occasion accused no.3 took her, her mother and sister in law and showed them tyre marks on the sand at her accused no.3's yard. Se showed them also marks similar to those worn by men and made from old motor vehicles tyres. These

answers, indicate beyond reasonable doubt that PW1 was an honest witness through out the trial and had no axe to grind against accused no.3.

I also put a few questions relating to accused no.3's character. PW1 answered my questions as follows"

"Accused no.3 and I were not friends. Accused no.3 actually had no friends in the area. She would only approach us when she had problems. She was a faithful woman. Her faithfulness was testified to by my husband who said of accused no.3 was a faithful and straight forward woman". (*sic*)

PW2 was Nomsa Clementine Mkhabela. It was her evidence that she too knew the deceased accused no.3, accused no.1 and 2. They all resided in the same area at Maphungwane and they were neighbours. PW2 states that deceased had confided in her that accused no.3 was not well behaving and this was causing problems between him and accused no.3. It was her evidence that as a result of her misbehaving he has had to chase her away. In turn accused no.3 said to PW2 that she was trouble by a certain motor vehicle which would come in the absence of the deceased. PW2 said accused no.3 told her she suspected that his motor vehicle came to their homestead at the instructions of deceased as deceased had told her i.e. accused no.3 that he was setting her off.

It was PW2's evidence that accused no.3 also said she in turn was contemplating revenging on deceased. PW2 said accused no. said she would get people to do the revenge on her husband. PW2 said however accused no.3 did not name the persons she would procure to revenge on her husband.

In my judgment I find no reason to doubt and reject PW2's evidence.

PW2 corroborated PW1's evidence about a meeting between her, PW1, accused no.2 and 3. According to PW2, this meeting was not a success as there was some dispute as to what accused no.3 had told PW1 and PW2. PW2 also mentioned a proposed meeting which was to take place in the bush, but that such a meeting did not materialised. As a result PW2 denied that either PW1 or accused no.3 had told her anything about execution of deceased. PW2 stated that she then decided to leave but that before she left accused no.2 warned her very seriously that she should not divulge what accused no.3 told her. It was her evidence that if PW2 dared to divulge the information he accused no.2 would do something that PW2 would feel very uncomfortable about. It was PW'2 evidence that he would still meet PW2 the following day; as he had not have

time to explain to PW2 about the matter. This was not to be as PW2 only met accused no.3 after the death of accused no.3's husband.

PW2 said she then asked accused no.3 how her husband died. Accused no.3 told her how certain people came and attacked her husband and she had raised an alarm and even went to her, PW2's homestead raising an alarm there, but PW2 had not heard them. PW2 said she then asked accused no.3 up to the death of her husband was not the work of the boy who came to warn them, that is accused no.2. Accused no.3 said she had not seen her attackers but had heard the sound of motor vehicle engine. Accused no.3 said she had been sharing a bed with the deceased when the attackers pounced on them. But that during the attack she moved and slept on floor. PW2 said accused no.3 said as she moved and slept on the floor her husband went out of the house and she heard him speak to the people outside. PW2 said she moved away from the bed because her husband threatened to see her off on some previous occasions. This was PW2's evidence.

PW2's evidence differs completely from accused no.3's evidence in chief in so far as the crucial time when the attackers arrived. It also differs from the account she gave to PW1 about how she escaped when the motor vehicle arrived. This conflict in her evidence is very important because she was there and giving conflicting accounts of what happened at the crucial time clearly is indicative that accused no.3 is misleading this court. I will deal in greater detail when dealing with her evidence in chief and answers she gave in cross examination by the Crown. This, will of course include very pertinent questions which we never put to the Crown witnesses PW1 and PW2. PW3's evidence 2547 Detective Constable Majawonke Dlamini was merely called to hand in and identify photos of deceased which he handed in as exhibit 1 and 2. His evidence was not challenged. These photos indicated where the injuries were

situated and these points where the injuries were further corroborated. The contents of annexure "A", "B", "C" i.e. the cause of death statement made to a judicial office and another judicial statement respectively. The following witness called by the Crown was PW4 Albert Mhlanga. It was his evidence that he was the herdboyc for deceased's cattle and stayed at the deceased's homestead. Deceased would come home on occasions and did not always stayed home.

