THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION)

JUDGMENT

Case No: SS 77/2017

In the matter between

THE STATE

and

JAPHTA HERRINGS

Coram: Rogers J

Heard: 6-8 and 13-15 August 2018

Delivered: 16 August 2018

ORDER

The judgment of the court is as follows:
(a) On count 1, the accused is convicted of murder, such murder falling, for purposes of sentencing, under Part II of Schedule 2 of Act 105 of 1997.
(b) On count 2, the accused is convicted of the theft of the items mentioned in the indictment.

JUDGMENT ON CONVICTION

Rogers J:

Introduction

[1] The accused is charged with murdering Ms [X] in her home on Thursday 3 March 2016 and of robbing her of various electronic goods and a Toyota Corolla vehicle. He pleaded not guilty to both charges, offering no plea explanation.

[2] There was a trial within a trial (TWT) at the conclusion of which I ruled two documents admissible as confessions. The first was a handwritten document prepared by the accused which he handed to the investigating officer, W/O Arendse. The second, arising from the first, was a formal confession made to a justice, Col Brits. The accused testified in the TWT. He later testified in his defence, his counsel asking for the evidence he gave in the TWT to stand as his evidence in chief.

[3] Since the accused may wish to challenge my ruling admitting the confessions, I shall first deal with the evidence without reference to the confessions.

Evidence at end of State's case, excluding confessions

[4] The deceased died from manual strangulation and from suffocation caused by two plastic bags tied over her head. Her body was placed in a domestic freezer chest in her home.

[5] Defence counsel's cross-examination of the deceased's husband, Mr [X], and of the deceased's friend, Ms [HS], neither of whom was a TWT witness, was to the effect that the accused had been having an affair with the deceased. The

accused formally admitted that the deceased gave him a handwritten letter (exhibit "G") which he in turn gave to the police after his arrest. The letter confirms a relationship of some intimacy. The deceased said in this letter that the relationship had been pleasurable but that it was better that they now put an end to it as things could turn ugly. From Mr [X's] evidence it seems probable that this affair was able to develop because he had been posted to Durban during 2015 and was undergoing training in the Cape Peninsula during the first three months of 2016. He wrote his last examination on 3 March 2016, so would have been due to return to the couple's home in Saldanha Bay.

[6] Defence counsel's cross-examination of Mr [X] placed his client in the deceased's home at the time of the murder. It was put to Mr [X] that a holdall containing firearms was stored in the ceiling of [the Xs] home; that while the accused was visiting the deceased on the morning of 3 March, three men with balaclavas entered the home; that they retrieved the holdall from the ceiling; that they were responsible for the deceased's death; and that they forced the accused to place her body in the freezer. Mr [X] said he did not believe this nonsense. The only thing in the ceiling was the geyser; he had been up there several years before when the geyser was giving trouble.

[7] I should add that the accused's fingerprints were found on a glass in the kitchen in the deceased's house. This appears from the accused's formal admissions as read with the report by the affidavit by the SAPS fingerprint expert. However, I do not attach any weight to this, because his fingerprints may have got onto the glass on an earlier occasion.

[8] From the evidence of Ms [HS] and Cecilia Arendse, it is clear that the deceased must have been killed before 08:30 on the morning of Thursday 3 March 2016. The white Toyota Corolla, which was usually parked under a tree outside

the deceased's house, was not in its usual place when Ms [HS] arrived there at around 08:30. While walking towards the house, she had seen a white Toyota Corolla driving away at speed but the car turned into another road before reaching her. She was unable to identify the driver.

[9] Because the deceased had been due to meet Ms [HS] at 08:30 so that they could take a taxi to Vredenberg, she was puzzled to see the deceased's car racing away from the home. On arriving at the house, she was surprised to find the front door unlocked. She phoned the deceased on the latter's mobile device but the call was not answered. Ms [HS] sent a WhatsApp message, to which she received a reply, purportedly from the deceased (who by now was actually dead), that her husband wanted to divorce her. In further WhatsApp exchanges, the deceased purportedly stated that she was going to see her attorney and wanted to do so alone but eventually she agreed that she would meet Ms [HS] in town at butchery called Cartol. When Ms [HS] arrived at this place, the deceased was nowhere to be seen. Ms [HS] went home and sent her a further WhatsApp query, to which the deceased purportedly replied, "God, ek gaan somme weg".

[10] At some stage during the morning Ms [HS] phoned the accused to ask if he knew anything about the deceased's whereabouts. He replied that he had seen her that morning chatting with a servant. She testified that the accused later phoned her to say that if she heard anything about the deceased she should let him know.

[11] Ms [HS] knew that the deceased collected her youngest daughter, [CD], from school at 12:45. She thus went to the place where the deceased normally met [CD], hoping to find the deceased there. When the deceased did not arrive, Ms [HS] went into the school and found [CD] still in her classroom. She took [CD] home to her own house.

[12] In the meanwhile, the accused drove in the deceased's car to Robertson, where he stopped at the home of his uncle, Mr Petrus Davids. Mr Davids found him there at around 17:45. He asked the accused whose car it was. The accused replied that it belonged to a friend. The accused asked Mr Davids whether he would lend him his car as he needed to go to Riversdale. Mr Davids replied that his car was not in fit state for a long trip. In the Toyota Corolla was a flatscreen TV, a laptop and a tablet. It is common cause that these items were removed from the deceased's home on 3 March 2016.

[13] The accused spent the Thursday evening at the Davids' home. He also spent the day there on the Friday. Since the accused wished to sell the laptop, and since Mr Davids' niece was apparently willing to buy it, they drove to her house where she paid the accused R800 and took the laptop. (The police later recovered it from her.)

[14] On the Friday evening the accused received a telephone call at around 21:00. After taking the call, he reported to Mr Davids that he needed to travel straightaway to Riversdale. He went off in the deceased's Toyota Corolla, taking with him the flatscreen TV and tablet (which had been stored in the Davids' home overnight for safety). He returned to the Davids' home early the next morning (Saturday). He still had the tablet but the TV was gone. He accompanied the Davids into town where he bought a cover and SIM card for the tablet. They left him at the taxi rank where he was to catch a taxi back to Vredenberg. He asked to leave the Toyota Corolla at their house for a week, saying he would fetch it the next Friday.

[15] On the afternoon of Monday 7 March the Davids read in *Die Son* about the deceased's murder and the theft of her Toyota Corolla and electronic goods. Mr Davids had already become suspicious and had looked inside the car (the keys of

which the accused had left with them). He had come across credit card slips and other documents containing the surname "[X]" and an address in [DM] Street, Saldanha Bay (the [Xs] lived at [… DM] Street). When he read the report in *Die Son*, he was convinced that the accused was the perpetrator. He immediately phoned the accused, confronting him with the words, 'Jy het wragtig die vrou vrek gemaak. Dit staan in *Die Son*'. The accused abruptly terminated the call without responding.

