



**IN THE HIGH COURT OF ESWATINI**

**CASE NO. 153/12**

**HELD AT MBABANE**

In the matter of:

**THE KING**

And

**BONGANI BHABHAMA DLAMINI**

**Neutral Citation:** *The King and Bongani Bhabhama Dlamini [153/12] SZHC 236 [2018] (31 October, 2018)*

**Coram:** **M. LANGWENYA J.**

**Heard:** 21 November 2017; 20 February 2018; 7 March 2018; 26 March 2018; 18 July 2018; 8 August 2018; 24 September 2018.

**Delivered:** 31 October 2018

**Summary:** *Criminal Law-Criminal Procedure-accused charged with murder-accused enters a plea of not guilty-Crown relies on circumstantial evidence as well as on confession and admission by accused-rules of logic which should be borne in mind*

*in reasoning by inference-inference to be drawn must be consistent with all proved facts; and that the proved facts should exclude every reasonable possibility save the one sought to be drawn-admissibility of confession during trial within a trial-ruling at end of trial within a trial interlocutory.*

*Confession finally ruled inadmissible-statement not an unequivocal admission of guilt but an exculpatory statement.*

*Admission ruled inadmissible-pressure brought to bear on the accused to make admission after traditional healer had initially accused him of having killed deceased-admission extracted first, by trainee of traditional healer-accused only made admission on second occasion after he had been brought by trainee traditional healer to his mother-admission was not freely and voluntarily made.*

*Crown failed to prove case beyond reasonable doubt-accused acquitted and discharged.*

## **JUDGMENT**

[1] The accused was charged with the offence of murder. In that upon or about 3 November 2010 and at or near Gege in the Shiselweni region, the said accused did unlawfully and intentionally cause the death of Nhlanhla Dlamini.

[2] As will be seen in the judgment the deceased is referred to as Nhlanhla Dlamini and also as Nhlanhla Mavuso. The deceased's biological father is a Mavuso but the accused grew up living in his maternal homestead who are Dlaminis.

[3] When the accused was arraigned he pleaded not guilty to the crime charged. The Crown called five witnesses in the main trial and three witnesses in the trial within a trial to prove its case. The sole witness for the defence was the accused at the trial within a trial stage and during the main trial.

[4] The Crown led the evidence of Zodwa Rose Mhlanga who was called as PW1. Pw1 earns a living by selling traditional beer at Gege.

[5] PW1 testified that the deceased was epileptic. On the morning of 2 November 2010 the deceased came to the homestead of PW1 and asked for money so he could go to the clinic. PW1 gave the deceased money to go to the clinic. The deceased went to the clinic but returned to PW1's homestead. PW1 advised the deceased to go home and leave his medication at home. The deceased obliged. The deceased later returned to PW1's home and found other patrons including Sicelo Mkhonta, the accused, Thando Dlamini, Musa Maziya and Fana Maziya drinking traditional beer.

[6] It is the evidence of PW1 that it was during the drinking session that an altercation between the deceased and Fana Maziya broke out after the latter accused the former of stealing his sweater. As a result of Maziya's accusation, a heated argument between the deceased and Fana Maziya ensued.

[7] According to PW1's evidence, although the deceased had been drinking beer from about 11am until about 7pm, the deceased was not drunk. The deceased did not have money to buy the traditional brew and he depended on people who had money to share their drinks with him.

[8] The accused and the other people who had been enjoying the home brew at PW1's homestead left the homestead when it was going for 7pm. Fana Maziya and the deceased remained behind watching certain programs on the television. Fana Maziya left PW1's homestead when it was going for 8pm and was followed by the deceased soon thereafter. At around 8pm, PW1 asked the deceased to go home so he could take his medication. The deceased then left PW1's homestead at around 8pm.

[9] On the following day, the body of the deceased was seen by Mdu Malaza lying on the road below PW1's homestead. Mdu Malaza alerted PW1's family. PW1's family and neighbours went to investigate. On closer inspection they saw deceased's body lying listlessly facing down and they thought the deceased had suffered epileptic convulsions and not that he was dead.

