

IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Case No: **08/2020**

Reportable: NO

Of Interest to other Judges: NO

Circulate to Magistrates: NO

In the matter between:

THE STATE

vs

SELLO JOSEPH TSHEHLO

Accused

HEARD ON: 17 AUGUST 2020 – 19 AUGUST 2020 &
09 MAY 2022 – 12 MAY 2022 &
22 JUNE 2022

CORAM: DAFFUE J

JUDGMENT BY: DAFFUE J

DELIVERED ON: 23 JUNE 2022

I INTRODUCTION

[1] A four-year-old girl child was raped and murdered during the winter of 2019 in the B[....] township adjacent to the small town of T[....] N[....]2. The assailant decided to get rid of the body by disposing it in a pit toilet. The gruesomeness of these deeds are beyond comprehension. It must be the work of a monster. It is recorded that although the case was set down for hearing during August 2020, it could not be finalised during the time allocated as the accused requested a postponement to obtain the services of a DNA expert. Since then the accused had problems to arrange finances and his attorneys even withdrew at a stage, causing the Legal Aid Board to come to his assistance. Eventually the accused had to resign from his employment and used his pension benefits to provide for his legal costs. After several postponements the matter was set down for trial in May 2022, but had to be postponed again on the fourth day to 21 – 23 June 2022 due to unforeseen circumstances. The accused's new counsel also requested that certain State witnesses be recalled which caused further delay. Fortunately, the matter can now be finalised.

II THE PARTIES & THEIR LEGAL REPRESENTATIVES

[2] Adv E Liebenberg appeared for the State. The accused is Mr Sello Joseph Tshehlo, a 36-year-old male person as at the time of the incident, residing in B[....] township, T[....] N[....]2. Initially Adv MS Mazibuko appeared for the accused on instructions of WJB Attorneys, but in 2022 he was substituted by Adv JJ Buys.

III CHARGES

[3] The accused is charged with three counts, to wit:

“1. Count 1: Kidnapping

In that upon or about the period 21 – 25 July 2019, and at or near B[....] Location, in the district of T[....] N[....]2, the accused did unlawfully and

intentionally take away N[....] C[....], the minor child of M[....] M[....]2 C[....] being the mother, with the intent to deprive the said M[....] M[....]2 C[....] of the lawful custody of N[....] C[....].

2. **Count 2: Contravening the provisions of section 3, read with sections 1, 50, 55,**

56(1), 56(A) as amended, 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007, further read with sections 94,

256 and 261 of the Criminal Procedure Act, 51 of 1977, further read with the provisions of section 51(1) of the Criminal Law Amendment Act, 105 of 1997, as amended

In that upon or about the period 21 – 25 July 2019, and at or near B[....] Location, in the district of T[....] N[....]2, the accused did unlawfully and intentionally commit an act of sexual penetration with N[....] C[....], a 4-year-old female person, by penetrating her vagina with his penis without her consent and thus raping her.

3. **Count 3: Murder, read with the provisions of s 51(1) and Part 1 of Schedule 2 of Act 105 of 1997**

In that upon or about 21 – 25 July 2019, and at or near B[....] Location, in the district of T[....] N[....]2, the accused did unlawfully and intentionally kill N[....] C[....], a 4-year- old female person.”

As set out in the indictment the second and third counts must be read with the provisions of s 51(1) of Act 105 of 1997 as amended.

IV THE PLEA, THE PLEA EXPLANATION AND ADMISSIONS

[4] The accused pleaded not guilty to all three charges and elected not to make any plea explanation.

[5] Bearing in mind the notice in terms of s 212B of the Criminal Procedure Act (“the CPA”) and the accused’s response thereto during the pre-trial procedure, I requested Mr Mazibuko to confirm whether the admissions could be admitted formally in terms of s 220 of the CPA. He confirmed this.

[6] I admitted the notice in terms of s 212B and the reply thereto as exhibits “A” and “B” respectively and the following admissions were duly recorded in accordance with s 220:

- “1. The deceased is N[....] C[....], a four-year-old female person.
2. The deceased went missing on 21 July 2019.
3. The body of the deceased was discovered on 25 July 2019 at house number 7793 Zone 2, T[....] N[....]2.
4. The body of the deceased did not sustain any further injuries from the time of the discovery to the time a post-mortem examination was conducted on her body by Dr J Mohai.
5. The contents of the post-mortem report by Dr Mohai are correct and correctly reflect the findings of Dr Mohai.
6. The photo albums and key thereto, depicting the crime scene compiled by Cst Kgomotso Sehularo, is a correct portrayal of what was photographed on 24 and 25 July 2019.
7. The cause of death of the deceased is: “Blunt face and head injuries.”

[7] Upon acceptance of exhibits “A” and “B”, Mrs Liebenberg handed in the following further documents by agreement:

- 7.1 The report on the post-mortem examination pertaining to the deceased by Dr John Mohai as exhibit “C”;

7.2 A photo album compiled by Constable Sehularo containing 45 photos and a google map as exhibit “D”;

7.3 A further photo album prepared on 12 August 2020 by the same photographer, containing 6 photos, as exhibit “E”. It is worth mentioning that the aforesaid admission of photo albums (plural) is strictly speaking incorrect. Only one photo album was available when the accused responded positively to the notice in terms of s 212B. However, the further photo album, prepared the week before the trial commenced, was also not in dispute.

V SUMMARY OF THE EVIDENCE

[8] The following is a summary of the evidence tendered to the court. I shall deal with the evidence in the chronological order in which the witnesses testified:

8.1 The first witness was **Mrs M[....] M[....]2 C[....]**.

i. She is a 44-year-old woman and the mother of N[....] C[....]. Although the witnesses and legal representatives throughout the trial referred to the minor child as N[....], I shall herein refer to her as “the deceased”. The deceased was born on 7 December 2014 and thus four and a half years old when she was killed. The deceased stayed with the witness at her residential home in Zone 2 (also referred to as B[....] 2), T[....] N[....]2. The witness knows the accused by his nickname, Bonki. The two of them grew up together. The deceased knew the accused as Uncle Bonki. The witness was aware of the fact that the accused from time to time gave money to the deceased to buy sweets.

ii. On 21 July 2019 and whilst she was watching TV at the so-called corner house across the street from her home, the deceased and some friends, *inter alia* D[....] and O[....], were playing in the street in front of B[....]2’s house. At a stage D[....] approached her whereupon she unsuccessfully enquired about the deceased’s whereabouts. This was between 17h00 & 18h00 that afternoon, although she was not

quite sure of the time. The deceased was missing. After a brief and unsuccessful search, she reported her missing child to members of the South African Police Service ("SAPS"). The 21st of July 2019 was a Sunday.

iii. The next morning she took a photograph depicting the deceased to SAPS. The search for the deceased on Monday and Tuesday was fruitless. On Wednesday SAPS discovered clothes belonging to the deceased. She identified the clothes depicted on the photo albums as those that the deceased was wearing the particular Sunday. She was the one that dressed the deceased on the day when she went missing.

iv. SAPS found the body of the deceased on Thursday evening. The witness confirmed the aerial photos depicted on exhibit "E" and indicated the positions of her house, that of B[....]2, the corner house, the shop, the street where the clothes were discovered, Bonki's house and the pit toilet where the deceased was found. She did not see the accused on the day that the deceased went missing.

v. During cross-examination she testified that D[....] had told her that "a certain brother with short pants and a bald head" removed the deceased from the place where the children were playing on the 21st of July. According to her D[....] knew Bonki, but she could not explain why he did not refer to the person that removed the deceased as Bonki. According to D[....], Bonki did not want him to join them, but indicated that the deceased would come back to them with sweets for him as well. Later on she mentioned that D[....] did not know Bonki's name, but only knew him by sight. According to the witness she "totally forgot" to whom D[....] was referring. She could not make out the identity of the person with the description given to her.

