

**IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)**

CASE NO: 161/07

DPP REF NO: JPV 2007/0240

In the matter of:

THE STATE

versus

THULANI SYDNEY MGABHI

Accused

J U D G M E N T

MEYER, J:

[1] The accused, Mr Thulani Sydney Mgabhi, has been arraigned for trial on an indictment containing one charge of murder of the late Mr Esrom Mpiyakhe Mdlalose (*“the deceased”*) committed on 19 February 2007, and

one charge of attempted murder of Mr Ramaoto Alfred Mabudusha committed on 5 March 2007.

[2] Adv Badenhorst appears for the State and the accused is represented by Adv Zulu. The accused pleaded not guilty to both counts and made no plea-explanation.

[3] At the commencement of the proceedings the accused made admissions in terms of section 220 of the Criminal Procedure Act 51 of 1977 (Exhibits A-D) relating to the identity of the deceased, his death on 19 February 2007 as a result of a "*gun shot wound chest and abdomen*", which he sustained on 19 February 2007 at or near the corner of Rossettenville and Stephenson Roads, Rossettenville, and that the photo album and key thereto (Exhibit D) correctly reflect the scene where the body of the deceased was found in a Metro bus that was driven by him.

[4] The State called as witnesses Ms Sibongile Xaba and Mr Ramaoto Alfred Mabudusha.

[5] Ms Xaba testified that on the morning of 19 February 2007 at about 05h10 she was walking down Rossettenville Road on foot when she noticed a double-decker Metro bus in Rossettenville Road that was stationary at the intersection with Stephenson Road. A white BMW motor vehicle with black tinted windows stopped next to the right-hand side of the bus more or less in line with where the bus driver was seated. The passenger side front window

of the BMW was open and she was able to see the passenger. She did not see the driver. She heard three gun shots and then she fled. The bus turned into Stephenson Road, drove down it and collided with the wall of certain public toilets. She noticed that the bus driver was slumped over the steering-wheel. She identified the scene depicted on the photographs (photographs 1-14, Exhibit D), including a broken wall (photographs 13 and 14, Exhibit D) and she confirmed that the bus had come to a standstill at a point which was depicted as point A on photograph 14.

[6] Mr Mabudusha testified that he had been a Metro bus driver for many years. On 5 March 2007, he was driving a Metro bus along Wemmerpan Road en route to the depot in Village Main. At the on-ramp to the N17 motorway he noticed a white 3 series BMW motor vehicle with dark tinted windows and no number plates travelling parallel to the bus. The left front and rear passenger windows of the BMW motor vehicle were open and when it reached the right side window of the bus more or less next to where Mabudusha was seated, he noticed two human arms protruding from each window. He did not see firearms, but he heard the sound of a gunshot, and he thereupon moved out of his seat and he fell into the passage of the bus. He believed there were three to five shots fired and he later saw three holes in the side of the bus just below the driver's seat. He prevented the bus from colliding with a pole by grabbing the steering-wheel and he was uninjured. He further testified that from 29 January 2007 there was a Metro bus drivers' strike which ended some time after the incident about which he testified. The deceased on count 1 was a friend and colleague of Mabudusha.

[7] The State placed on record that it wished to introduce in evidence a certain pointing out made by the accused to Supt André Neethling in connection with the murder count. The pointing out was contested by the accused on the grounds that it had been induced by assaults and torture and was not freely and voluntarily made, and that his constitutional rights had not been explained to him prior to the making of the pointing out. A list of the names of certain persons who allegedly assaulted and tortured the accused was provided to the State.

[8] A lengthy trial-within-the-trial was held. Earlier this morning I made a ruling that the state had not proved beyond a reasonable doubt that the pointing out was made freely and without undue influence and that the evidence of the pointing out made by the accused to Supt Neethling on the 1st April 2007 was inadmissible. I indicated that I would furnish the reasons for the ruling when judgment is delivered in this matter and such reasons are accordingly now given.

[9] In the trial-within-the-trial the State called as witnesses Sgt Mbowane (the investigating officer), Supt Neethling, Capt Magampa, Capt Mngomezulu, Capt Dlamini, Insp Mlangheni, Supt Ngcobo, Supt Sefoloshe, Capt Khumalo, Capt Sekgobela, and Prof Vellema. The police officers who testified and who were implicated in the alleged assaults and torturing of the accused and of others, denied such allegations.

