

Reportable:	YES / NO
Circulate to Judges:	YES / NO
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IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

Case No : K/S 21 /2016
Heard on: 05/09/2016;
07-09/09//2016
21-24/11/2016
Delivered on: 07/12/2016

In the matter between:

THE STATE

v

NEVILLE VAN STADEN

ACCUSED

JUDGMENT

MAMOSEBO J

- [1] The accused, Mr Neville Van Staden, is indicted on one charge of murder read with s 51 of the General Law Amendment Act, 105 of 1997, as amended, a second count of assault common, a third of assault with intent to do grievous bodily harm and a fourth of assault common. The

Justice Centre appointed Adv Maphalla on judicare to represent him. He pleaded not guilty on all four counts and did not tender any plea explanation or make any admissions. The State is represented by Adv Kgatwe from the office of the Director Public Prosecutions (DPP).

- [2] The post mortem report was handed in by agreement and marked Exh “A”. The accompanying photos and the affidavit in terms of s 212 of the Criminal Procedure Act, 51 of 1977 (the CPA) by W/O Maureen Mokgokolo marked Exh “B”; the photos from the crime scene and the affidavit in terms of s 212 of the CPA by W/O Phathutshedzo Tshibalo marked Exh “C” were all formally admitted in evidence. The accused further formally admitted the identity of the deceased, Ms Nancy Jas.

THE STATE CASE

- [3] Ms Lya Olyn is a registered nurse with a diploma in General Nursing. She has been in the profession for 30 years. She certified the deceased dead at the scene on 05 December 2015. The defence did not cross-examine her. The deceased’s body was removed from the scene by Mr Isak De Vos, a Pathologist Officer employed by the Department of Health for the past 27 years, and transported to the mortuary. The body did not sustain any further injuries during the transportation to the mortuary where he registered it under the De Aar No 224/2015, and up to the occasion that the post mortem was conducted.
- [4] Dr William Andrew Van der Merwe, permanently employed by the Department of Health and stationed at the Forensic Laboratory at De Aar, conducted the post mortem on the body of the deceased on 10 December 2015. His academic qualifications are a BSc, MBChB obtained from the

University of Rhodesia in 1975 as well as a diploma in Occupational Health (DOH) from the Witwatersrand University and a diploma in Forensic Pathology (Dip For Med (SA)) from the South African College of Forensic Pathologists obtained in 1998. His qualifications and credentials are not disputed. The Chief post-mortem findings were:

- 4.1 Multiple external and internal assault injuries; and
- 4.2 Strangulation.

[5] The doctor concluded that the cause of death was Asphyxiation (lack of oxygen to the body) due to strangulation, as well as the consequences of multiple assault injuries. The body of the deceased was depicted on the photographs as having sustained innumerable injuries which the doctor categorised under three heads: Abrasions, contusions and lacerations. It is necessary to mention all the identifiable injuries because they collectively contributed to the cause of death.

5.1 Abrasions

Abrasions were found all over the left side, the right side and the anterior aspect of the forehead; all over the left side, the right side and the anterior aspect of the chin; all over the left side, right side and the anterior aspect of the neck; all over the left and right cheeks; all over both knees; on the posterior aspects of both shoulders; all over both elbows; on the lumbar (lower) aspect of the back; above the left buttock; and on the lateral aspect (outer part) of the left upper leg.

5.2 Contusions (bruising)

They were on the right side of the chin; all over the middle of the back; on the lateral aspect of the right outer leg; above the right iliac crest (just above the right hip); and on the lateral aspect of the right upper arm. The doctor explained that the contused areas

were confirmed by dissecting the skin and confirming blood in the sub-cutaneous tissues, simply put, there was blood found in the tissues after the dissection.

5.3 Laceration

The doctor found a small laceration into the right naso-orbital junction (just below the right eye). It did not penetrate the right orbital cavity.

5.4 There was sub-cutaneous bruising on both sides of the scalp.

5.5 The deceased sustained multiple rib fractures. The ribs 6 – 10 on the right side were fractured while on the left side all the ribs 2 – 10 were fractured. These fractured ribs caused a laceration in the upper lobe of the right lung and the left lung was pulpified. There was also pulpification of the right lobe of the liver.

