



Reportable	YES / NO
Circulate to Judges	YES / NO
Circulate to Magistrates	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
[NORTHERN CAPE HIGH COURT, KIMBERLEY]**

CASE NR: KS 3/2012

DATE OF JUDGMENT: 11/09/2013

THE STATE

V

TSHEPO KENNEDY TAU

ACCUSED

JUDGMENT

PAKATI J:

1. The accused, Tshepo Kennedy Tau, a 30 year old male of Galeshewe, Kimberley, is arraigned on five charges. In count 1 he is alleged to have contravened s 3 read with sections 1, 55, 56 (1), 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007, read with s 51 of the Criminal Law Amendment Act, 105 of

- 1997, and read with s 256 and 261 of the Criminal Procedure Act, 51 of 1977 (“the CPA”), Rape. In count 2 he is charged with murder read with the provisions of s 51 of Act, 105 of 1997. In count 3 he faced a charge of assault with intent to do grievous bodily harm, alternatively mutilation of a body. In count 4 he faced theft and in count 5, assault common. The allegations are that the accused raped, stabbed and murdered the deceased, Sedia Merriam Moemedi, a 51 year old female and also stole her cell phones, a Samsung M620 and MTN cell phone. These incidents are alleged to have happened on 05 June 2011 in Lerato Park, Galeshewe, Kimberley. In count 5 the accused is alleged to have assaulted Segt Gerrit Christofel Faber by spraying him with pepper spray on 18 June 2011 at Kimindustria, Kimberley.
2. The accused is represented by Mr P Nagel on the instructions of Legal Aid South Africa. He pleaded not guilty and denied all the charges. He admitted visiting the deceased on 07 June 2011 and had consensual sexual intercourse with her at her house in Lerato Park. Thereafter the deceased instructed him to leave which he did. He noticed a strange motor vehicle parked at the gate as he was leaving. He also admitted spraying Segt Faber with pepper spray but pleaded self-defence. The MTN cell phone was never recovered.
 3. Ms Liza Seretsi, the deceased’s sister, testified that on 11 June 2011 the deceased’s daughter, Ms Pontsho Ndaba, phoned her and enquired whether the deceased was with her in Bloemhof. She told Pontsho that the deceased was not with her. Ms Seretsi then decided to phone her elder sister, Ms Selina Kedibone Sehako to no avail. She later received a

report that the deceased was discovered dead in her house later that day. She last spoke to the deceased on 04 June 2011.

4. Selina, her daughter and deceased's niece, Queen Sehako, and Ms Louisa Zono also known as Mammietjie, went to the deceased's house to investigate. The gate was locked. They jumped over the fence and proceeded to the door. The door was locked as the key was turned and hanging from the keyhole. Selina unlocked it and they entered the house. The bed was not made up. The deceased was lying on the floor covered with a duvet. The deceased was already dead. Mr Maruping, a neighbour, called the police who arrived shortly thereafter. The police took over the scene and asked them to look for the deceased's identity document which could not be found after a diligent search. Upon checking for missing items they noticed that the deceased's hand bag and two cell phones, a silver Samsung with a slide and an MTN phone, were missing. The MTN cell phone was in working condition but the Samsung's screen had a problem. There was no forced entry into the house. The assailant clearly let himself out. The body was taken to the mortuary.
5. Queen last saw the deceased alive the previous Sunday morning before the Saturday of 11 June 2011 when she fetched water from the tap. She did not visit the deceased during that week because the deceased knocked off late from work, around 17h00. It was during winter and it was cold and raining.

6. On 11 June 2011 Pontsho was called by Mammietjie. She informed her that her mother had died. She immediately phoned the accused but both his phones were off. She called him again after the funeral but in vain. Neither the accused nor his family members attended the funeral. Pontsho corroborated Mammietjie's evidence that the deceased had a sliding Samsung M620 cell phone and an MTN phone. She used the MTN phone to make and receive calls and for sms's. She used the Samsung phone to listen to the radio since its screen had a problem. She also confirmed the evidence of Ms Seretsi on these aspects.
7. Mammietjie testified that she last saw the deceased on a Sunday, 05 June 2011, prior to the Saturday her body was discovered. She had gone to borrow a flame stove from the deceased. She described the accused's relationship with the deceased as that of mother and son. This was confirmed by Pontsho. She disputed that her relationship with the deceased deteriorated in April 2011. In May 2011 the accused told her not to visit the deceased's house anymore as she was a nuisance.
8. W/O Godfrey Williams visited the scene of crime on 11 June 2011 at DH10 Lerato Park. In the bedroom he found deceased's body on the floor already dead. Her lower body was naked. He found no signs of forced entry in the house. The house was neat except for the bedroom that was in a mass. He confiscated the deceased's pink gown, blue pyjama pants and a panty. The panty and the pyjama pants were damp. He allowed them to dry in his office before he sealed them. He also confiscated an empty MTN box with IMEI no. 864944005535095. He