Apparently when deceased was murdered he had been present but sleeping in a different room than that used by deceased and accused no.3. It was PW4's evidence that during the evening accused no.3 knocked at the bedroom where he and the other boys were sleeping and informed them about certain strangers who had come to attack the occupants of the homestead. PW4 stated that they all fled including accused no.3 and the children and reported to different people of the neighbouring homesteads. They spent the night away from deceased homestead. They went back to deceased homestead in the morning and found many people who had gathered there and they were informed that deceased had died. It was PW4's evidence that when accused no.3 reported to them that they were being attacked he saw no motor vehicle at the homestead. PW4 also testified that at one stage accused no. 3 left deceased and PW4. He did not know why accused no.3 had left the homestead. However, she later came back and reformed them. As far as he could notice there was no change in the way the couple lived before she left and after she returned. It was also his evidence that when accused no.3 came and knocked at his door. He woke up and went out but saw no stranger at the homestead.

Mr. Vilakati on behalf of accused no.1 ad 2 did not challenge PE4's evidence. Mr. Mkhathwa asked PW4 certain questions but nothing much turned on that cross-examination.

As PW5 the Crown called Makhabane Elijah Matsebula. He said he was an "indvuna: under Chief Loyiwe Maziya and resided at Maphungwane area. It was his evidence that he knew deceased and his wife accused no.3 very well. It is common cause and this witness made it very clear how deceased treated his wife in a very brutal and inhuman fashion and PW5 did all he could to bring about peace in the family to no avail. PW5 ultimately decided to advise

accused no.3 to go back to her parental relatives. It was not long before accused no.3 had returned to her husband without the knowledge of PW5 and the persecution and the abuse on her had all started. Accused no.3 again came and reported the deceased's behaviour. Deceased was summoned to the chiefs "**libandla**" (advisory counsellor) where he was fined a beast for abusing accused no.3.

Neither Mr. Vilakati nor Mr. Mkhathswa disputed the evidence of PW5.

The Crown also led the evidence of PW6 3459 Constable Vukani Mbatha. It was his evidence that he knew accused 1 and 3. He was however not involved in the investigation of the alleged murder against them. He was not present when accused no.1 and 2 were arrested. He saw them after the arrest at the Siteki Police station. He had known accused no.1 and 2 long before their arrest.

Mr. Vilakati asked a few questions and PW6 gave the names of the police officers who investigated accused no.1 and 2. PW6 denied that he, himself took part in the investigation. As he was doing duties at the police station, he ascertained what charges accused no.1 and 2 were facing. It was his evidence that at one stage he was not present when accused no.1 and 2 were being interrogated at the Siteki Police station. He had no knowledge if any of the accused were tortured. Mr. Mkhathswa had no cross-examination for this witness.

PW7 was Detective Wilson Zwane. During the time in question he was station at Siteki Police station i.e. in 1998. He knew both accused no.1 and 2 and knew what charge they were alleged to have committed the crime of murder. He was present when accused no.2 was arrested. He had been asked to accompany the murder squad to accompany it to the Maphungwane area. This is where accused no.2 was arrested. He was present when accused no.2 told the murder squad no. was. He accompanied the murder squad and was present when accused no.1 was arrested. To his knowledge at no stage was any of the accused ever tortured during his presence; nor were any threats made against them. It was this witness's evidence that in his presence and after the arrest of accused no.1 and 2 they were never subjected to assault or torture.

Under cross-examination he said he knew the accused no.1 and 2 even before their arrest. He said accused no.1 and 2 were arrested after certain information had been received. He said at the arrest

of accused no.2 police officer Ndlangamandla did caution accused no.2 in terms of the Judges' Rules. PW7 said that accused no.2 was never assaulted. PW7 said he did not take part in the investigation.

Mr. Mkhathswa had no cross-examination of this witness.

PW8 Mr. Mcabano Philemon Dlamini, Senior Magistrate at Nhlanguano. His evidence was that on 22nd October 1998 a suspect was brought before him for the purposes of recording a statement. He identified the statement obtained from the suspect. In the light of question no.10 of the form headed "STATEMENT MADE TO A JUDICIAL OFFICER" preformed questionnaire which reads:

"Were any threats made to you which induced you to make this statement? If so, by whom and what was said to you?"
An answer by the deponent being "Yes, I do not know his name and his surname. The police officer said I will see what I have never seen if I do not talk". PW8 told the court that he repeatedly asked the deponent if he was still willing to make the statement and that he answered to the affirmative. PW8 was cross-examined by Mr. Vilakati on behalf of accused no.1 and 2. He said there was a reason advanced why the deponent was brought to him at Nhlanguano from the Siteki Magistrate District. PW8 said he could not remember the reason but it was a convincing one hence the recording of the statement by him.

It was also one of PW8's answers to the cross-examination that he explained to the deponent why the constable who brought him to record his statement had to be told to move away so that the Constable should not be within any earshot.

Mr. Mkhathswa had no cross-examination on behalf of accused no.3.