[10] It was only when the police arrived that they realized the deceased was dead and had stab wounds on his body.

[11] According to Dr. R.M Reddy, a police pathologist who conducted the post-mortem examination on the body of the deceased, the cause of death was due to multiple penetrating injuries involving lungs, plus neck blood vessels. Dr. Reddy observed the following ante-mortem injuries:

1. Cut wound over front of lower region of neck 1.5x5cm skin deep, 2x0.5cm blood vessels deep left effusion blood in soft tissues on left side;
2. Penetrating wounds over front of left chest 1.5x0.5cm; 1.5x0.5cm, 1.5x0.6cm, 2.5x0.7cm muscle deep and 2x0.5, 2.1x0.6cm lung deep. It involved 3<sup>rd</sup> space intercostal structures, pleura, lung and 4 space intercostal structures, pleura, lung edges clean cut, angle sharp front to back.
3. Penetrating wound front of right chest 2x0.5cm lung deep. It involved muscles, 6 spaces intercostal structures, pleura, lung edges clean cut, angle sharp. Pleural cavity contained about 1500ml blood.
4. Abrasions back of lower region trunk 7.2cm area.

[12] Dzeliwe Ellinah Hlatshwayo (PW2) is a traditional healer in the rural community of Gege. She also trains other people to be traditional healers. Some of her trainees are Malava Tsela and Boy Ntjakala.

[13] On the morning the body of the deceased was discovered lying on the road, PW2 met the accused along the way when she was going to the scene of crime. She asked the accused where he was going. The accused told her he was off to report the death of the deceased at deceased's home. PW2 enquired from the accused why he was going to the deceased's home alone as it is unconventional for a single person to report the death of another. PW2 then said the accused knows how the deceased had died because the accused was the last person to be seen with the deceased as they were friends. The accused broke down and cried. PW2 proceeded to where the body of the deceased lay and found a lot of community members gathered there already. She joined them and waited for the arrival of the police.

[14] It was the evidence of PW2 that sometime after the death of the deceased she met PW3 and informed her that her trainee traditional healer had imputed the death of the deceased on the accused (*wamnuka*).

[15] It was the evidence of PW2 that PW3 later brought the accused to PW2 and asked PW3 to talk to the accused. PW2 testified that the accused's mother had intimated to her that the accused was crying and could not confide in her on what the problem is. It is the evidence of PW2 that the accused told her that he and Fana Maziya killed the deceased at Thando's house.

[16] The Crown also led the evidence of PW3 Zanele Dlamini who is also the accused's mother. PW3 testified to the effect that on the night deceased was

killed, the accused returned home after the ‘generations soapie’ on television was over. He was alone when he arrived at home. The accused was not drunk when he got home. He ate his food and went to sleep. The next morning the accused left home and returned to PW1’s homestead to drink alcohol. When he left home he wore the same clothes he had on the previous day and his clothes had no blood stains.

[17] It was the evidence of PW3 that the accused, Sicelo and Thando were suspected by the community of having killed the deceased. This was because Malava Tsela-a trainee traditional healer under the tutelage of PW2 had imputed the killing of the deceased on the accused.

[18] PW3 stated that one night in June 2011, she was called by Malava Tsela and told to come to PW2’s homestead as Malava was seeing a problem with the accused. Because it was night time, PW3 could not go to PW2’s homestead. It was during the night that Malava, the accused, Sigadla and Ntjakala subsequently came to PW3’s homestead. Ntjakala informed PW3 that there was a dark cloud hanging over the accused.

[19] Ntjakala prompted the accused to tell PW3 what the problem was. The accused cried and admitted to robbing a man whom he hit with a crow bar at a bridge. Ntjakala said the accused was not telling the truth. After the admission by the accused of the robbery, the group left PW3’s homestead with the accused.