- put these items in separate forensic bags and sealed them. He also received a sexual kit with specimens taken during post mortem examination by Dr Sonata Walraven. He handed the exhibits to Brian Basil Buys, a W/O in the South African Police Services (SAPS) stationed at Roodepan Detective Branch who dispatched them for forensic investigation in Cape Town.
9. Const Simon Mabeleng is attached to the Local Criminal Record Centre. On 11 June 2011 he visited the scene to take photos which he compiled into an album (Exhibit "A"). As he was busy taking photos he noticed that the deceased's body was covered. Segt Kombe removed the cover in order to take photos. He confirmed that the photos depicted exactly the way he found the deceased. No finger prints were found at the scene.
10. Ms Joyce Moemedi is the sister to the accused's late father, Eric Moemedi. She went to the deceased's house on 11 June 2011 after she heard that the deceased had died. She immediately phoned the accused as the eldest son and head of the family and told him what had happened. The accused sounded surprised. She asked him to visit the scene. Strangely the accused told her that DNA analysis would not take long. He told her that he was on duty at the time.
11. Ms Moemedi suggested to the accused that Gloria should visit the scene since he could not. He told her that Gloria was in a coma in hospital. The accused did not attend the funeral because he was on duty. Ms Moemedi also did not attend the funeral because the deceased's family did not want to bury her in Kimberley but in Bloemhof. She disputed that she

- and her sister, Ms Kaletshwe Moemedi, refused that the accused attend the funeral. She disputed further that Gloria went to a clinic for a monthly check-up.
12. Ms Gloria Shuping, also known as Koekie, was the accused's girlfriend from 2005. They cohabited in Lerato Park. During May 2011 she had to live with her grandmother at Witdam whilst the accused temporarily lived with his mother at his parental home. She noticed that the accused had a silver grey Samsung. When she demanded to know whose cell phone it was he said it belonged to his friend and colleague, Mr Pascall Tlhalogang. On 09 June 2011 the accused did not have the Samsung phone with him. She had two cell phone numbers of the accused stored in her phone. They were 073 718 1811 and 084 385 1255.
13. Tlhalogang worked with the accused at Mapogo Security Company during 2011. He and the accused were good friends. Tlhalogang testified that during June 2011 the accused owned two cell phones, a Samsung and a Nokia. The Samsung, black and silver in colour, was a sliding phone. The accused did not use the Nokia for long. He told him that it was damaged and got himself the Samsung. He had another phone after the Samsung. Their employer gave them official cell phones if they did not have one. The accused's cell numbers were 073 718 1811 and 071 737 3074. He did not know the deceased.
14. On 19 June 2011 Tlhalogang sent a please-call to the accused and requested him to inform his employer that he would be late for work.

Around 16h00 or 17h00 the same day the accused sent him a sms asking for a place to sleep. He, however, did not respond. The accused sent a second one and asked if he did not consider his plea. He again did not respond. The accused never slept at his place before. He could not remember if the accused worked on 04 and 05 June 2011. This evidence went unchallenged.

15. Segt Faber, attached to the Detective Branch in Roodepan and Johannes Rudolph Louwrens, a Captain attached to the Organised Crime Unit in Kimberley, Constable Jacobs and Capt Duvenhage proceeded to Pro-Liquors in Kimindustria on 18 July 2011 to trace a specific cell phone. Capt Louwrens introduced himself to the accused and requested him to hand over his cell phone which he did. The accused intimated that his other cell phone was charging at a charging point in one of the offices. Segt Faber, Capt Louwrens and the accused proceeded to the said office but there was no cell. They proceeded to another office. The accused walked in front. Suddenly the accused entered one of the offices, closed the door behind him and fled through a window. The accused attempted to jump over the fence but slipped and fell back. Segt Faber grabbed him. They wrestled with each other. The accused took out his pepper spray and sprayed Segt Faber with it in his face. The accused managed to break free and jumped over the fence. He got stuck in the devil's fork on top of the fence. His pants got torn. He broke free and ran towards the direction of the golf grounds and disappeared.

