IN THE HIGH COURT OF SWAZILAND

In the matter of	CASE NO 17/1981
REX	
vs	
1. MEMO NHLEKO	(1st Accused)
2. MAMPFMPE SIMELANF	(2nd Accused)
3. AMOM F. PHAKATHI	(3rd Accused)
CORAM	Mr. Justice David Cohen
ASSESSORS	Mr. G. Dube and Mr Ndzinisa
APPEARANCES	For the Crown : Mr. A. Donkoh
	For Ace. No 1 : Mr. Landmark
	For Ace. Nos
	2 and 3 : Mr. P. Dunseith

JUDGMENT

(Delivered on the 22nd May '82)

Cohen, J.

The two Accused on the 29th April, 1981 pleaded not guilty to a charge of having murdered Rhodinah Mkhatshwa on the 8th December 1975. According to the summary of evidence supplied by the Crown in terms of Section 88 bis of the Criminal Procedure and Evidence Act 1938 part of the Crown case was that each of the two Accused had made voluntary confessions before a Judicial Officer, the Magistrate, Mr R Zondi. The validity of these confessions was strongly challenged on behalf of all accused, and the Assessors were accordingly asked to retire pending my decision in a "tril within a trial" on this issue.

During the course of these particular proceedings the Second Accused took ill and on the application of the Crown and with the approval of defending Counsel, I ordered a separation of trials. In the result only the remaining two Accused have been tried by me but for convenience sake they have continued to be referred to as Accused No 1 and No 3 respectively.

I came to the final conclusion that the confessions made by the remaining two accused before Mr Zondi were legally admissible and my decision has been set out by me in writing on the 2 5th May, 1981 - it now forms part of this judgment and must be considered as such, although it did not go into any great detail. Owing to my official retirement from the Bench this part-heard case was postponed to the 15th September, but because of illness on my part it was further postponed to the 15th October. On that date however, it appeared that one of the assessors who had heard part of the evidence was no longer available for personal reasons. Counsel for the Crown and the defence having consented and there being no prejudice to the Accused - the assessors sit only in an advisory capacity -I ordered the trial to proceed without this assessor. Early in the renewed hearing Mr Dunseith for Accused No 3 took ill and the case was further postponed to the 26th October. Evidence was then heard for the next 4 days when a further

adjournment was ordered to the 19th January, 1982 as Dr Poot who had conducted the Post Mortem examination and had already given part of her evidence (she was still to be cross -examined by Mr Landmark for Accused Mo 1) was out of the country and was not expected to return until mid January. The matter was however further postponed to the 19th April owing to the continued absence of Dr Poot. On that date the witness was still absent and the matter was then postponed to the 15th May.

It is unfortunate that these delays had to take place -it was inconvenient not only for the accused and Counsel but unsatisfactory from the court's point of view, especially as transcriptions of the evidence already given were not generally available and are for the most part unsatisfactory requiring careful checking.

Having now re-read my decisions on the issue of the admissibility of the evidence, I find that the decision covers my basic reasons and that the necessity for a full analysis of the law and the facts is not required and I shall accordingly content myself by referring merely to the more salient

3

features which influenced my final conclusion while at the same time endeavoring to avoid repetition.

Mr Zondi, the Magistrate, and the interpreters who translated the confessions from Siswazi into English in which language they were recorded, gave evidence as to what took place in his office when each accused separately made his statement. Mr Zondi has had considerable experience in the taking of statements and I had no hesitation in accepting his version as to what took place in his chambers as correct. In so far as he is contradicted by the Accused, e.g. as to whether or not Question 5 of the form used was put to the Accused, I unreservedly accept his evidence, supported as it is in the main by the testimony of the interpreters despite minor and immaterial differences. They were extensively cross-examined but were unshaken in so far as all material aspects of their evidence were concerned.

As I indicated in my final conclusion I consider that Mr Zondi rather unwisely suggested that the Accused point out the scene of the crime to him which each of the accused voluntarily did in his presence and that of the interpreters in a friendly atmosphere. I place no reliance on what was pointed out there; whatever the propriety of these alleged visits to the alleged scene of the offence, they do not affect the correctness nor accuracy of what happened in Mr Zondi's chambers and as the statements had already been recorded I do not think they affect the question of whether or not they had been made voluntarily and without undue influence.

Much was made of the possible presence of police officers at or in the vicinity of the spots pointed out by the accused. As already indicated there seems to be little, if any, relevance to this issue in the light of the statements having already been recorded.

Mr Zondi was criticised in cross-examination for his conduct, it being suggested, inter alia, that he had of his own volition volunteered the evidence of the visit to the scene of the offence, the suggestion apparently being that this showed bias and unreliability on his part. In fact,

4

however, a question had been put to him in chief and he replied to it. He had stated that he had not reported these visits to the police nor to Crown Counsel; how Mr Donkoh acquired this knowledge is not apparent, but I do not think that this lapse on Mr Zondi's part affects his credibility -it is clearly an error on his part.

Mr Zondi and the interpreters were satisfied that both accused understood their rights and that they appeared to be in their sober senses, voluntarily giving their somewhat lengthy statements and were quite calm and collected throughout. They were given the right to withdraw from their decision to make their statements but rejected this opportunity. Neither of them seemed to be acting under any observible influence or stress; they were both relaxed in the Magistrate's presence. They were both bold enough to

complain of the food and their sleeping accommodation and apparently would have had sufficient confidence in the Magistrate to have complained to him had any force or undue persuasion been exerted against them. They readily confirmed their verbal statements but despite the friendly prevailing atmosphere never suggested that they had been forced into making them. Mr Zondi impressed me as a gentle and soft spoken -person and one to whom the accused would have safely confided.

