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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA
(VEREENIGING CIRCUIT COURT HELD IN PALM RIDGE)**

Case number: CC18/2022

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: YES/NO
21 OCTOBER 2022

In the matter between:

STATE

VERSUS

SIYABONGA LEBOHANG HLOPHE MABE

ACCUSED

JUDGMENT

MAKOLOMAKWE AJ

INTRODUCTION

□1]The accused, a 26-year-old male person, residing at [...], Extension 7A, O[...] Farms, is arraigned before this court on one count of murder, read with the provisions of section 51(2) of Act 105 of 1997.

□2]The State alleges that on or about 29 February 2020 and at or near O[...] Farms area in the Regional Division of Gauteng, the accused unlawfully and intentionally killed Nomashandu Colline Ndlovu, an adult female.

□3]Accused is legally represented by Mr Moeng from Legal Aid South Africa. Before he pleaded to the charge, his legal representative informed the court that the provisions of sections 51 (2) of the Criminal Law Amendment Act 105 of 1997 (Minimum Sentences Act), as well as the applicable competent verdict in terms of the Criminal Procedural Act 51 of 1977, were fully explained to the accused. The accused confirmed that he understood the explanation.

□4]The accused pleaded not guilty to the charge. Mr Moeng, his legal representative, confirmed the plea and in terms of section 115 of the Criminal Procedure Act 51 of 1977 (the Act) and informed the court that the accused elects to exercise his constitutional right to remain silent.

FORMAL ADMISSIONS BY THE ACCUSED

□5]During the trial, the accused, duly advised and assisted by his legal representative, admitted certain facts relating to individual charges in terms of section 220 of Act 51 of 1977, as amended. In the formal admissions, the accused did not dispute the following:

5.1. That the deceased is Zamashandu Colline Ndlovu, and that she died on 1 March 2020 at Chris Hani Baragwanath Hospital. That the deceased did not suffer any injuries after she was found in a veld until the post mortem was conducted. That a medico-legal post mortem report that was compiled by Dr Susana Catherina Fourie on 5 March 2020 and the contents thereof are correct and that the cause of death is a "BLUNT FORCE TRAUMA TO THE BRAIN". The report was admitted as **Exhibit "B"**.

5.2. The affidavit of Sergeant Abram Moseki, the police officer who, after receiving information that a certain lady (the deceased) was found at a veld, went to the scene and transported her to the nearest fire station. He also summoned the ambulance that took her to hospital. The affidavit was admitted as **Exhibit "C"**.

EVIDENCE FOR THE STATE

□6] The State, in order to prove the charge against the accused, led the evidence of six witnesses, namely Sergeant Abram Moseki; Tryphina Johanna Oabula; Ntombi Hlophe; Thamsanqa Hlophe; Mapitse Kutlwano Pitse and Godfrey Sotyfa.

□7] According to the affidavit of Sergeant Abram Moseki, stationed at Extension 4 O[...] Farms Police Station, the deceased was found at a veld inside a blue Toyota Venture. Her clothes were dirty. She had visible injuries on the face and head. She could not speak, but she was just nodding her head. She was transported to a nearest fire station and thereafter to hospital by the ambulance.

□8] Tryphina Johanna Dabula testified as follows; on 28 February 2020, after knocking off duty, she went to Carter's tavern around 22h00. On her way to the tavern, she heard people arguing, as she was about to turn at the corner

of the street. It was dark, but she looked at them carefully as they got closer to her. She managed to identify them as the accused and the deceased. She demonstrated the distance between her, the accused and the deceased, by pointing at her hip saying they were very close.

□9]She asked the accused what he was doing to the deceased. The accused replied by telling her not to interfere in his affairs. The accused punched the deceased with a fist on her body and she fell down. She tried to intervene by telling the accused to leave the deceased alone, while holding him with both her hands. The accused pulled the deceased up from the ground and walked away with her, towards the direction of his home. She threatened the accused by saying that she was going to report the matter to the police. The accused replied that she can call the police.