16. Two days later Capt Louwrens again requested Segt Faber, Capt Duvenhage and Constable Jacobs to continue the search for the accused.

- On their arrival at the accused's parental home they confiscated a Mapogo black combat pants which looked like the one the accused had on when he ran away.
17. On 18 July 2011 Capt Louwrens received documents from MTN service provider (Exhibit "K") regarding a user profile with an IMEI number 3521 35021 966910 belonging to the deceased. The purpose of this investigation was to establish whether the said MTN IMEI number was used after the deceased's death. The investigation revealed that since 05 June 2011 when the deceased was alleged to have died the accused's sim card with number 073 718 1811 was used in the deceased's handset.
18. Ms Tshegofatso Joyce Tau, the accused's sister, testified that the accused lived with his girlfriend, Gloria. Gloria had to go to her home temporarily because her sister had a baby. During 2011 Joyce lived with the accused for a month. On Tuesday 19 July 2011 Capt Louwrens visited her house with three other police officials. They were looking for the accused in connection with a murder case. She realised that the sim card inserted in her phone belonged to the accused. She did not know the deceased. She never retrieved her sim card from the accused. The accused would interchange sim cards in his cell phone especially when he did not have airtime.
19. On 19 July 2011 Capt Louwrens, W/O Buys and other police officers arrived at Gloria's residence in search of the accused and the silver Samsung M620 cell phone. In their presence Gloria received a phone call from the accused's sister, Joyce. Capt Louwrens observed that the number that Joyce used was the accused's number, 073 718 1811.

Immediately they proceeded to Joyce's residence, the accused's parental home. Capt Louwrens called the 073 718 1811 number and Joyce's phone rang. He then retrieved the Samsung phone and sim card from her and handed them to W/O Buys. Gloria and Joyce were later taken to the police station for questioning. Gloria's phone was confiscated by the police. The accused visited Gloria at her home the following Friday. She called Capt Louwrens who came and arrested the accused.

20. Ms Lerato Teisho had a love relationship with the accused for four years which she ended when the accused got arrested. She works at Jet Stores. She bought two sim cards from Jet Stores for the accused which she registered (RICA'd) in her name. The numbers were 084 385 1255 and 074 693 9160. She testified that the accused at some stage had six cell phones. She spoke to him about it whereupon the accused reduced the number to two. He used his cell phones mostly for music. She could not remember if at some stage he owned a Samsung cell phone. She never bought sim cards for anyone else besides the accused.

21. Mr Lukas Stockenstrom, a general worker at Pro- Liquors testified that during 2011 he worked at All Call Security as a security officer. He worked at the same venue as the accused. At the time he owned a Sony Ericson cell phone. Its sim card was registered (RICA'd) by his sister, Miss Hester Stockenstrom. He lent his cell phone with its sim card to the accused on a Friday because the accused wanted to listen to music. The following week the accused returned his phone. Lukas later sold the cell phone. He could not recall if the accused returned his sim card. He never

- lent his cell phone with its sim card to anyone else except the accused. Initially, the accused showed interest to buy Lukas' cell phone but pay it in instalments. Lukas refused because he wanted a once off payment. Lukas disputed that the accused returned the cell phone that same day.
22. Ms Hester Stockenstrom, Lukas' sister, corroborated Lukas' evidence that she registered the sim card for cell phone no. 084 644 5498 for him. She added that she never used the sim card. She registered it before her brother worked at Pro-Liquors during 2010.
23. W/O Buys took over investigations from W/O Williams. He received exhibits from W/O Williams already packed and sealed. He sent same to the laboratory for analysis. He testified further that on 28 July 2011 he took the accused to Dr Olivier to draw blood and obtain hair specimens. The specimens were then sent to the laboratory for forensic analysis. An application for a section 205 subpoena was made to the cell phone service providers to investigate whether the deceased's cell phones and/or sim cards were used after the deceased's death. Having received that information, a search for the accused took a week before he was eventually arrested on 22 July 2011. Dr Olivier confirmed that she drew blood and obtained hair specimens from the accused.
24. Matthys Kellerman Hoffmann, a W/O attached to the Forensic Science Laboratory in the Western Cape as a Forensic Analyst, testified that he received a sealed case file for analysis on 29 September 2011. He evaluated and interpreted the DNA results of the crime samples and reference samples pertaining to this matter by a process requiring

competency in Biology. The following conclusions were made from the DNA analysis of the exhibits:

“2.3.1 The DNA result of the gown “E”(FSD-294384) matches the DNA result of the reference sample “B”, 08D3AB4396MX (“ TK Tau”); and

2.3.2 The most consecutive occurrence for the DNA result from the gown “E-5” (FSD-294384) is 1 person in every 150 billion people;

2.3.3 The DNA result from the reference sample marked “B”, 08D3AB4396MX (“TK Tau”) can be read into the mixture DNA from the Vestibule Swab 09D1AD9463GB (“Deceased DR 287/11”.

2.3.4 The most consecutive occurrence for the DNA result from the Vestibule Swab 09D1AD9463GB (“Deceased DR 287/11”) for all the possible contributors to the mixture DNA result, is 1 person in every 100 000 people.”

25. Ms Hilda du Plessis, a Forensic Analyst, testified, *inter alia*, that on 05 June 2011 at 03h12 the deceased's cell phone number received a call from the accused's cell phone number, 073 718 1811. This call went unanswered to the voice mail box. At 03h13 the same day the deceased's cell phone number received another call from the accused's number. This call lasted 59 seconds. From 06 June 2011 no further calls were made or received by the deceased's cell phone number. Exhibit L48-L49

indicated that the accused's phone number made six calls to the deceased's number from 12h02 to 03h13. It is also clear from this exhibit that the accused's sim card was used in the deceased's handset from 05 June 2011 until 06 July 2011. No further calls were made by the accused's cell number to the deceased's cell phone number after 05 June 2011. According to the records from 06 June 2011 calls were made to the deceased's phone number but her phone was not active and those calls were diverted to the voice mail.

26. Dr Walraven who performed the autopsy, testified that the deceased sustained two peri-mortal wounds to the abdomen. These injuries did not penetrate the internal organs. She explained 'peri-mortal' to mean that the injuries were sustained just before death or at the actual time of death as the heart beat slowed down and the blood pressure fell or just after death. She also found a small fracture of the stylohyoid attachment of the hyoid bone. This kind of fracture is 99% of the time consistent with manual strangulation and 1% by motor vehicle accidents. This fracture was ante-mortem which means that the deceased was still alive when it was inflicted. Manual force together with the victim's struggle is needed to break this bone because it is strong and does not break easily. The superficial abrasion she found on the left anterior chest was a graze wound sustained whilst the deceased was still alive. This injury was caused by a blunt object but this did not exclude a fall. During her examination of the genital organs she found multiple *foci* of tissue discoloration. She stated that it was not possible to discern between contusions and post mortem discoloration. In her opinion it was more likely that these were bruises because if it was just post mortem staining

one would expect to find similar stains elsewhere in the body which was not the case. The bruises to the neck and the injury to the vagina were inflicted at the same time. In her opinion it was possible that semen could be deposited four to six days prior to death. It was therefore not strange that positive semen was found in a period longer than 72 hours.

27. She recorded the following chief post mortem findings:

“1. The body of an elderly female in a state of decomposition which obscures post mortem findings significantly.

2. Two peri-mortal stab wounds to the abdomen.

3. Small fracture of the stylohyoid attachment of the hyoid bone.”

She concluded that the cause of death was strangulation. She also recorded the following: *“Not determined by autopsy alone. Due to the state of decomposition of the body, it is very difficult to discern between de-compositional stains and possible ante-mortem contusions.”* She estimated the time of death to be four to seven days before the body was discovered.

That was the case for the State.

28. The accused, a 30 year old male, testified that on 04 June 2011 he was on duty and posted at the Christian Brothers College (“CBC”), a school in Kimberley, from 22h00 until 06h00 on 06 June 2011. During his shift he went to JG Motors, +-2 km away to get some food. He worked again on 07 June 2011 at 05h00. He did not report for duty from 08 to 10 June 2011. On 05 June 2011 whilst he was on duty at CBC he activated the

deceased's handset by inserting his sim card in a pupil's phone when the pupil wanted to charge his phone. He noticed that the phone was in a working condition but the speaker had a problem. He used ear-phones to overcome this problem.

