# IN THE SUPREME COURT OF SWAZILAND

## JUDGMENT

Criminal Appeal Case No: 13/2011

In the appeal between:

**DAVID THABO SIMELANE** **Appellant**

and

**REX** **Respondent**

**Neutral citation:** *David Thabo Simelane vs Rex 13/2011 SZSC 54 [2012] (30 November 2012)*

**Coram:** **A.M. EBRAHIM JA**
**DR. S. TWUM JA**
**M.C.B. MAPHALALA JA**

**Heard:** **02ND NOVEMBER 2012**

**Delivered:** **30TH NOVEMBER 2012**

**Summary:** Criminal Appeal – multiple murders – conviction based on a confession and indications – evidence *aliunde* to prove commission of crimes established on evidence tendered. Appeal dismissed in its entirety both in respect of the convictions and sentences imposed.

**EBRAHIM J.A.**

[1] The Appellant was indicted to appear before the High Court on thirty five counts of murder. He was convicted of twenty eight counts. No extenuating circumstances were found and the Appellant was sentenced to death in respect of each of the twenty eight counts.

[2] This is a case of spine chilling proportions. The Appellant was accused of behaviour which can be aptly described as being that of being "serial killer". It is alleged that his outrageous behaviour commenced in early January 2000 and culminated in late April 2001 when he was arrested.

[3] During January 2000 and April 2001 reports abounded in the media in this country about women and in some instances children, who had accompanied their mothers were missing, and who had suddenly disappeared. In each instance the missing women and children were reported to have left their homes in good health, never to return, and never to be heard of again.

[4] Their disappearances sent shock waves within the community of Swaziland and led to a massive manhunt to be put in place. Rumours spread and these intensified when the remains of human bodies began to be discovered from early in the year of 2001. The police eventually

narrowed down their search to a specific person, the Appellant, whose description was widely circulated.

[5] Following a report received of a man fitting the description of the wanted person (the Appellant) they apprehended him.

[6] Before I proceed any further with my deliberations in relation to the contents of this judgment I must place on record my appreciation of the meticulous nature in which the learned judge a quo crafted his judgment in this matter. It is patently apparent that he was cautious to the extreme in ensuring that the Appellant's right to a fair trial was observed in every minute detail even to the extent, that on evidence which I consider to have been admissible, he chose to ignore such evidence, out of an abundance of caution in ensuring that the Appellant was afforded a trial beyond reproach.

[7] However, I must express my concern that it took almost ten years from the time of the Appellant's arrest to the time the trial was finally concluded on 31 January 2011, the trial having commenced on 29 May 2006.

[8] In my view it was incumbent on the Crown as *dominus litus* to ensure that this trial commenced, timeously, that it set aside sufficient court time to ensure the completion of the trial, and that as the Appellant was to be defended *pro deo*, that counsel, who took on the responsibility to defend

the Appellant was made patently aware that it was the intention of the Crown, to commence his trial and see to it that it reached finality without undue delay. I would have then expected that the learned counsel for both the Crown and the Appellant to have approached the Chief Justice to seek his assistance in deploying a judge to commence the trial and to see it to completion without unnecessary adjournments being granted.

[9] This was not done and it was only when the present Chief Justice took office that this fiasco was brought to an end following his insistence that this case be given priority and that all decks be cleared in order that this totally unacceptable situation be rectified.

[10] The learned judge a quo paid heed to this requirement and did just that, and did so with commendable care and caution and with a meticulous observance of what the rule of law demands. I now turn to the evidence which ultimately led to the conviction of the Appellant on twenty eight counts of the thirty five counts he was charged with.

[11] It is apparent that the Crown relied on the evidence of a confession and indications in its attempts to secure a conviction against the Appellant, supported by evidence *aliunde*. This approach was clearly permissible in terms of the law.

[12] Section 226(1) of CRIMINAL PROCEDURE AND EVIDENCE ACT, 1938 provides as follows:

> "226. (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:"

[13] Section 238(2) of the CRIMINAL PROCEDURE AND EVIDENCE ACT; provides as follows:

> "… (2) Any court which is trying any person on a charge of any office may convict him of any offence alleged against him in the indictment or summons by reason of any confession of such offence proved to have been made by him, although such confession is not confirmed by any other evidence:
>
> Provided that such offence has, by competent evidence, other than such confession, been proved to have been actually committed."

