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OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

In the High Court of South Africa
(Western Cape Division, Cape Town)

[REPORTABLE]

CASE NO: SS64/2017

In the matter between:

THE STATE

and

MORTIMER HENRY SAUNDERS

Accused

JUDGMENT DELIVERED ON: 6 AND 7 NOVEMBER 2018

MANTAME, J

A BACKGROUND

[1] The accused Mortimer Henry Saunders appeared before this Court on two (2) counts, that is, rape and murder. The accused pleaded not guilty on the main count of rape, but guilty on the alternative count of committing sexual act with a corpse; and not guilty on the main count of murder, but guilty on murder without premeditation and or planning. In his plea – explanation, and admissions in terms of

Section 220 of the Criminal Procedure Act 51 of 1977 ("CPA"), the accused stated the following:

- "1. I am the accused in the aforementioned matter.*
- 2. I have been informed of my rights, in particular:*
 - 2.1 To be presumed innocent until proven guilty beyond reasonable doubt;*
 - 2.2 To plead not guilty and put the State to prove of (sic) its case;*
 - 2.3 Not to be compelled to give self-incriminating evidence, and*
 - 2.4 I am not obliged to plead guilty as set out hereunder.*
- 3. The charges have been explained to me and I understand the charges against me, as set out in the indictment.*
- 4. I have not been unduly influenced or threatened to plead guilty nor were any promises made to me.*
- 5. I do so freely, voluntarily, without undue influence and while being of sober sense (sic).*
- 6. The provisions of the Criminal Law Amendment Act 105 of 1997 have been explained to me, in particular:*
 - 6.1 in respect of both Counts that the provisions of Section 51(1) of the Criminal Law Amendment Act 105 of 1997 are applicable.*

Plea of guilty and admissions

- 7. I therefore plead guilty as follows:*
 - 7.1 in respect of Count 1: Contravention of s14 of Act 32 of 2007 in that I unlawfully and intentionally committed a sexual act with a corpse;*

- 7.2 *in respect of Count 2: Murder without it being premediated and / or planned; and*
- 7.3 *that in respect of Count 2 it has been explained to me that the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997 are applicable to the aforesaid charge.*

8. *I make the understated admissions:*

- 8.1 *The deceased Courtney Pieters resided at [...] P Street, Elsies River.*
- 8.2 *The deceased Courtney Pieters, is the biological daughter of J P. She was born on [...] 2013 and was three (3) years old at the time of her death.*
- 8.3 *I rented a room in the home in which the family of the deceased lived at [...] P Street, Elsies River.*
- 8.4 *I did so for a period of about two (2) years prior to 4 May 2017.*
- 8.5 *On 4 May 2017 the parents of the deceased, J P and A F, left her in the care of her brother, aged six (6) years old.*
- 8.6 *I was on leave for the period 28 April 2017 to 8 May 2017 and was also at home.*
- 8.7 *During the course of the morning on 4 May 2017 I woke up and made use of the bathroom on the 1st floor.*
- 8.8 *On my way I noticed that both the deceased and her brother were still asleep.*
- 8.9 *Ten (10) to fifteen (15) minutes after my return to my bedroom on the ground floor the deceased came to my room to watch TV.*
- 8.10 *She stayed for a few minutes I told her to leave my room as I wanted to sleep further.*

- 8.11 *The deceased left but returned thirty (30) minutes later.*
- 8.12 *Irritated for having been woken a second time and compounded by ill feelings between myself and her mother I decided to give her ant poison.*
- 8.13 *I bought the poison some eight (8) months before, to use for an ant problem I had in my room.*
- 8.14 *Because it was in powder form I mixed it with water.*
- 8.15 *My intention was to make her sick and in doing so to get back at her mother.*
- 8.16 *Initially she did not want to drink it, but on telling her to do so she did.*
- 8.17 *She started coughing and some of the mixture settled on her face, hair and clothing.*
- 8.18 *At this point some of the other persons living on the property started looking for her.*
- 8.19 *She tried to respond to their calls.*
- 8.20 *I panicked, I did not want her to be found in my room in the aforesaid state.*
- 8.21 *To stop her from screaming I hit her with my open hand on the forehead, closed her mouth with a towel and choked her by putting my hand around her throat.*
- 8.22 *Her body became limp and I placed her on a duvet in the corner of my room.*
- 8.23 *I left my room with the door open.*
- 8.24 *After about ten (10) minutes I returned.*

- 8.25 *I noticed that her lips were blue and her body lifeless.*
- 8.26 *It also looked as if she vomited, as fluid was coming out (sic) her mouth.*
- 8.27 *I realized that she was dead.*
- 8.28 *Utterly stunned by what I have done I remained in my room for about an hour.*
- 8.29 *The TV continued playing and I mulled as what to do next.*
- 8.30 *I decided to get rid of the body.*
- 8.31 *Before I did so, I pulled down her denim shorts and panty penetrating her vagina with three (3) fingers.*
- 8.32 *There was no reaction of pain by her and no active bleeding as my fingers penetrated her.*
- 8.33 *However I became aroused.*
- 8.34 *I took out my penis and did place it on her body and around her vagina but I did not penetrate her with it.*
- 8.35 *I thereafter covered the body in the duvet and placed it in the plastic packaging the duvet came in.*
- 8.36 *I thereafter left the body in the bushes close to the factories and railway line.*
- 8.37 *When the parents returned that evening they received a report that the deceased is missing.*
- 8.38 *After an extensive search her lifeless body was found nine (9) days later where it had been dumped in a nearby industrial area.*
9. *I make further understated admissions in terms of s220 of the CPA.*

10. *The deceased mentioned in the indictment was at all relevant times correctly identified as Courtney Pieters.*
11. *That, from the time the body was found on 13 May 2017 until the time the post mortem examination, the body of the deceased did not sustain any further injuries.*
12. *Dr Aloysia Shanessa Ogle performed the post mortem examination on the body of the deceased on 15 May 2017.*
13. *The cause of death of the deceased as determined at the post mortem examination and noted on the said post mortem is correct as being, “most likely asphyxia in nature (smothering, strangulation, etc.) and / or poisoning, and the manner therefore unnatural.”*
14. *To the extent that her findings may be indicative that the genital injuries were inflicted prior to death I do not admit it.*
15. *Dr Aloysia Ogle took samples or specimens from the body of the deceased herein referred to as “specimens retained” during the post mortem examination and it was at all relevant times properly sealed and packed.*
16. *The photo album, affidavit and key to the photos taken and compiled by Warrant Officer Jaco Van Schalkwayk correctly depicts the scene of the alleged crime at [...]JP Street, Elsies River, [Exhibit “D”]*
17. *That the correctness and content of the photo album, the affidavit and key to the photos taken and compiled by Insp Elrika Van Niekerk are admitted and can be accepted as exhibits as mentioned:*
 - 17.1 *Photos 1 – 59 taken on 13 and 14 May 2017 depicting the scene where the body of the deceased was found on 13 May 2017 on an open field behind Silicon Factory, Bofors Circle, Epping Industria, Elsies River and where certain items were collected – [Exhibit “E”]*

- 17.2 *Photos 60 – 93 of the deceased taken during the post mortem on 15 May 2017 – [Exhibit “F”]*
- 17.3 *Photos 94 – 100 of the accused (Mortimer Saunders) taken on 15 May 2017 at FCS Bishop Lavis dressed in a red golf T-Shirt (Pringle medium) which was also collected as evidence.*
- 18. *On 13 May 2017 at Bofors Circle, Epping Industria, Dr Ogle collected the following samples or specimens from the body of the deceased:*
 - 18.1 *nail clippings*
 - 18.2 *one Paediatric Sexual Assault Evidence Collection Kit with seal number PAD000493120 that contained:*
 - 18.2.1 *Pubic swob (sic)*
 - 18.2.2 *Labia swob (sic)*
 - 18.2.3 *Vaginal swob (sic)*
 - 18.2.4 *Anal swob (sic)*
 - 18.2.5 *Top*
 - 18.3 *one Paediatric Sexual Assault Evidence Collection Kit with seal number PA 4001720739 that contained the following:*
 - 18.3.1 *vaginal swob (sic)*
 - 18.3.2 *right thigh swob (sic)*
 - 18.3.3 *right thigh swob (sic)*
 - 18.4 *one Adult Sexual Assault Evidence Collection Kit with seal number PAD001780501 containing the following:*
 - 18.4.1 *oral swob (sic)*
 - 18.4.2 *left arm swob (sic)*

18.4.3 left hand swob (sic)

18.4.4 denim shorts

18.4.5 under wear

19. *That on 16 May 2017 Jacobus Adrian Van Zyl, a properly qualified forensic analyst received a Toxicology kit with seal number T07893K and marked C14/1397/2017 and after an examination requiring skill in chemistry correctly found that the deceased had “carboryl” (sic) in her stomach, bile and blood, [Exhibit “G”].*
20. *That Dr Andrews examined me on 15 May 2017 and that I had no injuries.*
21. *That on 15 May 2017 and at the Directorate for Priority Crime Investigation, Old SARS Building Bellville I made a statement to Luitenant Colonel Mike Barkhuizen.*
22. *That I admit and confirm the content of the statement referred to in point 21 above and that I made the statement freely and voluntarily, in sound and sober senses, without being unduly influenced and further that I was satisfied with the content of the statement, [Exhibit “H”]*
23. *That on 15 May 2017 and at Bishop Lavis FCS the accused gave permission to Captain Sean Taylor to take my Buccal Sample and that it was correctly sealed in the DNA Reference Sample Collection Kit (16DBAP0277TF) and that it was handed in Elsie River SAP13/1191/2017. The Buccal sample handed in at the Forensic Laboratory in Platteklouf under LAB NO 278955/2017.*
24. *That on 16 May 2017 I took Captain Speed to [...] P Street, Elsie River where I pointed out the room where the deceased was killed.*
25. *On 16 May 2017 I took Captain Speed to Bofors Circle, Epping where I pointed out the place where I dumped the body of the deceased, [Exhibit “K”].*

26. *That the recording of CCTV footage with date stamp 4 May 2017 was correctly copied from the relevant system, transferred to a compact disk and thus reflects a true copy of the original footage and may be accepted as [Exhibit "L"].*
27. *That the frames reproduced from the CCTV footage as admitted to in paragraph 17, are true copies from the footage and may be accepted as [Exhibit "M"].*

Now therefore I admit that I am guilty of:

28. *Contravention of s14 of Act 32 of 2007 in that I committed a sexual act with a corpse; and*
29. *Murder, without premeditation and / or planning.*
30. *I admit that at all relevant times I knew that what I was doing was wrong and punishable by a court of law.*
31. *In respect of both counts I admit that I committed the crimes unlawfully and intentionally.*
32. *I admit (sic) at the time of committing these offences, I had no right or permission to act in the aforesaid manner and that my actions were punishable by law.*
33. *I am deeply remorseful for that (sic) I have done.*
34. *My legal representative has explained the consequences of this statement and it is with a clear understanding thereof that I plead guilty."*

[2] The state did not accept the guilty plea on the two counts, that is, Contravention of section 14 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 – committing a sexual act with a corpse, and murder, without premeditation and or planning. A plea of not guilty was therefore entered in respect of Count 1 – rape and Count 2 – murder.

[3] In proving its case, the state called ten (10) witnesses, that is, **J P, M W, Pamela Scholtz, Jacobus Van Zyl, Luthando Lukhanyo Tiya, Constable Bradley Spogter, Professor Jacob Johannes Dempers, Hildegard Thünemann-Oláh, John Patrick Segole and Captain Sean Timothy Taylor**. The defence only called one witness, **Dr Segaran Ramalu Naidoo**.

[4] Ms Cecil appeared for the State and Mr Calitz appeared for the accused.

B THE STATE'S EVIDENCE

[5] **J P** ("*Ms P*"), the mother of the deceased was the first witness to give evidence. The state made an application to Court that this witness be warned in terms of Section 204 of the CPA, specifically in respect of Section 305(3) (a) and (b) of the Children's Act 38 of 2005 relating to abuse or deliberate neglect of a child, as some of the questions that may be put by the state may incriminate her. Ms P was warned accordingly.

[6] Ms P testified that in May 2017, she resided at [...]P Street, Elsies River. She stayed with A F ("*A*"), her boyfriend and the house belonged to his sister, M P ("*M P*"). Mortimer Saunders, the accused also stayed in that house. In addition, M P's children resided in that house, i.e. M P and M W. M W occupied the backyard structure (wendy house) with her husband and baby.

[7] Ms P and A F have been in a long term relationship for more than twenty (20) years. They were blessed with four (4) children, A (21 years), M (16 years), A (7 years) and Courtney Pieters (3 years) (*the deceased*). She stayed with three (3) children and the fourth one M lived with a church sister in the same street.

[8] Initially, Ms P stayed in Tulbagh and she thereafter moved to Cape Town. She has lived in the aforementioned address for more than ten (10) years. When she gave testimony, she advised the Court that they have since moved to [...] Delft in November 2017. She is still staying with A F and her three (3) remaining children, that is, A, M and A.

[9] It was her testimony that she knew the accused from the time he came to stay at [...] P Street. Their relationship was a rocky one as they did not like one another.

The accused regularly caused some problems between her and her boyfriend A. The accused targeted A when he was drunk as he knew that he is rude when he is intoxicated. The accused would tell A things that she said about him and A would cause a scene. The accused took advantage of him as they were childhood friends, and close to each other.

[10] For the two (2) or three (3) years the accused stayed at [...] P Street, the accused occupied the bottom room and her family occupied the one bedroom upstairs. M P occupied another bedroom with her family next to them.

[11] In May 2017, she worked as a cleaner at Hungry Lion in Parow. She worked there for almost a year. A worked at a factory in Epping and did not know his employer.

[12] On Thursday, 4 May 2017 she woke up and prepared herself for work. At the time, she was still breastfeeding the deceased. When the deceased woke up, she breastfed her and prepared porridge for her. Since A was sick, she kept him home that day and he did not attend school. A and M P had already left for work. It was only M who was sleeping in his mother's room and the accused who occupied his bottom room was also present. Once the deceased finished her porridge, she gave her two (2) children some kisses and left for work. When she left, the deceased as usual asked her to bring some "*party packets*" in the afternoon.

[13] It transpired during Ms P testimony that the two (2) children were left alone on that day. Ms M W who normally took care of the deceased was not taking care of her that week, as she could not afford to pay her.

[14] When she returned that evening, A and C came running to her and advised her that the deceased was gone. She immediately went to the house and quickly put her bags down. On inquiry from Marsha, she advised her that she thought she took the deceased to work. Ms P started searching for the deceased frantically and asked her whereabouts at the houses she normally visits and unfortunately it turned out that nobody saw her on that day.

[15] After 19:00 in the evening, she decided to report the matter to the police, and thereafter proceeded with the search with the members of the community. They walked up to Vasco, Ruyterwacht and Goodwood to no avail.

[16] On Saturday 13 May 2017, she was collected at her house with A to attend at the police station. When they arrived, they were advised that the deceased's body has been found, but were not allowed to go and identify the body as they were not sure yet if indeed it was that of the deceased. They went back home thereafter.

[17] On Sunday, 14 May 2017, Captain Taylor came to fetch her, A and M P at home for DNA testing. At the police station, Ms P was requested by Captain Taylor to phone the accused to come to the police station. The accused advised her that he is in the taxi and was due to take another one. He proceeded to ask who is asking that he comes to the police station and what are they really saying. She told him not to worry about what they are saying, he must just come over. The accused promised that he would come, but he never turned up.

[18] Ms P confirmed that Captain Taylor showed her some pictures at the police station and was very shocked to see them. In fact, she lied to Captain Taylor and said she did not know the accused in the pictures. She could not believe that such a decent, quiet and well-behaved person who loved children including the deceased would do something like that. Ms P and A were taken to identify the deceased's body at the mortuary later on.

[19] Though the accused and Ms P did not see eye to eye, she would occasionally perform some laundry duties for the accused as she got paid. She confirmed that the deceased visited the accused regularly as she used to watch TV and play with the accused's daughter, S.

[20] Before 4 May 2017, Ms P testified that she has never left the deceased unattended, unless she was just attending to a place nearby. Ms P disputed that there was an ant problem in the house or that they used an ant poison. Ms P testified that although she was deeply hurt, she is partly to blame for the incident, and takes responsibility for leaving the child alone. However, she received counselling for a day. The incident also affected her health as she spent some time

in hospital after being diagnosed with tuberculosis (TB) and meningitis. She spent a month in Tygerberg Hospital and three (3) months at Brooklyn Chest Hospital.

[21] Much of Ms Pieter's cross-examination was on the fact that she made it a habit to leave the deceased at home alone and goes to work with the hope that Marsha would keep an eye on her. Ms P did not dispute that she left the deceased unattended on occasions. Further, she did not know what was happening to the deceased during her absence. She was however not aware that S, the accused's daughter took photographs of her playmates with her father's phone, as defence Counsel put to her. Ms P disputed the suggestion that she resented the accused as he told A that she did not look properly after the deceased and other children. According to the accused's version, she did not wash, clothe or give them food. Ms P was resolute that the accused made up stories to A that caused friction. For instance, on one occasion, the accused sent a message to the owner of the house, M P who was away, to come and check what was going on in the house, as he was convinced that Ms P has taken over the household. According to Ms P, the accused was always a troublemaker and enjoyed upsetting the mood in the house. It was disputed by Ms P that she ever cleaned the accused's room. She further disputed that there was an ant problem prior 4 May 2017 in that house. The only foreign creatures that were there were cockroaches, so said Ms P.

[22] **M W** ("Ms W") testified that she is married, and lived at a wendy-house at the back of [...] P Street. The house is owned by her mother M P. She has known the accused from the time she grew up as his father is a family priest. In fact, they had an easy relationship with the accused as they were friends. She has lived in that house for her entire life, but for two (2) years at the wendy-house.