[10] Application was made on behalf of the accused to introduce similar fact evidence relating to the arrests and torturing of others who had been arrested on similar charges in connection with the Metro bus strike action during February/March 2007. On 28 March 2008, I made a ruling in terms whereof the application to introduce such similar fact evidence relating to the arrests and alleged torturing of Mbuso Zulu, Ruphus Mapuase Mohlala, Deon Makhura, Stephen Sathekge, Johannes Mnisi and Themba Mzibela by members of the Provincial Organized Crime Unit in Germiston ("SOCS") during February and March 2007 was allowed.

[11] The accused testified and he called Mr Stanley Makhateni as a witness. The similar fact witnesses called on behalf of the accused were Mr Mbuso Zulu and Mr Rufus Mohlala.

[12] Insp Mbowane is a member of the SAPS with 10 years' service and has been stationed at SOCS since 2006. He is the investigating officer in this case. He testified that on Saturday, 31 March 2007 at about 05h00, on information received from an informer, he, assisted by a colleague of his from SOCS, Insp Makofane, and twelve uniformed police officers from the SAPS Hillbrow and from the SAPS Flying Squad who were not known to Mbowane, arrested the accused at a flat in Kotze Street, Hillbrow, where the accused and about ten other people were having alcoholic drinks. Mbowane identified himself to the accused who appeared to Mbowane to be under the influence of alcohol. He explained to the accused that they were police officers and the reason for their attendance. He informed the accused of the murder charge

against him and that the incident took place at Stephenson Road in Rossettenville on 19 February 2007 at 05h00. Mbowane explained to the accused his rights, namely the right to remain silent, that he could contact a legal representative of his choice, that if he did not have the money to pay for a lawyer then a legal representative from the Legal Aid Board could be appointed for him, and that he could also contact his family and inform them about his arrest. When Mbowane requested to handcuff the accused, he pulled his hands away saying that he was not going to be handcuffed. Because he was resisting, Mbowane, assisted by some of the other police officers including Makofane, “*pushed him to the ground*” or, as it was described under cross-examination, “*grabbed him and wrestled him to the ground*” and handcuffed him with his hands behind his back. Mbowane summoned transport and a Mazda 626 vehicle driven by Insp Mlangheni fetched them.

[13] The accused then took Mbowane to another flat where he said that he was staying with Mr Stanley Makhateni. Mbowane searched this flat. Makhateni arrived and took the police officers to a nearby panel-beating business where Makhateni was also arrested by Mbowane and Makofane. The uniformed police officers escorted them out of town and then turned back while Mbowane and Makofane took the accused and Makhateni to the SAPS Germiston where they arrived at 18h00.

[14] Mbowane read the accused his rights from a form headed “*Notice of Rights in terms of the Constitution (Section 35 of Act No. 108 of 1996)*”

(Exhibit H). He confirmed that the accused understood his rights, the form was signed by the accused and Mbowane at 18h10, and a copy thereof was given to the accused. The accused was thereafter booked into the cells at the SAPS Germiston by the cell commander at 18h20. The necessary Occurrence Book (“OB”) entry was made by the cell commander in the presence of Mbowane and co-signed by him. Mbowane, in his evidence-in-chief, confirmed the contents of this entry with OB No. 1633 (Exhibit I). Makhateni was also detained at the Germiston Police Office cells as from 18h20 on Saturday, 31 March 2007 (Exhibit I). Mbowane then left.

[15] The next morning, which was Sunday, 1 April 2007, at approximately 08h00-08h10, Mbowane visited the accused to interview him for the purpose of taking a warning statement from him and to obtain his fingerprints. Mbowane identified himself to the accused as the investigating officer in the matter and he again informed the accused of the charges against him, of his right to remain silent and that anything he said would be written down and could be used in court, of his right to obtain legal representation of his choice or if he could not afford one that one could be appointed for him, that he could contact his family to inform them that he was arrested and where he was detained, and that he would appear in court on the first court day following his arrest. The accused asked to make a phone call to his girlfriend and Mbowane allowed him to do so on Mbowane’s cellular phone. He informed Mbowane that he did not have his own legal representative at the time, but he requested his girlfriend to arrange a legal representative for him. The accused further informed Mbowane that he had no problem and would explain

to Mbowane what he knew of the matter even though a legal representative was not present. The accused thereupon disclosed certain information to Mbowane relating to the murder. Before taking any written statement, Mbowane stopped the accused and explained to him that he would rather arrange for an officer with a higher rank to whom the accused could furnish the information. The accused informed Mbowane that he had no problem to furnish the information to such other officer. Mbowane at no stage took a warning statement from the accused.