[6] The doctor clarified that all the injuries sustained were caused by severe blunt force and amplified that even if the deceased was treated by all the specialists surgeons the world over, based on these injuries, she would not have survived. The deceased was simply tortured to death. **Based on the medical evidence I am satisfied that the state has proved beyond a reasonable doubt that the deceased was murdered. The only question now left for determination is who the murderer was.**

[7] **This is how the events in count 1 unfolded. Mr Raymond Van Wyk is 35 years old and is the deceased's cousin.** He resides in the same house as the deceased's mother. On 04 December 2015 after knocking off from duty between 21h00 and 22h00 he visited a friend in the informal settlement known as Plakkerskamp. From the friend's place he proceeded to the accused's residence to repay him the R10 that he owed him. The accused was the deceased's boyfriend and they lived together.

- [8] As Van Wyk approached the couple's shack he heard an argument. Upon arrival he found the door to the one-roomed shack open and the accused standing at the door. It was dark inside. At the accused's request he used the assistive device of his cellphone to illuminate. He shone the light on the deceased's face. She was lying on the bed. He observed that the deceased's face was swollen, her nose was bleeding and her mouth was full of blood. The accused came and sat next to the deceased as she reported to him how the accused assaulted her. Van Wyk pleaded with the deceased to leave with him but the accused refused. The deceased was evidently severely beaten and Van Wyk was concerned for her safety.
- [9] Mr Van Wyk reluctantly left the deceased with the accused and went home where he first made a report to his father and later to the deceased's mother, Mrs Feitjie Jas. Mrs Jas undertook to visit the deceased the next morning. The following morning, upon his urging, the deceased's mother left for the deceased's place. Upon her return she was crying and reported to the family that the deceased was dead, which is common cause. Van Wyk did not observe the state of sobriety of the accused the previous night because the room was dark.
- [10] It must be borne in mind that a report recounted by a witness concerning what a victim of an assault relayed to the witness in the presence and hearing of the culprit (the assailant) is not hearsay evidence. She told Van Wyk: "Neville assaulted me". This statement was not controverted by the accused at the time.
- [11] During cross-examination of Van Wyk, his counsel put it to him that there was an altercation between him and the accused over an amount of

R250 which Van Wyk owed him. It was denied that there was an altercation between the accused and the deceased as he had testified. It was further put to Van Wyk that when he arrived the accused was not present in the house but on the contrary the accused found Van Wyk already there. Van Wyk's presense with the couple between 21h00 and 22h00 on 04 December 2015 has been established to my satisfaction.

[12] **This is Mr Frans Wewu's account. He is an uneducated 55 year old man and the complainant in Count 2.** His evidence by sheer coincidence also relates to Count 1. He went to a tuck-shop in his vicinity around 21h00 on 04 December 2015 to buy himself half a loaf of bread in order to prepare his lunch box for the following day. The customers purchased through a window of the tuck-shop. The shopkeeper served them from inside the caravan. The source of light inside the tuck-shop was a rechargeable lamp which illuminated up to the service point. Outside the tuck-shop visibility was provided by a nearby high-mast light commonly known as an Apollo-light.

[13] Wewu stood behind the accused who was buying lose cigarettes. After the transaction the accused took a few steps as though he was leaving but turned and charged at him. The accused delivered a blow just above his right eye with a clenched fist. He said something to the effect that he was Neville and should not be undermined. Wewu showed a one (1) cm healed scar just above his right eye. He did not receive any medical attention.

[14] The accused moved about 45 metres away and again returned to where Wewu was still waiting to be served. He then drew a sheepshear blade from the left side of his hip. He repeated that he should not be

undermined because he would stab and kill Wewu. Wewu did not respond as he was frightened. He paid for the bread and went home. The assault and threat were unprovoked. Although he wanted to go elsewhere that evening he feared that the accused would carry out his threats and retired to bed.