[14] I will here highlight the confession made by the Appellant which was admitted by the learned trial judge:

> **"On the charges I am facing, I did not explain where the other people were found. Two people have been found at Mankayane at kaCapha. Four of them were found at Macetjeni. One was found at Ntondozi at Khalangilile area. Three of them were found at Golden Forest. Fourteen of them were found at Malkerns at the Bhunya Forest.**

**I remember the surnames of those found at Macetjeni but I do not recall their names. One of them, was a Mkhwanazi and her homestead was at Ntondozi. I left with her from Malkerns after I had promised her work. We got to Macetjeni and I killed her. When we got to Macetjeni, I killed her by strangling her with my hands.**

**The other one was a Mngomezulu whom I found at Ka-Khoza. She told me that her homestead was at Ka-Phunga. I left with her from Manzini Bus Rank after I had promised her work. I went with her to Macetjeni and when we got there, I killed her by strangling her with my hands.**

**The third one was from St. Phillips and her surname was Sibandze. I left with her from Siphofaneni after I had promised to borrow her money. I went with her to Macetjeni where I strangled her with my hands until she died.**

**Then there was Vosho Dlamini who was my girlfriend from St. Phillips. I also went with her to Macetjeni where I strangled her with my hands until she died. That is all about Macetjeni.**

**Then there was Dumsile Tsabedze from Ncangosini area with whom we stayed together. She was my live-in-lover. When we got to Capha Mountain, I strangled her to death with my hands.**

**There was another one from Kukhulumeni in Mankayane whose surname was Vilakati. I went with her after I had promised her work. I got with her to Capha where I strangled her to death with my hands.**

**Another one was from Khalangilile but I have forgotten her surname. We both alighted from the same Bus at Khalangilile area and I strangled her with my hands to death.**

**Then there was Fikile Motsa from Sidwala area. She was with her child who was one year or just above one year old. I found her at Manzini Bus Rank and she said that she was looking for work. I promised her work and we left Manzini to Malkerns. We got to Golden Area where I killed her and her child by strangling them with my hands.**

**There is another one who is Manana by surname whom I found at Manzini Park next to City Council offices. I left with her to Malkerns at Golden Area where I strangled her to death. We got there by Insuka Bus Service after I had promised her work.**

**Another one was from Malkerns area who is a Magagula by surname. I also promised her work. We then left and got next to Eagles Nest at Malkerns where I strangled her with my hands to death in the forest there.**

**There was also one Sizakele Magagula from Malangeni area whom I found at the Park next to Manzini City Council Offices. I also promised her work. I then went with her to Malkerns and when we got to the forest there, I strangled her with my hands to death.**

**There was one Thandi Dlamini who was with her child. She was from St. Phillips and was my sister-in-law. I also promised her work. I got to her homestead and told her to come to Manzini where we will meet. We met at Manzini and we left for Malkerns area. When we got to the Bhunya Forest, I killed her and the child by strangling them with my hands to death.**

**There was then La-Kgosi of Malkerns but whom I think stayed at Ka-Dvokolwako area. I also promised her work. I went with her and told her that we were going to the person that will hire her. I went with her to Malkerns and when we got to the forest there, I strangled her to death.**

**There was one Sindi Ntiwane who told me that she was from Mbabane City. I found her at the Park next to the City Council Offices and I promised to borrow her money. I left with her and when we got to the forest at Malkerns, I strangled her to death with my hands.**

**There was another one Num by surname, whom I found at the same Park next to City Council Offices at Manzini City. She had a child with her of about eighteen to twenty two months. She was looking for a job and I promised her one. We left for Malkerns and when we got to the forest, I strangled her to death with her child with my own hands.**

**Then there was Zanele Thwala of Mambane area who was my live-in-lover. We stayed at Luyengo. We left Luyengo to Malkerns. We were just walking around until we got to the Bhunya Forest where I strangled her with my hands until she died.**

**Another one was from Sigombeni and she was a Malaza by surname. I found her at Malkerns looking for a job. I promised her a job at Eagles Nest and we proceeded there. When we got to the Bhunya A6 Forest, I strangled her with my hands to death.**

**There was also one Fikile Dlamini or Ndlela. I do not know which one was her surname. One of them was hers and the other was her husband's. I found her at the Parks next to Manzini City Council Offices. She was looking for a job and I promised her one. I left with her to Malkerns and when we got to the Bhunya Forest, I strangled her to death with my hands.**

