

IN THE KWAZULU NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

Case no. 159/11

In the matter of:

THE STATE

versus

Emmanuel Sibusiso Ndlela

Judgment

Delivered on: 23 December 2011

Govender AJ

The accused **is** charged with murder and it was alleged that or about the 9th of March 2011 and in or near Orange Road, Molweni in Pinetown, he unlawfully and intentionally killed Isiah Maqhingana Ndlovu, an adult male.

In the summary of substantial facts, it was alleged that the accused, with one or more companions approached the vehicle in which the deceased was sitting and fired several shots at the deceased. The deceased died as a result of multiple gunshot wounds with multiple organ involvement. The allegation by the State was that the accused and his companions acted in the execution of a common purpose to commit the offence of murder. The accused pleaded not guilty to the charge.

Various admissions were made in terms of section 220 of the Criminal Procedure Act 51 of 1977 (CPA) and these were admitted by consent and marked exhibit A. One of the admissions made was that the deceased was shot several times at or near Orange Road, Molweni in the district of Pinetown.

The correctness of the facts and findings of the post-mortem report by Dr Diagasen Pillay was also accepted, as were the photographs taken of the crime scene by Warrant Officer Ramanna. The post-mortem report was marked exhibit B while the photographs were marked Exhibit C.

The state called Constable Zuma to describe the scene of the murders. He testified that he was requested to attend the scene of the crime which was in Orange Road in Molweni. He found the deceased with bullet wounds to the head, lying on the front seat of a white kombi.

Sergeant Govender was involved in the initial arrest of the accused in Chatsworth and he then handed **the accused** to the investigating officer, Sergeant Ncama. Govender arrested the accused, Khaya Malinga and Maza. Ms Primrose T Ndlovu, the wife of the deceased and Mr M Mngwengwe testified as to what happened at the scene of the incident. I will reflect on their testimony later in the judgment.

Trial within trial:

After the evidence of Mr Mngwengwe, Ms Essack, for the State informed **the court** that she proposed leading the evidence of a confession and various pointings-out made by the accused. Mr Sithole, for the Accused confirmed that he objected to the admissibility of the confession and the pointings out. He argued that the **translation** from isiZulu to English, during both the taking of the confession, and during the pointings-out were flawed. He further alleged that the constitutional rights of the accused were either not explained **at all** or not properly explained to him prior to the confession being recorded and the pointings-out occurring. It appeared at this stage that these were the grounds upon which the admissibility of both the confession and the pointings-out **was** being challenged. I ruled during the trial that both the confession and pointings-out were admissible and indicated that reasons for my decision would be given subsequently. These are the reasons for my decision.

The accused during the cross-examination of Sergeant Ncama, for the first time mentioned that he had been tortured prior to being compelled to sign an acknowledgment that he had been served with his notice of constitutional rights, (that is the SAP 14 A). He did not allege being assaulted in any other way. He claimed that after his arrest and while he was in the unmarked police Quantum vehicle, he had a black plastic refuse bag placed over his head which was tied at the back. In addition, the accused stated his hands were tied behind his back with cable ties. He claimed that he was taken to a small cubicle, which was not the Chatsworth police cells, at Chatsworth station. He claimed that he was intimidated and threatened with death and it was suggested that the other two persons who were arrested with him had been dealt with. He also claimed that he heard the other two screaming for protracted periods, which he estimated collectively was in excess of an hour. The suggestion was that they were screaming as a consequence of being tortured. He claimed that the police officers alleged that the three suspects were 'killing the Molweni people.' After about an hour, the accused claimed that Sgt Ncama removed the plastic bag and told the accused that it was his turn if he did not sign acknowledgment of the notice. His contention was that he signed the notice of constitutional rights because of the torture.

After assessing the evidence I formed the view that the allegation of torture as described by the accused was a recent fabrication. The accused claimed that the torture occurred on the 6th of May 2011, shortly after his arrest. Later that evening, he was taken to Captain Hlongwa to record the confession. No mention of the torture was made to Captain Hlongwa. On the 7th of May 2011, prior to being taken out on the pointings- out, the accused was taken to the District Surgeon for a physical examination. After the pointing out, he was brought back to the District Surgeon for a further examination. At neither of these consultations, was any mention made of the torture. The findings and report of the District Surgeon are recorded in exhibits TWT B and C, and of note is the fact that the district surgeon found no signs of injury to the accused at either examination.

