



IN THE HIGH COURT OF ESWATINI
JUDGMENT

HELD AT MBABANE

CASE NO. 446/15

In the matter between:

- 1. TIKHALI MAJOZI MANGO**
- 2. MBONGENI SIBUSISO BUTHELEZI**
- 3. MADIBHANE HABBAKUKI SIMELANE**

Neutral Citation: *Tikhali Majози Mango, Mbongeni Sibusiso Buthelelezi & Madibhane Habbakuki Simelane [446/15] [2019] SZHC 215 (18 November, 2019)*

Coram: **M. LANGWENYA J.**

Heard: **28 March 2018; 9 April 2018; 3 July 2018; 4 July 2018; 11 July 2018; 18 March 2019; 21 March 2019; 25 June 2019; 23 September 2019; 3 October 2019; 10 October 2019; 18 October 2019.**

Delivered: **18 November 2019**

Summary: *Criminal Procedure-murder-contravention of Crimes Act-evidence of an accomplice witness-doctrine of common purpose-admissibility of confession-trial within a*

*trial-accused
confessions ruled*

*fail to give evidence in trial within a trial-
admissible.*

*Criminal law-murder-accused found guilty of murder and
acquitted of contravening Crimes Act/ 1889.*

JUDGMENT

- [1] The three accused persons were charged with one count of murder and a number of crimes concerning the contravention of the Crimes Act/1889. Before the charges were put to the accused persons, the prosecution applied to withdraw charges against the third accused. The application was granted by the Court. The trial proceeded against the first and the second accused.

- [2] The first and the second accused were indicted for the crime of murder, it being alleged that on or about 26 September 2015 and at or near Mambane area in the Lubombo region, the said accused persons each or all of them acting jointly in furtherance of a common purpose did unlawfully and intentionally kill Magidi Mlambo and did thereby commit the crime of murder.

- [3] The first accused was also charged with contravening section 80*bis* (1) of the Crimes Act No. 6 of 1889 as amended. It being alleged that upon or about 12 October 2015 and at or near Mambane area in the Lubombo region,

the said accused did unlawfully possess part of a human body and thus contravened the Crimes Act.

[4] The second accused was also charged with contravening section 80*bis* of the Crimes Act No. 6 of 1889 as amended. It being alleged that upon or about 12 October 2015 and at or near Mambane in the Lubombo region, the said accused did unlawfully possess part of a human body and thus contravened the Crimes Act.

[5] When the charges were put to both accused persons, they pleaded not guilty.

[6] The Crown led the evidence of sixteen witnesses to prove its case. Each of the accused persons led evidence in support of their case and no additional witnesses were called by the accused persons.

The Case for the Crown

[7] At the commencement of the trial, the prosecution led evidence from witnesses which may be summarized as follows: On 15 October 2015, PW1 Dr Komma Reddy, a police pathologist, carried out a post-mortem examination on the body of Magidi Mlambo. He noted that the body of the deceased was in a state of advanced decomposition; that it was partly skeletonized and devoid of soft tissue like muscle and skin. In some portions

the body, the skin was intact. The body was not intact as it was dismembered and without the right forearm, right hand, left leg, right foot, left leg and external genital organs. The third and fourth neck bones were fractured and ante-mortem in nature. The conclusion of PW1 is that the deceased died due to injury to the third and fourth neck bones. PW1 handed into Court the postmortem report which was marked exhibit 'A'.

[8] During cross examination, PW1 was asked if the face of the deceased was recognizable when he carried out the post mortem examination. PW1 told the Court that the face of the deceased was decomposing and skeletonized but that the deceased was identified by his brother in law. It was the evidence of PW1 that some bones of the deceased were taken for DNA testing and comparison. When PW1 was asked if in the state the body of the deceased was in it could be identifiable, his response was in the affirmative.

[9] The DPP indicated that PW2 Madibhane Habakuki Simelane was, in his view an accomplice witness who should be warned before testifying. The Court warned him in terms of section 234 of the Criminal Procedure and Evidence Act 1938. I have warned myself of the dangers of the evidence of an accomplice witness.

[10] PW2 told the Court that he lives at Ondiyaneni in the Shiselweni region and that he is a traditional healer and a prophet. In his call of duty PW2 once treated Magagula who had a problem with evil spirits. He went to

Magagula's homestead and performed certain rituals. It was when he was done treating Magagula that he spoke to him and enquired if he knew of anyone who had medicine for good luck and fortune. Magagula referred PW2 to Tikhali Majozi Mango- the first accused.

[11] PW2 eventually met the first accused for the first time at his homestead in Mambane. When PW2 met the first accused he was in the company of Magagula and Maguga Ndwandwe. Magagula told the first accused that they had come to seek help with *umutsi* for good luck and good fortune.

[12] The first accused gave him a calabash which had traditional medicine/*umutsi* inside. They paid E4.500 (four thousand and five hundred Emalangen) for the calabash and medicine. They left Mambane and went home to see if the *umutsi* was working. After some time they called the first accused and told him they were not happy with his prescription. The first accused asked that PW2 returns to see him.

[13] On the second visit to the first accused, PW2 was given *umutsi* with which he had to wash and steam. It was PW2's evidence that they then asked the first accused to find them *sandawane*-an animal that looks like a rat-which was known to bring luck and fortune especially in business. First accused is alleged to have said he has a friend in Nelspruit from whom he will get *sandawane*.

[14] On the second visit, the first accused was paid E2,500 by PW2. The first accused told PW2 that he would call him once he got *sandawane*. The first accused subsequently called PW2 to come collect *sandawane*. PW2, in the company of Maguga Ndwandwe went to see the first accused after receiving his call. The first accused gave them something which was wrapped. They took the parcel and left. Along the way, when they opened the parcel, they found that it was a chest of a duck. They called the first accused and told him as much. In particular, they told the first accused that this was not *sandawane* but a duck. They were assured by the first accused that what he gave them is what they ordered.

[15] Again, when they got home through a phone call they registered their protestations to the first accused that what he gave to them was not *sandawane*. The first accused called PW2 and told him that he was going to find him something else. The first accused is said to have told PW2 that he would find him an albino. The first accused is alleged to have said albinos bring luck as they do not die but they simply disappear into the mountains that separate Mozambique and Eswatini. That was the only thing that would bring PW2 luck-so the first accused is alleged to have told PW2.

[16] Later, the first accused called PW2 and told him he had found the wild animal (a reference to *umutsi* they had talked about with the first accused) and that he had the claws. When they talked about *umutsi* they also referred to it as *inyamatane*. PW2 was in the company of Ngudze Mamba

when he went to see the first accused on this occasion. They met the first accused before they reached his home. The first accused emerged from bushes carrying a plastic bag in which there was a parcel that was wrapped in a plastic bag. PW2 told the first accused he only had E1,300 as payment. The first accused said PW2 should pay him E6,000 when he finds money. It is the evidence of PW2 that when he got home and unwrapped the parcel he found a human hand and a bone. PW2 called the first accused and asked what exactly he had given him. The first accused is said to have told PW2 that he had given him the real thing. PW2 says he informed the first accused that he does not know and does not use what the first accused had given him.