vi. On Tuesday the other child, O[....], told her that U[....] father took the deceased away. In re-examination the witness mentioned that U[....] was just a small boy and it is possible that O[....] believed the

accused to be his father whilst it is apparent that the accused was his uncle.

vii. It was finally put to the witness in cross-examination that the accused normally gave money to children in the neighbourhood to buy sweets. The witness could not deny this.

viii. In May 2022 she was called back at the request of Mr Buys and with leave of the court in order for Mr Buys to put certain statements to her. She testified that she only realised that D[....] was referring to the accused after the deceased was found in the pit toilet. D[....] did not mention the name of the person that took the deceased away; merely that he was wearing short pants and his head was shaven clean (or as interpreted: “bald shaven head”). He did not tell her about the colour of the pants. She also asked O[....] about the perpetrator and he told her it was U[....] father. His residence was pointed out, it being his parental home, although the accused was not staying there. She did not go to the accused’s parental home as she had already reported the matter to SAPS. When asked who is U[....] father, the witness could not answer. She was uncertain when this conversation took place. Initially she said on Tuesday, but it could also be on the same Sunday. She also asked the other children to provide her with details of the perpetrator, but no one could assist.

8.2 The second witness was **Ms M[....]2 Elisa Tsokodibane**.

i. She is 25 years old and stays at 7733 B[....] 2, T[....] N[....]2. On 24 July 2019, that is the Wednesday after the deceased went missing, she found a child’s clothing underneath the trees in their yard. Her grandfather instructed her to throw the clothing in the street, as it might be stolen property. She did so. After a while SAPS and other people arrived at their home. The clothing consisted of a pair of shoes – running shoes - in Afrikaans: “tekkies”, tracksuit pants and a panty. She identified the street next to their house on photos 1 and 2 of exhibit “D”

as well as the clothing depicted on photos 3 to 7. She confirmed that the shop is located opposite their house. She knows the accused by sight only, but did not know the deceased. No questions were put to her in cross-examination and her evidence is therefore uncontested.

8.3 The third witness for the State was **Ms Kedidimetse Sebetlela**.

i. She is 29 years old and known as B[....]2. She confirmed that she was staying in the same street as the deceased and her mother. She rented a room at the place where the child O[....] was staying. She confirmed the layout of the township depicted on exhibit “E” although she marked her place of residence adjacent to the place indicated by the first State witness. Nothing turns on this.

ii. Whilst at home and at about 16h30 on Sunday 21 July 2019 Bonki arrived. She invited him in. She had visitors. He wanted to talk to her outside. He proposed sexual intercourse to her. There was a verbal altercation between them and she told him that her husband would be arriving from work soon. She asked him for a cigarette whereupon he gave her about R8 to enable her to buy a cigarette and sweets for the children. He left.

iii. Later that evening – at about 20h00 - the accused arrived at her home again, this time without even knocking on the door. At that stage her boyfriend and her brother were present. They ignored the accused and after a while he left. The witness explained that when she saw the accused that afternoon he was wearing a grey and white Adidas jersey and maroon Chino pants with Carvella shoes. He had a quart beer bottle in his hand. She indicated that he was under the influence of alcohol, but could walk and talk properly. She confirmed that at that stage a group of children, including her and her cousin’s children, were playing in the street in front of her house, but could not say whether the deceased was amongst them.

iv. When the accused returned that evening he was still wearing the same grey and white Adidas top, but this time short orange pants. He appeared frightened. He was still drinking from a quart bottle of Castle beer. Although he was under the influence, he was not staggering and “still okay”.

v. She was referred to photos 15 to 18 of exhibit “D” depicting clothing photographed in the accused’s house and identified the maroon Chino pants, the short red (orange) pants, the Carvella shoes as well as the grey and white Adidas top.

vi. During cross-examination she confirmed making a statement to SAPS on 26 July 2019. Her statement was properly proved and handed in as exhibit “F”. It is clear that she conveyed her version to the police officer in Sesotho who drafted the statement in English. Although she confirmed that the statement was read back to her, it appeared in re-examination that the officer merely explained the statement to her in Sesotho after having penned it down. She denied informing the police officer – as is apparent from the statement - that she had promised to go to Bonki’s place that evening, but failed to do so. She also mentioned in her statement that the accused was wearing the same clothes on both occasions, but denied this to be correct in her testimony. She was also criticized for mentioning several aspects in her testimony which were not recorded in her written statement. Furthermore, in her statement she said that the accused “look very drunk” which is contrary to her version in court.

vii. It was put to her the reason why Bonki returned to her that evening was that she requested him to return later. She responded that she would not at all say that as she knew that her boyfriend would be returning home from work. (This statement on behalf of the accused is in any event a contradiction of the version that she promised to go to Bonki’s place that night). It was also put to the witness that the accused went to a tavern with friends between the two visits. The witness could

not respond thereto.

viii. This witness was also called back at the request of Mr Buys and with leave of the court for certain statements to be made to her. She denied agreeing with the accused the previous Saturday at the Kiddo's tavern that he would meet her that Sunday at 4 o'clock. She could not make such an appointment, the reason being that she was expecting her boyfriend. This version put to her was new as the previous counsel did not mention that at all. She conceded that the accused was at her home the first time for a short while or as put to her, about three minutes. She could not deny that the accused went back to Kiddo's tavern from where he came after he left her. She also agreed, although uncertain of the time, that the accused arrived at her place the second time at 8 o'clock that night. She denied the statement that the accused went back to her at that time as agreed the afternoon. She could not agree as she was expecting her boyfriend. She denied that the accused was wearing the same maroon pants on both occasions and insisted that he wore the short orange pants the second time. She told the SAPS officers on Thursday when they questioned her that the accused was the last person she saw that Sunday night. It was put to her that Shadrack Moshodi was at Kiddo's tavern, but she did not know this person.

8.4 The fourth witness to testify for the State was **Captain Molefi Joel Phasiwe**.

i. He is stationed at the FCS in Seloshesha, the unit of SAPS dealing with family violence and child protection. He became the investigating officer in this matter at a later stage.

ii. On Wednesday, 24 July 2019 he was approached by the commander of FCS to assist them with investigating a case relating to a missing child. During the search he went to B[....]2's place as they were informed that children were playing next to her house on that Sunday.

They found a child, D[....], who apparently could give more information pertaining to the person that had taken away the deceased. At that stage they also had information pertaining to a person staying in Botshabelo and decided to approach that person after having made contact with him per cellphone. They took D[....] with them. When they met this person D[....] positively indicated that this was not the person who removed the deceased.

iii. According to the witness B[....]2 made contact with him in the township during a meeting of residents organised by the Station Commander. B[....]2 told him that Bonki was a male nurse of Botshabelo. At that stage they found the other child that had played with the deceased on the Sunday, to wit O[....], who was attending school earlier that morning. Enquiries were made and O[....] told them that the deceased went away with Bonki and that he was working as a nurse in Botshabelo. They requested B[....]2 to take them to Bonki's home. On arrival they met three women who confirmed that Bonki was working in Botshabelo, but that he was staying in a place of his own and not at his parental home anymore. The witness and colleagues went to that address where they found the gate closed and no one at home. This was just after 18h00 that evening. According to their information the accused normally arrived home at 19h00. They decided to get something to eat and waited in the street some distance from the accused's residence.

iv. After some time the accused arrived with a female and when he opened his gate, they approached him, introduced themselves and informed him about the reasons of their visit. The accused confirmed that he knew the deceased and that he had heard over the radio that she went missing. The accused confirmed seeing the deceased playing with other children in the street on the particular Sunday afternoon when he went to B[....]2's home to "buy sex". B[....]2 told him that the "coast was not clear" and that he had to come back later. Thereafter he went home.