The accused consulted with his attorney on the 8th of May 2011 and alleges that he did inform his attorney, Mr Shoba, of the torture. He claimed that Mr

Shoba's advice was not to make any further statements and that he, (Shoba), would take care of things.

When the accused appeared at his first court appearance on the 9th of May 2011, **again** no mention was made of the allegation of torture. At his bail application conducted a week later, he was again represented and no mention was made of the allegation of torture.

Given the **seriousness** of the allegations and the importance that these allegations would have had in determining whether the accused should be given bail, I would have anticipated that the accused' legal representative would have placed these allegations on record.

Further when the admissibility of the confession and pointings-out were initially challenged before me, no allegation was made that the accused was tortured. These allegations surfaced for the first time during the cross-examination of Sergeant Ncama. I am of the view that had these allegations been true, the accused would have notified the District Surgeon, the presiding magistrates or **this court** when the basis for the challenge was being laid. The fact that the accused did not mention this serious allegation until late into the hearing suggests that this was a recent fabrication.

The accused alleged that Sergeant Govender was present when the torture commenced. However this most material allegation was not traversed with Sergeant Govender when he testified.

Moreover it appeared unlikely that the detainees could have been tortured for periods in excess of an hour between the time that they were arrested and **detained**. According to Sergeant Ncama's evidence, he received notification of the arrest while he was in Durban at between 17h00 and 17h30. He then travelled to Chatsworth, **to where the accused and other suspects were** and arrested them at about 18h00. **They** were booked into the Chatsworth Police station at 19h00. This is reflected in the Occurrence Book (OB), the relevant pages **of which were admitted** by consent and marked exhibit TWT G. The entries recorded at 414, 415 and 416 indicate that they were arrested and detailed in the cells at Chatsworth.

It was alleged by the accused that he was never detained at the Chatsworth Police cells on the day of his arrest and that he was kept somewhere in a cubicle that was not a cell. Sergeant Ncama was emphatic that the accused had been **detained** at Chatsworth, and he was then challenged to produce the **OB records** in which the detention of the accused would have been recorded. The relevant pages of the Chatsworth OB were submitted by consent and these pages confirmed Sergeant Ncama's version that the accused was indeed lodged in the Chatsworth police station cells on the day in question.

It was also most improbable that the accused had the refuse bag tied around his neck in excess of an hour. He subsequently changed his version and stated that the bag was loosely tied around his neck.

As the testimony of the accused unfolded, he sought to place Sergeant Ncama at every point of the process. I am of the view that this was also an afterthought that was designed to undermine the confession and pointings-out. It was never put to Sergeant Ncama that he took the accused to Captain Hlongwa to record the confession and yet the accused **testified that Sgt Ncama** was standing **at** the threshold of the door when he, (**accused**) went in to see Captain Hlongwa. The OB entry indicates that the accused was taken from the cells at Chatsworth by Constable Mkize to Captain Hlongwa and brought **back to the cells by Constable Mkhize** after the confession had been taken.

Further the accused in terms of section 220 of the CPA admitted that Constable Mkize took him to Captain Hlongwa to record the confession and thereafter fetched him from Captain Hlongwa and booked him back in the cells at Chatsworth. **In addition hereto** it was admitted that the **OB** entry was correct. The accused then subsequently changed his version to indicate that both Ncama and Mkize were present. I **reiterate my** view that the accused sought to place Ncama at the various scenes in order to undermine the confessions and the pointings-out.