The Crown also led the evidence of PW9 Constable Sabelo Dlamini. It was his evidence that in 1998 he was stationed at Siteki Police station. He was requested to assist the murder squad. He joined the squad to the Bataria homestead at Maphungwane. He said this was the residence of accused no.1 and 2. He said at the homestead they found accused no.2. It was his evidence that after

the introduction by the squad, officer Ndlangamandla cautioned accused no.2 in term of the Judge's Rules. Accused no.2 was then asked, where his brother accused no.1 was, and accused no.2 directed the squad where accused no.1 was. Accused no.2 was then arrested. The squad proceeded to where accused no.1 was; again the same procedure was followed in regard to the introduction arrest and caution as was followed in the case of accused no.2 in regard to accused no.1. Both accused were then taken and lodged in the cells at the police station. He was not a member of the murder squad and he then continued with his normal duties. He was again called upon by the murder squad to accompany it in the company of the accused back to accused no.1 and 2's homestead at Maphungwane. It was his evidence that accused no.1 and 2 led them to a stream in which accused no.1 and 2 searched for an axe and a knife but only retrieved the axe and not the knife. It was PW9's evidence that accused no.2 also produced a pair of trousers he had been wearing, a pair of jeans. The pair of jeans was blood stained. The exhibits were taken possession of by the police. PW9 was subsequently asked to take accused no.2 to PW8 at Nhlngano. He denied that any of the accused were harassed at any stage in his presence; nor were they tortured. It was his evidence that he had handed the accused to PW8, he was asked to move away and that he was not within an earshot where PW8 and accused no.2 were. He said he moved away for a distance where he could not even see the building where accused no.2 and PW8 were in. It was his evidence that accused no.2 looked healthy and did not complain of any ailment. It was his evidence that neither of the accused were tortured whilst in custody at the Siteki Police station. He said he did not see any of his colleagues harass or torture any of the accused.

The cross-examination by Mr. Vilakati was very extensive and in my opinion the witness was never shaken. Moreso that Mr. Vilakati decided not to address the court after the counsel for the Crown submitted that the alleged statements be admitted.

PW10 was former Principal Magistrate now a judge of the Industrial Court. It was he who obtained a statement from accused no.1.

Mr. Vilakati on behalf of accused 1 and 2 sought to get a clarification relating to question 2 and 3 of the preformar questionnaire.

Question reads as:-

QUESTION: Who told you that you could come to me?

ANSWER: Police officer.

In my judgment I found nothing wrong with this question. Once an investigating officer realises that a suspect is deposing to a confession after having been warned in terms of the Judges' Rules

he obviously will refer the deponent to an appropriate person where such a confession can be made. Nor is there anything wrong with Question no.3. If the question is what was said to you. (*sic*) The deponent will of necessity divulge and inadmissible confession.

PW10 stated that the deponent never told him that he had been tortured in order to come to him to make an confession. I was perfectly satisfied that the deponent made his statement freely and voluntarily in terms of Section 227 of the **CRIMINAL PROCEDURE AND EVIDENCE ACT NO.67/1938** as amended.

PW11 Constable Jerome Ndlangamandla. He was an investigating officer. From the time of the arrest of the accused i.e. accused no.1 and 2 he contacted them and warned them in terms of Judges' Rules. Accused expressed their desire to have what they wanted to say reduced in writing. This is the reason why accused no.1 and 2 subsequently appeared before PW8 and PW10. I have already dealt with PW8 and 10's evidence and have ruled that accused no.1 and 2's statements to PW8 and 10 are admissible. What remains to be considered is accused no.3's evidence. Accused no.3 has given her evidence. In her evidence she has stated how the deceased treated her. In my judgment I cannot find any fault with the account she gave of the brutality her deceased husband gave. Her evidence about inhuman treatment at the hands of deceased is abundantly corroborated by PW5 Mabhalane Elijah Matsebula as indeed by PW1 and PW2 to a lesser or greater extent. Accused no.3's evidence relating to her ill-treatment by deceased has not been contravened by the Crown. This court will therefore for the purposes of this judgment, accept that deceased treated his wife accused no.3 in a most barbaric and inhuman fashion ever imagined. What concerns this court is the denial by accused no.1 and 2 of being related to accused no.3 as stated by accused no.3. The court is inclined to accept the evidence of accused no.3 in so far as the relationship is concerned. This acceptance is subject to what Mr. Vilakati's instruction is from accused no.1 and 2. This court further accepts that accused no.3 did in fact enter into elaborate arrangements with accused no.1 and 2 to eliminate the deceased. This arrangement is clearly indicative by the corroboration of accused no.1 and 2's statements to PW8 and PW10 in so far as how the plan to execute deceased was to be carried out i.e. the executioners were to use an axe and a knife and after the death of the deceased windows were to be broken in order to fake that the assailants had broken into the house and entered and led through the broken windows.