v. The accused granted leave to SAPS to search his premises. He led SAPS members in the direction of his room, but whilst they were walking in that direction, the witness decided to proceed to the toilet inside the yard. Upon his arrival he opened the door of the pit toilet, switched on his torch and looked inside the pit. After a while he noticed a small child's hand sticking out from the toilet waste and immediately alerted his colleagues who arrived at the scene with the accused. He gave his torch to the accused and asked him to indicate what he could see. The accused took the torch and looked whereupon he handed the torch back to the witness who asked him what he had seen. The accused said "I saw something what you said I must see." This was a strange answer as the witness did not tell the accused what to look for. Contrary to the witness that had to scrutinise the area in the pit toilet earlier to eventually notice the human hand, the accused immediately observed the part of the child's body sticking out. The witness' impression was that the accused was not even surprised.

vi. The witness examined the shack on the premises, but found that nobody was staying there. Also, the accused indicated to SAPS that the left hand door as depicted on the photos, led to a different room, but that nobody was staying there as the person merely left his furniture there.

vii. The accused's rights were explained to him and it was communicated to him that he was regarded as a suspect and that they were going to arrest him. Members of the Local Criminal Record Centre ("LCRC") were contacted to take photographs and the witness and his colleagues waited on the scene until their arrival. The witness identified the inside of the accused's room with clothing lying on the floor which were later placed in forensic exhibit bags. He also explained the nature of the premises, the gate and the barbed wire fence and the deduction that the pit toilet was probably only used by the accused and whoever visited him from time to time. The witness also explained that the residential address in the indictment, to wit 416 B[....] 2, T[....]

N[....]2 which the accused gave to the SAPS, is the same address referred to as house 7793 Zone 2, T[....] N[....]2 where the accused was staying and the deceased found.

viii. During cross-examination the witness indicated that the clothing pointed out to be photographed by the LCRC were found by him in the washing basket inside accused's house. It was apparent to him that the clothing in the wardrobe were still clean and not used, contrary to those found in the washing basket.

ix. It was put to the witness that he never gave the torch to the accused to look into the pit toilet and this was also not mentioned in his statement which was also proved and handed in as exhibit "G". The witness reiterated that he did in fact give the torch to the accused, otherwise he would not be able to see anything in the darkness. The accused denied the witness' version as to the conversation or lack thereof when the pit toilet was inspected. It was also put to the witness that his legal representative would argue that the accused's version should be accepted above that of the witness, bearing in mind the contradictions between the witness's written statement and his testimony in court. The witness mentioned that his version in court and written statement were the same and repeated that the accused saw the deceased's body in the pit toilet after he was handed the torch.

x. This witness was also called back at the request of Mr Buys and with leave of the court for certain statements to be made to him. The witness stated that they went to Botshabelo as D[....] had indicated that one of the male persons that visited B[....]2 that Sunday evening was from there. His version differs from that of B[....]2 who said that SAPS visited her that Thursday. According to the witness B[....]2 came to him during the meeting with the public on that Thursday and told him that the suspect was a nurse working in Botshabelo.

xi. A totally new version was put to the witness as to what

transpired when SAPS arrived at the accused's place on Thursday evening. The version as to how the accused looked into the toilet over the shoulder of the witness was denied and properly explained. The witness also denied that the accused told him about his alibi, Shadrack Moshodi, with whom he was at Kiddo's tavern during Sunday. He insisted that if he was informed about the alibi, he would have followed it up with the person. He repeated that the accused told him that when he left B[....]2, he went home. The previous counsel, Mr Mazibuko at no stage mentioned anything about an alibi to the witness.

8.5 The next witness of the State was **D[....] J[....]**, a six-year-old boy.

i. He gave his evidence through an intermediary, Mr ZA Nyenzane, an experienced and qualified intermediary in the employ of the Department of Justice and Constitutional Development. The intermediary was properly sworn in. After some lengthy questioning by me I was eventually satisfied that the witness understood the difference between the truth and a lie. He was cautioned to speak the truth. He was visiting his grandmother M[....]3 during July 2019. M[....]3 was also the deceased's grandmother. The deceased stayed with her. He testified that children were playing outside and near B[....]2's place. When asked whether he knew what happened to the deceased, he confirmed, but upon further questioning to explain, he indicated in the negative, the reason being that his grandmother had allegedly informed him not to tell people. At that stage he looked restless and upon a question by the prosecutor confirmed that he was getting tired. I adjourned for a while. Later he testified that he and the deceased were playing in the street when "they took her away". Initially he did not want to explain who "they" were, looked down and then eventually said that Bonki was the person. According to him Bonki was staying at his mother's neighbour. Bonki was alone and he did not know where the deceased was taken. After further questioning he indicated that the deceased had told him that they were going to the shop to buy sweets. Bonki told him to stay behind. This was the last time that he saw the

deceased. He always saw Bonki at Ona's place, it being a "drinking place".

ii. During cross-examination the witness indicated that his mother was staying at G[....] 2 in T[....]2, a neighbouring town. He used to see Bonki in T[....]2. I must comment at this stage already that the witness was quite confused in his evidence. He confirmed that his grandmother told him not to tell anyone, but immediately thereafter he stated that he had been informed by his aunt, Asempi, that Bonki had taken the deceased away. Eventually he repeated that he used to see Bonki at Ona's place in T[....] N[....]2. According to him O[....] also saw Bonki taking the deceased away. He confirmed telling the deceased's mother that Bonki had taken the deceased away.

8.6 The State's sixth witness was **Warrant Officer Phokela Mogashoa**, a forensic expert employed at the Biology section of the Forensic Science Laboratory in Pretoria.

i. He did two DNA analyses and confirmed during his testimony the correctness of two affidavits prepared by him in terms of s 212 of the CPA, the first dated 31 March 2020 and the second 13 August 2020. These affidavits were accepted as exhibits "H" and "J" respectively.

ii. In his first analysis he made use of the DNA analysis system to do analyses on a panty and a reference sample of Mrs MM C[....] (the deceased's mother). It is not in dispute that the panty belonged to the deceased as indicated earlier.

iii. The witness found that maternity could not be excluded as "alleles present within the DNA result of the alleged mother... occur within the DNA result of the donor of the DNA on the panty..."

He continued: "The alleged mother ... has a 270 thousand times

greater chance of being the biological mother of the donor of the DNA on the panty than any other randomly chosen individuals within the Black population group” and the “probability of maternity is 99.99%.”

In addition to the aforesaid results the witness also found mixture DNA results from exhibit PW3000503578, but no analysis was done at that stage.

iv. In the second analysis to which the report handed in as exhibit “J” refers, the witness analysed the following samples:

1. The aforesaid panty,
2. Pair of pants “C”,
3. Jacket “D” (it is apparent that this referred to the Adidas top),
4. Pair of pants PW4001221428 (PAD001068054) (that of the deceased), and
5. The reference sample of Mrs MM C[...] referred to earlier.

v. The pair of pants “C” is the maroon Chino pants shown on photo 22 of exhibit “D” and placed inside the forensic bag as is evident from photo 23. The jacket “D” (Adidas top) is that of the accused found on the scene as is apparent from photo 24 which was contained in the forensic bag as is evident from photo 25. The next pair of pants (item 4 referred to above), belonged to the deceased as *inter alia* shown in photos 3, 4, 5 of exhibit “D” and placed inside the forensic bag depicted in photo 9.

vi. Paragraphs 4.1 – 4.5 of the witness’ second report are repetition of the paragraphs in the first report. However, paragraphs 4.6 – 4.8.1 were added in the second report and the results confirmed in the evidence. In terms hereof “the DNA result of the panty ... is read into

the mixture DNA result obtained from the pair of pants “C” (the maroon Chino pants) and “the most conservative occurrence for the DNA result obtained from the pair of pants ... for all the possible contributors to the mixture DNA result is 1 in 6 billion people.” He continued: “The DNA result of the panty, is read into the mixture DNA result obtained from the jacket “D” and the most conservative occurrence for the DNA result obtained from the jacket “D” for all the possible contributors to the mixture DNA result is 1 in 17 million people.” The analysis in respect of the DNA result of the panty and that of the mixture DNA result of the deceased’s pants shows a result of 1 in 12 trillion people.