[23] Ms W has two (2) children, C (9) and J (1). She knew A F as he is her uncle and J P is her uncle's girlfriend. She was aware that the accused and Ms P used to argue, shout and swear at each other all the time, but could not figure out exactly the reason for such behaviour. In the opposite, A had a good relationship with the accused.

[24] On 4 May 2017 at about 7:30 in the morning, she took her daughter to her mother as it was her normal routine and she walked with her to school. As the baby

would be still asleep at that time, she would go back and sleep with her baby for a while. On that day at about 8:30 she went to the main house. When she entered the house A was standing in the front room. She then proceeded to ask where the deceased was. He responded that she was watching television in the accused's room. She then went back to the wendy-house as her baby was still asleep and started cleaning. When she was done, she went back to the main house. She estimated the time to be shortly after 9:00. Ms W asked the accused if the deceased was still watching television. The accused advised her that she left, but did not know where she went to. When she made this inquiry, the accused was standing in front of his door.

[25] Ms W proceeded to clean her mother's room upstairs. Whilst busy cleaning, Aunty Jolene arrived and asked where the deceased was as she wanted her to play with "*Poekoe*" (real name C). Ms W's response was that she thought she was at her house as the accused said she went out. This conversation happened downstairs and the accused was in his room. She immediately asked A to go and check if the deceased was not at Aunty Dimpie's house. A came back and said she was not there. She further sent him to look for her at Aunty Monica's house, he also came back and said she was not there. Ms W suggested that perhaps she was at her sister's place, Celeste Adonis. Her sister lived in the second street from P Street. She walked with Aunty Jolene to her sister's place, but her sister was not there nor the deceased.

[26] They decided to go back to her house as she thought Nonna (Celeste) took the deceased back home. On arrival at home they were not there and she continued with her house cleaning duties downstairs and the kitchen. While busy cleaning, her brother M arrived, and advised her that her mother said she must assist him with the laundry. They did the washing manually and hanged it on the line, but there was no trace of the deceased. She however saw the accused coming out of his room twice but did not have a conversation with him. M was cleaning the yard at the time. After finishing the clothes, she took a bath and prepared her baby in order to go to the post office. She then locked the wendy-house and went into the main house. When she entered, she noticed that the accused's room was locked and the padlock was hanging outside the door. It was now in the afternoon at about 14:00. She took the

pram and went to the post office. She instructed her brother that when the deceased returns home, he should keep her at home.

[27] It was Ms W's testimony that at some point when she was at the back at the wendy-house, that the accused brought her CV and advised that he went to the library to do her CV, and also walked around there to look for the deceased. This happened after she asked the accused to prepare her CV at his work some few weeks prior to that day. He advised her that since he was on leave he managed to have time to prepare the CV.

[28] On her return from the post office, she went back to her sister's house. Her sister advised her that the deceased was not there and they started to panic, as it was now in the afternoon. They all went to their house and were joined by some members of the community. It is then that they realised that the child was missing. Ms W asked the accused to get hold of her mother so that she can come back home urgently. The accused said he would not call her, as he did not want her to get worried unnecessarily. It was about 16:00 in the afternoon when the deceased's mother returned home and was advised about the disappearance of the deceased. At all times, the accused's demeanour was normal, cool, calm, unperturbed and he did not look suspicious, so said Ms W.

[29] The community started to be anxious and they proceeded to form search parties in order to look for the deceased. The accused did not join them, he was in his room. They conducted the search until 3:00 or 4:00 the next morning.

[30] On 5 May 2017, they continued with the search extending to Epping Forest and The Range. Ms W remembered that the accused assisted with the search of the deceased on the first Saturday, that is, 6 May 2017 after the deceased disappeared. In other days, she was with other search parties, as a result she did not interact with him. The groups were big and the police were also involved.

[31] During her testimony, Ms W confirmed that she was no longer taking care of the deceased in the week of 4 May 2017. In fact it was four (4) weeks since she did not take care of the deceased. Ms P would either leave the deceased in the bedroom or take her to "Poekoe" on her way to work. She stopped taking care of the deceased as the deceased's father A was laid down at work for some two (2) weeks

and could not afford to pay her. Usually when she looked after the deceased, and the mother went to work, she would leave the deceased with her. The deceased would ask to visit “*Poekoe*” later on in the day.

[32] Ms W described the deceased as a very shy child. This accorded with the deceased’s mother’s testimony. She would not take anything from a stranger. Also, she added that as a person who cleaned the house, she has not seen any ant problem in the house. Further, she could not remember seeing any ant poison in the house.

[33] Ms W was asked to identify a photo with a heading “*Missing*”. She testified that the attached photo was taken in the accused’s room, with the accused’s cell phone as the deceased is seen lying on his bed. During the search, the accused forwarded it to her sister Celeste for purposes of making a flyer for the missing child.

[34] **Pamela Scholtz** (“*Scholtz*”) gave testimony that she works for the community as a neighbourhood watch. She occupies the position of Captain in neighbourhood watch Sector 3. She resides at No 11 Leiden, Delft.

[35] Ms Scholtz heard about the disappearance of the deceased on the news, and people were called on to assist with the search of the deceased. At the same time, she received messages from the Brigadiers in the police to come and assist with the search. On 9 May 2017, she went to [...] P Street where the deceased was staying with her two (2) other colleagues, Bahija and Candice. They started searching the Salberau field, but could not find the deceased.

[36] On 10 May 2017, they decided to take Ms P for trauma counselling in Woodstock. In the afternoon they came back and continued with the search and were joined by the members of the South African Police Services who had a warrant. They searched each and every neighbouring house, to no avail. They searched Ms W’s wendy-house and could not find the deceased. They proceeded to the accused’s room and they found him sitting in his bed. He did not say anything to them. Ms Scholtz only remarked that he must keep his room clean as it was typically untidy. Otherwise, she did not see any ant problem in the room while doing the search. They did not return to the search party on 11 and 12 May 2017.

[37] On Saturday, 13 May 2017 they returned to the search party. Most of the neighbourhood watches were present at [...] P Street including Mitchell's Plain, Delft, Elsie's River and Ruytewacht. They were split into groups as usual. The accused was part of the search party, but not in Ms Scholtz's group. Her group consisted of herself, Captain Walters, Celeste (the deceased's cousin), Bahija and Candice. As Captain Walters was driving with them, he wanted to drop them off in order to continue the search and went to check on one (1) other group and fill up with petrol in Epping.

[38] As the Captain was about to leave, Celeste insisted that they should do the search at the back of the factories as there was an open field where people walk through to work. Captain Walters parked the car outside the gates and they all alighted. Captain Walters walked with Candice and Bahija to the right side, she and Celeste walked in the middle towards the left hand side. Celeste did not want to walk towards the left as the thorns were getting into her boots. She then proceeded alone to the extreme left along the wire. She walked straight down to the corner. While looking and scratching, she made up her mind that she needed to get to the corner of the field. To her shock, she discovered the deceased body lying motionless, covered with thorn bushes. She immediately knew that it was the deceased as her mother gave the description of the clothes she had when she disappeared. Her eyes caught the denim pants with an embroidery flower as described.

[39] It was about 13:30 when she discovered the body. Ms Scholtz immediately became emotional and powerless and she went to sit down. She sat for a while, and when she regained her strength, all she shouted was "*Hello*". At that time, Celeste was behind her and saw her. Celeste then called Captain Walters and said Ms Scholtz was trying to catch their attention. On their arrival, she showed them what she saw. Captain Walters proceeded to call other members of the police to attend to the scene.

[40] Even though it was put to Ms Scholtz during cross-examination that she was not an expert in the behaviour of ants, she still maintained that there were no ants in the accused's room when she conducted the search. Also when she was asked to comment about what she first saw when she laid her eyes on the deceased. Her

response was that she saw the navel, her jeans were open and the zip was down, the jeans were pulled down to the feet. There were no shoes on her feet.

[41] **Jacobus Adriaan Van Zyl** (“*Van Zyl*”) testified that he is a toxicologist and a member of the American Academy of Forensic Sciences – Toxicology Section. He co-authored two (2) papers. In these papers, they used the LC-MS (liquid chromatography mass spectrometry) for analysis. In 2014, he completed a Graduate Certificate in Forensic Toxicology at the University of Florida. In that course he did toxicology, drug biotransformation and mechanisms of toxicology and molecular mechanisms of toxicology, toxic substances and general toxicology as subjects. In 2015, he completed the Course for Coroners at the University of Dakota in the United States, and it is a course equivalent to pathology in South Africa called Death Investigation Training Course. The subjects covered were basics of death investigation, forensic pathology, terminology and diseases. This course empowered him to identify causes of death (what type of sickness caused the death), some initial observations until the body is uplifted to the mortuary. In 2015, he did a course in fundamentals of sample preparation used in toxicology, opioids and pain management course. These courses were offered by Forensic Science Education. In 2016, he did an introductory toxicology course at John Hopkins Hospital, Department of Medicine in the United States. It covered procedures to be implemented in medical emergencies, clinical toxicology – for instance, when a person took an overdose – symptoms for and how they should be treated.

[42] In 2000, he completed a National Diploma in Analytical Chemistry at the then Cape Technicon (now *CPUT*). In 2004, he completed a Bachelor’s Degree in Pharmaceutical Science at Tshwane University of Technology. He has eighteen (18) years’ experience as an analytical chemist, nine (9) years’ experience on LC-MS and eight (8) years on GC-MS (gas chromatography mass spectrometry), four (4) years’ experience on high-resolution accurate-mass. He worked just under five (5) years in the pharmaceutical industry, and over a year as a forensic chemist for the police. Currently he is stationed at the National Department of Health-Forensic Chemistry Laboratory in Woodstock as a forensic analyst, previously he worked for six (6) months as blood alcohol analyst. In addition, he has done four (4) years with Medical Research Council. In total, he has worked six (6) years, eight (8) months in

his current position as a forensic toxicologist, and is currently a Chief Forensic Analysis.

[43] Mr Van Zyl's duties entails doing maintenance of the equipment, and calibrating them, training of forensic analysts, signing off cases, analysis of cases, preparation of reports, discussing them with his supervisor (review the results if needs be), and send them out.

[44] In this matter he received a piece of stomach, a piece of kidney, a piece of liver, bile and blood to analyse. He compiled two (2) reports containing his findings. The two (2) reports were entered on record as Exhibits "O" and "P" respectively. In the first report, Exhibit "O", Mr Van Zyl did the screening looking for pharmaceutical drugs or drug of abuse. He then detected a carbaryl compound on the stomach contents. In essence, this report only tells that something is detected. He did not test that specific sample for further analysis. That is why it is referred to as the qualitative report. Nothing was detected on the kidney and liver as the sample was insufficient. Carbaryl was however detected on the bile as the sample was sufficient for the drug screen test. When screen tests were conducted on blood, carbaryl was detected as there was a sufficient sample to do a blood screen.

[45] Carbaryl was described as carbamate pesticide. It appears that the pathologist requested the sample kit to be analysed for pharmaceutical drugs, as they were looking for ant poison. The screening was done using GC-MS or Q Exactive Plus LC-MS Orbitrap. Now for pesticides to be detected, he performed a QuEChERS extraction or liquid-liquid extraction. If one needs a drug screen, he would do SPE because it is a better method than QuEChERS. One would be able to see lower amounts of quantities of compounds with SPE, because the sample is more concentrated and less diluted like in QuEChERS.

[46] The second report, Exhibit "P" is the supplementary report containing quantified results of the previous tests done. So it should be read in conjunction with the previous report. The results in these tests revealed that the carbaryl present in the bile had a value of 1.7 milligram per litre; and the blood had a value of 8 milligram per litre. Although there was carbaryl detected in the stomach, there was

no value shown as the sample was insufficient to quantify. In essence, Exhibit “P” reflected the quantitative measures of carbaryl in the specimens.

[47] Carbaryl was further described as a reversible acetylcholinesterase inhibitor. Acetylcholinesterase is an enzyme in the body which its function is to break down a chemical compound called a neurotransmitter. What happens in the body is that, if there is acetylcholine, this enzyme will break it into an acetate ion and choline. This breaking into two (2) happens in a normal body that is not poisoned or not under any pharmaceutical drugs. Acetylcholine is important in the brain as it uses it to send messages to the muscles. For instance, it tells muscles to contract or move. In a normal body, this chemical will be sent by the brain to the muscle to do its function. The enzyme, acetylcholinesterase will break it up to prevent the acetylcholine from building up in the body.

[48] With pesticides poisoning, in this case carbaryl, - carbaryl will bind to this enzyme, but over time it can break again – it is a reversible reaction. Carbaryl will inhibit the enzyme so that it cannot break up the acetylcholine. As the enzyme is inhibited, acetylcholine will be manufactured in excess. When the message gets to the muscles, it comes as lots of acetyl groups and in the process giving the same message. The area where the message is channelled or the receptor, gets overworked. The brain ultimately shuts down. Wherever that message was channelled, it then gets paralysed.

[49] Acetylcholine is found in glands, for instance, glands that form the tears in the eyes. It is used to send signals in eyes, it will form tears and in the mouth it will form saliva. It will also send signals in the lungs or bronchi – for example there will be more secretions, sweating in the skin, contracting of pupils, heart rate, blood pressure, respiratory rate – fast or slow breathing, defecation, diarrhoea or urination, twitching of the muscles and convulsions, constriction or excessive constricted pupils or pinpoint pupils – when the pupil closes, it looks like a little needle, bronchospasm or bronchoconstriction – that will result in coughing, sneezing or shortness of breath, bronchial secretions. As a result of fluid building up, the lungs cannot function properly and the heart will ultimately slow down. Vomiting and teary eyes could also be observed. In addition, excessive salivation, muscle control or muscle co-ordination would be affected, persons cannot walk or pick up objects, tremors,

paralysis of the diaphragm, slurred speech might be visible. A person might also get cyanosis – the bluish-purple discoloration of the skin or mucous membranes close to the tissues or close to the surface – because of lack of oxygen in certain parts of the body, and further because they are in a state of dying. Lastly, a person might go into a coma which is followed by death. Not all these symptoms or effects might be present. They all depend on the amount of poison administered in the body. For example, if less or mild poison was administered, the symptoms can take between four (4) – twelve (12) hours to be visible. In more than moderate or severe poisoning cases, it will take twenty (20) – thirty (30) minutes for serious effect to show.

[50] As stated above, the binding of acetylcholine to the acetylcholinesterase is reversible. In adults, as they have lots of these enzymes in their bodies, the body can break this bond and the symptoms will disappear – but also, it will depend on the dosage administered. In cases of high dosage, one has a chance of seeking medical treatment. That will be between twenty four (24) – forty eight (48) hours in adults. If the poison is not too serious they can recover on their own. The enzyme fixes itself in adult persons.

[51] With children, their cases could be more severe as they have less of this enzyme or the enzyme gets overpowered quickly and they have to deal with the symptoms as aforementioned. It therefore becomes more difficult for the child to deal with symptoms than an adult. With a child weighing 12.5 kg, it will be difficult to recover and they will require urgent medical attention. Again, it will depend on the amount of dosage administered. The main component this pesticide affects is the breathing. It becomes more difficult for the children to breathe. With high doses, within half an hour to an hour a child must get medical assistance, as the effect of poison is treatable.

[52] As carbaryl can be found in food, water or vegetable, the World Health Organisation, said the safe level of dosage for vulnerable people (children) would be equivalent to .01 milligrams per kilogram per body weight. This means one can ingest .01 milligram of carbaryl poison without any effects. A person weighing 12.5 kg can take .01 milligrams of this poison without serious effects.

[53] Mr Van Zyl testified that unfortunately he did not have literature values reflecting a toxic dose for children. He could only give examples of overdose on adults that were treatable after medical attention. For instance, for adults weighing seventy (70) kg – seventy five (75) kg a toxic dose is 5 milligrams per litre and a lethal dose is 6 milligrams.

[54] It was Mr Van Zyl's evidence that he was surprised to find pesticide in the blood as in his experience carbaryl is metabolised very quickly. It gets absorbed very quickly by the stomach and gets broken down and it moves out of the blood to the urine. In a normal situation, one will find carbaryl in the stomach, bile or urine as the body is trying to excrete the poison. As it is metabolised very fast – it is referred to as half-life. Pesticides have got very short half-lives. It does not stay long in the blood. High concentration in the stomach is usually caused by the overdose.

[55] The only explanation that Mr Van Zyl could come up with for the presence of carbaryl in the blood is that when one dies, the metabolism stops, it does not break down further. For him to see it in the blood, it could be that the person was exposed to a high dose. Since there was carbaryl in the bile, it means, there was enough time for metabolism to take place. There was either a factor that caused death or something else or other mechanism caused death or the pesticide caused death. In this case, death took place rather quickly, which then stopped metabolism and circulation of the blood in the body.

[56] According to Mr Van Zyl, given the fact that the body was decomposed and nine (9) days later, he could find almost 1 milligram (.08 milligram) of poison which is a fifth of the dose for an adult, the deceased was given a toxic dose. Also looking at its half-life not much of it was broken down.

[57] Mr Van Zyl could not comment on whether carbaryl had an impact on decomposition during cross-examination.

[58] **Mr Luthando Lukhanyo Tiya** (*“Mr Tiya”*) testified that before 17 May 2018 he was employed by the Forensic Science Laboratory in Plattekloof. He was attached to the Biology Unit. He was a Forensic Analysis and Reporting Officer, and held a rank of a Warrant Officer for about seven (7) years. His duties entailed getting an induction from the laboratory, training in bodily fluid identification and mentorship that

enabled him to work as an evidence recovery analyst. After two (2) years he received further training in the DNA process – from the extraction of a sample until obtaining the actual DNA results. This training took over a year to complete and he further had to undergo mentorship. He had been a reporting officer until he left the employ of the Forensic Science Laboratory. This means that he was the last custodian of a case – he made interpretations and reported on the findings.