The question as to whether a confession has been made voluntarily and without undue influence is of course largely, but entirely, dependent on the confessor's frame of mind and attitude at the actual time when it is being made. That is not to say that what preceded the actual visit to the Magistrate or other judicial officer is not of importance.

It is trite law that the onus of proof that the confession has been made rests on the Crown which has to prove its case beyond a reasonable doubt, but in this regard it cannot be expected to prove a negative and it is for the defence to raise the issue and to adduce its evidence in supporting its contention that the requirements of the law had not been followed. The Crown may, if the defence evidence only emerged

5

when it presented its case, exercise the right to rebut that evidence. But the final onus still rests on the Crown.

Mow Section 226(1) of the Criminal Procedure and Evidence Act provides for the admissibility of the commission of any offence but it is the provisos to subsection (1) which have been the subject of much judicial comment. They read as follows -

"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.

Provided further that if such confession is shown to have been made to a policeman it shall not be admissible in evidence under this section unless it was confirmed and reduced in writing in the presence of a Magistrate or any justice who is not a police officer"

It is a simple matter for an accused person to charge the police with all kinds of irregularities. It is appreciated on the other hand that in genuine cases of brutality and harshness and even over zealousness in the conduct of investigations the Accused's word frequently has, especially when there is no medical evidence of injury to him, to stand alone against that of the police. Both these factors have to be weighed by the court in arriving at its decision as to where the truth lies, not always on easy matter.

In the public mind the question is frequently posed as to why an accused person should of his own free volition confess to a crime. It requires the skill and learning of the psychiatrist to supply the answer, but even then the danger of over-generalisation is always present as individuals differ in their motivations. On the one hand very often persons who have perpetrated a crime confess to it only because of police pressure or undue influence. On the other hand more do not confess because they fear the consequences of telling the truth. An accused may confess because the mere fact of his incarce - ration, even only as a suspect, with its attendant inconveniences

6

and hardships may persuade him that it would be better for him if he did so, often in the hope that such a course would result to his benefit. But that does not necessarily mean that he has been unduly induced by police or other persons in authority over him to admit guilt. The fact remains that in a large number of cases accused persons freely plead guilty to the commission of serious crimes even without any prior confessions on their part.

I have rather enlarged on this aspect of the case because both counsel for the defence in their arguments before me have placed their case largely on the basis that the Crown has failed to prove the absence of

influence in the making of the confessions by the two accused. In doing so a number of relevant authorities has been cited. It is apparent to me from reading these authorities that it is dangerous to apply too strictly statements by Courts, intended as general principles of the law, to the facts of each case when indeed they have application in the main to the facts of a particular case and particular circumstances. Moreover all the cases are not always consistent with each other, some stressing certain features while others regarding them rather as guiding consideration as opposed to mandatory ones. Clearly each case depends on its own merits and in the final resort the judge must decide on the facts before him. Thus in certain cases a lengthy interrogation may de indi-cative of undue pressure on a person to admit an offence the commission of which he had denied; in other cases the number of questions may influence him unduly. On the other hadn much depends on the individual concerned e.g. his ability to withstand any such pressure, or his genuine ignorance of the matter or the period or cause of his final decision to make a statement. In the result I do not think that the two cases referred to by Nathan C.J. in R v Zwane 1970-6 S. L. R. 231 at 236 are of universal application. In fact they do not go further than indicate that lengthy police investigation of the confessor, even of a suspected person, is undesirable and must create a suspicion of influence by the police.

It was established by the evidence in this case that generally ritualistic murders provide difficulty in interrogation and that most frequently, as indeed is well-known, the Crown has to rely on accomplice evidence. Although one's

natural Instincts are to revolt against the detention of suspects and probable witnesses for lengthy periods of time and to their subjection to much interrogation, it seems clear that very few ritual murderes would be brought to book if there were times when this would not be found to be necessary. This does not of course condone the brow beating of witnesses, assaults on them, or their subjection to psychological pressures. It is appreciated that a lengthy detention may reduce the suspect to such a mental state that in order to escape from it he will make a confession, even If he knows it to be false. But I do not think in the present cases the actual confessions were made out of fear of the consequences or under any promises by the police of any advantages to the accused persons. When they made their statements to the Magistrate they were in a position to explain the true reasons for their presence and were indeed given several opportunities of doing so. They knew they were before a Magistrate and that if wronged they would have been protected. In fact they virtually conceded this under cross-examination.

In anticipation of the defence evidence the Crown called' Michael Matse, Assist. Supt., and station Commander at Siteki in the period 1978-80. The alleged murder had been committed in 1975 and the matter investigated up to 1977 but as in all murder cases it was never completely dropped. He had the investigations actively re-opened and decided to recall certain earlier suspects and possible witnesses. Amongst them was Accused No 3 who was so recalled on the 15th October, 1980, held in custody and questioned. The witness denied that any undue pressure was exerted on this accused nor, as was suggested in cross-examination, that he had interrogated him every day until the confession was made on the 21st.

In fact the accused only remained in Siteki for 3 days and was thereafter transferred to Mananga from which place he was apparently re-transferred to Siteki on the 8th November. On the 10th November Accused Indicated to the witness that he wished to make a statement and this was arranged to be taken by the Magistrate the following day. I was impressed with this witness both as a person and in the manner in which he gave his testimony.