**Then there was another one Gamedze by surname from Siteki area. I also found her next to the City Council Offices in Manzini at the Park there. She was looking for a job. I also promised her one. We proceeded to Malkerns and when we got to the Bhunya Forest, I strangled her to death with my hands.**

**There was one Twana Dlamini from St. Phillips. She stayed at Lubulini area. I promised her a job and I told her to meet me at Manzini Bus Rank. She came and we met. I then proceeded with her to Malkerns where I strangled her with my hands to death.**

**Another one was Nelisiwe Dlamini from Siteki area who was also looking for a job. I found her at the same Park next to Manzini City Council Offices. I promised her a job and I left with her for Malkerns. When we got to the Bhunya Forest, I strangled her to death.**

**Then there was one a Khumalo by surname from Manzini whom I found at the same Park at Manzini. I promised her work and we proceeded to Malkerns. When we got to the Bhunya Forest, I strangled her with my hands to death.**

**There was one Ntombinkulu Maseko from Ngwempisana in the Mankayane area. I also promised her a job. I left with her for Malkerns. I proceeded with her to the Bhunya Forest where I killed her by strangling her with my hands.**

**There was one Thabile Dlamini from Ngwempisana. I promised her a job and told her to meet me at Luyengo area. We met there and we proceeded to Malkerns after I had promised to give her a job there. I proceeded with her to the forest where I strangled her to death with my hands.**

**Another one was Simelane by surname from Mancubeni in Mankayane area. I found her at Malkerns looking for a job. I proceeded with her to the Bhunya Forest where I stabbed her to death. I stabbed her on the neck.**

**Then there was Thembi Kunene from Ngwempisana. I left with her from Ngwempisana after I had promised her work. We proceeded to Malkerns and we went to the forest where I strangled her to death with my hands.**

**There was also Sizeni Ndlangamandla from Ngwempisana, whom I found at Vukuzenzele next to the Bus Rank at Manzini City. She was also looking for a job and we proceeded to Malkerns. I went with her to the Bhunya forest where I strangled her to death with my hands.**

**There is another one whose name and surname I do not recall. I found her at the same Park next to Manzini City Council Offices. I proceeded with her to Malkerns after I had promised her a job. I went with her to the Bhunya Forest where I strangled her with my hands to death.**

**There was another one who stayed at Matsapha but was from Malindza area. Her surname was Tsabedze. I found her at the Manzini Bus Rank looking for a job. I promised her one and we proceeded to Malkerns. I went with her to the Bhunya Forest where I strangled and stabbed her to death.**

**There was another Tsabedze by surname from Ka-Hhohho area. She was my sister-in-law. She stayed at the same homestead where I was renting a house. She came there looking for a job. I was renting the house at Malkerns area at Ka-DuPont. I told her that I can organize her a job. We**

**proceeded to Malkerns. We went to Bhunya Forest where I strangled her to death with my hands.**

**There was Lizzy Mhlanga from Bhunya area. We met aboard a Kombi. We both alighted at Luyengo area and she became stranded because there was no public transport to take her to her destination. I promised her a place to sleep. I told her that I would organize her to the place from my sister. We proceeded to Malkerns and I went with her to the Bhunya Forest where I strangled her to death with my hands.**

**There was another one Mlotsa by surname from Siphofaneni. We met at Siphofaneni and I promised her job. We boarded a Kombi from Siphofaneni to Manzini. We got another Kombi from Manzini to Malkerns. We got to Malkerns and I proceeded with her to the forest where I assaulted her and stabbed her to death.**

**I did all this because I was convicted in the nineties for robbery of another woman. I was also convicted for raping the same woman. I did rob the woman of the money but I did not rape her. Even the doctor's report did not confirm the rape. Her evidence was also not corroborated by anyone that she first made the report to. I then told myself that I will revenge to any woman if the chance avails itself.**

**I was incarcerated for these offences from 1992 to 1998. If I could have met her first, I might have not killed all these women. All the people that I killed were women.** (emphasis added)

**The Bhunya forest I am talking about, is the A6 Forest. To convince the women to go with me to the forest, I would tell them that beyond the forest, there were houses for rent and that the people that would hire them, were staying there.**

**All the women did not know the way there and what was beyond the forest. I stabbed those that I stabbed because they would fight back to me. I had the money to gamble at the lotto machines, play cards for money or play the dice game for money.**

**That is all."**

[15] I turn now to outline the learned judge a quo's reasoning in admitting this confession as having been freely and voluntarily made. I should indicate at this juncture that the Appellant was represented at the two different stages of his trial by two different counsel. In the first place until the completion of the Crown case he was represented by Mr. Howe, thereafter, after Mr. Howe withdrew from representing the Appellant, Mr. Mabila took over those responsibilities for the remainder of the trial.