According to accused no.1 and 2's statements this is what they actually did. This court therefore rejects the denial of accused no.3's involvement in the killing of deceased. In a similar view, the court rejects the denial of accused no.1 and 2 that they are not related to accused no.3 i.e. in their statements to the Magistrates.

I now come to the case presented by the Crown. This court accepts the evidence of the Crown witnesses. The defence had dismally failed to cross examine on the aspects of the Crown evidence. It is trite that where the defence fails to cross examine the court can in appropriate cases have to draw an inference adverse to the defence case (See in this respect **MALELE 1975(4) SA 128(T)** and also **LANDSDOWNE AND CAMPBELL 787**).

An accused has a duty to introduce his defence as early as possible during the trial. This should be done by putting his defence to Crown witnesses who are being cross examined (see **NKOMO 1975(3) SA598 (N)**).

Accused no.3 was troubled greatly by the family of the deceased. For safe keeping the police took accused no.3 for her safekeeping. Because of the allegations made by the family of the deceased. PW11 would occasionally interrogate accused no.3 about the death of the deceased as she had been with the deceased at his death. As a result of the interrogations PW11 came to hear of the harassment of the accused no.3 by the deceased. PW11 formed the opinion that accused no.3 could have a clue of how deceased met his death. On the basis PW11's opinion that accused no.3 could very well be a suspect. PW11 stated in his evidence that prior to interrogations of accused NO.3 PW11 administered the caution in terms of the Judge's Rules. As a result of PW3's interrogation of accused no.3. Accused no.1 and 2 were arrested. This was a result of what accused no.3 said. PW11 again administered the oath in terms of the Judges' Rules.

PW11 again interrogated accused no.1 and 2 and this interrogation led to accused no.1 and 2 being arrested. PW11 again combined accused no.1 and 2 and as a result of this caution certain exhibits were recovered. These were an axe and a pair of trousers. The pair of trousers belonged to accused no.2 had blood stains. The axe was pointed by accused no.1 and 2 and was from a stream. The pair of jeans belonged to accused no.2. PW11 identified the

exhibits as those pointed by accused no.1 and 2. According to PW11 both accused 1 and 2 were cautioned in terms of the Judges' Rules when they left the police station and when they arrived at the place where the exhibits were pointed out.

Under cross-examination PW11 denied that he had given accused no.1 and 2 detailed report of what accused no.3 had made to the police. Accused no.1 and 2 never went into the witness stand to controvert what was denied by PW1 and 2. PW11 was cross-examined by Mr. Vilakati.

In my view PW11 evidence was never demolished and I accept his evidence as portraying the truth of what transpired. Nor did the cross examination of PW11 collapsed as a result of the cross-examination of Mr. Mkhathwa on behalf of accused no.3.

According to PW11 accused no.3 was cautioned in terms of the Judges' rules.

The Crown closed its cause and Mr. Vilakati also closed his case on behalf of accused no.1 and 2. The court whilst considering what was said in answer to cross-examination of the Crown witnesses including accused no.3's evidence it will inevitably rely on the evidence of the Crown witnesses and that of accused no.3. There is no evidence coming from accused no.1 and 2.

An application in terms of Section 174(1) of the **CRIMINAL PROCEDURE AND EVIDENCE ACT** as amended in respect of accused no.3 was rejected.

Mr. Maseko in opposing the said application referred the court to the decision case of **DUNCAN MAGAGULA AND OTHERS** and also **HOFFMAN AND ZEFFERT** page 589 paragraph relating to circumstantial evidence.

Mr. Maseko argued that the evidence of PW1 and 11 was overwhelming. It was Mr. Maseko's argument that PW1 and PW2 was overwhelming. Mr. Maseko stated the principle that "he who acts through another acts himself". (*sic*) Mr. Maseko based his arguments on the evidence of PW1 and 2 and that read with the evidence of PW1 and 2 the evidence was overwhelming. Mr. Maseko stated that there was a clear conspiracy between accused

no.1, 2 and 3 to commit the crime.

Mr. Maseko referred to **DUNCAN MAGAGULA & 10 OTHERS**. He also referred to **HOFFMAN & ZEFFERT** page 589 2nd edition. Mr. Vilakati had nothing to say.

On the 8th May 2001 this court ruled that accused no.3 had a case to meet. I have already referred to dismally failure of accused no/3 to given any evidence that could persuade this court to find in her favour.

