IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

JUDGMENT

NOT REPORTABLE
CASE NO: AR345/2013

In the matter between:

NKOSIYABONGA MICHAEL NGUBANE — APPELLANT

And

THE STATE — RESPONDENT

Coram : Koen, van Zyl et Seegobin JJ
Heard : 29 January 2016
Delivered : 26 April 2016

ORDER

On appeal from the KwaZulu Natal High Court, Durban, (before Ncube AJ, sitting as a court of first instance):

The appellant's appeal against conviction and sentence is dismissed.

JUDGMENT

SEEGOBIN J (Koen et van Zyl JJ concurring):

[1] The appellant, Nkosiyabo Michael Ngubane, was one of two accused who was arraigned before Ncube AJ in the High court sitting at Durban, on one count of murder which was to be read with section 51 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997. The two were alleged to have unlawfully and intentionally killed one *Zithulele Wiseman Mshibe*, an adult male (the deceased) on 1 March 2011 at Yellowood Park in the district of Durban.

[2] The appellant and his co-accused were legally represented. They pleaded not guilty to the charge and elected to remain silent. At the close of the State's case the appellant's co-accused was found not guilty and discharged. At the conclusion of all the evidence the appellant was found guilty. He was sentenced to life imprisonment.

[3] Leave to appeal was applied for and granted by the court *a* quo on 18 March 2013. Although leave to appeal was applied for against both conviction and sentence, the ruling of the trial court is not entirely clear as it seems to relate to conviction only. I will assume for purposes of this appeal that leave

was granted in respect of conviction and sentence. As far as the conviction is concerned, leave to appeal was granted on two issues only, the *first* was whether a court of appeal may find that the evidence of the pointing out should not have been admitted, and the *second* was whether the circumstantial evidence was not sufficient to corroborate the appellant's pointing out.

[4] The gist of the State's case was that the deceased was a Councilor in the eThekwini Region and a member of the African National Congress (the ANC). There were tensions between him and certain other members of the ANC. The appellant, his co-accused and another companion were hired by a certain person to kill the deceased for reward. At about 21h00 on Tuesday 1 March 2011 the deceased returned to his home after having attended a zone meeting in Umlazi. As he entered his yard in his motor vehicle the assailants, who had lain in wait for him, opened fire shooting him several times. They then fled the scene. The deceased drove his vehicle to Blamey Road in Montclair where he requested help from a passing motorist who drove him to the St. Augustine Hospital. The deceased died soon after arrival at the said hospital. The post-mortem examination established that his death was caused by 'multiple gunshot wounds to the chest and abdomen'. The State alleged that the appellant and his companions acted in pursuance of a common purpose to kill the deceased.

[5] At the commencement of the trial on 5 March 2013, Mr De Klerk, who represented the State, informed the court that insofar as the appellant was concerned, the State intended relying on the evidence of a pointing out made by him to a police officer. The State also intended calling the evidence of other witnesses who were in the vicinity of the shooting at the time but whose evidence did not go so far as to identify the perpetrators involved. Their evidence was said to be purely circumstantial in nature. It is this evidence which forms the subject matter of the issues which arise in this appeal.

[6] In the course of the trial the appellant made certain formal admissions in terms of section 220 of the Criminal Procedure Act 51 of 1977 (the CPA). These related, *inter alia*, to the identity of the deceased, the date of the incident being 1 March 2011 and the fact that the deceased was shot at 5… C…. Road in Y…. P…... There was no dispute that this was the residential address of the deceased.

[7] I start with the circumstantial evidence. The witness *Sibonga Mthembu* is the sister of the deceased's wife. She testified that on 1 March 2011 she was at the deceased's home at 5….. C….. Road in Y…. P….. The deceased was not in at the time as he was attending a meeting in his capacity as a ward Councilor. At about 20h00 the witness and her sister (the deceased's wife) heard the garage door opening. Immediately thereafter she heard the sound of more than five gunshots. When she peeped through the window she saw that the deceased's vehicle door was opening and closing. She also observed his vehicle taking off. She was unable to say who had fired the shots. She confirmed that the vehicle depicted in photograph 12 of Exhibit "C" belonged to the deceased. There was no dispute that the vehicle in question was a silver Toyota Fortuner.