- [15] While trying to dose off Wewu heard a loud male and a female voice and recognised the male voice as being similar to his assailant's at the tuck-shop. The female screamed repeatedly: "*Neville you're killing me, Neville you're injuring me.*" The male voice reprimanded: "*You are making noise you bitch*". Wewu eventually fell asleep.
- [16] Wewu's shack and that of the couple are very close to each other, just across the road. Wewu was too scared to intervene or investigate, for the stated reason. The next morning around 04h00 he heard male voices and running footsteps. A male voice cried out: "*Neville ek het jou niks gemaak.*" The now familiar voice responding: "*I am not done with you, I will get you.*" It transpired, see paras 17 – 21 below, that it was in fact the accused who chased Mr Phillip Kers. In the morning while taking a bath he heard many voices outside. He later established from Ms Dimakatso Patosi that the deceased had died. Ms Patosi testified. The police later arrived. The deceased's body was taken away.
- [17] **Mr Phillip Kers, the complainant in Counts 3 and 4 knocked off from work around 17h00 on 04 December 2015.** He visited his aunt and had wine with the family. He left around 21h00 for his home. On his way he met his friend Pate and his girlfriend and invited them to his place for a drink. Just before they arrived at his place, as they walked past the accused and deceased's shack, he heard the accused's girlfriend

screaming thrice: *"Neville, Neville please don't kill me."* It went quiet for a while. They sat next to the door of his shack ("K2") diagonally opposite the accused's shack ("K1") measured by W/O Tshibalo of the Local Criminal Record Centre at about 7.2 metres away. The location where Kers and his companions sat is depicted as point B on photo 11 of Exh "C". From where the deceased was lying, Point A on Exh "C", to the point where Kers was standing when he heard the screams was measured to be 18.5 meters.

- [18] As Kers and his guests were having a drink, he saw a person, the accused, walking past a thorn tree, depicted on photo 10 of Exh "C". He asked where "Phillip", meaning Kers, was. Mr Terence Klaaste pointed out that Phillip was with them where they were seated. Kers noticed that the accused was armed with a sheepshear blade. As the accused was approaching he sensed that an attack was imminent. He was amazed because the accused had never set foot at his place before. Kers then fled. The accused closely pursued him but he managed to evade him and sought refuge at his cousin's place where he spent the night.

- [19] Without warning and unprovoked the accused angrily pounced on Kers in the early hours of the morning around 05h00 while he was seated outside his cousin's house. The accused hit him once with a clenched fist on his mouth, flooring him. Whilst still so sprawled the accused kicked him with booted feet in the stomach, causing severe pain. He sustained injuries to his mouth and bled therefrom.

- [20] Kers fled to the home of Ms Dimakatso Patosi, a community leader in the area, to seek her intervention. Although she was reluctant at first to intervene that early the persistence by Kers' knock on her door left her

with no option but to accompany him to the accused's place. Upon their arrival she entered the shack alone while Kers stood outside terrified of the accused. The accused was absent but the deceased was found dead inside. The reasons for his unprovoked assault on Kers and his relentless pursuit of him with a dangerous weapon are a mystery to Kers.

- [21] The cross-examination of Kers by the accused's counsel suggested that the accused was not the person heard by the witnesses to have been inside the shack during the deceased's screams. It was further suggested that the accused merely chased Kers away because Kers asked him for a puff on his cigarette. He would have told Kers that he did not want people near his shack as he had recently suffered some loss after a housebreaking. It was also put to Kers that he hurled stones at the accused at the tuck-shop because Kers took exception to the accused having accused him of breaking into his shack and stealing therefrom.
- [22] **Mr Terence Klaaste** testified and corroborated Kers in all material respects. **Mrs Dimakatso Patosi** on the other hand corroborated Kers' testimony in all material respects. Ms Patosi went on to explain that she later re-entered the deceased's house accompanied by Ms Lena "Auntie Vonkie" Olivier, an elderly 72 year old pensioner, and the deceased's mother, Mrs Feitjie Jas, on 05 December 2012. Mrs Patosi, Mrs Olivier and Mrs Jas described their observations of the injuries on the body of the deceased as she was sprawled lifeless on the bed. The abrasions and swelling on her face with some dried blood from her mouth had attracted flies. In desperation, the deceased's mother called out her name three times, presumably in shock. Patosi advised the elderly ladies not to touch the body as she had telephonically contacted the police, who arrived

shortly. An ambulance also arrived while the witnesses were still at the scene.