Accused no.3 under cross-examination completely collapsed. She gave conflicting accounts. Some of the things she said were never put to the Crown witnesses. I have considered the evidence as a whole and am convinced that the Crown has succeeded in proving its case beyond a reasonable doubt. In the result I found all three accused guilty as charged.

JUDGEMENT ON EXTENUATING CIRCUMSTANCES

All three counsel agreed that there are extenuating circumstances in this matter. Mr. Vilakati has filed an affidavit i.e. accused no.1 and 2. Mr. Maseko agrees Mr. Mkhathshwa's state that the court should find that extenuating circumstances exists in accused no.3. Severe emotional stress amounts to private defence. (See **S VS KEMFER 1987(1) SA @940 AD.**) This case talks about wife battery, healing and; during a kill when deceased was asleep the wife used a firearm and killed hi and the Court of Appeal held that this amounted to private defence and by an analogy. This Court can find that *in casu* accused no.3 procured the services of accused no.1 and 2 because of the severe emotional stress. (See also **S VS WUD 1990 (1) SA LAW SACR** at 561. **PRINCIPLES OF CRIMINAL LAW - BUSCHELL & MILTON** page 235-239.

JUDGMENT ON EXTENUATING CIRCUMSTANCES & SENTENCE

You have been convicted of the murder of Amos Tsabedze and the

question of sentence was postponed to today. The court found that there were extenuating circumstances and this was supported by the three counsel who appeared on behalf of the three accused. The court also afforded the counsel to address it in so far as the mitigating factors and the court has taken all this into account. In some cases, extenuating circumstances and mitigating factors overlap, the court has taken that into account. Over and above these factors which have been brought to the court's attention, the court must not lose sight of the accused's socio-economic and educational backgrounds because these can have a bearing on the behaviour of an accused person. These grounds were set out clearly in the affidavit's file by Mr. Vilakati on behalf of accused no.2.

On behalf of accused no.3, Mr. Mkhathshwa has referred the court to the case of **R V CAMPHOR 1987(1) SA AD** at 940 and the court has had an opportunity to read through the case and the court is in total agreement with Mr. Mkhathshwa in so far as accused no.3's position. In that particular case the accused in self-defence killed the deceased and it was held that the court should take into account the way the deceased had been treating the accused before she killed him with a gun. I have said in my judgement that the deceased treated the accused no.2 in a very unfairly. On occasion she had to flee and spend a night in the field and return in the morning full of dew together with her children.

It is now at large for this court to consider all these factors and in doing so the court will refer to a case of **R V ZINN 1969(2) SA 537 A**. The factors in that case which were considered by the Court of Appeal, were the factors consisting of what I referred to as a triad, that is consisting of the crime, the offender and the interest of society. (*sic*)

Murder is always a serious crime. In the present case, it was

aggravated by the fact that it was done in cold-blood by accused no.1, 2 and in fact accused no.3 procured the services of accused no.1 and 2. This crime was carefully planned the three accused, meticulously over a period of time. Be that as it may, I will take into consideration that accused no.1 and 2 demonstrated their panic and remorse by immediately going before a Magistrate and deposing to affidavit informing the Magistrate how they committed the crime. Showing remorse is an important factor in considering whether or not the same crime is likely to be committed in future or not. In this particular case, it seems that the accused had shown their remorse they are not likely to commit the same crime again. By showing remorse the convicted person acknowledges his moral guilt, and squares his accounts with society. This should not be confused with the fact that the accused, before this court, pleaded not guilty and even went further to challenge the statements they had made immediately after the commission of the crime because they are entitled to plead not guilty in terms of our procedures, and it is upon the Crown to prove its case beyond reasonable doubt before they can be convicted. It cannot therefore be used, the plea of not guilty and the challenge of the statements which they subsequently made before a Magistrate, to show that they were not remorse because they have already shown that they are remorseful by going to the Magistrate when the matter was still fresh in their minds.

Considering all these factors and also the triad to which I have referred above, I am of the view that there should be no differentiation in the sentence of accused no.1 and 2. In the result, each accused is sentenced to undergo an imprisonment of 15 years and in respect of each accused the sentence will be backdated to the 19th October 1998. In respect of accused no.3, her case is slightly different.

In respect of accused no.3 her case is slightly different, even though she is the author and the person who started the whole chain of events but because of the personal circumstances in which she found herself vis-à-vis deceased her sentence would be different.

In her case, the court sentence her to an imprisonment for 10 years which will be backdated to the 7th October 1998.

J.M. MATSEBULA

Judge