Further, the accused sought to have the confession declared inadmissible on the basis that his constitutional rights as contained in section 35 of the Constitution of the Republic of South Africa were not explained to him, and he further argued that the process was flawed as there was no independent

interpreter. Captain Hlongwa testified that he had been contacted by Captain Vilakazi to note the confession. He had not been involved with the case and had not seen the docket. He further confirmed that he recorded the confession at the Chatsworth Police station and that the accused was brought to him by Const. Mkhize. He spent about an hour and forty minutes recording the confession and he testified that the accused appeared relaxed, at ease and that he spoke freely. He also stated that he did not note any injuries, and that the accused did not complain of being assaulted. Captain Hlongwa testified that he informed the accused of his S 35 rights and the accused had indicated to him that he understood English. He indicated that both, he and the accused, were Zulu speaking and that he was fully conversant in English. He stated that he explained the rights and then asked the accused to sign the pro forma which is marked exhibit 'TWT F'. It was accepted that both the thumb print and signature on each page of 'TWT F' was that of the accused. He stated that when the accused responded in isiZulu, he translated these answers into English for the purpose of recording the responses. Captain Hlongwa engaged with the accused, asked him to undress and noted the various tattoos on his body. During the trial within the trial, I was of the view that Captain Hlongwa was clear and convincing in his testimony and his version that he explained the rights of the accused was preferred to the version of the accused that the rights were not explained to him. Captain Hlongwa indicated that he was informed by the accused that he had passed Matric. It appeared that the accused had in fact passed standard 9. I am of the view that this difference is not material to the issue of whether the accused understood his rights. It was not contended that the accused had no knowledge of English and having past standard nine, he must have had a basic understanding of English.

Based on some of the responses on page 4 of TWT'F', Mr Sithole alleged that Captain Hlongwa attempted to misled the process by intimating that there was a third person interpreting. This submission was untenable as Captain Hlongwa signed on page 12 of TWT 'F' both as the interpreter and as the officer who recorded the confession. As both spoke isiZulu, there no need for an interpreter and as Captain Hlongwa appeared proficient in the English language, I am satisfied that the responses by the accused were accurately translated into English by Captain Hlongwa. I am not convinced that the lack of an independent interpreter, in these circumstances, in any way compromised

the accurate and **proper** recording of the confession. I am satisfied that the confession should be admitted.

As regards the pointings out:

The accused alleged that it was his understanding that he was being taken to verify his address when he was taken on the pointing-out. He claimed that he did not realise that he was being taken on a pointing out and was asked to be photographed at various places. This cannot be correct. The accused was photographed in the nude and with his clothes on, taken to district surgeon for a physical examination and accompanied by a photographer and **senior ranking police officials such as Captain Cele** on the journey. Given these factors, he could not have believed that the purpose of the journey was simply to verify his address. This, in **my** view was yet another instance of a recent fabrication. No allegation was made that the accused was assaulted prior to, during or after the pointing out. The accused was taken to a district surgeon prior to the pointing out and after it was completed. These reports were admitted as exhibits TWT B and C. The district surgeon reported that in respect of both examinations, the accused was found to be free of physical injuries, he was unharmed and healthy. He also appeared calm. Photographs of the accused contained in exhibit TWT 'J' appear consistent with the findings of the district surgeon as no visible injuries are discernible.

Once again, Captain Cele who noted the pointings out was Zulu-Speaking. He was adamant that accused understood what was being explained and that they communicated in isi'Zulu and that the **responses of accused** were translated and recorded into English. Much was made of a comment by Captain Cele that he was not fully conversant in English. However, it **was** clear that Captain Cele was proficient **in English**, and **was** able to accurately translate **accused'** responses from isiZulu to English. Captain Cele stated that he is sufficiently proficient in English to carry out the responsibilities of his job. I am satisfied that there was no material irregularity in Captain Cele translating the responses of the accused from isi'Zulu to English.

The accused belatedly attempted to impugn the pointings out by stating that both Sergeant Ncama and Sergeant Govender had accompanied Captain Cele to the pointing out. However these allegations were not **traversed with** either

of these **witnesses** when they testified, and appeared as part of a pattern of recent fabrications **by the accused**.

For these reasons, I concluded as follows on the issue of admissibility:

The confession noted by Captain Hlongwa dated 6th of May 2011 is admissible.

The pointings out made to and recorded by the team lead by Captain Cele on the 7th of May 2011 is admissible.