[16] This confession was in fact recorded by the late Magistrate Mr. Charles Masango on 8 May 2001. By its very nature this statement is unique in that it was not recorded by the police details investigating this case but by the Magistrate.

[17] Mr. Masango deposed that the Appellant was brought before him and he recorded his statement. He ensured that no police officer remained in sight or within hearing distance when the Appellant made the statement to him, and that he recorded the confession behind the closed doors of his office. The only other person present was the learned Magistrate's interpreter.

[18] The Appellant was advised by the Magistrate who he was, and was told that he was not obliged to say anything, but that whatever he said would be recorded, and might be used as evidence at his trial. The Appellant was

told that he had nothing to fear and that he could speak openly. The learned Magistrate, to his credit also completed a *pro forma* questionnaire form to which questions the accused responded. The Appellant told him that the purpose of his visit was to tell the Magistrate the other people he had killed. He also confirmed to the Magistrate that the police had told him that he would be taken before a Magistrate and he could tell him what he wanted to. He stated that he had not been forced to do so.

[19] The learned judge a quo in dealing with this evidence of the Magistrate observed in his judgment:

> **"[43] I find it difficult to criticize the late Magistrate of construing this in any other manner that that the accused freely and voluntarily wanted to record a statement, without being forced to do so, or that he was unduly influenced, threatened, assaulted or coerced to do so. The accused then went on, in question and answer form, to tell the Magistrate as to when he was arrested, some two weeks prior to then, and that he had been kept in custody at the Matsapha Police Station. He said that no promise was made to him in order to induce him to make a statement, also that nothing was said or done to induce him, that he was not promised his release from custody, nor that any threats were made to him which induced him to make a statement. He further said that he had not been assaulted by anyone since the start of the investigation or since his arrest, nor that he received any injuries, wounds or bruises. He said that he had previously made statements regarding this matter to Ndlangamandla and Mavuso, both being police officers, as well as written statement to Magistrate Nkonyane."**

The Magistrate gave evidence before the learned judge a quo and he was clearly impressed with him as a witness.

[20] The Appellant made this statement to the Magistrate, in Siswati and this was translated by the interpreter who wrote the ten pages in long hand, re-read it to the Appellant, translation and all, and the accused agreed that it was accurate and correct.

[21] Considering the nature of the challenges launched by Mr. Mabila, the Appellant's second counsel, to the admissibility of this confession. I can do no better than quote in detail the admirable way the learned judge a quo dealt with these challenges:

He stated:

> **"[49] … the challenge to the statement recorded by the late Magistrate Charles Masango becomes pivotal to the conviction or acquittal of the accused, hence the intense attack on its admissibility.**
>
> **[50] Before dealing with the aspects raised by Mr. Mabila, there is one particular and pertinent difference between his and the instructions given to the former defence counsel, Mr. Howe. In cross examination, Mr. Howe put it to the investigating officer, Mr. Solomon Mavuso who substituted for Ndlangamandla, that the accused sustained a quite visible cut on his head, an injury caused by the police in the course of assaulting him during interrogations.**

**[51] When the accused gave his own evidence, he did not mention a word about this stated injury. Although the Crown did not cross examine him about this anomaly, it seems to me that on the one hand, when it suited him, the accused told his lawyer that he sustained a head injury, but when time passed and he had a new lawyer, he totally forgot about such purported head injury, although it was initially endeavoured to be elevated to the extent that it would suffice to render his statements to judicial officers and subsequent pointings out *in situ* to the police as inadmissible, the results of violence and assaults directed against him, worthy of labeling his conduct involuntarily and influenced by violent assault.**

**[52] The scar still visible on the forehead of the accused stated by his erstwhile counsel to be another and old long gone injury, different from the cut caused by the police during interrogation. <u>Conflicting instructions to different attorneys, just like conflicting statements in the evidence of a witness, be it the accused himself or any other, goes hand in hand with disbelief and rejection</u>.** (emphasis added)