[20] On the next day, PW3 testified, the accused and Ntjakala returned to PW3's homestead. Ntjakala implored the accused to tell PW3 the truth. The accused broke down and cried. The accused made the admission that he was scared to tell PW3 that he and Fana Maziya had killed the deceased. According to PW3's evidence, the accused was drunk when he made the admission. According to the admission by the accused, the motive for killing the deceased is that the accused and Fana Maziya suspected that the deceased was having sexual relations with their girlfriends.

[21] It was the evidence of PW3 that the accused told her that he and Fana Maziya found the deceased inside a house, asleep and they stabbed him to death. They then put the deceased's body in a blanket and carried it to the road where they dumped it. They subsequently burned the bloodied blanket at a Tibiyo TakaNgwane farm at Gege.

[22] The accused subsequently repeated the admission to PW2 and PW4.

[23] On 24 October 2011, almost a year after the death of the deceased the accused was arrested at Mehlwabovu by the police and charged with the murder of the deceased. He was kept in custody for a day. On 25 October and after he was questioned by the police, the accused made a statement before a judicial officer.



## **Trial within a trial**

[24] At the trial, the defence counsel stated that the statement made by the accused before a judicial officer would be contested. A trial within a trial ensued. The Crown called 5074 D/Constable Jabulani Mhlanga who stated that he was an investigating officer in the matter before Court. It was the evidence of the investigating officer that on 24 October 2011, he was in the company of 4965 D/Constable Mkhabela when they went to Mehlwabovu where they found the accused person.

[25] The investigating officer stated that he introduced himself and told the accused that he was a police officer and that he was investigating the matter of the death of the deceased person. He then warned the accused according to the Judges' rules. The accused gave him certain information on the basis of which he then arrested the accused. The accused was taken to the Nhlanganano Police station where he was detained until the following day.

[26] On 25 October 2011, the accused cooperated with the investigating officer and other police officers. The accused person's rights to legal representation and his right to remain silent were explained to him. After the accused was questioned he gave certain information to the investigating officer. The accused was asked if he would like to repeat the statement before a magistrate but that he was not obliged to do so. The accused agreed to make a statement before a magistrate. According to the investigating officer, the accused was remorseful and cooperated with the police. The investigating

officer denied bringing pressure to bear on the accused to force him to make a statement before the magistrate.

[27] The accused was taken by 6488 Constable Vilakati to magistrate Mkhaliphi at the Nhlengano Magistrate Court. At the magistrate court, the accused was handed over to the interpreter Ms Pholile Dlamini, who in turn took him to the magistrate.

[28] The magistrate Mandla Mkhaliphi testified and confirmed that on 25 October 2011 at about 3.00pm the accused was brought to his chambers by Pholile Dlamini. The magistrate recorded the statement.

[29] It is necessary to relate what happened on 25 October 2011 when the accused was brought to the magistrate at Nhlengano in order for him to depose to his statement. The magistrate cautioned the accused according to the Judges' rules, particularly he cautioned him that he was not obliged to make the statement and further that if he did, the statement would be used in evidence. The magistrate further told the accused that he had nothing to fear and that he could speak openly with complete frankness.

[30] The magistrate further questioned the accused on circumstances which led up to the accused making the statement. These were questions such as, whether he was influenced to make a statement, promised anything if he were to

make a statement, whether he made a statement verbal or written in regard to the incident to any person, whether he was assaulted or had injuries and whether he expected any benefits after he made the statement.

[31] Exhibit 'A' is the pro forma filled by Mkhalihi the Nhlango magistrate at the time. Certain preliminary questions appear on this pro forma document as referred to above. Question 8 is whether anything was said or done to deponent to induce him to make the statement-to which the accused answered in the negative. The deponent was also asked whether he had been threatened to make the statement; whether he had been assaulted since the start of the investigation or since his arrest. To both these questions, the accused answered in the negative.

[32] Other questions followed and the magistrate eventually recorded an incriminating statement from the accused. The statement is marked exhibit 'A'.