vii. Pertaining to the second analysis the witness explained that when one deals with mixture DNA results, both figures/numbers - in this case in respect of the panty and the reference sample of Mrs MM C[...] - should appear in the mixture DNA result. As the witness has showed, this is indeed the case in respect of table 1 of his second report. Consequently, the witness concluded that the deceased’s DNS was found on the maroon Chino trousers and Adidas top of the accused. It is also evident that DNA of the deceased was found on the pair of pants confirmed to be hers. Although the witness testified that the results showed that the deceased was definitely in contact with the specific clothing items, he pointed out that he was dealing with “a low copy number” in respect of the deceased.

viii. The witness testified that reference samples of the accused were received and analysed, but it was not possible to read the DNA results into any of the samples referred to. He explained that there might be a number of reasons for inconclusive DNA, for example:

1. In high friction areas DNA gets rubbed off easily;
2. It can be difficult to get a proper profile depending on the kind of samples;

3. The samples could have been stored in less than ideal conditions; or

4. The kind of fabric of the sample also plays a role.

ix. The witness explained that dry skin of a person will easily rub off clothing and leaves the laboratory with no DNA for testing purposes. Contrary thereto, it is much easier to obtain DNA results from sweat, blood, semen and saliva.

x. As anticipated earlier in chambers, Mr Mazibuko for the accused placed on record that he was not in a position to cross-examine the witness. He and his attorney were in negotiations to obtain the services of a forensic expert and it was the accused's intention to have the samples retested. Mrs Liebenberg had no objection to the standing down of the witness and this obviously meant that the matter would have to be postponed eventually. I could not direct Mr Mazibuko to carry on with cross-examination as it was apparent that the latest report of the witness was only received a day before the hearing.

xi. On 9 May 2022 and about two years after the witness' testimony in chief, he was eventually cross-examined by Mr Buys. Before that, Mrs Liebenberg asked permission to ask further questions to the witness. It turned out that the witness referred to another report from a DNA expert which was handed in as Exhibit "M". According to this report by Captain Masetla, dated 25 September 2019, no DNA could be obtained from the exhibits provided to the expert, although a DNA result was obtained from the "Sweet" (Track suit pants). The witness explained how touch DNA was obtained from the exhibits such as the maroon pants, the Adidas top and the track suit pants of the deceased. The swabbing process was explained.

xii. The cross-examination followed. No testing was done by the witness on the sexual assault kit and although he explained in general

terms why DNA was not detected, he conceded that he could not say if a discharge was found or proof of any other activity. He explained that several reasons can be provided for major and minor contributions of DNA on an item. He confirmed that they had a reference sample of the accused's DNA, but that "we could not read in the accused in any of the exhibits." This applies to the accused's clothing as well as all the other exhibits.

xiii. It appeared that the witness did not do the swabbing of the clothes, but had to rely on someone else. He could not say on what areas of the clothing swabbing was done and by whom. Therefore, he could not say from where most of the DNA was lifted pertaining to the maroon pants and the Adidas top in particular.

iv. He did not want to concede that if there was direct contact between the accused and the panty and tracksuit pants of the deceased, his DNA should have been found on these exhibits and explained that the accused might not be a shedder (a person that sheds DNA easily) or he might have worn gloves.

v. He disagreed with the version of the accused's expert put to him that because the deceased's DNA was found on the accused's clothing, it did not mean there was direct contact between them. He therefore did not initially agree that indirect transfer could take place. However, he eventually conceded that if the accused used the pit toilet without knowledge that the deceased's DNA was transferred or deposited onto the wooden toilet seat, such DNA could be transferred to his clothing. In fact, he answered that it was very possible.

8.7 Further admissions.

i. On the morning of the third day, Wednesday 19 August 2020, a document containing further admissions, made and recorded as such in terms of s 220 of the CPA pertaining to the chain of evidence, was

handed in and accepted as exhibit “K”. In terms hereof the samples referred to in exhibits “H” and “J” were correctly collected, packed, sealed, sent and eventually received by the laboratory and that the reference sample identified as being from MM C[...], was obtained from M[....] M[....]² C[....], the mother of the deceased.

8.8 The next witness who testified on behalf of the State was O[....] M[....]⁴, a 7-year-old boy.

i. He also testified through the intermediary. He confirmed that he knew B[....]² and that she hired a room at the back of the house where he was staying. He knew the deceased and saw her the day that she disappeared. The witness was initially totally confused and went so far to say that he saw the accused throwing the deceased in the pit toilet. Later on he said that he had heard it from D[....], his friend who testified earlier. After being warned to testify only what he personally witnessed, his evidence became clearer. According to him, he and D[....] were playing soccer in the yard, whilst the deceased and Una played in the street. Bonki came down the road, took the deceased’s hand and walked away with her in the direction of the shop. Upon leaving, Bonki told the deceased that he was going to buy sweets. The two of them never came back. According to him and contrary to what he initially said, *ie* that he had seen the accused only once before the incident, he stated later that he knew Bonki for a long time.

ii. Mrs Liebenberg decided to arrange an informal identity parade after the witness had indicated that he would be able to identify Bonki. The witness was brought from the room where he was giving evidence into the court room. At that stage there were nine male persons present, excluding myself, the orderly and stenographer, sitting in different positions in the court room. By then the accused had left the dock, sitting next to it. The witness stood in front of the court, trying to identify Bonki, but failed to do so by saying “he is not here”. At that stage everybody was wearing their masks. I requested the people to

remove their masks to allow the witness to have another look at the men. Again he said “he is not here”. In all fairness to the witness it should be recorded that the closest people to him, to wit Mr Mazibuko and Mrs Liebenberg, were about 4 meters away whilst some of the other gentlemen were as far as 8 meters from him.

iii. It came as no surprise when Mr Mazibuko decided not to cross-examine the witness.

8.9 The next witness was Constable MA Masilo. She is a member of the FCS unit of the SAPS with 8 years’ experience.

i. On 25 July 2019 at about 19h00 she attended the scene at the accused’s house together with Captain Phasiwe. She confirmed in essence what Captain Phasiwe said and I do not intend to repeat her evidence. Her statement was also proved and handed in as exhibit “L”. As is the case with the Captain, there is also no reference in her witness statement to the handing over of the torch to the accused to look inside the pit toilet where the deceased’s body was found. She reiterated, as Captain Phasiwe did, that her testimony in court was the correct version. She also testified, contrary to the fact that it was not stated in her statement, that the accused mentioned after looking into the pit that “he saw the thing the Captain wanted him to see.” When she looked into the pit toilet by making use of the torch, she saw the body and became very emotional and even cried. She followed the accused and Captain into the accused’s house. At that stage the clothing appearing from the photographs were already lying on the ground. According to her the accused couldn’t say what he was wearing during the previous weekend.

ii. During cross-examination it was put to the witness that the accused indicated which clothes he was wearing over the weekend, but she denied this. She remained steadfast that he had answered that he was not sure. She found the accused’s reaction when he observed the

body of the deceased strange insofar as he was not shocked, did not get a fright and did not even mention that he saw a child. When confronted with her statement, she stated that all that information came from Captain Phasiwe's statement but did not know how to explain when it was put to her that even Captain Phasiwe did not mention the specific issues in his statement.

iii. It was put to her that the accused was never given a torch to look into the pit toilet, but she denied this. It was also put to her that the accused never responded to Captain Phasiwe as he and she testified, but she stood her ground. She agreed that the accused had given his co-operation at all times during their visit to his premises.