□10]She observed that the deceased was heavily under the influence of liquor, as she was staggering and could not walk properly. Further, that the accused was wearing dark coloured clothing and the deceased was wearing red track suit pants with white stripes, and a white top. The deceased was well known to her. She was staying in the same area and she used to see her on several occasions at the tavern.

□11]The accused is well known to her, they grew up together and he was a friend to her child. She had a good relationship with the accused. She did not know that the accused and the deceased were in a romantic relationship. Her attempts to intervene were not successful and she proceeded to walk to the tavern.

□12]Upon her arrival at the Carter's tavern, she went to Thamsaqa, the uncle of the accused. He was seated with Seun and Nomthandazo. She reported that on her way to the tavern, she saw the accused assaulting the deceased and the accused did not stop when she tried to intervene. She requested

Thamsaqa to assist. He replied by saying that the accused and the deceased are in a love relationship. She sat down, bought herself a beer and started drinking. She left the tavern and went back home between 01h00 and 02h00 in the morning.

□13]The next day, she received information that there is a person lying in the veld. She went to the scene and when she was nine to ten metres away, she saw a female person lying on the ground. She managed to identify her as the deceased, as she was still wearing the same clothes, being a red track suit pant with white stripes and a white top. The body of the deceased was moving, but she could not stand up.

□14]During cross examination she testified as follows; the deceased was also staying at Extension 6, but in a different section. She was not able to see the clothing of the accused, as they were dark and she was not certain about the colour. Thamsaqa informed her that the accused was in a love relationship with the deceased after she reported that she saw the accused assaulting the deceased on her way to the tavern.

□15]The deceased was staggering and walking by herself at the time they were approaching her. The deceased was walking in the same manner when the accused was pulling her and walked away with her. The accused was not under the influence of alcohol. She was also sober at that stage. She was heavily under the influence of alcohol when she left the tavern, but her consumption of alcohol did not affect her recollection. She insisted that she met with the accused and the deceased.

□16]She denied that she was mistaken about the identity of the accused. She disputed the version put to her that the accused was never in the company of the deceased, that he did not assault the deceased and that she was falsely implicating him. During questioning by court, she testified that she

spent about five to ten minutes with the accused and the deceased, and they were in front of each other. Further, that she even held the accused with both her hands while reprimanding him to stop assaulting the deceased.

□17]Thamsanqa Hlophe testified as follows; he is the uncle of the accused and a brother of the accused's father. He is staying with his sister, Ntombi Hlophe and the accused, at his parental place. He has known the accused from his childhood as he grew up at his parental place. He had a good relationship with the accused and his sister also had a good relationship with the accused.

□18]On 28 February 2020, he went to his parental place after knocking off, and early in the evening, he went to Carter's tavern with his neighbours, Seun and Nomthandazo. Upon arrival they sat down, bought alcohol and started drinking. The deceased entered the tavern after some time and joined them at their table. He objected when the deceased requested to share alcohol with them because he was not used to the deceased, but she drank their alcohol despite his objection.

□19]Thereafter, B also entered the tavern. He also went to their table and started consuming their alcohol. The deceased and B were kissing each other while drinking alcohol. The accused entered the tavern after some time. Thamsaqa conversed with the accused and requested him to return the R50.00 he had previously given him. The accused did not return it, but instead bought him two bottles of beer.

□20]The accused stood next to them, but he was not drinking alcohol. Thamsaqa later discovered that the accused was not around their table. Thamsaqa looked around and saw him at the gate of the tavern in the company of the deceased. Thamsaqa called the accused and requested him to come and join them. The accused replied by saying he will come. He

continued drinking alcohol and when he looked around again to check the accused, he was nowhere to be found.

□21]Johanna entered the tavern after some time and went to sit at their table. She arrived 15 to 20 minutes after the accused and the deceased had left. He corroborated Johanna, that she reported that on her way to the tavern, she saw the accused and the deceased fighting and pulling each other. He decided not to involve himself in the affairs of the deceased and the accused. They continued to drink alcohol.