### **Case for Defence-trial within a trial**

[33] During the trial within a trial defence counsel objected to the statement made by the accused to the magistrate. The objection was that the statement was not obtained freely and voluntarily since the accused was threatened with violence if he did not confess to the crime charged.

[34] The accused gave evidence during the trial within the trial in the following terms. On 24 October 2011 the accused was at Mehlwabovu and was drunk and asleep when he was woken by a light shining from a cell phone. When he woke up he realised that he had been handcuffed and shackled. The people who shone a light on him told him to wake up and go with them. The accused woke up and put on his shoes. One of the police officers then said 'this is the Bhabhama'. The accused recognized the said police officer as one of the police officers stationed at Gege.

[35] It is the evidence of the accused that he was then taken to a car and the police drove off with him without introducing themselves nor explaining why they were leaving with him. It was only when they were driving up Mehlwabovu that the police asked him about the death of Nhlanhla Mavuso. They told him they would let him sleep in the cell because he was drunk and will question him on the following day.

[36] True to their word, when they got to Nhlangano Police station, they locked the accused in the police cell and took the accused out of the cell at mid- day of the following day. The accused was taken to an office and allowed to sit on a chair. One of the police officers said if the accused is the type of person who, like a juke-box will talk only when given money, they have a way of making him talk. The accused considered this to be a threat. It is his evidence further, that when he looked next to the chair where he sat he saw a bench and a rope as well as a police camouflage jacket. The accused also said he

was also frightened by the rope and the police camouflage jacket and by the fact that the police were shouting at him.

[37] The accused says he was taken to the magistrate court by two police officers who told him to confess because if he did not, they would get a copy of the ‘confession’ and deal with him. Interestingly, this version was not put to the Crown witnesses-namely the investigating officer and the officer who the Crown alleges took the accused to the magistrate’s court.

### **Ruling on trial within a trial**

[38] Section 226(1) of the Criminal Procedure and Evidence Act, 1938 states as follows:

‘[1] Any confession of the commission of any offence, shall, if such confession is proved by competent evidence to have been made by any person accused of such offence (whether before or after his apprehension and whether on a judicial examination or after commitment and whether reduced into writing or not), be admissible in evidence against such person:

Provided that such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto’.

[39] I initially made an interlocutory ruling that the confession made by the accused to the magistrate was admissible. The ruling on admissibility in a trial within a trial is interlocutory in light of later evidence<sup>1</sup>.

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<sup>1</sup> See *S v Mkwana* 1966 (1) SA 736 at 742H-743A.

[40] It was my finding at the end of the trial within a trial that there was no tension or contradiction between the answers given by the accused to the magistrate. The accused's version, I found was consistent and showed that he wanted to make the statement. The accused was afforded a chance by the magistrate to say if he had been threatened to make the statement and his answer was in the negative. I accordingly ruled that the confession was freely and voluntarily made and therefore admissible.

[41] That was before I had had sight and made a careful analysis of the statement made by the accused to the magistrate.

### **The Defence Case**

[42] On 3 November 2010, the accused in the company of the deceased, Sicelo Mkhonta and Thando Dlamini were at PW1's homestead where they were drinking home brew. It is the evidence of the accused that present at PW1's homestead was Fana Maziya. According to the accused's evidence, Fana Maziya made utterances to the effect that the accused and the deceased must be beaten up because they stole his sweater. The accused denied knowledge of Fana Maziya's sweater.

[43] The accused left the shebeen in the company of Sicelo Mkhonta and Nothando. The rest of his friends and Fana Maziya remained behind drinking alcohol. The accused parted ways with his companions below a

Mabuza homestead. The accused proceeded straight home where he ate and went to sleep.

[44] The following morning, the accused left home and returned to the drinking spot because he had a hang-over. He wore the same clothes he had on the previous day.