[16] Mr Davids reported the matter to the police in Robertson and took the Toyota Corolla to them. He made two further calls to the accused. During the first call he asked the accused what his plan was with the car. The accused replied that he should remove the license plates and that he was on his way to fetch it. In a second call, made shortly after the first, the accused said that a friend was on his way to collect the car. In fact, nobody arrived in Robertson for the car.

[17] At around 05:00 the following morning (Tuesday 8 March), the accused was arrested at his wife's home at 59 Fink Street, Vredenberg. Although they were still married, they were separated and divorce proceedings were pending. The accused handed the deceased's tablet to the police at the time of his arrest. The flatscreen TV and a DVD player were recovered from the SAPS in Riversdale, and the Toyota Corolla from Robertson.

[18] The version put by defence counsel to various State witnesses (not during the TWT) regarding the accused's possession of the car and electronic goods was this. The deceased was planning a trip for some children to Ratanga Junction. She approached the accused because he was a driver at the Saldanha naval base's transport depot. Money had to be raised to fund the trip. The deceased gave him the electronic goods to sell for this purpose, and lent him the car.

[19] When this version was put to Ms [HS], she confirmed that a trip was being planned to Ratanga Junction. This was to celebrate the [Xs'] oldest daughter's birthday. The people who were to be part of the trip were the [Xs'] three children and Ms [HS]'s three children, the children – particularly the oldest daughters – being good friends. Although the accused's name was mentioned as a person who might be approached to assist with transport, she knew nothing of a plan by the deceased to raise money by selling household goods. She stated in evidence that she did not believe the accused's version. Ms [HS] testified that the deceased told her that the cost of the trip (ie entry to Ratanga Junction and entertainment there) would be R100 per child. Ms [HS] had told the deceased that she would pay for her own children. The only issue was transport. The deceased and her children would be able to use official transport which shuttled daily between Saldanha Bay and Cape Town. The transport issue related only to Ms [HS]'s children.

[20] When the accused's version was put to Mr [X], he likewise knew nothing of a plan by the deceased to sell electronic goods to raise money for the trip. He said that he got paid on the 15th of each month. In March 2016 he was earning around R8000 per month after deductions. His daughter's birthday was on 17 March. He would have been able to pay whatever was needed for the trip. As to the sale of the electronic goods, he pointed out that all of them apart from the tablet belonged to him, as did the Toyota Corolla. His wife would never have lent the car to a third party, certainly not without telling him. In regard to the tablet, he testified that his wife used it as her mobile telephone and as a camera. She had no other mobile telephone and the home did not have a landline.

[21] Disregarding the confessions, this was the evidence before the court when the State closed its case. The evidence I have summarised above from the State witnesses was largely uncontested. The State witnesses made a favourable impression on me. The accused's version as put to the State witnesses, to the

extent that they were against his own interest, were admissions regarding his affair with the deceased and his presence in her house when she was murdered.

[22] In my view, the evidence I have summarised represented a strong case against the accused, one which was bound to lead to a conviction if he chose not to testify. Although there was no forensic evidence tying him to the murder, there was a very powerful circumstantial case, fortified by the utter implausibility of the version he put to the witnesses. In that regard I note the following:

(i) On his own version, as put to the defence witnesses, the accused was at the crime scene at the time of the murder.

(ii) On his own version, as put to the defence witnesses, he drove off in the deceased's car in possession of electronic goods taken from her house.

(iii) He was still in possession of the car and of the electronic goods when he arrived at his uncle's house in Robertson on the afternoon of the murder.

(iv) He sold the laptop as if it were his own.

(v) His conduct in leaving the Toyota Corolla at his uncle's house, rather than driving it back to Vredenberg, suggests that he did not wish to be seen in it.

(vi) His version as to why he was in possession of the electronic goods was utterly implausible. The trip to Ratanga Junction would not have been so expensive that Mr [X] and Ms [HS] could not have funded the costs. The deceased would not have given away goods belonging to her husband for sale, at any rate not without first clearing it with him.

(vii) The flatscreen TV and DVD player came from the couple's bedroom where, it is reasonable to assume, it was in frequent use by both husband and wife.

(viii) The laptop, according to Mr [X], was used mainly by the children for playing computer games. Again, it is unlikely that an item in frequent use by the

children for their amusement would be disposed of to fund a once-off trip to Ratanga Junction.

(ix) The tablet was the deceased's only means of telephonic communication with her husband and others. It also contained her photographs. It is inconceivable that she would have allowed this item to be sold for any purpose at all, let alone for the trip to Ratanga Junction.

(x) The deceased would not have lent the accused the Toyota Corolla. Apart from the fact that it did not belong to her, she needed it to ferry her children to and from school. On the very day on which the accused took the car, the deceased would have needed it to collect her youngest daughter, [CD], from school.

(xi) The deceased had recently terminated her relationship with the accused, quite possibly on the very morning he visited her. It is improbable that she would have entrusted a car and goods to such a person for sale, particularly since she would not be able to avoid telling her husband to whom she had lent the car and given the goods. Her husband knew nothing of the affair, and from exhibit "G" it seems that the deceased was anxious that he should remain ignorant of it.

(xii) Since on the accused's own version the deceased was dead when he left the house, any purpose for which she had lent him the car or entrusted electronic goods to him for sale ceased to exist while he was still in the house, yet he took the car and the electronic goods and proceeded to try and sell them.

(xiii) In the light of the above circumstances, the accused's version regarding an invasion of the home by three masked men is simply not credible. There is no evidence suggesting that either the deceased or her husband had access to firearms or that a holdall containing firearms was stored in their ceiling. The evidence that the three men were masked in balaclavas and dressed in identical navy blue overalls seems to be a convenient way of avoiding any description which would enable his version to be investigated and tested.

(xiv) The accused did not disclose to anyone that a murder had been perpetrated by three unknown men. He did not report the matter to the police. He did not tell his uncle, Mr Davids, the truth. When Ms [HS] phoned him during the morning of the murder, he lied to her. Since the tablet was in his possession, it is an unavoidable inference that he sent the false WhatsApp messages to Ms [HS] from the deceased's tablet. (In the TWT the accused said that he refrained from disclosing the truth because of threats made by the three men. He also claimed that the WhatsApp messages were sent by masked intruders. However, for the moment I am assessing the evidence as it stood at the end of the State's case. At that stage, the evidence given in the TWT could not be regarded for any purpose other than determining the admissibility of the confessions.)

Evidence at end trial, excluding confessions

[23] Accordingly, and whether or not the confessions were admitted into evidence, the accused would have been convicted if he did not testify. He elected to testify on the basis that his evidence in the TWT would stand as evidence on the merits. He was cross-examined further by counsel for the State.

[24] The accused's version in his evidence was an elaboration on the version put to the State witnesses. The following additional features emerging from his evidence may be noted:

(i) He confirmed that he went to visit the deceased at her house on the morning of 3 March 2016.

(ii) He was in the house for about eight minutes before the masked men arrived.