8.10 Dr John Mohai was also called to testify notwithstanding the fact that his medico-legal *post-mortem* report was handed in by agreement as exhibit "C." His *viva voce* evidence does not take the matter any further and I shall not deal with that.

8.11 The owner of the premises where the accused was renting, Mr SD Molelekwa, was called to testify during May 2022. His evidence did not take the matter any further than can be viewed from the photographs before the court. He admitted in cross-examination that access to his premises was easy, either through the gate or the fence.

8.12 The photographer, Constable KL Sehularo, also testified although the photographs taken by him were not in contention. He explained that although the second album, Exhibit "E" is dated 12 August 2020, photos 3 to 6 therein, showing the clothing of the deceased, were taken already on 24 July 2019. He was not cross-examined.

8.13 The accused testified in his defence. He also called a DNA expert, Dr I Ferreira as well as his alibi, Mr Shadrack Moshodi. The accused's version is as follows:

i. He admitted renting the place where the deceased's body was found in the pit toilet. Also, that he used to work as a nurse at the Botshabelo hospital at the time. He knew the deceased's mother with whom he grew up, as well as the deceased. According to him B[....]2, whom he knows, is a prostitute. He explained that he met her the previous Saturday and that they agreed that he would visit her the following Sunday at 4 o'clock.

ii. On Sunday he left his home after 11 o'clock and went to Kiddo's tavern where he stayed until 10 o'clock (22h00) that night, save for three instances, to wit when he went home at just after 2 o'clock to change his clothing as it became cold, arriving back at the tavern by 3 o'clock, and during his two visits to B[....]2 at 4 o'clock and 8 o'clock where he stayed for a few minutes each time. On his version he went back to B[....]2 that evening at 8 o'clock as she requested him to do so. On the first occasion he was aware of children playing in B[....]2's yard, but did not see the deceased amongst them.

iii. His alibi, Shadrack Moshodi arrived at the tavern at half past 3. He was coming from a soccer match. He told Moshodi that he was going to visit B[....]2 quickly and returned shortly thereafter, telling him that "it was a flop." At 8 o'clock he left again and told Moshodi that B[....]2 requested him to return to her. When he came back soon thereafter he again reported to Moshodi that he "flopped again." The accused explained what transpired in the tavern during the time that he was there, referring also to playing pool. When the tavern closed at 22h00 they left and went to another tavern, Nice Night. He did not enter as he was banned from the place. Moshodi went in and bought two quarts' beers for them. They left and parted ways soon thereafter. He went to sleep after using the pit toilet.

iv. The accused gave a detailed version of his usage of the pit toilet during the next few days, always early mornings when it was still dark, or during the evenings. When he merely needed to urinate, he did not

use the toilet.

v. He only heard about a missing child on Thursday when his sister informed him. That day SAPS officers arrived at his home. There is no reason to give a detailed description of his version. This was put to the two SAPS witnesses and as mentioned, his version differed from 2020 to 2022.

vi. The accused was thoroughly cross-examined by Mrs Liebenberg, an experienced lawyer. Several of his explanations border on the fanciful and must be accepted as improbable. I do not intend to go into detail.

8.14 Dr Ferreira agreed in principle with the results obtained by the State's expert, W/O Mogashoa. She is an experienced DNA expert with an impressive CV. Her report was handed in as Exhibit "N". She testified *inter alia* as follows and again I do not intend to go into much detail, bearing in mind the concession by her counterpart:

i. Whereas the W/O referred to "low copy number" in his evidence in chief, this term is also referred to as "touch DNA" or "trace DNA." These terms are interchangeable. She also made the point that it is unknown from which areas of the clothing the DNA samples were collected.

ii. In criticising the version of her counterpart that the donor of the particular DNA profile was at some point in direct contact with the accused's clothing, she pointed out that transfer can occur directly or indirectly. If there was no direct contact, the person on whose clothes the particular DNA was found – the accused in this case – will have to explain how he believes the DNA was transferred.

iii. She also confirmed that the deceased's DNA was the major contributor to the mixture DNA found on the accused's clothes.

iv. Finally, on questions by the court about the three scenarios that may cause transfer of DNA onto items such as the accused's clothing, she made it clear that even the third scenario – the transfer from the deceased to the toilet seat and from there onto the accused's clothing - was probable, although it might be less probable than direct contact as put to her in respect of the other scenarios.

8.15 Mr Moshodi's version will not be repeated as it is about a mirror image of that of the accused, save for the following:

- i. He mentioned that his whole soccer team went to Kiddo's tavern after the soccer match and they sat in a circle while enjoying their drinks. The accused did not say anything about this.
- ii. He was present during the deceased's bail application.
- iii. They drank the beer that he bought at Nice Night outside the tavern.

VI LEGAL PRINCIPLES PERTAINING TO THE EVALUATION OF EVIDENCE

[9] In assessing the evidence, a court must in the ultimate analysis look at the evidence holistically in order to determine whether the guilt of the accused has been proved beyond reasonable doubt. This does not mean that the breaking down of the evidence in its component parts is not a useful aid to a proper evaluation and understanding thereof.¹ In *S v Hadebe and Others*² the SCA approved of the following *dictum*:

"But in doing so, (breaking down the evidence in its component parts) one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in the trial may arise when that aspect is viewed in isolation. Those doubts may be

¹ *S v Shilakwe* 2012 (1) SACR 16 (SCA) at p 20, par 11

² 1998 (1) SACR 422 (SCA) at 426f–h; also: *S v Mbuli* 2003 (1) SACR 97 (SCA) at p 110, par 57; *S v Van Aswegen* 2001(2) SACR 97 (SCA) at p 101a-e and *S v Trainor* 2003 (1) SACR 35 (SCA) at p

set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood from the trees.”

[10] It is acceptable in evaluating the evidence in its totality to consider the inherent probabilities. Heher AJA (as he then was)³ dealt with this aspect as follows: “The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused’s guilt.”

In this regard it is apposite to consider the evaluation of inherent probabilities by the trial court as accepted by the Supreme Court of Appeal in *Magadla v S*.⁴

[11] It is trite that an accused’s version cannot be rejected merely because it is improbable. As stated in *S v Shackell*⁵ it can only be rejected on the basis of the inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.

[12] In *Viveiros v S*⁶ the Supreme Court of Appeal stated that the need for caution cannot be ignored in considering the evidence of young children and proceeded as follows:

"In view of the nature of the charges and the age of the complainants it is well to remind oneself at the outset that, whilst there is no statutory requirement that a child's evidence must be corroborated, it has long been accepted that the evidence of young children should be treated with caution (*R v Manda* 1951 (3) SA 158 (A) at

40f-41c.

³ *S v Chabalala* 2003 (1) SACR 134 (SCA) par 15

⁴ 80/2011 [2011] ZASCA 195 (16 November 2011) par 22 and further

⁵ 2001 (2) SACR 185 (SCA) para 30

163C [also reported at [1951] 3 All SA 236 (A) – Ed]; *Woji v Santam Insurance Co Limited* 1981 (1) SA 1020 (A) at 1028B–D); and that the evidence in a particular case involving sexual misconduct may call for a cautionary approach (*S v J* 1998 (2) SA 984 (A) at 1009B [also reported at [1998] 2 All SA 267 (A); [1998] JOL 2141 (A); 1998 (4) BCLR 424 (A) – Ed]). For reasons which will presently emerge the present case is plainly one which calls for caution."