**[53] Presently, it places a question mark on the evidence of the accused, when he says that police officer Jomo Mavuso threatened him (not) to play to gallery, so to speak, otherwise his fate would be to also die under the hands of the police, as befell some youngsters at Mankayane. This fear, he said, caused him to record a second statement, this time before Mr. Masango.**

**[54] None of this was told to the Magistrate. In turn, the accused testified that once the police get to know what he told the Magistrate, he again would be in line to be killed by the police at worst or otherwise to again be suffocated.**

**[55]** **But the question remains: if indeed he sustained an injury to his head as he instructed his former attorney to say, why then did he not testify about it himself and instructed his second attorney accordingly and why was it not visible to the Magistrate, or recorded on the video cassettes, why did he not mention it in the Magistrate's court at any of the various occasions instead of telling the court how well he was treated by the police.**

**[56]** **This aspect, the purported injury to his head, remains to cast a measure of doubt on his remaining version.**

**[57]** **A second but more pertinent doubt about the veracity of his assertions is founded in the following anomaly: A great deal of argument and evidence is devoted to assert that the accused was briefed on just what to tell the Magistrate.**

**[58]** **The accused testified, and his attorney was evidently instructed accordingly, that the police were dissatisfied with the statement he made to Magistrate Nkonyane, as he then was. That statement does not amount to a confession, as held above. Whereas the accused, according to himself, had no knowledge about the string of murder cases being investigated against him, he testified that the police gave him the names of the victims, which he was then made to copy in his own handwriting, while he was locked up in a police cell.**

**[59]** **This list, he says, was made in accordance with what he was obliged to do, under threat of being executed like the "boys at Bhunya". Involuntarily and without his own volition or personal knowledge of the names, places or events, he then copied the details of the deceased persons, as provided to him by the police, on the paper they provided.**

**[60] This list, he says, was then used by him in order to be able to make a statement, a forced confession to the Magistrate, about something which he had no knowledge of. It is on this main basis that Mr. Mabila argues that the statement cannot be accepted as evidence, that it has to be rejected as inadmissible due to being false, prompted by the police under duress and undue influence.**

**[61] <u>It requires to be recalled that no such challenge was initially leveled against the statement at the time Magistrate Masango testified</u>. Instead, a long list of spurious attacks were limited to procedural aspects which are of no consequence to admissibility. For instance, attorney Howe seemed to have it that formalistic register entries and the production of unspecified documents relating to the accused were of prime importance, challenging the right of the police to bring a person to record a statement. He also queried the absence of a charge sheet at the time the statement was made and thereafter, what was recorded onto the charge sheet itself. The procedural aspects which were mooted as creating a bar against admission of the statement remain relegated to just that – procedural issues, real or imagined, which are of no consequence to the question of admissibility."** (emphasis added)

[22] The learned judge <u>a quo</u> came to the unassailable conclusion:

**"[83] It is my considered judgment, concluded after intense and anxious consideration, that all of the attacks against the confession recorded by the late Magistrate Charles Masango and admitted as exhibit no.2 are unfounded, unjustified and incapable of avoiding it to remain admitted as evidence in the trial. The admissibility thereof has been persuasively proved**

**and there is no justification to disregard or expunge it from the body of the evidence against the accused."**

[23] Both Appellants' counsel had also complained that the Appellant had only been brought to Magistrate Masango after he had been in the hands of the police for a period of two weeks. Whilst in normal circumstances it is clearly desirable for accused persons to be brought to the court expeditiously when it is intended to confirm statements they have made, the peculiar circumstances of this case render it perfectly understandable that they only brought him before the Magistrate after a period of two weeks. The police in this matter were investigating a person who they believed to be a serial killer and their investigations related to forty one murders. It would have been physically impossible for them to have concluded their preliminary investigations any sooner. The Appellant made indications at the scenes where the bodies were found, he had to be shown the clothing allegedly worn by the victims and so on. I therefore, see nothing untoward in the Appellant only being brought before the Magistrate when he was brought before him.

[24] The learned trial judge drew attention to the following weaknesses in relation to the challenges made by the Appellant to the admission of his confession.