Under cross-examination it was put to this witness that on Saturday the 18th October, 1980 he had been a party to the interrogation of Accused from the early morning till 6.30p.m. when the witness left to be present at a meeting to be attended by a CAbinet Minister, and that, thereafter, at 8.30p.m. he took the accused, apparently unguarded, to his home in Siteki, entertained him with a bottle of stout specially ordered for him, put the accused at his case in a friendly atmosphere and thereafter tried to persuade him

to involve police officer Dube, in 1975 and Assistant Superintendent stationed at Siteki, in the offence. The record should reveal the inconsistency between this version as put to the witness and chat actually given by the accused in evidence. I make further reference to this evidence at at a later stage. I had no alternative but to reject the accused's testimony as substantially false. I do not believe that he ever entered the witness's home and that the latter, and for that matter the witness Sotsha Dlamini, tried to involve their colleague Dube in this ghastly murder. The witness certainly did not convey to me the impression that, knowing of the serious consequences of the conviction of his colleague, he would have tried to bolster up a false case against Dube. Nor was there any reason ascribed as to why they should have so hated Dube as to place him in serious danger of his life.

Accused No 3 had been arrested sometime in 1977 together with some other persons, all of whom had been questioned. He was amongst those against whom it was intended to open a preparatory examination, but after several appearances before a Magistrate they were released. This accounts in some measure for their period of detention while awaiting trial, but I gathered that the period was for about one and half months. His re-arrest in 1980 and the ensuing interrogation were, however, at the hands of police officers different to those who had handled the matter in 1975-1977.

On the witness's return from Mananga to Siteki he was questioned by the Asst. Commissioner of Police, one Sotsha Dlamini, who came from Mbabane to spend a few days in Siteki for, inter alia, the purpose of pursuing the investigation further and personally interviewing the witness. I am satis-

fied that this witnesse's conduct In discharging this function was beyond reproach, accepting, as I do, his evidence in preference to that of the accused. He stated that on the 6th November, 1980 he proceeded to Siteki to finalize the investigation because Superintendent Jeremiah Dube was mentioned as being involved in the crime and because of the latter's high office he had to intervene and could not leave it more junior officers. He saw Accused No 3 sometime on that day - he estimated the time by just after 2.00pm and interrogated him. This interrogation lasted approximately an hour. The Accused made no complaint save that he had been kept at Mananga all the time. He denied that he had subjected the accused to an intensive and brutal investigation stating that he had been gently questioned. He left Siteki that afternoon and returned on the 11th November. He again saw and interrogated No 3 accused but this was after he had already made his statement to the Magistrate. The witness found the accused very relaxed and the latter made no complaints to him. The witness gave what appeared to me to be a satisfactory explanation as to why No 3 Accused decided to make a confession, namely as a result of being confronted by Accused No 2 who in his presence had implicated him in the crime. The witness described this confrontation in a convincing manner.

Then only time he had participated in any interrogation of No 1 was on the 15th November. Accused then looked well save that; he appeared to be undernourished. At that stage the witness had already read on earlier statement made by Accused Mo 1 in 1977 where the latter had referred to a white man who had dipped him into a river at that time and later volunteered that what he had then told the whiteman was a lie. According to the witness the accused was cheerful and "sort-of smiling". In the witnesse's presence no one had hit the accused in the chest. At one stage on the 15th November he thought the accused was somewhat hostile but later he was quite normal.

Accused No 3 in giving evidence stated that on the 18th October the witness Motsa came back from a function at the Central school at about 3p.m. Under Cross-examination it

It may be noted that the hanging threat alleged to have been made on this occasion was not even suggested to the witness during his cross-examination nor were any of the other threats.

He stated he did not tell the Magistrate a long story - he only saw two and a half pages of the recorded statement (as a fact it was 12 pages in length). He also stated that he did not explain to the Magistrate

how the deceased died when he had told the Magistrate that the purpose of his visit was "to make a confession in respect of a temptation that befell me." Clearly he was referring to the killing of the deceased, although later in reply to his counsel he stated that he had never told the Magistrate how deceased was killed. All, he said, he meant by this was that he was not present at the killing and that he had only heard of the killing from one Masuku. This is his evidence as I recorded it:

Did you describe to the Magistrate the events surrounding the death of the deceased? ----- Mo, nothing to that effect.

How is it that the Magistrate and police are now saying you made a confession admitting you had taken part in the killing of deceased? ----- It is because of what Masuku told me." Later he gave rather unsatisfactory evidence when cross-examined as to what Masuku had in fact told him. And at another stage he testified that before the Magistrate he told from "first word to last word" everything he had learned from Masuku which included details about the actual killing and his own presence there and his own role.

It was only under cross-examination that the Accused for the first time suggested some sort of assault against him; nor was such a suggestion made to the witness Motsa.

There is a great deal more in his evidence and particularly under cross-examination which satisfied me that I could place no reliance at all on his testimony, but I do not consider it necessary to deal with any further aspects of his testimony.

Accused No 1. testified and described how he came to make a statement to the police in 1977 when he was for the first time arrested - he was released 6 months later and then re-arrested before Christmas in 1980. He stated that in 1977

when he was for the first time arrested - he was released 6 months later and then re-arrested before Christmas in 1960, He stated that in 1977 he was beaten up by a white officer where he was interrogated for approximately one and a half months. This evidence is open to considerable doubt because he was arrested on the 14th November and made his statement to the Magistrate 7 days thereafter. He gave his version of his interrogation referring to threats which had not been put to the witness Motsa in cross-examination. He stated he had made his statement to the Magistrate because he was worried that he would be hanged. He contradicted Mr Zondi's evidence by stating that it was not explained to him that Mr Zondi was a Judicial officer or a Magistrate. He was according to him not a asked what was the purpose of his visit to Mr Zondi, nor that the Magistrate asked him whether any promise or threat had been made to him or if anything was said or done to induce him to make this statement. This evidence is false as Mr Zondi was most explicit on these issues. He was cross-examined as to a meeting by him with his brother and though he had allegedly been assaulted by the police resulting in a permanent chest ailment he did not find it necessary to make any mention of this to his brother. Here follow the questions put by me to him and his answers -

Did you not tell your brother that you were still suffering from chest trouble as a result? ---- No.