[45] It was while he was on his way to the drinking spot and close to the drinking spot that he saw a crowd. He went to investigate, he saw a person lying down. When he saw the clothes of the person who lay down, he noticed that it was the deceased. He surmised that the deceased may have suffered an epileptic attack but was surprised why the crowd was not helping the deceased. It was when he went close to the deceased that PW1 warned him not to. He went and joined the crowd.

[46] Whilst the accused was with the crowd, the deceased's uncle arrived and later asked the accused to go to the deceased home and report that the deceased was dead. Deceased's uncle is said to have told the accused to report that it was suspected that the deceased died as a result of epileptic convulsions.

[47] It was while the accused was on his way to report the death of the deceased at the latter's home that he met with PW2. PW2 said 'ye *Bhabhama*

*senimbulele leni lo Nhlanhla?*’ which translates to Bhabhama why have you killed Nhlanhla? The accused did not respond to the question.

[48] It is the evidence of the accused that the deceased was a very close friend of his. The deceased trusted and relied on the accused to accompany him home in case he had fits he would help the deceased.

[49] The accused denied that the deceased had a relationship of a sexual nature with his girlfriend. He conceded however that Fana Maziya was not in good terms with the deceased because the latter suspected that the deceased was having an affair with his girlfriend.

[50] It was the evidence of the accused that sometime in June 2011 he visited PW2’s homestead to drink alcohol made from sweets ‘*tjwala bemaswidi*’. He stated that he never went to PW2’s homestead with his mother. He conceded that he went to PW2’s home for treatment alone when he was unwell suffering from a headache. The accused testified that his mother came to PW2’s homestead to find out if his condition was improving. The accused denied that he went to PW2’s homestead to get treatment for nightmares flowing from a guilty conscience of killing the deceased. Asked why his mother and his sister would impute on him the killing of the deceased through an admission he is alleged to have made to them, the accused stated that the entire community of Gege suspected him of killing the deceased; but that he never killed the deceased.



[51] The accused stated that he heard rumours and suspicions that the deceased was killed by Fana Maziya but he does not know for sure who was responsible for the death of the deceased. The accused suspects that Maziya killed the deceased because, first, while they were at the shebeen, Maziya alleged that the accused and the deceased had stolen his sweater and that they should be beaten up; second, on the following day when the deceased was found dead, Maziya left the country. The accused heard from Maziya's girlfriend-Phindile-who lived with Maziya that the latter arrived at night, packed his bags and left with his daughter. Subsequently, the police came to Gege looking for Maziya, even long after the deceased was buried, the police came looking for Maziya.

[52] The accused denied having a hand in the death of the deceased and in the subsequent dumping of the body of the deceased on the road.

[53] On 24 October 2011, the accused was at Mehlwabovu when he was arrested by the police. It is the evidence of the accused that he was arrested and handcuffed by the police while he lay asleep in the afternoon after he had been drinking alcohol. At the time he was drunk-a fact that the Crown admits in a question posed to the accused under cross examination. He says he was woken up by three men who told him to get dressed as they were leaving with him. It is the evidence of this witness that the police did not introduce themselves nor did they tell him why they were leaving with him; least of all where they were taking him.

[54] The accused was put in a motor vehicle and only when they were going up Mehlwabovu did one of the police officers ask the accused about the death of the deceased. The accused told the police that he knew nothing about the death of the deceased. The police's response was that since the accused was still drunk, he'll sober up once he sleeps in the police cell. When they arrived at the police station, the accused was put in a police cell and taken out the following day. He was questioned about the death of the deceased inside a room where he sat on a chair but next to his chair was a bench. On the bench was a police jacket and a rope. The police asked the accused to talk about the death of the deceased. When the accused said he knew nothing about the death of the deceased, the police said if he was the type of person who-like a duebox- required cash before he cooperates, they'd find other ways to make him talk. The accused said after the threats from the police he sang like a canary.