[59] In 2009, he completed a Bachelor of Science degree majoring in Forensic Genetics and in 2010 he obtained a Bachelor of Science Honours degree, both with the University of Free State. He is currently a full-time Masters student at the University of Stellenbosch studying Clinical Pharmacology.

[60] In this case he made an interpretation and findings on all the exhibits that were received. Warrant Officer Thünemann-Oláh, his colleague was the receiving officer in this regard. Mr Tiya prepared two (2) reports in this case and they were marked Exhibit “R” and “Q” respectively. The difference between the two (2) reports is that the SAP21 contains the negative results and then the Section 212 affidavit contains the positive results.

[61] Mr Tiya described the DNA as a molecule that is found in the cells of a body and is termed a biological fingerprint. Basically, this means that the DNA is unique to a person and there are no two (2) persons that share the same DNA, except for the identical twins. For example, the DNA obtained from saliva of an individual would be the same as that found in his semen. It remains the same throughout the body. It does not change in a person’s lifetime. A DNA that an adult person has now is the same DNA that person was born with. Because a DNA is small, it cannot be seen with the naked eye. Various things have to be done in order to get a visualisation of a profile. These include DNA isolation, that is, chemistry that is done on the particular sample in order to extract the DNA from the cells. The next step would be QPCR (quantitative polymerase chain reaction). This enables the analyst to see whether the sample indeed contains the DNA or not, as it would be useless to send a sample downstream that does not contain any DNA. This step is important more especially in sexual assault offences where the analyst targets the sperm cells in order to detect whether there is male DNA in the sample. The next step is PCR where the DNA is amplified to make multiple copies of it. The next step is

electrophoresis – where the analyst converts this information into an information where they can visually see. Finally the analyst will employ a software which is called a Gene Mapper – the international software that is used or enables the analyst to visualise the said DNA profile.

[62] According to Mr Tiya's Section 212 affidavit, the forensic laboratory extracts DNA on sixteen (16) regions. One of these regions is called the gender marker. The gender marker reflects the sex of the donor of the DNA – whether it is male or female. In essence, it is the gender marker plus (fifteen (15) other STR *loci* that makes a person's unique DNA footprint. In order to say a person's DNA matches, it has to be matched on all those sixteen (16) DNA *loci*. A mismatch on just one will not be able to be a positive identification. When these tests were conducted, they were able to fully extract DNA from a possible semen sample that was on a top. It was referred to as a possible semen because at a preliminary level, a presumptive test was administered on this top. In a presumptive test, one looks at an exhibit and try to find any body fluid. Simply because an exhibit has a red stain, it does not mean that the red stain is blood. Similarly, if an exhibit has a white stain it does not mean it is semen. The presumptive test enables the analyst to eliminate the actual bodily fluids from those that are not. Then a confirmatory test would be the actual extraction of that said bodily fluid. Each and every bodily fluid has a different extraction method. Blood and semen extraction would be different. The extraction of semen is more involved and is called differential extraction. Its main aim is to target sperm cells and remove any other cells attached to the sperm cells. In some cases this extraction works perfectly well and the analyst is able to isolate mainly the male DNA, whereas in other cases one gets a mixture of DNA. This normally happens when the female DNA is in excess.

[63] In this particular case, the analyst was able to fully extract only the male DNA. Upon extraction of this unique male DNA the analyst compared the unique profile to that of the deceased and that of the accused. A blood was extracted from the deceased and a buccal reference sample obtained from the accused. According to the covering minute, a top was obtained from the deceased. A comparison was made between a top and the reference sample of the accused. The numbers fully

aligned and the same, there is no mismatch. The fifteen (15) plus the gender marker are the same and there was a full profile match.

Mr Tiya's findings were that:

"The DNA result of the possible semen on the top, sealed bag 13D7AA3014, matches the DNA result of the reference sample uniquely sealed in bag 16DBAP0277. The most conservative occurrence for this DNA result is one in 5.1×10 trillion people."

[64] Mr Tiya testified that with regard to his SAP21, there are different ways of reporting a negative result that is employed by the laboratory. A negative result is when one could not find a profile on the particular sample that matches an individual. It is reported on three (3) ways, first; NO DNA – meaning there was no DNA found in the sample, second; NO DNA result – meaning there is some DNA, however it is very small to put into the DNA process and third; NOT enough DNA – meaning there is some DNA that could yield a profile and then it is put downstream. However, in the downstream process it does not yield a usable profile. Then there is a report on non-incriminating matches – meaning having DNA on your own item for example, shirt that one is wearing. Mr Tiya's findings SAP 21 were that:

paragraph 3.1

"No DNA was obtained from the T-shirt which was uniquely sealed in PW3000053434. The swab marked Exhibit 1, which was sealed in 14DCAY0705. The swab marked Exhibit 2, sealed in 14DCAY0705. The panties sealed in Exhibit bag 15D7AA3014. The pubis swab sealed in 13D7AA3014 and the anus swab sealed in 13D7AA3014;

paragraph 3.2

Not enough DNA was obtained from the jeans, sealed in 15D1AB5641 and the deep vault swab 13D7AA3584;

paragraph 3.3

The DNA result from the reference sample, this is the accused reference sample, 16DBAP0277, is read into the mixture of the DNA result obtained from the swab, Exhibit 3, 14DCSY9768 and the mat stain 47, which was sealed in bag TAB000234136.

paragraph 3.4

The DNA result of the mat stains 43, 45 and 49 were sealed in bag TAB000234136, matches the DNA reference sample of the accused, which was in bag 16DAP0277

Paragraph 3.5

The DNA result of the vault swab sealed in 13D7AA3014 matches the DNA result of the reference sample of the deceased, which was uniquely sealed in bag 15D2AA7180."

[65] It was Mr Tiya's evidence that the jeans and the vault swabs were not tested at evidence recovery for presumptive testing. They went directly to DNA extraction as they contained a blood crotch area. It was indeed found that there was indeed DNA. The analyst deviates from testing samples that contained blood at a preliminary stage in order to ensure that they do not get any false positives at that stage. The solution used might not only react with semen, but with blood.

[66] Further, from the two (2) swabs that were received by the laboratory on the thigh. The second right thigh tested positive for possible semen at the preliminary stage. When the QPCR was conducted it was found that there is some male DNA, but insufficient to yield a usable profile. Be that as it may, the only semen that was extracted fully in this case was from the top, and it was a full DNA profile belonging to one individual, that is the accused.

[67] Also, a vault swab (sexual assault kit) was tested and a semen extraction protocol was used. It was found that indeed there was a male DNA and a female DNA. The testing was continued further, and at the end of the process the profile found was that of the accused, but it could not be visualised.

[68] Mr Tiya was asked during cross-examination as to what presumptive test he does for visible blood. The response was that he will use the H sticks (haemal). The strip itself is an oxidizing agent and it reacts to a green colour once blood is dipped on it. The other presumptive test for blood is luminol – this is where one cannot visualise the actual body fluid. This agent illuminates blood in the dark and produces a blue glow.

[69] The presumptive test for semen is a brentamine reagent. This reagent reacts with an enzyme that is found in semen and produces a purple colour. This enzyme is called the acid phosphatase (AP test). This is a time dependant test. A reaction to this enzyme under a limited time will be indicative of some presence of semen. AP is also found in vaginal secretions. However, the reaction time will be longer.

[70] After Mr Tiya had completed his evidence, the defence Counsel made an application for further cross-examination of Mr Tiya. He was therefore recalled for that purpose. Mr Tiya was cross-examined as to at what stage does a sample get subjected to a presumptive test. He testified that every sample that gets to a laboratory gets subjected to a presumptive test. However, it will depend on the swabs presented. For example, if it is a vaginal swab that has blood on them, it will not be subjected to a presumptive test. The only confirmation to be employed is an extraction protocol for a particular body fluid. The results that it will yield thereafter will be confirmation that indeed that particular body fluid has been extracted. In a case where the swabs are bloody, the main aim is to extract the DNA from the semen as it is a sexual assault kit. The target is to get DNA from the sperm cells. Those swabs will not be subjected to the preliminary testing, but to a method that isolates DNA from sperm cells.

[71] Mr Tiya disagreed with the supposition from the defence Counsel that the highest concentration of DNA is found in semen. According to him, the highest concentration of DNA is found in blood. It therefore depends on the amount of sperm cells found in the semen to get a DNA – for example, one might have a couple of sperm cells, but not yield a DNA result. The Court was taken through the DNA testing process in the examination-in-chief.

[72] It was put to Mr Tiya that Dr Naidoo will testify that semen is the most DNA rich or concentrated body fluid. Mr Tiya insisted that semen does have a lot of cells, and in fact millions, but that will not mean high concentration of DNA. Again, it was put to Mr Tiya that if a person ejaculates more than once, is it possible that the pre-ejaculation fluid could possibly carry some of the semen that was from the initial encounter. Mr Tiya's response was that it is possible. Further, the defence Counsel confirmed that Dr Naidoo agrees with Mr Tiya.

[73] The reports by Warrant Officer Thünemann-Oláh were presented to Mr Tiya for comment. Nothing much was said by Mr Tiya, except for the confirmation of what was reported by Warrant Officer Thünemann-Oláh. It was put to Mr Tiya that he testified that the semen was found in the deep vault swab. Mr Tiya disagreed with defence Counsel in this regard, and in his testimony he stated that both the jeans and deep vault swab had traces of the male DNA. He also mentioned that the right thigh swab where the male DNA was found but was not included in his Section 212 affidavit, as this was a subsequent test.

[74] When questioned as to how he came to identify the Y marker when it comes to the deep vault swab. His response was that when it comes to the QPCR test, they have a way of detecting it. One extracts DNA by first checking the maleness in the actual body fluid through the Quant duo kit that is manufactured by Thermo Fisher. This kit is used especially in sexual offences cases – to check whether there is maleness in the swab. Amelogenin is the second maleness test that is normally used. There is an SRY gene that is found in the Y chromosome of the male. That is why they explicitly concluded that there are traces of male DNA. Mr Tiya confirmed that the effect of decomposition on semen does contribute to its degradation.

[75] Mr Tiya further explained in his re-examination that if DNA is exposed to various elements over time, it degrades. One has a greater chance of obtaining DNA on a fresh sample than obtaining DNA on a sample that has been lying somewhere for a while. For instance, if well preserved, the DNA can stay intact for five (5) days. The Quant duo test was further explained to be used to check first whether the sample that the analyst dealt with is that of a human being. One needs to rule out if, for example, the blood is not that of a dog. The gene to look for is the RppH gene. The Quant duo test, further tests for another gene that is found in Y

chromosome and confirms that there is a male DNA present. Now contrary to the SRY, the amelogenin is present in the X and Y chromosomes, but expressed differently in X chromosomes compared to Y chromosomes.

[76] **Constable Bradley Ronaldo Spogter** ("*Constable Spogter*") testified that he is stationed at Elsie's River Police Station and doing blue-light patrols. He has been in the police service for the past seven (7) years. He is the arresting officer in this matter.

[77] On 14 May 2017 at about 23:00 at night, he was the driver of a police bakkie and was doing night patrols in Elsie's River when he received an anonymous phone call. This lady asked if he was still looking for Mortimer (the accused). Constable confirmed that indeed it is still so, and he continued to ask if there is an information that she had. The lady said he must go to 34th Avenue, and turn left to the first turn at No. 8, that is where he can find the accused. He followed up the lead and came to Jonah Close.

[78] On arrival at 8 Jonah Close, his colleague, Constable Fortune alighted and went to the man who was standing in front of the gate. Constable Spogter then followed him through the gate and walked towards the door and knocked. The door was opened and he went inside and observed Mortimer (the accused) sitting on a chair and watching television. Immediately he proceeded towards him. The accused stood up and walked in a different direction. He then grabbed him from behind as it was an indication that he wanted to get away. He informed him that he was looking for him in connection with Case No.: 82/05/2017, a murder case. He proceeded to read him his rights and placed handcuffs on him. He asked him whether he had any weapons or any injuries on him. The accused said he has nothing. Constable Spogter found his ID document in his right side of his trouser pocket. On the front side of the pocket was his cell phone. Constable asked if he was going to take these items with him. He advised that he will leave his cell phone with his friend. He informed him that he cannot leave his ID document as the investigating officer will need it for the purposes of this case.

[79] Constable Spogter took him to the police van and they drove to the Elsie's River police station. He knew it was the accused as his photograph was placed at

the police station. The accused was wearing a red golf t-shirt, blue jeans and yellowish caterpillars. On arrival at the police station he immediately informed Colonel Kiewits about his arrest. He proceeded to give the accused his written rights. He searched him once more and booked him into the cells.

[80] It was Constable Spogter's testimony that the photograph of the accused was taken from the video recording of the place where the deceased was found, and when he arrested him, he was still wearing the same clothes, and he gave his full co-operation.

[81] **Professor Jakob Johannes Dempers** (*"Prof Dempers"*) testified in Dr Ogle's stead, the pathologist who performed the post-mortem on the deceased. Dr Ogle was said to be untraceable. She was reported to be somewhere in Dubai, but her whereabouts are unknown. Professor Dempers was present when the body of the deceased was recovered and when the autopsy was conducted and he supervised Dr Ogle.

[82] Professor Dempers testified that he is a qualified forensic pathologist. He qualified as such at Stellenbosch University. In 2002 he sat for his examinations at the Colleges of Medicine of South Africa. He was employed as a registrar while doing his training and he has specialised in the same division since then and he is currently the Head of Department and Associate Professor in Forensic Pathology at Stellenbosch University. They are affiliated with the Forensic Pathology Services of the Western Cape. Academically, they operate at the University of Stellenbosch, Tygervalley campus. He has an MBChB degree (1994), Diploma in Forensic Medicine (1999) and a Forensic Pathology (FC) as a fellow of the College of Forensic Pathology (2002).

[83] Professor Dempers though appointed by the Western Cape Forensic Pathology Service, also teaches both undergraduate and post graduate students as they are affiliated with the University of Stellenbosch. He also teaches Registrars, that is, doctors who want to become pathology specialists, law students and students in health professions in general.

[84] As a Head of Department for the past year and a half, his duties involve the performance of medical legal autopsies, and he has performed about 7500 cases in

his career. The performance of autopsies was his primary role as a junior registrar, but with his appointment as a consultant, it came with a supervisory role. Currently, he has a huge administrative burden, but he still fully participates in the calls, supervising calls and registrars both at scenes and at the mortuary. He still testifies in court in cases where he either performed or supervised autopsies. He also trains about 350 medical students annually and teaches them forensic pathology.

[85] Further, Professor Dempers confirmed that Dr Ogle was a qualified medical practitioner who was appointed at Tygerberg Hospital as a registrar from 1 January 2017 – July 2017. She was at his division for five (5) months and he supervised her when she performed the autopsy of the deceased in this matter. Professor Dempers explained that not all the scenes are attended to by a consultant and a registrar. As this was not a relatively straightforward case, coupled with the fact that Dr Ogle was in her first year as a registrar, he accompanied her to the scene.

[86] As a consultant, he is charged with giving guidance and supervising all the autopsies that are performed in their dissection room throughout the dissection process. Before the body is closed, they will have a findings discussion. This is where part of the case evaluation is wrapped and the registrar reports the findings and summarises them. If needs be, this is where they all have an opportunity to re-look at all the facts and decide whether any information is crucial to the investigating officer if at that time he or she is not in attendance. This is the stage where they flag if they need more information and need to consult other specialists – this stage is termed a consolidation stage. In difficult or challenging cases this type of discussion is almost continuous as was the case in this matter.

[87] Professor Dempers confirmed that he was present during the scene investigation and in the dissection room during the autopsy. As he had other supervisory responsibilities he did not stand there next to the body for the duration of the autopsy, but he was consulted extensively by Dr Ogle throughout that dissection. He was shown and verified the findings that she made, and he is very comfortable with the facts of the case.

[88] In this case, the chief autopsy findings were that: the body was found to be a juvenile female. External blunt force injuries were present on the face, torso and

limbs. A deep scalp haemorrhage was noted without skull fractural brain injury which could be clearly identified. Features of pressure to the neck were noted and genital injury was also noted.

[89] At about 14:00 of the same day, Dr Ogle was informed by the investigating Officer, Captain Taylor that it was suspected that the child may have been poisoned. After this information had come to light, the body of the deceased was re-opened at about 15:00 and Dr Ogle collected specimens for toxicological analysis. The results confirmed the presence of carbaryl in the gastric tissue, bile and femoral blood. As the history was presented, Dr Ogle concluded that the cause of death was asphyxia in nature – i.e. strangulation or smothering and /or poisoning and the manner was suggested as being unnatural. As it was not clear at the time as to which mechanism that caused death, it was concluded that it could be either of these mechanisms or both.

[90] It was Professor Dempers' testimony that in addition, the issue of decomposition of the body potentially affected their observations. The moment a person dies, the physiological functions that keep the cells alive and keep the body looking the way it does ceases immediately and then the body becomes autolytic and starts to decompose. Decomposition starts within an hour after death. Decomposition is therefore classified into stages, i.e. early and late decomposition changes. In the early stage the body goes stiff – rigor mortis stage, that is, the cooling of the body depending on the atmosphere and ambient temperature, and then it progresses to hypostasis – that is, the movement of blood in the small blood vessels and the tissue to the gravity dependant areas. The late stage starts after about three (3) days. This includes marbling and insect predation. Marbling is the decomposition of blood vessels of the blood within the blood vessels. The blood vessels under the skin become green. The pattern is almost like a tree, the same can be seen on the skin of green branches. Due to the structure of red cells, the blood releases these substances that give a different colour. With that also come de-epithelialisation, the junction between the cells of the skin becomes decomposed and let go, and it looks like blister formation, if one takes the skin and rub it, it comes off and the dermis is left underneath. Also, the distention of the body cavities from organisms that produce gas can cause the body to balloon out or blow up, and the

fluid inside the body can seep out. Squeezed out or purged out of the cavities i.e. mouth, eyes, ears – as purging fluid. This can cause the eyes to be more prominent or bulged out, and the tissues can also discolour.