[8] On 1 March 2011 the witness *Bheki Wiseman Zazi Mathonsi* was driving from Montclair. He approached a robot-controlled intersection which was close to a Kentucky Fried Chicken (KFC) outlet. As the robot was red for him he stopped. The deceased, who was covered in blood, approached him crying out for help. The deceased requested that he be conveyed to the St. Augustine Hospital. Mr Mathonsi duly conveyed the deceased to the said hospital and handed him over to the hospital staff. He left his contact details with the hospital staff. Later that evening he received a call to say that the deceased had passed on. Mr Mathonsi confirmed that the deceased's motor vehicle, the silver

Toyota Fortuner referred to above, was parked in the far left lane near the KFC outlet.

[9] At about 21h35 on the evening in question Warrant Officer *Craig Robin Inggs* was called out to attend to an attempted hijacking incident. He proceeded to the corner of Blamey and South Coat Roads in Clairwood and there, opposite the KFC outlet, he spotted a silver Toyota Fortuner motor vehicle parked in the middle lane with its lights on. The key was still in the ignition slot but the engine was turned off. He noticed bullet holes on the driver's side, predominantly on the driver's door. A further bullet hole was seen on the inside of the front passenger door indicating that the shot was fired from the inside. The left passenger door was damaged as was the right front fender. There was blood on the driver's as well as the passenger's seats.

[10] At about 22h00 Warrant Officer *Ramsamy* proceeded to the deceased's house to attend to a shooting incident. The deceased's wife made a report to him. On checking the premises he found eight spent 9mm cartridges and one projectile.

[11] As I mentioned already, the only evidence implicating the appellant directly in the commission of the offence, consisted of a pointing out together with certain utterances made by him during the course of the pointing out. It was common cause that the pointing out was made to a Captain *Auerbach* on 10 March 2011. However, by the time the trial commenced on 8 December 2011, Captain Auerbach had died. In the trial-within-a-trial that followed and quite apart from the various policemen and the doctor who testified therein, the State sought to rely on the evidence of Warrant Officer *Nomvalo* who acted as an interpreter for Captain Auerbach at the time of the pointing out. Warrant Officer Nomvalo testified on two occasions, first in the trial-within-a-trial and later in the main trial.

[12] The State also relied on the evidence of Captain *Mafuleka* who was the driver of the motor vehicle which conveyed Captain Auerbach, Warrant Officer Nomvalo and the appellant at the time. It also called the evidence of Sergeant *Nzama* who was the official photographer employed by the Local Criminal Record Centre and who took the photographs of the pointing out as contained in Exhibit "N".

[13] The appellant testified in the trial-within-a-trial. He raised two objections to the pointing out; the *first* was that he did not make it freely and voluntarily, and the *second* was that the statement recorded by Captain Auerbach in Exhibit "G11" was not his. After the trial-within-a-trial the trial court found that the State had proved that the pointing out by the appellant and the admissions recorded by Captain Auerbach were made freely and voluntarily.

[14] I do not intend, in this judgment, to restate the law pertaining to pointings out. For the purposes of this judgment the reference to certain basic principles will suffice. In *S v Sheehama*[1] it was held that a pointing out is essentially a communication by conduct. If the pointing out is relevant and is not accompanied by an exculpatory explanation by the accused person, it is a statement that he has knowledge of the relevant facts which *prima facie* operate to his disadvantage[2]. In an appropriate case a pointing out amounts to an extra-curial admission and as such the common-law rule, now embodied in s219A[3] of the CPA applies, namely, that it must have been made freely and voluntarily.