[23] Mrs Jas testified and corroborated what was stated by Patosi. She expounded that the accused and the deceased were not married but had three children between them. The eldest is 21 years old and resides elsewhere in Kimberley while the 15 year old resides with the deceased's brother and still attends school. The 10 year old boy resides with another member of the family. The accused does not contribute financially or otherwise to the wellbeing of his children, she said.

[24] **Const Pule Matheatau, attached to the Visible Policing SAPS Unit,** testified that he and Const Kies were on duty on 05 December 2015 around 06h15 in the morning when they received information from the Customer Service Centre (CSC), the old-styled Charge Office, that there was a woman who has been beaten and was lying motionless on the bed. They rushed to the scene where Patosi pointed out the shack and the deceased to them. Const Matheatau observed that the deceased had a swollen face and had blood around her mouth. She also had scratch marks on the right side of her face. He immediately cordoned off the area and summoned an ambulance and the detective on standby duty, Sgt Riet. He handed over the crime scene to Sgt Riet. The deceased did not sustain any further injuries in his presence. The deceased was wearing red shorts and a white t-shirt.

[25] **W/O Tshibalo, a South African Police Service Member attached to the Local Criminal Record Centre, De Aar,** testified that he completed an affidavit in terms of s 212 of the Criminal Procedure Act, 51 of 1977 (the CPA), with the photographs marked Exh "C", having compiled the

photo album of the crime scene. He was contacted by the investigating officer, Sgt Riet, to attend the crime scene at Plakkerskamp in Prieska. He travelled from De Aar which is a distance of approximately 380 km's from Prieska. When he arrived the body had already been removed. Sgt Riet pointed out the scene in the deceased's home and Kers pointed out to him where he was standing when he heard the screams. W/O Tshibalo then compiled the photo album after making his own observations. He did not find any weapon nor observe any blood in the shack. He also saw soiled clothes: A pair of shorts and underwear which had faeces next to the door. He did not know, neither did he establish to whom the clothes belonged. He also did not confiscate them. W/O Tshibalo said for the stated reasons the scene was not original when he arrived.

[26] **Sgt Mmoloki Saviour Riet**, testified that he has been an SAPS member for 12 years, five years of which was served as a detective. He was the detective on standby duty when he responded to a telephone callout. He found Consts Matheatau and Kies at the scene who in due course handed it over to him. He otherwise confirms what is already known and not in dispute. Next to the door was a pair of smelly pants and underwear which were soiled with faeces. He later interviewed the witnesses already identified. The accused was by then among the bystanders. Sgt Riet summoned the LCRC, De Aar.

[27] Sgt Riet spoke to the accused the same morning of 05 December 2015 to ascertain his whereabouts having been informed that he was the deceased's live in partner. At this stage of the interview the accused was not a suspect. The accused explained (what amounts to an alibi defence) to the investigating officer. He said that he had visited the Pers Kombers tavern around 22h00 leaving the deceased behind. When the tavern

closed he left with a new girlfriend whom he found at the tavern and had spent the night with her. The accused could, nevertheless, not furnish to the detective the name of the girlfriend or where they spent the night. He could also not furnish him with names of any other person who could confirm his alibi. He said he was as surprised as anybody else to find people and the police in front of his home that morning. Sgt Riet informed the accused that some witnesses had reported to him that they saw him around the vicinity of Plakkerskamp around 05h00 that morning and enquired from him what his comment was. The accused was unable to answer the detective. Sgt Riet arrested the accused and explained his rights to him whereafter he requested Const Matheatau to take the accused to the police station and to detain him in the holding cells for further questioning as a possible suspect. The explanation of rights was in compliance with *S v Thebus and Another* 2003 (2) SACR 319 (CC).

[28] Sgt Riet interviewed the accused the following day on Sunday 06 December 2015 after explaining to him his rights again as they appear in detail on page 2 of the warning statement.

[29] According to Sgt Riet W/O Tshibalo arrived between 10h00 and 11h00. The body of the deceased had already been removed at his direction because it had been lying there in the shack for several hours from the previous night. He explained that it was December and the temperature in the Northern Cape at the time was scorching. The body was already attracting flies. Members of the community also congregated around the crime scene. In an attempt to manage the situation he then exercised his discretion and allowed Mr De Vos from Forensic Pathology to remove the body which was placed at the back of the forensics' vehicle. Sgt Riet later completed the necessary paperwork.