[91] When the deceased's body was found, there was blue discolouration on the face, on the cheeks, below the eyes and there was some blueness which is very focal on the upper eyelid on the left. Just underneath the hairline there is a blue area sticking out and the blueness goes down onto the face. In cases of this nature, they normally look at the history and distribution of lesions, how focal they are as decomposition rarely conforms to one area, unless it is around the eye where fly or larvae activity might be prominent. For instance in Picture 28 there are two (2) lesions that are very suspicious in terms of bruising. There are other injuries that are a bit more distinct in terms of the application of force. One is on the forehead and another on the eyelid. They are clearly demarcated and conform to the colour of a bruise. The one on the forehead is over the area of rounding and not in a recessed area. In cases of children, when the force is applied it is normally over a protruding area of the body. Professor Dempers had full cognisance of the fact that decomposition changes were present, it is not because of the autopsy photographs that they thought there was wounding. They saw the body in a much less state of decomposition two (2) days before the autopsy.

[92] In addition, he asserted that blunt force injuries can also constitute abrasions. At the scene, the body did not have any significant signs of advanced decomposition, there was a small area of marbling and no large areas of skin slippage in the areas where these wounds were identified. The autopsy report indicated that the wounds that were identified were abrasions, they did not say that they were de-epithelialised areas that looked like abrasions. From a medical perspective they were comfortable to state that those were abrasions.

[93] It was testified that Dr Ogle in fact specified all the pathological changes on the external aspect of the body. She described two (2) types of defects, i.e. abrasions and contusions. These areas were observed at the autopsy and were duly measured as such. As it could be seen from photograph 70, 71 and 74, there is a difference between loss of epidermis from decomposition and loss of epidermis from the application of force. In the vast majority of cases, contusions results from

the application of force, for instance, if they are small and focal they can result from poking skin with an object, and focal bruises can be caused by a grab with fingers, etc. In this case, one has to postulate the cause of the injuries. From the pattern of injuries, one cannot be specific as to what the causal object was, but in areas where there are large dispersed areas of abrasions, it could be that there was a rough object that was applied to the area. The movement or struggle could have caused the small abrasions.

[94] On the other hand, the deceased's one side of the face is distinctly blue, and towards the front of the cheek it becomes less blue or light blue. There is no doubt that the distinct colour is decomposition. At the same time, there is a very focal discolouration above the upper lip and that was characterised by loss of the superficial epithelium in that area. Epithelium according to Professor Dempers can be lost from the application of force and it can be rubbed off. One cannot exclude the possibility that there had been a substance that had caused the epithelium to come loose. This was quite irregular on the lips and had a distinctly demarcated line in the region, and when he first saw it at the scene it was as if it was rubbed off or an abrasion. This might as well occurred as a result of an application of a vigorous force to that area with the skin being compressed against the gums. In addition, a pressure of the hand on the upper lip can cause that type of an injury or a rough object.

[95] When the scalp was incised and the whole of the scalp was peeled off, they revealed a purple discolouration in keeping with a haemorrhage inside the scalp. This is a very good indication of blunt force head injury. At the same time, it was said that, one cannot exclude the fact that it could be caused by decomposition. Otherwise no microscopic abnormalities were noted in the mouth, tongue and pharynx. However, an incision of the upper lip mucosa from the inside of the mouth and the darkening of the tissue was noted and that was consistent with contusion. This can also be caused by the application of force. Further, the sternocleidomastoid muscles were meticulously examined and a dark discolouration consistent with contusions was present in the superior or the top aspect of those muscles. These are the muscles coming from the back of the head down onto the chest. This tissue block was retained as fragments of muscle tissue for histological

examination. These were consistent with the application of blunt force. According to Professor Dempers, these areas were suspicious as they were in the top part of the neck and in the floor of the mouth. If these signs are present, then it is consistent with strangulation.

[96] When the stomach was incised, there was a beige and small homogeneous amount of fluid and there were no strange odours emanating from it. In addition, the vagina was incised. At the opening of the vagina there were bands of lacerations. The tears seemed to involve almost the whole circumference of the discolouration of the soft tissue in the deep vaginal wall that was consistent with contusions and the tissue block was retained for histological examination. The findings were that the lacerations in this distal aspect were caused by the physical application of an object. In a young girl like the deceased, the vaginal orifice is quite small and when that structure is over distended it is surely going to rupture - in the ordinary it should allow a pinkie finger to go through. Further, there was dark discolouration of the soft tissues in the deep vaginal wall that was noted. That was consistent with contusions. This tissue was also retained for histological examination. It was stated that the lacerations could have been caused by penial penetration.

[97] Sections of the vaginal wall which showed autolytic tissue with loss of nuclei and cytoplasmic definition were taken. It was testified that there were no pools of red cell ghosts that were detected that are normally visible when a red cell is a distinct cell with a nucleus which helps it to develop. The red cells also had gone through autolysis and when they do they lose their definition on the inside of the cell, they get depressed in the middle and assume the shape of a disc. A careful examination of adjacent large blood vessels also failed to elicit the presence and remnants of red cells. Instead they contained a few *foci* of cellular debris and bacterial overgrowth. The only conclusion at that time was that there was no blood in the tissue, as they could not detect any trauma or haemorrhage in the tissue. When they had a closer look at the blood vessels, they could see debris and the odd ghost cells. If that is the case, there were few deductions to be made, firstly, that the blood vessels bled empty hence there was an indication of no red blood cells in the tissue or else the red cell component on the tissue was so autolytic to the extent that no red cells could be detected. The other possibility was that there could very well

be red cells in the blood where the debris was detected and /or in the tissue where the debris was seen.

[98] The crux of the medical evidence in the said situation would be that there was no ante-mortem injury because of the absence of red cells in the tissue. As stated by Professor Dempers, that was a diagnostic criteria and he was a little bit hesitant about that conclusion. Since the tissue was so autolytic it was not summarily excluded that there had been blood in the tissue and that it is now decomposed. Gathering from the histology findings, two (2) important points can be illustrated, that is, first, the degree of autolysis and second, the absence of any significant natural pathology. Further, that no natural pathology (disease) could be introduced by examination as a potential alternative cause of death.

[99] Sections of the brain also demonstrated an autolytic tissue with sparring of the cytoplasmic and architectural outlines to some extent. There was no evidence of obvious haemorrhage or other pathology.

[100] Professor Dempers proceeded to illustrate through the computer slides and a video, the structure of a brain. He demonstrated a fresh piece of brain that contained a cerebellum or the small brain and there were clearly visible blue dots. These represented the nuclei and the pink colour in the background is either the cytoplasm or neural fibres. These all come from the cells. The distinct spaces between the fibres indicated a normal tissue. This tissue was then compared with the tissue of the deceased. There were visibly no blue dots as compared to the normal one. The tissue was so thin and only the small vessels that were decomposing were seen. Decomposition is therefore associated with gas bubbles and pigment deposition. It was stated that nerve cells and nerve fibres in the tissue survive for a long time and these were detected. That is where a little peck of blue dots could be seen. These are not organised, they are a jumble. This pattern represented a well-established decomposition with loss of nuclei and cytological definition.

[101] At the same time, one could see some small rings. These were referred to as ghost cells. Next to them, there is a pink portion that has to be blood because it is inside the blood vessels. This cannot be detected easily because the tissue is

autolytic. There is no way that one can say that is blood and there is also no way that one can say that is not blood. So, it is difficult to say there could have been blood in the blood vessels. In fact the absence of what is typically considered as blood is a definite diagnosis of the fact that there was no application of force in the ante-mortem period. The samples that were analysed were taken from four sections of the vaginal soft tissue as well as the soft tissue in the neck.

[102] From what was shown in Court, Professor Dempers was very careful and meticulous in his analysis. His opinion was that the lack of distinct cells in the tissue where he saw some debris and some pink homogeneous structure, does not in his opinion exclude the fact that the blood could have been in the tissue before these nine (9) days but be obscured by decomposition. The inference to be drawn is that the possibility that injuries happened ante-mortem and that blood had seeped into the tissue cannot be excluded. Similarly, the contusion that was seen on the scalp, it was Professor Dempers opinion that he cannot exclude an ante-mortem haemorrhage. Further, he could not exclude that there may have been ante-mortem injuries to the vagina. As there are multiple areas of injuries before one can conclude if these injuries were caused before or after death, one has to look at the surrounding circumstances holistically.

[103] In addition, as carbaryl was found in the stomach of the deceased, Mr Van Zyl the toxicologist was asked to quantify his findings. As carbaryl is a potentially fatal substance and could have caused the death of the deceased, it was crucial that the actual quantity be known. Simply because someone has some poison it does not necessarily mean it caused their death. It was important for them to have a clue as to whether there was enough poison to kill the person.

[104] It was testified by Professor Dempers that carbaryl is in the carbamate family of drugs and an acetylcholine blocker. It causes acetylcholine to not bind in the area where it is supposed to at the neuromuscular junction or at the junction where the nerve cells ends. It is known for its respiratory effect. It causes lacrimation in the organs that secretes fluids in the body e.g. lungs, tears, etc. If the patient survives, they have very wet lungs – i.e. over production of fluid. The known side effects are stomach cramps, nausea and vomiting. Lungs are the most prominent side effect. In severe cases, a patient can have convulsions. Cardiac disturbances normally occur

towards the end of fatality, but at times it does not. That of course depends on the quantity of carbaryl that was administered. For instance, if the deceased was already compromised by poison and had difficulty with breathing, strangulation would have made her problem worse, but that would depend on the mechanism used. Professor Dempers in essence confirmed what Mr Van Zyl testified on with regard to the effects of carbaryl.

[105] It was however testified that the situation could be different if a person gets new air into the lungs, there is a chance that a person will be normal again.

[106] Professor Dempers reiterated that the dark purple black or black discolouration in the body of the deceased that was seen during autopsy was an indication of decomposition changes longer than a week. This discolouration should not be confused with cyanosis – where a person is deprived of oxygen within the cells in areas that are quite rich with blood supply, the blemish discolouration is quite mild and it usually affects areas with relatively thin tissues i.e. fingertips and lips. Now, due to the level of decomposition, one may not say that the person was cyanotic at the time of death.

[107] With regard to the semen that was found in the deep vaginal vault, there are many possibilities for it being there. For instance, it might have been due to contamination, it could have landed there due to the movement of the body, it could also have been deposited by a penis through ejaculation or contamination by the same penis inside the vagina. In a majority of cases, if there is semen inside the vagina, it was placed there. Professor Dempers rejected the suggestion that the deceased was digitally penetrated with fingers. In his opinion that could only happen if the semen was placed on the fingers, otherwise the fingers cannot ejaculate. The only source of semen is a penis. Now coupled with injuries to the vagina, it can only be a penis that caused those injuries to the vagina.

[108] Professor Dempers was requested to comment on Dr Naidoo's (defence pathology specialist) report. For instance, reference to extensive injuries in the autopsy report described the number and areas of injuries in the body. According to Dr Naidoo none of these injuries were found to be deeply penetrating for example, to have caused a skull fracture, or else to have caused any significant internal injury

that could have been seen as a cause of death. The description referred to multiple injuries over large areas like the cheek, forehead, thighs, back and so on. One might conclude that they were relatively minor in their severity. Professor Dempers noted that there is nowhere in the report where it is alluded to the fact that they were severe in terms of how deep they penetrated. However, their extensive nature was noted.

[109] Again, there was a small area of protrusion over the forehead that Professor Dempers was certain it was contusion. There were areas of haemorrhage in the frontal aspect of the scalp and they constitute injuries. Coupled with the history of what happened, one cannot exclude that there was an application of force in that area. Dr Naidoo's generic statement that it was unlikely that there was a head injury is unfortunate. A child getting a small bump on the head is also an injury.

[110] It was put to Professor Dempers that Dr Naidoo however, concedes that strangulation and /or smothering cannot be excluded. Professor Dempers agreed with Dr Naidoo as there were visible injuries in the deep muscles of the neck, abrasions on the lip of which the pattern is such that there was some force that was applied on the neck.

[111] Once more, Dr Naidoo opined that the ingestion and / or effects of the toxic pesticide might have contributed to the death of the deceased in some way. Professor Dempers agreed with Dr Naidoo in that respect. Further, Dr Naidoo concluded that there is no objective medical or scientific evidence to indicate that there was any seminal or other male DNA deposition on the vaginal canal to suggest penile penetration of the vagina either before or after death. Professor Dempers left this aspect in the hands of the Court to measure on the testimony by the experts in DNA evidence and the presence of semen in the vagina. But in his opinion, if semen was found in the vagina, it can only come from one place, which is a penis. However, it can be contaminated or it can be deposited there.

[112] With respect to the fact that in Dr Naidoo's opinion, there is no indication that there was any sort of vaginal penetration, if at all it had occurred, in his opinion it happened while the deceased was not alive, Professor Dempers re-iterated that in a situation where there is a fresh tissue one expects to see haemorrhage and red

cells. That cannot be seen in this case because the tissue is completely autolytic, so the pathology can point to either side. Professor Dempers stated that digital penetration of the vagina after death of the deceased is the most implausible version. In his opinion, one cannot exclude that the injuries occurred around death, peri-mortally but certainly while the little girl was still alive.

The Glycophorin A technique

[113] Professor Dempers somehow felt unsettled about the nature of evidence that he gave on the absence and /or presence of red blood cells in the tissues due to the degree of decomposition of the deceased body. He felt obliged to perform a further test at greater expense in order to prove this point. Shortly after the results were made available, the state moved an application to adduce further evidence on this point and such was granted by this Court. This Court will deal with this application later on in the judgment.

[114] The state re-called Professor Dempers and he testified that after he gave his testimony in chief, he went back to his academic department to discuss issues regarding this case with his registrars. A day after this discussion, one of the registrars came back to him and pointed out that there is literature available to specifically indicate the components of red blood cells that had decomposed. One of the issues that bothered Professor Dempers was whether debris or the small blebs that was illustrated on the slides were indeed decomposed red cells or not.

[115] The registrar found one article during the research. Subsequent to that they found two (2) other articles relevant to the subject out of hundreds of thousand that are published. These specifically looked at this marker, in the forensic setting to stain for decomposed cells. Although these markers are quite expensive, they nevertheless proceeded with the tests. Even though they have immunohistochemistry facilities in their laboratory, they did not have the specific marker for this test and they had to ask around the laboratories in Cape Town, as to who does the Glycophorin A markers. They established that the NHLS at Groote Schuur does the C version and that Pathcare, a private laboratory, does the Glycophorin A. In performing the tests they were guided by the articles aforementioned which were published in 2007 and 2011 respectively.

[116] Professor Dempers went back to the tissue and identified in the genitals very clearly where the areas of lacerations were seen. He recut a section and those were the areas that stained eventually with the stain. Due to the nature of these inks, it stains different parts of the cell differently. When the ink was put on the tissue it stained the cell membranes and cell components pink and it stained the nuclei black or blue. This type of staining is said to be normally done mostly in the diagnosis of tumours at anatomical pathology. Its use in forensic pathology is well-established overseas. As it is an expensive test, it is only starting to make inroads in South Africa, and there are specific diseases where it is used quite regularly, for example, in amniotic fluid embolism in children and pregnant mothers.

[117] This test assumes or presumes that there are different proteins in the cell membrane or in the cell nucleus that are unique to that cell, because all different types of cells have unique proteins, either in the membrane or in the cytoplasm or in the nucleus of the cell. This Antigen – is designed specifically to attach to the unique protein cell. As the antigen – antibody complex is not visible through a microscope, they also attach some sort of identifiable stain or colouring agent to the antibody that will attach to the antigen. This test can target a specific protein.

[118] It was Professor Demper's testimony that the immunohistochemistry has been used extensively and the tests are performed on a weekly basis in our country at the anatomical pathology laboratories. The technology itself is not new.

[119] In this case, Professor Dempers had a sliver of vaginal epithelium or the vaginal tear and a piece of normal muscle cell on the slide. There are controls in place for this test to exclude false positives or negatives. According to the article, red cells do decompose and when they decompose they break up. The studies have shown that at about six (6) to nine (9) days the cell start to break apart. Before this happens, one can see the little ringlets in the blood vessels as they were shown in Court. In those studies, the efficacy of the Glycophorin A was tested. There are about four (4) or five (5) groups of Glycophorin proteins (it is arguable) and they are transmembrane proteins in the red cell. They have varied functions in the red cells. The theory is that when the red cell breaks up, the molecules are not going to break as quickly and easily as the cell itself because the membrane of the cell gets small holes and starts to drift apart, but a lot of these proteins will be maintained.

[120] As illustrated in the articles, Glycophorin A was used to test the efficacy of the stain. Glycophorin A is used to illustrate red cells post mortally and cells that had been broken up and cells that have autolysed. It was therefore important to illustrate the findings of the stain and to indicate whether in fact those blebs that Professor Dempers suspected had been red cells that broke up.