[13] In *Ntonga and another v S*⁷ the full bench approved of the following approach pertaining to child witnesses who are also single witnesses articulated by Jones J:⁸

"[7] The first issue is the reliability of the evidence of the State, which brings me to the defence argument that the evidence is insufficient because of the magistrate's inadequate application of the cautionary rule of evidence. The cautionary rule came into being because of s 208 of the Criminal Procedure Act 51 of 1977 which provides that an accused person may be convicted on the single evidence of a competent witness (which includes a child witness). This is, of course, provided that the single evidence is good enough to discharge the onus of proof of guilt beyond reasonable doubt. In an unreported decision in this court (*Dyira v S*, Eastern Cape Division, Grahamstown, case No 222/07, 2 June 2009, paras 6 and 10). I had occasion to comment that:

'(T)o assist the courts in determining whether the onus is discharged, they have developed a rule of practice that requires the evidence of a single witness to be approached with special caution (*R v Mokoena* 1956 (3) SA 81 (A) at 85, 86). This means that the courts must be alive to the danger of relying on the evidence of only one witness, because it cannot be checked against other evidence. Similarly, the courts have developed a cautionary rule which is to be applied to the evidence of small children (*R v Manda* 1951 (3) SA 158 (A) at 162E-163E). The courts should be aware of the danger of accepting the evidence of a little child because of potential unreliability or untrustworthiness,

⁶ [2000] 2 All SA 86 (A) at par 2

⁷ [2013] 4 All SA 372 (ECG) at p 9

⁸ *S v MG* 2010 (2) SACR 66 (ECG)

as a result of lack of judgment, immaturity, inexperience, imaginativeness, susceptibility to influence and suggestion, and the beguiling capacity of a child to convince itself of the truth of a statement which may not be true or entirely true, particularly where the allegation is of sexual misconduct, which is normally beyond the experience of small children who cannot be expected to have an understanding of the physical, social and moral implications of sexual activity (*S v Viveiros* [2000] 2 All SA 86 (SCA) para 2). Here, more than one cautionary rule applies to the complainant as a witness. She is both a single witness and a child witness. In such a case the court must have proper regard to the danger of an uncritical acceptance of the evidence of both a single witness and a child witness (Schmidt *Law of Evidence* 4-7).

Our courts have laid down certain general guidelines which are of assistance when warning themselves of the danger of relying upon a single witness who is also a child witness. In the ordinary course:

- (a) a court will articulate the warning in the judgment, and also the reasons for the need for caution in general, and with reference to the particular circumstances of the case;
- (b) a court will examine the evidence in order to satisfy itself that the evidence given by the witness is clear and substantially satisfactory in all material respects ;
- (c) although corroboration is not a prerequisite for a conviction, a court will sometimes, in appropriate circumstances, seek corroboration which implicates the accused before it will convict beyond reasonable doubt ;
- (d) failing corroboration, a court will look for some feature in the evidence which gives the implication by a single child witness enough of a hallmark of trustworthiness to reduce substantially the risk of a wrong reliance upon her evidence (*S v Artman* 1968 (3) SA 339 (A) at 340H).’

[8] The cautionary rule is a rule of practice, not a rule of law, to be applied in the light of the warning of Holmes JA in the *Artman* judgment cited above at

341C, that –

‘ while there is always need for caution in such cases, the ultimate requirement is proof

beyond reasonable doubt; and courts must guard against their reasoning tending to become stifled by formalism. In other words, the exercise of caution must not be allowed to displace the exercise of common sense; . . ’

There are cases where the evidence of a single child witness has been found to be clear and satisfactory in every material respect, and hence sufficient for proof beyond reasonable doubt, without corroboration implicating the accused or without some additional hallmark of trustworthiness, other than the inherent value of the child’s evidence itself (*Director of Public Prosecutions v S* 2000 (2) SA 711 (T)). What is always necessary is that the evidence of a single child witness is evaluated with a full appreciation of the dangers of an uncritical reliance upon it.”

[14] In *Stevens v S*⁹ the Supreme Court of Appeal cautioned as follows:

"Courts in civil or criminal cases faced with the legitimate complaints of persons who are victims of sexually inappropriate behaviour are obliged in terms of the Constitution to respond in a manner that affords the appropriate redress and protection. Vulnerable sections of the community, who often fall prey to such behaviour, are entitled to expect no less from the judiciary. However, in considering whether or not claims are justified, care should be taken to ensure that evidentiary rules and procedural safeguards are properly applied and adhered to."

[15] In assessing circumstantial evidence a court should be careful not to approach the evidence upon a piece-meal basis. The following well-known *dictum* of

⁹ [2005] 1 All SA 1 (SCA) par 1

Davis AJA in *R v De Villiers*¹⁰ should be adhered to:

“The Court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way; the Crown must satisfy the Court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence.”

[16] Zulman AJA aptly referred to the following quotation in *S v Reddy and Others*:¹¹ “A number of circumstances, each individually very slight, may so tally with and confirm each other as to leave no room for doubt of the fact which they tend to establish.....*Not to speak of greater numbers, even two articles of circumstantial evidence, though each taken by itself weigh but as a feather, join them together, you will find them pressing on a delinquent with the weight of a mill-stone...*”

[17] In *S v Boesak*¹² the court dealt with the trite legal principle that the “State is not required to plug every loophole, counter every speculative argument and parry every defence which can be conceived by imaginative counsel without a scrap of evidence to substantiate it.” The court also reiterated the well-known principle¹³ that the “cross- examiner should put his defence on each and every aspect which he wishes to place in issue, explicitly and unambiguously, to the witness implicating his client. A criminal trial is not a game of catch- as-catch-can, nor should it be turned into a forensic ambush”. It should not be countenanced that the credibility of a witness be attacked based on speculation and without cross-examination of the witness on pertinent issues.

[18] It is necessary to deal briefly with DNA analysis. Van der Merwe AJA assessed

¹⁰ 1944 AD 493 at pp 508-9

¹¹ 1996(2) SACR 1 (A) at p 8i

¹² 2000 (1) SACR 633 (SCA) par 48

¹³ Ibid at par 50

DNA analyses of two experts in *S v SB*¹⁴ and in doing so relied on what he with respect correctly called the “valuable assistance”¹⁵ from the work of Prof Meintjies-Van der Walt.¹⁶ Mr Buys attached an article by the same author to his heads of argument. The learned judge confirmed the trite principle that the weight of expert opinion and also conflicting opinions depends on the extent to which the opinions are founded on logical and cogent reasoning.¹⁷ The difference of opinion in that case does not apply *in casu*, but it is important to mention the following *dictum* as I shall consider same in evaluating the evidence:

“[23] This brings into play the other evidence in a case. I cannot conceive of a criminal case where there is absolutely no other relevant evidence or evidentiary material. This may range, from direct eyewitness evidence implicating the accused, to circumstantial evidence as mundane as the proximity of the home of the accused to the scene of the crime. This may of course also include evidence pointing to the innocence of the accused. In the final analysis this evidence determines whether the guilt of the accused has been proved beyond reasonable doubt or not.”

[19] In *Fitzgerald v The Queen*¹⁸ the court held on appeal in dealing with secondary transfer of trace DNA that the appellant’s DNA could have been deposited on the didgeridoo which was left on the crime scene as a result of secondary transfer. Consequently, the appeal succeeded and the appellant was acquitted insofar as the court held that it had not been established beyond reasonable doubt that he was present at the crime scene and participated in the attack.

[20] The accused relies on the testimony of an alibi, but failed to mention this, either in his warning statement, or his plea explanation, or in statements to State witnesses. In fact, the name of his witness was withheld and it was merely put to B[....]2 that he went to the tavern with some friends. What is the law about the right to remain silent? The right to remain silent and the disclosure of an alibi defence

¹⁴ 2014 (1) SACR 66 (SCA); see also *S v Nkwanyana* KZP case no AR 108/16, a judgment delivered on 27 September 2016

¹⁵ *Ibid* para 7

¹⁶ *DNA in the Courtroom: Principles and Practice* (2010)

¹⁷ *S v SB* at para 19

¹⁸ An Australian High Court case, [2014] HCA 28 (13 August 2014)

were thoroughly discussed and considered in *S v Thebus and another* 2003 (6) SA 505 (CC) at 533 and further. Moseneke J held at paragraph 59 that: “A distinction may properly be made between an inference of guilt from silence and a credibility finding connected with the election of an accused person to remain silent.”