□22]Later, he went back home with his neighbours and informed his sister, Ntombi, about the report he received from Johanna. He proceeded to the shack of the accused and knocked at the door, but there was no reply. In the morning, he received information that there was a lady who was lying in the veld. He went to the scene in the company of his neighbour, Nomthandazo, and discovered that it was the deceased. She had visible injuries and blood all over her body, her face was swollen and the area around her eyes had blue bruises.

□23]He went back home and found the accused in his shack. The accused did not respond when he asked him what he did the previous day and that Johanna reported to him that she saw him and the deceased fighting and pulling each other. He told the accused that he was leaving and if the community members come and find him in their yard, he will see to finish. He was in a state of shock and left.

□24]During cross examination he testified as follows; he spent quite some time at Carter's tavern. The deceased was heavily under the influence of liquor when he saw her at the tavern. The accused arrived few hours after their arrival at the tavern, but he did not stay for a long time. They were all heavily under the influence of liquor when they left the tavern (himself, Seun

and Nomthandazo). The tavern is closer to his place, the lights of the houses from the tavern to his place were on and it was illuminated outside and he did not have a problem of it being dark.

□25]He went to Ruby's tavern with the accused and drank one beer. He conceded that when they both went back home after the closure of Ruby's tavern, he was heavily under the influence of alcohol and the accused went to his shack. The deceased was at Carter's tavern and not Ruby's tavern. He last saw the accused while he was standing at the gate of Carter's tavern with the deceased.

□26] He did not see him when he left and he does not know where he went to. He disputed the version of the accused that he found him at Ruby's tavern. During questioning by court, he testified that he decided to go back to the tavern to look for the accused when he arrived home and after realizing that he was not present at his shack. He found him at Carter's tavern with Johanna. He went with him to Ruby's tavern and thereafter they went home.

□27]Ntombi Hlophe corroborated Thamsaqa that she is his sister. The accused is their brother's child. They have known the accused since he was still very young. The accused grew up at their place and the accused was still staying at their place with them at the time of the incident. The accused was staying in a shack and they are staying in the main house. She had a good relationship with the accused prior to the incident. She started to stay with the accused during 2010, after the passing of her mother. She corroborated Johanna that it had rained during that night but it had stopped and that it was dark and cloudy.

□28]She testified as follows; she went to bed the previous night and later woke up to relieve herself. She decided to peep through the window inside the toilet before going back to bed and she saw a human figure. It was

bending slightly forward, with both hands on a knee level position, holding something reddish. She observed carefully and saw that it was the accused. In the morning, on her way from Extension 6, she saw the community members gathering in the veld. She went closer to them and she saw a female person lying on the ground. She overheard the community saying that she was with the accused at the tavern the previous night.

□29]She went back home and went to the accused's shack, as the door was open. He found the accused in the company of his girlfriend, Kutlwano. She knew her by sight. She confronted the accused with the information she received that he was with a certain lady at the tavern. The accused looked at her, but did not respond. She further told the accused that she saw him pulling something reddish. She then saw bloodstains around the door. It had rained the previous night and she also saw dragging marks on the ground. She went inside the shack and checked his laundry basket. She saw his pair of jeans and a t-shirt with bloodstains. The accused just kept quiet while she was talking to him, after the discovery of the aforementioned.

□30]She left the clothes and went to inform Thamsaqa about what she observed at the shack of the accused. Thamsaqa also informed her that he saw the accused in the company of the person found lying in the veld the previous night at the tavern. During cross examination, she testified that when she went to the toilet that evening, it had stopped raining. She peeped through the window facing the road. The house is situated closer to the fence. The accused was outside the yard, on the other side of the road, in a passage between the carwash and the church. The distance between her and the accused was 10.7 meters.

□31]During April 2021, the police came to her and took down her statement after interviewing her. She did not see the police officers at the scene where the person was found lying in the veld. She did not see the human faeces

inside the accused's shack. She was not certain if she saw the accused earlier, before seeing him in the evening, as he normally enters and leaves the house constantly. She does not know if the accused killed the deceased.

□32]She was criticised for not informing the police immediately after the incident as her statement was only made during April 2021. Her response was that she was scared, shocked and traumatised by the incident.