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[1] 1991(2) SA 860 (A).

[2] See the comments expressed by the learned authors Du Toit, De Jager, Paizer, Skeen and Van Der Merwe of the Commentary on the Criminal Procedure Act, vol 2, service 53, 2014, 24-68.

[3] S219A reads as follows:

"(1) Evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in evidence against him at criminal proceedings relating to that offence: Provided that where the admission is made to a magistrate and reduced to writing by him or is

[15] Notwithstanding the safeguards contained in s219A, any evidence which violates an accused's person's constitutional rights will be excluded[4]. To the extent that it is relevant herein, s35(1) and (2) of the Constitution provide:

> "(1) Everyone who is arrested for allegedly committing an offence has the right –
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> (a) to remain silent;
>
> (b) to be informed promptly –
>
> (i) of the right to remain silent; and
>
> (ii) of the consequences of not remaining silent;
>
> (2) Everyone who is detained, including every sentenced prisoner, has the right –
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> (b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;
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> (c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly."

[16] Section 35(5) of the Constitution provides that:

> "Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice."

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confirmed and reduced to writing in the presence of a magistrate, the admission shall, upon the mere production at the proceedings in question of the document in which the admission is contained-

(a) be admissible in evidence against such person if it appears from such document that the admission was made by a person whose name corresponds to that of such person and, in the case of an admission made to a magistrate or confirmed in the presence of a magistrate through an interpreter, if a certificate by the interpreter appears on such document to the effect that he interpreted truly and correctly and to the best of his ability with regard to the contents of the admission and any question put to such person by the magistrate; and

(b) be presumed, unless the contrary is proved, to have been voluntarily made by such person if it appears from the document in which the admission is contained that the admission was made voluntarily by such person.

(2) The prosecution may lead evidence in rebuttal of evidence adduced by an accused in rebuttal of the presumption under subsection (1)."

[4] S v Pillay and Others 2004(2) SACR 419 (SCA).

[17] With reference to the provisions of s35(5), *supra*, the SCA in *S v Tandwa and Others*[5], said the following:

> "The notable feature of the Constitution's specific exclusionary provision is that it does not provide for automatic exclusion of unconstitutionally obtained evidence. Evidence must be excluded only if it *(a)* renders the trial unfair; or *(b)* is otherwise detrimental to the administration of justice. This entails that admitting impugned evidence could damage the administration of justice in ways that would leave the fairness of the trial intact: but where admitting the evidence renders the trial itself unfair, the administration of justice is always damaged. Differently put, evidence must be excluded in all cases where its admission is detrimental to the administration of justice, including the subset of cases where it renders the trial unfair. The provision plainly envisages cases where evidence should be excluded for broad public policy reasons beyond fairness to the individual accused.
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> In determining whether the trial is rendered unfair, courts must take into account competing social interests. The court's discretion must be exercised "by weighing the competing concerns of society on the one hand to ensure that the guilty are brought to book against the protection of entrenched human rights accorded to accused persons. ..."

[18] In the present matter and quite apart from the admissibility requirements contained in s219A, the State also bore the *onus* to prove beyond a reasonable doubt that the knowledge demonstrated by the appellant during the pointing out, could only have been acquired by him through his participation in the alleged offence[6].

[19] In light of the issues which arise on appeal it is necessary to examine whether the trial court was justified in arriving at the conclusion which it did. As I understand the argument advanced by Mr *Makutu* on behalf of the

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[5] 2008(1) SACR 613 (CA) (paras 116-117); see also: S v Mgwaza 2016(1) SACR 53 (SCA) and the cases cited therein.
[6] S v Gwevu and Another 1961(4) SA 536 (E); S v Shabalala 1986(4) SA 734 (A) at 748-9.

appellant, it seems to be premised on two bases: the *first* is that the trial court ought not to have relied on the evidence of the interpreter, Warrant Officer Nomvalo, whose evidence was hearsay regarding what had transpired between the appellant and the late Captain Auerbach during the pointing out; the *second* is that the appellant's rights to dignity and self-incrimination were violated. The latter argument was premised on the fact that certain nude photographs of the appellant, presumably to show the absence of any injuries, were included in the album of photographs. I will return to this aspect later.

