

IN THE HIGH COURT OF SOUTH AFRICA
[Northern Cape High Court, Kimberley]

Case no: KS 18/09

In the matter of:

THE STATE

versus

TOMMY WILLIAMS

ACCUSED

Coram: **MAJIEDT J**
 assisted by Ms BM Pakati-Mabuza and Adv B Babuseng

JUDGMENT

MAJIEDT J:

1. This is the unanimous judgment of the full Court, i.e. myself and my two assessors, Adv Babuseng and Ms Pakati-Mabuza. The accused has been arraigned on nine counts, namely attempted rape, three counts of murder, one count of kidnapping, two counts of theft and two counts of assault with the intent to inflict grievous bodily harm.
2. For the sake of brevity we do not intend to set out fully the details of the aforementioned charges against the accused, since it is fully set out in the indictment. It is, however, convenient to refer to three separate incidents and time periods which relate to the various charges against the accused. In the first instance we shall refer to the events of 28 April 1987 which relate to counts 1 and 2

(attempted rape and murder) as the “*1987-incidents*”, with regard to counts 3, 4, and 5 (kidnapping, theft and murder) we shall refer to these as the “*2004-incidents*” and lastly we shall refer to the events relating to counts 6, 7, 8 and 9 (murder, theft and two counts of assault with the intent to inflict grievous bodily harm) as the “*2008-incidents*”.

3. The trial was characterised by various delays from the start. Initially Mr. Van Tonder, who appeared for the accused, requested a postponement, supported by Mr. Barnard who appeared for the State (assisted by Mr. Mashuga) because both of them were not ready to proceed. As a consequence the trial started approximately one week late. At the commencement of the hearing, Mr. Van Tonder informed us that he had serious problems getting any co-operation from the accused. The accused did in fact not co-operate and during the first day of the hearing when the charges were put to him, he refused to accept Mr. Van Tonder’s assistance. The latter had also not been able to procure any instructions from him. Having explained very carefully the gravity of the charges and having encouraged him repeatedly to make use of the assistance of Mr. Van Tonder, the accused regrettably persisted in his choice not to accept the legal representation on offer. As a consequence he acted in person during the plea stage.
4. The accused pleaded not guilty on counts 1, 2, 3, 5, 6, 7, 8 and 9 and guilty on count 4. Having pleaded guilty on count 4, theft, a plea of not guilty was noted after the accused failed to admit all the material elements of the offence. The provisions of s51 of Act

105 of 1997 were explained to him in respect of counts 2, 5, and 6, since the State relied on these provisions in the indictment. The competent verdicts on the various offences were also fully explained to the accused. At an early stage of the proceedings the accused swallowed an unknown substance and he was rushed to hospital as a consequence whereof the trial was further delayed. This was prior to the plea stage. Exhibit A before the Court is a note from Dr. J. Coetzee indicating that the accused was fit to stand trial. Thereafter the accused pleaded as set out hereinabove. The provisions contained in Act 45 of 1988, relating to the exceptions on the hearsay rule was also fully explained to the accused who was unrepresented at that stage. This was done, since Mr. Barnard had foreshadowed a reliance on these provisions during the evidence which he intended to lead in the State's case.

5. With regard to count 4, theft, the accused had, it will be recalled, pleaded guilty. Upon questioning in terms of s112(1)(b) of the Criminal Procedure Act, 51 of 1977 (hereinafter referred to as *the Act*), the accused admitted that he had on the date set forth in the charge sheet entered the complainant, Mr. Bihi's, house in Warrenton and that he had removed certain goods. Upon further examination, I was not satisfied with the explanation given and a plea of not guilty was noted in terms of s113 of the Act. The admissions made by the accused were however recorded as proof and this relates to the goods that he had taken from the house as reflected in the indictment.
6. With regard to the 1987 incident, the State charged the accused

with the murder of Martha Botha, an eight year old girl, as well as with attempted rape. The evidence briefly for the State was from the deceased's mother, Mrs Maria Botha, that the deceased had been sent to a shop by a neighbour to buy bread and the accused had been seen following her as she left the house. Her daughter never returned and when the accused passed her house later that afternoon he informed her that he had left the deceased at the shop and had parted ways with her. She later received information from one Mr. Ronnie Borothelo that he had seen the deceased in the company of the accused on the day of her disappearance. A few days later the accused pointed out the body of the deceased at a disused stadium in Ipopeng. This stadium has since been demolished. The State handed in as exhibit RR a statement from Mrs Ellen Mpiwa, confirming that the deceased had purchased bread in her shop on the day in question. The deceased had been alone at the time. I pause to point out here that the accused had, at my insistence, reconsidered his stance about legal representation at the end of Mrs Botha's evidence in chief. He took up my offer of assistance by Mr. Van Tonder (whom I had requested to remain in attendance on a watching brief). Mr. Van Tonder thus cross-examined Mrs. Botha, after having received full instructions from the accused. Mr. Van Tonder then acted throughout the proceedings for the accused.