[17] It was the evidence of PW2 that he was shocked, surprised and scared to see the human hand. He called Ngudze Mamba to accompany him to first accused's home so he could return the parcel. He indeed returned the parcel to first accused at his home. The first accused informed PW2 that he was not going to be able to refund him the money he had paid already. PW2 left the parcel at first accused's home and returned home at Ondiyaneni.

[18] The following morning, the first accused is alleged to have come to PW2's home and implored him to take the human hand. PW2 declined to take the human hand. When they could not reach an agreement, PW2 left the first accused in his hut and on return found that the first accused had left the human hand inside PW2's hut. Seven days later, the first accused came to PW2's home in the company of the police. The human hand was retrieved

from PW2's hut and PW2 was also arrested. It was the evidence of PW2 that he did not report the incident of the human hand to the police because he was frightened. PW2 identified the first accused as Mango.

[19] During cross examination, PW2 was unshaken in his assertion that the first accused gave him a human hand which was later taken by the police. It was also put to this witness that it was he who came to Mango looking for a hand of an albino and Mango chased him away from his homestead for wanting an albino's hand. This was denied by PW2 who insisted that he came to Mango looking for *sandawane or umutsi* for luck. On behalf of the first accused it was put to PW2 that Magagula will come and tell the Court that PW2 came to Mango looking for an albino's hand. It is however, history now that the said Magagula was never called by the first accused or by any side for that matter- to give evidence in court.

[20] PW3 is Samuel Julius Matse. He told the Court that on 12 October 2015 the police arrived at Mambane royal kraal and asked for someone to come with them and witness what the accused persons wanted to show them. PW3 came with the police from the royal kraal and found the accused persons outside the royal kraal at the play- ground waiting inside a police van. The accused persons were in the company of other police officers. In Court, PW3 identified both accused persons as the people he found waiting outside the Mambane royal kraal in the company of the police. Both accused persons are known to this witness as members of the community at Mambane. When

PW3 got to where the accused persons were- he asked the first accused why he was there. The first accused said he had come to show them where had hidden Magidi. PW3 retorted and asked if the first accused now knew where Magidi was.

[21] PW3 and some of the police officers used a separate motor vehicle from that which the accused were using. The accused led the police through the cattle gate which leads to the grazing land. The team travelled in police vehicles to Hholobeni where the accused persons pointed out the place where the body of the deceased was buried. The body of the deceased was stashed and buried in two separate spots which were a few metres apart. The first accused retrieved his own part of deceased's body and the second accused did the same with the lower part of deceased's body. The deceased's body was not intact when it was retrieved at Hholobeni. There was no hand, no arm bone and one part of the body did not have a leg. This witness was frightened at the sight of the dismembered body.

[22] From Hholobeni, the second accused led the police to his homestead where he stated that Magidi's bone was crushed and put inside a small calabash which was at the second accused's homestead. The second accused retrieved and gave the police a calabash and a bush knife at his homestead.

[23] The first accused led the police to a place where he said they had hidden Magidi's clothes. The team was led by both accused persons to a place

where deceased's clothes were retrieved from under a rock. The clothes were a pair of trousers, a t-shirt and a hat. The witness struggled to tell colours and stated that he was illiterate and also had problems with his eyesight. From here, the first accused led the police to Mabhananeni- a place he said is where they had killed the deceased. At Mabhananeni, the team found deceased's beads. The first accused then led the police to his fields where five human bones were retrieved. From there, the team proceeded to the first accused person's homestead where an axe that he said he used to kill the deceased was pointed out by the first accused and then given to the police.

[24] During cross examination, PW3 stated that at all times before pointing out anything, the accused persons were cautioned by the police. PW3 singled out senior investigator Sihlongonyane as the police officer who cautioned the accused persons before a pointing out was done by either of them. PW3 stated also that the accused persons were not assaulted by the police in his presence. According to PW3 the pointing out was done freely and voluntarily by the accused persons.

[25] It was put to PW3 that the second accused never pointed out bones but only pointed out a place where the deceased died at Mabhananeni. PW3's response was that there is nowhere the team went without being led and directed there by the accused persons. PW3 stated that when they got to Mabhananeni, both accused persons pointed out Mabhananeni as the place

where they had killed the deceased. A photograph taken by scenes of crime officer confirms this fact. Later in his evidence, PW3 stated that it was the first accused and not the second accused that spoke and stated that the deceased was killed at Mabhananeni.

[26] It was the evidence of PW3 during cross examination that the second accused was cautioned before he told the police that he had crushed one of deceased's bones and put it in his calabash at home. It was also put to PW3 that the second accused person's calabash only had *umutsi* and no crushed bones. PW3 disputed this and stated that the second accused voluntarily told the team that inside his calabash was the deceased person's crushed bones. This witness was also unshaken during cross examination. Note that contents of calabash was not corrected there.

[27] Ms Ndlangamandla and Mr Nzima-legal representatives of the first and second accused persons respectively, objected to the statements made by both accused on the ground that the statements were not obtained freely and voluntarily since the accused were tortured through suffocation with a plastic and threatened with violence by the police before they were brought to the different Magistrates to make the statements. It was also argued that the first accused was kept in police custody for three days before he was produced before a magistrate to record the statement that is being challenged. It is on this basis that a trial within a trial was held.

Trial within a trial

[28] During the trial within a trial, the objection was that the statements made by both accused persons were not obtained freely and voluntarily since both accused were threatened with violence; that the first accused was tortured and suffocated with a plastic bag; that the first accused was kept in custody for three days before he was brought before a magistrate and that both accused were not warned according to the Judges rules before they either pointed out something and before they made the statements complained of.

[29] It is common cause that the first accused was arrested on 11 October 2015 by members of the Royal Eswatini Police¹ and only recorded a statement on 14 October 2015 before magistrate Joseph Dlamini. The circumstances under which he had been arrested are in dispute. He was taken to Siteki police station where he was questioned and detained. Senior Supt Clement Sihlongonyane testified that the first accused had, at the time of his arrest and during his questioning not been assaulted, threatened with violence nor suffocated by the police. Sihlongonyane stated that the first accused cooperated with the police while they carried out their investigations.

[30] It is necessary to relate what happened on 14 October 2015 when the first accused was brought to the Magistrate Court, at Siteki in order for him to depose to his statement. Exhibit 'B' is *pro forma* filled by the magistrate at

¹ This is according to the evidence of PW14 the chief investigating officer Supt Clement Sihlongonyane. Sihlongonyane told the Court that the police got a report of a missing person from Ekucaceni, Mambane on 29 September 2015. The matter was reported to the police on 26 September 2015.

Siteki magistrate Court. Certain preliminary questions appear on this *pro forma* document. Question 10 is whether threats were made to the accused to induce him to make the statement-to which the first accused answered in the negative. Question 11 asks whether the accused was assaulted by anybody since the start of this investigation or since his arrest-to which he answered in the negative. In fact in answer to the question about who asked him to come to the magistrate, the first accused says ‘it came from my heart. I want to state what happened.’ Other questions followed and the magistrate eventually made an incriminating statement from the first accused.

