



**IN THE HIGH COURT OF ESWATINI**  
**JUDGMENT**

**CASE NO. 249/14**

**HELD AT MBABANE**

In the matter between:

**REX**

Versus

**THULANI GAMBULANE TSABEDZE**

**Neutral Citation:** *Rex vs Thulani Gambulane Tsabedze [249/14] [2020] SZHC*  
*198 (5 October 2020)*

**Coram:** LANGWENYA J

**Heard:** 23 March 2020; 23 July 2020; 4 August 2020

**Delivered:** 5 October 2020

**Summary:** *Criminal law-Criminal Procedure-Accused charged with murder-accused made admissions before family members- confession before a magistrate-statement made before a magistrate admitted by consent-statement ruled to be an admission-not an unequivocal admission of guilt-accused convicted on his own*

*admission-admission finds support in  
report.*

*medical report/autopsy*

## **JUDGMENT**

### **Background**

[1] The accused is charged with murder, it being alleged by the Crown that on or about 16 April 2014 at or near Mnyangombili in the Lubombo district, the accused unlawfully and intentionally killed Them bani Sarah Vilane.

[2] The accused pleaded not guilty to the charge.

[3] The Crown led the evidence of seven witnesses to prove its case.

[4] The accused asserted his right to silence and did not testify.

### **Crown's Case**

[5] The deceased, Tsembani Sarah Vilane was sixty-nine years of age when she met her death<sup>1</sup>. The deceased lived alone in a one room stick and mud, grass-thatched house at Mnyangombili in the Lubombo district. Deceased's sister, the court was told is Makati Vilane (Makati) and her niece is Nombuso Vilane (Nombuso).

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<sup>1</sup> Post-mortem report states that deceased's reputed age was sixty-nine years of age, at page 1.

[6] On 16 April 2014, during the day, Nombuso had been with the deceased and had promised to come and bring her maize chaff on 17 April 2014. On 17 April 2014, and between 2 and 230pm, Nombuso arrived at deceased's home as promised and found blood on the door of deceased's house. She called Makati. Makati came and called deceased's name and there was no response. Nombuso and Makati opened the door and made the gruesome find of deceased lying face down on the floor and in a pool of blood. The padlock on the door was locked but the door was not locked. Makati and Nombuso were devastated when they found deceased in the state she was in and they cried. Neighbours and members of the community subsequently came to the scene. The police were called but they only arrived in the early hours of the evening between 630pm and 7pm.

[7] The accused person's mother was called as PW3 and her name is Josephine Ngwenya-Tsabedze. She testified that in the evening of 16 April 2014, the accused came home and knocked on the door. She opened the door and the accused came in. The accused was sweating and had blood on his hands and on his clothes. He did not look alright. The accused informed PW3 that the blood was from meat that he was cutting where he held a piece job. The accused wore a pair of black shoes belonging to PW3; a white jacket which had an inscription at the back and a black track suit trouser. The accused then went to sleep in his brother's house. His brother's name is Wonder. Wonder was not at home on that day.

[8] On the next day, PW3 and Precious went to the mountain to collect firewood. She was called and asked to come home. When she got home, she found other members of her extended family gathered at her home. The accused admitted to killing the deceased in the family council meeting and police were called. Present at the family meeting were: Timothy, Elias, Ncamiso and Mary Tsabedze and a neighbor, Mr. Gamedze. Police arrived later and took the accused with them.

[9] PW3 identified the clothes that the accused is said to have been wearing when he returned home with blood on his hands and on his clothes. PW3 testified further, that police confiscated the knives accused came home with on the fateful evening. One of the knives was retrieved next to a rock and close to a house within her homestead by the accused. The rest of the knives, PW3 testified, belonged to the deceased. PW3 identified the knife that was retrieved by the accused next to a rock within her homestead. The clothes that the accused was wearing when he arrived home in the evening of 16 April 2014 were retrieved from under a bed in the house accused had slept in.

[10] PW3 heard from her neighbor Mr. Gamedze that the deceased had died. She went to deceased's home in the evening of 17 April 2014 after she heard about her death. She was still at deceased's home when police came and

took photographs of the scene and subsequently left with the body of the deceased.

[11] The police returned to her homestead on the next day and took accused's clothes.

[12] PW3 was not cross examined on behalf of the accused.