7. Further evidence on these two counts is that of Mr. Borothelo who confirmed that he had seen the accused and deceased walking together on the day in question in the direction of the Ipopeng stadium. When he had heard that the deceased's body had been discovered at the stadium, he reported to the family that he had

seen the accused and the deceased together on the day in question. The accused who was present at this time did not dispute this nor did he make any comment thereon. Mrs. Botha also testified about the discovery of the body. It was clear that it was concealed with grass and with a plastic bag. According to Mrs. Botha one could not see the body even if you passed close by it, given the fact that it was concealed to a great extent.

8. The evidence of Dr. JF Els, the district surgeon, indicates that the cause of death was strangulation and an examination of the genital area of the deceased indicated that at most there could be evidence of indecent assault or attempted rape.
9. Satellite images of the area where the Ipopeng stadium would have been, Mpiwa's shop as well as Mr. Borothelo's residence indicated that Mr. Borothelo's residence is in the opposite direction of the residences of the deceased and the accused. It was therefore not necessary for the accused and the deceased to pass Mr. Borothelo's residence if the deceased had gone to Mpiwa's shop. To get from Mpiwa's shop to the Ipopeng stadium however, one had to pass Mr. Borothelo's residence.
10. Mr. April, a former policeman, was the investigating officer in the matter. He testified after refreshing his memory from the investigation diary and the docket. According to his testimony he took a statement from the accused who he regarded as a witness at that stage. The accused indicated that he had visited one Jack Khoi Khoi on the day of the deceased's disappearance. Khoi Khoi's residence was in President Mangope Street. A statement

by Jack Khoi Khoi was handed in after an application by the State as an exception to the hearsay rule, because Mr. Khoi Khoi has since passed away. In that statement Mr. Khoi Khoi indicated that he was not at home on the day of the disappearance of Martha Botha and that the accused could not have visited him on that day.

11. The accused's witness statement made to Mr. April indicated that he had come across the deceased's body by chance and that he had then reported finding it.
12. As is the case in the other charges relating to the murders in the 2004 and 2008 incidents, the State relies exclusively on circumstantial evidence and also on similar fact evidence with regard to counts 1 and 2. We will revert to this at the end of this judgment when we discuss whether the State has proved its case beyond reasonable doubt. The accused formally admitted per exhibit P the identity of the deceased, the correctness of the satellite image of the vicinity around Ipopeng Stadium (exhibit B) and the correctness of the plan of the (now demolished) Ipopeng Stadium (exhibit C).
13. The evidence on counts 3 to 5 can briefly be summarized as follows. In these counts the accused was charged with kidnapping, theft and murder of Thabang Bihi, a 13-year old boy, at Warrenton. The evidence adduced by the State shows that on 17 April 2004 Thabang Bihi went missing from his house after his father had left his residence. Upon his return Mr. Bihi (snr) found that his son was missing and also that certain items had been taken from his house. Evidence led by the State from Mrs. Maria

Thomas (the accused's girlfriend at that time), Mr. Dawid Papier (a colleague of the accused who was engaged with the accused in guarding houses on behalf of their employer who in turn was engaged by Absa Bank to look after repossessed houses) and by Ms Angelina Modise (the girlfriend of Mr. Papier) established that the body of an unknown human being was found in a shallow grave in the backyard of the house which the accused had previously guarded and which Mr. Papier was guarding at that time. Inspector McAnda, a member of the SAPS's local criminal record centre, confirmed this gruesome find. He took photographs of the scene and collected various exhibits. Significantly the body was wrapped in a multicoloured cloth, similar to the cloth hanging in front of the windows inside the house in the lounge and which appeared to be part of a duvet cover. Part of this material used as curtains had been cut off.

14. The accused was arrested by Hartswater police at the instructions of members of the SAPS in Kimberley and the accused was handed over by Captain Van Staden to Superintendent Verster and Inspector Luis thereafter. Initially the accused attempted to deny that he was in fact Tommy Williams, but his identity document was found on him and it proved otherwise.
15. The accused presented a version to Superintendent Verster and Inspector Luis to the effect that he had taken certain items from Mr. Bihi's house on the day in question and that a certain unknown man had strangled the young boy inside the house which the accused was guarding. This man had asked the accused to assist him in holding the boy, which the accused did. This person later

appeared to be Mr. Ishmael Motingwe who was questioned by the police and his alibi was found to be true after it was verified.

16. The State also led the evidence of one Mr. Rudolph Fredericks who testified that during September/October 2004, while sharing a prison cell with the accused, the latter upon enquiry informed Mr. Fredericks that he was incarcerated for something he had not done and that he had merely found a body in the bath at his house.
17. The post mortem examination on the body was done by Dr. Liebenberg. This was done in Bloemfontein. The cause of death could not be determined due to the advanced state of decomposition of the body. She indicated however, that strangulation could not be excluded as a cause of death. Certain parts of the body was not present. She drew three conclusions from her examination:
 - (a) That the body was that of a person under the age of 25 years and it is possible that it could be that of a 13-year old person.
 - (b) That the person is a male – this could be determined with certainty.
 - (c) That the body was that of a person of mixed racial heritage, possibly the body of a Coloured person or of a Black person with multiple white genes.