□33]Mapitse Kutlwano Pitse testified as follows; she was the girlfriend of the accused until his arrest in 2020. They dated for a period of two to three years. During 2020, either on a Friday or Saturday, around 12h00 and 01h00 in the early hours of the morning, the accused and his uncle, Thamsaqa, found her at Ouma's tavern. They consumed alcohol and after they finished, they went to the place where the accused and his uncle reside. Upon arrival, she and the accused proceeded to his shack.

□34]She observed the following inside the shack of the accused; it was in a state of mess; the sofa was improperly placed and not its usual position; there was a smell of human faeces and it was clear that something like a fight happened. She asked the accused what had happened. He replied that Godfrey and his girlfriend were in his shack. They slept and the next morning, the accused cleaned the human faeces, which was behind the sofa, with water which was inside the bucket.

□35]She corroborated Ntombi and Thamsaqa that the accused is staying in the same yard with them but he is occupying a shack while they stay in the main house. She corroborated Ntombi that in the morning after they woke up, she came to the shack of the accused, that next to the door there was dragging marks and it looked like something was pulled and there were also droplets of blood. Further, that Ntombi entered inside the shack and took out a t-shirt and pair of jeans which had bloodstains and soil from the laundry

basket.

□36]She testified that Ntombi left with the accused and proceeded in the direction of the street. She remained inside the shack. The accused told her that the community members are looking for him when they returned to the shack. Ntombi told the accused to leave as she does not want bad things to happen in their shack. The accused refused and denied that he had done anything wrong. Ntombi persisted and the accused packed his clothes, and left. Later, the accused came back and told her that he did not get transport to go the place that the aunt suggested he should go to. Her relationship with the accused was fine. He did not want other men around her.

□37]During cross examination she testified as follows; she was heavily under the influence of alcohol when she arrived at Ouma's tavern. Inside the shack of the accused, the bed was also not in its usual position. The accused went directly where the faeces was and took a bucket with water to clean it. She asked the accused several times if he had committed the act as alleged, but he denied it.

□38]She cannot recall whether the accused unlocked the door or not when they arrived at his shack. She later realized that the accused was no longer staying at his place. She did not see the accused until he was arrested and she does not know when he left and where he moved to. The police came to her place long after the incident, on 13 April 2021 and obtained her statement. The deceased was not known to her.

□39]She later testified that she was not certain if the accused's uncle was at Ouma's tavern. During questioning by court, she confirmed that the dragging marks were at the door of the shack and that there was a funeral at Godfrey's place on the same day of the incident.

□40]Godfrey Sotyfa corroborated Kutlwano Pitse that around 2020, there

was a funeral of his grandmother at his place. He testified as follows; he knows the accused and they grew up together in O[....] farm. He is not related to him. He had a good relationship with him. He was in the company of his friend, Bongani on Friday

night before the funeral, and not the accused. He did not offload meat from the bakkie at his place with the accused.

□41]Upon his arrival at his place, in the company of Bongani, the meat was already offloaded from the bakkie. He left his place with Bongani around 18h00 and they went to Bongani's place where they consumed Black Label beer and thereafter, they went to sleep. During cross examination, he testified that the police officers came to him during April 2021. They obtained his statement and informed him that the accused was arrested the previous day.

□42]On Friday night before the funeral, he was not heavily under the influence of alcohol and he is able to recall the events of that night. The deceased is unknown to him. The accused was not his friend. He seldom used to sit and chat with the accused. He knew that Kutlwano was the accused's girlfriend. He knows nothing about the death of the deceased.

□43]The State indicated that the witnesses, Seun and Nomthandazo were present, and were made available to the defence. The State's case was closed.

THE EVIDENCE FOR THE DEFENCE

□44]The accused testified and did not call witnesses. He corroborated Johanna that he knew her, they grew up together, they had a good relationship and held no grudges against each other. He corroborated Ntombi that she is his aunt and they had a good relationship. He corroborated

Thamsaqa that he is his uncle and they had a good relationship. He corroborated Kutlwano Pitse that she was his girlfriend and they had a good relationship. He corroborated Godfrey that they grew up together and they had a good relationship.