[13] PW4 is Ncamiso Tsabedze (Ncamiso) and a brother of the accused. Accused person's father is an uncle (*babe lomncane*) of Ncamiso. Accused and Ncamiso are neighbours. On 18 April 2014 Ncamiso was informed by Banele that the accused had something to say about the death of the deceased. The accused admitted that he had a hand in the death of the deceased. Ncamiso and Banele reported the matter to the elders within the family. The accused admitted to killing the deceased during a family meeting. The accused then asked his family to call the police.

[14] It was the evidence of Ncamiso that no force was brought to bear on the accused to make the admission. He testified that present, at the family meeting was himself, his father, accused's father and accused's mother.

[15] It was the evidence of Ncamiso further, that on the day accused admitted to killing the deceased, he was cutting accused's hair. It was put to Ncamiso

during cross examination that it was the family that told the accused that he killed the deceased. Ncamiso was unshaken in his response that the accused freely and voluntarily admitted to killing the deceased. Present when accused made the admission during the family meeting were Ncamiso, Mary Tsabedze, Precious Sambo and Elias. Timothy Tsabedze is Ncamiso's father. Ncamiso denied that it was Timothy Tsabedze who leveled accusations at the accused person that he killed the deceased. It was the evidence of Ncamiso that it was accused's father-Elias, who presided over the family meeting where accused admitted to killing the deceased.

[16] The Crown further led the evidence of Joseph Madvolo Tsabedze (PW5). It was his evidence that an alarm was raised in the community that the deceased had been stabbed and had died. He went to the home of the deceased and found deceased had stab wounds on the neck. Ncamiso and Banele informed PW5 that the accused person had admitted to the crime. When he was informed of accused's admission, he was working in the fields with Elias Tsabedze and LaNdlela. A meeting was convened at home and the accused was asked about the matter. Accused admitted to killing the deceased. PW5 also stated that no force was brought to bear on the accused to make the admission. The police were called and they arrived and arrested the accused.

[17] PW6 is 6042 Detective Constable Lungelo Ngwenya and a scenes of crime officer who was stationed at Siteki police station in 2014. On 17 April 2014,

he was on duty when he received a call from Mr. Mabuza who was stationed at police regional headquarters, Lubombo instructing him to attend a scene of crime at Tsambokhulu. On arrival at the scene of crime, he found an investigating team from Lomahasha police station led by Ezrome Simelane.

[18] At deceased's home, he observed blood at the door of the house where deceased was found. Deceased's body was half naked and lay face down on the floor; deceased's head was covered in blood. He took photographs of the scene.

[19] The accused was now in police custody. The police retrieved two knives at the house of the deceased while led by the accused. The accused also led the police to his homestead where he again retrieved a knife. PW6 took photographs. It was the evidence of PW6 during cross examination that he would not know if accused was pressurized to point out the things he did.

[20] The investigating officer is 3214 Detective Assistant Superintendent Ezrome Simelane. In the year 2014 he was based at Lomahasha police station when he received a report of a murder at Mafucula area. He went to the scene with 5601 Detective Constable Zinathi Simelane and 6417 Detective Constable Mcolisi Mahlindza. The police were led to the scene by a certain Mr Tsabedze. At the scene there were several members of the community including Makati Vilane and Nombuso Vilane.

- [21] The police observed a blood-stained door frame of deceased's house on the floor at the entrance. The door frame was made of wood. Although the padlock on the door was locked, the door was not locked. PW7 forced his way into the house and found the body of an elderly woman inside. The woman was dead. He called the scenes of crime officers to come and attend to the scene of crime. The body of the deceased had a stab wound next to the left ear. The body was taken to Good Shepherd Hospital where deceased was certified dead by a doctor and was taken to the mortuary.
- [22] On 18 April 2014 and at about 0730 hours, PW7 received a call from a Chief's runner, a Mr. Vilane of Mnyangombili who asked PW7 to come to Tsawela as the suspect in the matter had come forward. PW7 and other police officers went to Tsawela and were led by a certain Tsabedze to the home of the alleged suspect. On arrival at the Tsabedze homestead, they found several people-both men and women. A certain Josephine Ngwenya said she was the wife at the homestead. She further introduced the other people who were present at her homestead. PW7 testified that the people who were present there were: Banele Tsabedze, Ncamiso Tsabedze and Thulani Tsabedze.
- [23] The police introduced themselves to the accused and explained their mission to him. Accused was cautioned in terms of the Judges' rules. Accused was taken to a police vehicle which was parked one hundred metres away from