Dr. Liebenberg also estimated through measurements of the

femur, fibula and the humerus that the person must have been about 1.58 metres tall. Her ultimate conclusion was that it was possible that this could have been the body of a 13-year old Black male.

18. Mr. Kolver, a forensic entomologist, also attended the aforementioned post mortem and he was able to determine the time of death through the study of insects found on the decomposing body. He explained his findings and in terms thereof his ultimate conclusion was that the post mortem interval (i.e. the time period between the death and the discovery of the body) could be between six to eight weeks. Assuming therefore that the body was indeed that of Thabang Bihi, he concluded that the deceased had died shortly after his disappearance on 17 April 2004.
19. With regard to counts 6 and 7 respectively, the State alleged that the accused had on 5 February 2008 unlawfully and intentionally killed one Norman Petrus Watermeyer. On count 7 it was alleged that the accused had stolen a pair of safety boots and a cellphone from this aforementioned deceased.
20. On counts 8 and 9 the accused was charged with assault with intent to commit grievous bodily harm on Veronica Benadé (his girlfriend at the time) and one Rosemary Blom respectively. Counts 6 to 9 are the 2008 incidents.
21. The deceased in count 6 was also known as Deon or Kosmos. On 12 February 2008 human remains were found in the veld in the

vicinity of Roodepan. It was formally admitted by the accused that these remains were those of the deceased. The deceased had gone missing on 5 February 2008 after having left his mother's residence in the company of the accused. According to his mother's evidence, the deceased had been sent by a neighbour to purchase prepaid electricity for her. The deceased was wearing black safety shoes (similar to exhibit 1 before the Court) and he also had his cellphone with him (the cellphone is exhibit 3 before the Court).

22. Subsequent to his disappearance the deceased's family (in particular his mother and his brother Colin) received numerous telephone calls from an anonymous caller. The anonymous caller informed them that the deceased intended to return home eventually and that he was refusing to go for his back operation. The caller never identified himself and declined the request to put the deceased on the line. After the deceased's remains were discovered and he was positively identified, the anonymous caller alleged that one Tefu was responsible for the deceased's death.
23. At some stage Colin (the deceased's brother), Dennis Thole (the deceased's cousin) and Tapelo Moetlo questioned the accused about information relating to the deceased's death. This questioning occurred in a veld some distance away from nearby houses.
24. The evidence relating to the accused's statements made in the presence of the aforementioned three witnesses, was subjected to a trial within a trial to determine the admissibility thereof. After

evidence was led by the State, the accused closed his case without adducing any evidence. We ruled the statements admissible and also the audio recording thereof made by Dennis Thole on his cellphone, which was later transcribed as exhibit LL before the Court. The parties were *ad idem* that we should listen to the audio recording as part of the evidential material upon which admissibility should be decided. We did not furnish reasons at the time and reserved same for the end of the trial. These are the reasons. We found the three witnesses for the State to be credible and, more importantly, having listened to the audio recording, it was evident that no evidence of threats or undue influence could be heard on the recording. The accused's voice, while somewhat weak and trembling on the second part of the recording, did not in our view exhibit indications of duress or undue influence. In the absence of any evidence controverting those of the state witnesses, we had taken the view that the statements were made by the accused while he was in his sound and sober senses, freely and voluntarily and without undue influence. The State had therefore, in our view, discharged its *onus* of proof beyond reasonable doubt that the statements and audio recording are admissible.

See generally:

S v Zuma and Others 1995(2) SA 642 (CC);

S v Maasdorp 2008(2) SACR 296 (NC).

25. In exhibit LL the accused implicates one Tefu and also makes reference to the fact that he was also present when the deceased was killed.

26. In addition to the foregoing the State also led the evidence of Veronica Benade (the accused's girlfriend at the time) who testified that she had asked the accused at some stage whether he had in fact killed the deceased. He responded by admitting that he and Tefu had killed the deceased. This evidence was admitted, because the accused did not contest the admissibility thereof, instead he simply, judging from the cross-examination, denied that he had ever made such statements to Veronica.
27. A pair of safety boots similar to those belonging to the deceased were found in a shanty in the backyard of the premises of Veronica Benade's parents. These boots were handed in as exhibit 1 before the Court. Colin Watermeyer testified that he had given these boots to the deceased and that they resemble the ones before the Court. What is of particular significance is that Colin testified that those boots were fairly new (as are those before the Court) and were a size 6, similar to that before the Court. The deceased's cellphone was found in the possession of Reginald Malebe, the accused's nephew. The accused had indicated to inspector Luis that the deceased's cellphone was with Reginald and it was confiscated from him. Cellphone records testified to by two witnesses on behalf of Cell C and MTN mobile networks respectively (Ms Ince and Ms Du Plessis), indicate that calls had been made from the accused's handset with two different prepaid simcards to the deceased's family who had received the anonymous phone calls.
28. Inspector Williams of the SAPS testified that the accused was handed over to him after the family of the deceased had conveyed