At paragraph 67 the following was said:

“The late disclosure of an alibi is one of the factors to be taken into account in evaluating the evidence of the alibi. Standing alone it does not justify an inference of guilt. Secondly, it is a factor which is only taken into consideration in determining the weight to be placed on the evidence of the alibi.”

The Court stated further at paragraph 68 and I quote:

“The failure to disclose an alibi timeously is therefore not a neutral factor. It may have consequences and can legitimately be taken into account in evaluating the evidence as a whole.

In deciding what, if any, those consequences are, it is relevant to have regard to the evidence of the accused, taken together with any explanation offered by him or her for failing to disclose the alibi timeously within the factual context of the evidence as a whole.”

VII EVALUATION OF THE EVIDENCE

[21] I already thanked both legal representatives for their detailed and well-prepared written heads of argument. I considered these as well as their oral arguments carefully. It is impossible to deal with each and every submission in this judgment and the fact that I don't refer to particular submissions should not be regarded as an omission to consider these.

[22] Several admissions were made and the disputes to be considered are relatively few, to wit:

- (a) Did the accused take the deceased with him on Sunday afternoon 21 July 2019, by removing her from the place where she was playing with other

children in order to go and buy sweets for her?

(b) If so, did the accused have the consent of the deceased's mother to take her away?

(c) Did the accused rape the deceased?

(d) Did the accused murder the deceased?

(e) Was DNA of the deceased found on the maroon Chino pants and grey and white top of the accused and if so, has an innocent explanation been given for the presence thereof.

[23] Mrs C[...], the deceased's mother, testified that she did not see the accused on the day that her daughter went missing. She did not give any consent for anybody to remove her daughter from the place where she was playing. She positively identified the clothing of the deceased and confirmed that she personally dressed her that morning. She testified that the accused had given the deceased money from time to time in the past to buy sweets. There is a question mark as to what was actually conveyed to her by the children and precisely when. If the report of D[...] to her was clear as to the identity of the accused it would be easy to make contact with him, bearing in mind that they grew up together and his parental home was a few houses further down the street. If D[...]’s version was vague, I find it strange that she did not interrogate any of the other children immediately. I am not satisfied that D[...] was so familiar with the accused as the witness wants the court to believe. He stayed with his mother in T[...]2 at the time and only visited his grandmother in T[...] N[...]2 for about a month at that stage. The accused was employed and worked at the Botshabelo hospital at the time. He would not be that often in the vicinity for D[...] to really become acquainted to him. I find it also disturbing that, if there was a search for the deceased immediately, that B[...]2 and other neighbours were not informed. As pointed out herein, B[...]2 was at home all time and by 20h00 she was in the company of her brother and boyfriend, apparently totally unaware that the deceased was missing. If the witness was indeed alerted that evening that the accused was the alleged perpetrator, I find it highly and inherently improbable that

she did not go to the accused's parental home and confront whoever was in attendance. I would have expected her to inform the SAPS that same night, but this did not happen. Mrs Liebenberg submitted that this witness had no reason to falsely implicate the accused, but it must be remembered that she received a version and might have believed subjectively that it was indeed the accused who killed her child.

[24] The second witness, Ms M Tsokodibane found the pair of shoes, panty and trousers which were positively identified as that of the deceased in her yard. On instructions of her grandfather she threw the clothing over the trees just next to the street running past their house. She also identified the clothing as depicted in the photographs. Her version was not challenged. It is unclear whether the deceased's clothes were removed at this site and left there or whether the perpetrator raped and killed the deceased at a different spot and dropped the clothes at the witness' property which is situated a few houses from the pit toilet.

[25] The third witness, Ms Sebetlela, also referred to as B[...]2, confirmed that the accused visited her during the late afternoon of Sunday, 21 July 2019. At that stage he was wearing maroon Chino trousers as well as Carvella shoes and a grey and white Adidas sweater top. He proposed sexual intercourse with her, but she declined. Later on that evening he came back at which stage her brother and boyfriend were home as well. This time the accused was wearing the same sweater top, but red short-sleeve pants. The maroon Chino pants, the red short-sleeve pants and the grey and white Adidas top were amongst the clothing taken out of the washing basket by Captain Phasiwe when they visited the accused's house. The Carvella shoes are also visible on the photos. The following aspects in her evidence bother me. Firstly, the witness mentioned in her statement that she did not go to Bonki's place as promised. In her *viva voce* evidence she denied having said so to the SAPS officer who took down her statement. Where would the SAPS officer get this information from, unless she admitted that she was a prostitute and/or prepared to have sex with the accused? Secondly, according to her statement the accused was wearing the same clothes when he returned to her house later that evening. In her testimony she said something different. Thirdly, why would she want to deny that she was prepared to have sex with accused. What must I do about these contradictions? The witness tried to convey that the statement was written in

English, that she had a discussion with the police officer in Sesotho and after he had written down the statement, he explained the contents thereof in Sesotho. According to her statement the accused was wearing “an orange or maroon trouser which he was still wearing during the day.” It is ironical that the short sleeve pants are red/orange in colour whilst the pair of Chino pants are in fact maroon in colour. The possibility of a misunderstanding between her and the SAPS officer may perhaps not be excluded, even though the statement was taken down a mere six days after the event. It is apparent that the accused wore the same top on both occasions.

[26] There are improbabilities in B[....]2’s version, but a major concern is the following. Why would the accused return to her house – which he confirms as well - if he was the perpetrator that had taken the deceased away earlier, well-knowing that the family would be searching for her? If he had already raped and killed her by then, he would on all probabilities not return to the place where he had kidnapped her, especially bearing in mind that the children would have seen him removing the deceased and that the community might be searching for the deceased in that area. If he had not executed his ugly deeds by then, where would he have kept the deceased at that stage? The witness’ testimony takes the matter no further than to show that the accused was at her residence twice that day. Her version also corroborates the accused’s version pertaining to his usage of alcohol insofar as he was in possession of a quart beer bottle every time he visited her and was intoxicated to an extent. We also know that other male persons, and not only the accused, visited her that afternoon and evening.

[27] Captain Phasiwe’s version appears to be truthful and probable. I do not agree with Mr Mazibuko’s submission that because the witness differed from his statement in two respects, his evidence should be rejected. It more often than not is experienced in criminal trials that witnesses are required to testify in much more detail than contained in their witness statements. In fact, it occurs in about each and every criminal case. The issues raised by a witness in testimony, after proper consultation with the prosecutor, often expands on the brief version contained in the witness statement taken down by SAPS. On all probabilities the witness would have requested the accused to also look into the pit toilet to see for himself what was detected. The same would be the case with the other SAPS officers present. In any

event, even if there was no such a request by the witness, I would have expected the owner of the house and pit toilet to request an opportunity to see for himself what caused the Captain to be so upset. I accept the version of the witness that the accused did not show any signs of discomfort or unease when he noticed the body in the pit toilet, but that may be a neutral factor. People differ and we often find apathy amongst individuals. Also, I do not accept that the witness was told by the accused about his alibi that night as put to him by Mr Buys when he was called back. This is clearly an afterthought by the accused. The Captain's version is corroborated in all material respects by Constable Masilo and I am also prepared to accept her version to be true. Both these witnesses made a favourable impression on the court, notwithstanding the fact that they testified in more detail than set out in their witness statements and although both deviated from their statements in respect of exactly the same issues. The question to be considered is whether this is sufficient to eventually convict the accused.