(iii) During this period he placed the electronic goods, wrapped up in a duvet, in the boot of the Toyota Corolla, this being in accordance with the alleged arrangement reached with the deceased for raising funds for the Ratanga Junction trip. (When the implausibility of the deceased's having handed these goods over

to him, he could provide no satisfactory explanation. He acknowledged, in particular, that he could not explain why the deceased would have been prepared to dispose of her only telephonic device.)

(iv) During this period (ie before the arrival of the masked men), the deceased handed him the letter, exhibit "G". He put it in his pocket without reading it. (This is implausible.)

(v) When the masked men invaded the house, one of them required him to kneel down in the lounge. The other two men retrieved the holdall from the ceiling and were busy with the deceased in the bedroom.

(vi) Later he was instructed to go to the bedroom, where the deceased was lying, apparently lifeless, on the bed. He was told to tie plastic bags over her head, which he did. He was then instructed to place her in the ceiling through the trapdoor in the passage. Because she was too heavy for him, they told him instead to put her in the freezer. (If the masked men for any reason wanted the body in the ceiling, they themselves could have put it there if it was too heavy for the accused.)

(vii) While he was in the house he received a call from Ms [HS] but was unable to answer because the men were already there. (This seems to have been a confused attempt to explain the unanswered call about which Ms [HS] had testified. However, the call which Ms [HS] made at that stage was not to the accused but to the deceased. On the accused's version, he could not have known about Ms [HS]'s call to the deceased because the latter's tablet was in the boot of his car. The call which Ms [HS] made to the accused was later in the morning and he indeed answered it.)

(viii) The three men then led him out to the car. Two of them got in the backseat and lay flat. The third man pushed the front passenger seat as far back as it could go and crouched down in the front with a firearm in the accused's side. They gave

him instructions as to where to drive. As he was driving from the house, he saw Ms [HS] approaching but they instructed him to turn off onto another road. (This version seems to have been designed to explain why Cecilia Arendse and Ms [HS] did not see multiple persons in the car. The accused was at some difficulty in explaining how the three men could have given him directions when they were below the line of the windows. And on his version, the three men must have arrived on foot because they did not have a getaway car. If they were willing to walk to the house, one may wonder why they were so anxious when leaving it.)

(ix) While he was driving, he heard the characteristic sound of a WhatsApp message arriving on the deceased's tablet. The bogus answers which Ms [HS] received, purportedly from the deceased, were given, he claimed, by one of the three masked men. (It is not apparent why, on the accused's version, the three men had access to the deceased's tablet. The accused said that the electronic goods were wrapped in a duvet and placed in the boot of the car. And if the three men were in possession of the tablet, it is passing strange that they did not take it with them when they got out.)

(x) The three men told him to stop alongside some open veld. They took a photograph of him. When they got out, they told him that he would see what would happen to his family, in particular his brother who was a policeman in Saldanha, if he talked or did anything further. He understood from this that if he went to the police or took anyone into his confidence his brother would be harmed. (I should mention, here, that the final message sent from the deceased's tablet to Ms [HS] – the message sent after Ms [HS] had walked home after failing to find the deceased in town – must, even on the accused's version, have been sent after the three men got out of the car. The conclusion is unavoidable that the accused was the person who sent this bogus message.)

(xi) While he was driving back to Vredenberg, he received a call from his wife to say that their son [AB] was sick and needed to be fetched from school. He parked

the Toyota Corolla at the wife's residence in Fink Street and walked to the primary school, which was a couple of blocks away. He walked with their son to his mother-in-law's house but because she was not there he left [AB] with a neighbour. (If his son was sick – and this part of the story might be true –, it is very surprising that he did not drive in the car to the school. It was put to him in cross-examination that this would have been the obvious thing to do and that his decision instead to park the car at the house was explicable only on the basis that he did not want the car to be seen at the school. The accused was evasive in responding to these questions and could provide no satisfactory answer.)

(xii) The accused did not, in his evidence, deny receiving Ms [HS]'s call or giving her the false answer I have previously mentioned. He also did not deny phoning her back and asking her to let him know if she heard anything more about the deceased. His response to these calls was clearly designed to avoid any suspicion falling on him.

(xiii) He then put petrol in the car with money provided by the deceased (at first he said this was at the Total garage, later he said the Caltex garage) and drove to Robertson. He claims to have told his uncle about the three men and that they had told him to sell the car. (This version, which is directly in conflict with Mr Davids' testimony, was never put to Mr Davids. The accused struck me as a man of reasonable intelligence. He displayed a close interest in the evidence, making notes from time to time. He also conferred with counsel as required.)

(xiv) He did not materially dispute the rest of Mr Davids' evidence. He indeed sold the laptop and tried to sell the tablet. (He could not explain why he thought himself still entitled to dispose of these items following the deceased's death.)

(xv) He did not dispute that he responded to Mr Davids' three telephone calls in the way alleged by the latter. In other words, he acknowledged that when his uncle confronted him in the first telephone call, he did not deny the charge and

instead terminated the call. He likewise did not dispute that in the second and third calls he told his uncle that he would arrange for the car to be collected.

[25] The accused made an unfavourable impression in the witness box. He struck me as a forceful character with a certain measure of cunning. When difficulties in his version were put to him, he was evasive, though sometimes he eventually came up with answers which were clearly recent fabrications. Particularly when cross-examined after the closure of the State's case, he repeatedly gave surly denials without apparent concern for the truth.

[26] So far from his explaining away the State's case, his evidence as I have summarised it above adds to the difficulties confronting him and the implausibility of his account. I would thus have no hesitation in convicting him of the deceased's murder, even leaving the confessions out of account (as I have done up to now).

Admissibility of confessions

[27] Turning to the confessions, the accused's counsel challenged their admissibility on two grounds: (i) that the confessions were made as a result of undue influence exerted on him by the three masked intruders and were thus inadmissible in terms of s 217(1) of the Criminal Procedure Act; (ii) that the confessions were obtained as a result of a violation of the accused's right to legal representation and thus inadmissible in terms of s 35(5) of the Constitution. It was these two matters which were investigated in the TWT.

[28] I approached the admissibility of the first confession (exhibit "H", the letter handed to the investigating officer) on the basis that, if the confession made to Col Brits was inadmissible, the confession contained in the handwritten letter was also inadmissible. I did so on the basis that a confession made to a peace officer who is not a magistrate or justice is inadmissible unless it is reduced to writing and

confirmed before a magistrate or justice. The investigating officer, W/O Arendse, is a peace officer but not a justice. Counsel for the State argued that the confession letter was not 'made to' a peace officer. The letter was not addressed to Arendse or to anyone. It was simply a document in which the accused had burdened himself. It would not matter whether it came into the State's hands through a fellow prisoner, a cleaner or a policeman.