to him that the accused could provide information on the deceased's murder. This was after the questioning in the veld alluded to in par 24 above. The accused provided a version to Inspector Williams that the deceased had been murdered by persons who had given them a lift. According to the accused he was forced by these persons to hold the deceased while he was being strangled. In this regard there is a discrepancy between the evidence of Mr. Williams and that of Dennis Thole, to the extent that the latter alleges that he had overheard the interrogation of the accused by Mr. Williams where the accused had in fact admitted that he was present and had actively participated in killing the deceased. We will revert to this discrepancy later.

29. On counts 8 and 9 Veronica Benade and Rosemary Blom both testified that they were assaulted by the accused in that they were throttled by him.
30. Dr. A Surtie conducted the post mortem examination on the deceased. He could not find any indication of injuries on the body of the deceased, save that the left hyoid bone had a fracture. The cause of death could therefore be possible strangulation. He noted that the body was in a state of decomposition and also had been partially burnt.
31. Inspector Luis testified about various exhibits he had confiscated, *inter alia* the deceased's cellphone and the safety shoes resembling those he had worn on the day of his disappearance. We might add at this juncture that the State adduced documentary and oral evidence regarding chain evidence in respect of all

exhibits. This evidence was not attacked at all by the defence, correctly so.

32. The accused did not testify in his defence, nor did he call any witnesses. The State's case therefore stands uncontroverted and the guilt or otherwise of the accused must be assessed on the State's evidence before the Court.
33. We have already indicated earlier in the judgment that the State relies exclusively on circumstantial evidence and also on similar fact evidence.
34. In the 1987 incident, in our view, the following facts are either common cause or have been proved beyond reasonable doubt by the State:
 - 34.1 On the day of the disappearance of the deceased she had left for Mpiwa's shop and the accused was seen following her.
 - 34.2 The accused was 16 years of age at the time and the deceased was 8 years old.
 - 34.3 The deceased and the accused were well-known to each other being residential neighbours.
 - 34.4 The deceased went to Mpiwa's shop alone where she purchased a loaf of bread.
 - 34.5 The deceased was thereafter seen walking with the accused

in the direction of the Ipopeng stadium. They were seen less than 100 metres from the gate of the stadium in a direction opposite to that of both their houses.

- 34.6 The deceased was murdered at the Ipopeng stadium by strangulation and that the person who had strangled her on the probabilities also attempted to rape her or assaulted her indecently. We deliberately put the latter events no higher than this, since as will appear shortly, we are of the view that the State has not proved beyond reasonable doubt the offences of attempted rape or indecent assault.
- 34.7 The deceased's body was concealed at the stadium in the vicinity of the cloakrooms where there was no discernible footpath in the vicinity. The body was concealed with grass and a plastic bag.
- 34.8 The accused conveyed to the deceased's family that he had found a body and, upon being confronted by Mr. Borothelo that he was seen with the deceased on the day in question in the vicinity of Mr. Borothelo's residence heading in the direction of the Ipopeng stadium, he did not dispute that.
- 34.9 The accused pointed out the body of the deceased where he had allegedly found her to the deceased's family and had lifted up the plastic bag for them to see the body.
35. On behalf of the State Mr. Barnard has forcefully argued that the discovery of the body by the accused was no pure coincidence.

He alluded to the fact that the body was found in a part of the stadium which was not used by passers-by and that the accused's version put in cross-examination that he had entered the stadium to look for water was completely untenable, since the stadium was in a disused state for a number of years. The State relied strongly on similar fact evidence in this matter, since this is conceivably the one incident where the State has led the least amount of evidence against the accused. Mr. Barnard has also argued that the State has proved beyond reasonable doubt, based on the evidence of Mrs. Botha and Mr. Borothelo, that the accused was the person who was walking with the deceased towards Ipopeng stadium. For his part, Mr. Van Tonder submitted that the evidence viewed holistically, does not warrant as only inference that the accused was the person who had killed the deceased. In this regard we must refer to the evidence of Prof. G. Labuschagne who testified on a comparison of the three cases before the Court (i.e. the 1987, 2004 and 2008 incidents).