□45]His evidence, in brief, is as follows; on 28 February 2020 from 18h00, he was with Godfrey and Bongani at Godfrey's place, as there was a funeral. He went to Bongani's place. Godfrey and Bongani also came to Bongani's place and found him there. They proceeded to Miya's tavern. He left Godfrey at Miya's tavern and went to Matyre tavern, where he found one of his friends, Soviet. He left around 22h00 and went back to Miya's tavern to look for Godfrey but he did not find him. He thereafter went to other places which sold liquor namely, Metsing's place and Msikhanti's pub to consume alcohol.

□46]He thereafter went to Ruby's tavern. He sat down and drank liquor. His uncle arrived at Ruby's tavern after 15 or 20 minutes. It was around 22h00. He had a discussion with him over two bottles of beer. They left and went to Ouma's tavern, which is opposite to Ruby's tavern, where he found his girlfriend, Kutlwano. They spent a few minutes there, then went to his place with Kutlwano and his uncle.

□47]He was moderately under the influence of alcohol. His uncle was heavily under the influence of alcohol. He disputed that he was at Carter's tavern with the deceased, that Johanna met them on her way to Carter's tavern and saw him assaulting or pulling the deceased. He denied that he killed the deceased.

□48]The defence case was closed.

ISSUES IN DISPUTE

□49]What appears to be in dispute is who had committed or perpetrated the

act set out in the charge?

□50]The State had a duty of proving whether or not the accused herein was the perpetrator of the above charge.

THE EVIDENCE FOR THE STATE

□51]The State handed in the affidavit of Sergeant Abram Moseki by consent and led viva voce evidence of five witnesses.

THE EVIDENCE FOR THE DEFENCE

□52]The accused testified and did not call witnesses.

□53]The State led direct evidence and circumstantial evidence.

UNDISPUTED FACTS

□54]The following facts are not disputed:

54.1.The discovery of the deceased at a veld, her transportation to fire station and to hospital, cause of death and her identity, and that the deceased did not sustain further injuries when removed from the crime scene until the post mortem examination was conducted.

54.2.Dr Susana Catherina Fourie conducted the post mortem on the body of the deceased and found that the cause of death was blunt force trauma to the brain.

54.3.The deceased was found in a veld. She was dirty with multiple injuries on her face and on her head. She could not speak.

APPLICABLE LAW

□55]In **S v Mthethwa 1972 (3) SA 766 (A)**, the Court held;

"Because of the fallibility of human observation, evidence of identification is approached by the courts with some caution. It is not enough for the identifying witness to be honest. The reliability of his observation must also be tested. This depends on various factors, such as lightning, visibility, and eyesight; proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility; of the scene; corroboration; suggestibility; the accused's face, voice, build, gait and dress; the result of identification parades, if any, and of course, the evidence by or on behalf of the accused ..."

□56]When dealing with circumstantial evidence, the enquiry before the court is whether on the evidence before it, it could reasonably come to a conclusion that it was indeed the accused who perpetrated the offences in question (see **S v Nduna 2011 (1) SACR 115 (SCA)**).

□57]According to **R v Blom 1939 AD**, two requirements must be satisfied; firstly, whether the inference sought to be drawn is consistent with all the proven facts because if not, then the inference cannot be drawn; and secondly, whether the proven facts are such that they exclude all other reasonable inferences from them save the one sought to be drawn. If the proved facts do not so exclude all other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct (see **S v Sesetse 1981(3) SA 353 (A)** at 369 - 370 and **S v Morgan 1993 (2) SACR 134 (A)** at 172).

□58]In order to decide whether the State has proved its case beyond

reasonable doubt based on circumstantial evidence, the court needs to take into account the cumulative effect of the evidence before it as a whole (see **S v Snyman 1968 (2) SA 582 (A)** at 589F and **S v Hassim 1973 (3) SA 443 (A)** at 457H)

EVALUATION

□59]The State has a duty to prove the guilt of the accused beyond reasonable doubt. In evaluating the evidence, the totality of the evidence must be taken into account (see **Zwane and Another v S (426/13) [2013] ZASCA 165 (27 November 2013)** at para 13; also, **S v Meyden 1999 (2) SA 79 (W)** at 82 0-E; **S v Van Aswegen 2001(2) SACR 97 (SCA)** at para 8; **S v Chabalala 2003 (1) SACR 134 (SCA)**).