- [31] It was the evidence of PW4 that the first accused was brought to his chambers by PW5 Thuli Maziya, a court interpreter at Siteki Magistrate Court. PW4 explained to the accused his legal rights in particular that he was not forced to record a statement before the magistrate. Once PW4 was satisfied that the accused wanted to make a statement, he then asked him the questions as stated in the *pro forma* document. The questions were asked through the medium of an interpreter. It was the evidence of the first accused that he came to PW4 because he killed a person. The accused had been kept in custody for three days before he was taken to the magistrate to make a statement. He told the magistrate that he had been told by the police to come to the magistrate to narrate what happened. According to the answer given by the accused, he was not induced in any way to make the statement to the magistrate. The accused did not present with any injuries, wounds or bruises before the magistrate.

[32] During cross examination, magistrate Dlamini told the Court that he satisfied himself that the accused was eager to make a statement and not that he was forced by the police to do so. It was put to PW4 that the accused was tortured, suffocated and forced to go to the magistrate to make the statement. The magistrate stated that the accused was well, calm and eager to make the statement even when he had been told by PW4 that he was free to leave without making a statement if he had a change of heart. The accused person's response was that he wanted to make a statement. According to PW4 when the accused person appeared before him there was nothing suspicious-there was no sign he had been tortured as he was in good condition.

[33] PW5 is the interpreter who was present when the first accused made a statement before PW4. Her evidence is that she interpreted the accused person's statement from SiSwati to English. Prior to the statement being recorded, the accused person was asked questions in the form and his answers were recorded in English. All parties signed the form and the statement recorded by the first accused was signed by the accused as well.

[34] PW6 is 3571 Constable Leonard Sihlongonyane. In the year 2015 he was stationed at Siteki police station in the General Duty department. On 14 October 2015 he received instruction from 2713 Sgt Dlamini, the shift officer to escort a suspect-Tikhali Mango to the Magistrate Court, Siteki to make a confession. He took the accused from the police cells to the

magistrate court. At the magistrate court he was led by PW5 to the magistrate's chambers. He introduced himself to PW5 and informed her of his mission. He went inside the magistrate's chambers and introduced himself and informed PW4 he had brought the suspect to him because there is something he wanted to tell PW4. PW6 then left PW4's chambers. PW6 was not part of the investigating officers although he was told by the shift officer that the suspect was facing a murder charge. PW6 went outside the magistrate's chambers and where he waited he could not hear what the suspect was telling PW4 as the door was shut and he was about fifteen metres away from the magistrate's chambers. Once the suspect was done with PW4, PW6 took the suspect back to the shift officer.

[35] PW7 is Magistrate Philisiwe Delphine Dlamini. She told the Court that in the year 2015 she was stationed at Simunye magistrate court. On 14 October 2015 she was on duty when the second accused was brought in her chambers to record a statement. The second accused was accompanied by 6697 Constable Mlungisi Dlamini who handed him over to the secretary. PW7 introduced herself to the accused and informed him that he was not obliged to say anything unless he wants to do so; that whatever he says will be taken down in writing and may be used in evidence against him; that he has nothing to fear and should speak freely.

[36] PW7 asked the second accused about the purpose of his visit and he told her that he had come to explain how the deceased got injured and killed. The

accused informed the magistrate that he was told by the police to come to PW7 and was told to tell the truth about the issue. From the second accused, PW7 ascertained that he had been kept in custody for two days before he came to record a statement before the magistrate. She was informed by the second accused that he had not been induced or promised anything to come and make the statement. The second accused did not have injuries when he came to PW7. He told the magistrate that he had made two prior statements to the police-the first was made at Hlathikhulu police station on 13 October 2015 and the second statement was made at Siteki police station.

[37] During cross examination it was put to PW7 that the accused was assaulted and suffocated by the police before he came to record the statement. PW7 stated that she was not informed by the second accused that he had been assaulted and suffocated by the police. PW7 informed the Court that the second accused did not have physical injuries when he came to her office. It was also put to PW7 that the second accused was threatened by the police to make a confession and that the police told the accused that they will know if he has not told the truth. PW7's response was that he would not know what happened at the police station; that she explained to the accused the difference between a confession and an admission made to a police officer. It was PW7's evidence that the statement recorded by the accused was made freely and voluntarily by the accused.

[38] PW8 is Nokuthula Cebile Thomo. She is a Court interpreter. In October 2015 she was stationed at Simunye Magistrate Court. On 14 October she was on duty when the second accused was brought by an officer in uniform. The officer introduced the accused to me and left the accused at the entrance of PW8's office. PW8 took the accused to PW7 who was in chambers. In PW7's chambers there was no police officer only the magistrate, PW8 and the second accused person. The door was locked. Before the accused made a statement, PW7 asked him a few questions and PW8 translated the questions for the accused. The magistrate asked the accused the questions in the *pro forma* document in English and the questions were translated by PW8 into SiSwati before the accused responded thereto. At the end of the recording of the accused answering the questions in the form, PW8, the magistrate and the second accused all appended their signatures on same.

[39] When PW8 saw the accused person, he had no visible injuries. PW8 then identified her signature in the form on the first and on the last page of the form. During cross examination it was put to this witness that the accused was not told that he had a choice to record and not record a statement. This was denied by PW8. PW8 stated during cross examination that the second accused recorded a statement freely and voluntarily before PW7 and PW8. PW8 also stated that the second accused had no visible injuries when he was brought before the judicial officer.

[40] PW9 is 6697 Constable Mlungisi Dlamini. In 2015 he was a member of the police service and stationed at Simunye police station at the records department. On 14 October 2015, he was instructed by Sergeant Mayisela to escort the second accused who was from Siteki police station to Simunye magistrate Court. He boarded a police vehicle and sat at the back with the second accused. At Simunye Magistrate Court a criminal investigation officer from Siteki police went to the clerk's office while the second accused and PW9 remained in the police vehicle. After a while, they were called by PW8 to come to the Magistrate's chambers. He escorted the accused to the magistrate's chambers and returned to the Court's entrance. After a while, PW8 informed PW9 that they were done. PW9 called the police station to come and collect him and the accused.

[41] It is the evidence of PW9 that he was unaware what charge(s) the second accused was facing. PW9 told the Court he never threatened the accused.

[42] PW10 is senior superintendent Clement Sihlongonyane. He is one of the investigating officers in this matter. It is his evidence that the first accused was rescued by the police at Mambane in a community meeting where the public was baying for his blood following a meeting where the first accused had been summoned as a prime suspect in the disappearance of the deceased. The police took the first accused to the police station at Siteki where after due caution he was interviewed about the disappearance of the deceased.

The first accused said something and also mentioned the name of the second accused.

[43] The first accused was again cautioned in terms of the Judges rules before he led the police to the home of the second accused. On arrival in Mambane at the second accused person's home, the police introduced themselves to him and cautioned him in terms of the Judges rules. The second accused elected to say something.

[44] According to PW10 both accused persons were never assaulted nor threatened to make statements before different judicial officers pertaining this matter. It is the evidence of PW10 that he never accompanied the second accused to make the statement before the magistrate. He further informed the Court that he did not school the accused on what to say before the judicial officers.

[45] During cross examination PW10 stated that the accused made the statement before the judicial officers freely and voluntarily. PW10 informed the Court that the first accused was informed of his rights-even his right to remain silent when the caution was administered to him at Siteki police station. He denied that the first accused was insulted and suffocated with a plastic bag while at the police station or anywhere else by the police. PW10 stated that the first accused was cooperative in course of the conduct of the investigations.