Did you and your brother greet each other? ---- Yes.

Did he enquire after your health? ---- Yes.

Did you tell him you had chest trouble? —---No."

Under cross-examination as to his visit to the Magistrate he denied that he was told that he was not obliged to say anything and also stated that had he known he was a Magistrate he would not have told him what he did tell him. In reply to questions put by the Court he said he thought Zondi was a policeman.

All in all this accused was a most unsatisfactory witness and I was not prepared to place any reliance on his testimony.

On behalf of Accused No 1, Jeremiah Dube, the Superintendent who was allegedly involved in the commission of the offence was called to testify. I was unable to see how this witness

13

furthered the cause of the accused. He spoke mainly in general terms but conceded that as far as he knew no irregularity had been committed in the interrogation of any of the accused, save in respect of Chibi. He was clearly shown by the records which came under his surveillance to have been much more deeply involved in the investigation then he was prepared to concede. I found him an unsatisfactory and lying witness. It is difficult to accept that he was not always fully apprised of the extent, the result and the mannner of the investigation and that if the interrogation had failed to produce any results he would have been told that this was so despite persistent and harsh interrogation. All that he was really concerned with in his evidence was to minimise his own role in the investigations.

Having duly admitted the 2 confessions as evidence they were proved by Mr Zondi and the two interpreters. Mr Zondi was cross-examined by Mr Landmark in the main on two aspects relating to his recording of the statements and it was subsequently suggested in argument that he was in fact not the "gentle" person I had described but rather obdurate and hostile and that I should accordingly re-assess my earlier judgment of him.

The Crown called one Phenias Sithole who was related to the deceased by marriage. He remembered the day she was reported on missing and described how her body was discovered by him. The body was removed to the hospital and apparently after the autopsy it was handed to him for burial by the family. The autopsy was performed by Dr. Poot and I refer at a later stage to her evidence.

The Crown also called a police officer J.T. Dladla who handed in certain photographs taken by him of the body of the deceased. He described the injuries seen by him on the deceased's body.

The other evidence by the Crown was that of Ndodenye Simelane, son of Accused No 2. Ndodenye was treated as an accomplice and duly warned in ters of the law. His evidence,

14

apart of course from the two confessions, constitutes the only-evidence before the court as to the circumstances and details of the murder. The Crown had in its summary of evidence given details of the evidence to the commission of the offence. For some unexplained, but argued reason this witness was not called by the Crown.

It is appropriate at this stage to refer to an application on behalf of the accused in regard to the witness Ndodenye made prior to his being used as a Crown witness. His name as a potential Crown witness was not originally mentioned in the summary but during the hearing of the case the Court and the defence were some time after the 11th May supplied with a copy of the evidence to which he was expected to depose. On the morning of the 29th April Mr Dunseith told the court that he had interviewed Ndodenye as a result of which he had intended to call him as a witness on behalf of the defence, but that Ndodenye had been arrested by the police apparently while sitting in this court. Mr Dunseith orally applied that I should order that he be not interferred with by the Crown. I then advised Mr Dunseith that if he wished Ndodenye to be called as his witness he should cause him to be subpoenaed. On the 4th May Mr Dunseith again orally applied for Ndodenye not to be interfered with by the police, he having after some search ascertained that the latter was being detained in Siteki. I then ordered that a subpoena be issued and served and that if Ndodenye was not brought to Court a further application should be made before me. According to an affidavit subsequently filed by Mr Dunseith he had that morning been advised by Mr Donkoh that Ndodenye was being questioned by the police and that he was "singing like a bird". Pursuant to this Notice of Motion proceedings were instituted on behelf of two of the accused against the

Commissioner of Police and the Director of Public Prosecutions; affidavits on behalf of the accused were made by Mr Dunseith and one Jabulane Simelane, another son of Mampembe Simelane, and on behalf of the respondents and affidavit was deposed to by Sotsha Dlamini, Commissioner of Police, who had taken charge of the investigations in 1980. The documents in this apolication were admitted as evidence by consent as constituting pat of the record in the trial with a reservation as to their evidential volve.

15

The averments in the affidavits on behalf of the accused were not controverted by the Crown save that Ndodenye in evidence in Court was not in all respects in complete conformity with Mr Dunselth's affidavit. In his affidavit (Jurat 7th May) the latter stated that in April 1981 he has interviewed Ndodenye in his office and that the latter indicated to him that he was willing to give evidence for the defence at- the trial of the applicants with regard to his detention and interrogation by the police during November, 1980 and also with regard to the evidence of an accomplice Masuku. He advised him that he would voluntarily attend Court at the trial and he accordingly did not deem it necessary to subpoena him. On Mr Dunseith's arrival in court on the 29th April, 1981, being the first morning of the commencement of this trial, he received information that Ndodenye had been arrested by the police. He there and then advised Mr. Donkoh that Ndodenye was a defence witness and should not be interfered with. He likewise made a similar statement to me in open Court, but at this late stage I do not recollect having made any specific order - there is no record that I did so, but I have some recollection of stating that while I could not avoid the arrest I expected that the police would in the light of Mr Dunseith's statement act with circumspection. I think I should interpolate here that despite the witness's evidence to the contrary, (and I propose to set it out fairly fully at a later stage in this judgment as it was recorded by me on this particular aspect) I accept that he had in face agreed to give testimony on behalf of his father. He certainly did not admit to Mr Dunseith that he had been present at the murder, nor did he implicate his father. Had Mr Dunseith not been satisfied that Ndodenye was a potentially important witness who could contradict the evidence of the only accomplice Elliot Masuku who according to the summary of evidence provided was to testify for the Crown, he certainly would not have immediately on Ndodenye's arrest made the above statement to Mr Donkoh and in open Court.