[16] Mbowane contacted Capt Magampa at SOCS, who was willing to take the accused's warning statement at his office at SOCS, which is about half a kilometer away from the SAPS Germiston. When Mbowane wanted to handcuff the accused to book him out of the cells, he told Mbowane of pain that he felt in his shoulder. Mbowane asked the accused whether it was serious and whether he wanted to be taken to a doctor. The accused said: *"No it was just a little thing, just scratches."* Mbowane asked the accused when and where he had sustained *"the injuries"*, whereupon the accused replied: *"At the time when he was arrested."* Mbowane testified that the accused *"was wearing a very tight T-shirt. I saw some scratches on his left shoulder down and on his wrists where he was cuffed"*. The accused according to Mbowane was shy and did not wish to remove his T-shirt. Mbowane testified that the accused was *"relaxed, very friendly and talking easily"*. Mbowane booked the accused out of the cells and the necessary OB entry was made at 08h15 in the presence of Mbowane and co-signed by him (Exhibit J, entry #12).

[17] Mbowane handed the accused over to Magampa in his office at SOCS so that Magampa could take a warning statement from him. Magampa was not requested to deal with a pointing out. Mbowane left them and went back to the SAPS Germiston where he booked Makhateni out of the cells at 08h25 (per OB entry 13, Exhibit J). Mbowane took Makhateni to his office at SOCS in order to take a warning statement from him. Magampa called Mbowane and told him that the accused had furnished information which he, Magampa, could not handle and that he would arrange assistance from higher officers who are not associated with the SOCS unit. Magampa did not take a warning statement from the accused.

[18] Mbowane fetched the accused from Magampa's office and thereafter took both the accused and Makhateni back to the SAPS Germiston, where they were booked back into the cells at 09h51 in terms of the relevant OB entry (entry #20 on Exhibit K), which was again made in Mbowane's presence. The accused was booked out again at 09h55 (entry #21, Exhibit K) whereupon Mbowane and Makofane took him to the SAPS Johannesburg Central, because such was the arrangement made between Magampa and Supt Neethling. The OB entry, which was made in Mbowane's presence, records that the accused was booked into the cells at the SAPS Johannesburg Central at 11h50 (entry #25 on Exhibit L). Mbowane and Makofane then left.

[19] The next time Mbowane saw the accused was when he booked him out of the cells at the SAPS Johannesburg Central on Tuesday, 3 April 2007, at 09h40 in order to take him to the Johannesburg Magistrates' Court. This is supported by an OB entry, which was made in the presence of Mbowane (entry #121, Exhibit M).

[20] Capt Magampa's evidence was also that the accused was brought to him after Mbowane had requested him to take a warning statement from the accused. He testified that Mbowane brought the accused to his office at SOCS. Mbowane then left. Their arrangement was for Magampa to call Mbowane when he had finished the taking of the accused's statement. Magampa interviewed the accused and then decided that it would be preferable for a senior officer from another unit to take over since it seemed to him that the accused wanted to make a pointing out. The accused agreed. Magampa phoned Mbowane to fetch the accused. Mbowane thereupon fetched the accused from the office of Magampa. Once they left Magampa called Supt Neethling, who agreed to assist in a pointing out. Magampa was uncertain as to the time duration between the time when Mbowane brought the accused to him and when he fetched the accused from him, but he estimated the time to be less than half an hour.

[21] Supt Neethling testified that, at the request of Capt Magampa, he conducted a pointing out by the accused on Sunday, 1 April 2007 at 13h29 to 15h25. Capt Khumalo interpreted between Neethling and the accused from English into Zulu and *vice versa*. The accused was taken through the *pro*

forma portion of the “*notes on the pointing out of a scene(s) and/or point(s)*” (Exhibit O), which was completed by Neethling during the interview which he had with the accused prior to the pointing out. Neethling testified that each page was read back and interpreted to the accused and also the entire document once completed. It was signed by Neethling, the accused, Khumalo, and a photographer and a driver who were also present. Photographs were taken of the accused (Exhibit P), but the accused refused to take off his clothes and he was accordingly asked to lift up his shirt as depicted on photographs 4, 5, 6, 14 and 15 with his shoulders and upper arms covered by his T-shirt. Photographs 5, 6 and 14 depict scratch marks on the left side of the accused’s back. Photograph 12 depicts marks on the accused’s wrists.