**"[77] Consequently, this attack on the admissibility of the confession also falls to be rejected as an untruth devoid of any merit. The same applies to the evidence of the accused that**

**he was suffocated ("tubed" in common parlance) at the police station during interrogation. This allegation was also left to the last minute, to belatedly be "exposed", instead of being dealt with right from the onset in a mini trial. He also never mentioned a word about it to the different magistrates before whom he appeared. To them all, he repeatedly said how well he was being treated by the police.**

**[78] The final attack against admission of the confession is said to be that he recorded the statement purely out of fear for his own life. The accused testified that Jomo Mavuso (the late Senior Superintendent of detectives in the Royal Swazi Police) threatened him that unless he confesses to the string of murder charges investigated against him; he would be killed by the police "just like the boys at Bhunya". According to Simelane, some youngsters mysteriously died at Mankayane Police Station while detained in custody and that he was scared by this threat that he agreed to do as he was told to do.**

**[79] Again, if this actually was the version of events which caused him to confess to murders that he did not commit, he most certainly is expected to have told his erstwhile attorney all about it and Mr. Howe would then have requested that a trial within a trial be held. Thereat, he would then have ventilated his instructions and the Crown would have been able to call Jomo Mavuso as witness to deal with such a serious accusation. That this was not done is history.**

**[80] <u>Instead, most belatedly and after closure of the Crown's case, this aspect first came to the fore when his new attorney put the accusation to a recalled witness, Detective Sergeant Solomon Mavuso, who vigorously denied any such threats having been made to the best of his knowledge. The accused can hardly expect otherwise than that his own evidence of such alleged threats or suffocation be labeled anything else</u>**

**<u>than belated afterthoughts or recent fabrications</u>.** (emphasis added)

**[81] In context, the accused had an inordinately long period of time, almost ten years by now, during which he could reflect on all facets of the case against him. He had about half that amount of time to put his thoughts together before commencement of his trial, more than ample to realise the importance of serious, compelling and real threats to his own life, which caused him to confess to numerous murders which he did not commit. If that was the true position, he would have had the admission of such a forced, coerced and untrue confession with utmost vigour, right on the first day of the trial when the confession was dealt with. Instead, waiting for a further five years to raise the issue for the first time does not persuade this court to accept it as a reasonable possibility, even if the truth thereof does not also have to be accepted.**

**[82] To add insult to injury – the untruthfulness of his related evidence about the spoonfed list of names provided by the police which he had to use when confessing to the murders, is equally devoid of any compunction to abide by a sworn oath, to speak the truth, the whole truth and nothing else than the truth.**

**[83] It is my considered judgment, concluded after intense and anxious consideration, that all of the attacks against the confession recorded by the late Magistrate Charles Masango and admitted as exhibit No.2 are unfounded, unjustified and incapable of avoiding it to remain admitted as evidence in the trial. The admissibility thereof has been persuasively proved and there is no justification to disregard or expunge it from the body of evidence against the accused."**

These are observations which are eminently sensible and accord with my views. The confession was properly admitted.

[25] For the same reasons the evidence of the indications made by the Appellant were in my own view properly admitted.

[26] The Crown relied on the indications made by the Appellant which led to the recovery of the bodies of the victims in this case, as well as the recovery of clothing worn by the victims at the time they met their death.

[27] Mr. Mabila submitted that the evidence of the indications made should not be admitted for the same reasons given by the Appellant and his counsel in challenging the confession made to the learned Magistrate Mr. Masango and that in addition, that his client had not been properly cautioned prior to making the indications.

[28] In my view the weaknesses in the defence case in respect of the challenge made in relation to the admission of the confession made to the Magistrate Mr. Masango apply with equal force to the challenge launched against the admissibility of the indications. I therefore do not propose to repeat what I have already highlighted in this regard earlier in this judgment.

[29] Mr. Mabila, however, raised a further and new challenge in his attempts to resist the admission of the evidence of indications made by his client.

[30] He submitted that his client had been "tricked" into accompanying the police to the various scenes where he had murdered his victims and where numerous items of clothing belonging to the victims had been recovered. It was Mr. Mabila's contention that the Appellant had not been appraised of his rights prior to being taken to the scenes.