Mr. Dunseith's affidavit went on to state that thereafter he made efforts both from the Commissioner of Police and the Director of Public Prosecutions as to Ndodenye's whereabouts but both of them informed him that they had no knowledge of his whereabouts and undertook to find out and tell him.

16

This should normally surely have been a simple matter on the part of the two respondents. In fact they never did advise Mr Dunseith. The only conclusion I can draw is either that they did not make this simple inquiry, or that the persons they approached, who must have been then in charge of or closely connected with this case, deliberately concealed this evidence from them. In either eventually this behaviour on the part of the police is in my view most reprehensible and leaves one with the strong impression that at all costs they wanted to hold this witness for police purposes and keep him away from the defence. Eventually, however, Mr Dunseith as a result of his own investigation ascertained that Ndodenye was being held at the Siteki Police Station. Again one is surprised that he was not held in a more readily place. No explanation why this was done has been forthcoming.

On Monday 4th May Mr Dunseith made an oral application to me that Ndodenye be brought to Mbabane and that he should not be interfered with or questioned by the police. Again I interpolate that Mr Dunseith would hardly have been so brazen and ill-motivated to have made such an application if he had in fact not been told by Ndodenye that he was willing to testify on his father's behalf. Be that as it may, the Court ordered that a subpoena should be issued and served on Ndodenye and that if he was not brought to Mbabane a further application should be made to Court. The affidavit also revealed that Mr Donkoh had told Mr Dunseith that morning - whether before or after the oral application was made to me I do not know - that Ndodenye was being questioned by the police and that he was "singing like a bird" - presumably I take it in his cage in Siteki!

Pursuant to my order the subpoena was issued on the 5th May for Mdodenye to appear before Court but was treated by the police in the words of Mr Sotsna Dlamini in his replying affidavit (jurat 8th May) as if it was "null and void" because the Court did not intend to sit on the 6th May owing to the illness of one of the accused and the subpoena never reached the police for service.

Mr Dunseith's affidavit proceeded to state that on the 6th May Mr Donkoh advised him that Mdodenye had made a confession to a Magistrate, that the Crown was considering using him as an accomplice witness in the case and was not prepared to make him

17

available to the defence. I think this attitude on the part of Crown was wrong because knowing that the defence had intended to use Ndodenye as their witness, while the Crown may not have been barred from itself using him as its witness it should have made the witness available for consultation with Mr Dunseith, with or without the qualification that such consultation be held in the police presence.

In the result on the 7th May I issued an Order on the application which now forms part of the record in this case in which I ordered, inter alia, that the subpoena on Ndodenye be served on him forthwith and that he brought to Court on the 11th May there to await the further decision of the Court. The respondents were also ordered that pending the further decision of the Court respondents and their officers be restrained from interviewing or interrogating the witness.

On the 11th May Ndodenye was brought before me in Court. Mr Donkoh then stated that Ndodenye was being charged with murder and that he was being brought before the Magistrate that afternoon. This of course represents a reversal of the original decision by the Crown to use him as a witness. In these circumstances there were no good reasons to deal with the restraint. I had imposed on the police as presumably they would not have interrogated or questioned a person charged with murder and my order to that effect was accordingly discharged. Appa-rently, however, I was wrong in so assuming because at a later stage in the trial the summary of evidence to be given by Ndodenye was served on defence counsel and filed with Court. This blatant reversal of decision by the Crown could only have resulted after an inverview with the witness in which he volunteered or agreed to give a testimony for the Crown, presumably after having been explained that if he did so the murder charge would be withdrawn and he would be afforded the statutory protection accorded to all accomplice witnesses.

There is no evidence at all before the Court as why Ndodenye suddenly experienced a change of heart, and departed from his willingness to testify on his father's behalf. The Court is left with grave misgivings as to what motivated him in so doing,

18

under what pressure or inducement or persuasion was he placed so that in the end he was willing to betray even his own father. In the light of these circumstances there is no alternative left to the Court but to approach his evidence not only with the usual caution required in the case of all accomplice evidence but much suspicion. How much weight can the Court attach to evidence obtained and given in the circumstances I have deserted.

To complete the picture on this aspect of the case I quote fully from his evidence as recorded by me.

Cross examined by Mr Dunseith.

How long after arrest did you make the statement to Magistrate at Siteki? ---- Not a very long time.

A few days? ---- I would say it was weeks, 2 months and some weeks.

H/L: He is warned to answer the question and it is repeated: How long after the arrest did you make that; statement? ---- It could be about 4 weeks.

Mr. Dunseith: Not 2 months and some weeks? ----- It confuses me. I did not have this in mind.

You were charged by police with murder of deceased? ---- Yes.

And this occurred about one week after your arrest? ---- I admit police charged me, but I do not remember when.

Did they continue to interrogate you after arrest? ---- Yes.

Did they continue to interrogate you up to the time you made your statement to the Magistrate? ---- Yes."

It will be recollected that according to Mr Dunseith's statement on information from Mr Donkoh, the witness had already made his statement to the Magistrate on the 6th May, a matter of a week after his arrest in Court on the 29th April.

"What induced you to go to the Magistrate to make a statement? ----- I felt I should make a statement before the Magistrate.

At that stage had the police told you they might use you as a witness? ----- No, they were interrogating me.

Do you remember you came to my office on the 27th April?

---- I do. I came in company of my mother.

You had come to my office to make a statement to me about your father's alleged involvement in this crime, is that correct?

------ I had not gone there to make a statement. The position is that money was handed to my mother that I should come to see you.

What was your purpose in coming to see me?----- I do not know. I was called by my mother who took me to you.