[46] It was the evidence of PW10 during cross examination that the second accused was cautioned by sergeant Magongo in the presence of PW10 when the police arrived at his homestead to carry out his arrest. At Siteki police station after due caution, the second accused was cooperative as he responded to all questions asked by the police. Immediately the second accused said something to the police, he was advised to make the statement before a judicial officer. The second accused was told that he was not obliged to make the statement but that if he did, it would be written and may be used as evidence against him in Court. PW10 denied that the second accused was threatened with violence if he did not tell the truth before the judicial officer. He denied also, that the police made a veiled threat to the second accused that they will know if the second accused that they will know if the second accused has not told the truth to the magistrate.

[47] The defence did not lead evidence of the accused during the trial within a trial. The Crown led the evidence of the two judicial officers who told the Court that the accused persons made confessions before them freely and voluntarily after they were cautioned by the judicial officers not to say anything if they were not so inclined. The evidence of the judicial officers is that both accused persons did not present with visible injuries and when they were probed by the magistrates they both said they had not been threatened nor forced to come to the magistrates and make the statements. The evidence of the judicial officers is supported by that of the Court interpreters.

[48] Ms Ndlangamandla for the first accused submitted that the first accused only made a statement before a judicial officer after he had been languishing in police custody for three days. It was her submission that during the three days first accused remained in custody it is unclear what was happening to him except for what he says that he was assaulted and suffocated while in police custody. The first accused, according to the submissions made on his behalf was forced to make a confession before the judicial officer by the police.

[49] It was submitted on behalf of the first accused that the nature of the assault suffered by the first accused in the hands of the police need not have been visible when the confession was made as he was suffocated. It was submitted that the police employ different tactics when visiting violence on suspects and that it is not in all instances that such violence will leave visible injuries on the accused person.

[50] It was submitted that the police ought to have produced the first accused before Court within 48 hours of his arrest. In this case, the first accused was taken to the magistrate after three days of his arrest. The Crown did not give reasons why the accused was kept in police custody for three days instead of two days before he was taken to Court. This, according to submissions made on behalf of the first accused was unlawful. The Court was referred to *R v Mabola Dlamini & Others*. It was submitted that the Crown failed to give

reasons why the accused was kept in custody for three days instead of the stipulated 48 hours.

Section 16 (3) and (4) of the Constitution states as follows:

“16(3) person who is arrested or detained.

(a) Upon reasonable suspicion of that person having committed, or being about to commit a criminal offence, shall, unless sooner released, be brought to court without undue delay before a court.

16(4) Where a person arrested or detained pursuant to the provisions of subsection (3) is not brought before a court within forty-eight hours of the arrest or detention, the burden proving that the provisions of subsection (3) have been complied with shall rest upon any person alleging that compliance.

From the evidence at the court’s disposal, the first accused was taken into police custody for his protection when the community of Mambane bayed for his blood. He was questioned by the police concerning the disappearance of the deceased. On the second day, the first accused was taken to Mambane where the pointing out of various exhibits was done. On the third day, he was taken to Ondiyaneni where the hand of the deceased was retrieved. The explanation proffered herein is reasonable and means the first accused was brought to court without undue delay. The crown has therefore proved that the provisions of subsection (3) have been complied with.

The facts of *R v Mabola Dlamini and Others (High Court Case No. 249/85)* are distinguishable from the facts before court. In *Mabola Dlamini*, the

accused was held in custody for over a month before she was produced in court. She gave evidence of how she was tortured and threatened by the police while in police custody. Some of the evidence of that time was confirmed by the police. This is not the case in the present matter.

[51] It was submitted on behalf of the second accused that he was suffocated and threatened with violence by the police before he agreed to make a confession before a judicial officer. It was argued that the second accused was not cautioned before he was taken to the Magistrate to make a confession. It was also urged on the Court that the second accused was not informed by the magistrate that he has a right to refuse to write a confession much against a plethora of authorities in this jurisdiction in that regard.

[52] The Crown's submission is that there is no evidence controverting the evidence led by the Crown that the accused were neither threatened nor induced to make the confessions which they made before the different judicial officers.

Ruling on the admissibility of confessions

[53] After the evidence by the prosecution witnesses and after they were cross examined by the defence during the trial within a trial, I made a ruling that the statements made by the accused before the judicial officers were admissible and, accordingly ordered that they be admitted into evidence. At

the time, I did not provide any reasons for my decision. These are my reasons. Both accused persons did not give evidence during the trial within a trial. Only the Crown led evidence opposing the submissions made on behalf of both accused persons that the confessions were not made freely and voluntarily. Both accused persons did not lead evidence in support of their assertion that the police threatened them with violence before they confessed to the crime charged. This is telling. Except for questions put to the Crown witnesses during cross examination that the accused persons were with violence and suffocated with plastic in order for them to make the confessions, there is no *viva voce* evidence that was tendered by the accused persons controverting the case for the Crown during the trial within a trial.

[54] Accordingly, when both accused persons told the different judicial officers that they had not been assaulted or threatened in order to influence them to make a confession, I am satisfied beyond reasonable doubt that they were telling the judicial officers the truth.

[55] The magistrates' assessment of the accused persons in this case was that they were men who really wanted to unburden themselves. Both judicial officers detected no hesitancy. The magistrates were perfectly satisfied at the genuineness of the accused persons' answers. I was thus satisfied that the formal confessions were made voluntarily and without undue influence.

[56] Both confessions have a level of detail quite inconsistent with people fabricating a false confession under threat of harm. The confessions contain certain information which both accused persons would not have known if they were not perpetrators. The first accused's confession about hitting the deceased with an axe on the neck region-a fact that is confirmed by the second accused- and a fact that is consistent with the pathologist's report which concluded that the deceased had died due to injury to neck bones (third and fourth).

[57] I was at the time of the ruling and, I still am, of the opinion that the Crown had succeeded in establishing that the confessions were made freely and voluntarily by the accused persons, while in their sound and sober senses and without having been unduly influenced thereto and that they confessed, apparently reliably, that they murdered the deceased in the way alleged in the indictment and in the autopsy report. I accordingly allowed the confessions into evidence and, as I was also not swayed during further evidence or argument to come to a contrary conclusion, the interlocutory ruling to admit the confessions became a final ruling and the confessions will be assessed together with all the other evidence on the merits.

[58] PW11 is Rita Mlambo. She is the first accused's mother in law. The deceased is her brother. The deceased lived in the same homestead with PW11. She says Magidi left home with the first accused even though she did not see the first accused leaving her home with the deceased. She says the

first accused had come to her home to remind Magidi that on the following day they would go to dig *muti*. She reported the deceased missing to the police at Tikhuba. A search for Magidi was conducted by the community and he was not found. During cross examination she stated that the deceased informed her that on the following day-a Saturday, he will go with the first accused to emabhananeni to dig *muti*. In the afternoon of the said Saturday, the first accused came to PW11's home and enquired where Magidi was. PW11 says he told the first accused that Magidi left with him.

[59] PW11 showed the Court clothes which she said belonged to the deceased. The clothes included a white and pink hat; grey pants-torn on one leg; torn black and white striped T-shirt; light blue and red underwear as well as a bush knife.

[60] PW12 is 2325 Detective Sergeant Lokotfwako. He holds the rank of Detective Assistant Inspector and is based at Lubombo Regional Headquarters in the Scenes of Crime Unit of Eswatini Royal Police Service. His duties include collection of forensic evidence, taking photographs at scenes of crime, collection of exhibits for forensic examination, taking fingerprints and packaging exhibits. He has been a scenes of crime officer for eighteen years.