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Having ruled the confessions and the pointings-out to be admissible, the State again led the evidence of Captain Hlongwa and Captain Cele to provide the contents of the confession and pointings-out respectively. The confession was admitted and marked exhibit D. Captain Hlonwa testified that the confession was made in isi'Zulu and then translated into English by him. In the confession, the accused stated that he was a taxi owner in the Molweni area and that he had a dispute with the deceased, M Ndlovu over threats made to prevent his **(accused')** taxi from operating. A meeting between the two ended acrimoniously and the accused stated that he and his friend, Mjay Sikhakhane, then started planning to kill Ndlovu. It was decided to use a fire-arm that the **accused** had illegally purchased and it took them two days to locate the deceased.

The accused stated that they noticed the vehicle of the deceased parked outside his (the deceased's) sister's house and that it was about 18h00. **Accused** was using his car at the time and had parked it away from the vehicle of the deceased. According to the accused, he and Mjay Sikhakhane walked to the vehicle, and the firearm was given to Mjay because the accused considered him **to be** better at shooting. They walked towards the White Hi-Ace that belonged to the deceased and noticed the deceased sitting in the driver's seat. The accused stated that Mjay then shot the deceased about three times in the head and that he knew that he was dead as he saw pieces of his brain splattered over the seat. They then walked back to his car where he retrieved his fire-arm from Mjay and dropped Mjay off at his home. The next day it appears that he met Mjay and they threw the fire-arm into the Umgeni river. A

few weeks later Mjay was murdered, and fearing for his life, the accused fled to Umlazi. When he heard that the police were looking for him, he returned and was subsequently arrested.

Under cross-examination, Captain Hlongwa confirmed that he did not ask the accused what car was used by him on the day and neither did he ask the accused what he was wearing on the day. Under cross-examination, the various contradictions in the State's case was put this witness, but his response was that he only wrote down what was being said and could not comment on the contradictions.

It is necessary at this stage to consider the evidence of two witnesses called by the State who were present at the time of the shooting. Mrs PM Ndlovu confirmed that she travelled with her husband to Orange Road in Molweni. They had gone there to pick up a motor vehicle light which Mr M Mngwengwe wanted. She was seated in the back of the vehicle and her husband was seated in the front. While they were waiting for Mr Mngwengwe to return, they noticed a Toyota Tazz drive past. She then recounted a conversation with her husband. They identified this car as belonging to Khaya Malinga and her husband confirmed that he was still embroiled in a dispute with Malinga relating to their various taxi operations. As she was speaking on the cellphone, she saw a silhouette approach on the driver's side of their vehicle and she then heard explosions. She initially thought that the cellphone had exploded and threw it down, but then heard her husband groan and fall onto the passenger seat. She said that there were further explosions and she saw a person in what appears to be a hooded jacket running past.

She did not see the face of the **shooter** and could not identify the colour of the hooded jacket. She testified that she knew the accused as they grew up together in the Molweni area. Under cross-examination, Ms Ndlovu conceded that the person who fired the shots was short and thin and confirmed that this description did not fit the accused. She also confirmed that she knew Khaya Malinga as he lived in the area. She confirmed that she told the police that it was Khaya's motor vehicle that drove past.

Mr Mngwengwe testified that he got out of the vehicle to go to the home of the mechanic pick up the light. As he walked towards the house, he noticed a Toyota Tazz which he said belonged to Khaya Malinga. He stated that there were three occupants in the vehicle. They were Malinga, Mjay Sikhakhana and an unknown person, and Mjay Sikhakhana was driving the vehicle. As he received the light, he noticed that the person who was not known to him alight from the front passenger seat of the vehicle and walk towards the deceased's vehicle. Mr Mngwengwe reached the vehicle and as he opened the front passenger seat and got into the motor vehicle, the unknown person started firing at Mr Ndlovu. He estimated that about five shots were fired and he got out of the vehicle. The shooter then went back in the direction from which he came and got into the white Tazz. He could not recognise the shooter and said that he was unaware of the colour of the hooded jacket, but guessed that it could be Khaki. He also confirmed that he knew the accused as a person who lived in the area. Under cross-examination, he conceded that he told the police the names of the persons who were in the white Tazz. When being re-examined, he indicated that he did not see the face of the shooter but that the shooter was shorter than himself. The witness confirmed further that he was shorter than the accused.