[55] After making the statement, the accused says he was taken to the magistrates' court by three police officers. It was while they were walking up the stairs to the magistrates' court in Nhlngano that one of the police officers said *lapha ke wakhuluma lokungekho sitayitfolo icopy sitawujika nawe sibuyele emuva-* which translates to 'here if you do not confess to the crime we will get a copy of your statement and we will return with you to police custody'. When he got to the office of the magistrate, he then confessed to killing the deceased.

[56] The accused says he was threatened by the police to confess to the killing of the deceased in a statement he made to the magistrate.

## Application of the Law to the Facts

[57] The accused, it appears is charged with murder on the strength of his alleged admission to PW2, PW3 and PW4 and his alleged confession to the magistrate. There are no eye witnesses and the Court has to rely on circumstantial evidence. According to *R v Blom*<sup>2</sup> when relying on circumstantial evidence two rules need to be considered and they are as follows:

*‘[T]hat the inference sought to be drawn must be consistent with all the proved facts. The proven facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct’<sup>3</sup>.*

[58] I deem it appropriate at this stage to traverse, albeit briefly, some of the pertinent salient principles governing confessions to lay a foundation for the verdict I have arrived at in this matter. As alluded to earlier, the admissibility of evidence contained in a confession is governed by section 226(1) of the Criminal Procedure and Evidence Act, 1938 which provides that such a confession shall be admissible into evidence if it is proved to have been freely and voluntarily made by a person in his sound and sober senses and without having been unduly influenced thereto.

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<sup>2</sup> 1939 AD 288

<sup>3</sup> *ibid*

[59] The trite principle of law is that a confession must conform to the rigidly defined requirements specified in section 226. Failure to satisfy any of the requirements will render it impermissible to tender the statement as a confession.

[60] In *R v Becker*<sup>4</sup> it was stated that a confession can only mean an unequivocal acknowledgment of guilt, the equivalent of a plea of guilty before a Court of law. It is therefore an extra-curial admission of all the elements of the offence charged.

[61] In *R v Hans Veren and others*<sup>5</sup> and with regard to what amounts to a confession, the Court said that the accused must in effect have said:

*'I am the man who committed the crime'*. For this reason, a statement made with an exculpatory intent will not be regarded as a confession. The decisive factor is whether the accused has admitted all the essential elements of the offence.

[62] I am of the view that the accused's 'confession' should be excluded on the basis that it is not an unequivocal admission of guilt as although he placed himself at the scene during the commission of the offence, he nonetheless exculpated himself from any wrongdoing by averring that he was told by Mfana Maziya to act in the manner in which he did. I quote from the relevant parts of the statement:

<sup>4</sup> 1929 AD 167 at 171

<sup>5</sup> 1918 TPD 218 at 221

*'I was at Gege, at a place known as Logodvweni in November 2010 but I have forgotten the date. There was a person who was found dead and with stab wounds and his name was Nhlanhla Mavuso. He had been stabbed by Mfana Maziya with a sharp home-made spear (intshumentshu) it was in the afternoon hours. I was present when the offence was committed. He then said we should carry him (deceased) in a blanket to place him on the road.'*

[63] Clearly from the above excerpt of the accused statement, not all the elements of the offence were admitted by the accused. The statement therefore does not amount to a confession and is accordingly excluded. Consequently, the interlocutory ruling to admit the confession at the end of the trial within a trial cannot stand.

[64] The evidence of the accused on the role of Mfana Maziya finds support from the evidence of PW1 Zodwa Rose Mhlanga who stated that earlier on the day, Maziya had threatened to assault the deceased for allegedly stealing his jacket. The accused's evidence is that at PW1's homestead on the day the deceased died, he and the deceased had been threatened with assault by Maziya who accused them of stealing his jacket.

[65] It is the evidence of the accused that Maziya left the country on the night the deceased died. This evidence finds support in the evidence of the investigating officer who stated that the police never got to question Maziya

because when they looked for him they were told he had left the country and later died.