You never asked why you had to make this journey to see the attorney? ----- All my mother said was the attorney required me and gave me the money. She told me I was required by my father's attorney.

At that time your father was in the Sidwashini gaol awaiting tril?----Yes.

You had a conversation with me in my office, throughout which my secretary was with me as interpreter. At the outset I advised that you were not obliged to say anything to me you did not wish to?---- There was no answer by the witness and the Court repeats the question to which he then replied. "I do not remember"

At a later stage he was questioned concerning the identification in 1980 of him by Masuku as one of those present when the offence was committed. XX by Defence: What did you say when he incriminated you in this crime? ---- I said I was not there because I was still denying
the alleged charge.

I put it to you that in April you. told me in my office that Masuku was brought to you and unable to identify you? ---- 1 did not say that.

You also told me that when police asked if you were Makhosini or Mdodenye, Masuku said he did not

know you and. you were neither of these men? ----- That is not what Masuku said.

H/L: But is that what you told the attorney? —--- Masuku said he did not recognise me clearly, but later ho said he recognised me as Ndodenye.

Was that on a different occasion?---- On the same day H/L: At the stage when interviewing Mr Dunseith were you still denying your participation in this killing? ---- I was denying it. The Attorney suggested he could find a way of helping my father.

DC: And you agreed to give evidence for your father? ---- I objected.

H/L: Were you at that stage, willing to give evidence in your father's case?-----The attorney said I should dispute Masuku's evidence in that I should say I never did it.

Was that not correct because you were saying you were not there so you could not know what your father did? ----- I was denying my presence on my personal behalf and not on my father's behalf.

The witness had earlier stated that the attorney was to teach him what to say.

DC: And did I then teach you what to say? ---- The attorney said I should dispute Masuku's evidence and if I succeeded in disputing Masuku's evidence I would be helping my father and would myself be free from conviction. That was how I could help my father.

Did you at any stage during our interview admit to me that you had been a party to the killing? —-- No."

Later after some apparent confession as to whne he was interrogated the Court asked him -
"H/L: When you were taken by the police from the Courtroom in 1981 were you again interrogated? ---- Yes they did.

At that time i.e. in April 1981 I admitted my presence K/L:. Straightaway or only after a few days interrogation?----

They interrogated, I denied, they interrogated me again, I denied. They interrogated me and I admitted .

It was at the third interrogation in .1981 that you admitted?

---- I was taken from the Court and after some interrogation I admitted.

Before you admitted were you charged with Murder? ---- No.

At any stage did the police tell you they were keeping you there on a charge of murder? ---- I do not remember."

XX by Mr. Landmark

DC: "You did say yesterday you had been charged with murder?

---- I did not, I was still being interrogated."

When questioned by the assessor Mr Dube as to whether he had only mentioned this matter after Masuku had mentioned his name he reflect: "Indeed I admitted after Masuku had mentioned the matter and I further I felt some guilt conscience.

In re-examination Mr Donkoh referred back to the interview with Mr Dunseith - here follow some of the

questions and answers -

"Did he ask you if you knew anything about the death of LaNdwandwe? ---- He did. I said I knew nothing about her death.

Did he ask you if you were present when she was killed? ----- I do not recollect at this stage.

Did he ask you if you knew Masuku? ---- He did.

What was your reply?----That I knew him.

Did he mention Dube's name? —----I do not know at this stage if he did or not.

Did he tell you what your father is alleged to have done? ----

He told me my father had been arrested in connection with the killing of this woman.

H/L: Any details?---- He added he was my father's attorney.

Did he tell you in what manner your father and others are alleged to have killed this woman? ---- Yes.

Re XX

You said attorney told you he was going to teach you a plan? ---- He did.

Did he teach you the plan? ---- He did. He said I should dispute Masuku's evidence that my father was present; and that my father and I would be acquitted.

Was that the whole plan? ----- There was a misunderstanding as to how I would help to get my father acquitted and the attorney said he would tell me what to do.

Did he tell you what to do? ----- He said I should dispute Masuku's evidence."

After referring to an argument between himself and attorney he was asked if he agreed or refused to give evidence on behalf of his father ---- " I did not agree because my mother had the same idea that I had as she did not understand how I could help my father to get acquitted."

H/L: Tell me if I am right or wrong. Did you in effect refuse to give evidence on your father's behalf? ---- Yes.

It is obvious from the aforegoing evidence that Ndodenye was most unsatisfactory as far his visit to Mr Dunseith was concerned and his interrogation.

At the resumed hearing on Monday Mr Donkoh closed his case stating that Dr Poot was not available to continue her evidence. Both defence counsel then applied for the discharge of the accused on the ground that, as provided for in Section 174(4) of the Code,

a case had not been made against the accused sufficiently to require them to make a defence. The full significance of this subsection has been frequently explained in our Courts and particularly so in the leading case of R v Mtetwa & Other 1970 - 76 S. L. R. 76 by the Chief Justice. The test as formulated by him was in the following terms: "Granted that there is some evidence against the accused, should the court convict on the evidence as it stands? ----- Unless the question can be answered in the affirmative

the court must dismiss the case and acquit the accused". This test has been misinterpreted by counsel in argument in a number of cases to mean that at the close of the Crown evidence there must be evidence establishing the case against the accused beyond reasonable doubt. Clearly that was never intended as that issue only arises after both the Crown and Defence have closed their case, whether or not the defence leads any evidence in rebuttal of the Crown case. I am in respectful agreement with the Chief Justice when he stated at page 366." The present Swaziland section postulates an actual appraisal of the Crown evidence, in contrast with the former section under which the assessment was more theoretical. The present section and the present approach veers more towards the "should" than towards the "might". The assessment of the evidence at the close of the Crown case does not proceed in exactly the same line as at the close of both the Crown and the defence cases; but it permits of more regard being had to the quality of the evidence than formerly."