Neither the testimony of Mrs Ndlovu nor that of Mr Mngwengwe was discredited and I must accept their uncontradicted testimony. In important respects their evidence is materially different to that which was stated by the accused in the confession. Both witnesses knew the accused and neither placed him at the scene. Both witnesses indicated that the car that conveyed the assassin belonged to Khaya Malinga. Both witnesses identified Khaya Malinga as being at the scene. Mr Mngwengwe indicated that there were three people and not two in the vehicle. Both witnesses only noticed one person walking to the vehicle before the shooting commenced. From the description of the assassin, it seems very improbable that it was the accused.

Both witnesses testified that there were many shots and Mr Mngwengwe estimated that there were about 5.

The last witness to testify on behalf of the State was Captain Cele. He was recalled to indicate what was pointed out to him by the accused on the 7th May 2011. The pointings out and the report were admitted and marked exhibit D.

He stated that the accused took him to house number 26 Charl Malan Road in the Bluff where he produced a grey hooded jacket. Photograph 10 of exhibit TWT 'J' depicts the accused holding a jacket. According to Captain Cele, the accused stated that he used this jacket when he shot the deceased. This flies in the face of the evidence of the witnesses who were at the scene and with what the accused **stated** in the confession.

He then testified that the accused took him to a place alongside the Umgeni River where he pointed out where he had disposed of the fire-arm. Photographs 11 of exhibit TWT J depicts the accused pointing to a spot in the river. In his evidence in chief, **Captain Cele** stated that the fire-arm could not be found.

However under cross examination, he conceded that no attempt was made to actually look for the fire-arm in the river. He stated that he did not get into the river as he was concerned about his safety as he did not know how deep the river was. When asked why he did not make any attempt to secure the assistance from an SAPS diver, he replied that he contacted radio control and that no one was on call that day. This was never mentioned before. He also stated that he asked the investigating officer to make arrangements to search for the fire-arm. Sergeant Ncama made no mention of searching for the fire-arm. On the evidence, it appears that no real attempt was made to search for the fire-arm and as a consequence of this, vital evidence could have been lost. Given the importance of the evidence and the potential link between the fire-arm and the murder of the deceased, one would have expected a senior police officer like Captain Cele to have acted more diligently in ensuring that the river was searched. As the fire-arm was not found, the pointing out to the spot in the river carries no evidential weight.

Captain Cele that the testified that accused took them to the crime scene and photographs 13 and 14 of exhibit TWT 'J' depicted the accused pointing out the scene of the crime. According to Captain Cele, the accused pointed out a spot between poles 5 and 6 in Chakide Road in the Molweni area as the place where the crime occurred. However Constable Zuma who attended the scene of the crime on the 9th March 2011, indicated that the incident occurred in Orange Road. This was confirmed by Ms Ndlovu and by Mr Mngwengwe.

There was no evidence of a direct link between the jacket found and the crime, no fire-arm was found at the scene and the place that the accused pointed out as being the place where the crime occurred was not the place where the crime actually occurred. I put to Ms Essack that as a consequence of this, the pointings-out carried very little evidential weight and she accepted this proposition.

Importantly Captain Cele recorded that the accused stated that he shot the deceased and that he disposed of the fire-arm on the same day in a river. According to Captain Cele, the accused stated that he was alone when he disposed of the fire-arm. These assertions are different from that recorded in the confession by Captain Hlongwa who noted that the accused stated that Mjay Sikhakhane carried out the killing and that they met the next day to dispose of the firearm.

The State closed its case after Captain Cele testified and Mr Sithole made an application for the accused to be discharged in terms of section 174 of the CPA. Mr Sithole pointed out that according to the evidence led by the state, three different people may be responsible for killing the deceased. In terms of exhibit D, the pointing out report, the accused is alleged to have killed the deceased. In terms of exhibit F, the report on the confession, the accused is quoted as saying that Mjay did the shooting in his presence. Finally according to the witnesses at the scene, the shooting was done by a single individual who was much shorter and thinner than the accused. Mr Sithole also pointed out the material inconsistencies between the contents of the confession and the evidence of the various witnesses called by the state. He argued that the eye witnesses did not place the accused at the scene and at least one of them was clear that the accused was not the shooter. He concluded that no reasonable court would convict on the evidence before the court and that the application for discharge should be granted.