[66] When each little piece of evidence, like that on the night the deceased died, Maziya was the last person who remained at PW1's homestead with the deceased-only leaving the place shortly before the deceased did; that during the fateful day, Maziya had an altercation with the deceased and that when the body of the deceased was found Maziya was nowhere to be found is put in its place it does not exclude every other reasonable inference that it was the accused who murdered the deceased. In fact, the totality of the evidence in this regard points to Fana/Mfana Maziya as the likely person who may have committed the murder as he had the motive, time and opportunity to way lay the deceased on that fateful night.

[67] I now turn to consider the issue of the alleged admission made by the accused to Sigadla Tsela, Ntjakala, PW2, PW3 and PW4.

[68] The accused was initially accosted and accused of murdering the deceased by PW2-a traditional healer whose opinions and beliefs are respected in the rural community of Gege. Subsequent to the accused's encounter with PW2 he is accused by Sigadla and Ntjakala (both trainees of PW2) of having murdered the deceased and pressured to admit to the crime. The accused is brought to his mother by Sigadla Tsela among others, and coerced to admit to the murder. On the day the accused is forced to admit to the murder he was drunk.

The accused initially does not admit to the commission of the offence charged instead admits that he robbed a man at the bridge.

[69] The accused only admits to the murder of the deceased after he is brought to his mother the second time by Sigadla Tsela. Quite un-meritoriously, Sigadla Tsela who appears as PW10 in the summary of evidence does not come to court to give evidence. If Sigadla Tsela gave evidence in court, he may have helped the court with clarity on whether or not he had been sent by PW2 to extract an admission out of the accused. This did not happen and no reasons were advanced why Tsela was not called.

[70] Sigadla Tsela appears in the summary of evidence but is not called to give evidence in court. On the question of how the Court should view the failure by one party to call an available witness is clear and it is this as per Watermeyer CJ<sup>6</sup>:

*‘It is true that if a party fails to place the evidence of a witness who is available and able to elucidate the facts before the trial Court this failure leads naturally to an inference that he fears that such evidence will expose facts which are not favourable to him’.*

[71] For the reasons outlined above, I cannot in good conscience hold the admission made by the accused to PW2, Sigadla Tsela, Ntjakala, to the

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<sup>6</sup> In *Elgin Fireclays Ltd v Webb* 1947 (4) SA 744 at 749-750.

accused's mother and to the accused's sister to have been made freely and voluntarily.

[72] There is also the issue of absence of blood stains at the place where the deceased was allegedly murdered and absence of blood stains on the clothes which were worn by the accused on the day the deceased died. There is evidence from the accused's mother that the accused returned from drinking at the end of the 'generations soapie', ate his food and slept at home. The accused's mother testified that the accused's clothes did not have blood stains. On the following morning the accused is said to have left home and was seen by his mother still wearing the clothes he had on the previous day. The clothes did not have blood-something that is unlikely to have happened if the accused murdered the deceased and later carried the body of the deceased to the road.

[73] That the accused did not escape from Gege after the murder of the deceased also raises doubt he is the person who committed the offence.

[74] The Crown bears the burden to prove beyond reasonable doubt that the accused committed the offence charged. On the contrary, the accused bears no such burden. What is required of the accused is eloquently stated by Greenberg JA in *R v Difford*<sup>7</sup> as follows:

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<sup>7</sup> 1937 AD 370 at 373



*‘No onus rests on the accused to convince the Court of any explanation which he gives. If he gives an explanation, even if that explanation is improbable, the Court is not entitled to convict the witness unless it is satisfied that beyond any doubt it is false. If there is any reasonable possibility of his explanation being true then he is entitled to his acquittal.’*

[75] Having considered the totality of the evidence, I am of the considered view that there is a reasonable possibility that the version of the accused may be substantially true.

[76] The evidence of the accused has not been rebutted in material respects. Accordingly, the Crown has failed to prove beyond reasonable doubt that the accused committed the offence charged.

[77] The accused is accordingly acquitted and discharged.



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**M. LANGWENYA J.**

For the Crown: Mr. K. Mngomezulu

For the Defence: Mr. B. J. Simelane.