[20] Turning to the pointing out itself, the evidence presented by the State established the following:

> [20.1] Captain *Hlongwa*, the Investigating Officer, testified that the appellant was arrested during the evening of 9 March 2011 by himself and Warrant Officer *Ramara*. The appellant's constitutional rights were fully explained to him before the arrest was effected. These rights included his right to remain silent and the right to legal representation. He was also informed that whatever he said will be reduced to writing and may be used against him in a trial. The appellant was thereafter taken to an office at the Cato Manor Police Station where he was questioned. In the course of the questioning the appellant provided certain information which pointed to the involvement of other suspects in the commission of the offence. While some effort was made to immediately locate these suspects, it is not entirely clear from Captain Hlongwa's evidence whether they were in fact arrested that evening. However, in the course of the questioning the appellant started divulging certain information about his own involvement in the matter. His constitutional rights were again fully explained to him, especially those relating to legal representation. He indicated that he did not require a

lawyer at that stage. He was asked whether Captain Hlongwa could arrange for a neutral person to record a statement from him or to do a pointing out. The appellant indicated that he had no objection to this. According to Captain Hlongwa the appellant was not assaulted at any stage.

[20.2] Arrangements were then made with Captain Auerbach from the Wentworth Police Station to conduct a pointing out because, according to Captain Hlongwa, that is what the appellant elected to do. The pointing out was arranged for the 10 March 2011. It was not disputed that Captain Auerbach was completely independent since he was stationed at the Wentworth Police Station. Furthermore, he knew nothing about the matter nor was he involved in the investigation in any way. The following morning Captain Mafuleka and Warrant Officer Mvuyane conveyed the appellant to Dr *Vawda*, the district surgeon, to be examined. After the examination by Dr Vawda the appellant was taken to Captain Auerbach in Wentworth. As I pointed out already, it was Captain Mafuleka who thereafter drove the motor vehicle which conveyed Captain Auerbach, Warrant Officer Nomvalo and the appellant for purposes of the pointing out.

[20.3] Warrant Officer Nomvalo is a policeman with 23 years of experience. He was stationed at the Lamontville Police Station at the time. As part of his duties he often acted as an interpreter for many of his non-Zulu speaking colleagues. There was no dispute that Warrant Officer Nomvalo was not part of the investigation team nor did he know anything about the offence in question. To that extent he was completely independent.

[20.4] Warrant Officer Nomvalo confirmed that on 10 March 2011 he assisted the late Captain Auerbach in interpreting from English into Zulu and *vice versa* in a pointing out involving the appellant. He confirmed that apart from himself as well as Captain Auerbach and the appellant, a photographer was present at all times and took photographs before the interview commenced, then during the pointing out itself and when they finally returned to the Wentworth Police Station. In relation to the pointing out forms, Exhibit "G1", he confirmed that he signed the document and further confirmed that everything which appears in that document was interpreted by him as the questions were posed by Captain Auerbach and as the responses were given by the appellant. He confirmed that Captain Auerbach fully explained to the appellant his constitutional rights which were then interpreted by him and explained to the appellant. The appellant's responses thereto appear on the first and second pages of the document.

[20.5] As for the pages dealing with the actual pointing out and what was said by the appellant at the time, he confirmed that everything recorded therein by Captain Auerbach was told to him by the appellant and interpreted to Captain Auerbach. Finally, and perhaps importantly, he confirmed that after the pointing out was concluded, Captain Auerbach read everything back to the appellant and that he i.e. Warrant Officer Nomvalo interpreted the same into isiZulu. The appellant thereafter appended his thumbprints to the document. He also placed his initials next to the thumbprints and signed the document. Warrant Officer Nomvalo in turn placed his initials next to the appellant's thumbprints and both he and Captain Auerbach thereafter signed the document in the relevant places. Warrant Officer Nomvalo testified that he interpreted according to the best of his ability. A signed certificate by him appears in

Exhibit "G1" in which he certified that he interpreted truly and accurately and to the best of his ability. None of this evidence was materially challenged by the appellant.