[121] The tests were conducted at Pathcare. Professor Dempers testified that according to his observation on microscope, the tissue does not stain from immunohistochemistry. The antibody binds on the antigen with a colour tag. It can be brown or red or whatever the colour might be. In this case it was brown. That is where the Glycophorin protein attached. The Glycophorin protein is unique to red cells and Glycophorin A stains quite clearly. So this is a positive stain. The very dark staining inside the decomposed blood vessel represents the red cells that are still relatively maintained. One can be relatively sure that the Glycophorin protein that was stained represents the presence of red cells in the blood vessels, but there is no way to absolutely state that there has been bleeding before the person died or very shortly thereafter. In conclusion, the blebs that Professor Dempers thought were red cells are indeed red cells. So, the opinion by Dr Naidoo that there are no red cells and that it is therefore likely that the injuries occurred post-mortem are unsustainable.

[122] However, Professor Dempers disagreed during cross-examination with Dr Naidoo's opinion that the distinct defects on the cheeks are blisters that have dried out as a result of refrigeration. When blisters break, they do not express a significant darkening. It is only abrasions that darken like that because of red cells that have released a haemoglobin pigment. Further, when questioned about whether blood is present in purging fluid during the process of decomposition, Professor Dempers could not commit that there is indeed blood and /or purging fluid or both. But from what he observed, the stain was not a purging fluid in the crotch region of the jeans. However, it was agreed by Professor Dempers that the concentrated stain on the edges and the clear demarcation is for the blood on the deceased's t-shirt.

[123] Upon being asked on whether there are any negative controls that Professor Dempers applied in these tests that were performed, it was responded that because of the specificity of the Glycophorin protein, the important aspect in this case was the

positive control. The negative controls were the tissue in the slide that does not contain a Glycophorin protein. The red cells stain and the other tissues do not stain. There are also parts that stain a ghost outline. Even though Professor Dempers did not specifically indicate that those were an assumed negative control, but by inference he thought it was.

[124] It was put to Professor Dempers that Dr Naidoo asserts that the appearance of the two (2) lesions in the deceased's right thigh are in keeping with decomposition and any attempt to weigh these into bruises is stretching the possibility to probability. Professor Dempers cautioned Dr Naidoo that his opinion should not be based on external photographs having not been present at autopsy. The defects in the deceased's body, that is, the two (2) focal lesions were carefully considered after spending hours on it. He still maintained that the areas of darkening were consistent with contusions, which are consistent with the application of blunt force. If they are focal, it can be due to poking of the skin with an object, for instance, if someone grabs with fingers and so on.

[125] Further, it was the defence's pathologist's opinion that he disagrees with Professor Dempers' testimony that there was a gradual transition of decomposition. According to Dr Naidoo, that is not always predictable. Professor Dempers restated that when they first visited the scene when the body was found, the body had not reached the level of decomposition that they observed two (2) days thereafter when they performed an autopsy. Again, it is very easy for Dr Naidoo to just look at the pictures and give an opinion, so said Professor Dempers.

[126] With regard to Professor Dempers' testimony that the small dark areas that are excavated and seemingly that there was a loss of tissue on the cheek and close to the ear and upper lip, in his opinion a force was applied and that looked like a wound and not a post-mortem change. There was a little doubt that the areas looked like an abrasion. According to Dr Naidoo, these were decomposition blisters which the detached skin causes them to be exposed and dried out because of the refrigeration. This assertion was disputed by Professor Dempers for the reasons already explained above.

[127] It was put to Professor Dempers further that in his testimony reference to multiple lacerations of varying degrees and depth around the introitus, the whole circumference of the vagina and dark discolouration was consistent with contusion, whereas that is not associated with any reddening or inflammation could not be correct, more especially that none could be detected in histology. These defects according to Dr Naidoo could be of a post-mortem nature. Professor Dempers' response was that Dr Naidoo would at least have appreciated that the body was nine (9) days decomposed, so there would be no hope for any redness from inflammation to be seen even if it was once present. So with haemorrhage or blood in the tissue, after nine (9) days and without the Glycophorin A test being conducted, there is nothing which could be proven conclusively that the blood has leached into the tissue while the person was alive or while she has gone through the process of dying or after death.

[128] Furthermore, it was put to Professor Dempers that Dr Naidoo does not agree that the deceased's tears on the vagina seems to involve the whole circumference of the vagina. According to Dr Naidoo, the full circumference injury is generally opposed to that seen in the penile penetration where the injury is usually at a six o'clock position or thereabout as opposed to a portion of the vestibule introitus. Professor Dempers disagreed with this statement as it seemed Dr Naidoo was referring to a rape case in a generic way as to how injuries happen. Where a woman is raped pinned down and the penis is forcefully thrust against the posterior wall of the vagina, in that situation, one can get lacerations in the posterior wall. In children, there is a very restricted small vaginal wall orifice. Any object that is significantly larger is bound to cause lacerations and unpredictable lacerations for that matter in that area. One cannot take the generic rape scenario of ten and six o'clock lacerations. It depends from which side the penis enters the vagina and then has to be applied to a child where the variables are varied. For instance, if one has a head of a penis or whatever large object penetrating the vagina, one could have these lacerations that do not conform to the typical six o'clock position that one finds in adults.

[129] Notwithstanding the fact that Dr Naidoo appreciated the application of the specialised technique of the use of Glycophorin A, it was Professor Dempers'

opinion that in the last report he prepared based on his testimony on the subject, Dr Naidoo seemed to be contradicting himself. He somehow in the same report expressed doubt as to the validity and usefulness of the test. For Dr Naidoo to state that the test cannot be valid because it was made to detect tumours is nonsensical. As Glycophorin A membrane proteins are present in the precursors of red cell tumours, Glycophorin A protein is also present in the membranes of red cells. After this test was conducted, Professor Dempers' concluding remarks that he can safely say in the area where they noted contusion and lacerations of the vagina, that there was blood. This test put him in a different situation than before where he was full of doubt.

[130] The state called the evidence of **John Patrick Segole** (*"Mr Segole"*), the medical technologist who assisted Professor Dempers with the further tests. Mr Segole testified that he qualified as such at Cape Peninsula University of Technology in 2007. He did his internship in Histopathological Methods in 2008 and qualified as a histopathological technologist in 2009. He was then employed by the National Health Laboratory Services from 1 December 2009 – end April 2015. He is currently stationed at Tygerberg Hospital but employed by the Department of Health, Forensic Pathology Services. His duties include doing normal histology and immunochemistry, histology (the study of tissue) and immunohistochemistry (a technique that is used to identify cellular structures with the aid of antibody-antigen interactions).

[131] According to Mr Segole, Professor Dempers requested that a test be performed on Glycophorin A which is an antibody that binds on the epitope on the antigen in the region of the cell. He wanted to establish if there was blood present in that specific tissue.

[132] As the immunohistochemistry is quite a new field, they received their new instrument at the beginning of this year in their laboratory. They only have a few antibodies in their laboratory as they tend to be expensive. It so unfortunately happened that they did not have this Glycophorin A antibody. Professor Dempers arranged with Pathcare Laboratories in N1 City that they perform the test on their behalf.

[133] Mr Segole proceeded to cut the specific sections of the specific blocks as requested by Professor Dempers. On 1 August 2018, he took them to Pathcare Laboratories where he labelled the slides with their numbering system. The test was completed after three (3) hours. The technologist at that laboratory figured out that there was an adhesion problem and that the cover slipped resulting in the tissue not sitting on the slide. It could not stick due to the robust reagent that they used. He suggested that he redo the whole preparation of the tissue and gave him the Pathcare slides to use.

[134] The next morning, 2 August 2018, he prepared the slides, labelled and numbered them and on this occasion the tissue was incubated overnight. When he went to check the results on 3 August 2018, the test was successful. He collected the slides and handed them back to Professor Dempers for evaluation.

[135] **Warrant Officer Hildegarde Thünemann-Oláh** (*“Warrant Officer Thünemann”*) testified that she has been employed by the South African Police Services since December 2014 at the Forensic Science Laboratory as an Evidence Recovery Analyst. In 1994, she obtained a degree in Bachelor of Science majoring in Microbiology and Biochemistry. After graduating in 1994 she was a stay-at-home mom until 1999 when she created some craft and body products. From 1999 – 2003 she worked for Stellenbosch University as a technical officer at the Conservation Ecology Department, and from 2003 – 2012 she was a manager at a school for children with special needs, that is, Camphill School in Hermanus. From 2012 – 2014, she returned to Stellenbosch University and worked for a fundraising charity.

[136] Warrant Officer Thünemann’s duties are to maintain the chain and custody of her cases and to recover biological evidence from the exhibits she receives from the crime scene. With regard to this case she received numerous samples and swabs which were collected from the deceased, accused and the accused’s residence to recover biological evidence. According to Warrant Officer Thünemann, she tested the deceased’s panties and possible blood was detected and there was no possible semen detected, no possible hair was recovered and it was not tested for epithelial cells. When she tested the deceased’s blue jeans, there was possible blood that was detected, no possible semen was detected, no possible hair was removed and it was not tested for skin cells. The mouth swab was not tested for possible blood or semen

or hair removed or epithelial. On the left arm swab and left hand swab there were no reagents used or presumptive tests done. In the deep vault swab and right thigh swab, no presumptive test was done. When a "Top" was tested, possible blood was detected, possible semen was detected and possible hair was removed. However, it was not tested for skin cells. On the vault swab, labia swab, pubis swab, anus swab – no presumptive test was done. On the fridge swab, possible blood was detected. On the fridge tray swab – possible blood was detected and no presumptive test was done. On the Mira swab there was possible blood detected, but not tested for possible semen. Possible hair was removed and possible epithelial was removed. On the bags and tape – no possible blood was removed, no possible semen detected. On the t-shirt there was possible blood detected. However, it was not tested for possible semen, no possible hair was removed and it was not tested for skin cells.

[137] This report was contained in a Section 212 affidavit dated 16 November 2017. She performed the presumptive test for the detection of blood. The test she uses for visible blood is a reagent called Hemastix and for invisible blood she uses Luminol. For semen detection she uses a chemical called Brentamine. For example, when she tested the jeans, she went for the crotch area as it looked bloody and in such instances a sexual assault was possible.

[138] According to their standard operating procedures, when genital area swabs are bloody they are not tested with a reagent for Brentamine. They are presumed to be positive for semen and are sent directly into the DNA process. This includes the deep vault swabs, right thigh and the left thigh swabs. Again, swabs that are not from the genital area are not tested for semen, unless the doctor or prosecutor has given such instructions. For these reasons the two (2) right thigh swabs, mouth swab, left arm swab were not tested.

[139] When these tests are conducted there is no room for contamination as they strictly adhere to their standard operating procedure. Their laboratory has a list of database of DNA profiles for everyone including contractors. If there is contamination, it can be picked up by the system immediately.

[140] **Captain Sean Timothy Taylor** (*Captain Taylor*) confirmed that he is the investigating officer in this matter. He is stationed at Bishop Lavis SCS, Family Child and Sexual Offences. As a unit commander, he is in charge of the officers, but he does take on some cases personally.

[141] On 4 May 2018, he received a call for a missing child, Courtney Pieters in Elsies River. His unit started with the search the next morning. Since the case attracted a lot of interest, the police received false information at times. As they normally do with other cases, they first started interviewing people who resided in the house with the deceased, including the accused. The accused stated that he saw the deceased on the day that she disappeared. She came into his room and he watched DSTV with her and she then left. All other people who stayed in the house had no clue of what happened to the deceased.

[142] Captain Walters of Elsies River organised all the search parties. They also followed all the false information they received from the public. At some point, there were two (2) random ransom demands and they turned out to be false and there was other information that the deceased was seen walking in Cape Town. Captain Taylor and his team followed this information up and this again turned out to be false information. The accused was also involved in all the searches. At some point Richard Maxim was said to be the number one suspect by the accused and other people. It was said that the deceased was seen standing opposite his house that morning of her disappearance. He was eliminated after the interview.

[143] On 13 May 2017 midday, Captain Taylor received a call from SAPS Elsies River informing him that they have found the deceased at Bofors Circle in Epping. He and his team decided to go and attend at the scene. When they arrived at the scene it was cordoned off, but could see where the deceased's body was lying. The warrant officer from Bellville LCRC was called to take over the crime scene. Nobody was allowed to go near the scene except the pathologist, Professor Dempers and Dr Ogle. The war room personnel also attended the scene. That same evening, a video footage of the accused carrying and later on dumping the deceased was collected by the war room officers.

[144] On 14 May 2017, that is, Saturday at about 09:00, Captain Taylor attended at Elsie's River SAPS and a video footage was shown to him. He could clearly see a person dressed in a red t-shirt walking with something over his shoulders. This person walked first to the right side and kneeled and he then moved to the corner about ten (10) metres where the body was found. This person then dropped something there. He left the area and came back later on to do the unknown.

[145] As an investigating officer, during his investigations he started by sharing the video to people who stayed in the area. He called Gail Baron. Gail Baron immediately identified the accused as they grew up together. He thereafter called the mother and the father of the deceased to show them the video footage. At that stage, they said they did not know the person.

[146] On Sunday, 15 May 2017, the mother of the deceased went to identify the body at the mortuary. At that point, the preliminary autopsy was already commenced with by Dr Ogle. As sexual assault was already suspected on the body of the deceased, Captain Taylor decided to get all the males in the house in order to collect the buccal swab for DNA purposes in order to start eliminating people. He could not get access to the accused but managed to take samples from the other males in the house. He repeatedly asked him to come to the police station to no avail. At some point, he asked the deceased's mother to call him on her cell phone. He could overhear him saying that he was on his way to the police station but never pitched.

[147] Later in the day, he contacted the dog unit for a blood fluid investigation at [...] P Street. On entering the house, the dog immediately ran to the accused's room. When the dog handler, Sergeant Timmy took the dog out of the room, it went back to the room repeatedly. On the last occasion, Sergeant Timmy came out of the room with the dog and advised him that the dog definitely sniffed body fluids. That is when he decided to call the Cape Town LCRC to investigate the room. They collected a couple of exhibits for testing. While he was waiting in the yard for them to finish, J P, the mother of the deceased approached him and advised that she lied when she told him that she did not know the person on the video. She could clearly see that it was the accused. She could not believe that the accused could do this to her.

[148] On Sunday evening, the accused was arrested by Constable Spogter because at that time they had gathered enough information about him.

[149] On Monday morning, 16 May 2017, he was excused from attending the autopsy and he and Warrant Officer Kotze booked out the accused for an interview. They first explained all his constitutional rights, nevertheless he advised them that he does not need any legal representation. He told them that he killed the deceased, he admitted raping the deceased after she had died and putting his fingers into her vagina. At that stage, Captain Taylor stopped the interview and enquired if he wanted to have a confession and he agreed. He once more asked if he wanted to get legal representation. The accused advised that he wanted to get his head clear and tell the truth.

[150] Captain Taylor proceeded to phone the Goodwood Magistrate's Court, but was unable to obtain a magistrate to take a statement. The accused was taken to Lt Col Barkhuizen in Bellville in the afternoon for that purpose. He also took his buccal sample and collected further samples from the mortuary to hand over to the forensic laboratory. When that process was completed, he asked if the accused wanted to point out the scene. He did not have a problem with pointing out. He further asked if he did not want to get legal representation. His response was that it is not necessary. Captain Taylor arranged with Captain Speed to do a pointing out with the accused.

[151] It was Captain Taylor's testimony that when the search for the deceased was conducted, the photograph of the deceased was obtained from the accused. Actually, it came from his cell phone. Initially, it was a photograph of three (3) children including the deceased, but it was cut to reflect only the picture of the deceased. At the time, the deceased's parents did not have the picture of the deceased. The picture was circulated in the community with the flyer including the Pink Ladies.

[152] Captain Taylor confirmed that he does not know the results of the tests of the exhibits that were taken at the accused's room during cross-examination. He also confirmed that the accused confirmed to him that he poisoned the deceased and when she got sick, he did not know how to keep her quiet, so he started to suffocate

her. After the deceased died, he did not know what to do with the body and when he got a chance, he went to dump the body. At the crime scene, he used his fingers to penetrate her. However, during his confession, the accused stated that he penetrated her in his room.

[153] On being questioned during his cross-examination on whether he knows for a fact that the accused took the photograph that was used in the flyer to broadcast a missing child, Captain Taylor testified that he could not confirm as he does not know whether the accused took the photograph himself. He was told that the accused took the photograph himself. Captain Taylor also confirmed that he investigated the issue surrounding the ant poison. The investigations were done through the owner of the house, the mother of the deceased, J P and the father of the deceased, A F. They all confirmed that there was no ant problem in the house. Also, when he was at [...] P Street during his investigation of the case on a number of occasions he did not witness any ant problem in the house.

[154] It was put to Captain Taylor that the accused denies that he told him that he penetrated the deceased after her death at the crime scene where he dumped the body. Captain Taylor responded that what he testified on is what he could remember and hence he stopped the interview when he wanted to make a confession. He also confirmed that the accused told him during his interview that he bought the ant poison as there was an ant problem in the house.

[155] It was further put to Captain Taylor that the accused's version is that he did not take the photograph. The children constantly played with his cell phone and took each other's photographs. Captain Taylor re-iterated that he received the information that the accused took the photograph from the people who stayed at the deceased's house.

[156] When asked about whether he investigated the circumstances that the deceased's mother left the deceased on the morning of 4 May 2017, Captain Taylor testified that he investigated such circumstances. The deceased was left with her six (6) year old brother and the deceased's mother did not want to wake them up early in the morning. J P sister or niece, who stayed at the back as he was advised, usually looked after the deceased.

[157] The state closed its case.

C THE DEFENCE'S EVIDENCE

[158] The defence elected not to call the evidence of the accused, but rather the evidence of his pathologist.

[159] **Dr Segaran Ramalu Naidoo** testified that he is a forensic pathologist by profession. Due to his training and tertiary qualifications he is a specialist in the field. He is duly registered with the Health Professions Council. He qualified as a general medical doctor in 1981 before he specialised as a pathologist. He has thirty five (35) years of experience as a qualified doctor and twenty eight (28) years as a specialist. For the greater part of his work experiences, he has been attached to state institutions. He then left the state employment in 2011 and started his private practice.