Ms Essack, on the other hand, opposed the application for a discharge, and argued that the confession which was deemed admissible indicates that the accused was instrumental in carrying out a premeditated murder. After some equivocation as to the actual role played by the accused in the crime, she submitted that the accused was with the shooter when the crime was committed and was complicit in the planning and in the execution. She

submitted that as the confession had been admitted, the accused owed an explanation to the court as to why he had made the confession and why he made conflicting comments in the pointing out. She correctly pointed out that the accused' defence was a bare denial and that he was obliged to provide some explanation for making the confession. She acknowledged that the State's case was entirely reliant on the confession as the pointing out added no evidentiary weight in support of its case. There was no other evidence that materially corroborated the confession. Ms Essack submitted that the confession must be assessed in isolation and not in conjunction with the other evidence led by the state. She concluded that if the confession is assessed on its own, it directly implicates the accused in a premeditated murder and this establishes a prima facie case against the accused, thus justifying the dismissal of this application.

Section 174 of the CPA provides:

If at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.

It has been held that the test is whether there is no evidence on which a reasonable person acting carefully may convict.¹ Prior to the constitutional dispensation, the following enquiry laid down by Hiemstra CJ in *S v Shuping & Others* 1983 (2) SA 119 (B) was generally followed.

The first consideration is whether there is evidence on which a reasonable man can convict; if the answer is negative it must be asked whether there is a reasonable possibility that the defence evidence may supplement the State case; if the answer is positive a discharge should be refused.²

The issue was whether this approach was consistent with section 35(3)(h) of the Constitution which provides that every accused person has the right to remain silent and not to testify. In *S v Lubaxa*,³ the SCA reflected on how

¹ . R v Shein 1925 AD 6 and S v Magxwalisa & others 1984 (2) SA 314 (N)

² . quoted in Du Toit et al *Commentary on the Criminal Procedure Act* 22-321

³ . S v Lubaxa 2001 (2) SACR 703 (SCA)

section 174 of the CPA should be reconciled with section 35(3)(h) of the Constitution and other constitutional rights and concluded thus⁴ :

I have no doubt that an accused person (whether or not he is represented) is entitled to be discharged at the close of the case for the prosecution if there is no possibility of a conviction other than if he enters the witness box and incriminates himself. The failure to discharge an accused in those circumstances, if necessary *mero motu*, is in my view a breach of the rights that are guaranteed by the Constitution and will ordinarily vitiate a conviction based exclusively upon his self-incriminatory evidence.

The right to be discharged at that stage of the trial does not necessarily arise, in my view, from considerations relating to the burden of proof (or its concomitant, the presumption of innocence) or the right of silence or the right not to testify, but arguably from a consideration that is of more general application. Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common law principle that there should be “reasonable and probable” cause to believe that the accused is guilty of an offence before a prosecution is initiated (*Beckenstrater v Rottcher and Theunissen* 1955(1) SA 129 (A) at 135C-E), and the constitutional protection afforded to dignity and personal freedom (s 10 and s 12) seems to reinforce it. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold. That will pre-eminently be so where the prosecution has exhausted the evidence and a conviction is no longer possible except by self-incrimination. A fair trial, in my view, would at that stage be stopped, for it threatens thereafter to infringe other constitutional rights protected by s 10 and s 12.

The test laid down by a unanimous SCA is that section 174 must be interpreted consistently with the right to a fair trial and with the rights to dignity and personal freedom . This would require determining whether at the close of the prosecution’s case a conviction is no longer possible except if the accused incriminates himself. If this is the conclusion, then the accused would have to be discharged. A failure to do so may vitiate the conviction that follows. I now turn to the question of whether there is no possibility of a conviction on the evidence at the close of the state’s case.

Not only does the pointing out statement not support the contents of the confession, but it undermines the veracity of the confession in material respects. In the pointing out statement, the accused is alleged to have stated that he killed the deceased whereas in the confession he states that he provided the gun and accompanied the assailant to the deceased’s vehicle

⁴ . Ibid from para 18 to 20

where the killing occurred. In the pointing out statement as well as in the confession, the accused is reported as having stated that he drove to the scene of the crime in his vehicle. Neither Captain Hlongwa nor Captain Cele deemed it necessary to ask for a description of his(the accused's) vehicle. However both Ms Ndlovu and Mr Mngwengwe were clear that the car ferrying the assailant was a White Toyota Tazz which belonged to Khaya Malinga. Both informed the police of this immediately after the incident.