The State closed its case.

[30] The accused testified in his defence and did not call any witnesses.

His version is that he was seated with the deceased under the veranda drinking wine on the night of the 04 December 2015. He later went to the nearby tuck-shop to purchase a packet of 10 cigarettes, having left the deceased behind. He paid using a R100 note and received R80 00 change which he ostensibly pocketed. When he arrived home he discovered that his money was missing and retraced his footsteps to the tuck-shop. Wewu was at the tuck-shop and was being served from the window. He found the R80 00 next to Wewu who claimed it to be his. He then pushed Wewu who fell to the ground. He did not notice any injuries on him because there was inadequate lighting. He returned home and joined the deceased.

[31] As he and the deceased were seated under the veranda Kers approached them and asked for cigarettes. He warned Kers exclaiming that his landlord, Mr Hemman, complained of the theft of his stones around his premises. He then chased Kers away.

[32] Around 22h00 he informed the deceased he was heading for Queens Tavern. He left her seated under the veranda uninjured. At Queens he drank two 750 ml bottles of black label beer. There were many people at the tavern. He danced to his preferred type of music and played pool. After midnight he walked to his parental home and spent the night there in a back room previously belonging to his younger brother.

[33] The following morning, around 06h10 on 05 December 2015, he went home. His attention was caught by the crowds of people gathered there, with visible police vehicles on the scene. That caused him to increase his pace in curiosity. Upon his arrival Const Adams barred him from entering the shack. Const Kies pulled him aside and asked him to remain calm. The investigating officer, Sgt Riet, then approached him and introduced himself and asked about his whereabouts the previous night. He informed Sgt Riet that he was at Queens Tavern and later went to sleep at his parental home. He was asked to change his clothes to make them available for forensic investigation. He entered the shack to change. It is when he saw the deceased for the first time in that state lying on the bed. The deceased's body was then removed and placed at the back of the pathology van. Sgt Riet then informed him that he is a possible suspect and ordered Const Matheatau to take him to the police station. He denied killing the deceased and does not know what happened to her. He also denied assaulting the two complainants. The accused also denied being in possession of a sheepshear blade.

[34] The four incidents happened at different times but the chronology and their interrelatedness is strikingly unmistakable. I am mindful of the guidance by the Supreme Court of Appeal on the correct approach to the evaluation of evidence in a criminal trial as enunciated by Heher AJA in *S v Chabalala* 2003 (1) SACR 134 (SCA) at 139i – 140b (para 15):

“[15] The trial court’s approach to the case was, however, holistic and in this it was undoubtedly right: S v Van Aswegen 2001 (2) SACR 97 (SCA). 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. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch onto one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence. Once that approach is applied to the evidence in the present matter the solution becomes clear."

This salutary approach by Heher AJA was also adopted in *S v Trainor* 2003 (1) SACR 35 (SCA) at 41b-c (para 9).

Count 2

- [35] Wewu was a single witness on this count. It is trite that the Cautionary Rule is applicable. However, s 208 of the Criminal Procedure Act, 51 of 1977 (the CPA) provides that a single witness' evidence is adequate to sustain a conviction, provided that it is satisfactory in all material respects. See *S v Sauls* 1981 (3) SA 172 (A) at 180E – F. The accused hit him once with a clenched fist and further threatened him with a sheepshear blade. This dangerous weapon was seen by several witnesses whose evidence has been dealt with. Wewu's evidence on this aspect, therefore, does not stand alone. He sustained a 1cm cut above his right eye. He was extensively cross-examined by the accused's counsel but remained consistent in his version. Not once was the version testified to by the accused put to Wewu that he laid claim to the accused's cash of R80 00 which he lost at the tuck-shop. See *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at 36J – 37B (para 61) where the following is stated:

"[61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is 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. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witnesses's testimony is accepted as correct. This rule was enunciated by the House of Lords in Browne v Dunn [(1893) 6 R 67 (HL)] and has been adopted and consistently followed by our courts."

- [36] I find the accused's version to be a fabrication and an afterthought which lacks merit. He attacked Wewu unprovoked. Even on his version alone that he pushed Wewu who fell to the ground amounts to an assault. I however accept the version of Wewu as the truth and reject the accused's. I am satisfied that the State has proved its case beyond reasonable doubt in Count 2.