□60]The evidence of Sergeant Abram Moseki, regarding the visible injuries on the deceased, was corroborated by Johanna and Thamsaqa. Further, that the deceased was still alive but could not stand up or talk. The court accepted their evidence that the deceased sustained serious injuries to her face. It is common cause that she died as a result of those injuries.

□61]The accused corroborated Johanna that they grew up together, they are well known to each other and they had a good relationship at the time of the incident. Johanna admitted that it was dark. She was adamant that she was able to identify the accused and the deceased after they walked very close to her, and that they were facing each other. She estimated the time she spent with the accused and the deceased to be five to ten minutes.

□62]The deceased was also very well known to her. She was corroborated by Thamsaqa that when she arrived at the tavern, she immediately reported that she met the accused and the deceased on her way to the tavern. She stood by her version throughout. It is her testimony that when she left the tavern, she was heavily under the influence of alcohol and that when she met

the accused and the deceased, she was sober.

□63]In ***R v Dlad/a and Others 1962(1) SA 307 AD*** at 310C, the Court held as follows:

"One of the factors which is of great importance in the case of identification is the witness' previous knowledge of the person sought to be identified. If the witness knows the person well or has seen him frequently before, the probability that his identification will be accurate is substantially increased; and the questions of the identification marks, of facial characteristics, and of clothing are of much less importance. What is important is to test the degree of previous knowledge and the opportunity for a correct identification, regard being had to the circumstances in which it was made."

□64]Johanna had ample opportunity to observe the accused and the deceased as they walked closer to her, and in particular, their faces as they were facing each other while she was trying to reprimand the accused. The accused was well known to her and her accuracy to identify the accused increased, as was held in ***R v Dladla (supra)***. The Court finds that she was an honest and reliable witness.

□65]Thamsaqa has known the accused since he was still very young. The accused grew up at his place. He had a discussion with him at the tavern. He spent quite some time with him at the tavern and the accused also bought him two bottles of beer. He had a good relationship with the accused. He was not heavily under the influence of alcohol when he was with the accused. The accused arrived when he was sharing one bottle of beer with his friends. He conceded that, at a later stage, he was heavily under the influence of alcohol. It is improbable that he mistook the identity of the accused and that he would falsely implicate the accused.

□66]It was argued on behalf of the accused that there is a material contradiction in his evidence and that of Johanna regarding whether or not the accused and the deceased had a love relationship. There is indeed a contradiction, as stated by Mr Moeng. The inconsistency in his evidence and that of Johanna as to whether or not he told Johanna that the accused and the deceased had a love relationship is found not to be material.

□67]Mr Moeng further argued that he contradicted Johanna as she did not mention that later that night he came back to the tavern and found her fighting for a beer with the accused. Johanna testified that she left the tavern in the early hours of the morning and she was heavily under the influence of alcohol. The Court finds the discrepancy not to be material. He stood by his version throughout. The Court finds that he was an honest and reliable witness.

□68]Ntombi Hlophe stood by her version throughout. The accused corroborated her regarding their blood relationship, that he is well known to her and that at the time of the incident they had a good relationship. She conceded that it was dark and it had rained earlier, but when she carefully observed and identified the person, she saw holding something reddish as the accused, it had stopped raining. Further, that the house is situated closer to the fence and she could clearly see in the passage between the church and the carwash.

□69]She was asked how she managed to identify the accused who was 10 meters away from her, at night, and when it was also dark and raining. She replied that the light affixed outside the house was lit and she knows the accused very well and she carefully observed him. She was adamant that she saw the accused. Her testimony that the next morning she told the accused that she saw him when she was having a discussion with inside his shack and the accused never responded, was not disputed.

□70]Her version that she was not able to see the clothing of the accused confirms that she is honest as it would be difficult, if not impossible, to identify the clothes of the person who was bending forward with both his hands in a holding position and at a knee level. The submissions by Mr Moeng is that Ntombi investigated the accused but failed to inform the police about her investigation. In my view, her conduct confirms that she was adamant that she identified the accused as the person who was holding something reddish.