[61] On 12 October 2015, PW12 was on duty when he was called to attend to a scenes of crime at Hholobeni in Mambane area. At the scene, there was a

pointing out taking place. At Hholobeni the accused persons in this matter pointed out two shallow graves after they were cautioned in accordance with the Judges' Rules. The graves were about one metre apart. On the first shallow grave was retrieved the upper torso of the human body parts from the head to the waist. On the second shallow grave was retrieved the lower torso of the human body parts from the waist to the toes. The human body parts were in an advanced state of decomposition. The body parts were wrapped in a red sack and put in sacks.

[62] The police examined the body trying to establish if there were missing body parts. One right arm and the right leg were missing. PW12 took photographs of the whole scene. From Hholobeni, PW12, the accused persons and the other police officers went to the home of the second accused where the second accused pointed out a bush-knife which was hidden in the roof on the thatched hut.

[63] From second accused's homestead the team went to Etjeni Lekushelela which is a grazing land around Mambane. Here, both accused persons pointed out items hidden under a rock. The items were a torn pair of trousers, red and white hat and a T-shirt as well as green underwear. PW12 took photographs. The team then proceeded to Emabhananeni where the accused persons pointed out where the deceased was killed. It was at EMabhananeni that the team was shown beads next to a tree called *lihlalanyosi*. PW12 took photographs of the scene.

[64] After being cautioned by the investigating officers, the first accused led the team to his field where small human bones were found hidden under a rock. PW12 also took photographs. The team then went to first accused's home where an axe was seized. Majahonkhe Mango-the son of the first accused gave the team an axe that was allegedly used in killing the deceased. Photographs of the axe were taken by the police.

[65] Except for the beads, all other exhibits which were found at the main scene were taken by the investigating officers, packaged and sealed and handed over to PW12 for forensic analysis. PW12 transmitted the exhibits to police headquarters for further investigation in the Republic of South Africa. Bone samples were taken from the body of the deceased since the body was decomposed.

[66] The photographs which were taken by PW12 are marked as JDL1-JDL24.

[67] During cross examination PW12 stated that the human bones found in first accused's field were taken for forensic analysis. He stated that the forensic results are now available. PW12 stated that before the accused person pointed out the various places and various exhibits, they were cautioned by Mr Sihlongonyane who was the RCBO at the time. PW12 said he was not one of the investigating officers so he does not know if the first accused made the pointing out freely and voluntarily.

- [68] PW13 is 5380 Detective Constable Thulani Israel Gama. He is a police officer based at Shiselweni Regional Headquarters in the scenes of crime department. He told the Court his qualifications and that he has worked in the scenes of crime department for nine years.
- [69] On 13 October 2015 he received a telephone call from the acting desk officer at Hluthi police station. Acting on the call, he went to Hluthi police station where he found the acting desk officer with Shiselweni and Lubombo serious crimes unit police officers. Mr Sihlongonyane RCBO Lubombo; 3706 Detective Sergeant Magongo were present as well as three accused persons. Two of the accused persons were from Lubombo region while one was from Ondiyaneni, Shiselweni region. I was introduced to the accused persons by the police officers who were with the accused. It was Madibhane Simelane who was about to point out something. Madibhane was cautioned and he led the team to his homestead. Before the team got to Madibhane's homestead, the investigating team got an independent witness who was introduced as MaHappy and was a neighbor of Madibhane.
- [70] Upon arrival at Madibhane's homestead, the team was led by Madibhane to a two-room house on the right hand side of the homestead. A photograph of the house was taken both inside and outside. Madibhane retrieved a small metal box from *muti* containers which were inside the house. He opened the

small metal box and inside was an alleged human hand with some bones and wood-saw like dust. The contents of the small metal box were photographed.

[71] The alleged human bones and hand were seized and taken for forensic analysis. Before the exhibits were sealed, Madibhane went to another room where he retrieved a cloth and alleged that the cloth was used to wrap the human hand. The small metal box and cloth were handed over to Detective Sergeant Magongo as an exhibit.

[72] On the next day, PW13 conveyed the exhibits which were supposed to be subjected to forensic analysis to Police Headquarters for onward transmission to Pretoria. This witness submitted to Court a total of seven photographs of the two-room house, metal box, human hand-charred and the cloth that was allegedly used to wrap the human hand.

[73] The human hand was sealed in RSPFSL 19619 and marked GTI 1. GTI 1 the Court was told, represents the initials of the police officer who found and packaged the exhibits. The exhibits are marked serially. The human bones were sealed in SWAG 016052 and were marked GTI 2. PW13 then handed in a photo album of the photographs he took at Madibhane's house. The album was marked exhibit 'D'.

[74] The Court was shown five pieces and two fragments of bones as well as a human hand which was charred on the side of the wrist. The bones were collectively marked exhibit '1' while the hand was marked exhibit '2'. The witness told the Court he has a copy of the report from Pretoria forensic laboratory and that the original report was sent to Siteki under RCCI 2099.

[75] PW14 is 3475 Clement Sihlongonyane. In 2015 he was stationed in Lubombo Regional Headquarters. On 29 September 2015 he was on duty at Lomahasha conducting another investigation when he received a report of a missing person at eKucaceni in Mambane. The missing person's name is Magidi Mlambo. Investigations were conducted about the missing person and on 11 October 2015 information to the effect he was last seen with the first accused was received. The first accused was taken to Siteki police station where he was cautioned in terms of the Judges' rules before he was interviewed. The first accused said something.

[76] On the morning of 12 October 2015 the first accused was cautioned and he led the police to the second accused's homestead. On arrival at the home of the second accused, the police found him still asleep and they introduced themselves as police officers and explained their mission at his homestead. The police explained to the second accused that they were investigating the suspected murder of Magidi Mlambo. The second accused was cautioned in terms of the Judges' Rules and he said something. The second accused pointed out a bush knife which was hidden on the thatched roof.

Photographs were taken by the scene of crime officer and the bush knife was taken as an exhibit in this matter. A calabash was also retrieved from the second accused person's homestead and the team was informed by the second accused that part of Magidi's bones were crushed and used as *muti*. The calabash was also taken as an exhibit in this matter.

[77] After the first and the second accused were cautioned in terms of the Judges Rules they led the police to EHolobeni where two sacks containing human body parts were retrieved from shallow graves in the presence of community members. The human body parts were found in two separate shallow graves; on the one grave was the upper torso of the human body and on the other shallow grave was the lower torso of the human body. After the both accused persons were cautioned, the two sacks were opened and human body parts which were badly decomposed were seen. After examination, it was discovered that there was a missing hand and a missing leg of human body. Both accused persons elected to say something.

[78] The accused persons were cautioned before they led the team to Etjenilekushelela where clothes allegedly belonging to the deceased were retrieved from under a rock. The clothes were pointed out by the accused persons after they were cautioned in terms of the Judges Rules. The clothes were taken as exhibits in this matter. From Etjenilekushelela, and after they were again cautioned, the accused led the police to Emabhananeni-a place

which was in a forest. At Emabhananeni, beads were found on a surface of a tree which was carved. The beads were also taken as exhibits in this matter.