[160] Dr Naidoo's daily duties involves autopsy work, consultations, legal consultations, agency functions, teaching medical students, human rights work and many others. He estimated to have performed approximately 12000 – 14000 autopsies to date. He also added that he specialised in sexual clinical forensic medicine. As he completed a Diploma in Forensic Medicine, he therefore focused on sexual violence medicine.

[161] Dr Naidoo started teaching at the University of KwaZulu-Natal ("UKZN") and further worked at the Department of Health from 1990 until 2011. In the last eight (8) years he was with the State and further worked as an Associate Professor and Head of the Academic Forensic Department at UKZN. He has continued teaching even after he left the State's employ. He still runs the LLM postgraduate module for law students. He is also involved in training Legal Aid Board practitioners on sexual violence medicine. Additionally, he does gender based violence training with an NGO called the Street Law in Durban and Port Elizabeth. He also occupies himself with informal teaching online, webinar teaching with Cranfield University in the UK. He taught undergraduate medical students, post graduate students training as specialists, nurses and other groups.

[162] As a specialist in sexual violence medicine or sexual assault his approach is focus specific as the field requires a different approach in evaluation and understanding other than for instance, that of a gynaecologist. Gynaecologists and obstetricians could be reasonably competent in examining a rape case, but not able to dissect and differentiate the intricacies or nuances or physical signs that one would find with his specialisation for the benefit of the case in his opinion. Sexual abuse medicine is about understanding medical findings in sexual assault cases. Currently, he is writing a court handbook for doctors and lawyers.

[163] Further, Dr Naidoo has done some human rights violations work with the United Nations and African Union in Ukraine, South Sudan and Gambia. It was his testimony that he is the Founding Chairperson of the Africa Network of Forensic Medicine and a member of Forensic Advisory Board of the International Committee of the Red Cross Hospital. He also worked in Bosnia, Croatia and Kosovo on human rights investigations.

[164] Dr Naidoo commenced his testimony by explaining death and decomposition, and when a person is said to be dead. According to the National Health Act, a person is referred to as dead when he or she is brain dead. Whereas when one talks about decomposition of the body that constitutes changing of constituents in the body after death, the cells autolysis, that is, in the earlier stages they self-digest or auto digest with the aid of small proteolytic enzymes inside the body. Autolysis takes place between 18 – 24 hours. It starts in the intestinal area, because that is where the greatest amount of bacteria is found and also on the surface of the body. It then progresses due to insect activity, predations and so on. The body then starts to liquefy because of bacterial action and releases the purge fluid through the orifices. Orifices in this regard refer to nose, mouth, anus, vagina, and penis and so on.

[165] Dr Naidoo's testimony was that he had been involved in cases where he discovered a positive pesticide in the body and that include the carbamates. The carbaryl that was found in the deceased's body is a carbamate and basically anti-cholinergic. Carbaryl has an effect on enzyme cholinesterase. When acetylcholine is broken down by an enzyme, the brain sends a message to a muscle or gland the poison affects the enzyme. For instance, all the messages to the muscles are hyper stimulated and a person might die or damage might be caused as a result thereof.

[166] It was conceded by Dr Naidoo that he is at a disadvantage in this case as he did not attend the autopsy. Notwithstanding that, he had sight of the reports, slides, photographs and all the information that was provided to him in order to form his opinion. For instance, he looked at the post-mortem report and photographs of the deceased and observed that Dr Ogle has reported on certain injuries that were sustained by the deceased. Based on this information, he compiled his own report and that is where his testimony is based.

[167] Dr Naidoo went on to challenge Dr Ogle's findings on the injuries sustained by the deceased. For example the injuries on the face, torso and limbs as they appear on the images, to him, they are of such a degree of decomposition that the findings of injuries could easily be due to putrefaction changes. Also, the blistering and skin shading of the skin surface of the face, lips, neck, arms and right shin are in keeping with putrefaction. They have dried out due to exposure and refrigeration and such could be misdiagnosed as abrasions on the skin surface as Dr Ogle has done. Similarly, an ant bite and other insect and scavenger excretions can also look similar to abrasions of physical injuries.

[168] According to Dr Naidoo the wounds could be misdiagnosed, for instance, when a body decomposes it gets blisters and when they dry out by exposure to elements like refrigeration such blisters could be mistaken with bruises or abrasions. Reference was made to Photograph 62 and 63 – when Dr Naidoo identified a blister below the deceased's earlobe and close by and on the left eyelid. To him, below the cheek it looked like shed blisters and to someone it may appear as abrasions. Dr Naidoo magnified the photographs of the deceased in his laptop. In his observations, the detached skin looked white and the slightly drying surface looked brown. That is typical of a shed blister and /or intact blister in photographs 64, 65, 66 and 67.

[169] Dr Naidoo acknowledged that this is a well-documented autopsy. He could clearly see the colour changes of the deceased's skin that it is in keeping with the post mortem changes. In his opinion, the dark blue patches over the deceased's forehead, nasal bridge and around the eyes and mouth are consistent with the greater bacterial proliferation. Likewise, the front of the chest and the shoulders and

the linear branching areas are marbling and in keeping with greater progression of decomposition. The trickle from the nostrils could well be a purging fluid.

[170] Additionally, turning to photograph 71, the two (2) lesions marked "X" in the right thigh - Dr Naidoo disagreed with Professor Dempers that the lesions could be caused by fingerprints, according to him that could be decomposition as it looks no different from the black of the marbling.

[171] Further, Dr Naidoo testified that a large blister partially collapsing could be seen in photograph 73 on the left side of the thigh. On the trunk, there are several other small blisters. Some of them have shed and look more like focal abrasions. Further up on the left thigh there is a pinkish-red discolouration and a lot of black that is emerging. That is a different stage of decomposition. One might misdiagnose it as a bruise. Similarly, the right lower back and the buttock region appear less darkened. It is Dr Naidoo's opinion that this is all decomposition colour changes.

[172] Dr Naidoo's view for instance, on the report by Dr Ogle's which made reference to 'extensive blunt force trauma', - in his opinion, such finding is misleading to the Court. However, this is not to infer that there were no mild bruises and abrasions. The distinction between those is very difficult to make in the presence of established decomposition. The histology examination of the tissue did not establish that there were abrasions or bruises in the neck and genital areas.

[173] Dr Naidoo disagreed with Dr Ogle's finding that the purplish discolouration of the skull is in keeping with the deep scalp haemorrhage. In his observations, such discolouration may be attributed to the changes of decomposition.

[174] Similarly, this discolouration applies to the neck region. Bruises do not necessarily have to manifest if smothering or strangulation had occurred. For young children who cannot resist for whatever reason, it then follows that physical injuries may not manifest. Findings of subaponeurotic bruising of neck muscle were nullified by the negative histology examination which looked to confirm the bruising in these sections. This equally applies to suspected genital bruising which was thought to be present on naked eye examination.

[175] With regard to the genital injuries, Dr Naidoo was not convinced objectively by looking at the photographs that what he saw was linear lacerations or multiple linear lacerations involving the whole circumference of the vagina as was stated by Dr Ogle. According to him, if there were such injuries, the histology examination would have shown it. Dr Naidoo re-iterated that there was no damage on the vagina. In any event if there was damage that might be acceptable to this Court, it could easily have been post-mortem as there was no inflamed redness or bruising that he could detect microscopically or with the naked eye. In any event, if there was penile penetration, entry is usually at a six o'clock position or thereabout at the posterior portion of the vestibule or the introitus. This means the greatest tractional injury is at the rear of the vagina closer to the anus varying between three, six or nine o'clock position. At times it might be a four or five o'clock position. In his opinion, the pattern as stated by Dr Ogle does not fit the normal penile penetration.

[176] Dr Naidoo confirmed further that he examined 25 slides received from Professor Dempers and they showed significant decomposition, liquefaction, loss of character, detail, texture and resolution. In his observations, there were several large blood vessels with clearly identifiable ghost outlines of red cells and nucleated white cells with smudge appearance.

[177] In view of the fact that the whole exercise was to consider a diagnosis of traumatic bruising of connective tissue sections of neck and genital tissues, in his opinion, there is no evidence of red blood cells in between fibre septae and muscle fibres to any degree. Debris noted is of minimal nature and likely the consequence of liquefaction change. These features do not suggest the presence of any traumatic bruising to any degree.

[178] With regard to the immunohistochemistry technique, Dr Naidoo agreed with Professor Dempers that it is still in its early stages in our country and it is used to detect red cell antigens. Specifically, it is used for the tissue identification in tumours and some abnormal lesions. Applying it for forensic purposes like the present is a novel usage. It will always be secondary to the tried, tested and confirmed vehicles and tools that are currently used. Dr Naidoo therefore noted and accepted the features of the immunohistochemistry that were employed by Professor Dempers. According to him, it is important to draw the Court's attention that the mere detection

of red blood cells by a special immuno or detection process does not make a diagnosis of bruising. Bruising is not diagnosed by the presence of scanty red blood cells outside vessel walls but by a pattern of recognition of substantial amount of red cells that escape out or are driven out by vascular hydrostatic pressure or ruptured small blood cells from physical trauma. In his opinion, he is not convinced that there were in fact vaginal injuries. If there were injuries, assuming this Court accepts, there is no evidence to suggest that this was at all ante mortem, it could have easily and readily be post mortem or peri mortem. If the accused inserted fingers on the deceased's vagina, that could have caused damage.

[179] Dr Naidoo rejected Professor Dempers opinion that after conducting the immunohistochemistry technique on Glycophorin A, the results pointed to the fact that there was indeed red blood cells present. In his opinion, the fragments of red blood cells in globs or globules and the debris clearly prove that the bleeding was post-mortem. Put differently by Dr Naidoo, a cluster of swallows does not make a summer.

[180] During cross-examination when Dr Naidoo was asked what he did to qualify himself as a sexual assault specialist, his response was that this is not a specialisation as such in South Africa, but this area is recognised in other jurisdictions. There is no specific training that one needs to undergo, as an independent academic, he does research and keeps abreast with the latest developments.

[181] Dr Naidoo conceded that he was not present at the scene and during post mortem. He relied on the information received in the form of post mortem report, photographs and so on in order to prepare his own report. He conceded further that looking at the photographs alone, it would be difficult to distinguish between bruising and decomposition, especially with the resolution and the angle in which the photographs were taken.

[182] It was put to Dr Naidoo that the accused in his admissions in terms of Section 220 of the CPA stated that in order to stop the deceased from screaming, he hit her with an open hand on the forehead. Having regard to the injury of the deceased's forehead and the accused's version, would it not be possible that the blunt force

applied could cause a bruise. It was conceded that it could cause a bruise, based on the amount of force applied. Further, it was conceded by Dr Naidoo that the same situation would have caused bruises on the cheeks, eye and upper lid. But to him, the marks were more in keeping with decomposition or else, it may either be a bruise or decomposition.

[183] Dr Naidoo during cross-examination denied Dr Ogle's findings that there was an irregular abrasion measuring 40/12mm on the upper lip. According to Dr Naidoo, Dr Ogle was employed by the forensic services for a few months. As a junior doctor she misdiagnosed the decomposition and called it an abrasion because of inexperience. On being asked as to how possible could that be after having been supervised at the scene and autopsy table by Professor Dempers. Dr Naidoo responded that the artefacts of decomposition are so complex, that even a senior and experienced person can do so. When Dr Naidoo was reminded that when he explained the characteristics of a bruise, he said the abrasions can be irregular, and that is exactly what Dr Ogle has done and even gave measurements. How is it possible for her to misdiagnose in that scenario. Dr Naidoo then agreed that perhaps that could be an abrasion.

[184] It was put to Dr Naidoo that the marks below the left ear and two in front of the ear were identified by him as blisters. Dr Ogle and Professor Dempers identified these marks as abrasions. Again, in light of decomposition, how can he be dogmatically certain that these are blisters and not abrasions. Dr Naidoo responded that because of their pattern, to him they looked like shed blisters that have dried out or crated surface. There is less likely possibility that these might be abrasions, but cannot completely exclude abrasions.

[185] Dr Naidoo was asked for an opinion where a person's mouth has been closed with a towel, if that person cannot suffer abrasions. Dr Naidoo agreed that such a scenario could cause an abrasion, but it will depend on the tightness and roughness of the towel. It was put to Dr Naidoo that the accused in his admissions said he closed the deceased's mouth with a towel and choked her by putting his hand around her throat. Dr Naidoo agreed that it is possible that abrasions may follow depending on the towel and the manner in which it was wrapped. It could cause an abrasion. But again, the focal nature of the upper lip does not fit with a towel,

obstructing the entire nostrils and mouth. As small children's nostrils are sensitive, the towel would have abraded the nostrils or the lower lip or else the surrounding cheek. The abrasion would somehow result if the towel was rough.

[186] It was put to Dr Naidoo that in his first report, his opinion was that, there were fine mucosal fissures that are longitudinal on the distal vagina, how come during his evidence he could not see the injuries in the vagina. His response was that when he subsequently looked at the material in preparation for this case he realised that what he saw was not convincing as fissures more especially that he viewed the photographs on his new laptop screen. The resolution was now clearer hence he is now revising or correcting his previous opinion.

[187] Further, it was put to Dr Naidoo that if he cannot see the injuries, he cannot say they were caused ante or post mortem. He agreed. When asked if he took into account the evidence of Mr Tiya that the DNA results proved that there was a male DNA in the deep vaginal vault. Dr Naidoo retorted that he looked at it briefly and did not focus on it. He only concentrated in the areas of his expertise which is medicine and pathology.

[188] The question whether it was possible to get semen in the deep vaginal vault only with the accused's three (3) fingers, was asked having regard to the accused's admission that he first penetrated the deceased with his three (3) fingers and he became aroused and took out his penis and placed it around the vagina. Further, male DNA was also found in the crotch area of the deceased's jeans. Dr Naidoo commented that semen can land up in the deep vaginal vault by contamination if the semen is on the fingers and the fingers penetrated the vagina. At the same time, if there was no contamination, it is possible that semen might have landed in the vagina through penile penetration.

[189] Further, Dr Naidoo stated that although he had occasionally performed a staining test on immunohistochemistry, however he has not worked with Glycophorin A, but has a basic knowledge of how it works through the literature. He therefore agrees with Professor Dempers' findings. In spite of this comment, Dr Naidoo testified during cross-examination that he accepts that Glycophorin A is scientifically valid, it worked well, it proved something that we expected to see, but the application

of this test in the context of this case to show bruising is faulty. The state closed its case.

D SUBMISSION BY THE STATE AND DEFENCE

[190] With regard to a rape charge, the state argued that it relied on circumstantial evidence. According to Professor Dempers' testimony, the opening of the vagina had multiple lacerations of varying degrees and depth around it. These tears were on the whole circumference of the vagina and could have been caused by a blunt object. It is when that part of the body is over extended and stretched too far that one gets injuries like those of the deceased. Professor Dempers testified that the vaginal orifice of a child will normally allow a pinkie, but if it is over extended, it will lacerate or rupture. Further, the dark discolouration of the soft tissues in the deep vaginal wall was consistent with contusions. As stated by Professor Dempers, a penis could cause the lacerations in the introitus. This point was conceded by Dr Naidoo during his cross-examination.

[191] It was further submitted that apart from what Professor Dempers testified on, the DNA expert, Mr Tiya testified that a male DNA was found on a top of the deceased, on the jeans and deep vaginal vault and it tested positive for semen [*"the state's emphasis"*]. Further, the right thigh swab of the deceased tested positive for possible semen, but was insufficient to read in a profile.

[192] Both Mr Tiya and Warrant Officer Thünemann-Oláh testified that they followed strict standard operating procedure in their laboratory and that there was no room for contamination of exhibits. There are positive and negative controls to pick up any contamination.

[193] It was further submitted that the Accused, in his plea explanation admitted that he first penetrated the deceased with his three (3) fingers and thereafter became aroused. It was only at that stage that the accused took out his penis and placed it on her body and around her vagina. He denied penetrating the vagina with his penis. If the accused's explanation could be accepted, that he did not penetrate the deceased, then where did the semen in the deep vaginal vault come from? What was the cause of darkening inside the vaginal wall? Both Professor Dempers and Dr Naidoo agreed that there are other ways in which the semen could end up in the

deep vaginal vault, first, by penile penetration and second, by contamination through fingers.

[194] It was argued further that if it is the accused's explanation that he first inserted his fingers in the vagina, it is therefore highly improbable that the semen could have come from the fingers. It could only be the penis that deposited the semen in the vagina as it was taken out after the digital penetration was completed. His fingers were not contaminated hence it could not be the fingers that deposited the semen in the vagina. According to the state the crux of this charge is about drawing a reasonable inference from the proven facts as was stated in R v Blom 1939 AD 188 at 202-203 that:

"In reasoning by inference there are two cardinal rules of logic which cannot be ignored:

- (i) The inference sought to be drawn, must be consistent with all the proved facts. If it is not, the inference cannot be drawn;*
- (ii) The proved facts should be such that it exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."*

[195] It was submitted that applying the test to the facts of this case, and in light of the totality of evidence, the only inference that can be drawn is that the accused penetrated the deceased with his penis. Further, the accused is the last male person who last saw the deceased alive. The male DNA was found in the deep vaginal vault of the deceased. Even though it was insufficient to read the profile of the accused, the only reasonable inference to be drawn from the proven facts is that the semen belonged to the accused.

[196] The main dispute in this matter was whether the deceased sustained such injuries before or after death.