It is with the quality of all the evidence in this case, which includes the two confessions admitted by me, and all the surrounding circumstances which affect such evidence that I am presently concerned.

Let me state immediately that the evidence of Mr Zondi and the interpreters apart, the Crown evidence was never entirely satisfactory. Doctor Foot's testimony, even without regard to the fact that she was not available for full cross-examination, was of a most unsatisfactory character. Obviously in 1975 she had little or no experience in the conduct of autopsies. She did not open the corpse to find out which parts of the body were missing; nor was she able to give any adequate description

23

of the alleged mutilation; she was very vague as to the degree of damage which could have been caused by maggots and she was in contradiction with the evidence of Joseph Themba Dladla, the Constable who testified as to the injuries he saw on the deceased, and with the accomplices description of the injuries inflicted on the deceased. All in all I think it would be unsafe to base any decision on her testimony.

The witness Phineas Sithole was equally unsatisfactory - he in fact saw no injuries on the deceased body which he had discovered. Apart from the fact that he identified the deceased I cannot place any value on his testimony. Constable Dladla who produced certain photographs which were of little value, did describe the injuries on the body from which it seems reasonable to conclude that the deceased had in fact been murdered. But the evidence to that effect is not overwhelming in it directness and one is left in some doubt why better and stronger evidence was not forthcoming. Why for instance was Constable. Dladla called his -name is not mentioned in the summary of evidence provided by the Crown and not a superior officer in the person of Sub. Inspector Gumede who is in fact so mentioned.

The defence are faced in this matter by the fact that the court has admitted the so called confessions made by the two accused. I have been asked by Mr Landmark in the light of the further evidence to revise my earlier decision on the admissibility. This I think he was entitled to do. It is fair to state that had I read the two confessions prior to my decision and had all the circumstances relating to the calling of the witness Ndodenye been before me at the time there is some possibility that my attitude might have been different. I have however carefully re-considered this aspect and in the light of the evidence given by Mr Zondi and the interpreters, I remain satisfied that no undue influence had been exerted on the accused. There may have been hidden motivations which Impelled them to confess, but I would be entering into an area of complete speculation if I would allow these to influence me to depart from my earlier decision.

There seem to me to be two possible approaches to the matter. The first is for the Crown to rely on the two confessions and

24

to seek any corroboration which may be necessary from the evidence of the accomplice. The other is to base its case on the evidence of the accomplice and to seek for any required corroboration from the confessions. The two methods do however overlap because in the circumstances of this case the quality of the confessions is affected by the accomplice's evidence.

Mr. Donkoh has urged that there was no need for him to call the accomplice at all nor to rely on his evidence. He argued that under Section 238(2) of the Code once the fact of the murder had been established by evidence aliunde there was no need for confirmatory evidence of the confessions. That sub-section reads as follows"

"(2) Any court which is trying any person on a charge of any offence 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 actual committed."

It seems to me that the court is not bound to convict an accused merely on the strength of a confession by him provided the commission of the offence itself has been proved by other evidence. The Court has a discretion and I think should only exercise it in the Crown's favour if the proof of the killing is clear beyond doubt, and if a comprehensive picture of the actual cause of death is provided sufficient to fit in with the terms of the confession. This is how Hoffmann, S.A. Law of Evidence. (2nd Edition) correctly puts it at page 409:

"It must be emphasised that even when S. 258(2), (this is the sub-section in S.A. corresponding to our S. 238(2)) is satisfied, it will not necessarily be safe to convict. There is still the overriding requirement that the court must be satisfied beyond reasonable doubt that The accused is guilty. The court must therefore consider whether the confession is reliable. This may appear from the surrounding circumstances or from the contents of the confession itself."

25

In any event, however, Mr. Donkoh did in fact not rely only on this subsection because he found it necessary to call confirmatory evidence by the accomplice and indeed he went to considerable effort to obtain such evidence and keep the witness away from the defence. Even before the decision to call Ndodenye the Crown must have considered that the sub-section by itself was inadequate to its case, because it had through its summary of proposed evidence intimated the use by it of another accomplice, namely, Masuku Elliot.

I do not find it necessary to deal in full detail with Ndodenye's evidence. As already indicated by me it must be approached with extreme caution. One is rarely impressed with the evidence of an accomplice as in the nature of things he is a person who is willing to aid in the conviction of his fellow travellers, here one is his own father, in order to save his own skin. There are obvious flaws in his testimony, some of which may be due to the passing of the years from December 1975 to October 1982 when ho gave his actual testimony. Where gaps or errors occur because of this, it is of course unfortunate from the Crown's point of view. There are however, many instances in his evidence where such errors cannot be ascribed merely to alack of memory. For example, he gives an unacceptable version of the actual killing and the part he played. His function according to him was on his father's instructions merely to hold the torch, but he actually related a more active participation by him, namely the throttling of the deceased at his hands, and assisting the transfer of her from the scene of the assault to the thicket. The torch according to his evidence was only handed to him at the time of the mutilation. His evidence as to the place of origin of the weapon used by accused No 3 is also difficult to accept. It came, he said, from his father's car, but he had in fact never seen such a weapon either in the back or the fron of the car. He gave a detailed description as to the individual role, of the murderers e.g. who hit the deceased, who of them grabbed the deceased as she fell - it should be remembered it was night, who put a piece of wood in her mouth to stop her from shouting. (I may say in parenthesis that it is difficult to imagine the deceased, more than slightly intoxicated at the time,

26

the victim of a severe blow behind the head with a crow bar, being throttled by the witness, and unable to run away, but still so strong that there was the remotest possibility of her being able to cry out). The witness was able to recall that No 3 had cut below the left breast of the deceased. He recollects that it was Masuku who was ordered to fetch a canvas, and car seat, that No 3 cut out the heart and the liver as well as the genitalia, that Chibi was ordered by Dube to continue with the cutting. He was able to say exactly at what stage Dube arrived on the scene. He recalled that although struck very severely by No 3 she did nor cry out. He was in my mind concocting the story that the deceased cried out twice "Here I die leaving my children" a reference to the recorded evidence will reveal how unsatisfactory that bit of evidence was.