□71]She was corroborated by the girlfriend of the accused, Kutlwano, in all material respects regarding her observation outside and inside the shack of the accused. She had a good relationship with the accused and she had been staying with him since the passing of her mother in 2010. She has no reason to falsely implicate him. It is clear from her evidence that she was like a mother to the accused. The accused testified that she often enquired and wanted to know how he was spending his income.

□72]She was criticised for not informing the police officers she found at the scene about her observation. Her evidence is that she only found members of the community. There is no evidence that she found police officers at the scene. Her evidence that she was shocked and traumatised by what she saw at night and further observed at the shack of the accused, is found to be probable. She corroborated Thamsaqa regarding what happened the next morning and the report he received and also the report she made to him, in all material respects.

□73]The accused was well known to her and her accuracy to identify him increased as was held in ***R v Dladla*** (*supra*). The Court finds that she was an honest and reliable witness.

□74]Kutlwano conceded that she was heavily under the influence of alcohol

when the accused and his uncle found her at Ouma's tavern around 12h00 and 01h00, in the early hours of the morning. It was argued on behalf of the accused that there is a contradiction between her evidence and that of Thamsaqa regarding whether or not they found her at Ouma's tavern or Ruby's tavern. Her testimony is that they found her at Ouma's tavern whereas Thamsaqa testified that it was at Ruby's tavern.

□75]She testified that her ability to recall the events of the early hours of the day of the incident was affected by her state of intoxication. Her testimony that Ruby's tavern and Ouma's are opposite each other was not disputed. Both Kutlwano and Thamsaqa corroborated each other that at that stage, they were heavily under the influence of alcohol. The Court finds the contradiction in their evidence is due to poor recollection, as they were heavily under the influence of alcohol. Further that it is immaterial.

□76]It is her evidence that in the morning, Ntombi came to the shack after they woke up and they were sober. The room was in the same state it was when they arrived in the evening, as they went straight to bed. She corroborated Ntombi, who was also sober about her observation inside and outside the shack of the accused. Her following version was not disputed: her observation of the condition or the state of the room immediately when they woke up, but before the arrival of Ntombi; that the accused went straight behind sofa with a bucket and water to clean the human faeces; and that when she asked the accused why the room was in that condition, he replied that he borrowed it to his friend Godfrey and his girlfriend.

□77]It is settled law that an opposing party is under a duty,

"...when it is intended to suggested that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact

*that by questions put in cross-examination showing that the imputation intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character." (see **President of the Republic of South Africa v South African Rugby Football Union 2000 (1) SA 1 (CC) para 61.**)*

□78]There is accordingly no basis in law for this court to discredit Kutlwano on her evidence which was left unchallenged in cross examination. Her relationship with the accused was good. She had no reason to collude with other witnesses to falsely implicate him. Her love relationship with the accused ended that morning, as she did not see the accused after that day and she did not know where he moved to. The Court finds her to be a credible and reliable witness.

□79]Godfrey stood by his version that he did not see the accused on the evening before his grandmother's funeral and that he was not in the company of the accused at any stage. The accused corroborated him that they grew up together and that their relationship was good at the time of the incident. The Court observed him during his testimony and found his demeanor to be good. It is improbable that he would collude with other witnesses to falsely implicate the accused.

□80]The Court will now assess the evidence of the accused. It is trite law that the accused is entitled to be acquitted if his version is found to be reasonably possibly true. The version of the accused is that he was at Godfrey's place earlier that evening, and later he was with his girlfriend, Kutlwano. He denied being in the company of the deceased at any stage on the night of the incident. Godfrey disputed his. The version of Godfrey during cross examination that he has never slept at the accused's place was not challenged. The version of Kutlwano that accused informed her that Godfrey

and his girlfriend were at the shack was not disputed.