[197] It was only during cross-examination, that Dr Naidoo agreed with Professor Dempers that the focal mark on the upper right thigh of the deceased is consistent with a contusion caused with a fingertip or digit. Dr Naidoo further conceded that it might have resulted when the accused held the leg of the deceased down to restrain her. He conceded further that the injuries to the neck could have been caused by strangulation or smothering. Dr Naidoo could not challenge the cause of death as stipulated in the post mortem report.

[198] The state further observed that what was disturbing is that Dr Naidoo in his initial report, conceded that indeed there were lacerations at the introitus of the deceased's vagina. When he gave evidence in Court, he testified that he could not see any injuries in the vagina of the deceased. In light thereof, he could not say whether the injuries were caused ante or post mortem. However, should the Court find that there were such injuries, in his opinion, Dr Naidoo said they were caused post mortem. The state asked the Court to reject such a contention.

[199] Dr Naidoo it was argued, conceded in his cross-examination that his knowledge in respect of the immunohistochemistry test is limited and he has never used Glycophorin A in the past. He however, was adamant that this test by Professor Dempers and Mr Segole did not heed a significant pattern of distribution of red blood cells. He was convinced that he could not see bleeding or contusion in the decomposed tissue after the results were made available to him. In his opinion, a focal collection of blood cells does not confirm that there was a haemorrhage ante mortem as there was no pattern of distribution of red blood cells. However, he conceded that the Glycophorin A is a valid test. He could not dispute that the test was positive for staining of red blood constituents.

[200] The state submitted that Dr Naidoo is not an expert on the Glycophorin A test. He is therefore not in a position to draw an opinion. In any event, the defence did not challenge the outcome of the results and the Court has no reason to accept this testimony by Dr Naidoo. In turn, Professor Dempers was very honest in his testimony. He should therefore be regarded as a reliable witness.

[201] In light of this evidence, it is more probable that the injuries to the vagina were sustained before death and not after death as per the accused's plea explanation. The state, it was submitted, has proven its case on rape beyond reasonable doubt.

[202] It was the defence's view, that it was Dr Naidoo's testimony that apart from some shredding, he saw no bruising which would be the vital reaction if the deceased sustained the injuries in his vagina while still alive. Professor Dempers, when he testified on immunohistochemistry results, conceded that the contusion could have resulted ante or post mortem, so these results do not take the matter any further. Despite the fact that Dr Naidoo could not see any injuries in the vagina when he testified, he however took the view that the injuries were more in keeping with digital penetration as evidence or repeated thrusting was absent. In any event, there is doubt as to whether the injuries as described were true injuries, it was argued.

[203] With respect to the fact that the injuries as testified by Professor Dempers were true injuries, they differed considerably as Dr Naidoo identified them as the continued process of decomposition. Certain findings were in keeping with the accused's plea explanation. The accused did not deny that he violently applied force on the deceased. Also, it was conceded during argument that the right thigh swab tested positive for semen, but it did not do so at QPCR. Further, the semen found on the deceased's jeans does not contradict the version of the accused.

[204] It was the defence's submissions that the possible semen found on the deep vault swab did not yield a full profile. According to Professor Dempers, it might have landed there on three ways, through the penis, contaminated fingers and / or contamination itself. Even if the Court accepts that it was deposited there through the penis, the next inquiry would be when that happened. On the probabilities, it was the defence's submission that there is more which does not countenance penetration while the deceased was alive. If the accused repeatedly thrust his penis into the deceased's vagina while she was still alive, her screams and reaction to the pain would have caught attention. According to the defence, the state has not discharged its onus that the deceased was penetrated while still alive.

[205] With regard to the pre-meditated murder, it was the state's contention that the accused in his plea explanation stated that the deceased came to watch television in

his room and she stayed for a few minutes. He then told her to leave as he wanted to sleep. He became irritated as he was woken up for the second time by the deceased. He admitted that he decided to give her ant poison. This was triggered by his ill feelings for her mother. This was confirmed by J P and M W in their testimony.

[206] The state submitted that the Supreme Court of Appeal in Montsho v The State (20572/2014) [2015] ZASCA 187 (27 November 2015) at para [13] it was stated:

“In the view I take of the matter, I do not consider that there is any benefit to be derived, on the facts of this case, in formulating a general definition of whether the phrase ‘planned or premeditated’ denotes a single concept. The inquiry as to whether any given facts would at the very least sustain an inference to be drawn from them as to whether or not an Accused had manifested a plan or premeditation to commit the offence in issue can properly be determined on a case by case basis. Thus the circumstances in which a crime was committed and the peculiar facts of each case will determine whether or not the commission of the crime was planned or premeditated.”

According to the state, in his own words the accused stated that he made up his mind to administer the ant poison. He gave effect to his decision when he took the poison and mixed it with water. He knew the effects of the poison when he gave it to the deceased. In Kekana v The State (629/2013) [2014] ZASCA 158 (1 October 2014) para [13] the Court stated:

“In my view it is not necessary that the appellant should have thought or planned his action a long period of time in advance before carrying out his plan. Time is not the only consideration because even a few minutes are enough to carry out a premeditated action.”

[207] The state disagreed with the accused’s version in his plea explanation that he wanted to make the child sick. From the evidence of the toxicologist, Mr Van Zyl, it was clear that the quantity of poison that was administered was high as the presence of carbaryl was still present in the bile and blood after nine (9) days.

[208] It was the state's submission that the accused started to panic when the deceased's started to scream and hit her with an open hand. He did not want anyone to find her in his room in that condition. If indeed he wanted her to get sick, he could have sought medical attention or some help. He did not advise anyone that the deceased was in his room. He hit her on the forehead, closed her mouth with a towel and proceeded to choke her by putting his hands around her throat. From his actions, he wanted to permanently silence the deceased. He wanted to finish what he had started. The state submitted that the accused knew what he was doing. When the body became limp, he even placed it on a duvet in the corner of his room and still went about his duties. He gave a description in his plea that her lips turned blue and that she vomited. His actions were not of a person who wanted the child to become sick. He waited for her to die. His further action to get rid of the body indicated that he wanted to complete his plan. His further explanation was that he bought the poison eight (8) months prior to this incident as there was an ant problem in the room. All the witnesses who lived in that house testified that there was no ant problem in the entire house. It was the state's submission that the accused waited to kill someone with this poison. So there exists no reasonable doubt that the accused has not committed the crime.

[209] The state concluded that in considering the circumstantial and other available evidence in this matter it is convinced that it has proved the guilt of the accused beyond reasonable doubt that the murder was premeditated. The accused should therefore be convicted of the murder and rape of a child below the age of sixteen (16) years.

[210] It was contended by the defence that in S v Raath 2009 (2) SACR 46 (C) at para [16] it was stated:

"Clearly the concept suggests a deliberate weighing-up of the proposed criminal conduct as opposed to the commission of the crime on the spur of the moment or in unexpected circumstance."

However, the defence noted that the courts have dealt with each matter on a case to case basis. In the circumstances where the presence of the people and their movement were unpredictable, their close proximity, in a room in which the door

hanging from the hinges could not fully open or close and the latch was on the outside, it would be highly irresponsible for the accused to commit a premeditated or planned murder. Accordingly, the state has not discharged its onus beyond reasonable doubt that the murder was planned or premeditated.

E APPLICATION BY THE STATE TO ADDUCE FURTHER EVIDENCE

[211] After the examination in chief of Professor Dempers and before his cross examination, the state made an application to adduce further evidence. The state submitted that after Professor Dempers concluded his examination in chief, he felt unsettled about some of his evidence, as he could not answer the court's questions with certainty. He went back to conduct further tests in order to prove or disprove a specific fact. The state therefore asked leave to tender such further scientific evidence. This was made by the state fully aware that the cross-examination has not commenced yet and no delay could be anticipated. The state submitted that it is therefore its duty to adduce further evidence in order to ensure a fair trial.

[212] The defence objected to this application on the basis that this would amount to new evidence. The state disputed this contention and argued that the tests are meant to support what Professor Dempers has already testified on in Court. This contention was denied by the defence and it submitted that this is another ploy by the state in its attempt to augment its evidence, the Court should therefore refuse this application.

[213] The tests were performed on the decomposed neck and genital tissues of the deceased. The purpose was to establish whether there was any bleeding ante or post mortem. The results of such tests have been dealt with in Professor Dempers's evidence.

[214] Applications of this nature are normally dealt with at appeal stage, but in this case, the application was made during trial. Section 309B of the CPA and Section 19 of the Superior Court Act 10 of 2013 give guidance in this regard. But what is evident in Section 309B (5) (c) is that:

“(c) The court granting an application for further evidence must –

- (i) *receive that evidence and further evidence rendered necessary thereby, including evidence in rebuttal called by the prosecutor and evidence called by the court; and*
- (ii) *record its findings or views with regard to that evidence, including the cogency and the sufficiency of the evidence, and the demeanour and credibility of any witness.”*

[215] It is without a doubt that policy considerations have to be taken into account when the court is confronted with applications of this nature. In my view, since Professor Dempers has not yet been cross-examined, only his examination in chief had been concluded, the re-opening of the examination in chief in my view would not prejudice any of the parties as the trial has been on-going. In light of the fact that Professor Dempers was at pains in court trying to explain whether there was bleeding or no bleeding before the tissue became autolytic, without a doubt that is a point that needed to be clarified or settled, if there was a way of doing so. The fact that he conducted tests on the issue that has already been canvassed during his evidence, in my view would not amount to new evidence. This would rather be a continuous debate on the subject that was already before court. The question about the delay in proceedings does not even come into play.

[216] When justice demands, in circumstances like the present matter, the Courts will not hesitate to allow further evidence. In the interest of justice, fair trial, and public interest there are no justifiable reasons to refuse this application. The application therefore succeeds.

F ANALYSIS OF FACTS AND THE APPLICABLE LEGISLATION

[217] It is common cause that the burden is on the state to prove the guilt of the accused beyond reasonable doubt. It is therefore common cause that the state relied on circumstantial evidence in this case. The accused appeared before this court on two (2) charges, that is, rape and murder as stipulated in the indictment.

[218] Rape used to be a crime that was perpetrated against a woman by a man. That on its own does not legitimise the crime of rape as it is the most, shameful, intrusive, disempowering type of a crime. But, in this day, our courts are inundated

with this type of crime being perpetrated against babies and children of all sexes. Children are repeatedly deprived an opportunity to be children. Their lives are interrupted before they even understand their own purpose of living. In most instances, these abominable crimes are committed by close people, like in the instant case. These are the people who are meant to protect them in a sane and normal world, rather than be the perpetrators. The accused abused his position of trust as the deceased was unable to consent to the degree of abuse she received from the accused. She was a young defenceless child. The deceased died a slow torturous death.

[219] To the extent that the accused pleaded not guilty to the charges he faces before this court, it is of utmost importance that this court evaluates whether the state has discharged its burden of proving the guilt of the accused beyond reasonable doubt, given the circumstantial evidence it presented.

[220] The evidence before this Court is that the deceased was left by her mother with her younger brother, A when she met her death. The deceased's mother, J P could not afford to pay M W who previously took care of the deceased. The accused that has stayed in that house for more than two (2) years was present as he was on leave. Ms P left the children in bed and proceeded to work. The accused had a long standing relationship with this family as he grew up with the deceased's father A F in the same community. It appears that the negotiations for the accused to stay at [...] P Street were even facilitated by A as they were close friends from childhood. That is how the accused rented a room downstairs from A's sister, M P.

[221] J P acknowledged that she had a rocky relationship with the accused, but when asked by the accused, she performed some laundry duties for him as she desperately needed the money for their upkeep. It was not disputed that the deceased used to visit the accused regularly as she watched DSTV in the accused's room and played with the accused's daughter, S. In effect, there was some trust relationship that was built between the accused and the deceased over a long time as they all stayed under the same roof. Ms P even described the accused as a decent, quiet and well behaved person who loved children including the deceased. Even though parents warn their children to be careful of strangers, in my opinion, accused seemed to be trustworthy and reliable around children including the

deceased. Much confidence and trust was placed on him by the deceased's parents. The fact that the deceased's mother left her two (2) children in the same house and in the accused's presence indicates that she harboured no fear against the accused.

[222] It might be that the accused had ill feelings towards Ms P. Again, could that be a valid reason for him to violate her child. This is not only Ms Pieter's child, this is also A F's child, who was accused best friend. If he wanted to get back at Ms P, he should have confronted her and not the child. It is without a doubt that the death of the deceased deeply hurt his best friend equally. This Court rejects the version that the accused poisoned the deceased to get back at her mother. In any event, the accused's lecherous mind did not stop at the poisoning stage. In my view, the crimes committed were motivated by the accused's lewd and selfish reasons.

[223] The accused did not testify during trial about the sequence of events which took place from 4 May to 13 May 2017. Again, this Court does not hold that against the accused, as it is his right to do so, if he so elects. As the burden of proof is on the state, this court will therefore analyse the circumstantial evidence, that is, the witnesses' evidence including the scientific and / or medical evidence to prove the charges against the accused.

[224] Mr Tiya, the forensic analyst testified that when the tests were conducted on the specimen's received, they were able to fully extract DNA from a possible semen sample that was on a "top". It was then referred to as possible semen because the test was administered at a presumptive stage. The analyst compared the unique profile to that of the deceased and the accused. Blood was extracted from the accused. A comparison was made between a top that was obtained from the deceased and a reference sample of the accused. According to Mr Tiya the numbers fully aligned and there was no mismatch. This means that the sixteen (16) DNA *loci* corresponded, and matched the profile of the accused. Further, it was Mr Tiya's evidence that both the jeans and deep vaginal swab contained traces of male DNA. The male DNA was found in the right thigh swab. In fact, the second right thigh swab tested positive for possible semen at the preliminary stage. The jeans and deep vault swabs went directly to DNA extraction as the jeans contained a blood crotch area.

[225] This version has to be evaluated against the admissions in term of Section 220 of the CPA that were made by the accused. The accused admitted that he pulled down the denim shorts and panty of the deceased and penetrated her with his three (3) fingers. There was no reaction of pain or active bleeding. He became aroused and took out his penis and placed it on her body and around her vagina and did not penetrate the deceased. That's begs a question of what sane adult person behaves in such a manner towards a baby. Whereas, in his confession statement, the accused does not state exactly, at what stage he penetrated the deceased with his three (3) fingers. He stated that he penetrated her with his fingers to make it look like she was raped. He stated further in his confession statement that there is no DNA because he only used his fingers to penetrate her. According to the confession statement, the idea was to mislead the investigators in the matter so that they do not think it was him. It appears that the accused had a polluted mind when he committed and / or finished committing these crimes. Why was it so important for the accused to state that there was no DNA. Was he perhaps certain that he covered his tracks after raping the deceased? *[my emphasis]*.

[226] Dr Ogle who performed the autopsy reported that on examination of the vaginal vault, multiple lacerations of varying degrees and depth were present around the introitus and distal third of the vagina. These tears seemed to involve almost the whole circumference of the distal vagina. Dark discolouration of the soft tissues in the deep vaginal wall was consistent with contusions. Dr Ogle however, confirmed the pathological changes as a result of decomposition.

[227] As the tissue in the sections of the vaginal wall were so autolytic, an examination of adjacent large blood vessels also failed to elicit the presence and remnants of red cells. Instead they contained a *foci* of cellular debris and bacterial overgrowth. The only conclusion that was reached at the time was that there was no blood in the tissue as no trauma or haemorrhage could be detected in the tissue. When a closer look was made there was debris and odd ghost cells present. If that was so there were few deductions to be made, first, that the blood vessels bled empty hence there was no indication of red blood cells, second, that the red blood cell component on the tissue was so autolytic to the extent that no red cells could be

detected, third, there could be red cells in the red blood where the debris was detected and or in the tissue where the debris was seen.

[228] Professor Dempers in his analysis testified that the lack of distinct cells in the tissue where debris or pink homogenous structure were present does not in his opinion exclude the fact that there could be blood in the tissue before these nine (9) days but obscured by decomposition. If that is so, the inference to be drawn by this Court is that the injuries in the deceased happened ante-mortem and that blood had seeped into the tissue.

[229] In the contrary, Dr Naidoo concluded that there is no objective medical or scientific evidence to indicate that there was any seminal or other male DNA deposition on the vaginal canal to suggest penal penetration of the vagina before or after death. It appears that Dr Naidoo made this statement loosely as, in fact there was a DNA evidence presented to that effect.

[230] As Professor Dempers felt unsettled about this uncertainty, he performed further tests in order to ascertain whether the debris or small blebs that were illustrated on the slides were indeed decomposed red cells or not. It was important to settle this issue as it was relevant for the determination of injuries in the vagina if they happened ante or post mortem.

[231] In fact, Dr Naidoo did not agree that the deceased tears on the vagina seem to involve the whole circumference of the vagina. However, Dr Naidoo accepted that he is at a disadvantage in this case as he did not attend the autopsy. It was Dr Naidoo's testimony that he was not convinced that what he saw on the photographs was multiple linear lacerations. This was however an about turn from his initial report. In his opinion, if there were such injuries, the histology examination would have shown it. Again, Dr Naidoo failed to appreciate that histology examination would not yield any results given that the tissue was autolytic. Further, his idea that the pattern stated by Dr Ogle does not fit the normal penetration, appears to have been made after having in mind the generic type of a rape. Further, Dr Naidoo gave this opinion without the full comprehension that this is not a fresh refrigerated or well-preserved body, it had undergone some level of decomposition. One would not have seen any redness or swelling in a situation where the body had undergone some

degree of decomposition for nine (9) days. Nonetheless, Dr Naidoo could not explain the causes of dark discolouration inside the vaginal wall that Dr Ogle diagnosed as contusion.