[29] There is authority that the restriction placed on the admissibility of confessions 'made to' a peace officer should be narrowly interpreted (*R v Tshetaundzi* 1960 (4) SA 569 (A) at 572H). Nevertheless, in the present case the accused wrote out the confession while he was in police custody and with the obvious intention of handing it to a policeman. It so happened that the policeman who came to his cell on the morning of Wednesday 9 March to take his warning statement was W/O Arendse and it was to him that the accused chose to hand his confession. Having regard to the purpose presumably underlying the statutory provision in question, I think the confession should be regarded as having been made to Arendse within the meaning of s 217(1)(a) (see *S v Lotter* 1964 (1) SA 229 (O) at 231B-232E; see also *R v Burgess* 1947 (1) SA 560 at 566).

Lack of voluntariness/undue influence

[30] As to the first ground (lack of voluntariness and undue influence), the onus rested on the State to prove beyond reasonable doubt that the confessions were made voluntarily and without undue influence. The accused's first ground depended on his version that the murder was perpetrated by the three masked intruders who had subsequently threatened him if he were to talk. For reasons I have already explained, by the end of the State's case I was satisfied beyond reasonable doubt that the accused's version in that respect was false. The unsatisfactory impression he made on me already existed at the end of the TWT. Of course, a final decision on the accused's guilt would have to await an

assessment of all the evidence, including evidence adduced on behalf of the accused. However, for purposes of the TWT I was satisfied beyond reasonable doubt that the story about the three men was false, from which it followed that the assertion of undue influence was also false.

[31] Furthermore, the accused at no stage testified that the three men told him that he or his family would be harmed unless he confessed to the crime. The highwater mark of the threat was that he should not say anything about them. Given the accused's version that they were masked by balaclavas and wearing identical blue overalls, it is difficult to know how he could have identified them – he certainly was unable to be of any help in the witness box in that respect. Be that as it may, if the threat was that he should not disclose that three men had invaded the house and stolen a holdall containing firearms, it would not follow that he was under any pressure to confess to the crime. He could have claimed to know nothing about the deceased's death; or he could have alleged that the crime was perpetrated by an unknown intruder. In response to my questions, he gave no satisfactory answer as to why the threat uttered by the three men induced him to make a confession. And if he felt the need to confess because of the threats, why did he not do so immediately – for example when Ms [HS] phoned him or when his uncle confronted him?

[32] Accordingly, when the accused told Col Brits that he had not been assaulted or threatened in order to influence him to make a confession, and that he had not been influenced or encouraged by any person to make a confession, I am satisfied beyond reasonable doubt that he was telling Col Brits the truth.

[33] I must mention that Col Brits was an excellent witness. He is recently retired but at the time was a colonel in the Defence Force. He has and had no connection with the police. He has a law degree and qualified as an attorney. He used to teach

criminal procedure at the Military Academy (forming part of the University of Stellenbosch) and has served as a prosecutor, defence counsel and judge in military tribunals. He testified that he is very meticulous and careful when taking confessions, something that he did only two or three times a year. At the slightest sign that something was wrong, he would terminate the process and send the suspect back to the police. He does not go through the prescribed questions simply as a matter of form.

[34] One of the preliminary matters canvassed before a confession is taken down is an encouragement to the accused to take the senior officer into his confidence and tell him if anything untoward has occurred to influence him to make a confession; and an assurance by the senior officer that any such allegations will be investigated and that the accused will be provided with the necessary protection. Col Brits canvassed this with the accused, and I am satisfied that he did so in a genuine endeavour to discern whether anything was amiss.

[35] Col Brits' assessment of the accused in this case was that he was a man who really wanted to unburden himself. He detected no hesitancy. He was perfectly satisfied at the genuineness of the accused's answers. At the end of the confession, the accused was weeping and overwrought. Col Brits offered him a handkerchief and almost shared the emotional catharsis with him. My assessment of Col Brits' demeanour and manner was that he is a kindly gentleman, the sort of fatherly figure in whom a person in distress could confide. If the accused really had been threatened by three unknown men, Col Brits was just the sort of person to whom to explain the dilemma.

[36] I was thus satisfied beyond reasonable doubt that the confession letter and the formal confession were made voluntarily and without undue influence.

Denial of access to legal representation

[37] The second ground of attack was that the accused was denied access to his lawyer, Mr Kaptein, before making the confessions. The confessions were thus said to have been obtained in violation of his right to legal representation as guaranteed by s 35(2) of the Constitution. Section 35(5) the Constitution states in this connection:

'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.'

[38] During argument in the TWT the question arose as to the burden of proof, having regard to the conflicting evidence given by the accused and Mr Kaptein on the one hand and the police witnesses on the other. Unfortunately counsel were unable to refer me to the relevant authorities. Prior to giving my ruling, and based on my own research, I concluded that it would be prudent for me to approach the matter on the basis that the State bore the onus of proving beyond reasonable doubt that the accused had not been denied access to legal representation and thus whether the evidence had been unconstitutionally obtained. I also concluded that if the evidence was unconstitutionally obtained, the State would need to satisfy me that the admission of the confessions would nevertheless not render the trial unfair or be detrimental to the administration of justice.

[39] Differing views have been expressed on this question. In *S v Naidoo* 1998 (1) SACR 479 (N) McCall J held that the onus in respect of these matters rested on the accused on a balance of probability (522c- 523b). This view was followed in *S v Gumede & others* [1998] 5 BCLR 530 (D) at 538D and *S v Lottering* [1999] 12 BCLR 1478 (N) at 1483D, though in the latter two cases the proposition was mentioned only in regard to whether the admission of the unconstitutionally obtained evidence would render the trial unfair or be detrimental to the

administration of justice. In *S v Mathebula & another* 1997 (1) SACR 10 (W) Claassen J held that the onus of proving that his constitutional rights had been infringed rested on the accused (16e-j). In *S v Soci* 1998 (2) SACR 275 (E) Erasmus J held that that there was no onus on the State to disprove the fact of an alleged violation of an accused's constitutional rights (289d). A contrary view was expressed by Buys J in *S v Brown & another* 1996 (2) SACR 49 (NC) at 73b.

[40] However, in *S v Mgcina* 2007 (1) SACR 82 (T) a full court in Gauteng (per Du Plessis J) held that, consistently with the onus of proof in respect of the matters contained in s 217(1) of the Criminal Procedure Act, the onus rested on the State to prove beyond reasonable doubt that the evidence was not unconstitutionally obtained (93-96) and this view was approved by a full court in KwaZulu Natal in *S v Nzama* [2009] ZAKZPHC 13 paras 33-35. It was in deference to these full court decisions, which though not binding on me have strong persuasive value, that I decided – not without considerable doubt – to approach the matter on the assumption that the onus rested on the State to prove beyond reasonable doubt that the evidence had not been unconstitutionally obtained. In regard to the further question as to whether, if the evidence was unconstitutionally obtained, its admission would render the trial unfair or otherwise be detrimental to the administration of justice, it does not seem to me that the matter is strictly one of onus. The court makes a value judgment in accordance with the principles recently rehearsed in *S v Gumede* 2017 (1) SACR 253 (SCA) paras 19-25.