[22] In cross-examination Neethling was shown photographs taken of the accused on 4 April 2007 at 12h30 (Exhibit Q), depicting an injury to the accused’s left shoulder. It was put to Neethling that the accused would deny various of the answers which Neethling had recorded in Exhibit O, to which Neethling replied that he did not understand the Zulu language and had relied upon the interpretation by Khumalo. It was also put to him that the accused had told Khumalo that he needed medical attention because of assaults, to which he replied that the accused did not appear as if he had been assaulted.

[23] Capt Khumalo testified that he acted as interpreter from English to Zulu and *vice versa* between Neethling and the accused. He and the accused understood each other. The accused appeared to him to be “*free*” and not as

if he had a problem nor did the accused mention to him that he had a problem. After Neethling had taken down the statement, Khumalo read it back to the accused and the accused was satisfied with the contents thereof. The evidence of Neethling and that of Khumalo corroborated each other on the material respects.

[24] The accused alleged that Capt Mngomezulu was the driver of the Mazda 626 motor vehicle in which Mbowane, Makhateni and the accused were taken to the SAPS Germiston. Such was denied by Capt Mngomezulu, who testified that he only met the accused during May 2007 when the accused attended at the SOCS offices to collect his cellphone. According to Mngomezulu that was his only contact with the accused. Insp Mlangeni testified that he was the driver of the Mazda 626 motor vehicle that took Mbowane, Makhateni and the accused to the SAPS Germiston on the 31st March 2007. He denied that the accused was assaulted or threatened in the vehicle en route to Germiston.

[25] Supt Sefeloshe testified that on 4 April 2007 he conducted a different pointing out by the accused. He questioned the accused about an injury on his left shoulder. The accused replied that he had sustained that injury on the day of his arrest and that he had received some medical attention for it. He identified the injury as the injury depicted on photographs 1, 2 and 3 (Exhibit Q).

[26] Supt Ncgobo testified about the Metro bus strike action at the beginning of 2007 when certain non-participating drivers were shot. She obtained information of the names of persons who were suspected of being involved in such crimes from Metro bus, and she conveyed such information to Mbowane.

[27] Capt Segobela testified that on a date which she accepted was Sunday, 1 April 2007, she was on duty doing administrative tasks in her office when Mbowane brought Makhateni to the SOCS offices. She requested Mbowane to collect documents for her from a person with whom she had an appointment in Alberton. He agreed on condition that she took a statement from Makhateni, which she did. Under cross-examination she conceded that language difficulties existed between her and Makhateni – she spoke Southern Sotho and Makhateni spoke Zulu. The statement was taken in her office, which was on the first floor about 20 metres from the reception area. She testified that the reception area only had two benches with no table and that the furniture was subsequently changed to two couches and one bench. One has to pass through the reception area in order to get to the offices on the first floor. Some time later Mbowane fetched Makhateni from her when she handed the statement that she had taken from Makhateni to Mbowane.

[28] Prof Vellema is a specialist forensic pathologist with extensive experience in *inter alia* the medico-legal investigation of wounds. She expressed the opinion that the wound to the accused's left shoulder depicted on photograph 2 (Exhibit Q) had the appearance of an abrasion, which is

damage to the outer epidermal layer of skin, and that the likely cause of that wound was a blunt force impact of the shoulder with an object, such as a floor, wall or carpet, accompanied by a scraping movement. The wound, in her opinion, could not have been caused by an electric current since it did not have the characteristics of a classic burn wound and the accused would have died had an electric current passed from his penis through his heart to his shoulder, which would have been the pathway of such current. The white substance surrounding the wound, in her opinion, was the residue of lotion or cream applied to soothe the wound or to expedite the healing process. She also expressed the opinion that it was entirely possible for the wound to have been sustained in a scuffle where the accused was thrown down and his hands cuffed behind his back. In this regard she expressed the opinion that if the accused's hands were behind him, he would have fallen on his shoulder bone and the scraping could have been caused in the process. In other words, in her opinion there could have been a hard impact combined with the friction of motion.

[30] The injuries to the accused's back as depicted on photograph 5 (Exhibit P) were, in the opinion of Vellema, linear scratch abrasions, and consistent with wounds sustained by a handgrip and fingernails scraping across the skin. In a scuffle, when a person twists out of a firm grip, it would leave the appearance of such fingernail abrasions. In her opinion, these were not tram or train track wounds, the likely cause of which would have been a blunt force applied by an object, such as a stick, which would have burst blood vessels thereby leaving marks with the appearance of a train or tram

track. Nor did the marks, in her opinion, have the appearance of injuries inflicted by kicking or punching.