[20.6] Captain Mafuleka is a policeman with 26 years of experience. On 10 March 2011 he assisted Captain Hlongwa by driving Captain Auerbach, the appellant and Warrant Officer Nomvalo when the pointing out was done. He confirmed that the appellant bore no signs of any injuries. He further confirmed that it was the appellant who provided him with the directions when they departed from the Wentworth Police Station.

[20.7] Sergeant Nzama testified that he was an official photographer stationed at the Local Criminal Record Centre. He confirmed that he assisted Captain Auerbach in the pointing out on 10 March 2011 by taking the photographs contained in Exhibit "N".

[20.8] Dr Vawda examined the appellant prior to and after the pointing out. As Dr Vawda's evidence shows and as is apparent from the J88 medical reports (Exhibits "L" and "M") the appellant was examined thoroughly on each occasion. On each occasion as well he found no signs of any injuries on the appellant. Significantly, however, he recorded that the appellant had informed him that he was dragged by his leg at the time of his arrest. I will revert to this aspect when dealing with the appellant's version of events.

[20.9] When the appellant testified in the trial-within-a-trial, he maintained that after his arrest he was taken to the Lamontville grounds where he was tubed and assaulted. Thereafter he was taken to the Cato

Manor Police Station where he was further assaulted. He was unable however to provide any specific details about the alleged assault and torture. He testified for the first time that he was placed in the boot of the police vehicle when he was taken to the Lamontville grounds. He was unable to explain why this was not put to any of the police witnesses when they testified. His evidence was superficial and sketchy. The appellant proved to be quite an unimpressive witness. Mr Makutu quite properly, and correctly in my view, conceded this in argument before us. According to the appellant Dr Vawda never spoke to him at all nor did he examine him. He averred that Dr Vawda just stood on the other side of the counter. According to the appellant, Dr Vawda was given some forms which he looked at. He then looked at the appellant and began filling out the forms. The appellant even denied telling Dr Vawda that he was dragged by the police at the time of his arrest. He was unable to explain why Dr Vawda would record something adverse to the police if it did not come from him.

[20.10] Dr Vawda had recorded that the appellant suffered from tuberculosis. However, when the appellant testified he denied telling Dr Vawda this. He was unable to explain why he failed to tell Dr Vawda that he was assaulted and tortured by the police. However, what is most significant about the appellant's version is that he maintained that even though he was assaulted, this did not induce him to do a pointing out. This concession on the part of the appellant placed his legal representative somewhat in a quandary because, as the record reflects, she then decided not to call a witness who she intended to call on his behalf. While in the one breath he maintained that he wanted to show the police where the deceased resided, in the next he denied pointing out anything to them.

[21] In the context of what I have recounted above, it is not surprising then that the learned Judge *a quo* ruled that the pointing out as well as the admissions recorded by Captain Auerbach at the time, were made freely and voluntarily, without any undue influence, and were accordingly admissible as evidence in the trial.