his homestead while police recorded statements from the witnesses at the homestead. When the recording of statement was done, PW7 went to the police vehicle where accused was kept and introduced himself as an investigating officer of this matter. He cautioned the accused in terms of the Judges' rules and the accused said something. The police sought and secured the attendance of an independent witness-a certain Mr. Gumedze. The accused led the police to the house of the deceased where the accused was again cautioned in terms of the Judges' rules. The accused pointed out two knives that were pinned at the grass thatched roof. The accused also led the police to his homestead, next to his house under a shrub where he pointed out a knife which had a handle that had no covering. This he did after he had been cautioned in terms of Judges' rules. The scenes of crime officer took photographs of the pointing out. The accused further led the police to his house and was once again cautioned in terms of the Judges' rules and he retrieved a white jacket and a sweater with inscriptions 'West Virgin' from under a mattress of his bed. He also pointed out a pair of black track suit pants and said these were clothes he wore on the day the deceased died. He also pointed out a pair of black shoes that he said he wore on the day in question. The items were seized by the police as exhibits in this matter. The items were presented in court as part of the evidence of the Crown.

[24] The accused was formally charged at Lomahasha police station.

[25] During cross examination, PW7 disputed that the accused was not warned in terms of the Judges' rules before he made a statement to the Magistrate. PW7 also disputed that he did not warn the accused of his rights to legal representation. PW7 testified that he told the accused that if he is charged with murder he will get a lawyer paid for by the State.

[26] I found the evidence of Crown witnesses to be cogent and credible.

[27] The accused subsequently made a statement before a judicial officer. The statement was not contested by the accused. The statement was admitted as evidence by consent of the defence. The contents of the statement were read into the court record. I capture hereunder the contents of the statement:

**‘On the 16<sup>th</sup> a Wednesday at around 2100 hours, I arrived at the old lady’s home I asked if she recalls what she said during the day. She said she does then not recognize me, I then took a candle brought (sic) closer to her she told me she recognizes me.**

**I then grabbed her throttled her, pressed her on her bed while pressing her then she then shouted for help, I then raped her but I did not ejaculate. I stabbed her on the neck made her lay face down wards placed her body between the bed and mattress. I left the home went home told my mother.**

**My mother told me not to elope as police will come for me. My mother also told all my uncles. They came home, Police did not come that night until the following evening. The whole family came talked to me over this, police later came talked to the family Then we proceeded to the old woman’s home they took knives from there, they also took the one I used to stab her. The police then took me to Lomahasha police station on the 18<sup>th</sup> April 2014. That is all.**

[28] May I mention that I also cut myself on both hands with the knife.

Statement signed by Judicial officer F. Msibi

Statement signed by Interpreter- S Mabuza

Statement signed by accused- T. Tsabedze.

[29] The post mortem report states that the cause of death was due to haemorrhage as a result of penetrating injury to the left side of the neck involving blood vessels. The post mortem report was entered as exhibit 'TT1'.

### **Defence Case**

[30] The accused asserted his right to silence and did not lead evidence in his defence. He also did not lead evidence from other witnesses.

[31] However, it is said that where there is *prima facie* proof of the accused's guilt, as I have found there is in this matter<sup>2</sup>, the election of the accused not to testify, although not presupposing that an adverse inference can be drawn against the accused per se, entails certain consequences for the accused. One of those consequences is that *prima facie* evidence left uncontroverted, might be found to be sufficient proof of the accused's guilt.<sup>3</sup>

[32] The Constitutional Court in South Africa in *S v Boesak* per Langa DP stated as follows in that regard:

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<sup>2</sup> Section 174 (4) if the Criminal Procedure and Evidence Act, 1938

<sup>3</sup> *S v Brown and Another*[196] All SA 625(Nc).

silent  
accused  
Court may well  
absence of an  
conclusion is

**‘The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain during the trial. If there is evidence calling for an answer, and an person chooses to remain silent in the face of such evidence, a be entitled to conclude that the evidence is sufficient in the explanation to prove the guilt of the accused. Whether such a justified will depend on the weight of the evidence.’**

[33] It is common cause that there is no direct evidence *per se* that links the accused to the death of the deceased except for the admissions he made before his family members and before a magistrate.