[31] The State witnesses, including Supt Ncgobo, Capt Mngomezulu, Capt Dlamini, Insp Mlangheni, and Sgt Mbowane denied that they were involved in any form of assault on or torture of the accused or any other named suspect who was arrested in connection with the Metro bus crimes.

[32] From the accused's testimony it appeared to be common cause that he was arrested at a flat in Hillbrow during the afternoon of 31 March 2007, that he was taken to Makhateni's residence where he and his girlfriend also resided at the time, that he accompanied police officers, including Mbowane, to a nearby panel-beating business where Makhateni pointed out his white BMW motor vehicle, and that the accused and Makhateni were taken to the SAPS Germiston where they were booked into the cells for the evening. It was also common cause that Mbowane and another police officer took them to the SOCS offices the next morning, which was 1 April 2007, although there was a dispute as to whether they were taken together or separately. Mbowane and the other police officer later took Makhateni to the SAPS Germiston and the accused to the SAPS Johannesburg Central, although there was a conflict as to whether or not both Makhateni and the accused or only Makhateni were booked into the cells at the SAPS Germiston before the accused was taken to the SAPS Johannesburg Central. It was also common cause that Supt Neethling interviewed the accused during the afternoon with

the assistance of an interpreter, Capt Khumalo, whereafter the accused made a pointing out.

[33] The accused testified that he was assaulted without reason at the time of his arrest on 31 March 2007 as a result of which he fell on his back. When he stood up he was handcuffed. His constitutional rights were not read or explained to him at the time of his arrest. En route to the SAPS Germiston, Mbowane assaulted him and Makhateni when Mbowane turned around from the front passenger seat where he was seated. When he was booked into the cells at the SAPS Germiston his constitutional rights were neither read nor explained to him. Makhateni told him that a certain document contained his rights and that he should sign it, which he did. He furnished a detailed account in his evidence of the assaults and torture that he endured at the SOCS offices during the morning of 1 April 2007. When seated in the reception area at the SOCS offices where Makhateni was also present, he was assaulted and then taken into an office where he was made to wear an overall and a hood that covered his head. He was assaulted and tortured *inter alia* by means of electric shocks for just over an hour. A number of police officers participated in such assault and torture. They enquired from him where the firearm was and they told them that he would tell the truth. He did not furnish information. He was thereafter taken back to the reception area where Makhateni was present. The accused also testified that when he was taken to the SAPS Johannesburg Central, Mbowane showed him where the incident had taken place.

[34] Mr Stanley Makhateni testified that he was not present at the flat where he resided on the afternoon of 31 March 2007 when Mbowane, other police officers, and the accused arrived. He was called by his wife. Upon his arrival he found everything in his apartment turned upside down. Mbowane introduced himself and enquired from Makhateni whether his vehicle had a certain registration number and letters, which Makhateni confirmed. Upon being asked where the motor vehicle was, Makhateni informed Mbowane that it was at a certain panel-beating business and he took Mbowane and other police officers to such business where he pointed his motor vehicle out to Mbowane, who said: *"Yes, this is the vehicle that we are looking for"*. A police officer arrived in a Mazda 626 motor vehicle and he drove Mbowane, Makhateni and the accused to the SAPS Germiston. Despite his enquiry, Makhateni was not told why he was being taken, he was only informed that he would come back. Makhateni enquired from the accused on the way to Germiston what was happening, whereupon Mbowane hit both Makhateni and the accused with the back of his hand and told them to keep quiet. The police officer who drove the motor vehicle made certain threats about what would happen to the accused if he did not tell the truth.

[35] At the SAPS Germiston, Makhateni and the accused were each given a document containing their constitutional rights and told to sign it. Makhateni read the document. The accused refused to sign, but Makhateni told him that it contained his rights and he should sign it. They both signed the document. Mbowane issued instructions for the accused to be locked in a single cell, that

he might not receive visitors or make any phone calls or receive bail. Such instructions were not given in respect of Makhateni.