36. Prof. Labuschagne is clearly an expert in his field. He is a forensic psychologist and heads the investigative psychology unit of the SAPS at its head office in Pretoria. He compiled a comparison report between the three murders as aforementioned. He had regard only to the *modus operandii* and surrounding circumstances of the three murders. His objective was to determine whether these three murders could have been committed by one person and not whether the accused before Court is the perpetrator in all or any of them. He convincingly testified that there were three unique similarities between the three murders namely:

- 36.1 That all three victims were vulnerable, i.e. the deceased Martha Botha was only 8 years old, Thabang Bihi was a 13-year old boy and Norman Watermeyer was sickly in that he suffered from scoliosis of the spine and had a weakened right arm.
- 36.2 That there had in all three cases been post mortem tampering with the bodies, i.e. in the first two instances (the Botha and Bihi-cases) the suspect had covered the bodies with grass and branches respectively and in the third instance (the 2008 incident relating to Norman Watermeyer), the deceased appeared to have been partially burnt.
- 36.3 The cause of death in the first and last cases was strangulation and in the second instance (the 2004 matter relating to Thabang Bihi) the cause of death could not be determined due to advanced decomposition, however the fact that a shoelace was found in the vicinity of the deceased's neck was of particular significance. His conclusion was that it was probable that the three murders had been committed by one person, although he could not state so beyond reasonable doubt.
37. On counts 2, 3 to 5, 6 and 7, the State asked this Court to find beyond reasonable doubt that the only inference reasonably to be drawn from all the facts and circumstances proved and from the common cause facts is that the accused was the one who perpetrated these offences. Mr. Van Tonder on the other hand has submitted that the State has failed to prove its case beyond

reasonable doubt and that the inference sought to be drawn is not the only reasonable one in the circumstances.

38. A useful point of departure in our findings in this matter is the question of credibility. Mr. Van Tonder has understandably not argued that the State's case is not credible. All the witnesses, generally speaking, appear to us to have been truthful and reliable witnesses. There are certain discrepancies in the State's case, but none of the materiality that would cause us to reject a witness's evidence. Having said that, we must record that we have approached the evidence of Mr. Dennis Thole, regarding the accused's alleged confession to Inspector Williams, with considerable caution. This evidence is at variance with that of Inspector Williams (see par 28 above) and we prefer the latter's version to that of Mr. Thole, on this aspect. As we shall presently show, the State has nevertheless, even excluding that part of Mr. Thole's evidence, established adequate proof of the accused's guilt. Generally therefore we find that the State has presented a credible case based on circumstantial evidence and the only question that remains is the probative value thereof. Put differently:

- a) Is the inference sought to be drawn, i.e. that the accused is the murderer in all three these incidents consistent with all the proved facts? and
- b) Are the proved facts of such a nature that they exclude every reasonable inference from them save the one sought to be drawn, namely that the accused had murdered the deceased

in the 1987, 2004 and 2008 incidents?

See in this regard the well-known *dictum* of Watermeyer JA in **R v Blom 1939 AD 188** at 202-203.

39. With regard to the 2004 incident, we are of the view that the following are the common cause facts or the facts which the State has proved beyond reasonable doubt:
- a) Thabang Bihi had disappeared on 17 April 2004 and has never been seen since. No other children or adults had been reported missing in the Warrenton area during that time.
 - b) The person whose body was found in a shallow grave in the backyard in Warrenton had suffered an unnatural death and had been murdered, which is explained by the fact that the body was buried in a shallow grave so as to conceal same.
 - c) In all likelihood the deceased had been strangled, given the presence of a shoelace in the vicinity of the neck. The absence of blunt force on the bones as testified to by Dr. Liebenberg indicates that the only reasonable inference to be drawn is that the deceased had been strangled with a shoelace.
 - d) It is striking that the accused had mentioned that Thabang Bihi had been strangled by another person (Mr. Ishmael Motingwe). This he mentioned to Superintendent Verster and Inspector Luis, even before a post mortem had been

conducted by Dr. Liebenberg. This strongly suggest peculiar knowledge on his part, which is unexplained before us, except to reflect adversely on the accused.

- e) The identity of the deceased has been established beyond reasonable doubt as that of Thabang Bihi. We come to this conclusion based on the evidence of Dr. Liebenberg regarding the estimated age, sex and race of the deceased; the evidence of Mr. Kolver regarding the date of death; the identification of the clothing by Mr. Bihi and the admission that Thabang Bihi had disappeared on 17 April 2004 and that no other children or males had been reported missing at that time. In addition there is the version of the accused conveyed to Superintendent Verster and Inspector Luis that Mr. Motingwe had strangled Thabang Bihi in that house.
- f) The duvet cover material found in the shallow grave wrapped around the body and that which were used as curtains in the lounge of the house were the same, based on the evidence of Ms Thomas, Mr. Papier, Ms Modise and the forensic tests by Mr. Khoza of the SAPS forensic laboratory (exhibit S before the Court).
- g) The aforementioned material was used by the accused at that Warrenton house and also at other houses previously guarded by him on behalf of his employers. The State's evidence proves conclusively that the duvet cover belonged to the accused.

- h) Thabang Bihi's murderer had wrapped the body in the aforementioned duvet cover material before burying it in the shallow grave.
- i) Thabang Bihi had been murdered and buried in that shallow grave at the time when the accused had been guarding that house in Warrenton.

40. We will revert to the inferences to be drawn from the aforementioned proved or common cause facts in due course. We turn now to the common cause facts and the facts which the State had proved beyond reasonable doubt regarding the 2008 incident.