Neither saw the **accused** at the scene, but saw the other occupants of the vehicle. According to Mr Mngwengwe, one person left the Tazz and walked to the deceased's vehicle where he opened fire. This person then went back to the Tazz which departed. This directly contradicts the statement in the confession that the accused and the assailant walked to the deceased's vehicle where the shooting occurred. This witness confirmed that the person who did the shooting was much shorter than him and that he was shorter than the accused. He did not recognise the shooter but he knew the accused as someone who lived in the area. This contradicts the version in the pointing out statement that the accused actually did the shooting. Both the evidence of Ms Ndlovu and Mr Mngwengwe were consistent in that both indicated that there was one shooter. Neither saw the accused at the scene. Ms Ndlovu also stated that the shooter was thin and short and agreed that this description did not fit the accused. Mr Mngwengwe made similar comments in his testimony **in respect of the description of the shooter**.

In both the confession and in the pointing statement, reference is made to the deceased being shot approximately three times. Mr Mngwengwe estimated that five shots were fired while Ms Ndlovu indicated that many shots were fired. According to the post-mortem report, there were multiple gunshot wounds and 9 were identified. This is a far cry from the three shots that the accused referred to in his confession. The description of the multiple gunshot wounds in the post-mortem report indicates that the deceased was shot repeatedly and the report which was admitted by consent directly contradicts an important aspect of the confession. The post-mortem findings regarding the number of gun-shot wounds on the deceased are closer to the estimation of the witnesses were at the scene than to the number given by the accused.

Section 209 of the CPA provides:

An accused may be convicted of any offence on the single evidence of a confession by such accused that he committed the offence in question, if such confession is confirmed in a material respect or, where the confession is not so confirmed, if the offence is proved by evidence, other than such confession, to have been actually committed.

It is common cause that the confession is not confirmed in a material respect by evidence outside the confession. It is also apparent that the occurrence of the offence was proved by evidence other than the confession. However the confession itself is contradicted in a number material respects by other evidence led by the state. In the *S v Mbambo*,⁵ the court when interpreting the predecessor to section 209 of the CPA held that even where there is evidence outside the confession which corroborates it in some material respects, there is still the overriding requirement that the trial court must be satisfied beyond reasonable doubt that the accused is guilty.

In *S v Khumalo*,⁶ there were inconsistencies between what the accused stated in his confession and other evidence. The court held that the 'discrepancies between the appellant's confession and the objectively indisputable facts constituted a serious difficulty in the way of the State securing a conviction for murder against the appellant, for they are of a material nature and accordingly strongly suggestive of the possibility that the appellant's confession may have been false.'⁷ Finally in *S v Blom* 1992 (1) SACR 649 (E), it was held that the court must ask itself whether it can safely rely on the material allegation made in the confession and whether the guilt of the accused has been proved beyond reasonable doubt. It went to state that if the court had doubts as to the probative value of the confession and if this was the only evidence linking the accused to the crime, then in that event there would be a reasonable doubt as to whether the accused committed the offence in question.

The confession in this case is riddled with inconsistencies **when** evaluated against the other evidence presented by the State. It cannot safely be relied upon. These inconsistencies create a reasonable doubt as to whether the accused committed the offences with which he is charged. I am of the view

⁵ . *S V Mbambo* 1975 (2) SA 549

⁶ . *S V Khumalo* 1983(2) SA 379 (A)

⁷ . *Ibia* at 382.

that at the close of the State's case a conviction is not possible, except if the accused were to incriminate himself. In the light of the S v Lubaxa (supra), I am obliged in these circumstances to grant the discharge that is applied for in terms of section 174 of the CPA.

In the circumstances I made the following order:

1. The application for a discharge in terms of section 174 of the CPA is granted.
2. The accused is accordingly found not guilty of the charges in the indictment.

Dated at Durban on the 23rd day of December 2011

Govender AJ

For the State: Ms Essack

For the Accused: Mr Sithole