[41] My reasons for doubting the correctness of *Mgcina* (and thus *Nzama*) were, and remain, the following. Where one is concerned with the burden of proof in relation to statutory requirements, the question is one of statutory interpretation. This flows from the principle that the incidence of onus is a matter of substantive law: 'Any rule of law that annexes legal consequences to a fact . . . must, as a

necessary corollary, provide for which party is supposed to prove that fact' (D T Zeffertt and A P Paizes *The South African Law of Evidence* 2 ed 45-46, a repetition of a an identical proposition in an earlier edition cited with approval in *During NO v Boesak & another* 1990 (3) SA 661 (A) at 672H-I). Naturally constitutional values and public policy are of great importance in interpreting statutes but the language of the enactment is the starting point and may be decisive. Even where the Constitution itself must be interpreted, 'it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean'. Its language must be respected. If its language is ignored 'in favour of a general resort to "values"', the result 'is not interpretation but divination' (*S v Zuma & others* 1995 (2) SA 642 (CC) paras 17-18).

[42] In the case of s 217(1) of the Criminal Procedure Act, the statutory requirements are framed as conditions in order for evidence to be admissible. A confession 'shall … be admissible' 'if such confession is proved …' etc and if, in the case of a confession made to a peace officer, it has been confirmed and reduced to writing in the presence of a magistrate or justice. Since s 217(1) specifies conditions to be proved before a confession may be admitted into evidence, it is obvious that the onus must rest on the party seeking to have the confession admitted to prove that the conditions of admissibility are satisfied. This will invariably be the State. And where the State bears a burden of proof in criminal proceedings, the burden is proof beyond reasonable doubt unless the statute states otherwise.

[43] Section 35(5) of the Constitution is differently framed. It sets conditions for the exclusion of evidence, not for its admission. If evidence is obtained in a manner that violates any right in the Bill of Rights, it must be excluded if the admission of the evidence would render the trial unfair or otherwise be detrimental to the administration of justice. As a matter of language, the person

seeking to exclude the evidence (ie the accused) would bear the burden of proving that the conditions for exclusion are satisfied, namely that the evidence tendered by the State (being evidence otherwise relevant and admissible, including in terms of s 217(1)) was obtained in a manner that violated the accused's fundamental rights and that its admission would render the trial unfair or be detrimental to the administration of justice. And where an onus rests on an accused person, the onus is on a balance of probability.

[44] The ordinary rule is that where a statute creates an offence, a statutory exception to liability must be proved by the person setting up the exception (ie the accused) on a balance of probability. In South Africa the rule has been embodied in the provision currently found in s 90 of the Criminal Procedure Act. In *Zuma* supra the Constitutional Court emphasised that its judgment did not purport to apply to exceptions, exemptions or provisos to statutory offences (para 42). See also *R v Hunt* [1987] AC 352, where the House of Lords (per the majority speech of Lord Griffiths) held that a provision similar to our s 90 merely stated 'the orthodox principle . . . that exceptions, etc., are to be set up by those who rely on them' (373H) and that the person setting up the exception must discharge his burden on a balance of probability (374A-B).

[45] In the present case we are not concerned with an exemption or exclusion from conduct which would otherwise constitute a crime but with the exclusion of evidence which would otherwise be admissible. This seems to me to be an a fortiori case for placing the burden on the person setting up the exclusion, since the burden does not relate to his guilt but only to the admissibility of evidence. If the evidence is admitted, the State still needs to prove the accused's guilt beyond reasonable doubt. The accused may seek to controvert the evidence. At the end of the case the court must still determine whether the admitted evidence is true or reliable and what weight to attach to it.

[46] Placing the onus on the accused person on a balance of probability does not seem to me to be less calculated to promote the spirit, purport and objects of the Bill of Rights than placing the onus on the State to prove the contrary beyond reasonable doubt. In the ordinary course, a person who seeks to obtain the benefit of a remedy because of an alleged violation of his constitutional rights must prove the violation on a balance of probability. Although the exclusion of evidence in terms of s 35(5) may not be a remedy in the conventional sense, it is a beneficial result which the violated party achieves in consequence of the violation of his fundamental rights. Section 35(5) is a statutory mechanism for vindicating the fundamental right, even though the evidence excluded might be very reliable and highly probative. Why should this outcome be available for the benefit of an accused and to the detriment of society where it is merely a reasonable possibility, but not a probability, that the accused's fundamental rights were violated in the obtaining of the evidence, and where – if the evidence were received – it would still need to be weighed with all the other evidence in order to determine whether the State has proved the accused's guilt beyond reasonable doubt?

[47] I mention these considerations for such value as they may have if and when the issue of onus needs to be authoritatively determined. As I have said, I was willing to approach the present case on the basis that the State needed to prove beyond reasonable doubt that the accused's fundamental rights were not violated in the obtaining of the confessions.

[48] The accused's evidence was that as he was being arrested early in the morning on Tuesday, 8 March 2016, his wife said that she would contact Mr Kaptein, the attorney acting for him in the divorce proceedings. The accused said that during the course of the Tuesday he mentioned the fact that he was expecting a visit from Mr Kaptein to Sgt Bara and to Sgt Michelle Davids. These police officers categorically denied that the accused had told them any such thing. I was

impressed by both of them and have no reason to doubt their honesty. Conversely, the accused has shown himself over and over again to be a dishonest witness.

[49] The accused was orally warned of his rights when he was arrested at Fink Street and was again warned in writing, by way of the standard SAP 14A notice, when he was processed into the Saldanha Bay police cells a little later in the morning. These rights included his right to silence and his right to an attorney, including an attorney at State expense if he could not afford one.

[50] The accused testified that his wife visited him during the evening of 8 March. She brought him a Bible and a juice. She told him that she had contacted an attorney, Mr Kaptein, who would come and see him the next morning. The accused's wife, who could have corroborated this assertion, was not called by the defence.

[51] The accused was collected from his cell by W/O Arendse at around 09:30 on the Wednesday morning, 9 March, with a view to taking his warning statement. This was when the accused handed him the confession letter which he had evidently written overnight. Arendse read the letter and then asked the accused whether he wished to make a confession to a justice, which the accused confirmed. Arendse reported this to his commanding officer, Capt Carosini, who set up the interview with Col Brits and arranged for Sgt van Dyk to take the accused to Col Brits.

[52] It is common cause that W/O Arendse was not expecting to receive a confession from the accused. The accused also admitted that he did not tell Arendse that he had an attorney, or that he had expected an attorney to arrive the previous day or that he was expecting to receive a visit from an attorney that same day, or that he wanted to talk to an attorney before making a confession.

[53] Sgt van Dyk testified that when he went to collect the accused in order to take him to Col Brits, he again explained his rights to the accused. He particularly emphasised to the accused his right to remain silent and his right to an attorney, rights which he regarded as of particular importance at that juncture. The accused told Van Dyk that he wanted to go ahead with the confession. Van Dyk then drove him to Col Brits' office He dealt with the accused in a sympathetic way: he cuffed the accused's hands in front rather than behind; the handcuffs were concealed by a tracksuit; while they were waiting for Col Brits, he offered the accused a cigarette, and they chatted in a friendly fashion.