[79] On 14 October 2015 and after due caution, both accused persons led the police to Hluthi to a Simelane homestead. Simelane was found in town at Hluthi. The police introduced themselves to Simelane and explained their mission. Simelane went along with the police to Ondiyaneni at his homestead. Simelane, the police were told is *inyanga* or traditional healer. At his homestead, and after due caution, Simelane pointed out a small box which was found in his consultation room. Inside the small box was a human hand. The human hand was handed to Nhlanguano Police where Simelane was kept as an accused person in this matter.

[80] PW14 handed into Court the following items as exhibits in this matter: the bush knife which was found in second accused's homestead was marked exhibit '3', the axe which was retrieved from the first accused's homestead was marked exhibit '4', the small box retrieved from Simelane's consultation room was marked exhibit '5', the small calabash with beads retrieved from second accused's home was marked exhibit '6', clothing-grey pair of trousers and underwear were marked exhibits '7' and '8' respectively, all the clothes that were alleged to belong to the first and the second accused were collectively labeled as exhibit '9'. The clothes belonging to the first accused were a red top, black pair of trousers, black shoes. A pair of blue trousers and a green 'forest hill' T-shirt are clothes that

were presented to Court as belonging to the second accused person. Green and red underwear belonging to the deceased was marked exhibit '10'. PW14 also handed into Court vegetation that was collected from the different places where the pointing out was done by the accused persons. The vegetation was marked exhibit '11'.

[81] During cross examination PW14 stated that at first accused's home, it was the first accused and not his son who pointed out and later gave the police an axe. This evidence contradicts that of PW12 who told the Court that Majahonkhe, a son of the first accused handed the axe to the police. PW14 denied that the first accused was threatened with violence before he pointed out the places and exhibits that were recovered as a result of his cooperation with the police. It was the evidence of PW14 during cross examination that when they went to the home of the first accused they were accompanied by an independent witness in *indvuna* Samuel Matse. Although PW14 admitted that the first accused was taken in for questioning on 11 October 2015 he said he does not know when he was taken to make a confession before a judicial officer.

[82] When PW14 was asked if he had proof that the bones pointed out by the first accused hidden under a rock were those of a human being, the response from PW14 is that experts who made DNA analysis on the bones will give evidence in that respect. It was also put to PW14 that the bones that were brought to Court were those retrieved from Madibhane and those that were

retrieved from the first accused were not brought to Court. PW14's response was that the bones retrieved at the instance of the first accused were sent for forensic analysis.

[83] It was put to PW14 that the first accused was led by the police to where the body of the deceased was found after a search party had been looking for the deceased and not that the first accused led the police to where the deceased was buried. This was denied by PW14. PW14 also denied that the first accused pointed out the place where the deceased was buried as a result of torture, assaults and threats of violence.

[84] During cross examination on behalf of the second accused, PW14 told the Court that the second accused was arrested by the police who were in the company of the first accused at about six in the morning on 12 October 2015. It was the evidence of PW14 that the police introduced themselves to the second accused and told him about their mission and then cautioned him accordance to the Judges' Rules and there and then arrested him. The second accused then showed the police the exhibits.

[85] It was put to PW14 that his evidence is contradictory to the evidence of PW12 (Lokotfwako) in as far as the chronology of places visited is concerned. PW14's response was that PW12 was mistaken about the chronology of events, that it was PW14 who is one of the investigating

officers who knows exactly which places were visited as a result of the police being led by the accused persons.

[86] It was put to PW14 that the second accused was assaulted and suffocated and then led by the police to the various places which he allegedly pointed out certain exhibits. This was denied by PW14.

[87] PW15 is 4071 Sergeant Muzi Simelane who is a police officer based at the Mbabane Police headquarters. He is a case administrator and his duties include receiving exhibits from regional scenes of crime officers which require forensic examination. He is responsible for the conveyance of exhibits which requires forensic examination to their respective destination.

[88] On 21 October 2015 he was on duty when he received exhibits from the scenes of crime officer from Shiselweni Police regional headquarters through 2750 Detective Sergeant Mkhabela. There were two parcels sealed in different bags. One sealed bag was marked RSPFSL 19699 and contained a suspected human hand. Another exhibit was marked SWAG 016052 and it was sealed with suspected human bones. PW15 kept the exhibits in a refrigerator locked in safety strong room and waited for more investigations to link exhibits.

[89] In February 2016, PW15 received another exhibit from 2325 Detective Sergeant Lokotfwako from Lubombo Scenes of Crime officer and they were twenty-three exhibits in number. The following items listed hereunder are the exhibit referred to herein:

1. A black bush knife sealed in a bag marked SWAR 019177 RSPFSL
2. A small calabash in a sealed bag marked RSPFSL 21229
3. Grey trouser cut into two pieces marked RSPFSL 22071
4. Black and white stripped T-shirt marked RSPFSL 22053
5. Light blue red coloured underwear marked RSPFSL 22096
6. Five pieces of bones SWAG 056989
7. Axe marked SWAR 019173
8. Bottle green T-shirt RSPFSL 22039
9. Blue pair of trouser marked RSPFSL 22038
10. Right black safety shoe RSPFSL 22036
11. Black trouser RSPFSL 22034
12. Red jacket RSPFSL 22040
13. Left safety shoe marked RSPFSL 22037
14. Multi coloured beads marked SWAR 021810
15. Two bones in sealed bag marked RSPFSL 23354
16. Vegetation in a sealed bag marked SWAG 056319
17. Cream white trouser in sealed bag marked RSPFSL 22061
18. Sleeping mat in SWAR 019172
19. Bush knife with orange handle in sealed bag SWAR 019175
20. Blood sample bag sealed and marked IOD3AB 8738EB
21. Blood sample in bag marked IOD3AB8723EB.
22. Blood sample marked IOD3AB8721EB

- [90] Except for the human hand which came from Nhlanguano police station, all the other exhibits were received from Lubombo scenes of crime officer. After receiving the exhibits, PW15 wrote a covering letter which involved all exhibits received from Shiselweni and Lubombo scenes of crime linking them. On 11 February 2016 he conveyed the exhibits to Pretoria for DNA testing. He requested that the exhibits be linked with the human hand and bones found in the Shiselweni region with exhibits found in the Lubombo region.
- [91] PW16 is Warrant Officer Prince-Eddie Neo Mmushi. He is employed by the South African Police Service and is attached at the biology section of Forensic laboratory in Pretoria as a forensic analyst. He holds a B. Sc degree from the University of Limpopo and has been attached to the Biology section of the Forensic laboratory since 1 August 2009. In the course of his work, he has received training in serological and DNA techniques and, at the time he compiled this report, he had a total of ten years' experience in the biological sciences.
- [92] On 25 July 2016 during the course of his duties he received a case file Siteki Swaziland RCCI 2099/2015 LAB 37764/16 from the administration component of the biology section of the forensic science laboratory. He made his DNA analysis of the bone sample RSPFSL-19699, T-shirt RSPFSL-22278, hat RSPFSL-22053, underwear RSPFSL-22096 and bone sample GTI-2 (SWAG-061052) and found that it matches the DNA result of

the bone sample SMM7 (SWAG 056989). The DNA profile from the bones is the same as the DNA in the exhibits referred to in this paragraph.

[93] His analysis also found that the DNA profile from the hand is the same as the DNA from the bones.