As I have already indicated the witness was particularly unimpressive when questioned about his interrogation. He was unwilling to commit himself to time, even as to months, weeks, days or hours. I had in fact to intervene on one or two occasions to warn him to answer on these points. I have already indicated that I did not believe his version as to what took place at Mr. Dunseith's office.

In the result I am obliged to conclude that certain unknown pressures or promises must have been made to cause him within a short period after his arrest to effect a complete somersault of attitude, make a confession to the magistrate and agree to testify in this court.

I think enough has been stated by me to indicate that I can place no reliance at all on his testimony, and that it cannot be treated as confirmarory of the confessions.

I turn now to deal with the contents of the confessions.

Mr. Landmark has fully set out the difference between the contents of the confessions, the summary of the evidence, and the accomplice's actual testimony. It is unnecessary for me to repeat all of them but these differences are certainly impressive.

Accused No l's version of the killing is completely different to that given by the accomplice. According to this accused it was the father who grabbed the deceased by the throat and closed her mouth and with the other hand jelled her to the ground. All those present then grabbed her. Chibi held her on the head and the father throttled her until she died. There is nothing here about an assault by No 3 Accused or anyone else with a piece of iron, nor any reference to her having cried out, nor to the placing of a piece of wood between her teeth. According to him it was the father and not Ndodenye who held the torch and lit it, not on her breasts as the latter suggested, but on her private parts. The torch was handed over to No 3 accused, not to Ndodenye, and the father himself cut the various portions of deceased's body i.e. the genitalia the breast, 2 ribs, the liver and the heart, the kidneys, all of which he himself handed over to Dufae. His story varies considerably from the confession of No 3 Accused and from Ndodenye's evidence. It is as if each one was describing a different murder.

In the light of the aforegoing I cannot say that I am completely satisfied that this confession is reliable. At the most it may be acceptable as to his presence at the killing but that of course does by itself not sufficient. He had to be on actual participant.

The case against No 3 seems to me much stronger than the one against accused No 1, but even No 3's version varies in material aspects from that of Ndodenye. In the first instance although his confession mentions the names of all who were present at the killing, there is no further reference at all to the presence of Ndodenye. His story does approximate close to the accomplice's version than No 1 Accused and in particular in so far as his personal involvement is concerned. The confession, however, is to the effect that he acted under a certain amount of physical compulsion at the hands of Mampempe. As opposed to Ndodenye who states that this accused brought the piece of iron used from the front of Mampempe's car and that he had seen him doing so, the confession is the effect that it was thrown at this accused by Mampempe, and that

when he was preparing to run away Mampempe threatened to strike him with a clenched fist. He makes no mention of the throttling of the deceased or the placing of the piece of wood in her mouth or the use of any torch. According to his confession everything that he did was in accordance with Mampempe's orders and under under fear of him. To that extent this confession may be exculpatory in character. Although as it reads it may not extablish a full proof defence of compulsion, it should be borne in mind that the onus of proof of an absence of compulsion would rest on the Crown once this issue has been raised by an accused. It is possible, that in the so called confession the accused intended to exculpate himself by raising this line of defence. It may be assumed that he was not familiar with all the legal requirements of a defence of compulsion but I think it may also be assumed that it was his intention so to explain or justify his conduct. This issue was indeed not canvassed in argument, and although aware of the inherent dangers of allowing such a plea. I hesitate to make any dogmatic statements on the essentials of a successful defence of compulsion. I cannot, however, eliminate it as a possible defence nor that the accused may in making his statement have hud it in mind as a justification for his participation In the offence. The whole question of the effect of a statement intended to be exculpatory is dealt with by Hoffmann at pages 161 et seq.

Bearing in mind the conflicts between the evidence of the accomplice and that contained in the two confessions, the circumstances surrounding the calling of Ndodenye as a Crown witness, the possibility that accused's confession was made with exculpatory intent and that he raised a defence which has not beer satisfactorily rebuked by the Crown, I am reluctant to find that is a sufficiently reliable confession. I must add that I have come to that conclusion not without considerable-hesitation on my part, particularly because the defence had not specifically raised this defence either in cross-examination or argument. An ignorant accused, with a good defence, however, may well fall to raise it an feel himself in a stronger position by basing his entire defence on a complete denial of his presence at or participation in the crime. Had the accomplice's evidence which indicates a

complete absence of compulsion been supported by other evidence the position might well have been otherwise. Thus if Elliot Masuku had been called by the Crown and if he testified on the lines indicated in the summary of the proposed Crown testimony I would in all probability have come to a different conclusion. There has no good reason advanced as to why Masuku was not called by the Crown to testify and the only logical conclusion from this failure in all the circumstances seems to be that as a fact the Crown had no confidence in Masuku's reliability as a witness on its behalf. To quote once more from Hoffman (page 432):

"All that can be said is that the party bearing the onus runs the risk of losing if the evidence of the remaining witness is sufficient to carry the necessary degree of conviction."

In my final view of this extremely difficult and worrying case I feel obliged to grant the application and to discharge the two accused. It may be that in doing so, I am being excessively considerate to the accused, and especially so to No 3 Accused, and that they both may regard themselves as fortunate. But to err favour of the accused accords with our basic concepts of criminal justice.

D. COHFN