[28] The testimony of the two minors, D[...] and O[...], may be considered simultaneously. They are the only alleged eyewitnesses that can link the accused with the disappearance of the deceased. Mrs Liebenberg did her best to convince me to accept their versions, but conceded that their versions were not beyond criticism. I was not impressed at all with their evidence and do not intend to repeat their versions which I summarised above. I had difficulty to establish whether they really knew what it meant to speak the truth and whether they appreciated the seriousness of the matter. Saying this, I accept that a court must be cautious not to adjudicate the evidence of a child in the same manner than one would have done in the case of an adult. I have serious concerns about the veracity of their evidence and also what they conveyed to the deceased's mother as testified to by her. The possibility that they became aware of the rumours and/or that they were told what to testify cannot be excluded. The case law referred to earlier comes to mind. D[...] even confirmed in cross-examination that his aunt Asempi told him to say that Bongki took the deceased away. This is contrary to his earlier version that he told the deceased's mother that Bonki took the deceased. The evidence of young children like the two witnesses have the potential to be unreliable as a result of *inter alia*, lack of judgment, imaginativeness and susceptibility to influence and suggestion. I accept that they were playing with the deceased and other children during Sunday

afternoon, 21 July 2019. I am not convinced that they either knew the accused well enough to identify him as the perpetrator, or even if that was the case, that they actually saw him taking away the deceased that afternoon. Neither of them gave a proper description and/or name of the perpetrator upon which the deceased's mother could have acted. Strangely enough, no other child could apparently be of assistance *ex facie* the evidence, notwithstanding the fact that several children were playing together.

[29] Evidence about the identification of a perpetrator should be dealt with caution, the reason being that it is easy to make an honest mistake. This is trite. According to the deceased's mother it was established between 17h00 and 18h00 that the deceased was missing. There is no indication whether the sun was still shining at the time. Identification is often a contentious issue. *In casu* the children were apparently playing when the deceased left them. There is evidence of other males visiting at least B[....]2 at the time. We also know that the corner house was also a drinking place. Identification becomes more relevant in respect of child witnesses.

[30] The accused did not play open cards with the court. He relied on his right to remain silent as an excuse as to why he did not refer to his alibi. Then, he went further and testified – only during cross-examination - that he even told a police officer where he was the particular Sunday, in whose company he was and that the particular tavern was fitted with video cameras and that footage should be available. This information was never revealed until he eventually testified and the State was not given an opportunity to investigate this aspect. It is trite that a party's version should be put to the other side as stated in *Boesak supra*. A criminal trial should not be turned into a forensic ambush. Even if I find the version of the accused as improbable and/or false in this regard, it might be insufficient under the circumstances of this case and against the background of the unacceptable evidence of, and discrepancies in the versions of, the two child witnesses to convict the accused, also bearing in mind the other proven facts.

[31] I am of the view that the accused and his alibi discussed the events of the Sunday and that Mr Moshodi was subjective and had sufficient reason to present evidence favourable for the accused. It is astonishing how much their versions

correspond in respect of detail. It cannot be forgotten that Mr Moshodi testified more than a month after the accused presented his version and although it was denied that they had contact during this time, I doubt this. In any event, they had ample time since 2020 when the trial started to come to an agreement what to say. As mentioned in *Thebus supra*, the late disclosure of an alibi is one of the factors to be taken into account in evaluating the evidence of the alibi, but standing alone it does not justify an inference of guilt. The fact that the alibi was disclosed at such a late stage must be considered in light of the accused's explanations, but more importantly, in the factual context of the evidence as a whole. This cannot raise the State's case from the ashes. However, to finally consider the matter the expert evidence and the adjudication thereof becomes vital.

[32] The two experts made concessions when required to do so and both impressed me not only as experts in their field, but also as objective witnesses. W/O Mogashoa conceded that the deceased's DNA could have been transferred or deposited to the seat of the pit toilet and then transferred or deposited onto the accused's clothing when he used the pit toilet. In fact, he said it was "very possible." Dr Ferreira pointed out that transfer of a DNA profile can be direct or indirect and it is impossible to say from the amount of DNA recovered whether it was deposited by direct or indirect contact and that the detection of a DNA profile on a surface cannot be considered as proof of contact. I put three scenarios to Dr Ferreira but although she conceded that the first two was more probable, the third scenario cannot be excluded as it was probable as well. This third scenario is the one presented by the accused as his explanation how the deceased's DNA profile could be transferred onto his clothing, *ie* the use of the pit toilet whilst wearing his maroon chino pants and Adidas top. I bear in mind that we deal with a criminal case and that the test differs from the standard required in civil cases. If one considers that the deceased's body, whilst partly naked, had to be pushed through the hole in the wooden toilet seat, there must be a likelihood, and not only a faint possibility, that her DNA would be transferred to the toilet seat and from there to the accused's clothing. Mrs Liebenberg considered this and therefore, she suggested to the accused that the toilet seat could easily be lifted in order to discard a body into the pit. The accused explained, and there is no contradictory evidence, that the seat was fastened to the corrugated walls with screws.

[33] It is also important to take cognisance of the fact that the accused's DNA was not found on the clothing of the deceased, to wit the panty and tracksuit pants. If he raped her as alleged by the State, the absence of his DNA is a material consideration in finding for the State.

[34] No doubt, save for the expert evidence relating to the DNA analysis and the conclusions to be drawn, there is other evidence to be taken into consideration and as stated in *S v SB supra* which may range from "direct eyewitness evidence implicating the accused, to circumstantial evidence as mundane as the proximity of the home of the accused to the scene of the crime. This may of course also include evidence pointing to the innocence of the accused. In the final analysis this evidence determines whether the guilt of the accused has been proved beyond reasonable doubt or not."

[35] If the accused was the perpetrator, he would know that the other children would have recognised him and it is highly improbable that he would in such circumstances deposit the deceased's body in his pit toilet, whilst he could have discarded it in the open veld next to the township where the SAPS were searching eventually as testified, or some other place. Furthermore, the fact that the deceased's clothing was discarded at a different location from where the body was hidden, shows calculated conduct of the perpetrator to avoid being implicated with the crimes. It is improbable that the accused, being so calculated, would keep the clothes that he wore the Sunday when the crimes were committed on his premises. Mrs Liebenberg submitted that the accused was the only person to tell the court what happened, but he chose to lie. Therefore, she submitted that the court cannot speculate and should convict him as charged. This submission would be acceptable if the eyewitnesses' version could be accepted.

VIII CONCLUSIONS

[36] The DNA evidence cannot be conclusive to prove the accused's guilt. In any event the authorities quoted support the viewpoint expressed by the accused's expert and conceded by the State's expert. The DNA evidence on its own is not sufficient to establish the accused's guilt.

[37] There is no acceptable evidence of eyewitnesses *in casu*. The trite test for adjudicating circumstantial evidence must be considered. The inference that the accused is guilty must be consistent with all the proven facts. If not, the inference cannot be drawn. The proven facts should be such that they exclude every reasonable inference from them save the one sought to be drawn, to wit that the accused is guilty of the offences charged.

[38] *In casu* the deceased's body was found in the accused's pit toilet and the DNA analysis connects the accused's clothes to the deceased's DNA. A reasonably acceptable explanation was provided by the accused, backed up by expert opinion. Although I mentioned improbabilities in the accused's version and even falseness in certain respects, and although fingers are pointing towards him, it cannot be said that his version as to what happened on Sunday 21 July 2019 is so improbable that it cannot reasonably possibly be true. Also, the real evidence depicted in the photographs, corroborated by the version of the accused and his landlord is clear: anybody could gain easy access to the premises. In my view, and after duly considering the test to be applied pertaining to circumstantial evidence, and even considering the *dictum* in *Reddy supra*, I am not in a position to find that the guilt of the accused is the only inference that can reasonably be drawn from the evidence as a whole.

[39] Consequently, the accused is entitled to an acquittal.

IX ORDER

[40] The following order is issued:

The accused is found not guilty and acquitted on all three counts.

JP DAFFUE J

On behalf of the State:

Instructed by:

Adv E Liebenberg

DPP

Bloemfontein

On behalf of the Accused:

Instructed by:

Adv JJ Buys

WJB Attorneys

Bloemfontein