[22] Warrant Officer Nomvalo was recalled to testify in the main trial once the evidence of the pointing out was admitted. On this occasion he testified on the contents of Exhibit "G11" and what was said by the appellant to Captain Aeurbach when the pointing out was done. The contents of the statement were read out by Warrant Officer Nomvalo and while he experienced a few difficulties with Captain Auerbach's handwriting, he had no difficulty in conveying to the trial court the full import and substance of what was recorded at the time. The following excerpts from Exhibit "G11" establish that the appellant bore personal knowledge of the offence in question thus pointing to his involvement therein:

> [22.1] At page 13 of Exhibit "G11", he states that the killing of Mr Mshibe, the deceased, was planned by himself and his companions *Sthe Ngubane, Siphiwe Nene, Thembe Ngwenya,* and *Nyawose.* In photograph 7 of Exhibit "N" he points to an area where the planning took place. This was next to a container (shown in photograph 7). It is here that they parked their motor vehicles, a white Tazz and a bakkie in February 2011 when the planning took place.
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> [22.2] In photograph 11 of Exhibit "N", he points to a spot near Qhilika School from where he states they followed the deceased on the date on which he was killed.

[22.3] He states that the deceased was driving a silver grey Toyota Fortuner motor vehicle. The vehicle was riddled with bullet holes. This piece of evidence ties up with that of the deceased's wife's sister, Sibonga Mthemba, as well as with that of Warrant Officer Inggs who found such a vehicle at the corner of Blamey and South Coast Roads in Clairwood, opposite the KFC outlet. It also ties up with the evidence of Mr Mathonsi who came to the deceased's assistance and conveyed him to hospital.

[22.4] He further states that he dropped off Themba Ngwenya and Sthe Ngubane next to house 4…. C….. Road in Y……. P….. so that they could hide in wait for the deceased. The spot where he says he dropped Themba and Sthe is depicted in photograph 9 of Exhibit "N".

[22.5] He states that he went down the road to wait for Themba and Sthe to shoot the deceased. He then heard several gunshots at the deceased's house. This piece of evidence ties in with the evidence of Ms Mthembu who said that she heard more than five gunshots being fired. This also ties in with the evidence of Warrant Officer *Ramsany* who testified that he found eight spent 9mm cartridges at the deceased's house. That piece of evidence also ties in with the chief post-mortem findings of the body of the deceased to the effect that he died of multiple gunshot wounds.

[22.6] The appellant's statement also ties in with the appellant's own admission made by him in terms of s220 of the CPA to the effect that the deceased was shot at 5….. C…… Road, Y….. P…. and died later that day at the St. Augustine Hospital.

[23] The learned Judge *a quo* found, correctly in my view, that the evidence of Warrant Officer Nomvalo was not seriously challenged in cross-examination. His cross-examination was perfunctory and merely aimed at highlighting certain words written by Captain Auerbach which he found difficult to decipher. There was no suggestion whatsoever that Warrant Officer Nomvalo did not interpret correctly to Captain Auerbach all that was said by the appellant during the pointing out.

[24] It would seem to me that there was nothing fundamentally wrong with the State calling the evidence of Warrant Officer Nomvalo in order to prove what was said by the appellant during the pointing out. In my view, Warrant Officer Nomvalo's evidence was the best evidence that was available at the time. In any event, I consider that even if Captain Auerbach was alive and in a position to testify, all he would have been able to confirm is that the information he recorded in Exhibits "G1" and "G11" was essentially information interpreted by Warrant Officer Nomvalo of what the appellant told him[7]. The information would then be hearsay. Warrant Officer Nomvalo would then have to be called to confirm that he correctly interpreted to Captain Auerbach all that the appellant had communicated to him. It is only then that the hearsay would be eliminated[8].

[25] I further consider that while strictly speaking Warrant Officer Nomvalo was not employed by the appellant to interpret for him, he became the appellant's representative as well when he agreed to assist with the interpretation. The appellant did not object to Warrant Officer Nomvalo's presence or to his assistance at the time. The effect of this is that the admissions

[7] R v Mutche 1946 AD 874.
[8] Magwanyana and Others v Standard General Insurance Co. Ltd 1996(1) SA 254 (D) at page 257.

recorded by Captain Auerbach as they were made to him by Warrant Officer Nomvalo during the interpretation of the appellant's words, are admissible against the appellant[9]. Inasmuch as the appellant may wish to deny that what he told Captain Auerbach emanated from him, this is not borne out by his own evidence as appears at page 152 of the record, lines 21-28, where he states the following:

> "The notes that were made by Captain Auerbach, did you tell him what to write? --- Well, some of the things that I told the captain were not the things that were said that I should say to the captain. I just said things that came from me, I did not say some of things that Hlongwa and others said that I should say."
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> [my emphasis]

[26] All in all I am satisfied that the trial court acted correctly in admitting the evidence of the pointing out made by the appellant on 10 March 2011. While nothing was discovered as a consequence thereof, the information provided by the appellant sufficiently corroborated the circumstantial evidence provided by the other witnesses who testified. The information further served to establish that the appellant was integrally involved in the planning of the deceased's death and shared a common purpose with the others who were involved. In the statement to Captain Auerbach the appellant even goes so far as to provide a reason why the deceased was killed. That reason seems to be that the Councilor, Mr *Nyawase,* had promised the appellant and his co-perpetrators houses, however the deceased was going to take Mr Nyawase's place in the Council in Ward 79.

[27] In the face of a strong *prima facie* case against him, the appellant elected not to testify in his defence. He simply closed his case without calling any evidence on his behalf. While an accused person enjoys a constitutional right to

[9] S v Goncalves 1972(1) SA 243 (T).

remain silent, in my view this is no right at all especially in a case which calls for a direct answer from him. In *Osman v Attorney-General, Transvaal* 1998(2) SACR 493 (CC) the Constitutional Court focused on the fact that South Africa's legal system is of an adversarial nature. In paragraph 22 of the judgment it states the following:

> "Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a *prima facie* case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice."

[28] The Constitutional Court, in *S v Boesak*[10] held in paragraph [24] that:

> "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 silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence".

[29] In the circumstances, I consider that the trial court was correct in finding that the guilt of the appellant was proved beyond a reasonable doubt. I see no reason to upset that finding.

[30] Before I conclude, however, there is one aspect that requires comment and it relates to Mr Makutu's complaint that the appellant's dignity was

[10] 2001 1 SACR 1 (CC); see also S v Boesak 2000(1) SACR 633 (SCA); S v Chabalala 2003(1) SACR 134 (SCA) and S v Brown 1996(2) SACR 49 (NC).

impaired because of the two nude photographs which appeared in Exhibit "N". The inclusion of these photographs in the album by the State was no doubt to pre-empt any suggestion on the part of the appellant that he was assaulted by the police. There can be no other reason but this. While I consider that it is highly undesirable that these photographs were included in the album, I do not believe that any of the appellant's fair trial rights were violated in any way. I would, however, caution the State to be a lot more circumspect in the manner in which it deals with photographs of this nature in future.

[31] In all the circumstances, I conclude that the trial court was entitled, *firstly*, to admit the evidence of the pointing out made to Captain Auerbach on 10 March 2011, and *secondly*, to find that the circumstantial evidence had sufficiently corroborated the appellant's pointing out. With the acceptance of this evidence the guilt of the appellant was proved beyond a reasonable doubt. It follows that the appeal against conviction must fail.

[32] Turning to the appeal against sentence, Mr Makutu quite fairly and properly, in my view, accepted that the sentence imposed was an appropriate one in the circumstances. In my opinion contract killings by their very nature are cold-blooded acts which are motivated mainly by greed and for which there can be no justification. These types of killings are fast becoming a scourge in the country and must be stamped out. Accordingly, the sentence imposed warrants no interference on appeal.

ORDER

[33] In the result, I make the following order:

The appellant's appeal against conviction and sentence is dismissed.

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KOEN J

I agree

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VAN ZYL J

Date of Hearing	:	29 January 2016
Date of Judgment	:	26 April 2016
Counsel for Appellant	:	WCM Maqutu
Instructed by	:	Justice Centre, Durban
Counsel for Respondent	:	N Mzila
Instructed by	:	Director of Public Prosecutions

Pietermaritzburg