41. In our view the following are common cause facts or have been proved beyond reasonable doubt by the State:

41.1 That the deceased had disappeared on the day when he was last seen with the accused, namely 5 February 2008. The deceased was never seen again.

41.2 It is common cause that the body found in a partially burnt and partially decomposed state in the veld in Roodepan on 12 February 2008 was that of the deceased Norman Watermeyer.

41.3 The cause of death based on Dr. Surtie's evidence was strangulation. This is to some extent supported by the accused's version made to Colin, Dennis and Thapelo and also to Inspector Williams.

- 41.4 During February 2008 the accused was in possession of the deceased's cellphone, exhibit 3 before the Court. This is clear from the evidence of Reginald Malebe and also from cellphone records handed in as exhibits V and X in particular.
- 41.5 The aforementioned cellphone records prove conclusively that the accused was the one who had made anonymous phone calls regarding the deceased's disappearance to the deceased's family.
- 41.6 The shoes before the Court, exhibit 1, are those worn by the deceased on the day of his disappearance and these were found in a shanty occupied by the accused and Veronica Benade at the time.
- 41.7 All the evidence points conclusively thereto that the shoes and cellphone were stolen from the deceased at the time of his murder.
- 41.8 The audio recording, the transcript thereof which is exhibit LL before the Court, and the evidence of Colin, Denis and Thapelo as well as the evidence of Inspector Williams indicate that the accused was present when the deceased had been murdered and it involves him to a greater or lesser extent in the execution of the assault on the deceased.
- 41.9 The allegation by the accused that Tefu had committed the murder is not substantiated by any evidence before the

Court and was rightly regarded by the police as a false trail and as a red herring created by the accused so as to confuse them in their investigation.

- 41.10 The phone calls made by the accused to the deceased's family from the deceased's cellphone, were similarly designed to create a false trail, i.e. by creating a pretence that the deceased was still alive and well.
42. With regard to the 1987 incident we are satisfied that the State has proved beyond reasonable doubt that the deceased was in fact in the company of the accused heading to the Ipopeng stadium, based on Mr. Borothelo's evidence. Mr. Borothelo struck us as a particularly honest witness. The Court conducted an inspection *in loco* subsequent to his evidence to inspect the scene which he had testified about. The scene was consistent with Mr. Borothelo's observations. It was quite evident that Mr. Borothelo did not seek to exaggerate his evidence against the accused, nor did he embroider on what he had seen on that day. In **R v Dladla and Others 1962(1) SA 307 (A)** at 310 B-E the Appeal Court alluded to the fact that a particularly important factor in the identification of a suspect is a witness's previous knowledge of the suspect. In the present matter Mr. Borothelo quite clearly knew the accused well, since he had visited quite frequently in the street where the accused stayed. We are consequently satisfied that Mr. Borothelo's evidence of the identity of the accused can be accepted without hesitation. That evidence is also to a large extent corroborated by the mother of the deceased who had seen the accused following the deceased. In his witness statement

taken down by Inspector April, the accused also confirms that the deceased had walked behind him.

43. We now consider the law relating to similar fact evidence and circumstantial evidence. With regard to the latter, we have already referred to the leading *dictum* of **R v Blom** *supra*. It is well to remember the following instructive *dictum* by Lord Wright in **Caswell v Powell Duffryn Associated Collieries Ltd 1940 AC 152** at 169:

“Inference must be carefully distinguished from conjecture or speculation. There can be no inference less there are objective facts from which to infer other facts which it is sought to establish ... but if there are no positive proved facts from which the inference can be made, method of inference fails and what is left is mere speculation or conjecture.”

In deciding whether the State has proved its case beyond reasonable doubt based on circumstantial evidence, we need to take into account the cumulative effect of the evidence before us as a whole. It is impermissible and an incorrect approach to consider the evidence piecemeal.

See in this regard: **S v Reddy 1996(2) SACR 1 (A)** at 10 b-d.

See also: **S v Snyman 1968(2) SA 582 (A)** at 589 F;

S v Hassim 1973(3) SA 443 (A) at 457 H.

S v Zuma 2006(2) SACR 191 (W) at 209 b-i.

44. In assessing the circumstantial evidence before us, we must not lose sight that circumstantial evidence can vary from case to case in its nature and cogency. Thus the following remarks made by Lord Coleridge in **R v Dickman**, referred to in **Wills on Circumstantial Evidence, 7th Ed** at 46 and 452-60, are apposite:

"It is perfectly true that this is a case of circumstantial evidence and circumstantial evidence alone. Now circumstantial evidence varies infinitely in its strength in proportion to the character, the variety, the cogency, the independence, one of another, of the circumstances. I think one might describe it as a network of facts around the accused man. That network may be a mere gossamer thread, as light and as unsubstantial as the air itself. It may vanish at a touch. It may be that, strong as it is in part, it leaves great gaps and rents through which the accused is entitled to pass in safety. It may be so close, so stringent, so coherent in its texture, that no efforts on the part of the accused can break through. It may come to nothing - on the other hand it may be absolutely convincing. . . . The law does not demand that you should act upon certainties alone. . . . In our lives, in our acts, in our thoughts we do not deal with certainties; we ought to act upon just and reasonable convictions founded upon just and reasonable grounds. . . . The law asks for no more and the law demands no less."