[231] In spite thereof, it was Ms Scholtz's evidence that when she discovered the body at the scene, she saw the navel, the deceased's jeans were open and the zip was down and the jeans were pulled down to the feet. If it was the accused's intention to put his 3 fingers inside the deceased's vagina, and nothing else, then why would he pull the deceased's jeans down. In addition, if after putting the three (3) fingers, there was no reaction of pain, how did the deceased suffer multiple linear lacerations in the vagina; how did the panty end up with blood, and how did the jeans end up with blood and seminal fluid. In numerous rape cases that regularly come before this Court these are the identifying feature that a victim has been sexually violated. This Court rejects the accused's explanation that he only penetrated the deceased digitally.

[232] Again, to answer my initial question, the fact that the accused knew that there is "no DNA" as he penetrated the deceased digitally as he put it, when he gave the confession statement could only mean that he thought he covered his tracks well, as he had all the time to do so to himself or else was discouraging any type of investigation to the deceased genitals. If he did not rape the deceased, why would it be the responsibility of the accused to mislead the investigators of the case. The inference to be drawn by this Court could only be that he believed he was successful in wiping out the evidence. He was not aware that besides providing his lame explanation for tearing of the vaginal orifice being his three (3) fingers – the DNA tests and pathological examinations by Dr Ogle and further Glycophorin A test by Professor Dempers would reveal more.

[233] In light of this denial by the defence, coupled with his own uncertainties, Professor Dempers performed the Glycophorin A test that is used to illustrate red cells post mortally and cells that had been broken up and cells that have autolysed. The findings were that the debris or small blebs that Professor Dempers thought were red cells were indeed red cells. Dr Naidoo however, rejected these findings without any evidence to the contrary or supporting his opinion. According to Dr Naidoo, in order for the Glycophorin A test to prove positive for bruising, there should

be blood all over the damaged cells. In his opinion the fragments of red blood cells in globs or globules and debris clearly proves that the bleeding was post mortem. This opinion was made despite the medical authority to the effect that Glycophorin A is useful as a marker of bleeding when decomposed bodies are investigated using anti-human GPA monoclonal antibody immunohistochemically. In all the specimens obtained, from the dead bodies with different degrees of decomposition, GPA was detectable on blood vessels. This therefore suggests that GPA is considerably resistant to putrefaction, GPA is an excellent and useful marker for distinguishing discolouration. See – Immunohistochemical demonstration of bleeding in decomposed bodies by using anti-glycophorin A monoclonal antibody, Forensic Science International 87 (1997) 1 – 8 – N Tabata, M. Monita.

[234] A. Tadorelli et al on The use of the anti-Glycophorin A antibody in the detection of red blood cell residues in human soft tissue lesions decomposed in air and water – a pilot study. - opines that the distinction between ante mortem and post mortem wounds is one of the most important medico-legal problems. In fresh cadavers the microscopic examination of haemorrhagic infiltration can be sufficient to reveal the vitality of a wound but in more difficult cases (putrefied corpses) histological and histochemical analyses is vital. Tadorelli went on to state that most pathologists still look for the more mechanical signs of haemorrhaging i.e. the presence of red blood cells within the tissue surrounding the lesioned area. (This is exactly what Dr Naidoo did in this case). Furthermore, Tadorelli acknowledged two (2) authors in the subject – who looked into the possibility of verifying within decomposed tissues the presence of haemorrhaging by looking for red blood cell residue (the Glycophorin antigen) – that is, Kibayashi et al and Tabata et al.

[235] Professor Dempers testified that the tests were conducted according to the guidelines stated in these articles with success. For Dr Naidoo to maintain that histological examination should have shown the injuries after the tissue was said to be autolytic is unfortunate. It seems he did not appreciate the advanced medical technology on the subject. Dr Naidoo was not present at the scene, he was not present at autopsy and he only based his own opinion on what he saw on the photographs. Both Professor Dempers and Dr Naidoo agreed that he might be disadvantaged by these factors as he was not present at the autopsy.

[236] However, it is quite contradictory for Dr Naidoo to acknowledge that Dr Ogle's post mortem report is well documented in the same way he acknowledged the application of the Glycophorin A technique. He was upfront that he has never worked with Glycophorin A. He however criticised and undermined Dr Ogle's diagnosis of injuries. He further volunteered his bold opinion on this new technique, despite him not ever working with it, that its application on this case is faulty, as it is meant for cancer tumours. This leaves this Court with one conclusion that Dr Naidoo is not objective in his approach as an expert witness or deliberately misled this Court. I agree with the state's contention that he is not an expert on Glycophorin A. It is incomprehensible as to how did he arrive at that conclusion after Professor Dempers testified extensively to the veracity of the Glycophorin A test and further referred to medical literature.

[237] Further, there is an unchallenged DNA evidence that the semen sample that was on a "top" matched the DNA of the accused; male DNA was found on the right thigh swab; the male DNA was found on the crotch area of the jeans and the vault swab and the medical evidence that multiple lacerations of varying degrees were present around the introitus and distal third of the vagina. There appears to be some corroboration in this respect with regard to the injuries in the vaginal vault and the male DNA found in the deep vaginal vault. It therefore follows that the male DNA could only be deposited in the vaginal vault through penial penetration. It is not the accused's explanation that his hands were contaminated with semen or seminal fluid when he penetrated the deceased with the fingers. As Professor Dempers put it, fingers cannot ejaculate. The semen can only originate from one place, that is, a penis. In fact, this Court rejects the version that the deceased was penetrated using fingers.

[238] It is clear in the accused's confession statement, plea explanation and Section 220 admissions, that the accused is not honest as they do not set the same tone. The fact that he elected to state that he used his fingers to penetrate the deceased, surely points out to the fact that he clearly thought about this crime and, if caught on this shameful act, he did not want to be convicted of rape.

[239] In my mind, the accused's plan to rape the deceased was hatched some time ago. Somehow, things did not unfold according to plan, hence he panicked and

killed the deceased. It is so unfortunate that though Dr Naidoo conceded in his report that the injuries on the deceased's vagina were lacerations, he nonetheless retracted such concession and testified that he could not see any injuries and if the Court finds that there were injuries, such injuries occurred after death since the histological examinations could not reveal them. Again, the histological examination could not have been able to show the injuries as the tissue was decomposed.

G FINDINGS

[240] Having analysed the aforementioned evidence, the fact that there was blood and male DNA in the crotch area of the jeans; there was male DNA in the vault swab; there were tears of varying degrees in the vaginal vault and a subsequent positive result in the Glycophorin A test proved that there was bleeding in the lacerated vaginal tissues this is enough proof beyond reasonable doubt that the injuries happened ante mortem. The semen or male DNA found on the deceased's body could belong to no one else other than the accused. He is the last person to see the deceased alive and the last person to pull the panty and the deceased jeans down when he became aroused. This Court should reasonably infer that he is the same person who raped the deceased.

[241] The fact that not even a single person in that house heard a scream or some sort of movement in his room is an indication that the accused put a strain on the deceased. In fact, due to the accused's dominance, the deceased was not in a position to scream. He however admitted to closing her mouth with a towel and choking her. The focal marks or lesions on the deceased upper right forehead, eyes and lips, is a reflection that the deceased put up some resistance but was met with violence and overpowered by the accused. It is so unfortunate that Dr Naidoo wants this Court to believe that all those defects were caused by decomposition.

[242] Having analysed this evidence, I am therefore satisfied that the state has proved its case of rape beyond reasonable doubt.

[243] With regard to the count of murder, the accused does not take issue with the fact that he caused the death of the deceased, whether by strangulation or by poison or both. It would not be necessary to deal with the cause of death, as same is not in dispute. The accused's contention is that he admits that he is guilty of murder,

without premeditation and / or planning. The state, on the contrary rejected the accused's admissions to that effect.

[244] Again, this Court rejects the version of the accused that he administered the poison on the deceased in order to make her sick for the following reasons; judging from the toxicologist evidence if indeed that was so, he had all the time, to seek medical help and to save the life of the deceased. Carbaryl as the toxicologist put it, is not a fast acting poison in humans. Its effect is reversible and treatable. In fact Mr Van Zyl was surprised to find carbaryl in the blood as it metabolises quickly. The only explanation if carbaryl is in high concentration is that the person was exposed to high doses and death happened rather quickly. Also since carbaryl was found in the bile, there was enough time for it to metabolise. If the accused's intention was really to make the deceased sick, the child would not have died from poisoning, given this evidence. The accused, in my view had other motives that were clearly to commit crimes.

[245] In order to ascertain whether the murder committed by the accused is premeditated or not, it is important to examine all the circumstances surrounding the murder.

[246] The witnesses, J P and M W testified about the rocky relationship between the accused and the deceased. This Court has rejected the fact that this might be a valid reason for the accused to rape and murder the deceased. It appears though that the accused harboured ill-feelings against the deceased's mother for a long time. In paragraphs 8.12 and 8.15 of the accused's admissions, he stated the following:

"8.12 Irritated for having been woken a 2nd time and compounded by ill feelings between myself and her mother I decided to give her ant poison.

...

8.15 My intention was to make her sick and in doing so to get back at her mother."

Gathering from these statements, the accused has always had an intention to get back at Ms P. He planned to commit a crime a long time ago. Whether the offences committed justify such a revenge when the witnesses who testified in Court and the accused could not put a finger on the cause of these disagreements, is a cause for concern, and I repeat, in my view not enough a reason for the crimes committed.

[247] Further, all the witnesses who resided at [...] P Road testified that there was no ant problem at that house prior 4 May 2017. Ms Scholtz who conducted the search of the deceased in that room was resolute that there was no ant problem in the said room. Captain Taylor was asked if he did investigate this ant problem during his investigations. He testified that he did investigate the issue. He has been in that house on numerous occasions during his investigations, not even a single day did he encounter ants in that household.

[248] This therefore brings the Court to a question once more, whether the accused was honest when he made his admissions, plea explanation and confession statements. The accused stated in his confession statement that he wanted to mislead the investigators not to think it was him who committed these offences. Similarly, the accused wants this Court to believe that the ant poison was in the house to get rid of the ant problem. Whereas in fact the reason for the ant poison was for the accused to use it on the deceased or any other person for that matter. As the toxicologist testified, the quantity of carbaryl in the deceased blood was very high. Further, the accused did not know the effect of this poison on a human being. In the said situation, could the accused be believed if he stated he wanted to make the deceased sick. The only inference that this Court can draw given the absence of evidence that there was an ant problem at that house is that the accused intended to kill the deceased.

[249] It is so that premeditation requires some planning, and that the accused's actions in my view could not be said to have happened at the spur of the moment. He procured the poison; waited for the opportune time to execute his plan when the child or children had no adult supervision in the house; went to mix the poison outside his room in the sink; gave the poison to the deceased and further threatened her with violence if she did not want to drink it; he choked her when she wanted to

scream; he hit her with an open hand on the forehead and continued to choke her by putting his hand around her throat.

[250] If one had to consider what the deceased had gone through before her death, it has been a painful, agonizing and harrowing experience. This is borne out by the injuries that she sustained in her body that were noted by Dr Ogle. It is apparent that the deceased went through a great deal of torture before she met her death. The accused had all the time to do as he pleased on the deceased the whole morning. The video footage only showed him carrying the body of the deceased to the dumping site shortly after 14:00 in the afternoon.

[251] The accused had enough time to stop his evil intentions if indeed he wanted to, but nevertheless went ahead. This means that for all intents and purposes, the accused made it a point that what he had planned has to be carried through. It is settled law that planning should not have been done a long time ago, a short time would suffice. In Kekana v The State (*supra*) the court held:

“In my view it is not necessary that the appellant should have thought or planned his action a long period of time in advance before carrying out his plan. Time is not the only consideration because even a few minutes are enough to carry out a premeditated action.”

[252] In this matter, the circumstances were such that the planning and carrying out the premeditated action were achieved. The inference to be drawn is that the accused had manifested a plan to commit a crime and succeed in doing it – See Montsho v The State (*supra*).

[253] It might be that the expert witness that was called by the defence downplayed what was typically the injuries that were suffered by the deceased in this ordeal. Dr Naidoo blamed all the defects in the deceased body to haemolysis due to decomposition. For instance, the injuries that were described by Dr Ogle and Professor Dempers as abrasions were identified by him as shed blisters. At the same time, he was non-committal about the basis of his opinion.

[254] Highly disturbing the pronounced dark marks on the forehead, eyes, upper cheek and upper lips which is patently clear that it resulted from the application of

blunt force was described by Dr Naidoo as a random colour change and was in keep with the greater bacterial proliferation. Dr Naidoo maintained his opinion despite being reminded that the accused admitted hitting the deceased with an open hand, closing the deceased's mouth with a towel and choking her. Surely, this would require an amount of force from the accused to shut the deceased down. Dr Naidoo's response was that he drew an objective inference having kept the accused version on the background. The state in my view has proved the case of murder beyond reasonable doubt.

The assessment of the pathologists

[255] The principles governing the assessment of expert evidence are the same in both civil and criminal matters, and are set out in Schneider v AA 2010 (5) SA 203 WCC at 211 E, where Davis J observed:

"In Zefferdt, Paizes & Skeen The South African Law of Evidence at pg 330, the learned authors, citing the English judgment of National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The 'Ikarian Reefer') [1993] 2 Lloyd's Rep 68 at 81, set out the duties of an expert witness thus:

- '1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.*
- 2. An expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his expertise ... An expert witness should never assume the role of an advocate.*
- 3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.*
- 4. An expert witness should make it clear when a particular question or issue falls outside his expertise.*

5. *If an expert opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.*

In short an expert comes to court to give the court the benefit of his or her expertise. Agreed, an expert is called by a particular party, presumably because the conclusion of the expert, using his or her expertise, is in favour of the line argument of the particular party. But that does not absolve the expert from providing the court with an objective and unbiased an opinion, based on his or her expertise, as possible. An expert is not a hired gun who dispenses his or her expertise for the purpose of a particular case. An expert does not assume the role of an advocate, nor gives evidence which goes beyond the logic which is dictated by the scientific knowledge which that expert claims to possess."

[256] In my view, when an expert comes to give evidence, he or she should stick to the principles as laid down in Schneider (*supra*). This court was presented with evidence, most of which was scientific in nature. In my analysis, the expert evidence provided by the state cannot be faulted. From the toxicologist, a DNA expert, medical technologist and pathologist, their evidence was independent, objective and unbiased.

[257] Then coming to the parallels of the two (2) pathologists, that is, Professor Dempers and Dr Naidoo, the two (2) experts seemed to be at odds with each other. Frankly, this Court understood the role of an expert witness clearly when Professor Dempers testified as a witness. The wheels started to turn when Dr Naidoo testified. In my mind, it was clear that Dr Naidoo was a hired gun who dispensed his expertise for the purposes of the accused's case. Dr Naidoo's evidence was tailor-made to suit the explanation of the accused, for instance, that he committed sexual intercourse with a corpse. He continued to advance the opinion that the injuries, if any that were sustained by the deceased in her genitals and on the entire body were

post mortem, even after overwhelming scientific evidence to the contrary from the DNA expert, Dr Ogle (pathologist who performed autopsy) and Professor Dempers who performed immunohistochemistry stain test. Given the fact that both experts were from the same field, this Court expected them to agree on a number of issues and concessions be readily made where possible. But that was not the case. Dr Naidoo in my view came to Court with a fixed mind and in the process assumed the role of an advocate.

[258] However, in accepting the expert evidence of Professor Dempers, the Court examined both expert witnesses and analysed their essential reasoning, based on the surrounding circumstances of the case. The approach to the expert evidence has an established rule and it was laid down in Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another 2001 (3) SA 1188 at 1200 at para [36] where the Court held:

“That being so, what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning.”

The evidence of Professor Dempers, in my view assisted the Court tremendously as it went further to uncover the evidence that was obscured by decomposition. The application of Glycophorin A, as a novel phenomenon and a specialised technique ultimately proved that where Dr Ogle noted contusions and lacerations on the vagina, there was indeed blood. Professor Dempers evidence in its entirety was logical.

Immunity from prosecution

[259] To the extent that it might be said that Ms P abused and / or neglected the deceased by leaving her alone in the house with her six (6) year old brother, A, this Court is equally alive to the economic status of Ms P. Ms P left the children alone so that she could afford to put food on the table. She left the children alone in order to earn a living. Unfortunately, Ms P' children especially the deceased suffered the consequences of being born in a society that is unequal and poverty stricken. Their mother had to leave them unattended as she could no longer afford to pay Ms W, in order to attend to the job for their sustenance. The accused, on the other hand, was

present in the house, he was not a stranger to this family, but he abused their trust. He was part of this family unit as the parents and the deceased developed some level of trust when he was around. Little did the family know that the accused would be the main perpetrator of these crimes. Even after he committed these crimes, he kept quiet for days and went about with the search parties to look for the deceased, knowing very well what he did to her. He in fact agreed with the members of the community when at some stage the number one suspect was said to be Richard Maxim. Had there been no discovery by Ms Scholtz's search party, he would have continued with his life and said nothing. The behaviour of the accused in this entire period is the most vicious, brutal, inhumane, ruthless, sanguinary and painful this Court has ever seen.

[260] After observing the mother of the deceased reliving what happened to her last born child through her testimony in Court; the lack of professional support; the emotional effect of this ordeal and the impact it had on her health; it would not be fair and just for the Court to add an element of prosecution, more so after the deterioration of her health. In any event, Ms P showed some remorse as she was deeply hurt. She took responsibility for leaving the deceased without adult supervision. Ms P is therefore granted immunity from prosecution. In the result, Ms P is discharged from prosecution in terms of Section 204 (2) of the CPA.

[261] In conclusion, after careful consideration of the totality of evidence that was presented in Court, this Court is therefore satisfied that the state has proved its case beyond reasonable doubt. In the result,

261.1 The accused is found guilty on Count 1 – Rape (the main count

261.2 The accused is found guilty on Count 2 – Murder (the main count)