[36] Makhateni was booked out of the cells the next morning just after breakfast by Mbowane. He and another officer took him and the accused to the SOCS offices. In the reception area on the first floor, Mbowane instructed Makhateni to go to a lady behind the reception desk or counter and that he should give his statement to her about his motor vehicle and how he was arrested. The accused was seated on a bench in the reception area and Makhateni was able to see him from where he was seated behind the counter. Mbowane left by going into a passage that led to the offices. No one at the SOCS offices was wearing police uniforms and Makhateni observed people when they passed the accused slapping him saying: "*Oh this is the killer*". A few minutes later the accused was taken away into the passage that led to the offices. For the next approximately one hour Makhateni on and off heard crying and noises. In between Mbowane returned twice to Makhateni and the lady who was taking his statement. After about an hour the accused returned to the reception area and he was seated on the same bench where he had sat before. He was crying. The intermittent noise and crying that Makhateni heard had stopped. The lady who took Makhateni's statement had already left. Makhateni went over to where the accused was seated. He enquired from the accused what had happened to him. The accused was crying, he told Makhateni that he had been tortured, and Makhateni also noticed an injury to the accused's shoulder.

[37] Mbowane and the other police officer took Makhateni back to the SAPS Germiston, and the accused was taken to the SAPS Johannesburg central. Makhateni was released the next day. He was never taken to court, or charged, and it was never explained to him why he was taken into custody for a few days.

[38] I return to the similar fact evidence of the witnesses Mr Mbuso Zulu and Mr Rufus Mohlala about the assaults on them and their torturing by means of electric shock treatment at the hands of police officers at the same SOCS unit and in connection with the same investigation.

[39] Upon a consideration of all the evidence in the trial-within-the-trial, I concluded that the State had not proved beyond a reasonable doubt that the pointing out had been made freely and without undue influence.

[40] Mbowane, who was a key State witness on essential issues, did not inspire any confidence and his evidence on various issues was unreliable and could not be accepted. I mention a few examples:

- (a) It was common cause that the accused sustained visible marks on his wrists, linear scratch abrasions on his back, and a brush abrasion on his left shoulder. It was also common cause that the injuries to his wrists were caused by the handcuffs at the time of his arrest on 31 March 2007. The accused alleged that the linear scratch abrasions and brush abrasion were sustained

at the time of his torture on 1 April 2007. Only the marks on his wrists and linear scratch abrasions were shown to Supt Neethling at the time of the pointing out. Mbowane testified that he did not see the scratch marks on the accused's back (the linear scratch abrasions) and he did not know how they were caused. He also testified that when he interviewed the accused on the morning of 1 April 2007, he told him of pain he felt in his shoulder and Mbowane saw some scratches on his left shoulder down and on his wrists where he had been handcuffed. He testified that he did not know when and how the accused sustained the injury to his left shoulder, but that the accused told him that he had sustained the injury at the time of his arrest. Mbowane's evidence on this material aspect is contradicted by his undated witness statement (Exhibit R) wherein he stated that minimum force was used to arrest the accused by wrestling him to the ground and by handcuffing him while he was lying on his stomach. He further stated that *"upon finishing the process of arrest on my close look I found that he sustained a minor injury on the left shoulder, due to that he fell on the ground"*. The OB entry (number 1633, Exhibit I) that was made on 31 March 2007 at 18h00 in the presence of Mbowane and co-signed by Mbowane, confirmed the accused's version that the brush abrasion on his left shoulder was not sustained during his arrest. In such entry it was recorded: *"No injuries or complaints"*. However, all the OB entries of 1 April 2007 recorded that the

accused had “*no complaints*” and “*no injuries*”, or “*no visible injuries*”, or “*was free from any injuries*”, or “*was free from any visible injuries*”. The absence of injuries was clearly falsely recorded in the OB entries of 1 April 2007. Mbowane’s attempts at justifying such records in his evidence were, in my view, not plausible.

- (b) In his evidence-in-chief Mbowane testified that he left the accused with Capt Magampa at the SOCS offices on the morning of 1 April 2007. He then fetched Makhateni from the Germiston SAPS cells and brought him to his office at SOCS in order to take a warning statement from him. In this regard he testified as follows: “*When Capt Magampa was busy with the accused Stanley Makhateni was with me in my office. While I was busy with him Capt Magampa called and said that the accused had furnished information which he could not handle. He was going to require assistance from higher officers who are not from the SOCS unit. He informed me to fetch the accused. I went over and fetched him.*” Under cross-examination, however, Mbowane testified that he, at the request of Sekgobela, left the SOCS offices and went to Alberton to collect documents from an informant for Sekgobela. Such evidence is in conflict with the evidence of Makhateni, who testified that Mbowane on two occasions approached him in the reception area where Capt Sekgobela was taking a statement from him.