This approach to circumstantial evidence has recently again been restated by the Supreme Court of Appeal in **Benzani Nxumalo v The State (case no 450/2008) [2009] ZASCA 113**, delivered on 23 September 2009.

45. The next legal issue for consideration is similar fact evidence. It is firmly established in our law that this type of evidence is only admitted in exceptional circumstances. In **Schmidt and Rademeyer, THE LAW OF EVIDENCE**, at 15-22, the following useful summary is contained regarding similar fact evidence – similar facts are admissible if they are relevant and evidence can be relevant only if a reasonable inference may be drawn from it about a fact in issue. Similar facts must be distinguished from criminal propensity and it is therefore improper to draw an inference of guilt merely from a propensity to commit crime. There must of course be a logical connection between the *factum probans* (the similar fact) and the *factum probandum* (the fact to be proved).

See in this regard: **Stephen, DIGEST OF THE LAW OF**

EVIDENCE, 11th Ed on 171 at footnote vii where the learned author states:

“You are not to draw inferences from one transaction to another, which is not specifically connected with it merely because the two resemble each other. They must be linked together by the chain of cause and effect in some assignable way before you can draw your inference. Such a connection may be found for example through the improbability of coincidence. What is meant here is that the more striking the similarity of events are, the more improbable the possibility of coincidence would be.”

In this regard Schmidt and Rademeyer supra at 15-6 (footnote 26) cite the example of **R v Simms 1946(1) ALL ER 697** where the accused had been charged with committing indecent acts with four persons. The four complainants each gave an identical account of how they had met the accused and what he had subsequently done. Evidence given by each complainant was held to be relevant in respect of each incident because the Court held that it was improbable that all the complainants would think up an identical version.

See further, generally: **Hoffmann & Zeffert, The South African Law of Evidence, 4th ed** at 55.

46. Lastly on the law we need to consider the effect of the accused's silence. It is trite that the accused bears no onus to prove his innocence or to disprove the State's case.

See in this regard the well-known *dictum* of **R v Difford 1937 AD 370**.

The decision not to testify is, however, not without consequences. Thus in **S v Boesak 2001(1) SACR 1 (CC)** at par [24] the Court held that:

“The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, the Court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence.”

See also in this regard:

S v Brown 1996(2) SACR 49 (NC);

S v Chabalala 2003(1) SACR 134 (SCA).

In the present matter the State’s evidence stands uncontroverted and the inferences sought to be drawn must be assessed on the basis of the cogency of the State’s case alone.

47. Lastly it is necessary to reiterate again that the State does not have to prove its case beyond all possible doubt. In **S v Ntsele 1998(2) SACR 178 (SCA)** at 182 b-f Eksteen JA in referring to **Miller v Minister of Pensions [1947] 2 ALL ER 372** at 378 H stated that:

“Die bewyslas wat in ‘n strafsak op die Staat rus is om die skuld van die aangeklaagde bo redelike twyfel te bewys – nie bo elke sweempie van twyfel nie.

48. A factor weighing very heavily with us in applying these legal principles to the facts before us is the improbability of coincidence in the context used by **Stephen, Digest of the Law of Evidence**, *supra* and **R v Simms**, *supra* (see par. 45 above). We find it utterly improbable that by sheer coincidence:

48.1 in respect of the 1987 incident:

- (a) the accused is seen following the deceased when she

leaves her house on the errand to purchase bread;
and

- (b) the accused is seen with the deceased heading towards Ipopeng stadium (where the deceased's body is later found) in a direction away from the accused's and the deceased's houses and also away from Mpiwa's shop; and
- (c) the accused is the one who discovers the deceased's body in a seemingly remote, unused part of the stadium in circumstances where not even a casual passerby would have noticed the concealed body; and
- (d) the accused does not take issue with the report by Mr. Borotelo that he had seen the accused in the deceased's company in the vicinity of the Ipopeng stadium.

48.2 Regarding the 2004 incident:

- (a) Thabang Bihi disappears on the very same day that the accused (on his own admission) enters the Bihi residence and steals various goods therefrom; and
- (b) Thabang's body is discovered in a shallow grave in the backyard of the house that the accused had been occupying (as a guard) at that time; and
- (c) the very same material belonging to the accused and

used by him at that time (and previously) as curtains, is found wrapped around Thabang's body; and

- (d) the accused makes a statement to Superintendent Verster and Inspector Luis that Thabang had been **strangled** by Mr. Motingwe, thus imputing peculiar knowledge to the accused since at that stage no post mortem examination had as yet been conducted on the deceased's body.