The accused is found guilty of assault common on Count 2.

- [37] The *modus operandi* of the accused in respect of the assault allegations revealed a pattern. Kers was also very terrified of him to the extent of being afraid to sleep at his own home and sought accommodation at his relatives' place. The accused, charging like a vicious bullterrier, subsequently attacked him at his place of refuge and hit him on his mouth and kicking him in the stomach while he was on the ground. Kers had to persistently knock on Patosi's door, seeking her intervention at dawn. The similarity in the versions of the two complainants is that they had done

nothing to the accused and never retaliated. The accused walked around armed with a sheepshear blade and displayed raw gratuitous aggression. Mr Kgatwe submitted that the fact that the accused did not use the instrument was immaterial because it is his intention to cause Kers grievous bodily harm that must be assessed and for which he must be convicted of assault with intent to cause grievous bodily harm.

[38] The accused disputed both incidents and denied having assaulted Kers at all. According to him he only chased Kers away because he did not want him or anyone else near his shack. If Kers was under no attack the question remains what caused him to flee, leaving his guests with whom he was unwinding at his place. What is worse for the accused is that Kers flees again from his relative's place to Patosi for her intervention. Kers arrived at her home crying and scared. The fear that he displayed was evident to Patosi to the extent that he stood outside the accused's shack afraid to enter when Patosi, a lady, went to enquire from the accused what the reasons for the attacks were.

[39] Unashamedly, the accused falsely claimed that even though the complainants in Counts 2, 3 and 4 identified or pointed to him as the "Neville" who attacked them that there are other people by the name of Neville in the area. In relation to Count 1 it has and will become evident that the accused was trying hopelessly to insinuate that some other person by the name of "Neville" may have committed the murder.

[40] The accused had no reason to threaten and attack Kers in Counts 3 and 4 in the manner described. Similarly, I am satisfied that the State has proved its case in respect of counts 3 and 4 beyond a reasonable doubt.

I therefore find the accused guilty of assault with intent to cause grievous bodily harm in Count 3 and of assault common in Count 4.

[41] In as far as Count 1 of murder is concerned, although no one witnessed the commission of the offence, the circumstances must be looked at holistically. Van Wyk found the accused and the deceased in an unlit shack. The accused denied during cross-examination that Van Wyk found him there. He maintained that he arrived the following morning and found the deceased dead. The explanation proffered by the accused on the injuries observed by Van Wyk is unintelligible. Through the use of his cellphone light Van Wyk observed and described the injuries on the deceased which were similarly described by all the other state witnesses. The dichotomy in the versions of the two is that while Van Wyk maintained that the deceased implicated the accused there and then, in his presence, of assaulting her the accused said that there was nothing untoward with the deceased at that stage.

[42] Van Wyk was concerned and offered to remove the deceased from the accused but the latter prevented him from doing so. This led to an altercation between Van Wyk and the accused. Van Wyk gave up and left. The accused concedes to an argument with Van Wyk that night inside the couple's shack. According to him the altercation preceded the deceased's death and claims that it concerned an amount of R250 which Van Wyk owed to him. This therefore places him on the scene of crime as alleged by Van Wyk at the crucial time.

[43] The commonality of the evidence of Wewu, Klaaste and Kers is that they heard the screaming from the same shack. The female voice was making desperate pleas not to be harmed, killed and indeed sent out an SOS that

she was being killed. Ironically, no one else is said to have been in the company of the accused and the deceased at the relevant time. Fatefully, in the morning the very same person who was shouting for help was found dead. No one was seen entering or leaving the accused's shack at the time of the screaming.

- [44] The question that falls for determination is whether this circumstantial evidence stitched together and accompanied by the complaint to Van Wyk in the accused's presence that he assaulted her justifies a finding of guilt on the murder charge.
- [45] **Let me first deal with the accused's alibi defence.** The duty of the police to investigate an alibi raised by a suspect is trite. See *S v Mlati* 1984 (4) SA 629 (A) at 632 A – D; and 640E – I. The investigating officer, Sgt Riet, testified to the effect that the accused informed him that he went to Pers Kombers Tavern whereafter he left with a girlfriend that he had met at the tavern that evening. He claimed to have spent that night with her. What is incomprehensible and seems farfetched is that the accused could not remember nor furnish the name of that girlfriend to the investigating officer; neither could he remember where he spent the night with her for the investigating officer to confirm or disprove his alibi. The accused's testimony also deliberately avoided naming names, particularly of the people with whom he interacted at the tavern, to enable the investigating officer to confirm or shutter this defence. Despite the fact that he played for a soccer team in Prieska and was known in the area, he stated that he did not remember anyone of the people who were at the tavern that night and he could also not furnish the name of the tavern owner.