[94] Because of insufficient DNA in the following exhibits: the sleeping mat, the calabash with beads, panga and bush knives as well as the axe; the results were inconclusive.

[95] PW16 then handed in his report which was marked as exhibit 'B'.

[96] The Crown closed its case.

Defence case

[97] The first accused gave evidence and told the Court that he is a traditional healer from Mambane. He knows Madibhane and once helped him with *muti* for good fortune. The first accused says on the first occasion Madibhane consulted him, he gave Madibhane *tiwasho* as a remedy for good fortune. The second time Madibhane came to the first accused's home and asked to be given *sandawane*-a rodent-like animal renowned for bringing good fortune. The first accused's account is that he gave Madibhane the *sandawane*. When the first accused attended to Madibhane and gave him

sandawane, the latter was alone when he came for consultation at first accused's home.

[98] The first accused denied ever giving Madibhane a human hand. It is the evidence of the first accused that prior to Madibhane coming to his homestead to ask for help with good fortune, the first accused had never known about, nor had he met Madibhane. The first accused stated that he did not know where the home of Madibhane was.

[99] Madibhane again came to the first accused person's home and asked for a calabash. The first accused made a calabash for Madibhane and he left with it.

[100] The first accused told the Court that he was arrested by police from Tikhuba police station and transferred to Siteki police station where he spent three days behind bars. At Siteki he was handed over to a team of thirteen police officers. Sihlongonyane came with three plastic bags and a rope and he ordered the other police officers to take off first accused's jacket. Three police officers held the first accused's leg and another three officers held his right leg while one police officer stood behind the first accused. Sihlongonyane put the plastics over first accused's head and strangled him on the neck. The first accused says he was suffocated with the plastic bags and realised he was about to die.

[101] Before he went to the place where the deceased's body was retrieved, he was not cautioned by the police officers he was with. Sihlongonyane threatened him with violence if he did not talk. Sihlongonyane took out his gun and told the first accused to say something. The first accused says he told Sihlongonyane to rather kill him and he did not point out anything to the police. The first accused was locked at the back of the police van and threatened with death if he did not speak. Along the way, they found a group of people next to Mambane royal kraal. Only Simon Matse and another person who is unknown to the first accused boarded the police van next to Mambane royal kraal. The police vehicle was driven to a place where the two people who boarded the police vehicle directed it. The first accused did not know the destination the police vehicle was going to. At the destination, the police told the first accused and the second accused to alight from the vehicle and went with the police to a bush.

[102] Sihlongonyane took out his gun and pointed it at both accused persons and ordered them to go to a bush. The accused complied with Sihlongonyane's orders. Sihlongonyane directed the first accused to point out a pit while the other police officers took photographs of the pointing out.

[103] The entourage of the police, Matse and the accused persons then went to the first accused's homestead. The police ordered the first accused to show them the bones of the person he had killed. The first accused denied knowing any human bones and stated that if the police wanted to kill him, they should go

ahead and do so. The police put the first accused inside the house at his homestead and ordered him to call his children. The first accused refused to call his children and told the police to do whatever they wanted.

[104] The police ordered first accused's children to give them the axe which he had used to kill the deceased. Majahonkhe- first accused's son- stated that he did not know his father's axe and that the only axe which was in the house was his. Sihlongonyane threatened Majahonkhe with death and the latter then gave the police the axe which was presented to court as evidence.

[105] Besides the axe, the police took a red top and a pair of black trousers from the first accused's home. It is the version of the first accused that the police did not dig nor did they find anything from his field and from his home.

[106] It is the evidence of the first accused that he recorded a statement before the judicial officer at Siteki magistrate court. Prior to the first accused recording a statement before the Magistrate, the magistrate did not say anything to him other than staring at him. When he recorded the statement, Sihlongonyane was present although he remained outside the Magistrate's chambers. Before the first accused was handed over to the magistrate, Sihlongonyane is alleged to have made utterances to the effect that the accused is the one who murdered the deceased. The first accused says he was never told the implications of making the statement. He says he was told to say whatever he knew.

[107] The first accused says he does not know Magidi and that he did not kill him. He said he has never met Magidi and that he had never gone to the forests with Magidi to look for *muti*. Rita Saraphina Mlambo told the Court that the deceased is her brother. The first accused stated that Rita is his mother in law.

[108] During cross examination, the first accused admitted that he sold a calabash to the second accused. The calabash contained *insiti* mixed with herbs *tihlahla*.

[109] During cross examination the first accused denied that he made a statement before the Magistrate. He told the Court that when the magistrate asked him to tell him what he knew, the first accused's response was to deny knowledge of the matter and he remained silent. The first accused first denied that he confessed to killing the deceased before the magistrate but later stated, during cross examination that he confessed to killing the deceased because he was threatened with death. Otherwise what he confessed to was not true, so he told the Court. This, however, was not put to Matse.

[110] During cross examination the first accused denied hearing Matse saying he was present when the accused carried out the pointing out in the presence of the police and other people. It was the first accused's response that Matse could lie against him because he was influenced by Sihlongonyane and the

police officers he was with that he had killed the deceased. The first accused also intimated that Matse could lie against him because he hated him because he was the most powerful traditional healer at Mambane.

[111] During re-examination, the first accused stated that he did not tell the magistrate that he killed the deceased; but that he was told to tell the magistrate that he killed the deceased.

Evidence of the second accused

[112] Prior to his arrest in 2014 he was a resident of Mambane and earned a living as a traditional healer. After the death of the deceased his homestead was burned down and his wife and child relocated to his parental home at Phonjwane.

[113] He told the Court that sometime in 2014 he went with the first accused and the deceased to a bush to dig *muti*. It is his evidence that the deceased was killed by the first accused. He states during cross examination that he did not see the first accused kill the deceased. He was present in the bush but found the deceased already dead. That the second accused, in chief says he did not see the deceased being hacked with the blunt side of an axe is a poor act of removing himself from the scene and is problematic for two reasons: first, in his confession he gives details which only a perpetrator of the murder

would know; and second, he actively associated himself in the dismembering and concealment of deceased's body.

[114] He was arrested by the police on Sunday at around eleven at night. He was taken to Siteki police station where he was questioned about the death of the deceased. The police then brought the first accused to where the second accused was being questioned. The first accused told the police that it was the second accused who killed the deceased and later burned him.

[115] On Monday, the police informed the second accused that the first accused was going to show them where the deceased was. At some point, during interrogation, both accused were questioned in the same room. This happened on Sunday at about 11pm. It is difficult to understand how the second accused could have been arrested at Mambane at around 11 pm on Sunday and at the same time be said to have been subjected to questioning at Siteki police station at the same time. The version of PW14 is preferred to that of the second accused on this aspect. Sihlongonyane says the second accused was arrested on Monday morning at around 6 and taken with the first accused to the different places around Mambane where they pointed out certain exhibits.

[116] It was the evidence of the second accused that on Monday morning , the first and the second accused, in the company of the police went to Mambane. They started at the royal kraal and then went to where the deceased's body

was. At Mambane royal kraal the police went inside the royal kraal and returned with two men. One of the men was Samuel and the other man is unknown to the second accused. The plan to go to where the deceased's body was, was agreed upon the previous night-on Sunday at 11pm. According to the evidence of the second accused, the police did not caution the accused before they set out to conduct the pointing out.