- (c) Mbowane testified that he did not know what happened to the accused during the almost one and a half hours when he handed him to Magampa and the time when he took him back to the Germiston SAPS cells. But Magampa's evidence created the impression that the accused only spent a short while with him when he decided to get an officer from a different unit to assist. He estimated the time to be less than half an hour.
- (d) Mbowane's evidence was unsatisfactory in many other respects. There were internal contradictions and external contradictions with his previous statement. He was often evasive when he testified. On occasions he tried to explain contradictions by stating that he did not or might not have understood counsel's question. He also said that the interpreter made mistakes, but when asked when she made a mistake he could not remember and he then said that he had stopped her at the time and it was rectified.

[41] Magampa's evidence was also not satisfactory. His evidence was important to the issues in the trial-within-the-trial since he was the SOCS officer whom the accused allegedly told that he wished to make certain pointings out, before he proceeded with Mbowane and another officer to the SAPS Johannesburg Central. Again I mention only a few examples.

- (a) No plausible explanation was given by Magampa why he was unable to have assisted in the pointings out which the accused allegedly so 'freely' and eagerly wished to make and why he needed to arrange with two other officers from a different unit to take charge thereof, especially since Magampa was a captain with twenty years' service at the time and his testimony that he was not involved in the Metro bus investigations. Yet he testified that he was not allowed to take charge of the pointing out because he was 'connected' to this case. He explained that he became connected with the case 'during the very short time Mbowane brought the accused' to him. Such explanation furnished no plausible answer to the question.

- (b) Magampa kept no notes of his alleged interview with the accused and he said that his testimony was based on his recollection of events of nearly a year ago. Asked under cross-examination how he was able to remember the details of the occasion with the accused, he replied that he was able to remember upon seeing the accused in court. It was, however, then pointed out to him that he had made a statement during January 2008 in connection with his interview with the accused, which was about eight months after such alleged interview. No plausible explanation was given.

[42] Sekgobela's evidence was also unsatisfactory in material respects. Her recollection was clearly not reliable. She could not remember what day 1 April 2007 was, but she nevertheless insisted that she was doing administrative duties in her office and that she did not take Makhateni's statement in the reception area. Under cross-examination she said that upon entering into the building on the Sunday in question she went into her office and she "*cannot recall that (she) sat in the reception*". Makhateni's evidence is to be preferred on this issue.

[43] I considered Neethling, to whom the pointing out was made, and Khumalo, who acted as the interpreter during the pointing out, to be credible witnesses and their evidence as reliable. Their version that the accused had been properly appraised of his rights and that he did not mention to them that he was assaulted, tortured, and threatened to be taken back to the SOCS offices was, in my view, to be preferred to the version of the accused on such issues. Certain aspects of the accused's version, particularly what he allegedly said or indicated to Khumalo were only put to Neethling and not to Khumalo. Accepting their evidence, however, did not detract from the reasonable possibility that the accused was indeed assaulted and tortured a few hours before he was taken to them. On the contrary, if undue influence of which the accused testified indeed caused the pointing out it was to be expected that false answers would have been given by him and that he would not have disclosed his earlier ordeal in fear of being taken back to the SOCS offices. The same applied to what the accused allegedly told Sefeloshe on 4 April 2007. Neethling also testified that he would have suspended the

pointing out and reported the matter to his superiors had the accused indicated to him that he had been tortured. Also Neethling's observation of the appearance and demeanour of the accused as very calm, relaxed, compliant, and even a bit cheeky, and that of Khumalo that he appeared 'free', did not, in my view, detract from the accused's version of assaults and torture as being reasonably possibly true. Firstly, such observations were subjective, and, secondly, the alleged assaults and torture occurred a few hours before the accused was seen by them.

[44] Prof Vellema is undoubtedly well qualified and extensively experienced in the matters of which she testified. The opinions advanced by her were not contradicted and are, in my view, founded on logical reasoning (see: *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another* 2001 (3) SA 1188 (SCA), at pages 1200 to 1201 paras [34] to [40]). The opinions expressed by her, however, did not exclude the reasonable possibility that the wounds to the accused's left shoulder and to his back were sustained at the time of the assault and torturing of which he testified even though they were clearly not sustained by means of the alleged electric shock treatment. She also expressed the opinion that the effect of using water when being tortured by means of electric shock is that the water reduces the chances of there being significant or even any burn wounds which would otherwise be caused by direct electric shock treatment. An experienced torturer, in her opinion, would not wish to leave marks and would want to conceal what he had done. Victims of electric shock treatment might not show any physical marks, especially where the body was wet and the electrodes used were wider. She

also mentioned that studies have shown that in about 30% of cases of electric shock there is no visible evidence.