[46] In *S v Thebus and Another* 2003 (2) SACR 319 (CC) at 353d – 354b (paras 76 – 78) the Constitutional Court made the following remarks concerning alibi defences:

“[76] After his arrest, the first appellant was confronted by the police with the allegation that he had been present at the scene of the shooting. After having been warned of his rights he was asked by the police, prior to his arrest, what he had to say about these allegations. He chose to proffer an explanation, albeit a truncated one. His response that the family was in Hanover Park is hardly consistent with the alibi subsequently asserted. The only explanation he could give was that he was referring to his family and not to himself. This disingenuous explanation for the failure to disclose the alibi when confronted with the evidence against him can legitimately be taken into account in the evaluation of the evidence. Having regard to the fact that a late disclosure of an alibi carries less weight than one disclosed timeously, the cogency of Kiel's evidence and the unsatisfactory nature of the first appellant's evidence, the trial Court was entitled to reject the evidence of the alibi, and to convict the first appellant.

[77] The trial Court properly convicted the first appellant on a consideration of the totality of the evidence. The appellant's explanation of why he chose to remain silent, the lateness of the disclosure of his alibi defence, the unacceptable evidence which was tendered by two of his witnesses and the cogency of the evidence tendered by Kiel taken together, entitled the trial Court to return a verdict of guilt against the first appellant.

[78] Such is the adversarial nature of our criminal process. Once the prosecution had produced sufficient evidence which established a prima facie case, the first appellant had no duty to testify. However, once he had

chosen to testify it was quite proper to ask him questions about his alibi defence, including his explanation on his election to remain silent. When his evidence was found not to be reasonably possibly true, as did the trial Court, he ran the risk of a conviction. Thus, absent a credible version from the first appellant, the version advanced by the prosecution, if found credible, was likely to be accepted. In S v Dlamini and Others, Kriegler J emphasised the importance of freedom of choice in a democracy. However, liberty to make choices brings with it a corresponding responsibility and 'often such choices are hard'."

- [47] The accused, to his credit, elected outright to disclose to Sgt Riet that he was elsewhere when the deceased was assaulted and strangled. However, his alibi was vague, truncated and ultimately false. Van Wyk, an extremely credible witness, placed him on the scene when the deceased was already badly injured. His responses when questioned about the alibi when he testified were far from satisfactory. Regard being had to *S v Thebus* in para 46 above, I find that the evidence of the accused pertaining to his alibi incredible. In the circumstances, I find that his alibi defence is false. I will also follow the approach in *S v Shabalala* 1986 (4) SA 734 (A) at 736 C – D where the Court pronounced:

"It was proved beyond reasonable doubt that the appellant's alibi was false. The effect of the falseness of an alibi on an accused's case is to place him in a position as if he had never testified at all."

Having rejected the alibi defence of the accused does not however bring the matter to an end. The State still carries the onus of proving its case beyond reasonable doubt.

- [48] There is no direct evidence or eye-witness account in the murder count. I have to consider all the surrounding circumstances in order to arrive at an

irresistible finding. In *S v Reddy and Others* 1996 (2) SACR 1 (A) at 8c – g Zulman AJA pronounced:

“In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true.

The evidence needs to be considered in its totality. It is only then that one can apply the oft quoted dictum in Rex v Blom 1939 AD 188 at 202-203 where reference is made to two cardinal rules of logic which cannot be ignored. These are firstly, that the inference sought to be drawn must be consistent with all the proved facts and secondly, the proved facts should be such "that they exclude every reasonable inference from them save the one sought to be drawn". The matter is well put in the following remarks of Davis AJA in R v De Villiers 1944 AD 493 at 508/509:-

"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."