[31] The learned judge a quo dealt with this belated challenge thus:

> **"[16] The evidence of Ndlangamandla, later reiterated by Mavuso, is over-saturated with numerous and repetitive recounting of cautions administered in terms of the Judge's Rules. Time and again, *ad nauseam*, this court heard the repetition of the cautionary words addressed to the accused by Ndlangamandla, as testified by himself and repeated by Mavuso as having been done in his presence. In each instance preceding a trip to some scene of crime, the caution against self incrimination, free and voluntarily action and that there is no obligation to admit or point out anything, plus that the consequence of such evidence by conduct could be used against him at his trial was verbally administered. As if that was not enough, the whole episode was yet again repeated upon arrival at the place where the accused told the driver to stop the police vehicle.**
>
> **[17] To now argue or testify that no, that is not how it happened, instead the accused was taken by the police to the various scenes not *vice versa*, only afterwards to be informed of the consequences of his action, does not impress me as having any ring of truth to it. The cautionary words addressed to the accused before he embarked on the various pointings out were**

**not mere incantations belatedly spoken by the police – on the contrary, the evidence is that full cautionary administrations preceded all events.**

**[18] This is repeatedly found in the evidence of the police officers who testified to that effect in court, and left unchallenged. Moreover, the police officers also repeatedly said that as the events occurred, it was captured on video camera recordings. <u>For now, it suffices to state that when this court viewed the video recordings, to which I revert below, it was abundantly clear that the contention by Mr. Mabila and the statement of the accused that the cautions were administered only after he pointed out, without him being aware of the consequences and with the police leading him to the various scenes instead of him leading the police, are fallacious and devoid of merit</u>."** (emphasis added)

[32] This learned judge summarised his conclusions on this aspect of the challenge to the admissibility of the indications made by the appellant in the following terms:

**"[124] The trickery and chicanery by the police to induce the accused to participate in staged, trumped up mockeries of "evidence gathering" that is alleged by the accused, yet again fails to convince that it might have even just a ring of truth to it. Firstly, this challenge was not leveled against Ndlangamandla nor Mavuso in any significant measure of clarity when they testified. Secondly, the video recordings of the various pointings out by the accused graphically demonstrates the absence of the unfounded allegations. Repeatedly, *ad nauseam*, the accused was comprehensively and unambiguously cautioned by Ndlangamandla in the**

**presence of Mavuso, that he is in no way obliged or compelled to go and point out anything. He was also fully appraised that the consequences of pointing out may well result in evidence that may be used against him at the trial.**

**[125] Also repetitive were the further comments made by especially Ndlangamandla, and reiterated by Mavuso, that the accused was "very cooperative" and that he voluntarily took the police to all of the scenes of crime. In the process, the police discovered further evidence in the form of human bones and personal belongings, at new scenes which they were unaware of until it was pointed out to them by the accused.**

**[126] From the aforegoing, I cannot but reject the contentions that the evidence of pointings out by the accused must be disregarded and not allowed. It would appear a blindfolded trier of fact to look at the video recordings of pointings out and conclude that it was anything else than freely and voluntarily done, anteceded by due, proper and comprehensive cautioning."**

[33] I fully associate myself with the correctness of this reasoning.

[34] I turn now to consider the evidence led by the Crown in its attempts to establish that there was evidence *aliunde* that the murders were proven to have been committed.

[35] In my view there was a wealth of evidence to establish this requirement.

1. In each instance the victim was last seen in the company of the accused or in some instances she left in the company of the accused

with a different person but still it was the last time she was seen alive with the accused being present. Thereafter she was never seen alive again, to this day.

2. Thereafter numerous remains were found in remote forest areas and in the vicinity, items of clothing were recovered which were identified as items belonging to the missing persons.

3. The places where the bodies were found were situated in remote areas, on forested areas or well bushed mountainsides or in rocky outcrops and dongas.

4. These areas where the bodies/clothing were found were pointed out by the accused.

[36] The learned judge a quo concluded, understandably so, thus:

> **"[147] In this trial, with the exception of only a few instances as stated below, the identification of personal property which used to belong to missing relatives and either recovered in the immediate areas where the human remains were found or recovered from a place where the accused had taken the police to, justifies the only reasonable conclusion that can be drawn – the deceased persons are those lost relatives who used to own the personal belongings. It is this body of evidence which proves the commissioning of the individual crimes which the accused confessed to, fortified by himself**

**when he pointed out the different scenes to the police.** (emphasis added)

**[148] When relatives positively swear to the fact that particular items used to belong to a missing person and it is not gainsayed such uncontroverted evidence cannot readily be dismissed at a whim. When multiple objects are identified, so much the more. When it is further shown that the multiple personal belongings were recovered in the immediate vicinity of a human skeleton and amplified by a confession of the accused that the particular person "died at his hands" and when he furthermore confirmed that the items which were identified to have been the property of that person, it becomes very difficult to draw any other conclusion, consistent with the facts, that the accused indeed killed the particular person."**

[37] Of the thirty five counts with which the Appellant was charged with murder the learned judge a quo again exhibiting an abundance of caution, acquitted him on seven counts.