[54] There was virtually no challenge to Sgt van Dyk's evidence. In cross-examination the accused's counsel told Van Dyk that his instructions from Mr Kaptein were that the police prevented him from consulting with his client. Van Dyk said he knew nothing about that, his involvement being limited to what he had told the court.

[55] However, when the accused testified in the TWT, he claimed that as they were driving to Col Brits he told Sgt van Dyk that Mr Kaptein was his lawyer. Van Dyk allegedly replied that Kaptein was a good attorney. He also told the accused that it was a good thing to confess. None of this had been put to Van Dyk. The accused could give no satisfactory explanation for the omission. I have no reason to doubt the evidence of Van Dyk, who made a favourable impression on me. He was completely unconnected to the investigation of this case; indeed, he was not at this time involved in ordinary criminal investigations at all but in gang operations. I have already summarised the humane way in which he dealt with the accused. He had no reason to conceal anything to the accused's advantage. I thus reject as false beyond reasonable doubt what the accused claimed to have said to Sgt van Dyk.

[56] During his interview with Col Brits, the accused was clear that he did not want to consult with an attorney. He made no mention of having an attorney. Col Brits testified – and I have no hesitation in accepting this evidence as true – that if he had detected the slightest hesitancy in this regard on the accused's part, he would terminated the interview and advised the accused to take the precaution of consulting a lawyer. I asked the accused why, if he had been willing (as he claimed) to mention that he had a lawyer to Sgt Bara, Sgt Davids and Sgt van Dyk, he had refrained from telling Col Brits the same thing. He could not answer.

[57] I was and thus remain satisfied beyond reasonable doubt that the accused was fully aware and understood his right to refrain from making a confession and his right to consult with an attorney at any time after his arrest; and that he took a considered and deliberate decision to make a confession in order to unburden his guilty conscience. It is gratifying in this case to have no hint whatsoever, even from the accused, of undue pressure applied on him by the police to make a confession. The handwritten confession which he prepared overnight was entirely of his own volition and came as a surprise to W/O Arendse. The formal confession to Col Brits followed logically from the informal confession. The process followed by Col Brits was impeccable, and by the end of the interview the accused was observed to be in a condition entirely consistent with his having unburdened himself of a terrible truth and entirely inconsistent with his having made the confession under compulsion or in the face of a denial of his fundamental rights.

[58] If, by the time he made his confession to Col Brits, the accused was aware of steps taken by his wife to procure the services of Mr Kaptein as his attorney, I am satisfied that he took a deliberate decision to proceed with the confession despite knowing that he was entitled to keep his silence and to refrain from making a confession until he had consulted his attorney. In fact, however, I do not believe

that the accused had the knowledge about Mr Kaptein's engagement which he professed in evidence. I have rejected as false beyond reasonable doubt his testimony of mentioning an attorney to Sgt Bara, Sgt Davids and Sgt van Dyk. He made no mention of having an attorney when he handed his confession letter to Arendse or when he made his formal confession to Brits.

[59] Mr Kaptein's evidence gives rise to greater difficulties. He testified that on the morning of the arrest, which he said was Monday 7 March 2016, he was contacted by the accused's wife and told of the arrest. He asked her to come to his office, which she did. She paid him a retainer of R500 to cover initial work by him to ascertain the accused's whereabouts and to have a first consultation with him. He telephoned Capt Carosini, who was known to him as the commanding officer at Saldanha Bay SAPS, and introduced himself as the accused's attorney. Carosini replied that W/O Arendse was the investigating officer and that Mr Kaptein should deal with him. Kaptein asked Carosini whether he could speak with Arendse. Carosini replied that Arendse was not at the station at that time. Kaptein obtains Arendse's mobile number from Carosini.

[60] He phoned Arendse who told him that he was still in the process of charging the accused and that he could see his client later in the day. Kaptein told Arendse that this was unacceptable, that he was the accused's lawyer and wanted to see him. Arendse would not relent. Kaptein thus got into his car and drove from Vredenberg to the Saldanha Bay police station. There he spoke with the duty constable (whose name he could not recall). The constable told him that Arendse and the accused were not at the police station but were together at the crime scene.

[61] According to Mr Kaptein, all the events described above occurred before ten o'clock in the morning on Monday 7 March. After receiving the report from the unidentified constable, he drove back to Vredenberg and phoned the accused's

wife to say that her husband was not at that time at the Saldanha Bay police station. He then phoned Arendse again. According to Kaptein, Arendse told him that the accused was 'in the process of making a confession' though in the same conversation Arendse also supposedly said that the accused did not need an attorney as he had already made a confession.

[62] The accused's first appearance in court was in Vredenberg at around 14:00 on Wednesday 9 March. Mr Kaptein did not, during his evidence in chief, mention that he was at court on that occasion and spoke with the accused. His testimony in chief was that he first consulted with the accused at Malmesbury Prison on 14 March. In cross-examination, however, he disclosed that he had been at court on 9 March. He had not mentioned this because at that time the accused was represented by a legal aid lawyer. Kaptein had not yet come on record. This was because the initial deposit paid by the accused's wife did not extend thus far. The accused apparently had legal insurance with Legal Wise, and his wife was in the process of obtaining authority from the insurer to fund Mr Kaptein's fees. This authority had not yet been forthcoming at the time of the accused's first appearance.

[63] Capt Carosini testified that he had no recollection whatsoever of talking with Mr Kaptein about this case. He was acquainted with Mr Kaptein because he (Carosini) played bowls with Kaptein's father. He could not recall whether he had ever spoken with Kaptein on the phone in connection with any cases but he had certainly met him from time to time at court. When asked how he would have reacted had Kaptein phoned him as alleged, his initial answer was that he would have put an end to further dealings with the accused until the accused had an opportunity to consult Kaptein. In response to a question from me, however, he said it was possible that he might have responded by referring Kaptein to the investigating officer.

[64] The deceased's murder was a big case for the Saldanha Bay SAPS and my impression is that Carosini would have remembered a call from Kaptein had it taken place. However, Carosini seemed reluctant to assert this, perhaps being uncomfortable about stating categorically that an attorney was not telling the truth. I assessed Carosini to be an honest witness.

[65] Arendse categorically denied having ever spoken with Mr Kaptein over the telephone. In the main, I was satisfied with the way Arendse gave evidence. However, and perhaps by long experience as a policeman, he answered only the questions asked and gave short answers, providing no elaboration in an attempt to make what he said more convincing. To some extent, therefore, he was inscrutable. On the other hand, when he and Sgt Bara were recalled at my request to testify regarding the custody register, occurrence book and Arendse's pocket-book, there was nothing inconsistent in these documents with their evidence.