29. The deceased was his step mother. After the death of his father he and the deceased grew closer which resulted in a love affair. However, they decided to keep the affair secret because the community would show displeasure in a relationship between a step-mother and son. He last saw the deceased on 07 June 2011 after 20h00 when he took an amount of R1000-00 to the deceased which she needed to go to Senekal in the Free State. She and the deceased had consensual sexual intercourse. He thereafter left around 00h00 after the deceased received a phone call and requested him to leave. The gate was locked and he had to jump over the fence.

30. The accused says the next day he phoned the deceased but could not get hold of her. He went to the deceased's place of residence but found the gate locked. He decided to return but the gate was still locked. He jumped over the fence and found both doors to the house locked. His aunt, Ms Joyce Moemedi, reported to him the death of the deceased on 11 June 2011. On 13 June 2011 he met her when they had a family meeting at his elderly aunt's place, Ms Kaletshwe Moemedi. He requested them to accompany him to the deceased's house but they refused. He decided to go alone. However, his aunts stopped him. His aunts decided that none of their family members would attend the funeral. He was not happy with this decision. He nevertheless decided to respect it. He disputed that he stabbed the deceased, raped her or killed

her. He also disputed that he stole her cell phones. The deceased gave her the Samsung cell phone to him for repairs. He alleged further that he sprayed Segt Faber with pepper spray in self-defence.

31. On 18 July 2011 the accused was on duty at Pro-Liquors in the camera room checking the camera when he noticed his colleague at the gate standing with unknown people. He could hear that the people were looking for him because his two-way radio was activated. He decided to approach them. On his way to the gate he met Capt Louwrens who demanded his cell phone which he handed to him. Capt Louwrens also wanted the MTN phone. When he wanted to know who Capt Louwrens was he became aggressive and hit him twice with fists on his chest. He never introduced himself to the accused. They then proceeded to the charging point. On their way Segt Faber assaulted him from behind.
32. The accused did not find the phone at the charging point. Capt Louwrens kept on demanding it from him. Capt Louwrens and Segt Faber assaulted him again. He then took out his pepper spray and sprayed between them. He fled the scene and tried to contact his manager from another building. After a while he returned to Pro-Liquors.
33. The accused confirmed that he had the deceased's cell phone in his possession from April 2011. However, he was unable to repair it and returned it to the deceased. He also had a Samsung M620 that looked like the deceased's. It also had problems since February 2011. He took both Samsung M620 cell phones, his and the deceased's to the repair store. On 03 June 2011 he returned to the store and received only one phone which did not have a sticker. He therefore could not identify

whose it was because the data had been removed with the old parts. He disputed that he told his aunt that Gloria was in hospital. He further disputed that he was at Galeshewe during his shift from 04 to 06 June 2011.

34. Ms Mpho Ramotsamai, the accused's mother, and W/O Williams testified on behalf of the accused. Their evidence did not take the defence case any further.

35. In summary the following points were made:

35.1 That the deceased had two cell phones;

35.2 That the accused's semen was found on deceased's clothes through forensic DNA analysis;

35.3 That the deceased's cell phone, Samsung M620, was in the accused's possession;

35.4 That the accused used his sim card in the deceased's hand set after the deceased was allegedly murdered from 05 June 2011 to 05 July 2011;

35.5 That the accused sprayed Sgt Faber with pepper spray; and

35.6 That a call was made from the accused's cell phone to the deceased's number during the early hours of 05 June 2011 and did not phone her again.

36. The fact that there were no signs of a break-in shows that the perpetrator was let in by the deceased or the door was not locked when the intruder

gained access. The only items that went missing during 05 June 2011 to 11 June 2011 were the deceased's two cell phones and her hand bag. Only one cell phone, the Samsung M620, was found. Nothing valuable was removed from the house. The evidence shows that the accused was not only in the neighbourhood where the deceased resided but contacted the deceased during the early hours of 05 June 2011. Shortly thereafter he got possession of the deceased's hand set. After 05 June 2011 he never tried to contact the deceased again. From this conduct one can draw an inference that he knew that the deceased was dead. Thereafter the accused used several other sim cards not registered in his name in the deceased's hand set thereby hiding his identity.

37. The existence of a secret love relationship is central to the exculpatory explanation by the accused and why his semen was found on the deceased's clothes. The deceased's cell phone found in his possession is hard to explain because the deceased would not give him both her cell phones and remain without a means of communication. This alleged love relationship is a fabrication and is absurd. The State witnesses testified that the relationship between the deceased and the accused was that of mother and son and this was not disputed by the accused. He even called the deceased "Mmamane" which means small mother.
38. The State in this matter relies on circumstantial evidence to prove its case. In **S v REDDY AND OTHERS 1996 (2) SACR 1 (A)** at 8c-g Zulman AJA held:

*“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 **R v BLOM 1939 AD 188** at 202-3, 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 508-9:*

‘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.’”