## **The Law**

[34] The evidence led by the Crown to prove its case centres on the admissions said to have been made by the accused to his family and the statement he is said to have made before magistrate F. Msibi. This position raises the question of admissibility of the said statements and an extract from *Du Toit et al*<sup>4</sup> is apposite where the following is stated:

confession or  
219A  
accused

**‘It is clear now, that there are two separate yet, potentially related inquiries that have to be carried out in determining the admissibility of a admission; first, whether the requirements of respectively section 217- have been satisfied and secondly, whether in all circumstances the had a fair trial<sup>5</sup>.**

[35] The rationale for the rules on admissibility of extra-curial confessions and statements made by an accused person is to protect an accused against self-

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<sup>4</sup> ‘Commentary on the Criminal Procedure Act at 24-55

<sup>5</sup> See also: *Hlayisani Chauke v The State* (70/12) [2012] ZASCA 143 (28 September 2012).

incrimination and against abuse by police whilst the accused is in custody and being questioned. Most importantly, the rules on admissibility of extrajudicial statements are meant to avoid the determination of the guilt or otherwise of an accused based on potentially unreliable or outright false evidence that has been unduly extracted from an accused person.

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

**‘226(1) Any confession of the commission of any offence shall, if such confession is proved by competent evidence to have been made by any person accused of such offence (whether before or after his apprehension and whether on a judicial examination or after commitment and whether reduced into writing or not), be admissible in evidence against such person:**

**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 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 to writing in the presence of a magistrate or any justice who is not a police officer; and,**

**Provided also that if such confession has been made on a preparatory examination before any magistrate, such person must previously, according to law, have been cautioned by such magistrate that he is not obliged, in answer to the charge against him, to make any statement which may incriminate himself, and that what he then says may be used in evidence against him.’**

[37] The above provision of the CP&E Act must be read and interpreted *in tandem* with whatever constitutional provisions which are relevant and or applicable in each case. Section 21 of the Constitution provides as follows:

**‘21(2) A person who is charged with a criminal offence shall be-**

**(a) Presumed innocent until that person is proved or has pleaded guilty;**

**(b) ....**

**(e) permitted to present a defence before the court either directly or through a legal representative chosen by that person;**

[38] Subsection 2(a) above must be read and understood subject to provisions of section 21(13)(a) of the Constitution which deals with cases where the accused bears the burden of proving particular facts.

[39] From the above cited provisions of the law, an extra-jural statement made by an accused is admissible against such an accused person at his trial provided that it has been proven to have been freely and voluntarily made by the accused, while in his sound and sober senses and without him having been unduly influenced thereto.

[40] And again, where the statement in question has been made before a magistrate, it must be proven by the Crown that the accused was duly warned before he made such a statement<sup>6</sup>.

[41] The *pro forma* of the statement made before the magistrate reflects that the accused was duly warned in terms of the Judges’ rules before he made the statement. Again, the contents of the statement made by the accused before a

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<sup>6</sup> See third proviso of section 226 (1) of Criminal Procedure and Evidence Act, 1938.

judicial officer was not disputed by the defence, thus it was entered by consent of both parties as evidence of the Crown.

[42] The magistrate further questioned the accused on circumstances which led up to accused making the statement. These questions were such as, whether he was influenced to make a statement, promised anything if he were to make a statement, whether he made a statement verbal or written in regard to the incident to any person, whether he was assaulted or had injuries, whether he expected any benefits after he made the statement.

[43] The statement made before the magistrate reflects that the accused cut himself on both hands with the knife.

[44] I am satisfied that the statement recorded before the judicial officer by the accused was freely and voluntarily made by the accused in his sound and sober senses.

[45] **Did Accused make a confession or an admission before a Magistrate?**

A confession is an ‘unequivocal acknowledgment of guilt, the equivalent of a plea of guilty before a court of law<sup>7</sup>’ In his statement before the magistrate, the accused states ‘I then stabbed her on the neck made her lay face down wards...’ This cannot amount to a confession, at most it is an unequivocal

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<sup>7</sup> *R v Becker* 1929 AD 167 at 171.

admission of assault on the deceased. Nevertheless, I am satisfied that the assault on the deceased caused her death given the findings of the pathologist. To have stabbed an elderly woman on the neck, accused foresaw that death would ensue. I am satisfied also, that the admission made by the accused before his brother Ncamiso and before his family was voluntarily made.

[46] In the present case, the accused is the only person in a position to explain the circumstances of the assault that led to the death of the deceased. The accused chose to give the explanation in the nature of admissions. The court is entitled to draw an inference that the accused committed the assault with intent to kill if one considers the nature of the weapon used and the part of the human anatomy in which he stabbed the deceased.