[45] The accused's version on the disputed issues and that of his witnesses were in direct conflict with those of many of the State witnesses who testified. It could not, however, be found that the State's case was overwhelming for the reasons I have mentioned.

[46] The accused's evidence was unsatisfactory in many respects. There were several contradictions in his evidence and his evidence was at variance with various propositions that had been put to other witnesses by his counsel. An example was the subtle change of his version concerning the injury to his left shoulder having been caused by an electric shock, to one where this was merely his erroneous perception, after Prof Veller had testified that such injury could not have been caused by electric shock. But, his evidence was corroborated on material issues by the evidence of the witness Makhateni, whom I considered to be a credible and impressive witness whose evidence was reliable. Extensive and thorough cross-examination did not discredit him.

[47] The witnesses Zulu and Mohlala were both arrested by the police during March 2007 in connection with the crimes that were committed against Metro bus drivers during the February - March 2007 Metro bus strike action. Upon their arrests they were also detained in the cells at the SAPS Germiston. From there they were taken to the SOCS offices where they alleged they were assaulted and tortured *inter alia* by means of electric shock

in order to obtain information from them. Their uncontradicted evidence was that they each required medical treatment upon their release from custody and that they shortly thereafter laid criminal charges.

[48] Although I considered the witness Zulu's account of the manner in which he received the alleged electric shock to be improbable, this did not, in my view, mean that he was not reasonably possibly tortured by means of electric shock. His explanation of the manner in which he was tortured could have been based upon his own conjecture. But the witness Mohlala was an impressive witness. It was also apparent from his emotional breakdown during his evidence in court that the fearsome and traumatic effects of the torture of which he testified about were still with him.

[49] Adv Badenhorst submitted that had there been any truth to the allegations of assault and of torture, Makhateni would also have been assaulted and tortured. I disagreed. Makhateni freely and voluntarily furnished the information requested from him to Mbowane. It in any event seemed that he was not a suspect as the format of his statement made to the police was that of a witness statement. His name also appeared on the State's list of witnesses, but he was made available to the defence during the course of the trial-within-the-trial.

[50] The evidence of similar assaults and torturing of other suspects arrested in connection with the Metro bus crimes in my view bore a "*striking similarity*" to the allegations of assault and torture testified to by the accused.

There was no evidence of any collusion (see: *S v M and Others* 1995 (1) SACR 667 (BA) at pages 692e-693b). The reasonable possibility of a concerted *modus operandi* on the part of members of the SOCS unit was not excluded, which included arresting suspects in connection with the Metro bus strike action crimes, detaining them, attempting to solicit information from them by means of assaults and electric shock treatments, and if no incriminating information was obtained, releasing them without their being charged. There was, in my view, “... a sufficient nexus in respect of proximity of time, of method, and of circumstance, at least to add weight to the other evidence that that also happened ...” to the accused (see: *S v Letsoko and Others* 1964 (4) SA 768 (A), at page 775C-E).

[51] I accordingly concluded that the State failed to prove beyond a reasonable doubt that the accused was not subjected to the assaults and torture testified to by him or that the pointing out was not induced thereby.

There is furthermore

‘the absolute prohibition on the use of torture in both our law and in international law therefore demands that ‘any evidence’ which is obtained as a result of torture must be excluded ‘in any proceedings.’

(per Cachalia JA in *Mthembu v The State* (379/2007) [2008] ZSCA 51 (10 April 2008), para [32]).

[52] I now return to the trial. The State closed its case once the ruling of inadmissibility of the pointing out evidence was made. Adv Zulu, on behalf of the accused, promptly closed the case for the accused without calling any witnesses.

[53] The evidence of the witnesses Xaba and Mabudusha does not incriminate the accused in any way. The State has not proved the guilt of the accused on the count of murder (count 1) or on the count of attempted murder (count 2).

[54] The accused is accordingly found not guilty on both counts.

P A MEYER
JUDGE OF THE HIGH COURT

1 December 2008.