39. Segt Faber is a single witness as far as the assault on him is concerned. S

- 208 of the CPA provides that an accused may be convicted of any offence on the single evidence of any competent witness. Capt Louwrens corroborated Segt Faber's evidence that he had covered his teary eyes with his hands. The accused pleaded self-defence as justification for the admitted assault. Self-defence does not arise when an accused is being lawfully arrested and no excessive or unlawful force is employed.
40. The accused was a poor witness. He contradicted himself on numerous occasions. He was very evasive in answering questions. He gave long winded answers and kept adjusting his evidence to fit in with his fabricated version as the case progressed. When given an opportunity to explain contradictions he claimed that there was a misunderstanding between him and his legal representative. He had difficulty explaining why he took his phone for repairs only in May 2011 when it had problems in February 2011 already. His explanation of how he activated the deceased's phone on 05 June 2011 is not only a fabrication but a desperate means to justify his usage of deceased's hand set as evidenced by the cell phone records. He disputed the cell phone records when he could not explain why the cell phone records showed that he was in Galeshewe from 12h02am until 07h00am on 05 June 2011. CBC is in the city centre of Kimberley. If he was innocent he had no reason to evade the police from the time of the deceased's death.
41. The accused's version was full of improbabilities. It is untenable that the deceased would borrow R1000-00 from him when the evidence showed that she had R62 000-00 in her bank account at the time of her death.
42. Heher AJA in **S v CHABALALA 2003 (1) SACR 134 (SCA)** at 139i-

140a had this to say:

“The approach is to weigh up all the elements which points 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.”

43. As far as the charge of assault with intent to do grievous bodily harm and its alternative is concerned I am not persuaded that this charge should stand. The two peri-mortal wounds to the deceased’s abdomen were inflicted in the course of the main intent. If the injuries were sustained just before death or at the actual time of death or just after death the only reason would be to make sure that the deceased was dead. This shows direct intention to kill the deceased. In **S v JABANI 2006 (2) SACR 171 (NC)** at 173a-d Kgomo JP held:

“...[I]t will be discerned that, although the State proved the commission of the crimes of attempted murder and, separately, that of rape, the dominant intention of the accused for luring the complainant into his shack appears to have been to rape her at all costs, even if it took extreme measures to immobilise her to achieve this end. The authors Lansdown and Campbell SA Criminal Law and Procedure vol V at 228 say the following in regard to the test for an improper splitting of charges:

‘It is impossible to say that any one of these tests will cover every particular case that may arise [R v Johannes 1925 TPD 782 at 785] or to lay down any hard and fast rule which will apply in every instance arising for discussion. Where the various offences, committed in the course of the same transaction, do not permit of separate charges, the accused should be charged with the most serious offence, regard being had to his dominant purpose [S v Brereton 1971 (1) SA 489 (A); S v Shupika 1973 (2) SA 471 (RA)]. In borderline cases which are not covered by one or other of the tests, the decision of the issue must depend on the judicial officer’s common sense and sense of fair play.

[S v Mbulawa 1969 (1) SA 532 (E)].’”

In the instant case the charge of assault with intent to do grievous bodily harm is tantamount to undue splitting of charges. The accused has to be discharged on this count and its alternative.

44. Having regard to the evidence and the analysis set out above I am satisfied that the State proved its case beyond a reasonable doubt that the accused raped and murdered the deceased. He also stole her cell phones. I am also satisfied that the accused did not act in self-defence when he sprayed Segt Faber with pepper spray. I therefore reject his evidence as false.

The following verdicts are returned.

- 1. On count 1, Rape: The accused is found guilty as charged for having sexual intercourse with the deceased Sedia Meriam Moemedi without her consent.**
- 2. On count 2, Murder: The accused is found guilty of murder of Sedia Meriam Moemedi with *dolus directus* as a form of intent.**
- 3. On Count 3, Assault with intent to do grievous bodily harm alternatively mutilation of the body: The accused is found not guilty and discharged.**
- 4. On count 4, Theft: The accused is found guilty of theft of two cell phones belonging to the deceased.**
- 5. On count 5, Assault common: The accused is found guilty of assault common.**