[66] Except for his failure to mention meeting and talking with the accused at his first appearance on 9 March, there was nothing about the manner in which Mr Kaptein gave his evidence which I can criticise. He did not come across as an untruthful witness.

[67] Objectively speaking, however, his evidence is subject to two serious criticisms. The first is that the events he described could not have occurred on Monday 7 March. The accused was only arrested early in the morning on Tuesday 8 March. Furthermore, the events he described all occurred, according to him, during the course of the same morning. The last of those events – his second telephone conversation with W/O Arendse – could not have occurred until Wednesday 9 March, because it was not known until the morning of 9 March that there would be a confession.

[68] Furthermore, and assuming that the interactions in question happened on 8 or 9 March, on neither of these days was the accused absent from the police station in order to attend with Arendse at the crime scene. The custody register and occurrence book showed that the accused was in the police cells for the entire period until he was booked out at 10:45 on 9 March to accompany Van Dyk to Col Brits. Furthermore, Arendse testified that he did not attend at the crime scene on either 8 or 9 March 2016. His pocket-book, which I asked him to produce, recorded that in the early hours of 8 March he assisted in the accused's arrest in Vredenberg. He went back to Vredenberg at around 09:30 to interview the accused's wife and to make other investigations, only returning to Saldanha Bay at 13:00. His pocket-book entries for the morning of 9 March likewise did not reflect a visit to the crime scene.

[69] It thus seems very unlikely that the unidentified constable with whom Mr Kaptein says he spoke could have told Kaptein that Arendse and the accused were not at the police station because they were together at the crime scene.

[70] The second criticism, which is connected with the first, concerns Mr Kaptein's note-keeping. I asked him about his file notes. He said that it was not possible to make them available without disclosing privileged information. His notes concerning his dealings with Carosini and Arendse were intermingled with notes regarding his conversations with the accused's wife in which, among other things, she conveyed to him information she had obtained from the accused.

[71] I asked him to read the portions of the notes recording his interactions with the police. He confirmed that his notes specifically recorded the interactions with the police as occurring on the morning of 7 March. At one point he said that the date came from the accused's wife. On the other hand, he claimed that he was making the notes more or less contemporaneously. If that was the case, he would

not have needed to rely on the accused's wife for the date, since on his evidence he was making the notes on 7 March.

[72] In regard to his file note of the second conversation with W/O Arendse, Mr Kaptein said that it simply recorded Arendse telling him that the accused had already made a confession. The recordal did not mention that the accused was on his way to make a confession.

[73] Since the date recorded in the notes was obviously wrong, and since the date would not have been incorrectly recorded had the notes been made contemporaneously, there must have been a greater delay between the alleged events and the making of the notes than Mr Kaptein claimed and that to some extent the notes must constitute a reconstruction. Kaptein withdrew as the accused's attorney not long after 14 March 2016 and was only required to revisit this matter when asked to testify at the TWT more than two years later. His recollections may have been inaccurate.

[74] If the accused were required to prove on a balance of probability that he was denied access to Mr Kaptein before making the confessions, I would find that the onus was not discharged. However it would be going very far to say that Mr Kaptein's account of events is in all respects false beyond reasonable doubt. While there may be material errors of recollection and reconstruction, it is unlikely that an officer of the court would fabricate an entire account.

[75] I must thus find it to be reasonably possible that interactions of the kind described by Mr Kaptein took place. However, for the reasons I have explained, it is not reasonably possible that those events took place on 7 or 8 March. They must have occurred on the morning of 9 March, the day on which the accused made his confessions. If Kaptein was told by a constable on that morning that Arendse and the accused were not at the police station, this may have been because the accused

had already been booked out by Sgt van Dyk in order to make his confession and because W/O Arendse had left the station for purposes unrelated to the case. (According to his pocket-book, at 10:30 he went to the prosecutor's office to fetch unspecified dockets.)

[76] Kaptein's notes do not indicate the times when the alleged conversations with Arendse took place. His only written recordal of the second conversation was that Arendse told him that the accused had already made a confession. I thus cannot find it to be reasonably possibly true that this conversation happened before the interview with Col Brits was completed. If it happened only after the formal confession was completed, it can have no bearing on the admissibility of the confession.

[77] As to the first conversation, Mr Kaptein stated that Arendse told him that he was in the process of charging the accused. According to the custody register and occurrence book, Arendse charged the accused at 12:15 on 9 March, which would have been after the accused returned from Col Brits but before he was booked back into the cell at 12:30. If so, the first call was made after the second confession was completed.

[78] On the other hand, placing the first call at around 12:15 would not account for the intervening trip which Mr Kaptein says he made to Saldanha Bay and the information given to him by the unidentified constable. I must thus find it reasonably possible that the call happened earlier, perhaps at around 09:30 when Arendse was preparing to charge the accused and take his warning statement.

[79] Although it is possible that Kaptein is mistaken as to the identity of the policeman with whom he spoke, I think I must assume it to be reasonably possibly true that he spoke with Arendse. On that basis, it is reasonably possible that Arendse told Kaptein that he was in the process of charging the accused and that

Kaptein could see him later in the day. Since Arendse made no mention at that stage of a confession, this must have been before the accused handed him the confession letter. Arendse had no reason to believe that the accused was on the verge of making a confession.

[80] On the facts as I find them to be as a reasonable possibility, Arendse's failure to halt the process after receiving the first call from Kaptein was a violation of the accused's right to legal representation. It is possible that the accused would then not have handed Arendse the confession letter until consulting with Kaptein, and that after consulting Kaptein he would have refrained from making any confession.

[81] I must thus consider whether admitting the confessions, which were to this extent obtained in violation of the accused's fundamental right to legal representation, would result in an unfair trial or bring the administration of justice into disrepute. I do so by considering the factors and weighing the competing considerations as explained in *S v Gumede* supra.

[82] On the one hand, Arendse's conduct prevented the accused from consulting with an attorney who had been engaged for him by his wife. On the other hand, the accused was well aware of his right to silence and of his right to an attorney. On the facts as I find them to be, he did not know that an attorney had been engaged for him. With full knowledge of his right to an attorney, and in order to unburden his guilty conscience, he chose to make a confession. His first confession, the handwritten one, was prepared before Kaptein made contact with Arendse, even though it was only handed to Arendse after Kaptein's first call.

[83] The accused did not testify that, if Arendse had told him that Kaptein wanted to see him, he would not have handed Arendse the confession letter or would not have proceeded with the formal confession. Kaptein was entitled to see the

accused if the latter want to consult him; Kaptein could not insist on seeing him. The accused was anxious to unburden himself. Having already written out a confession (which he had headed, 'The truth will set you free!!!'), he may well have decided to carry through with his intention of confessing, either without consulting Kaptein or after consulting him. Mr Kaptein did not testify that he would have advised the accused against making a confession if the accused's instructions to him were that he had committed the crime.