- [49] Reverting to the facts before me and the circumstances surrounding the deceased's death I infer the following incidences to be supported by the evidence:

- 49.1 The words uttered by the deceased and heard by the witnesses Wewu and Kers relating to the deceased imploring the accused not to kill her and not to injure her and also that he was injuring her and killing her; I find to be credible;
- 49.2 I find that the “Neville” who boasted to Wewu at the tuck-shop that he was “Neville” to be the same person who chased Kers when Wewu heard Kers shouting the name “Neville” and pleaded that he had done nothing to him; In Hoffman and Zeffertt: *The Law of Evidence* 4th Edition, the respected authors put it as follows at p 52:
- “... Similar fact evidence, it will be seen, is only exceptionally admissible. It will be received, exceptionally, only if it is, first, sufficiently relevant to warrant its reception and, secondly, if it has a relevance other than one based solely upon character.” See also *Omega, Louis Brandt et Frere SA and Another v African Textile Distributors* 1982 (1) SA 951 (T).
- 49.3 I find as a fact that Van Wyk placed the accused on the crime scene the night of the incident and discovered some injuries were already inflicted to the deceased’s face and that she was bleeding from the mouth;
- 49.4 I am satisfied that Kers placed the deceased at Plakkerskamp around 05h00 in the morning and thus refuting his claim that he was not at Plakkerskamp between 22h00 and 06h10 the following morning;
- 49.5 I find that the accused’s alibi defence was manifestly fabricated;
- 49.6 It is clear that the accused’s attack on the innocent victims who had not provoked him or given him any justification for the attacks on them shows that he was spoiling for a fight, any fight with whomsoever;

49.7 There is no evidence of the presence of any other person in the shack at the time when Van Wyk observed the injuries on the deceased except for the couple.

49.8 The accused did not deny the assault when the deceased made the report to Van Wyk that he had assaulted her. He just walked towards the bed and sat next to her.

49.9 The accused prevented Van Wyk from rescuing the badly injured deceased from him or seeking help for her; and

49.10 The accused fled from the house and left the deceased to her own fate. He did not summon any medical help and instead raised a false alibi.

[50] In my view the accused was on a mission to indiscriminately terrorise members of the Plakkerskamp community and that the deceased, Wewu and Kers were his easy prey. He was the Goliath of Plakkerskamp. It was very unfortunate and disheartening that this act of terror took the deceased's life in such an inhumane manner.

[51] In *Director of Public Prosecutions, Gauteng v Pistorius* 2016 (2) SA 317 (SCA) at 326H para 26 Leach JA explained that in the case of murder, a person acts with *dolus directus* if he or she committed the offence with the object and purpose of killing the deceased. In *Rex v Ngcobo* 1921 AD 94 Innes CJ stated:

"The law presumes murder from the fact of killing. There can be no doubt that the appellant killed the deceased and that the killing was unlawful. ...An intention to kill is an essential element in murder; but its existence may be inferred from the relevant circumstances."

[52] I am satisfied that the accused acted with the sole intention of killing the deceased. The act of asphyxiation coupled with the excessive force exerted on the deceased's body which caused the multiple injuries sustained was without doubt an indication of a clear direct intent to kill. The deceased's death was therefore also premeditated. As Holmes JA emphasised in *S v Sigwahla* 1967 (4) SA 566 (A) at 570C – E:

“The distinction must be observed between what actually went on in the mind of the accused and what would have gone on in the mind of a [reasonable person] in the position of the accused. In other words, the distinction between subjective foresight and objective foreseeability must not become blurred.”

[53] I am satisfied that the State proved its case beyond a reasonable doubt in respect of all four counts and reject the version of the accused *in toto*. I therefore find that the accused is guilty as follows:

1. **Count 1: The accused is found guilty of the premeditated Murder of the deceased, Nancy Jas, with the direct intent to cause her death;**
2. **Count 2: Guilty of assault common;**
3. **Count 3: Guilty of assault with intent to cause grievous bodily harm;**
4. **Count 4: Guilty of assault common.**



MAMOSEBO J

NORTHERN CAPE HIGH COURT

For the State:

Adv K Kgatwe

Instructed by:

Office of the DPP

For the accused:

Adv M Maphalla

Instructed by:

Justice Centre

Kimberley