□81]The accused did not tell his aunt that his friend Godfrey was inside the shack with his girlfriend during her conversation with him inside his shack in the morning. Godfrey was called as a state witness and the explanation given by the accused to Kutlwano, when she enquired why the room was in the state of mess, that Godfrey and his girlfriend was in the shack, was not put to Godfrey.

□82]The question is if Godfrey was never at the shack of the accused and has never slept there, why would the accused inform Kutlwano when asked about the state of the room that Godfrey and his girlfriend were at his shack? Why would the accused conceal the particulars of the person(s) who left his shack in a state of mess by telling Kutlwano that it was Godfrey and his girlfriend? If the accused did not know who was in the shack, why was it difficult to say so to Kutlwano?

□83]If the accused was at all times with Godfrey and Bongani in the early evening on Friday night, as per his testimony, why did he tell Kutlwano that Godfrey was with his girlfriend inside his own shack. If the accused allowed Godfrey and his girlfriend to go to his shack, why did he not tell Ntombi when asked him about the presence of the blood drops and dragging marks at his shack in the morning?

□84]After Ntombi took out his bloodstained clothes from the laundry basket, why did he not inform her that he was assisting with offloading meat at Godfrey's place? Kutlwano testified that there was soil and bloodstains on the clothes of the accused that was removed from his laundry basket. Her evidence was not disputed. The question is if the accused only offloaded meat at Godfrey's tavern, why was there soil on his clothes too? The aforementioned conduct of the accused affects the credibility and reliability of

his evidence.

□85]The abovementioned conduct of the accused strengthens the version of all the State witnesses. In his evidence in chief the accused testified that around 22h00 that evening he went back to Miya's tavern to look for Godfrey but he did not find him. He thereafter went to other places which sold liquor namely, Metsing's place and Msikhanti's pub to consume alcohol. Johanna stood by her version that she left her place and went to the tavern around 22h00, and along the way met the accused and deceased. The version put to Johanna is that the accused was with his girlfriend.

□86]The undisputed version of Kutlwano is that she was not in the company of the accused around 22h00 but met with him late in the evening. It is clear from the evidence of the accused and Kutlwano that they were not in the company of each other around the time that Johanna said she saw the accused and the deceased in the street.

□87]In my view, despite some attempt on the accused's behalf to suggest that the witnesses conspired to fabricate their evidence and to corroborate each other, there is clearly no basis for them to do so. I weighed the probabilities and the improbabilities of both versions. I also took into account the credibility of the witnesses and finds the version of the accused to be inherently improbable.

□89]The submissions of Mr Moeng, that it could be any person other than the accused that assaulted the deceased, is based on speculation. It is trite law that the inference cannot be drawn from the vacuum.

□90]The evidence presented by the State established that the accused was seen by his uncle in the company of the deceased at the gate of Carter's tavern; Johanna saw the accused arguing, dragging, assaulting and pulling the deceased towards the direction of his place; on the very same evening,

Ntombi saw the accused holding something reddish; the deceased was wearing red pants; the observation of Ntombi inside and outside the shack of the accused on the next day are on record; the unchallenged evidence of Kutlwano that, in addition to the bloodstains, there was soil on the clothes of the accused; the unchallenged evidence of Thamsaqa that his place is not far from the tavern; the deceased was found lying on the ground and badly injured in the veld wearing red pants and white top, not far from the accused's place and the cause of the death of the deceased.

CONCLUSION

□91]Having regard to the totality of the evidence, the Court finds that the only inference to be drawn is that after the accused was seen leaving Carter's tavern with the deceased and also seen on the street arguing with the deceased, punching her with a fist and when she fell down, pulling her towards his place. The accused thereafter proceeded to his place with the deceased; the blood drops and dragging marks found next to the shack of the accused were caused by the accused, while he was dragging and assaulting the deceased; the mess of the furniture inside the shack and the human faeces were caused by the accused and the deceased; the injuries that were sustained by the deceased were inflicted by the accused and the deceased died as a result of those injuries.

□92]The Court is satisfied that the State has proven the guilt of the accused beyond reasonable doubt. The version of the accused is found to be inherently improbable. The accused is found guilty of murder read with the provisions of section 51(2) of the Criminal Law Amendment 105 of 1997.