[47] In the statement made before a magistrate, the accused admits stabbing the deceased on the neck. This explanation is consistent with medical evidence that the cause of death was due to bleeding as a result of penetrating injury to the left side of the neck involving blood vessels. From the proven facts, it can reasonably be inferred that the act of stabbing the deceased on the neck with a knife was committed with direct intent to kill.

### **The right to be informed of right to legal representation**



[48] This aspect of the case occupied most of defence counsel's time when he addressed the court. The enquiry turns on the constitutional admissibility of an admission as I have found the statement of the accused before a magistrate to be an admission. The question is whether in all the circumstances of this case, the accused received a right to a fair trial.

[49] The accused in this case bore the *onus* of proof in regard to the alleged constitutional infringement of his right to legal representation<sup>8</sup>. The version of the accused is unknown as he did not give evidence nor did he call witnesses to testify in support of his case. What the court relies on is his admissions and the evidence of the Crown regarding accused's pointing out of the knife used in the attack of the deceased.

[50] During cross examination, the investigating officer stated that the accused was informed of his right to legal representation, in particular that as he was charged with murder, he would be given an attorney paid for by the State. The investigating officer further stated that the accused pointed out the knife used in commission of the offence after due caution.

[51] Even if the accused had not been warned about his right to legal representation, there are authorities to the effect that the court has discretion to allow or exclude unconstitutionally obtained evidence or evidence in

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<sup>8</sup> *S v Soci* 1998 (2) SACR 275 (ECD) at 288 and 289d

conflict with a constitutional right for reasons of public policy<sup>9</sup>. No strictly exclusionary rule is adopted in exercising the court's inherent power in ensuring a fair trial.

[52] Kriegler J in *Key v Attorney General, Cape Provisional Division & Another*<sup>10</sup> the following was said:

**'[13] In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book, and, on the other, the equally great public interest in ensuring that justice is done to all, even those suspected of conduct which would put them beyond the pale. To be sure, a prominent feature of that tension is the unceasing endeavor by international human rights legislature and courts to prevent or curtail excessive the prevention, investigation or prosecution of sympathy for crime and its perpetrators. technical niceties and ingenious demands is that the accused be Ferreira v Levin, fairness is of each case, and the trial decision. At times obtained be excluded. that evidence, albeit emphasis)**

**manifestly**  
**them beyond**  
**universal and**  
**bodies, enlightened**  
**zeal by State agencies in**  
**crime. But none of that means**  
**Nor does it mean a predilection for**  
**legal stratagems. What the Constitution**  
**given a fair trial. Ultimately, as was held in**  
**an issue which has to be decided upon the facts**  
**Judge is the person best placed to take that**  
**fairness might require that evidence unconstitutionally**  
**But there will also be times when fairness will require**  
**obtained unconstitutionally nevertheless be admitted.'** (my

**[14] If the evidence to which the applicant objects is tendered in criminal proceedings against him, he will be entitled at that stage to raise its admissibility. It will then be for the trial Judge to decide whether the circumstances are such that fairness requires the evidence to be excluded.'**

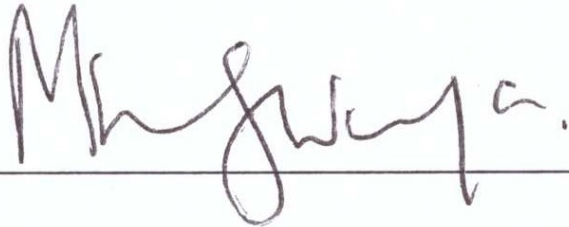
[53] I have, in the present case decided that the evidence obtained through admissions made by the accused to both members of his family and to a

<sup>9</sup> *S v De Wee* 1999 NR 122 (HC) at 1271

<sup>10</sup> 1996 (4) SA 187 (CC) at 195G-196D paras 13 & 14

magistrate are admissible even though there is no evidence on the pro forma that the accused was warned of his right to legal representation. I am of the view that since the admissions were made freely and voluntary without any force being brought to bear on the accused, such admissions are admissible in the interest of fairness.

[54] In the circumstances, and for the above reasons, the accused is found guilty of murder with direct intention.

A handwritten signature in black ink, appearing to read 'M. Langwenya J.', is written over a horizontal line.

**M. LANGWENYA J.**

For the Crown: Ms. N. Mhlanga

For the Defence: Mr. S. M. Jele