[38] I propose to briefly highlight his reasons for doing so. In count 3 the Appellant was acquitted as the Crown withdrew the charge against him. In respect of counts 15, 16 & 17 the Appellant was acquitted, the learned judge a quo observed "that as is the position in the other counts the accused did not confess to have killed any of them …." As regards to count 21 the Appellant was acquitted as although the body of the victim was found there was "no clear proof as to who might have been responsible for her death. As regards count 29 the Appellant was

acquitted, although he confessed to have killed his victim there was no evidence of the commission of the crime itself. There was no evidence of any item of clothing or other personal property of the victim to establish the basis that she "indeed died nor that she was murdered." For the same reasons as in respect of count 29 the learned judge a quo acquitted the Appellant on count 31.

[39] The learned judge a quo concluded his judgment in relation to the convictions he returned in the following terms:

> **"[431] In conclusion, although the establishment of motive for the crime of murder does not carry remotely the same prominence in our law as in contrast with American jurisprudence, the accused has volunteered his motive for the multiple murders as part of his confession. He said that it was out of revenge for having been incarcerated for the crime of rape which he did not commit. He admits to having robbed the same woman but he says that he was grossly and unfairly treated by also having wrongly been convicted and imprisoned for having raped the same woman, hence his revenge.**
>
> **[432] This court accepts that he murdered his victims out of revenge. This dispels the often mooted diverse theories and speculation in the media that he had some other more sinister motives, or that he was assisted by highly placed persons, or that he harvested body parts for equally sinister, undisclosed but highly placed individuals."**

Clearly these words were entirely apposite in the light of the evidence he had placed before him. In the result his conclusions were entirely appropriate.

[40] The Appellant was sentenced to death on each of the twenty eight counts he was convicted of. It is patently apparent that he has not shown any remorse for his murderous conduct, which resulted in the death of defenceless woman and innocent children. His conduct was one of revenge as is evidenced by what he said in his confession, and he vented his anger on persons who had no connection whatsoever with what he considered to be a wrong inflicted on him. This has been one of the most serious cases I have dealt with both in my career as a State Counsel or as a judge. The Appellant's conduct has sunk to the very depths of depraved and evil conduct and he does not deserve any form or sympathy whatsoever. The learned judge a quo was entirely correct in finding no extenuating circumstances and consequently imposing the ultimate penalty.

[41] Accordingly, the appeal is dismissed in its entirety and the sentences imposed are confirmed.

_____

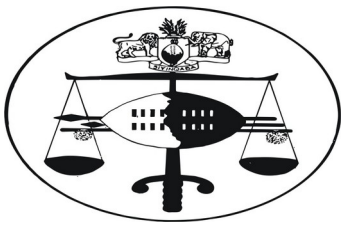
A.M. EBRAHIM
JUSTICE OF APPEAL

I AGREE : _____
DR. S. TWUM
JUSTICE OF APPEAL

I AGREE : _____
M.C.B. MAPHALALA
JUSTICE OF APPEAL

**FOR APPELLANT : M. Mabila**

**FOR RESPONDENT : S. Fakudze**



# IN THE SUPREME COURT OF SWAZILAND

**HOLDEN BEFORE THEIR JUSTICES OF THE SUPREME COURT EBRAHIM, DR. TWUM AND MCB MAPHALALA AT MBABANE ON THE 2ND NOVEMBER 2012**

**In the matter between:**

**DAVID THABO SIMELANE** **Appellant**

and

**REX** **Respondent**

## COURT ORDER

It is hereby ordered that:

The appeal is dismissed in its entirety and the sentences imposed are confirmed.

**BY THE ORDER OF THE SUPREME COURT**

**REGISTRAR OF THE SUPREME COURT**

**SIGNED AT MBABANE ON**
**30TH NOVEMBER 2012**