[117] The police were led by the accused- first to Hholobela. The accused were travelling in a police van. When they alighted from the vehicle the police asked the first accused where they should go and the first accused showed them where to go. The accused were not cautioned before the pointing out. At Hholobeni, the first accused is alleged to have pointed out the body of the deceased.

[118] From Hholobeni the group went to the second accused's homestead where he led them to a rondavel from which he retrieved a bush knife from the roof top. He also gave the police the calabash which he had bought from the first accused. The calabash contained *insiti*. The calabash had red beads. The second accused testified that the police asked to be shown the scene where the deceased had been killed.

[119] From the homestead of the second accused the group proceeded to Etjenilekushelala where the first accused took out the clothes of the deceased from where they were hidden between rocks. The group then went to

Emabhananeni where the deceased had died. From Emabhananeni, the team went to the first accused person's homestead and thereafter to the police station. It is the evidence of the second accused that the pointing out around Mambane took place on a Monday.

[120] On Tuesday, and while both accused persons were still in police custody, the police told the first accused to show them the person to whom he had sold the human parts.

[121] The second accused went to Court and was remanded on a Tuesday of the second week after he was arrested. He recorded a statement before the magistrate on the Tuesday he appeared in Court. He was told by Sihlongonyane to make a statement before the police. Prior to making the confession he had no idea what a confession is. He told the magistrate what he knew about the matter. The magistrate did not tell him about the consequences of the confession. He made a confession before the magistrate and what is contained in the statement before the judicial officer is what he told the magistrate.

[122] During cross examination by first accused's legal representative, the second accused stated that photograph JDL1 shows both accused pointing out a human body. The second accused states he pointed out the human body because he was ordered to do so by the police. The second accused conceded during cross examination that he led the police to the scene where the

deceased was killed and to his homestead. During cross examination the second accused stated that he pointed out the bush knife and informed police that the bush knife belonged to the deceased; that he took the bush knife from where the deceased met his death in the hands of the first accused. The first accused is alleged to have thrown deceased's bush knife in the bush and the second accused took the bush knife for himself from the bush. The first accused first discarded his boots before he threw away Magidi's bush knife in the bush.

[123] During cross examination, the second accused stated that he was present when the first accused killed the deceased. He did not report the murder because he feared for his life. The first accused had threatened him with death if he so much as told anyone about what he had seen. The first accused took body parts of the deceased for his friends. The second accused denied taking any bone from the deceased's body after he was killed. He told the magistrate that the body of the deceased was cut into two and he carried the lower torso of the deceased in a white sack and then deposited it next to a river. It was his evidence that he only told the magistrate so because that is what he had heard the first accused say.

[124] From the answers given by the accused persons to the different magistrates there is no tension or contradiction between the answers. The accused persons' versions is consistent and in my view show that they wanted to make the statements to the judicial officers. They were afforded a chance by

the magistrates to say if they had been threatened to make the statements and their answer was in the negative. I accordingly ruled that the confessions were freely and voluntarily made and therefore admissible.

[125] I am quite aware that the accused persons have no burden to prove the offences charged. They have no burden to prove their innocence. I, however find that both accused were placed at the scene of the murder of the deceased. The confessions of the accused persons place them at the scene of crime while PW11's evidence corroborates the fact that the deceased would have been at Mabhananeni with the first accused to dig *umutsi*. Rita Mlambo's evidence provides a crucial detail that the first accused had, on a previous day come to remind the deceased to go with him to dig *umutsi* at Mabhananeni. The lame defence, coming so late in the trial by the first accused that Magidi is unknown to him is rejected. Rita is the first accused's mother in law. Magidi is Rita's brother and lived with Rita before his death. It is inconceivable therefore that the first accused would not know Magidi-his brother in law in the circumstances.

[126] The first accused denies killing Magidi and denies giving PW2 a human hand as a remedy for good luck and good fortune. PW16 connected the human hand retrieved from PW2's home as that belonging to Magidi. These denials are obviously false. The force of suspicious circumstances is augmented where the accused attempts no explanation of facts which he may reasonably be expected to be able to explain. The false, incredible and

contradictory statements given by the first accused by way of explanation if disbelieved become of substantive inculpatory effect. The police were able to retrieve the human hand after the first accused led the police to PW2's home where the hand was found.

[127] I have found the evidence of the accomplice witness to be credible and the accomplice witness to have been unshaken during cross examination. Accordingly, the accomplice witness is discharged from all liability to prosecution for offences charged in accordance with section 234(1) of the Criminal Procedure and Evidence Act, 1938.

[128] The first and second accused pointed out the place where the deceased was killed; they then led the police to the place where the deceased was buried after his body was dismembered; they later pointed out and retrieved the clothes of the deceased where they had hidden them. It is important to state, at this point that the evidence procured during a pointing out exercise constitutes an overall confession by conduct by the accused persons, therefore the law demands that it be made freely and voluntarily².

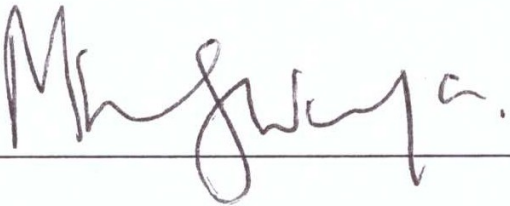
² See *King v Khetha Mamba* Criminal case n. 198/11 at paragraph 57 where Ota J stated: 'In the case of July Petros Mhlongo and Others v The King, case no. 185/92, the Court made reference to the South African case of *S v Sheehama* 1991 (2) SA 860 where the Court stated as follows:

'A pointing out is essentially a communication by conduct and, as such, is a statement by the person pointing out. If it is a relevant pointing out unaccompanied by any exculpatory explanation by the accused, it amounts to a statement by the accused that he has knowledge of relevant facts which prima facie operates to his disadvantage and it can thus in an appropriate case constitute an extra judicial admission. As such the common law, as confirmed by the provisions of section 219 of the Criminal Procedure Act 51 of 1977 requires that it be made freely and voluntarily.'

[129] The Crown alleges that the accused acted in furtherance of a common purpose in committing the crime of murder. I agree. The evidence before Court is that the deceased was struck with an axe on the neck region by the first accused. The second accused actively associated himself in the joint unlawful enterprise by: assisting in the dismembering of the deceased's body and taking the body to a place where it was buried; taking some of the deceased's body parts for his own use; failing to report the incident to the police and not being upfront with the police only relenting when he heard the first accused imputing the commission of the offence of murder on him; as well as appropriating to himself the bush-knife belonging to the deceased once he had been killed. Taken cumulatively, the evidence shows second accused's complicity in the commission of the offence of murder.

[130] For the above reasons, I am of the view that the Crown has proved its case beyond reasonable doubt. Accordingly, the first accused number and the second accused are found guilty of the murder of Magidi Mlambo.

[131] Accused number one is acquitted and discharged of the crime charged in count two. Accused number two is acquitted and discharged of the crime charged in count three. The Crown has not proved beyond reasonable doubt that the accused were unlawfully found in possession of part of a human body.



M. LANGWENYA J.

For the Crown: Mr P. Dlamini (Director of Public Prosecutions)

For the first accused: Ms N. Ndlangamandla

For the second accused: Mr O. Nzima