48.3 In respect of the 2008 incident:

- (a) the accused leaves with the deceased while the latter is in possession of his cellphone and safety shoes; and
- (b) the accused is later found in possession or in control of the shoes and cellphone; and
- (c) the accused is the anonymous caller who leads the deceased's family to falsely believe that the deceased is alive and well; and
- (d) without knowing that Dr. Surtie has found the deceased's hyoid bone to be fractured (thus indicating strangulation) the accused conveys to various persons that the deceased had been strangled, again imputing peculiar knowledge regarding the deceased's death; and

- (e) the accused again blames others for the murder, as is the case in the 2004 incident.

49. Similar fact evidence has played a decisive role in our decision on count 2, the murder of Martha Botha. These similar facts are in our view highly relevant, have a logical connection and go substantially beyond mere coincidence. Professor Labuschagne alluded to the three unique similarities in the three cases. To recapitulate, those are:

- (a) all three were vulnerable victims;
- (b) in all three instances there has been some form of tampering with the bodies post mortem;
- (c) strangulation was the common cause of death.

50. To the above three similarities one can add the following:

50.1 Strangulation is a somewhat unusual method of assault and yet we have here five strangled victims in the three deceased and Ms Benade, the complainant in count 8 and Ms Blom, the complainant in count 9. Strangulation appears to be the accused's favoured method of assault and this similarity appears to us to be more than mere coincidence.

50.2 In two of the three instances items had been removed from the scene (i.e. in 2004 and 2008).

50.3 In all three incidents the victims were well known to the

accused and were seen with or in the vicinity of the accused on the fateful day of their disappearance.

50.4 In the 1987 and 2008 cases the accused was to some or other extent involved in the investigation.

50.5 In the 2004 and 2008 incidents the accused attempted to place the blame on someone else.

We accordingly find that these similarities overwhelmingly point to the accused as the perpetrator.

51. We are satisfied on counts 5 and 6 (the 2004 and 2008 murders) that the State has, through circumstantial evidence, proved beyond reasonable doubt that the accused perpetrated those offences. With regard to count 2, the murder of Martha Botha, similar fact evidence has persuaded us that the accused's guilt has been proved beyond reasonable doubt, when taking into account further the circumstantial evidence implicating the accused. We find that the proved and common cause facts justify beyond reasonable doubt as the only reasonable inference that the accused is the perpetrator of all three these murders. Furthermore the similar fact evidence presents a discernible unique pattern and *modus operandi* quite beyond mere coincidence, all pointing to the accused's guilt.

52. Mr. Van Tonder has effectively conceded that the State has proved its case on counts 4 and 7 (theft relating to the 2004 and 2008 incidents). That concession has been correctly made. With

regard to count 3 (kidnapping) Mr. Barnard has not asked for a conviction, correctly so.

53. What remains for decision is counts 1 (attempted rape of Martha Botha), 8 and 9 (assault with the intent to commit grievous bodily harm on Veronica Benade and Rosemary Blom respectively). On count 1 we have, after careful consideration, come to the conclusion that the paucity of evidence does not establish that the victim had in fact been indecently assaulted or that there had been an attempt to rape her. We have only the evidence of Dr. Els in this regard and that is rather inconclusive as alluded to above. The accused must therefore be acquitted on this count.
54. Lastly, Mr. Van Tonder has submitted that counts 8 and 9 amount to trivialities and the maxim "*de minimis non curat lex*" should apply. We disagree. The two complainants were strangled, in the case of Ms Benade, more severely so. We are of the view that these acts constitute punishable criminal wrongdoing in law. We do however agree with Mr. Van Tonder's alternative submission that these two instances constitute common assault given the nature and gravity of the injuries sustained.
55. This has been a difficult case for all concerned, albeit for differing reasons. As a Court we had to deliberate long and hard to reach a decision. The complexity of the case is to be found in the circumstantial and similar fact evidence. Mr. Van Tonder has had a trying time from the start to conduct a meaningful defence, for the reasons outlined in the introduction of this judgment. He has done rather well in the circumstances. The State (and here I

include the two prosecutors and the SAPS investigating team) have excelled in investigating and prosecuting this case to its ultimate successful conclusion. The difficulties should be self-evident, given the fact that the 1987 matter occurred twenty two years ago, the inquest docket had been destroyed and material witnesses have passed away or have retired. The same obstacles presented themselves to a lesser extent in the 2004 matter. Dogged persistence and diligent investigation coupled with meticulous prosecution have borne fruit for the State. The investigation and prosecution teams are deserving of commendation and we unreservedly oblige.

56. We find as follows:

56.1 The accused is convicted on counts 2, 4, 5, 6 and 7 as indicted.

56.2 The accused is convicted of common assault on counts 8 and 9.

56.3 The accused is acquitted on counts 1 and 3.

SA MAJIEDT
JUDGE

BM PAKATI-MABUZA
ASSESSOR

B. BABUSENG
ASSESSOR

FOR THE STATE : ADV T BARNARD AND ADV T
MASHUGA
FOR THE ACCUSED : MR A VAN TONDER