[84] Although Arendse should have put things on hold, he did not refuse to allow the accused to see an attorney. At a time when Arendse was not expecting to receive a confession, he simply told Kaptein that he was processing the accused and that Kaptein could see him later. Arendse can be criticised for not getting back to Kaptein once it appeared that the accused wanted to make an incriminating statement, but the violation of the accused's rights does not go beyond this.

[85] There is no evidence of a concerted or systemic endeavour by the police to deprive the accused of his rights. One particular officer made what might be regarded as an error of judgment in dealing with the accused. The accused himself had a remedy in his own hands. He could have told Arendse or Brits that he wished to consult with an attorney.

[86] For the reasons I have already explained, the State had a strong case against the accused. By Wednesday 9 March the Toyota Corolla and some of the electronic goods had already been recovered and the police would have had statements from the accused's uncle and Ms [HS]. The accused's confession was consistent with evidence already available to the State. For reasons I have explained, the accused's conviction does not depend heavily on the admission of

the confessions. Indeed, I consider that the accused would be convicted even if the confessions were excluded.

[87] I was thus of the opinion when I made my ruling, and am still of the opinion, that the admission of the confessions, despite the irregularity mentioned above, would not result in the accused's having an unfair trial and would not bring the administration of justice into disrepute.

The confessions as additional evidence

[88] The handwritten confession and the formal confession (exhibits 'H' and 'I') are mutually consistent though sometimes there is a point of detail which is on the one and not the other. They are also largely consistent with the other evidence tendered by the State. In the confessions the accused says that after the deceased handed him her break-up letter darkness came over him. He put his arm around her neck and strangled her. He tied the plastic bags over her head. He tried to put her body into the ceiling but she was too heavy so he placed her in the deep-freeze and covered the body with frozen meat (this is how the body was found). In the confession letter he said that he was crying and saying, 'I am sorry, it was not my intention to harm you'. In the formal confession he said that after strangling her he put her head in his lap, cried her name repeatedly, and was talking to himself, asking God what he (the accused) had done. After he had placed the body in the freezer, he took the electronic goods to the car and drove off.

[89] He confirms in the confessions having seen Ms [HS] approaching. He also refers to the WhatsApp messages, stating in exhibit 'H' that he sent a message on the deceased's tablet purporting to say that the deceased wished to be alone and then that Ms [HS] should meet her at Cartol. When he testified in his defence, I asked the accused how he could have known this information since on his version the messages were sent by one of the three masked intruders. His initial answer

was that he could hear the characteristic sound of the arrival of a WhatsApp message. I said that this would not enable him to know what reply was sent. He then claimed that he heard the men discussing how to reply to Ms [HS] – another recent fabrication to extricate himself from difficulty.

[90] The confessions have a level of detail quite inconsistent with a person fabricating a false confession under threat of harm. They also contain information which he would not have known if he were not the perpetrator. Apart from the WhatsApp messages mentioned in the confession, there is the fact that on his evidence he was not present in the room when the deceased was killed. He acknowledged in cross-examination that he did not know how the accused had died. His confession about applying force to her neck with his arm is consistent with the pathologist's report which concluded that the deceased had been manually strangled and had suffered inter alia a fracture of the hyoid bone.

Conclusion

[91] In all the circumstances, the accused must be convicted on the first count of murder. Before considering whether the murder falls within Part 1 of Schedule 2 of Act 105 of 1997, it is necessary to consider whether, on the second count, the accused should be convicted of robbery (in which case it would undoubtedly be robbery with aggravating circumstances) or of theft. The critical issue here is whether the violence which resulted in the deceased's death was directed at enabling the accused to take the goods (as to which, see Snyman *Criminal Law* 6 ed 508-510).

[92] The State is required to prove robbery beyond reasonable doubt. It would have been much wiser for the accused in this court to have maintained the openness he did in his confessions. However, the fact that he chose instead to recant and give dishonest evidence does not entitle me to make assumptions

favourable to the State if it remains a reasonable possibility that the circumstances in which events unfolded did not constitute robbery.

[93] If the accused had been a stranger to the deceased and her home, it may have been easy to infer – in the absence of some other reasonably possible explanation – that the motive for killing the deceased was to take goods from her house. However, the accused was having an affair with the deceased, a relationship which she apparently broke off by handing him the letter, exhibit 'G'. And although the State is not obliged to accept the truth of everything said in the confessions, the State nevertheless has asked me to receive them as evidence. In those confessions the accused links the 'darkness' which descended over him to the deceased's handing to him of the break-up letter. He also describes being distraught at having found he had killed her.

[94] In the circumstances, I think it is reasonably possible that the accused inflicted violence on the deceased, not with any idea of taking her goods but, to use a colloquial expression, in a moment of madness brought on by the termination of their relationship. He could not have taken her goods without incapacitating her but the possibility remains that she was incapacitated for reasons unrelated to the taking of her goods and that the accused then took advantage of her incapacitation to take her goods.

[95] He has not told us why he did so. It is reasonably possible that he hoped to throw the police off the scent by creating the impression of an all-too-familiar home invasion accompanied by robbery. If so, he swiftly changed course, adopting the mercenary approach of selling the goods for his own benefit. Alternatively, he may, after killing the deceased, have decided while still in the house to take advantage of her death by stealing her goods. Either way, there is

not that connection between the violence and the taking of the goods which the law demands before a person can be convicted of robbery.

[96] Counsel for the State referred me to *S v Yolelo* 1981 (1) SA 1002 (A) where Van Heerden AJA said that in every case one must consider whether, in the light of all the circumstances, and particularly the time and place of the accused's acts, there is such a close connection between the theft and the violence that the two acts can be seen as inextricable components of what is essentially one course of conduct (1015 G-H). The context of the learned judge of appeal's remarks was the case where violence comes after, rather than before, the taking of the goods. Although the timing and location of the violence and the taking are important elements in determining whether a sufficient connection exists, the judge of appeal did not say that such connection exists merely because the violence and the taking are very closely connected in point of time and location. The question always is whether one can infer that the violence was inflicted either in order to take or to retain possession of the goods.

[97] I thus find that the State has not proved robbery beyond reasonable doubt, from which it follows that on count 2 there must be entered the competent verdict of theft.

[98] Returning to count 1, the finding on count 2 means that the murder cannot be brought within the ambit of Part I of Schedule 2 on the basis of having been perpetrated in committing robbery with aggravating circumstances. The other basis alleged in the indictment is that the murder was premeditated. However, counsel for the State conceded, correctly in my view, that one could not find beyond reasonable doubt that the accused went to the deceased's home with the intention of killing her. Put differently, one could not exclude as a reasonable possibility that the murder occurred on the spur of the moment.

[99] The judgment of the court is thus as follows:

(a) On count 1, the accused is convicted of murder, such murder falling, for purposes of sentencing, under Part II of Schedule 2 of Act 105 of 1997.

(b) On count 2, the accused is convicted of the theft of the items mentioned in the indictment.

O L Rogers J

APPEARANCES

For the State	Mr C Burke Office of the Director Of Public Prosecutions, Western Cape
For the Accused	Mr Caiger